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Comment

Larson v. Dunn: Toward a Reasoned Response to Parental Kidnapping

Jessica Larson's mother, Loree Dunn, hid Jessica from the law and her father for seven years.¹ Their flight began when a judge in southern Minnesota awarded custody of Jessica, then two years old, to Dunn's ex-husband, John Larson.² It ended the day agents from the Federal Bureau of Investigation (FBI) burst into their home in Washington state.³ After the federal government reunited Jessica with her father, he sued Jessica's mother and the girl's grandparents for interfering with his custodial rights.⁴ The trial judge dismissed the suit for failing to state a claim,⁵ but the Minnesota Court of Appeals reversed,⁶ thereby joining a number of states that have judicially created a tort for parental kidnapping.⁷ The Minnesota Supreme Court reversed again,⁸ bucking a nationwide trend.⁹ The court determined that the state would not serve the best interests of children by allowing their parents to use the courts to battle endlessly over family matters.¹⁰

The Minnesota Supreme Court's decision was a watershed. All thirteen state supreme courts that had previously addressed this issue had concluded that creating the new tort furthered

1. *Larson v. Dunn*, 460 N.W.2d 39, 41 (Minn. 1990).

2. *Id.*

3. *Id.* at 42.

4. *Id.*; see *infra* notes 124-27 and accompanying text (describing Larson's claims).

5. See *infra* note 128 and accompanying text (describing the trial judge's decision).

6. See *infra* note 129 and accompanying text (describing the court of appeals decision).

7. See *infra* notes 93-104 and accompanying text (describing the trend toward adoption of the tort of custodial interference).

8. *Larson*, 460 N.W.2d at 47; see *infra* notes 130-42 and accompanying text (describing the Minnesota Supreme Court's ruling).

9. See *infra* notes 94-104 and accompanying text (describing previous decisions by state high courts elsewhere in the nation).

10. See *infra* notes 130-42 and accompanying text (describing the Minnesota Supreme Court's reasoning).

public policy objectives.¹¹ Unlike the Minnesota court, however, few of the other courts faced suits that one parent brought against the other *after* the kidnapped child had returned home and had begun adjusting, once again, to a new family setting.¹² Most of the litigation in other courts had resulted from efforts to recover still missing children¹³ or from attempts to win damages from non-parent, third-parties who helped carry out the abductions.¹⁴ This Comment demonstrates that the Minnesota court's focus on the abducted child's welfare adds an important new dimension to the tort of custodial interference with children. Part I provides the context for the tort's growing acceptance, describing the extent and causes of the parental kidnapping problem and previous measures designed to address it. Part II analyzes the Minnesota court's novel approach to the tort. Part III praises the direction of the Minnesota approach, but criticizes the court's blanket rejection of the tort. The Comment concludes with a proposal that the state legislature adopt a limited custodial interference tort that would aid in the return of children abducted for the long term, but would minimize further damage to nuclear family relationships when children have returned to their custodial parents.

I. CHILD KIDNAPPING IN THE UNITED STATES

Although experts agree that child kidnapping represents a serious problem,¹⁵ researchers have conducted few studies providing accurate information on how many parents abduct their children.¹⁶ Frequently cited estimates suggest that anywhere

11. See *infra* note 95 and accompanying text (listing state high courts that judicially established the tort of custodial interference).

12. Only two other state high courts faced suits between parents after the children returned home. See *Montgomery v. Crum*, 199 Ind. 660, 664, 161 N.E. 251, 254 (1928); *Wood v. Wood*, 338 N.W.2d 123, 123 (Iowa 1983); see also *infra* notes 104-11 and accompanying text (describing the *Wood* and *Montgomery* decisions).

13. See *infra* note 103 and accompanying text (describing suit filed while children were still missing).

14. See *infra* notes 96-102 and accompanying text (listing the actions against non-parent defendants).

15. See S. ABRAHMS, CHILDREN IN THE CROSSFIRE: THE TRAGEDY OF PARENTAL KIDNAPING 5 (1983); M. AGOPIAN, PARENTAL CHILD-STEALING 1 (1981); P. HOFF, INTERSTATE AND INTERNATIONAL CHILD CUSTODY DISPUTES 37 (1984); L. KARP & C. KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICTS & SEXUAL ABUSE § 5.01 (1989).

16. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, MISSING, ABDUCTED, RUNAWAY AND THROWN AWAY CHILDREN IN AMERICA at i (1990) [hereinafter MISSING CHILDREN].

from 25,000 to 750,000 children are kidnapped annually by one of their parents.¹⁷ Some studies report that seventy to ninety percent of these children never return.¹⁸ Many of these statistics, however, are implausible on their face, suggesting as many as forty children per state disappear each day.¹⁹ A recent telephone survey by the U.S. Department of Justice suggests that very few parents kidnap their children for a long term.²⁰ The

17. The most frequently cited statistic is 100,000 children per year. See Campbell, *The Tort of Custodial Interference — Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 229; Note, *Abduction of Child by Noncustodial Parent: Damages for Custodial Parent's Mental Distress*, 46 MO. L. REV. 829, 829 (1981); Comment, *Parental Kidnapping in Minnesota*, 13 WM. MITCHELL L. REV. 985, 985 (1987).

18. See Note, *Tortious Interference with Custody: An Action to Supplement Iowa Statutory Deterrents to Child Snatching*, 68 IOWA L. REV. 495, 495 (1983).

19. Common sense suggests that 750,000 children cannot be kidnapped each year by one of their parents. Such a number would equal an average of 15,000 children per state per year, 290 children per state per week, or an incredible forty children per state per day. Over a ten-year period, parents would kidnap 150,000 children from an average state. In Minnesota, this would be an extraordinary number of children, far more than, for example, are enrolled in the state's largest public school system. The Minneapolis school system has a total kindergarten through twelfth grade enrollment of about 40,500 children. RESEARCH AND DEVELOPMENT DIVISION, MINNEAPOLIS PUBLIC SCHOOLS, REPORT OF THE ANNUAL SIGHT COUNT OF STUDENTS AND PERSONNEL 2 (1989).

The numbers are even more absurd coupled with the supposed large percentages of kidnapped children who are never heard from again. See *supra* note 18 and accompanying text (asserting that 70% to 90% of the children kidnapped by one of their parents never return). The "conservative" 70% estimate would mean that, over a ten-year period, 105,000 children per state would vanish at the hands of parental kidnapers. Nationwide, over the period of a single decade, parental kidnapping would account for 5,250,000 missing children who never return. By contrast, during 1981, 1982, and 1983, the FBI's missing children computer logged 2,142 parental abduction complaints. P. HOFF, *supra* note 15, at 80.

The calculation of 5.2 million missing children per decade seems particularly unrealistic juxtaposed with the number of American casualties in the Vietnam War. In the 12 years of conflict, 46,000 Americans died in combat. 29 THE NEW ENCYCLOPEDIA BRITANNICA 264 (15th ed. 1989). Indeed, the 750,000 children supposedly kidnapped by their parents each year is far greater than the number of Americans serving in Vietnam during the peak of the conflict — 500,000. *Id.*

20. MISSING CHILDREN, *supra* note 16, at xi. Researchers at the University of New Hampshire conducted the study for the Department of Justice at the request of Congress. *Id.* at i. A telephone survey of 34,822 randomly selected households formed the centerpiece of the study. *Id.* at vii. Researchers interviewed 10,544 caretakers about the experiences of 20,505 children. *Id.* The report concluded that missing children make up five distinct sets of problems: children abducted by family members, children abducted by non-family members, runaways, throwaways, and children missing because they

Justice Department survey estimates that each year 354,100 children, typically girls between the ages of two and eleven, are kept by one of their parents, at least overnight, in violation of a custody order.²¹ Of these, all but a small percentage of the children soon return to their custodial parent.²² Most episodes last two days to a week;²³ only ten percent continue for a month or more;²⁴ and less than one percent of the children actually vanish.²⁵

A. REASONS FOR PARENTAL KIDNAPPING

The parental kidnapping problem arises, in part, from today's divorce climate in America.²⁶ Divorce rates began skyrocketing in the mid-1960s²⁷ as sex roles chang-

were lost, injured or for some other reason. *Id.* at vi-vii. It also concluded that many of the missing children are not literally missing; their caretakers knew where they were but were experiencing difficulty retrieving them. *Id.* Although the authors concluded that family abductions are a larger problem than previously thought, their statistical evidence suggests otherwise. The survey found that thousands of parents violate custody orders by failing to turn over the children to the other parents at court-ordered times, but few of these cases resulted in long term separations. *See infra* notes 22-25 and accompanying text (describing the incidence of long term abductions).

21. MISSING CHILDREN, *supra* note 16, at xi. Many of these delays returning children occurred in January and August at the conclusion of vacations. *Id.* Indeed, custodial parents knew the whereabouts of their "missing" children, at least part of the time, in 83% of the cases. *Id.* at xxvii. Caretaker parents contacted police in only about 40% of the cases, *id.* at xii, and contacted lawyers only about half the time. *Id.*

22. *Id.* at xi.

23. *Id.*

24. *Id.*

25. *Id.* Even the Justice Department's conclusion that 3,500 children vanish each year at the hands of parental abductors seems overstated. That figure translates to 70 children vanishing, and not returning, per state per year, or slightly more than one each week.

26. M. AGOPIAN, *supra* note 15, at 24-25. Parental kidnapping, however, is not a new phenomena in the United States. The magnitude of the problem, however, is new. A handful of early American court cases reflect a child abduction problem, but the majority of these cases result from parents bringing suit over the seduction of a daughter for immoral purposes. *See Magee v. Holland*, 27 N.J.L. 86, 95 (1858) (a father's suit over the abduction of his three children, ages two to six, by their mother and her brother).

27. Norton & Moorman, *Current Trends in Marriage and Divorce among American Women*, 49 J. MARRIAGE & FAM. 3 (1987); *see also* Campbell, *supra* note 17, at 229.

Divorce is now very common. About one-fourth of all women between the ages of 20 and 54 who have been married also have been divorced. Norton & Moorman, *supra*, at 4. Roughly the same percentage of children now live with but one parent, and about 60% will spend at least part of their childhood in a single-parent home. Minneapolis Star Tribune, Jan. 21, 1988, at 12A, col. 1

ed,²⁸ more women moved into the work force,²⁹ and states lifted legal obstacles to ending marriage.³⁰ With six out of ten American children living in a single-parent household at some point in childhood,³¹ vast numbers of families provide the structural opportunity for potential parental kidnappers.

