Tort Law—Tort Recovery for Intentional Interference with Custodial Rights in Minnesota—Larson v. Dunn, 460 N.W.2d 39 (Minn. 1990)

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CASE NOTES

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INTRODUCTION

Jessica Larson was barely two years old when her mother took the law into her own hands and abducted her in defiance of a court order that granted Jessica’s father sole custody. When Jessica’s father, John Larson, next saw his little girl, she had already celebrated her
ninth birthday. During the seven long years that John Larson
searched for his daughter, he never knew whether she missed him or
even remembered him. John Larson was deprived of the opportu-
nity to witness countless milestones in Jessica's development; he was
left without memories of his daughter's metamorphosis from toddler
to young girl. In addition to John Larson's mental anguish and the
expense of carrying out a nationwide search, he also was deprived of
precious time with his daughter—time that can never be regained.

Regrettably, John Larson's ordeal is not uncommon. Despite an
increase in legislation in the early 1980s, a recent study confirms that
parental kidnapping remains a significant problem.1 Given the cur-
rent divorce rate, the incidence of parental kidnappings is expected
to remain high.2 Although the outlook is grim, parental kidnapping
is preventable with increased attention and flexible application of
legal remedies.3

This Note begins by looking at the scope of the parental kidnap-
ping problem. Next, the effectiveness of current statutory and judi-
cial remedies in deterring parental kidnapping and securing the
return of abducted children is examined. This Note then reviews the
history and current application of tort remedies for custodial inter-
ference. Special attention is given to the recent Minnesota Supreme
Court decision in Larson v. Dunn4 and the decision's possible effect
on damage recovery for custodial interference in Minnesota. Finally,
this Note concludes with proposed legislation to supplement Minne-
sota's existing parental kidnapping laws and provide a comprehen-
sive means of damage recovery for victimized parents.

I. BACKGROUND

A. The Problem

Parental kidnapping occurs when one parent abducts and conceals
a child without the consent of the other parent.5 Parental kidnap-
ping can occur at any time. Some abductions occur before either

1. See U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PRE-
VENTION, MISSING, ABDUCTED AND THROWAWAY CHILDREN IN AMERICA 4 (May, 1990)
(Executive Summary) [hereinafter JUSTICE DEP'T STUDY].
2. Reynolds, Parental Kidnapping: A Proposed Act for Expanding Tort Remedies, 25
3. JUSTICE DEP'T STUDY, supra note 1, at 19.
4. 460 N.W.2d 39 (Minn. 1990).
5. Parental abduction is defined as the abduction of a child by a noncustodial
parent who (1) concealed the child's whereabouts from the custodial parent, (2) took
the child out of the state, or (3) apparently intended to keep the child. JUSTICE DEP'T
STUDY, supra note 1, at 9. For purposes of this Note, "parental kidnapping" and "pa-
rental abduction" are used interchangeably.
parent is granted sole custody of the child, while others occur when both parents share custody of the child.

The number of parental kidnapping cases is staggering. The first comprehensive study of the number of missing children was released by the United States Justice Department in May, 1990. The study found that in 1988 an estimated 163,200 children had been abducted by a parent. Children between the ages of two and eleven are most frequently abducted. One child in ten is removed from the state by the abducting parent, and at least twenty percent of stolen children are never found.

Whether the victimized parent has joint custody, sole custody, or no custody or visitation rights, the injuries inflicted by the abducting parent are severe. The victimized parent is deprived of the opportunity to develop or maintain a close parental relationship with the child. Similarly, the child is deprived of a relationship with the victimized parent.

The financial and emotional damages suffered by victimized parents are well documented. Spending $50,000 trying to locate and regain custody of a child is not unusual. In addition, parents who lose a child to a parental kidnapper often blame themselves for the kidnapping. As a result, depression can manifest itself in physical

