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THE PARENTAL KIDNAPPING PREVENTION ACT: HOW CAN NON-MARITAL CHILDREN BE PROTECTED?

Nancy S. Erickson*

Parental kidnapping has been called “one of the most subtle and brutal forms of child abuse.”¹ The National Conference of Commissioners on Uniform State Laws, in its Prefatory Note to the Uniform Child Custody Jurisdiction Act (UCCJA), stated:

The harm done to children by these experiences can hardly be overestimated. It does not require an expert in the behavioral sciences to know that a child, especially during his early years and the years of growth, needs security and stability of environment and a continuity of affection. A child who has never been given the chance to develop a sense of belonging and whose personal attachments when beginning to form are cruelly disrupted, may well be crippled for life, to his own lasting detriment and the detriment of society.²

In response to the seriousness of the problem of child-

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1. Note, *Prevention of Child Stealing: The Need for a National Policy*, 11 *LOY. L.A.L. REV.* 829, 831 (1978).

2. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 111, 112 (1979) (Commissioners' Prefatory Note).

snatching and its increasing incidence in this country, steps have been taken on both state and federal levels. The UCCJA was approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association in 1968.³ By 1984 it had been enacted in all states and the Virgin Islands.⁴ Virtually all states have also enacted criminal parental kidnapping statutes.⁵ In 1980, Congress passed the Parental Kidnapping Prevention Act (PKPA), which not only strengthened the provisions of state laws but also contained additional safeguards against childsnatching.⁶

Before the UCCJA and the PKPA, a parent who lost a custody battle could simply snatch the child, take the child to another state, and seek a court order of custody in that state. Using the child's presence in the state as a basis for jurisdiction, the second state could and often would entertain the petition for custody. Then the court of the second state would often ignore the custody order of the first state on the ground that states were not required under the Full Faith and Credit Clause to give recognition to custody orders of other states.⁷ The UCCJA was designed to prevent states from giving refuge to childsnatchers by requiring them to decline jurisdiction of custody actions if another state (usually the state from which the child was snatched) was a more appropriate forum.⁸ The PKPA was designed to achieve the same goal by requiring states to give full faith and credit to existing custody decrees if those decrees fulfilled certain specifications in the PKPA. Additionally, the PKPA authorizes the Federal Parent Locator Service to assist in locating abducted children and their abductors and provides that the Fugitive Felony Act applies to state felony parental kid-

3. *Id.* at 111.

4. *Id.* at 1986; Supplementary Pamphlet at 25-26.

5. See P. HOFF, J. SCHULMAN, A. VOLENIK, & J. O'DANIEL, *INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING: POLICY, PRACTICE AND LAW*, Appendix IV (1982) [hereinafter *Interstate Disputes*].

6. Public Law 96-611, § 6-10, codified at 28 U.S.C. § 1738A (Supp. 1982), note to 18 U.S.C. § 1073 (1976), and 42 U.S.C. § 651 (Supp. 1982). It should be noted that the federal law criminalizing interstate kidnapping is ineffective against parental kidnapping because it provides for parental immunity for kidnapping one's own minor child. 18 U.S.C. § 1201(a)(1984).

7. *Webb v. Webb*, 451 U.S. 493 (1981); *Ford v. Ford*, 371 U.S. 187 (1962); *Kovacs v. Brewer*, 356 U.S. 604 (1958); *May v. Anderson*, 345 U.S. 528 (1953); *Halvey v. Halvey*, 330 U.S. 610 (1947).

8. For more detail, see *Interstate Disputes*, *supra* note 5, at 1-4 to 1-6.

napping cases where the abductor has left the state or the country to avoid prosecution.⁹

The UCCJA and the PKPA have been quite effective in achieving their child-protective goals with regard to children of divorced couples, but they are much less protective of children of parents who have never been married. The PKPA, in particular, contains loopholes so large as to make much of it virtually useless in many cases concerning non-marital children.