Another component of the problem results from the unfortunate tendency of matrimonial law innovations to place children at the center of their parents' disputes.³² States no longer require petitioners to prove grounds for divorce,³³ a requirement that some petitioners had used to punish marital misconduct.³⁴ Abandoning this requirement has removed the courts as forums for angry parents to use to aim their hostility directly at each other.³⁵ Instead, many parents transfer their rage over divorce to custody battles, drawing their children into the disputes.³⁶

(quoting Arlene F. Salutero of the U.S. Census Bureau's Marriage and Family Statistics Branch).

28. Minneapolis Star Tribune, July 16, 1990, at 1E, col. 1 (quoting Constance Sorrentino, economist for the U.S. Department of Labor's Bureau of Labor Statistics).

29. *Id.* This allowed more women to live independently of their husbands. *Id.*

30. C. FOOTE, R. LEVY & F. SANDER, *CASES AND MATERIALS ON FAMILY LAW* 580-83 (3d ed. 1985).

31. See *supra* note 27 and accompanying text (describing divorce rates).

32. See *infra* notes 35-40 and accompanying text (describing litigation trends that place children at the center of parental divorce hostility).

33. Traditionally, all U.S. jurisdictions permitted couples to divorce only on proof of statutory grounds such as adultery, desertion, cruelty, conviction for a crime or drunkenness. C. FOOTE, R. LEVY & F. SANDER, *supra* note 30, at 543-44.

Because the traditional fault-based approach interfered with formally ending relationships, states developed so-called no-fault laws. *Id.* at 577-84. These laws permitted divorce if a marriage had irretrievably broken down. *Id.* Now, virtually all states have some form of no-fault divorce. Freed & Walker, *Family Law in the Fifty States: An Overview*, 18 FAM. L.Q. 369, 379-82 (1985) (asserting that only South Dakota does not allow no-fault divorce).

34. C. FOOTE, R. LEVY & F. SANDER, *supra* note 30, at 545.

35. Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 698 (1985). Fault determinations often involved battles over intimate family details resulting in "a distasteful, privacy-invading process that seemed to further alienate the spouses from each other rather than end the marriage with some sense of dignity and mutual responsibility for its failure." *Id.* (quoting C. FOOTE, R. LEVY & F. SANDER, *supra* note 30, at 1073-1101 (containing an imaginary discourse on divorce policy among a bishop, a law professor, and a doctor)).

36. See M. AGOPIAN, *supra* note 15, at 26 (noting that compared with division of property child custody is "fraught with emotions and controversy"). Agopian also asserted that today parents frequently channel "[t]he hostility of divorce . . . into the ultimate battle of the war between ex-spouses — the

Relaxing bright-line rules for determining custody has fueled the litigation fire also. In recent years, state law has accommodated the growing number of fathers seeking custody of their children³⁷ by abandoning discriminatory presumptions that favored awarding young children to their mothers.³⁸ States replaced this bright-line presumption with flexible standards that rely on case-by-case factual determinations,³⁹ further

struggle to retain custody of the child." *Id.* at xvii; see also L. KARP & C. KARP, *supra* note 15, § 5.01, at 194 (noting the explosion of custody litigation since the 1970s).

37. M. AGOPIAN, *supra* note 15, at 24-25.

38. Almost all states have abandoned, in custody cases, the presumption that young children be placed with their mothers. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 478 (1984). Some of the same sociological changes that led to the demise of fault-based grounds for divorce also caused the breakdown of the so-called tender years presumption, which favored mothers over fathers. See Schepard, *supra* note 35, at 697. These include changing sex roles and the greater numbers of women joining the work force. *Id.* In addition, studies bolstered the important contributions fathers should make to the growth of their children. *Id.*

39. See Chambers, *supra* note 38, at 478-83 (arguing that the current focus on awarding custody based on a child's "best interests" is sensible, but in practice provides "too little guidance to courts").

In Minnesota, state law directs judges to make custody decisions based on the best interests of the child. MINN. STAT. ANN. § 518.17 (West 1990). The statute lists 12 factors for judges to consider. They are:

- (1) the wishes of the child's parent or parents as to custody;
- (2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
- (3) the child's primary caretaker;
- (4) the intimacy of the relationship between each parent and the child;
- (5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests;
- (6) the child's adjustment to home, school, and community;
- (7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
- (8) the permanence, as a family unit, of the existing or proposed custodial home;
- (9) the mental and physical health of all individuals involved;
- (10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any;
- (11) the child's cultural background; and
- (12) the affect on the child of the actions of an abuser, if related to domestic abuse, as defined in section 518B.01, that has occurred between the parents.

Id. § 518.17 subd. 1.

The 1990 Legislature forbade judges from presuming custody decisions based on a determination of which parent had acted as the child's primary caretaker. MINN. STAT. ANN. § 518.17 (West Supp. 1991) (Historical and Statutory Notes). This statute nullifies the Minnesota Supreme Court's decisions in

encouraging litigation between spouses.⁴⁰

As a result of the changes, many children face great stress. Even in the smoothest of divorces, children must cope with fears of an uncertain future.⁴¹ Bitter custody battles can devastate children caught between warring mothers and fathers.⁴² Similarly, kidnapping gravely injures children.⁴³ Nevertheless, parents who profess to love their children continue to embroil

Pikula v. Pikula, 374 N.W.2d 705 (Minn. 1985), and Sefkow v. Sefkow, 427 N.W.2d 203 (Minn. 1988), in which the court developed the primary caretaker doctrine. The doctrine states that "when both parents would be suitable custodians, the intimacy of the relationship between the primary parent and the child should not be disrupted if at all possible." *Sefkow*, 427 N.W.2d at 211.

The *Sefkow* court criticized the 12 state law factors for determining best interests, calling them "somewhat nebulous and often resist[ing] application." *Id.* It developed the primary caretaker doctrine to create objective standards that foster more certainty in litigation. *Id.*

40. Intrafamilial disputes have become so heated that, in order to win custody, growing numbers of spouses are willing to invent claims that their former partners sexually abuse the children. Myers, *Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection*, 28 J. FAM. L. 1, 20-24 (1989). Myers contends few cases of child abuse are fabricated, except in the divorce setting. *Id.* at 22. There, spouses are already suspicious of each other, creating a greater chance for misperception and deliberate fabrications. *Id.* at 23. Myers cautions, however, that all allegations need thorough evaluation because, even in the divorce arena, some are true. *Id.* at 23-24.

41. Chambers, *supra* note 35, at 507; Schepard, *supra* note 35, at 703-04.

42. R. GARDNER, THE PARENTAL ALIENATION SYNDROME AND THE DIFFERENTIATION BETWEEN FABRICATED AND GENUINE CHILD SEX ABUSE 70-97 (1987). Gardner, a noted child psychologist, said before custody battles became so frequent and so bitter, he rarely saw children who had extraordinary hatred of one of their parents. *Id.* In the heat of custody battle, too many parents in effect brainwash their children by manipulating their emotions to turn them against the other warring parent. *Id.* Gardner described the children as follows:

These children speak of the hated parent with every vilification and profanity in their vocabulary — without embarrassment or guilt. . . . The hatred of the parent often extends to include that parent's complete extended family. . . . Grandparents, who previously had a loving and tender relationship with the child, who welled up with joy and pride over their relationship with the child, now find themselves suddenly and inexplicably rejected. The child has no guilt over such rejection nor does the loved parent.

Id. at 70-72.

The *Sefkow* court said a child's sense of stability is paramount, 427 N.W.2d at 211, and urged bifurcating divorce proceedings to speed custody determinations and prevent "a parent from manipulating the system to achieve personal goals which have very little to do with the best interests of the child." *Id.* at 212.

43. UNIF. CHILD CUSTODY JURISDICTION ACT prefatory note, 9 U.L.A. 116 (1968).

them in ugly custody fights⁴⁴ and continue to kidnap them.⁴⁵ Some experts believe the same anger that fuels protracted custody battles drives parental kidnapping.⁴⁶ Others, such as the drafters of a nationwide divorce law, believe the problem stems primarily from an unwillingness to accept the court's decision.⁴⁷ The Justice Department has speculated that some male kidnapers, pessimistic about receiving fair treatment from traditional family court systems, decide to "take matters into their own hands."⁴⁸

B. CONGRESS FIGHTS PARENTAL KIDNAPPING

Congress has passed two pieces of legislation to help parents recover kidnapped children. In 1980, Congress enacted the Parental Kidnapping Prevention Act (PKPA),⁴⁹ which created national jurisdictional requirements in divorce cases.⁵⁰ It supplemented state by state efforts, now largely successful, to remove any incentive for parents to spirit their children across state lines to relitigate custody.⁵¹ The Act also authorized the

44. See *supra* notes 32-40 and accompanying text (describing divorce litigation that places children at the center of disputes between parents).

45. S. ABRAHMS, *supra* note 15, at 123-24.

46. *Id.* at 138; M. AGOPIAN, *supra* note 15, at 25-26. Abrahms argues malice is the most common motive. S. ABRAHMS, *supra* note 15, at 126. She quoted one angry Florida child snatcher complaining that his ex-wife "told me to go to hell, so I'm telling her the same." *Id.*

47. UNIF. CHILD CUSTODY JURISDICTION ACT prefatory note, 9 U.L.A. 117 (1968). The prefatory note says: "It is well known that those who lose a court battle over custody are often unwilling to accept the judgment of the court. They will remove the child in an unguarded moment or fail to return him after a visit . . ." *Id.*

Abrahms contends that female child kidnapers often feel a sense of shame and embarrassment for having lost a child custody battle. S. ABRAHMS, *supra* note 15, at 138.