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6. The Justice Department found that 41% of parental abductions occurred before the marital relationship ended. Id. at 8.
8. JUSTICE DEP'T SURVEY, supra note 1, at 6.
9. Id. at 8. The study found that most abductions are perpetrated by men who are noncustodial fathers and father figures. Id. at 6.
11. Reynolds, supra note 2, at 244. The Justice Department found that abducted children experience serious or mild mental harm in three of every ten cases. While sexual abuse is one of the most feared aspects of family abduction, sexual abuse occurs in less than one percent of cases, an unusually low figure. JUSTICE DEP'T STUDY, supra note 1, at 8.
12. Reynolds, supra note 2, at 244.
13. Deb Than, a Minneapolis mother, was reunited with her son after spending twenty months and $50,000 to track him down. Agony of Abduction, supra note 7, at 11A, col. 1. A Los Angeles court interpreter was reunited with her daughter after spending five years and $20,000 in detective fees searching for her stolen daughter. L.A. Times, Dec. 26, 1990, at B4, col. 1. The child was five years old when she was abducted. Id. The owner of a commercial cleaning business spent ten years and over $200,000 to locate his daughter. Wash. Post, Aug. 14, 1990, at B1, col. 1. His child was abducted when she was just three years old. Id.
or emotional injury.\textsuperscript{15}

The physical and emotional injuries suffered by abducted children are equally severe.\textsuperscript{16} Abducted children are frequently shocked or frightened by the abduction itself; they miss the parent, relatives and friends left behind; they are frequently moved from place to place and are often forced to assume new identities.\textsuperscript{17} Most importantly, the children are deprived of stability and the opportunity to develop normal relationships.\textsuperscript{18}

B. Statutory Solutions

The Uniform Child Custody Jurisdiction Act (UCCJA)\textsuperscript{19} was the first attempt to address the problem of parental kidnapping on a national level. The UCCJA was promulgated by the Commission on Uniform Laws in 1968, and, by 1983, was adopted by all fifty states.\textsuperscript{20}

The UCCJA was created to prevent forum shopping by parents hoping to obtain a more favorable custody decree in another state.\textsuperscript{21} To accomplish this objective, the UCCJA set uniform guidelines to identify one state as the exclusive forum for conducting child custody proceedings.\textsuperscript{22} The "home state" has jurisdiction to handle all cus-

\textsuperscript{15} S. Abrahms, Children in the Crossfire: The Tragedy of Parental Kidnapping 166 (1983).

\textsuperscript{16} Reynolds, supra note 2, at 245. Children frequently exhibit post-traumatic stress disorder, the effects of mental indoctrination, grief or rage about an absent parent, and an exaggerated identification with or wish fulfillment about a parent. Id. at 244-45.

\textsuperscript{17} Id. at 245.

\textsuperscript{18} See infra note 111 and accompanying text.

\textsuperscript{19} 9 U.L.A. 115 (1988).


\textsuperscript{21} Commissioners' Prefatory Note to Uniform Child Custody Jurisdiction Act, 9 U.L.A. 115, 118 (1988) [hereinafter Commissioners' Prefatory Note]. Before the UCCJA, there was no certainty as to which state had jurisdiction when persons seeking custody of a child or modification or enforcement of an existing order approached the courts of several states simultaneously or successively. Id. at 116. The judicial trend permitted custody claimants to sue in any court, regardless of the child's fleeting contact with the particular state. Therefore, divorced parents were encouraged to seek a more favorable decree by moving the child to another state. Id. at 117. The result was a great deal of uncertainty in the law and upheaval for children. Id. at 116.

Aside from minimal jurisdictional requirements, the easy modification of custody decrees also contributed to the forum shopping problem. Since custody decrees do not have a res judicata effect, the Supreme Court determined on several occasions that custody decrees need not be given full faith and credit by other states. Ford v. Ford, 371 U.S. 187 (1962); Kovacs v. Brewer, 356 U.S. 604 (1958); May v. Anderson, 345 U.S. 528 (1953). Therefore, states were free to completely disregard custody decrees rendered in another forum.