As an illustration of these loopholes, let us consider the hypothetical case of Jennifer Ross, whose mother is Paula Grubs, and whose father is Clyde Ross.¹⁰

Paula and Clyde lived together for about a year in New York State. During that time, Jennifer was born. Six months after the birth, Clyde departed and thereafter communicated with Paula only sporadically; she thought he was living near his parents in New Jersey. Clyde provided no child support. On her own, Paula was unable to pay for child care, so she had to leave her job and apply for public assistance. The welfare authorities required that she cooperate in an action against Clyde for paternity and child support; she cooperated, and an order of paternity, along with a child support order, was issued against him. However, Paula still did not receive any child support from Clyde.

When Jennifer was two years old, Clyde phoned to ask whether he could take Jennifer to New Jersey to visit his parents. He indicated that he would pick Jennifer up on Saturday morning and return her on Sunday afternoon. He stated that he had just obtained a good job and would soon be sending money to enable Paula to get off welfare. Paula agreed to the visit and released the child to him on Saturday morning. When Clyde did not return on Sunday, Paula phoned his parents, only to be told that he had not brought Jennifer to visit them and that they did not know where he was living, but they thought it was Washing-

9. See *Interstate Disputes*, *supra* note 5, at 1-6 to 1-10.

10. The names were taken from the case of *Grubs v. Ross*, 291 Or. 263, 630 P.2d 353 (1981), which had a happier ending than this hypothetical. The hypothetical also has some factual similarities to the case of *Albergottie v. James*, 470 A.2d 266 (D.C. App. 1983).

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Paula went to the police to swear out a warrant for his arrest on a kidnapping charge. However, the police asked to see her custody order, and she could not produce one. Since she and Clyde had never been married, they were never divorced, and no custody order was ever issued. The court orders establishing paternity and child support contained no custody provisions.¹¹ The police informed Paula that since she had no custody order, Clyde could not be guilty of any crime, misdemeanor or otherwise, for taking Jennifer through his ruse and hiding her from Paula.¹² Because no felony could be charged, the state prosecutor's office could not apply to the United States Attorney for a "UFAP" (Unlawful Flight to Avoid Prosecution) warrant and request F.B.I. assistance in locating the child, pursuant to the PKPA.¹³

11. It may seem incomprehensible that a court order could require, for example, that a father pay \$40 per week to a mother for the support of their child without also making an order that the mother should have custody of the child. If the mother does not have custody of the child, why should she be receiving child support for the child? Putting aside the issue of whether the court hearing a paternity case involving the issue of support would have jurisdiction to determine custody (*see Interstate Disputes, supra* note 5, at 2-15 to 2-17), there are many cases where the mother has *de facto* custody, which has been uncontested by the father, and either she is not a party to the paternity proceeding (the Welfare Department being the petitioner in her stead) or her attorney sees no need to seek a formal custody order. *Id.* at 2-16.

This is unfortunate, since the issue should be decided early on in order to avoid disruption to the child's life later. If the issue is left open, the father can always seek custody later, and if custody were granted to him, the change might well be more traumatic to the child than it would have been earlier. The usual standard used by the court to make an initial order of custody is the "best interests of the child". Once an initial order is in place, if the non-custodial parent wishes custody, he or she must petition for a change of custody. The usual standard for a change of custody is whether there has been a substantial change of circumstances so that the best interests of the child require a change of custody. Thus, the non-custodial parent in a change of custody proceeding faces a heavier burden of proof than either parent in an initial custody proceeding. That higher burden of proof is intended to protect the child against moves that will undermine the child's sense of stability and continuity. *See infra* text accompanying notes 18-20.

12. N.Y. PENAL LAW § 135.50 (McKinney 1987) makes "Custodial Interference in the First Degree" a felony. However, since Paula had no custody order, Clyde could not be guilty of interfering with her lawful custody. The same is true with respect to "Custodial Interference in the Second Degree," a misdemeanor. N.Y. PENAL LAW § 135.45 (McKinney 1987). Clyde could be charged with the misdemeanor of "Unlawful Imprisonment" but he would have an affirmative defense to such a charge because he was the child's "relative". N.Y. PENAL LAW § 135.15 (McKinney 1987).