48. MISSING CHILDREN, *supra* note 16, at xii. The survey noted many of the kidnapers are men living in the South, where courts are more likely to award custody to mothers as a matter of course. *Id.*

49. The PKPA is codified at 18 U.S.C. § 1073 (1988), 28 U.S.C. § 1738A (1988) and 42 U.S.C. §§ 606, 674, 1382 (1988).

50. The PKPA attempts to eliminate problems of concurrent jurisdiction by providing jurisdiction only if "it appears that no other state would have" home state jurisdiction. 28 U.S.C. § 1738A(c)(2)(A)-(B). A new state may modify another state's custody determination only if the other state no longer has or fails to exercise jurisdiction. *Id.* § 1738A(f).

51. In 1968, The National Conference of Commissioners on Uniform State Laws proposed the Uniform Child Custody Jurisdiction Act (U.C.C.J.A.), which commissioners hoped would gain national acceptance and remove a legal incentive for parents to transport their children across state lines. UNIF. CHILD CUSTODY JURISDICTION ACT prefatory note, 9 U.L.A. 117 (1968). The

federal government to help search for abducted children by permitting the Department of Justice to issue arrest warrants for kidnapping parents⁵² and by providing government records, such as tax records, to help locate abducting parents.⁵³ Two

U.C.C.J.A., however, is not a reciprocal law and thus was not uniformly adopted in each state. L. KARP & C. KARP, *supra* note 15, at 238.

In large measure, the U.C.C.J.A. aims to reverse the impact of *May v. Anderson*, 345 U.S. 528 (1938), in which the United States Supreme Court declined to interpret Article IV, Section 1 of the United States Constitution to require full faith and credit in custody disputes. *Id.* at 534. The U.C.C.J.A. reverses traditional jurisdiction guidelines based on the child's location. UNIF. CHILD CUSTODY JURISDICTION ACT § 3(a)(I)(ii), (c) & comment, 9 U.L.A. at 143-44 (1968). The Act accomplishes this through uniform guidelines to determine which state has the greatest interest in the custody dispute at issue. *Id.* § 3 & comment, 9 U.L.A. at 143-44. Providing a so-called "home state" with exclusive jurisdiction over custody disputes, *id.* § 3(a)(ii), 9 U.L.A. at 143, the Act directs other states to enforce the "home-state" decrees without modification. *Id.* §§ 13, 14, 15, 9 U.L.A. at 276, 292, 311. It emphasizes this point by admonishing courts to refrain from accepting jurisdiction to issue an initial decree or modify another state's decree if the petitioner has wrongfully taken the child out of state. *Id.* § 8, 9 U.L.A. at 251. This caused problems because parents could easily move their children from state to state, and thus more than one state could assert jurisdiction. *Id.* at prefatory note, 9 U.L.A. at 117. Thus, "child snatching prior to or after a custody decree was quasi-accepted behavior, somewhere in the no-man's land of the law." Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 FAM. L.Q. 203, 203 (1981).

All 50 states and the District of Columbia have now adopted the Act, largely stripping away the legal incentive to parental kidnapping. See Bodenheimer, *supra*, at 226. Bodenheimer asserts that in the case of kidnapped children, practically no courts will now accept jurisdiction to change another court's custody determination. *Id.* Despite the U.C.C.J.A., however, some pre-litigation child kidnappers continue, on occasion, to manage to start custody actions in a states where grandparents or other relatives live or where the petitioners lived in the past. *Id.* The Act does permit parents to recover attorney fees, court costs, and travel related expenses if forced to travel out of state due to the petitioner's wrongful conduct. UNIF. CHILD CUSTODY JURISDICTION ACT § 8(c), 9 U.L.A. 251 (1968).

52. 18 U.S.C. § 1073 (1988). The kidnapping parent must be charged with a state felony before the federal government will issue an arrest warrant. *Beach v. Smith*, 743 F.2d 1303, 1305 (9th Cir. 1984). Forty-eight of the 50 states provide felony punishment for kidnapping parents. The two exceptions provide misdemeanor penalties. C. KARP & L. KARP, *supra* note 15, at app. J.

The Justice Department was slow to embrace the law and at first required "independent and credible information that the child was in a condition of serious abuse or neglect" before it would authorize an arrest warrant. *Beach*, 743 F.2d at 1305. Under congressional pressure, it lifted the abuse requirement. *Id.*

53. 42 U.S.C. § 654 (1988). The Act provides parents of abducted children with access to the Federal Parent Locator Service, which Congress initially created to find parents not making court ordered support payments. 42 U.S.C. § 653(a) (1988). The service attempts to find absent parents by checking address and employee information that the Social Security Administration, In-

years later, Congress enacted the Missing Children's Act (MCA),⁵⁴ further expanding the federal government's role in child abduction cases. The MCA allows local law enforcement agencies to list descriptions of abducting parents and their missing children on the National Crime Information Center computer, facilitating return of the missing child if police stop either the parent or child on an unrelated charge.⁵⁵

C. MINNESOTA'S RESPONSE TO PARENTAL KIDNAPPING

Although the federal government has sought to help curtail parental kidnapping through the Parental Kidnapping Prevention Act and the Missing Children's Act, jurisdiction over dissolution matters remains primarily the responsibilities of the states.⁵⁶ In Minnesota, the legislature first addressed parental kidnapping in 1963, when it created a felony-level offense for parents who abduct their children with the intent to interfere with custody.⁵⁷ Minnesota's current statute assigns felony penalties for kidnapping a child with the intent to deprive another of visitation or of custody rights,⁵⁸ but the court shall dismiss the charge if the abducting parent voluntarily returns the child within two days⁵⁹ or if the abductor, without leaving Minne-

ternal Revenue Service, the Department of Health and Human Services, the Department of Labor and other federal departments and agencies retain. *Id.* § 653(a)-(b).

54. 28 U.S.C. § 534 (1988); P. HOFF, LEGAL REMEDIES IN PARENTAL KIDNAPPING CASES: A COLLECTION OF MATERIALS 18 (1986).

55. P. HOFF, *supra* note 54, at 18.

56. See *Bennett v. Bennett*, 682 F.2d 1039, 1042 (D.C. Cir. 1982). Under the "domestic relations" exception, federal courts will not assert diversity jurisdiction over a case that would "require it to grant a divorce, determine alimony or support obligations, or resolve parental conflicts over their children." *Id.*

57. Criminal Code of 1963, ch. 753, § 609.26, 1963 Minn. Laws 1185, 1203-04 (1963) (codified at MINN. STAT. § 609.26 (1990)). The Minnesota Supreme Court upheld the law in the face of a challenge arguing the constitutionality of criminalizing the kidnapping of one's own child. *Olsen v. State*, 287 Minn. 536, 538-39, 177 N.W.2d 424, 427 (1970).

In 1967, the Legislature amended the law by also making it a felony to detain one's own child outside Minnesota. Act of May 18, 1967, ch. 570, § 1, 1967 Minn. Laws 1148-49. However, in *State v. McCormick*, 273 N.W.2d 624 (Minn. 1978), the Minnesota Supreme Court overturned this portion of the statute. It ruled that the statute sought to punish activities solely outside of Minnesota. *Id.* at 626 (quoting *People v. Merrill*, 2 Parker's Crim. Rep. 590, 603 (1855)). It also held that the provision violated the equal protection clause of the United States Constitution by establishing disparate punishment for non-resident parents, without rational basis. *Id.* at 627.

58. MINN. STAT. § 609.26 subd. 1 (1990).

59. *Id.* at subd. 5(a) (the 1991 Legislature reduced the dismissal period from two weeks to two days). The required dismissing of charges does not ap-

sota, brings a custody action in court.⁶⁰ The statute excuses an abduction intended to protect the child from physical or sexual assault or substantial emotional harm.⁶¹ Under the statute, a judge may order restitution to the custodial parent for expenses incurred in returning the child,⁶² and also may direct an appropriate county welfare agency to provide counseling for the child.⁶³

In addition to this criminal prohibition, the Minnesota Supreme Court has interpreted state law to provide trial judges with "broad discretion to protect custodial and visitation rights."⁶⁴ For example, in *Tischendorf v. Tischendorf*,⁶⁵ the supreme court upheld a judge's requirement that a noncustodial parent post bond before taking a child overseas for extended visitation.⁶⁶ State law further specifies that judges shall modify custody arrangements to serve the best interests of children,⁶⁷ restrict visitation that will endanger the child,⁶⁸ issue contempt of court citations to address unwarranted interference with visitation,⁶⁹ order county supervision of custody if needed,⁷⁰ and restrain any pre-divorce harassment or mistreatment of children.⁷¹ State law also forbids custodial parents from moving out of state to interfere with the non-custodial parent's visitation rights.⁷² The 1991 Legislature directed the state to distribute a quarterly bulletin with information on missing children to law enforcement agencies, schools and

ply if the child is returned as a result of intervention by law enforcement officials. *Id.*

60. *Id.* at subd. 5(b).

61. *Id.* at subd. 2(1). In addition, the law permits abductors to defend against charges by asserting they took the child to protect themselves from physical or sexual assault. *Id.* at subd. 2(2). Consent is also a defense. *Id.* at subd. 2(3).

62. *Id.* at subd. 4.

63. *Id.* The Minnesota Legislature has also enacted the U.C.C.J.A. MINN. STAT. § 518A (1990).

64. *Larson v. Dunn*, 460 N.W.2d 39, 47 (Minn. 1990).

65. 321 N.W.2d 405 (Minn. 1982), *cert. denied*, 460 U.S. 1037 (1983).

66. *Id.* at 412.

67. MINN. STAT. § 518.175 subd. 5 (1990).

68. *Id.* at subd. 1.

69. *Id.* at subd. 4.

70. *Id.* § 518.176 subd. 2.

71. *Id.* § 518.131(g). The judge may also prohibit either party from removing the children from the jurisdiction before disposition of the divorce proceeding. *Id.* § 518.131(h). The judge may issue contempt of court citations for violations; prosecutors may also bring misdemeanor charges to punish violations of the orders. *Id.*

72. *Id.* § 518.175(3).

others.⁷³ The Legislature considered, but did not pass, a measure that would allow parents to sue child kidnappers for tortiously interfering with their custodial rights.⁷⁴

D. HISTORY OF TORTIOUS INTERFERENCE

The tort of interference with custodial rights descends directly from the English common law action for trespass⁷⁵ that permitted fathers⁷⁶ to recover for the loss of services a kidnapped child would have performed for the family.⁷⁷ Since at least the mid-1800s, American courts have allowed parents to sue child kidnappers.⁷⁸ Early courts seemed willing to overlook the proof of service found in the English trespass actions,⁷⁹ and

73. 1991 Minn. Sess. Law Serv. § 299C.52(7) (Westlaw, MN-Legis database). The Legislature directed the state to include photographs of missing children in the quarterly bulletins. *Id.* It also urged state and local officials to include information about missing children in other mailings to the public. *Id.* In addition, the law gives law enforcement officials greater access to medical data about missing children. *Id.* § 299C.52(9).