\textsuperscript{22} Commissioners' Prefatory Note, supra note 21, at 117-18.
tody matters related to the child.\textsuperscript{23}

The UCCJA served as the model for the federal response to the parental kidnapping problem, the Parental Kidnapping Prevention Act of 1980 (PKPA).\textsuperscript{24} The PKPA contains three main provisions. First, the PKPA mandates full faith and credit for custody decrees and visitation orders rendered by a state in conformity with articulated federal standards.\textsuperscript{25} Second, the PKPA authorizes the Federal Parent Locator Service to aid in locating the child and the abducting parent.\textsuperscript{26} Third, the PKPA applies the Federal Fugitive Felon Act\textsuperscript{27} to parental kidnapping cases involving interstate or international flight.\textsuperscript{28}

Although the PKPA offers important assistance to the victimized parent, it does not provide a criminal penalty. The victimized parent must look to state law for criminal sanctions. Currently, forty-nine jurisdictions impose criminal sanctions on a parent who takes a child in violation of a custody order.\textsuperscript{29}

\begin{itemize}
\item\textsuperscript{23} Id.
\item\textsuperscript{24} Pub. L. No. 96-611, 94 Stat. 3566 (1980) (codified in scattered sections of 18, 28 & 42 U.S.C. (1988)).
\item\textsuperscript{26} 42 U.S.C. § 653 (1988).
\item\textsuperscript{27} 18 U.S.C. § 1073 (1988).
\end{itemize}

Most state criminal laws treat custodial interference exclusively as a felony or have enacted both felony and misdemeanor laws. The distinction is significant because prosecutors may invoke FBI assistance under the Fugitive Felon Act only when the state classifies the crime as a felony and interstate flight is involved. Legal Remedies, supra note 27, at app. F-1, F-2.

C. Judicial Solutions

The judicial remedies of criminal contempt and habeas corpus are often used in parental kidnapping cases if a court has determined custody and issued a decree granting custody or visitation rights. Both remedies seek to enforce the existing decree and thus compel prompt return of the child. Neither remedy offers a means to financially compensate the victimized parent.

A criminal contempt order may be obtained when a person abducts or conceals a child, or otherwise interferes with the enforcement of an existing custody order or decree. However, there is no assurance that a contempt citation will be enforced by a state different from the forum jurisdiction. Consequently, the contempt remedy is limited if a parent removes a child from the state of the issuing court.

The writ of habeas corpus is the principle remedy used for parents claiming legal custody of an abducted child. In a child custody habeas corpus proceeding, control of the child by the parent without legal right to custody is deemed the equivalent of an unlawful retention. The writ is used to compel the parent accused of illegally holding a child to appear before a court and justify the child’s retention.

II. Tort Remedies for Custodial Interference

A. Early Tort Remedies

Child abduction has not always given rise to civil or criminal sanctions. Early tort remedies for abduction or “enticement” of a child

31. See id.
32. See Comment, The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings, 1983 U. Ill. L. Rev. 229, 240 (noting that most judicial remedies such as civil contempt and ne exeat republica do not provide compensatory relief to the victimized parent).
33. Child Snatching, supra note 30, at 102. Child snatching is considered a serious violation of a custody decree, and courts have broadly wielded their power in this area. Id. at 102-03.
34. Id. at 103. See also Comment, supra note 32, at 240.
36. Id. at 112.
37. Id. When the abducting parent can be located, the UCCJA removes most jurisdictional bars to the enforcement or modification of the original custody decree. See supra notes 21-23 and accompanying text.
38. See W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts 924 (5th ed. 1984) [hereinafter Prosser and Keeton]. Early common law only provided a remedy for the abduction of an heir. This action apparently was based upon the parent’s pecuniary loss of the heir’s marriage prospects, and
evolved from English common law of master and servant. Courts used these remedies to compensate the parent for the loss of the legal right to the value of the child's services.\textsuperscript{39} Therefore, actual pecuniary loss from the child's unavailability to render services was a necessary element to a victimized parent's suit for custodial interference.\textsuperscript{40}

The lost services requirement in child abduction cases was never uniformly adopted in the United States.\textsuperscript{41} So long as a victimized parent could establish the legal right to a child's services, many courts were willing to find "constructive" loss of services.\textsuperscript{42} Other courts recognized that the real basis for a tort remedy was the interference with the parent-child relationship and did not even consider the issue of constructive loss of services.\textsuperscript{43}

As tort law evolved, intangible aspects of family relationships, such...
as companionship and affection, were afforded wider protection.\(^44\) This "modern view" of tort recovery for child abduction does not require proof of lost services.\(^45\) When a child is taken from its parent, the existence of other damages are a sufficient basis for the cause of action.\(^46\)