13. The PKPA provides that the Fugitive Felon Act (18 U.S.C. § 1073 (1976)) shall apply in state felony parental childsnatching cases if the abductor crosses state lines or

Next, Paula went to a private attorney. Fortunately, her parents agreed to pay the attorney's fees. Even if she had been entitled to a court-appointed lawyer, such attorneys often handle too many cases to be able to devote much time to any one case, especially on an emergency basis. The private attorney advised Paula that the first step was to locate Jennifer. To do this, she commenced a custody action under the UCCJA and petitioned the court to request the Federal Parent Locator Service (FPLS) to locate Jennifer and Clyde. Fortunately, Paula had Clyde's social security number, because the FPLS relies primarily on computer searches of various data sources for the target parent's social security number.¹⁴ While the FPLS search was proceeding, the court served notice on Clyde by mail to his last-known address, to his parents' address, and publication in a newspaper in Washington, D.C., the cost of which Paula had to pay. Clyde failed to appear for the custody hearing, and the court granted Paula a temporary order of custody. However, by this time Clyde's trail was cold, and Paula was never able to locate him, despite the FPLS search and her own efforts.¹⁵ Her custody order proved worthless.

This hypothetical case points out the need for immediate and effective assistance to locate abducted children. The PKPA was intended to provide such assistance by authorizing F.B.I. investigations of child abductions. However, because a court order of custody is a prerequisite to F.B.I. involvement, most non-marital children are unprotected by this PKPA provision.¹⁶ In the extensive literature on parental kidnapping and the PKPA, there is virtually no notice of this problem.¹⁷

leaves the United States to avoid prosecution. Public Law 96-611 § 10, 94 Stat. 3573 (Dec. 28, 1980). For a discussion of how this statute operates, see *Interstate Disputes*, *supra* note 5, at 8-24 to 8-26.

14. For a description of the operation of FPLS, see *Interstate Disputes*, *supra* note 5, at 13-1 to 13-3.

15. See *id.* at 13-8 to 13-9 for steps parents can take to locate their abducted children.

16. Marital children are also unprotected if snatched before any court order is made regarding custody; commonly this occurs just as the marriage is breaking up. However, many divorcing parents, having been advised by counsel, realize the need for a custody order and request a temporary custody order at the same time a divorce action is commenced. Single mothers, on the other hand, often are not aware of the importance of a custody order — they believe they already have legal custody, since they have physical custody and were never married to the father.

17. See M. AGOPIAN, MICHAEL, PARENTAL CHILD STEALING (Lexington Books, 1981);

Furthermore, even if Paula had been able to locate Clyde, her lack of a pre-abduction custody order would mean that, in most states, she and Clyde would stand on an equal footing with regard to custody. Paula's sole physical custody of Jennifer up until the abduction and the failure of Clyde to pay child support would not be enough to guarantee that Paula would be awarded custody.¹⁸ To gain legal custody, Paula would have to prove that an award of custody to her would be in the "best interest of the child".¹⁹ By contrast, if Paula had had a pre-abduction custody order, the burden would be on Clyde to prove that "changed cir-