74. The bill passed the Senate during the 1991 session but did not come up for a vote in the House. S.F. 1024, 77th Leg., 1st Sess. (1991). It would provide joint and several liability to kidnappers and their helpers. *Id.* § 2. It would excuse third-parties who assist with the kidnapping only if they had no notice of existing custody orders and should not have known of such orders. *Id.* The bill would allow defendants to assert affirmative defenses on the basis that the custodial parent had given them written permission to be with the children and on the basis that they took the child to prevent imminent physical or sexual abuse. *Id.* § 4. In the latter case, defendants must have promptly filed reports with an appropriate law enforcement agency. *Id.* Plaintiffs under the proposal could receive damages for expenses incurred locating their children, enforcing existing court orders and bringing a lawsuit under the proposal, including attorney fees. *Id.* § 3. In addition, they may seek payment for mental suffering. *Id.* The proposal also suggests that courts may order defendants to reimburse the government for its expenses locating the child. *Id.*

75. See *Pickle v. Page*, 252 N.Y. 474, 476, 169 N.E. 650, 651 (1930) (recounting the historical foundations of the tort).

76. The common law discriminated sharply against women and allowed only fathers to bring such actions. Not only could mothers not bring an action to recover for the abduction of her children, but initially fathers could sue only over the abduction of an heir — the eldest son. *Id.* The rationale was that only men could own property, and only heirs provided property value. *Id.*

77. *Id.* The *Pickle* court explained that the common law allowed these actions only if a father suffered an actual loss of service. Such claims were refused if the child, not an heir, was too young or otherwise incapable of work. *Id.* Some judges permitted fathers who suffered a loss of service from their children also to claim damages for the harm the abduction caused their relationships with their children, but mere harm to family relationships, without loss of service, did not sustain a cause of action. *Id.*

78. See *Magee v. Holland*, 27 N.J.L. 86, 88 (1858); *Rice v. Nickerson*, 91 Mass. 478, 478 (1864); *Clark v. Bayer*, 32 Ohio St. 299, 301 (1877).

79. See *Magee*, 27 N.J.L. at 96 (requiring parents to plead a loss of service

by the turn of the century American courts had discarded the requirement as an "outworn fiction" masking the real purpose of the tort.⁸⁰ The modern view recognizes that the tort serves to protect the parent-child relationship and that loss of service is secondary.⁸¹

The *Restatement (Second) of Torts* section 700, which codifies the tort of custodial interference,⁸² also takes the view that a parent's loss of society with the child, without accompanying loss of service, is sufficient injury for redress.⁸³ Section 700 allows a parent to recover for loss of society, emotional distress, loss of service, reasonable expenses of regaining custody, and reasonable expenses incurred in treating the child for physical and emotional harm suffered.⁸⁴ The *Restatement (Second)* limits the scope of the tort. It grants immunity to kidnappers who rescue children from physical violence inflicted by their parents,⁸⁵ and it relieves from liability abducting parents with joint

but saying it may be inferred, even though one of the kidnapped children was but two-years-old).

80. *Howell v. Howell*, 162 N.C. 283, 286-87, 78 S.E. 222, 224 (1913) (asserting the real damage of child abduction results from the "destruction of [a] household").

The *Pickle* court dealt what probably was the mortal blow to the common law loss-of-service approach. It said: "It would be a reproach to our legal system if, for the abduction of a child in arms, no remedy ran to its parent, although for a 'parrot, a popinjay, a thrush' and even 'for a dog' an ample remedy is furnished to their custodian for the loss of their possession." *Pickle*, 252 N.Y. at 482, 169 N.E. at 653 (stating explicitly that "no loss of service be alleged or proven").

81. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 924-25 (5th ed. 1984) [hereinafter PROSSER & KEETON]; Annotation, *Parental Child Abduction*, 49 A.L.R.4th 7 (1986).

82. RESTATEMENT (SECOND) OF TORTS § 700 (1977). The tort was included in the American Law Institute's first *Restatement of Torts* in 1938. RESTATEMENT OF TORTS § 700 (1938).

83. RESTATEMENT (SECOND) OF TORTS § 700 comment d. The *Restatement (Second)* creates tort liability to anyone who, without consent, "abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him." *Id.* § 700. Neither § 700 nor the comments that follow discuss whether third parties may be named as defendants in tortious interference cases for assisting a parent abducting his or her child. *Id.*

84. *Id.* at comment g.

85. *Id.* at comment e. The Comment restricts immunity to situations in which it "appear[s] reasonably probable that the child is about to suffer immediate harm or that it will be subjected to immediate harm if it returns to its home." *Id.*

The *Restatement (Second)* also grants immunity for inducing a minor to leave home to marry. *Id.* at comment f.

custody because they are, by definition, entitled to custody.⁸⁶

Custodial parents bring tortious interference suits for two reasons: to obtain leverage for the return of a missing child⁸⁷ and to obtain money damages after a child is returned.⁸⁸ In the former case, parents often sue grandparents and other relatives who know where the child is located.⁸⁹ The threat of money damages, perhaps escalating damages,⁹⁰ may pressure defendants into cooperating.⁹¹ In the latter case, custodial parents often name the abducting parent and others as defendants.⁹²

In recent years, courts increasingly have accepted the tort.⁹³ Before the *Larson* decision, all thirteen state high courts

86. *Id.* at comment c.

87. A "typical case" is filed while the child is still missing in order to gain bargaining strength for the child's return. Annotation, *supra* note 81, at 14. A good example is *Lloyd v. Loeffler*, 539 F. Supp. 998 (E.D. Wis.), *aff'd*, 694 F.2d 489 (7th Cir. 1982) (applying Wisconsin law). In *Lloyd*, a custodial father brought suit to regain his abducted one-year-old daughter, alleging that his former lover, Bonnie McMahan, kidnapped their daughter, Carol Caren Lloyd, at the conclusion of summer visitation. The father, Kenneth Lloyd, sued McMahan; her husband, Earl McMahan; and the child's maternal grandparents, Irma and Alvin Loeffler. *Id.* at 1000-01. Lloyd was unable to locate the McMahans, and they did not appear at trial. *Id.* at 1003.

The United States district court determined that Wisconsin would adopt the tort because the state has followed other provisions of the Restatement (Second) of Torts and has made child kidnapping a crime, and because other states have judicially adopted the tort. *Id.* at 1004. At trial, evidence showed that the Loefflers helped the McMahans hide the child by setting up bank accounts, making other financial arrangements, and performing tasks that allowed the couple to remain hidden. *Id.* at 1001-02. After a bench trial, the court found the McMahans and the Loefflers jointly and severally liable to Lloyd for \$70,038.45 in compensatory damages. *Id.* at 1005. Noting that Bonnie McMahan thrust her parents "in an understandably difficult position" when she disregarded their advice against kidnapping her daughter, the court relieved the Loefflers of punitive damage liability, but awarded Lloyd punitive damages from the McMahans of \$25,000 plus \$2,000 per month until the child was returned. *Id.* at 1005.

88. See P. HOFF, INTERSTATE AND INTERNATIONAL CHILD CUSTODY DISPUTES 14-1 (1984) (contending tortious interference provides the greatest promise for compensating custodian parents to the full extent for the abduction of their children).

89. Annotation, *supra* note 81, at 12-15.

90. See *Lloyd*, 539 F. Supp. at 1005.

91. Snyder, *Tortious Interference with Custody — The New Personal Injury Suit*, 2 AM. J. FAM. L. 51, 54-57 (1988).

92. See Annotation, *supra* note 81, at 12-14.

93. See *DiRuggiero v. Rodgers*, 743 F.2d 1009, 1017-18 (3d Cir. 1984) (applying New Jersey law); *Lloyd v. Loeffler*, 694 F.2d 489, 495-97 (7th Cir. 1982) (applying Wisconsin law); *Bennett v. Bennett*, 682 F.2d 1039, 1044 (D.C. Cir. 1982) (applying D.C. law); *Fenslage v. Dawkins*, 629 F.2d 1107, 1109-10 (5th Cir. 1980) (applying Texas law); *Kunz v. Deitch*, 660 F. Supp. 679, 683 (N.D. Ill. 1987) (applying Illinois law); *Kajtazi v. Kajtazi*, 488 F. Supp. 15, 18 (E.D.N.Y.

that addressed the tort adopted it judicially,⁹⁴ almost uniformly without dissent.⁹⁵ Few of these courts, however, faced arguments that the tort was not in the best interests of children. The majority of the high court decisions came in cases in which plaintiffs did not press claims against former spouses. Custo-

1978) (applying New York law); *Rosefield v. Rosefield* 221 Cal. App. 2d 431, 433-34, 34 Cal. App. Rptr. 479, 481-82 (1963); *Howell v. Howell*, 162 N.C. 283, 285-86, 78 S.E.2d 222, 223-24 (1913); *Coleman v. Shirlen*, 53 N.C. App. 573, 281 S.E.2d 431, 433-34 (1981) (using civil conspiracy theory). *But see* *Adra v. Cliff*, 105 F. Supp. 857, 866-67 (D. Md. 1961) (best interests of child was to remain with mother, despite violating Lebanese decision awarding custody to father); *Simmons v. Simmons*, 41 F. Supp. 545, 548-49 (E.D.S.C. 1941) (holding the tort would violate domestic felicity); *Rayford v. Rayford*, 456 So. 2d 833, 834-35 (Ala. Civ. App. 1984) (allowing a mother to recover costs of returning her children through contempt proceedings against the father, but disallowing further damages); *Whitehorse v. Critchfield*, 144 Ill. App. 3d 192, 194-95, 494 N.E.2d 743, 745 (App. Ct. 1986) (not recognizing the tort); *Johns v. Johns*, 471 So. 2d 1071, 1076-77 (La. Ct. App. 1985) (holding no damages available for refusal to comply with custody order); *Kipper v. Vokolek*, 546 S.W.2d 521, 527 (Mo. Ct. App. 1977) (tort denied where custody unclear).