B. Intentional Interference with Custodial Rights

In 1938, the Restatement of Torts recognized a cause of action for interruption of the parent-child relationship.\(^47\) The tort requires (1)
an intentional interference with (2) the custodial parent's legal right to custody of the child.\textsuperscript{48} Proof of loss of the child's services is not required.\textsuperscript{49}

If a victimized parent establishes intentional interference with a superior right to custody of the child, that parent may recover damages for the emotional distress resulting from the child's abduction. The parent may also recover for the loss of the child's society or services, reasonable expenses incurred to regain custody of the child, and treatment for the child of any illness or other bodily harm resulting from the defendant's tortious conduct.\textsuperscript{50} The \textit{Restatement (Second) of Torts} recognizes a privilege allowing interference with a parent-child relationship when it appears "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."\textsuperscript{51}

Currently, twenty-one states allow a victimized parent to recover in tort for custodial interference.\textsuperscript{52} Eight states have enacted stat-

\begin{itemize}
  \item One who, without a privilege to do so, \begin{itemize}
    \item (a) abducts a minor child, or
    \item (b) induces it to leave home with knowledge that the parent has not consented, or
    \item (c) with knowledge that it has left its home and that the parent is unwilling that the child should be absent, induces it not to return thereto or prevents it from so doing,
  \end{itemize}
  is liable to the parent, who is legally entitled to the child's custody.
\end{itemize}

\textit{Id.}

\textsuperscript{48} The current version of section 700 is as follows: "One who, with knowledge that the parent does not 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, is subject to liability to the parent." \textit{Restatement (Second) of Torts} § 700 (1977).

\textsuperscript{49} \textit{Id.} § 700 comment d.

\textsuperscript{50} \textit{See id.} § 700 comment g.

\textsuperscript{51} \textit{Id.} § 700 comment e.

\textsuperscript{52} Very few states that have considered the issue declined to allow tort recovery for custodial interference. \textit{See} McDougal v. Jenson, 596 F. Supp. 680, 684-85 (N.D. Fla. 1984) (interpreting Florida law; primary issue was federal court jurisdiction of domestic dispute), \textit{aff'd}, 786 F.2d 1465 (11th Cir. 1986); Schuppin v. Unification Church, 435 F. Supp. 603, 609 (D. Vt.) (interpreting Vermont law; court found no cause of action for alienation of adult child's affections), \textit{aff'd}, 573 F.2d 1295 (2d Cir. 1977); Bartanus v. Lis, 332 Pa. Super. 48, 57, 480 A.2d 1178, 1182 (1984) (constructing custodial interference as an action to recover for alienation of the child's affection).


Other states have not expressly recognized the custodial interference tort but quote extensive authority supporting the cause of action when addressing other issues. \textit{See, e.g.,} Finn v. Lipman, 526 A.2d 1380 (Me. 1987); Hixon v. Buchberger, 306
utes permitting tort recovery for child abduction, and the remainder allow recovery under common law. States that provide recourse for the victimized parent through common law adopt differ-