Barker, Edward & Hamman, *The Best Interests of the Child in Custody Controversies Between Natural Parents: Interpretations and Trends*, 18 WASHBURN L.J. 482 (1975); Batt, *Child Custody Disputes: A Development Psychological Approach to Proof and Decision Making*, 12 WILLAMETTE L.J. 491 (1975); Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L.Q. 203 (1981); Bodenheimer, *Progress Under the UCCJA and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CAL. L. REV. 978 (1977); Bodenheimer, *The Rights of Children and the Crisis In and Out of State*, 46 U. COLO. L. REV. 495 (1975); Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207 (1969); Cleveland, *The UCCJA and the PKPA: Dual Response to Interstate Child Custody Problems*, 39 WASH. & LEE L. REV. 149 (1982); Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711 (1982); R. CROUCH, *INTERSTATE CUSTODY LITIGATION: A GUIDE TO USE AND COURT INTERPRETATION OF THE UCCJA* (1981); P. HOFF, *INTERSTATE AND INTERNATIONAL CHILD-CUSTODY DISPUTES: A COLLECTION OF MATERIALS* (3d ed. 1982); P. Hoff, *Use of the Federal Parental Kidnapping Law*, 15 CLEARINGHOUSE REV. 138 (1981); P. HOFF, J. SCHULMAN, A. VOLENIK, & J. O'DANIEL, *INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING: POLICY, PRACTICE AND LAW* (1982); Hudak, *The Plight of the Interstate Child in American Courts*, 9 AKRON L. REV. 257 (1975); Irani, *Parental Kidnapping: Can the UCCJA and Federal PKPA of 1980 Effectively Deter It?*, 20 DUQ. L. REV. 43 (1981); S. KATZ, *CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN* (1981); Mothershead, *The Problem of Parental Kidnapping*, 10 WYO. L.J. 225 (1965); Noelker, *The UCCJA: The Difficulties It Presents for Poor People*, 11 CLEARINGHOUSE REV. 222 (1977); Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795 (1964); Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act*, 38 S. CAL. L. REV. 183 (1965); Ratner, *Procedural Due Process and Jurisdiction to Adjudicate*, 75 N.W.U. L. REV. 363 (1980); Stern, *Stemming the Proliferation of Parental Kidnapping: New York's Adoption of the UCCJA*, 45 BROOKLYN L. REV. 89 (1978); Note, *The Parental Kidnapping Prevention Act: Analysis and Impact on the Uniform Child Custody Jurisdiction Act*, 27 N.Y.L. SCH. L. REV. 553 (1981); Note, *Prevention of Child Stealing: Need for a National Policy*, 11 LOY. L.A.L. REV. 829 (1978).

18. See, e.g., *In re Weinstein*, 42 Ill. Dec. 243, 87 Ill. App. 3d 101, 408 N.E.2d 952 (1980) (father kidnapped child, but court awarded him custody because, *inter alia*, no court order existed at time of kidnapping); *Albergottie v. James*, 470 A.2d 266 (D.C. App. 1983) (similar to *Weinstein*).

19. *Burchard v. Garay*, 42 Cal. 3d 531, 724 P.2d 486, 229 Cal. Rptr. 800 (1986) (best interests test, not changed circumstances test, applies where there has never been a court order of custody regarding the non-marital child, even though child has been living with his mother for his entire life).

cumstances” following the original custody order warranted a change of custody; this would be more difficult to prove, so Paula’s custody would probably remain secure.²⁰ The reason for the higher burden of proof for a change of custody is that stability and continuity of relationships are deemed important for children.

A few states have laws, several only recently enacted, that may afford non-marital children some measure of protection in abduction situations. For example, a few states provide that, by operation of law, a mother has legal custody of her non-marital child unless and until the child is legitimated or a different custody order is made by a court.²¹ In cases involving the PKPA, such legal custody might be viewed as equivalent to the requisite court order of custody. At least one other state, in its criminal child abduction statute, provides that an unmarried mother is presumed to be the lawful custodian of her non-marital child and that an unadjudicated putative father commits child abduction if he “conceals, detains, or removes the child without the consent of the mother”.²²

The statutes discussed in the paragraph above suggest one possible option for reform of other states’ laws. Each state could pass statutes providing that the mother automatically has custody of a non-marital child upon the child’s birth, unless and

20. See discussion of the changed circumstances rule in *Burchard*, 724 P.2d at 488-91. In that case, the trial court and the intermediate appellate court, applying the best interests test, transferred custody from the unmarried mother who had raised the child for the two and one half years of his life to the unmarried father, giving little weight to the child’s need for stability and continuity. The California Supreme Court, holding that the trial court had abused its discretion by failing to give weight to that factor, reversed the lower court order, and sent the case back for a new trial. Unfortunately, the child had been with the father for over four years while the appeals were pending, so even if the initial transfer of custody to the father was in error (which was not decided by the California Supreme Court), to correct the error by transferring custody back to the mother would cause a second uprooting of the child.

21. See GA. CODE ANN. § 74-203 (1979); IOWA CODE ANN. § 675.40 (West 1987); MINN. STAT. ANN. § 257.541(1) (West Supp. 1986).