In addition, several law reviews have recommended that states adopt the tort. *See* *Campbell*, *supra* note 15, at 260; Comment, *Torts-Punitive Damages-Escalating Punitive Damages in Cases of Child Abduction* — *Lloyd v. Loeffler*, 1983 ARIZ. ST. L.J. 191, 204; Comment, *In the Best Interest of the Child? Minnesota's Refusal to Recognize the Tort of Parental Kidnapping*: *Larson v. Dunn*, 14 HAMLIN L. REV. 257, 274-75 (1991) [hereinafter Comment, *Best Interests*]; Comment, *Abduction of Child By Noncustodial Parent: Damages for Custodial Parent's Mental Distress*, 46 MO. L. REV. 829, 843 (1981); Comment, *supra* note 17, at 1009.

Further, one state enacted the tort into statute. *See* TEX. FAM. CODE ANN. § 36 (Vernon 1991). The statute creates liability for taking or retaining a child in violation of a court order and for assisting in such conduct. *Id.* § 36.02. A defendant will be relieved of liability, however, for complying with the custody order after receiving notice of the violation. *Id.* § 36.04. A defendant may also recover attorney fees and court costs if the claim was frivolous. *Id.* § 36.08.

94. *See* *D & D Fuller CATV Constr., Inc. v. Pace*, 780 P.2d 520, 523-24 (Colo. 1989) (en banc); *Shields v. Martin*, 109 Idaho 132, 136-38, 706 P.2d 21, 25-27 (1985); *Montgomery v. Crum*, 199 Ind. 660, 672-73, 161 N.E. 251, 256-57 (1928) (by implication); *Wood v. Wood*, 338 N.W.2d 123, 124-25 (Iowa 1983); *Finn v. Lipman*, 526 A.2d 1380, 1381-83 (Me. 1987) (declining to reach the issue, but quoting extensive authority supporting the cause of action); *Brown v. Brown*, 338 Mich. 492, 498, 61 N.W.2d 656, 659 (1953), *cert. denied*, 348 U.S. 816 (1954); *Plante v. Engel*, 124 N.H. 213, 216-17, 469 A.2d 1299, 1301-02 (1983); *Pickle v. Page*, 252 N.Y. 474, 481-83, 169 N.E. 650, 653 (1930); *Howell v. Howell*, 162 N.C. 283, 285-87, 78 S.E. 222, 223-24 (1913); *Clark v. Bayer*, 32 Ohio St. 299, 311-13 (1877); *McBride v. Magnuson*, 282 Or. 433, 435-36, 578 P.2d 1259, 1260 (1978) (en banc); *Bedard v. Notre Dame Hosp.*, 89 R.I. 195, 197-99, 151 A.2d 690, 691-92 (1959); *Silcott v. Oglesby*, 721 S.W.2d 290, 292-93 (Tex. 1986).

95. Judges dissented on the question of adoption of the tort only in *Wood*, 338 N.W.2d at 127-30 (Wolle, J., joined by Harris & McGiverin, JJ., and joined in part by McCormick, J., dissenting). The dissenters argued that the tort will become "a new weapon for the arsenal of litigants engaging in marital or post-marital warfare." *Id.* at 127.

dial parents directed three of the suits against relatives who helped to abduct the children,⁹⁶ two against police officers who assisted the abductions,⁹⁷ one against a grandparent who abducted a child,⁹⁸ one against an ex-spouse's attorney who allegedly counseled his client to abduct her children,⁹⁹ one against a hospital that refused to discharge their infant child,¹⁰⁰ one against a police officer for wrongly taking a child into protective custody,¹⁰¹ and one in which the defendant is unclear.¹⁰² An additional suit sought return of a still kidnapped child.¹⁰³ Only two of the cases resulted from suits in which one parent sued the other over a child who had returned home.¹⁰⁴

96. *D & D Fuller*, 780 P.2d at 521 (suing the child's grandfather); *Brown*, 338 Mich. at 494, 61 N.W.2d at 657 (suing aunts and uncles); *Plante*, 124 N.H. at 215-17, 469 A.2d at 1300-02 (suing the child's grandparents) (in dicta, the court said that it would permit tortious interference suits against abducting parents).

97. *Shields*, 109 Idaho at 136-38, 706 P.2d at 25-27 (suit against police officer who helped a mother using an outdated custody order obtain her son from day care; the custodial father also named the abducting mother as a defendant but she did not appear in person or by counsel); *Pickle*, 252 N.Y. at 475-76, 169 N.E. at 650-51 (suit against county sheriff who helped a mother abduct her child from his grandparents who had adopted the boy when his mother abandoned him five years before).

98. *Silcott*, 721 S.W.2d at 291 (suit against grandparent who allegedly abducted child from stepparent acting as child's managing conservator; court adopted tort judicially after noting that Texas legislature enacted similar tort that became law after this suit arose).

99. *Finn v. Lipman*, 526 A.2d 1380, 1380-83 (Me. 1987) (summary judgment affirmed for defendant holding that plaintiff failed to present evidence that the attorney counseled his client to violate the custody order; the court assumed Maine would adopt the custodial interference tort in an appropriate case); see also *McEvoy v. Helikson*, 277 Or. 781, 787-89, 562 P.2d 540, 543-44 (1977) (recognizing custody rights in suit by custodial father against his ex-wife's attorney for returning her passport to her in violation of a court order, enabling her to flee with the children to Switzerland).

100. *Bedard v. Notre Dame Hosp.*, 89 R.I. 195, 196-97, 151 A.2d 690, 691 (1959).

101. *McBride v. Magnuson*, 282 Or. 433, 435, 578 P.2d 1259, 1259-60 (1978) (en banc) (mother sued police officer who took eight-month-old child into protective custody after the child suffered burns).

102. *Clark v. Bayer*, 32 Ohio St. 299, 299-304, 312 (1877). In *Clark*, the Ohio Supreme Court permitted a custodial grandfather to bring perhaps the earliest example of a pure custodial rights case. *Id.* at 310-13. Clark sued Bayer, the alleged abductor, but the decision does not identify the defendant's relation to the children, other than to identify him as someone other than the father. *Id.* at 299-304.

103. *Howell v. Howell*, 162 N.C. 283, 283-84, 78 S.E. 222, 222-23 (1913) (custodial father sues non-custodial mother and her father for return of his six-year-old daughter; suit seeks monetary damages only from the grandfather).

104. *Wood v. Wood*, 338 N.W.2d 123, 123 (Iowa 1983) (discussed *infra* notes 105-11 and accompanying text); *Montgomery v. Crum*, 199 Ind. 660, 664-67, 161 N.E. 251, 254-55 (1928) (custodial mother sued noncustodial father who twice

Unlike the other high courts, the Iowa Supreme Court, in *Wood v. Wood*,¹⁰⁵ engaged in vigorous debate on whether to adopt tortious interference.¹⁰⁶ *Wood*, a lawsuit between parents, arose after the non-custodial father kidnapped his child from his ex-wife and kept the child for a little more than a month.¹⁰⁷ The child had returned home when the custodial mother pressed her suit.¹⁰⁸ Looking at broad policy goals, the court concluded that adopting the tort as outlined in the *Restatement (Second)* would help to speed the return of kidnapped children by encouraging cooperation of third-party defendants and allowing aggressive use of civil discovery tools.¹⁰⁹ The majority also found that the threat of damages would deter parents from kidnapping their children.¹¹⁰ The dissent, however, concluded that the tort would foster "prolonged bitterness among family members resulting from jury verdicts, whether damages be collected or denied."¹¹¹

II: *LARSON V. DUNN*: MINNESOTA BUCKS THE TREND

Less than two-years-old when her parents separated, Jessica Larson was caught in the middle of a nasty divorce.¹¹² Loree Dunn, Jessica's mother, claimed her husband, John Larson, physically abused her¹¹³ and sexually abused Jessica.¹¹⁴ Larson

kidnapped his children, the second instance occurring after he received a pardon from his prison term for the first kidnapping; to receive the pardon, the non-custodial father promised not to interfere with his children).

105. 338 N.W.2d 123 (Iowa 1983).

106. *Wood*, 338 N.W.2d at 127 (Wolle, J., joined by Harris & McGiverin, JJ., and joined in part by McCormick, J., dissenting).

107. *Id.* at 123.

108. *Id.*

109. *Id.* at 127.

110. *Id.*

111. *Id.* at 129 (Wolle, J., joined by Harris & McGiverin, JJ., and joined in part by McCormick, J., dissenting). The minority also said that the tort may result in families spending large amounts of money on attorney fees and court costs, money that could be better spent raising the children. *Id.* In addition, the minority was concerned that there may be no limit to the litigation, noting defendant parents might countersue for visitation violations. *Id.*

112. *Larson v. Dunn*, 460 N.W.2d 39, 41 (Minn. 1990).

113. Affidavit of Loree Carol Larson Dunn at 1-3, *Larson v. Dunn*, 460 N.W.2d 39 (Minn. 1990) (C7-89-1139). In her affidavit, filed after she was arrested for kidnapping Jessica, Dunn claims that Larson controlled her through "physical, emotional and sexual violence." *Id.* at 1. Even before they were married, he often hit her. *Id.* at 1-3. Sometimes he grabbed her arms so tight he left "bruises that looked like the prints of his hands." *Id.* at 1. Dunn also claimed the violence continued during her pregnancy with Jessica and after her birth. *Id.*

114. *Id.* at 4-5. Dunn claims that Larson often examined Jessica's genital

responded by calling his wife a liar.¹¹⁵ He won a custody dispute over Jessica in part by persuading a family court judge that Dunn fabricated her claims of violence.¹¹⁶

The day after the judge awarded him custody Larson went to retrieve Jessica.¹¹⁷ Dunn's father, Franklin Rigenhagen, told Larson that Dunn and Jessica had fled the state.¹¹⁸ Larson immediately called the police and officers issued an arrest warrant for Dunn.¹¹⁹ Despite spending \$50,000 searching for his daughter,¹²⁰ Larson neither saw nor heard from Jessica for the next seven years.¹²¹ During that time, the Rigenhagens claimed they did not know where Dunn and Jessica had gone.¹²²

The FBI found Dunn living a new life in Washington state and returned Jessica to Larson.¹²³ After her return, Larson initiated suit.¹²⁴ He claimed Dunn had abducted Jessica, that the

region. *Id.* at 4. When Jessica was old enough to crawl, Dunn said that Larson encouraged her to fondle his penis. *Id.* at 4-5. She said Larson responded to her objections by claiming he wanted to prevent Jessica from "growing up to be gay." *Id.* at 5.