54. See, e.g., D & D Fuller CATV Constr., Inc. v. Pace, 780 P.2d 520, 526 (Colo. 1989) (Mother brought suit against paternal grandparents; court held that tortious interference with the parent-child relationship occurred in Colorado for purposes of long-arm statute.); Shields v. Martin, 109 Idaho 132, 138, 706 P.2d 21, 27 (1985) (Mother and police officer were jointly liable for the abduction of the child from a daycare center.); Montgomery v. Crum, 199 Ind. 660, 663, 161 N.E. 251, 253 (1928) (Mother brought suit for custodial interference against former husband, his parents, brother and sister after both a habeas corpus filing and the husband’s extradition and conviction on parental kidnapping charges failed to secure the child’s return.); Wood v. Wood, 338 N.W.2d 123, 124-25 (Iowa 1983) (Claim for damages asserted against parent who refused to return child within the time provided in the dissolution decree.); Brown v. Brown, 338 Mich. 492, 498, 61 N.W.2d 656, 659 (1953) (Mother recovered damages against former in-laws who aided her former husband in abducting her children to South Africa., cert. denied, 348 U.S. 816 (1954); Plante v. Engel, 124 N.H. 213, 217, 469 A.2d 1299, 1302 (1983) (Court recognized cause of action for custodial interference when father alleged that maternal grandparents had conspired to interfere with his rights to custody.); Howell v. Howell, 162 N.C. 283, 287, 78 S.E. 222, 224 (1913) (Father had cause of action for custodial interference against the child’s maternal grandfather.); Clark v. Bayer, 32 Ohio St. 299, 312 (1877) (Grandfather given sole custody of his two grandchildren by their parents entitled to seek recovery in loco parentis for custodial interference against the parents.); McBride v. Magnuson, 282 Or. 433, 435, 578 P.2d 1259, 1260 (1978) (Mother alleged sufficient facts to establish the right to recover in tort against a police officer for interference with her right to custody.); Bedard v. Notre Dame Hospital, 89 R.I. 195, 198, 151 A.2d 690, 692 (1959) (Plaintiff could recover nominal damages against hospital for its willful invasion of her legally-protected right to custody of her child.); Silcott v. Ogelsby, 721 S.W.2d 290, 294 (Tex. 1986) (Grandfather liable to child’s stepfather under the common law tort of child abduction.).

See also Armstrong v. McDonald, 39 Ala. App. 485, 486, 103 So. 2d 818, 819 (1958) (Plaintiff recovered damages for custodial interference when her son was persuaded to leave home and work as a migrant farm worker.); Surina v. Lucey, 168 Cal. App. 3d 539, 543, 214 Cal. Rptr. 509, 512 (1985) (Maternal uncle could be liable to parents for damages resulting from his abduction of their child.); Mathews v. Murray, 101 Ga. App. 216, 219, 113 S.E.2d 232, 235 (1960) (Father could recover against third party who conspired with child’s mother to remove child from the jurisdiction.); Spencer v. Terebelo, 373 So. 2d 200, 202 (La. Ct. App.) (Mother had legal duty to custodial father under state parental kidnapping statute; breach of duty was an actionable tort., cert. denied, 376 So. 2d 960 (La. 1979); Kipper v. Vokolek, 546 S.W.2d 521, 527 (Mo. Ct. App. 1977) (Father unable to recover for custodial interference against ex-wife and her new husband because he was unable to establish a superior right to custody.); LaGrenade v. Gordon, 46 N.C. App. 329, 330, 264 S.E.2d 757, 757-58 (Mother sued child’s father and paternal grandparents for interference with
ent approaches. Many state supreme courts apply section 700 of the Restatement (Second) of Torts.\textsuperscript{55} Other states recognize the parent’s legal interest in the custody of the child and base recovery on the sanctity of the parent-child relationship.\textsuperscript{56}

C. Intentional Infliction of Emotional Distress

The tort of intentional infliction of emotional distress (IIED) was developed to compensate plaintiffs for emotional injuries sustained as a direct result of the intentional conduct of another.\textsuperscript{57} The basic principle is embodied in section 46 of the Restatement (Second) of her right to custody arising from contract.), \textit{appeal dismissed}, 300 N.C. 557, 270 S.E.2d 109 (1980), \textit{appeal after remand}, 60 N.C. App. 650, 299 S.E.2d 809 (1983).