22. 38 ILL. ANN. STAT. § 10-5, 10-6 (Supp. 1987) (Amendment to the Intergovernmental Missing Children Recovery Act of 1984). See also CAL. CIV. CODE § 4600 (Deerings Supp. 1988), which, as a matter of law, gives sole legal custody to an unmarried mother at birth when there is no presumed father. Thereafter, if the father abducts the child, he may be prosecuted for child abduction under Section 278 of the Penal Code even though there is no custody decree. Section 278 was upheld against an equal protection attack by an unwed father in *People v. Carrillo*, 162 Cal. App. 3d 585, 208 Cal. Rptr. 684 (1984).

until a court order provides otherwise. To guarantee court recognition of her custody, the state could routinely provide each such mother with a custody order as soon after the birth as practicable. In addition, or as a second option, the PKPA could be amended to provide that, in lieu of a custody order, the authorities could accept a sworn statement by the mother that (1) she is the child's mother, as evidenced by the birth certificate, (2) she was not and is not married to the child's father, (3) she has had physical custody of the child, and (4) the child has disappeared or has been taken from her.

There are two practical difficulties with the second approach. First, a birth certificate does not generally indicate whether the child's parents are married. Thus, if a birth certificate for Susan Smith states that her parents are Mary Smith and John Jones, there is no way to determine from the certificate whether the parents are married and gave their daughter the mother's surname or whether the parents are not married.²³ Second, the parents might have married after the child's birth, thus "legitimizing" the child under most state laws.²⁴ These difficulties could be overcome if authorities accepted the *prima facie* validity of the mother's statements until the child was located. A hearing could then be held with both parents present.

The first option might be preferable because it would have a beneficial side-effect. If a custody order were routinely issued to the mother upon the birth of a non-marital child, the law could give the mother and father the option of obtaining instead a court order of paternity with whatever custody provisions the parents agreed to. This could be done if both parents agreed that the father should be declared the legal father and both signed a joint declaration of paternity.

This procedure would differ from current practice in most states in one important way. Currently, when a non-marital child is born the parents generally have the opportunity to file a joint declaration of paternity with the Registrar of Vital Statis-

23. See MacDougall, *The Right of Women to Name Their Children*, 3 LAW & INEQUALITY 93 (1985). For an example of the many state laws that specify that the fact of in-wedlock or out-of-wedlock birth shall not appear on the birth certificate, see N.Y. PUB. HEALTH LAW § 4135(1)(a) (McKinney 1988).

24. See, e.g., N.Y. DOM. REL. LAW § 24 (McKinney 1988).

tics so that the father's name will appear on the birth certificate.²⁵ However, in order to convert a declaration of paternity into a court order of paternity, the mother, father, or both parents must commence a paternity action in the appropriate court. Often this is not done because the parties have insufficient funds to hire a private lawyer, and appointed counsel is not available to them. If a joint declaration of paternity could be converted into a paternity order by means of an automatic and simplified court procedure that was handled by an attorney employed by the court or a non-profit organization, that procedure might obviate the need for many of the more formal and adversary paternity actions that now clog our family courts.²⁶

Research should be conducted to determine which of these options, or perhaps another option, would most effectively protect non-marital children against kidnappings by their non-custodial parents.

In the rush to pass laws to prevent and punish child-snatching, the non-marital child has been overlooked. The loopholes in the UCCJA and the PKPA need to be eliminated so that non-marital children will not once again become stigmatized, second-class citizens, who are denied equal protection under the law, as they were in our not-too-distant past.²⁷

25. *See, e.g.*, N.Y. PUB. HEALTH LAW § 4135(2) (McKinney 1988).

26. I believe this procedure would reduce the number of adversary paternity actions because the parents are often psychologically closer at the time of the child's birth than they are a few years later, when the Welfare Department or the mother or someone else on the child's behalf finally brings a paternity action. The procedure has the disadvantage, however, of being brought during a period of time when the mother may be most naive about the possible conflicts of interest that may arise between her and the father concerning raising of the child. Thus, both parties would need to receive the advice of counsel to make sure that they understand the consequences of the joint declaration and the court order that would be issued based on the joint declaration.

27. *See, e.g.*, *Levy v. Louisiana*, 391 U.S. 68 (1967); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Gomez v. Perez*, 409 U.S. 535 (1973); *Mills v. Habluetzel*, 456 U.S. 91 (1982).