115. *In Re Marriage of Larson and Larson*, No. C-21-41, slip op. at 3 (Martin County Nov. 5, 1980) (order granting divorce).

116. *Id.* at 3 (asserting Dunn "tends to lie").

117. *Larson v. Dunn*, 460 N.W.2d 39, 41 (Minn. 1990). Larson had attempted to pick up Jessica the day the custody decree was issued, a scheduled visitation period for him. *Larson v. Dunn*, 449 N.W.2d 751, 752 (Minn. Ct. App.), *rev'd*, 460 N.W.2d 39 (Minn. 1990). Dunn's father, Franklin Rigenhagen, refused to surrender the child. *Id.* He told Larson that his permanent custody would begin the next day, and he slammed the door on Larson's hand. *Id.* at 753.

118. *Larson*, 460 N.W.2d at 41. Dunn claims that she left Minnesota on her attorney's advice, before the permanent custody award took effect. *Id.* at 42.

119. *Larson*, 449 N.W.2d at 753.

120. *Id.* Five years after Dunn and Jessica disappeared, the FBI informed Larson that his ex-wife had initially stayed with an aunt in California and that the Rigenhagens had helped them move. *Id.* Based on this information, Larson filed suit in federal court, but he dropped the action when Dunn's family continued to deny knowing her whereabouts, and the FBI refused to testify during an ongoing investigation. *Id.*

121. *Larson*, 460 N.W.2d at 41.

122. *Id.* at 41-42.

123. *Id.* at 42.

124. *Id.* Larson alleged that after Jessica returned, she told him that the Rigenhagens and other maternal relatives had frequently visited her in Washington. *Larson*, 449 N.W.2d at 753. Dunn's new, and subsequently estranged husband, Paul Dunn, also provided Larson with an affidavit making the same allegations. *Larson*, 460 N.W.2d at 42.

Since the time that Jessica was reunited with Larson, she has not had any contact with her mother. *Id.* at 46.

In a tape recorded telephone conversation with Larson and his new wife, Dunn apologized for keeping Larson from his daughter for so long. Respon-

Rigenhagens and other relatives had helped to hide her,¹²⁵ and that despite their claims of ignorance about Dunn's whereabouts, the Rigenhagens visited their daughter frequently.¹²⁶ The suit asked for compensatory damages for intentionally interfering with his custodial rights.¹²⁷ The district court noted that Minnesota had not adopted a custodial interference tort and dismissed Larson's claims for failure to state a claim.¹²⁸ The Court of Appeals reversed in a 2-1 decision, determining that custodial parents have "legally protectable right[s] to maintain relationships with their children."¹²⁹

A divided Minnesota Supreme Court, however, declined to examine the custodial interference tort in the context of tradi-

dent's Brief and Appendix at A-38, *Larson v. Dunn*, 460 N.W.2d 39 (Minn. 1990) (C7-89-1139). She offered to provide Larson with pictures of Jessica so he could, in a very small way, observe portions of the missing years. She said:

I can't make it up to you. I can't take it back. I want you to understand why I left, what was going through my head . . . I'm tired of games. I don't care if I've not convinced you. Maybe it's better. There are specific people out there that want me to do all these terrible things to you guys. I'm not gonna do it. You're her daddy. You're her new mommy. I'm not doin' it, ok. Now if you guys want to barbecue me at the stake, fine, go ahead.

Id.

125. *Larson*, 460 N.W.2d at 41-42.

126. *Larson*, 449 N.W.2d at 753.

127. *Larson*, 460 N.W.2d at 42. Larson's suit also alleged intentional infliction of emotional distress, fraud, and civil conspiracy. *Id.*

128. *Larson v. Dunn*, No. 46-C-88-1312, slip op. at 2 (Martin County Feb. 17, 1989).

129. *Larson*, 449 N.W.2d at 753. The majority held that the public policy of Minnesota favored adoption of the new tort. It concluded:

While we are reluctant to add another weapon to the arsenal already available for use by family members against one another, we think the custody decree vests the custodial parent with a legally protectable interest in a relationship with the child. The tort of intentional interference with custodial rights is an appropriate means of remedying interference with that relationship.

Id. at 758.

A dissenting opinion by Judge Doris Huspeni also focused on public policy. *Id.* at 760-61 (Huspeni, J., dissenting). Huspeni warned that adoption of the new tort could do more harm than good:

Today not only are courts making anguishing decisions in countless marital dissolution actions involving minor children, but they are cautioned by thoughtful voices both inside and outside the judicial system that courts of law are not particularly well-suited to resolve family relationship issues and perhaps alternative fora should be explored. Ill-considered adoption of the tort of intentional interference with custodial relations could provide a vehicle through which many of the most divisive and psychologically and financially draining aspects of marital dissolution actions would be broadened, deepened, extended and exacerbated.

Id. at 761.

tional tort analysis.¹³⁰ Instead, the majority shaped the discussion in terms of family law,¹³¹ borrowing the standard used to make custody determinations. Under that analysis, the court concluded that it would not be in Jessica's "best interests" to allow her father to pursue a cause of action against her mother.¹³² The court concluded the new tort would, once again, place the child in the middle of a bitter family dispute,¹³³ possibly requiring relitigation of original custody determinations.¹³⁴ Such a tort, it concluded, "could be used as a weapon for revenge and continued hostility."¹³⁵ Thus, it held that the tort failed to meet Minnesota's public policy objectives of protecting children.¹³⁶

Although the dissenting justices asserted that the tort might encourage the return of kidnapped children,¹³⁷ the majority court questioned the need for another such tool.¹³⁸ The majority stated that the tort would not deter intrafamilial kidnapping because "family ties are stronger than the fear of money damages."¹³⁹ In addition, Minnesota law already pro-

130. See *Larson*, 460 N.W.2d at 45.

131. *Id.*

132. *Id.* at 46-47.

133. *Id.* at 46. The majority said evidence is piling up that children can be devastated by divorce and subsequent family strife. *Id.* at 45. A new lawsuit addressing many of the same issues as the earlier divorce action would "duplicate the ambivalence and dislocation of the dissolution itself." *Id.* at 46. The majority concluded:

For the good of our children, the law should seek to promote such harmony as is possible in families fractured by the dissolution process. At a minimum, the law should not provide a means of escalating intrafamily warfare. . . . The interest in compensation should not outweigh the effects of bitter accusations on young children.

Id. at 45-46.

134. *Id.*

135. *Id.* at 47.

136. See *id.* The dissenting justices argued, however, that a child's best interests are served "by encouraging the return of absent children by imposing a civil damages remedy." *Id.* at 52 (Popovich, C.J., joined by Yetka & Kelley, JJ., dissenting).

137. *Id.* The dissenters also argued that tort liability is appropriate to prevent a parent from exercising self-help measures in contravention of court orders, *id.* at 48, that the tort will not add significantly to deteriorating family relationships since the relationships have already broken down, *id.*, and that the costs of a parent's search for a child should be compensated, *id.* at 51.

138. *Id.* at 47.

139. *Id.* The court said Minnesota already provides other mechanisms in law to prevent child kidnapping. Among them are the possible deterrent effects provided by the felony prohibitions against child snatching. *Id.* (citing MINN. STAT. § 609.26 (1990)). In addition, family law gives trial judges broad discretion to use contempt of court citations in cases of unwarranted denial of

vided for punishment and redress through criminal statutes.¹⁴⁰ Rather than fill gaps in the law, the court held this new tort would duplicate other legal avenues and could have a detrimental impact on the innocent children that family law was designed to protect.¹⁴¹ The court concluded by warning that the tort "may profoundly and permanently affect the relationships between children, their parents, grandparents, aunts and uncles" and thus should not be adopted without detailed study.¹⁴²

III: A WORKABLE SOLUTION

A. LARSON GOES ONLY PART WAY

The *Larson* court's focus on the welfare of kidnapped children represents an important step in the evolution of the tort of custodial interference.¹⁴³ Originally conceived to protect a father's pecuniary interests in his heir, the tort now protects the relationship interests of custodial parents, whether mothers or fathers.¹⁴⁴ With the current divorce climate, parents often bring claims under the tort when their former spouses abduct their children.¹⁴⁵ The Minnesota Supreme Court's *Larson* decision, however, recognizes a sad irony: This tort that protects

visitation rights. *Id.* (citing MINN. STAT. ANN. § 518.175(4) (1988)). Family court judges also may require a parent to post bond to guarantee children will not be removed from Minnesota. *Id.* (citing *Tischendorf v. Tischendorf*, 321 N.W.2d 405, 412 (Minn. 1982)).

140. *Id.* at 46. The court noted that MINN. STAT. § 609.26 provides for redress. The criminal statute allows the trial judge to impose costs incurred by the custodial parent in locating the child. The court noted that in addition to being convicted of child kidnapping, Dunn has also been punished by her separation from Jessica since her arrest. *Id.* She has not even been allowed to have visitation with her in that time. In dicta, the court also said the most egregious cases of custodial interference can proceed under a theory of intentional infliction of emotional distress. *Id.* (recognizing intentional infliction of emotional distress as set forth in the RESTATEMENT (SECOND) OF TORTS § 46(1) (1965) (citing *Hubbard v. United Press Int'l*, 330 N.W.2d 428, 438-40 (Minn. 1983))).

141. *See id.* at 47.

142. *Id.*

143. The *Larson* court acknowledged that its decision broke from the trend in other states. *Id.* at 44-45.

144. *See supra* notes 75-92 and accompanying text (discussing the evolution of the tort).