In various federal court decisions, the court interpreted how the state supreme court would likely rule on the issue of the tort’s adoption. \textit{See}, e.g., DiRuggerio v. Rodgers, 743 F.2d 1009, 1018 (3d Cir. 1984) (applying New Jersey law; court held that New Jersey recognizes a cause of action for custodial interference and allowed father to proceed with suit against ex-wife, her current husband and their children, and her attorney.); Wasserman v. Wasserman, 671 F.2d 832, 834 (4th Cir.) (applying Maryland law; wife permitted to bring custodial interference suit against her former husband, his new wife, the child’s paternal grandparents, and the attorneys who represented her former husband in the custody proceeding, \textit{cert. denied}, 459 U.S. 1014 (1982); Fenslage v. Dawkins, 629 F.2d 1107 (5th Cir. 1980) (applying Texas law; judgment for custodial interference upheld and mother permitted to recover damages from ex-husband and his relatives); Kunz v. Deitch, 660 F. Supp. 679, 683 (N.D. Ill. 1987) (applying Illinois law; court declined to follow Whitehorse v. Critchfield, 144 Ill. App. 3d 192, 494 N.E.2d 743 (1986), and recognized a father’s claims for custodial interference and intentional infliction of emotional distress against his child’s maternal grandparents); Bennett v. Bennett, 595 F. Supp. 366, 368 (D.D.C. 1984) (When mother violated father’s custody rights under a decree, she had to compensate him for any harm done.); Lloyd v. Loeffler, 539 F. Supp. 998, 1004 (E.D. Wis.) (applying Wisconsin law; Wisconsin recognizes the tort of custodial interference and permitted father to recover against his former wife, her new husband and the child’s maternal grandparents), \textit{aff’d}, 694 F.2d 489 (7th Cir. 1982); Kajtazi v. Kajtazi, 488 F. Supp. 15, 21-22 (E.D.N.Y. 1978) (applying New York law; mother recovered substantial damages against former husband, his stepfather and brother when they conspired to abduct the child and remove him to Yugoslavia).

\textsuperscript{55} \textit{Restatement (Second) of Torts} § 700 (1977); \textit{see}, e.g., \textit{Wood}, 338 N.W.2d at 124; \textit{Brown}, 338 Mich. at 498, 61 N.W.2d at 659. Several federal courts also have relied on section 700 to predict how a state would formulate a tort remedy for custodial interference. \textit{See}, e.g., Lloyd v. Loeffler, 694 F.2d 489, 496 (7th Cir. 1982).

\textsuperscript{56} \textit{See Plante}, 124 N.H. at 216-17, 469 A.2d at 1301-02; \textit{Bedard}, 89 R.I. at 198, 151 A.2d at 692. The Louisiana Supreme Court took a somewhat different approach and implied a tort action based on the state’s criminal statute for parental kidnapping. \textit{See} Spencer v. Terebelo, 373 So. 2d 200, 202 (La. Ct. App.), \textit{cert. denied}, 376 So. 2d 960 (La. 1979).

\textsuperscript{57} \textit{See Prosser and Keeton}, supra note 38, at 60-61. Early IIED cases refused all remedy for mental injury, unless the action was brought within the scope of an already recognized tort. \textit{Id.} at 57. Gradually, too many cases appeared in which no recognized tort was found. By the 1930s, extreme and outrageous conduct causing emotional distress constituted a cause of action in itself. \textit{See id.} at 60.
Four elements are necessary to state a cause of action for IIED: (1) extreme and outrageous conduct (2) done intentionally or with reckless disregard of the probability of causing emotional distress (3) resulting in severe emotional distress (4) actually or proximately caused by the outrageous conduct.

Because of the difficulty in establishing the boundaries of outrageous conduct, the IIED tort is not as widely applied to parental kidnapping cases as is the tort of custodial interference. In Kajtazi v. Kajtazi, however, the court found the abducting father's conduct sufficiently outrageous to award the mother substantial damages for lost society and "wounded feelings" under the tort of intentional interference with custodial rights and damages for emotional distress under IIED. Her former husband had abducted the child and removed him to Yugoslavia. The court stated: "It is difficult to conceive of intentional conduct more calculated to cause severe emotional distress than the outrageous conduct of [the abducting fa-

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58. Section 46 reads as follows:

Outrageous Conduct Causing Severe Emotional Distress

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.


59. Outrageous conduct is described as follows:

Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Id. § 46 comment d.

60. The element of intentional or reckless disregard is satisfied when the defendant "[d]esires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct." Id. § 46 comment i. This element is also satisfied when the defendant acts recklessly, "in deliberate disregard of a high degree of probability that the emotional distress will follow." Id.

61. "The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." Id. § 46 comment j. "Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed." Id.