145. *See supra* notes 26-48 and accompanying text (demonstrating that the parental kidnapping grows out of the large numbers of divorces today and the accompanying frequent custody battles); *see also supra* notes 87, 89-91, 112 and accompanying text (discussing use of the tort to try to retrieve children that parents kidnap).

the relationship between one parent and child can become a sword severing the relationship between the other parent and child.¹⁴⁶

Faced with a suit between parents over a kidnapped child who had returned home, the *Larson* court observed that tortious interference claims, like custody proceedings, place children in the maelstrom of emotional, intrafamilial controversies.¹⁴⁷ The court concluded that, in tort litigation between parents, as in custody proceedings, the child's interests are paramount.¹⁴⁸ Because in this instance Jessica Larson had spent too many years caught in the crossfire of her parents' disputes, her interests demanded family peace and stability.¹⁴⁹ The court found that Jessica's interests overshadowed her father's otherwise legitimate claims for redress.¹⁵⁰

In *Larson*, the Supreme Court's rejection of the tort advanced the court's objective of protecting kidnapped children from further damage. If Jessica Larson were still missing, however, rejecting the tort would not have served the court's purpose.¹⁵¹ In situations where the child is still missing, the "best

146. *Larson*, 460 N.W.2d at 44-47. The court likened the tort to a claim for alienation of a child's affections, *id.* at 46, a cause of action the legislature abolished out of concern for grave abuses. *Bock v. Lindquist*, 278 N.W.2d 326, 327-28 (Minn. 1979). The *Bock* court complained that the child at the center of that lawsuit had become "the object of intrafamily controversy and, indeed, a pawn in disputes over monetary matters." *Id.* The court said in divorce cases the tort "would exacerbate unhappy relationships and become a strategic tool for advantageous use of one family member over another." *Id.* at 328. Like the *Larson* court, the *Bock* court noted that family members may seek to correct violations of custody orders through contempt-of-court motions, or even habeas corpus proceedings. *Id.* The court also believed that parents should be able to maintain actions in tort against "a stranger who meretriciously intrudes into a family relationship." *Id.*

147. See *supra* notes 131-36 and accompanying text.

148. *Larson*, 460 N.W.2d at 45. The court noted that 25 years of family law litigation teaches that when the welfare and best interests of children are intertwined with the rights of their parents, it is more important to consider the children's interests. *Id.*

149. *Id.* at 46. Loree Dunn also seemed to agree that the family's healing should begin. See *supra* note 125 (quoting Dunn's statement that she wants the family to provide support for Jessica).

150. See *Larson*, 460 N.W.2d at 45-47. The trauma may be even more acute in tort actions than in dissolution cases because the defendant parent may suffer extreme financial hardship. *Wood v. Wood*, 338 N.W.2d 123, 129 (Iowa 1983) (Wolle, J., Harris & McGiverin, JJ., dissenting) (asserting that the "parents' continuing internecine struggle" will exhaust money needed for raising children). Additionally, insurance exclusions for intentional acts are likely to exclude parental kidnapping from coverage. See Annotation, *Insurance — Intended or Expected Injury*, 31 A.L.R.4th 957 (1986).

151. See *Wood*, 338 N.W.2d at 127 (asserting that a tort suit will help speed

interest" of the child is not to remain kidnapped.¹⁵² Use of the tort gives parents searching for missing children great leverage over third parties, such as grandparents, who may know where the children is located.¹⁵³ By rejecting the tort completely, the Minnesota Supreme Court discarded a valuable tool for locating still missing kidnapped children.

The proposal pending in the Minnesota Legislature would restore that tool in Minnesota by overturning the *Larson* decision.¹⁵⁴ While reversing the detrimental impact of *Larson*, the bill ignores *Larson's* strength because it fails to protect children who have returned home from the emotional turmoil that litigation causes. A few limitations would accomplish this,¹⁵⁵ but just as courts that previously have addressed tortious interference claims, supporters in the Legislature have approached the issue in an all or nothing fashion.¹⁵⁶ Like the *Larson* court and other courts, they see a choice of either allowing a parent to sue

the return of a missing child in part by coercing better cooperation from potential third party defendants).

152. See *Politte v. Politte*, 727 S.W.2d 198, 200-01 (Mo. Ct. App. 1987) (stating that "[t]he interests of the child kept by one parent in violations of a court decree are best served by a prompt return of the child to the parent who the court had determined to be the more qualified custodian").

153. See *supra* notes 87, 89-91 and accompanying text (describing use of the tort for this purpose).

154. See *supra* note 74 and accompanying text (discussing the proposed legislation).

155. The proposal would relieve defendants of liability if they take the child with written permission, or if they do so because of imminent physical or sexual abuse and they promptly notify appropriate law enforcement officials. S.F. 1024, 77th Leg., 1st Sess. (1991). The bill would provide parents with no other affirmative defenses and is stricter than the state criminal statute, which relieves parents of felony punishment if they return their children within two days. See *supra* note 59 and accompanying text.

156. In contrast with *Larson's* total rejection of the tort, *Plante v. Engel*, 124 N.H. 213, 469 A.2d 1299 (1983), exemplifies a decision accepting the tort without any limitation. In *Plante*, the New Hampshire Supreme Court adopted the tort in a lawsuit brought by a custodial father against his former mother- and father-in-law for assisting his ex-wife in kidnapping their two children. *Id.* at 215, 469 A.2d at 1300. He had since found and recovered the children, and he then brought a tortious interference suit against his children's grandparents for helping with the abduction. *Id.* In a 13-paragraph decision, the New Hampshire Supreme Court relied on the significance that state law affords the parent-child relationship and determined that parents should be fully compensated for any intentional interference with their custodial relationships. The court found "no reason to circumscribe this cause of action either by including only non-parents, or by excluding them." *Id.* at 217, 469 A.2d at 1302. Although the court noted that the *Restatement (Second)* provides a cause of action for custodial interference, it did not address any of the affirmative defenses the *Restatement (Second)* suggests. *Id.*

the responsible parties for full damages, including punitive damages, or preventing the parent from bringing any action at all.¹⁵⁷ Such all or nothing approaches, however, fail to satisfy the public policy goal of providing consistent protection for children, whether they are still missing or have returned home. Because of the delicate nature of family relationships,¹⁵⁸ policy makers must consider the particular fact situations in order to promote consistent public policy goals.

B. A PROPOSED SOLUTION

The state should exercise its full power to find and return kidnapped children. In the process, however, it should not harm the very children it seeks to protect by placing them in the center of bitter litigation between their parents. The custodial interference tort proposed below represents a compromise that meets both of these objectives. This tort would allow parents to use state courts to sue third parties, including relatives, who may know where their kidnapped children are,¹⁵⁹ but it prohibits parents from using the courts to sue each other.¹⁶⁰ Recognizing that the primary tortfeasor, when a parent, may be relieved of all damages, the proposal limits third-party liability to defendants who refuse to cooperate with efforts to locate and to return kidnapped children.¹⁶¹

157. The *Larson* court acknowledged that it was taking an all-or-nothing approach but suggested that the Minnesota Supreme Court was not the appropriate institution for undertaking the study necessary for determining the scope of the tort and the extent of its damages. *Larson v. Dunn*, 460 N.W.2d 39, 47 (Minn. 1990).

158. Tort suits between family members have proven to be one of the most difficult areas of the law. PROSSER & KEETON, *supra* note 81, § 901. Until the 1960s, few courts allowed spouses to sue each other in tort. *Id.* This interspousal immunity stemmed from notions that husbands and wives comprised single legal units, that actions between them would cause marital disharmony, and that where insurance is available there is a potential for fraudulent claims. *Id.* § 902. These rationales are now discredited. All states have approved Married Women's Property Acts to secure separate legal identities for women. *Id.* Marital disharmony is not a concern if insurance will pay, see *Baudette v. Frana*, 285 Minn. 366, 371, 173 N.W.2d 416, 420 (1969) (abolishing interspousal immunity in Minnesota), and the claims present no greater potential for fraud than do many other types of actions. PROSSER & KEETON, *supra* note 81, § 901.

159. See *infra* Proposed Statute subd. 1(c).

160. See *infra id.* at subd. 2(a).

161. See *infra id.* at subd. 1(c).

PROPOSED STATUTE: TORTIOUS INTERFERENCE WITH
CUSTODIAL RIGHTS ACT¹⁶²

Subd. 1. Prohibited acts. Whoever intentionally does any of the following acts may be liable for damages for interfering with custodial rights of another:

- (a) takes, obtains, retains or fails to return a minor child from or to the parent in violation of a court order, where the action manifests an intent substantially to deprive that parent of rights to custody; or
- (b) takes, obtains, retains or fails to return a minor child from or to a parent after commencement of an action relating to child custody but prior to the issuance of an order determining custody, where the action manifests an intent substantially to deprive that parent of parental rights; or
- (c) knowingly assists in taking, obtaining, retaining or failing to return a minor child from or to a parent in violation of either (a) or (b) above, unless within 60 days of being served with a suit under this act, the actor makes reasonable efforts to locate and return the child or children who were taken to deprive a parent of custodial rights.

Subd. 2. Defenses. No person is liable under subd. 1 if:

- (a) the actor is the child's parent;
- (b) the action is taken to protect the child from physical or sexual assault or substantial emotional harm;
- (c) the action is taken to protect the person taking the action from physical or sexual assault;
- (d) is consented to by the parent, stepparent, or legal custodian bringing the cause of action; or
- (e) is otherwise authorized by a court order issued prior to the violation of subd. 1.

Subd. 3. Venue. A person who violates this section may be named as a defendant in a suit brought either in the county in which the child was taken, concealed or detained, or in the county of lawful residence of the child.

Subd. 4. Damages. Damages are permitted as follows:

- (a) Actual costs and expenses incurred in locating the child;
- (b) Actual costs and expenses incurred in returning the child;
- (c) Actual costs and expenses, including attorney's fees, expended in enforcing a court order that was violated;

162. The proposal is based on the prohibitions and defenses contained in MINN. STAT. § 609.26 (1990), the Minnesota child kidnapping criminal statute. The criminal law also forbids interference with visitation rights, but such an interference is not included as a cause of action under this civil proposal. The primary reason for excluding a visitation right tort is the potential for abuse by litigants. Unlike in the criminal setting where the discretion of a third party observer, the prosecutor, can limit frivolous claims of visitation interference, a civil cause of action would allow parents to sue one another for trivial infractions.