In \textit{Sheltra v. Smith},\footnote{64} the court held that a mother had established a prima facie case of IIED when the defendant rendered it impossible for her to have personal contact with her daughter for one month.\footnote{66} However, other courts indicate a reluctance to apply the IIED tort against family members.\footnote{67}

The tort of intentional infliction of emotional distress differs from the tort of intentional interference with custodial rights in two ways. First, a parent’s allegation of IIED does not depend upon that parent’s legal right to custody of the child. Second, recovery under IIED is limited to compensation for the plaintiff’s emotional distress.\footnote{68}

\section*{D. Recovery Against Third Parties}

Tort actions against third parties involved in the abduction or concealment of the child can be persuasive tools to obtain information when the child or abducting parent cannot be found.\footnote{69} Individuals who assist in the child’s abduction may be joined as civil conspirators to the tort of intentional interference with custodial rights.\footnote{70}

\begin{itemize}
\item [64.] Id. at 20-21.
\item [65.] 196 Vt. 472, 392 A.2d 431 (1978).
\item [66.] Id. at 475, 392 A.2d at 433. The \textit{Sheltra} court evaluated the case under IIED and did not consider the application of the custodial interference tort. \textit{See id.} at 476, 393 A.2d at 433.
\item [67.] \textit{See}, e.g., \textit{Bartanus v. Lis}, 332 Pa. Super. 48, 480 A.2d 1178 (1984). In \textit{Bartanus}, a father brought an action for enticement and alienation of his son’s affections. The court held that the facts pled could support a claim for intentional infliction of emotional distress against the parent’s sister and brother-in-law. The court noted the potential for abuse of the IIED tort when one parent sues the other. \textit{Id.} at 54-55, 480 A.2d at 1181.
\item [68.] \textit{See} \textit{RESTATEMENT (SECOND) OF TORTS} § 46 (1977). In comparison, section 700 provides a much more comprehensive damage recovery for the victimized parent. \textit{For the text of section 700, see supra note 50.}
\item [69.] \textit{LEGAL REMEDIES}, \textit{supra} note 27, at 69. The victimized parent frequently requires financial resources to search for or put pressure on the abductor to return the child. Money can be raised and information can be received through judgments against friends, relatives, or others who aided the abductor.
\item [70.] Civil conspirators are held jointly and severally liable when means are employed or purposes are accomplished that are themselves tortious and the conspirators have “merely planned, assisted or encouraged the active wrongdoer.” \textit{PROSSER AND KEETON}, \textit{supra} note 38, at 324. Mere agreement is not enough. There must be an act by one of the parties in pursuance of the agreement which is itself a tort. \textit{Id.} \textit{See}, e.g., \textit{DiRuggiero v. Rodgers}, 743 F.2d 1009, 1010 (3d Cir. 1984) (alleged conspirators included the abducting mother, her new husband and their children, as well as three state court judges); \textit{Wasserman v. Wasserman}, 671 F.2d 832, 833 (4th Cir.), \textit{cert. denied}, 459 U.S. 1014 (1982) (alleged conspirators included the abducting hus-
sons have been held liable as conspirators for providing financial support and aiding in the concealment of the child, for arranging for passports, and for misrepresenting the location of the child or abductor.

III. **Larson v. Dunn**

A. The Facts

John Larson and Loree Rigenhagen were married in February 1978 and their daughter, Jessica, was born soon thereafter. In February 1980, Loree Rigenhagen commenced an action to dissolve the marriage and was granted temporary physical custody of Jessica. Under the final dissolution decree, John Larson was awarded sole custody of Jessica. On the evening of November 5, 1980, John Larson went to the home of Loree Rigenhagen's parents to claim his daughter but was denied access to Jessica by Loree Rigenhagen's father. The following day, John Larson again, armed with a copy of the court order granting him custody, attempted to claim Jessica, but was told that Loree Rigenhagen had fled the state with Jessica. A warrant was issued for Loree Rigenhagen's arrest for felony deprivation of parental rights. These events marked the commencement of John Larson's seven-year, nationwide search for his daughter.

In August 1987, Loree Rigenhagen and Jessica were located by the FBI in the state of Washington. Loree Rigenhagen was subsequently charged with and pled guilty to violating the Minnesota criminal statute for parental kidnapping. Jessica was returned to

71. **Fenslage v. Dawkins**, 629 F.2d 1107, 1109-11 (5th Cir. 1980) (applying Texas law).