- (d) Actual costs and expenses, including those expected to be incurred, obtaining reasonable medical and reasonable psychological treatment of injuries suffered by the child while away;
- (e) The value of loss of society of the child during the time custodial parent and child were separated, except that loss of society damages shall not be available if the child is returned before trial begins;
- (f) The value of emotional pain and suffering resulting from the parent and child being separated, except that emotional pain and suffering damages shall not be available if the child is returned before trial begins;
- (g) Punitive damages are available to plaintiff at the discretion of the judge if the defendant acted with reckless disregard or intent to cause harm to the plaintiff, except that punitive damages shall not be available if the child is returned before trial begins.

C. ANALYSIS OF PROPOSAL

The primary objective of this proposal is to balance the public policy goals of helping custodial parents locate a missing child while avoiding the harm of allowing parents another forum in which to act out their hostilities at the child's expense. Consistent with these goals, the proposed statute permits access to the courts only in appropriate situations and to appropriate litigants.¹⁶³

1. Short-term kidnapping

A vast majority of parental kidnappers return their children to the custodial parents after relatively short periods, almost always within a matter of days.¹⁶⁴ Often the custodial parents knows his or her child's location.¹⁶⁵ Although short-term kidnapping is wrong, making it tortious will spark a flood of litigation and only add to the pain of a family struggling with divorce.¹⁶⁶ Further, other legal mechanisms such as contempt

163. Under the proposal, strangers who kidnap a child could be liable for the full amount of damages. One Minnesota commentator has taken the opposite view of this Comment and argued that the Minnesota legislature should repeal *Larson* and allow parents to sue each other as well as strangers. See Comment, *Best Interest*, *supra* note 93, at 274-76.

164. See *supra* notes 20-25 and accompanying text (demonstrating most parental kidnappings are short lived).

165. See *supra* note 20 and accompanying text.

166. Similarly, some states have been reluctant to adopt a tort for interference with visitation rights because of a concern about permitting "claims for petty infractions" that would not be in a child's best interests. See Gleiss v. Newman, 141 Wis. 2d 379, 381, 415 N.W.2d 845, 846-47 (Ct. App. 1978). In *Gleiss*, the Wisconsin Court of Appeals distinguished the custodial interference claims brought in *Lloyd v. Loeffler*, 539 F. Supp. 998 (E.D. Wis.), *aff'd*, 694 F.2d 489 (7th Cir. 1982), see *supra* note 88, with Gleiss's claims by raising con-

proceedings¹⁶⁷ and criminal charges¹⁶⁸ better address short-term kidnappings. The proposed statute recognizes that allowing use of the tort in short term kidnappings by family members would not further its purposes.¹⁶⁹ It thus limits suits over parental kidnappings to those abductions that continue for more than 60 days.¹⁷⁰

2. No parental liability

The proposal is likely to receive the most significant criticism for relieving the principal actor in many kidnappings, the parent, of any liability.¹⁷¹ Some will argue that this proposal misses an opportunity to deter parental kidnapping. It is unlikely, however, that the possibility of tort litigation will have much of a deterrent effect. As the Minnesota Supreme Court noted, "family ties are stronger than the fear of money dam-

cerns about the "trifling" nature of the visitation claims. *Gleiss*, 141 Wis. 2d at 380, 415 N.W.2d at 846.

The leading case supporting a tort for interference with visitation rights is *Ruffalo v. United States*, 590 F. Supp. 706 (W.D. Mo. 1984), in which a mother was denied all visitation rights with her child after the father and the child changed identities under the federal Witness Protection Program, *id.* at 713. *Ruffalo*, however, was not followed by *Politte v. Politte*, 727 S.W.2d 198 (Mo. Ct. App. 1987), which concluded that parents already had enough weapons at their disposal for conducting "post-marital warfare." *Id.* at 201.

167. See MINN. STAT. § 518.131 subd. 1(f) (1990) (permitting a judge to order one or both divorcing spouses to stop harassing, mistreating or restraining the liberty of any children); *id.* § 518.131 subd. 1(g) (permitting a judge to restrain one or both divorcing spouses from removing their minor children from the jurisdiction); see also *id.* § 518.131 subd. 10 (authorizing a judge to issue contempt citations for violations of subdivisions 1(f) and (g) and also authorizing misdemeanor penalties).

168. MINN. STAT. § 609.26 (1990).

169. Similarly, Minnesota criminal law recognizes that short-term episodes are less serious by requiring prosecutors to reduce felony kidnapping charges to misdemeanor levels if abducting parents return their children within two days of charges being filed. See *supra* note 59 and accompanying text. Further, prosecutors exercise their own judgment about which cases to bring, thus providing a gate that restricts criminal charges to more serious allegations.

170. Under the proposal, kidnapping parents cannot be held liable under subdivision 2(a). Under subdivision 1(c), defendants who assist the kidnapping, or who help hide the child, may be held liable only if they fail to make a reasonable effort to locate or return the child within sixty days after service of the lawsuit. Their help returning the child will be unnecessary in kidnappings shorter than sixty days, and thus there can be no liability for short-term kidnappings within a family. The proposal, however, does not limit liability from non-parent kidnapers, whether the abduction be short-lived or long term.

171. See *supra* Proposed Statute subd. 2(a).

ages."¹⁷² In fact, the law already seeks to deter parental kidnapping by providing felony level punishment for offenses¹⁷³ and by making contempt of court a possibility.¹⁷⁴

Further, not permitting tortious interference suits between parents is worthwhile even if such actions had deterrent value. Since the turn of the century, courts that recognized tortious interference as a cause of action have recognized that its purpose is to protect the parent-child relationship.¹⁷⁵ Hence, it makes little sense to protect the child's relationship with one parent with a tort that invades the same child's relationship with the other parent. As the Minnesota Supreme Court noted, litigation can greatly harm children.¹⁷⁶

Moreover, simply because parents may not be named as defendants in civil suits does not mean the law will not deal with them for kidnapping their children. Prosecutors may charge them with criminal offenses, and judges may sentence them to jail for kidnapping their children.¹⁷⁷ Family court judges may sanction them with contempt of court penalties and may limit access to their children.¹⁷⁸

3. Third-party liability

In Minnesota, parents of abducted children have no recourse against third-parties who knowingly help kidnap their children. Third-parties are rarely subject to the criminal law sanctions¹⁷⁹ or family court jurisdiction. In many cases, they are relatives of the abducting parent and maintain contact with him or her.¹⁸⁰ The proposal gives custodial parents leverage

172. See *supra* note 139 and accompanying text (quoting Minnesota Supreme Court decision).

173. MINN. STAT. § 609.26 (1990).

174. See *supra* note 167.

175. See *supra* notes 75-81 and accompanying text.

176. See *supra* notes 141-42 and accompanying text.

177. MINN. STAT. § 609.26 (1990).

178. See *supra* note 167.

179. Prosecutors in the state's two most populated counties say that they are reluctant to charge third parties with aiding and abetting child abduction because of the difficulty in proving such charges. Telephone interview with Kate McPherson, Legal Services Specialist with the Criminal Division of the Hennepin County Attorney's Office (June 4, 1991) [hereinafter McPherson interview]; Telephone interview with Anne Hyland, Head of Juvenile Family Violence Division of the Ramsey County Attorney's Office (Apr. 10, 1986) [hereinafter Hyland interview]. Hennepin County prosecutors occasionally have brought such charges, McPherson interview, *supra*, but Ramsey County prosecutors never have, Hyland interview, *supra*.

180. See *supra* note 166 (discussing the *Lloyd* case in Wisconsin).

over assisting third-parties by overruling that portion of the *Larson* decision that gives third-parties, as it does parents, immunity from suit for interfering with custody. Recognizing that subdivision 2(a) immunizes a parent from liability for abducting his or her child, the proposal also does not attach liability to the third party for the abduction itself. Instead, subdivision 1(c) states that third parties may be held liable only if they fail, in a timely manner, to cooperate with efforts to locate and return kidnapped children.¹⁸¹ The tort thus provides relatives with incentive to use their influence to reunite family members by eliminating their liability if they make reasonable efforts to locate the abducting parents within two months of the litigation's commencement. Similarly, the reasonable effort requirement will allow a neighbor or some other third party who may have assisted the kidnapper to escape liability by showing that he or she does not know how to locate the kidnapper and the missing child.

Further, the proposal seeks to minimize a third party's damages if the child has been returned, even without the third party's help, before the beginning of trial. The proposal does so by limiting available damages to out-of-pocket expenses incurred in returning the child.¹⁸² Because Minnesota criminal and family law also allows awarding such costs,¹⁸³ the damages may not even be available in the tort case because of state law prohibitions on collateral source payments.¹⁸⁴

CONCLUSION

The problem of parental kidnapping in the United States remains serious even though Congress and state legislators have enacted laws to prevent it and to provide for the return of abducted children. Additional measures, such as a tort for interfering with custodial rights, will be helpful in Minnesota, but only as a reasoned response to the problem. This Comment

181. Similarly, TEX. FAM. CODE ANN. § 36.04 (Vernon 1989) provides an affirmative defense for returning a child upon notice of a violation. *See supra* note 93 (discussing the Texas statute).

182. *See supra* Proposed Statute subd. 4(e), (f) & (g).

183. *See supra* notes 62-63 and accompanying text (describing Minnesota criminal and family law provisions). Minnesota law permits judges to require custody violators to pay necessary travel and other expenses, including attorney fees, for coming to Minnesota to enforce a decree from another state. MINN. STAT. § 518A.15(2) (1990).

184. MINN. STAT. § 548.36 (1990) (preventing plaintiffs from recovering twice for the same injury).

proposes the Minnesota Legislature adopt a custodial interference tort, and proposes a model statute. The statute balances the sensitive nature of family relationships by protecting a child's relationship with both parents, yet also advancing the public policy goal of returning missing children to their custodial parents. It achieves this goal by focusing liability in parental kidnapping on third parties who refuse to cooperate with efforts to find and return kidnapped children. Thus, further litigation by parents over their children will be prohibited in order to protect the parent-child relationship, but custodial parents whose children have been kidnapped will gain an additional and much needed tool for locating previously unfindable children.

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