75. **Id.**

76. **Id.**

77. **Id.** Loree Rigenhagen later claimed that she left when the temporary custody order was still valid and she did not learn until 30 days later that John Larson had been granted permanent physical custody of Jessica. Loree Rigenhagen also alleged John Larson had physically abused her and sexually abused Jessica. **Id. at 42.**

78. **Id.** See **MINN. STAT. § 609.26** (1990).

79. **Larson**, 460 N.W.2d at 41. John Larson's search for Jessica included efforts by local law enforcement authorities as well as the FBI. During his seven-year search for Jessica, John Larson spent more than $50,000. **Id.**

80. **Id. at 42.**

81. **Id.** See **MINN. STAT. § 609.26** (1990).
John Larson's custody.82

To recover for emotional distress and the financial expenses resulting from the abduction, John Larson filed a civil lawsuit against Loree Rigenhagen, her parents, her aunt, her uncle and her brother for their conduct in the abduction and concealment of Jessica.83 John Larson sought damages both individually and on Jessica's behalf.84 The complaint alleged intentional interference with custodial rights, intentional infliction of emotional distress, civil conspiracy and fraud. The trial court dismissed the case for failure to state a claim upon which relief may be granted.85

On appeal, the Minnesota Court of Appeals recognized a cause of action for custodial interference.86 The court of appeals held that Minnesota public policy supported recognition of the new cause of action in tort, and that John Larson was entitled to an opportunity to establish a claim for damages.87

B. The Minnesota Supreme Court's Decision

The Minnesota Supreme Court granted review to consider whether the new tort of intentional interference with custodial rights should be recognized.88 Acknowledging that its decision was not consistent with the nationwide trend,89 the supreme court reversed

82. Larson, 460 N.W.2d at 42.
83. Id. John Larson's claims against Loree Rigenhagen's parents and other relatives were based on information he obtained from Jessica after her return. John Larson learned from Jessica that her grandparents and uncle visited Loree Rigenhagen and Jessica during their seven-year absence. John Larson alleged that those same persons denied having any knowledge of Loree Rigenhagen's whereabouts when they were questioned by various authorities. Id.
84. Id. John Larson sought damages for his mental anguish and suffering, loss of society and companionship of his daughter, and out-of-pocket expenses for locating her and recovering her custody. Damages were claimed on Jessica's behalf for loss of her father's companionship during the abduction. Id.
87. Id. In a well-reasoned opinion, the court of appeals summarized the federal and state criminal penalties for parental kidnapping. Id. at 754. The court recognized that, although a civil remedy is not precluded, neither federal nor state criminal laws authorized a cause of action for damages sustained by the victimized parent. Id. at 755. The panel noted the nationwide trend toward recognition of the tort and its recognition by the Restatement of Torts. Id. The court turned to section 700 of the Restatement of Torts to define the parameters of the cause of action. Id. at 756. Finally, the panel broke down the damages recoverable under the Restatement and justified the recovery of each under the guidelines set by existing Minnesota law. Id. at 756-58.
89. Id. at 44. "The trend in the past years has been toward recognizing this tort. Approximately one third of the state appellate courts have ruled on this issue." Id.
the court of appeals and refused to recognize the new tort. A
forceful dissent argued that principles of equity and fairness com-
pelled following the nationwide trend to permit victimized parents to
recover damages under a custodial interference cause of action.

The court stated that, in disputes over children, the welfare and
best interests of the child are more important than the rights of the
parents. The court reasoned that recognition of the tort could cre-
ate an additional burden on an abducted child and require relitiga-
tion of the original custody decision. The court characterized the
tort of custodial interference as a potentially divisive force which
could pit child against parent or other family members in a bitter
court battle.

Fundamental to the court's decision is its argument that sufficient
redress already exists under Minnesota law for the victimized parent
of a kidnapped child. The court explained that, when kidnapping
involves defiance of a court order, the appropriate remedy lies with
contempt and other judicial sanctions. In addition, the court noted
that financial redress for victimized parents is available under Minne-
sota's victim's rights and parental kidnapping statutes.

The court reasoned that two existing torts offer relief to victimized
parents in Minnesota. First, a parent may seek relief in "egregious"
cases by alleging intentional infliction of emotional distress. Sec-
ond, damages may be awarded for the child's lost services. The
court concluded that a new tort remedy was unnecessary because it
would offer no deterrent to future kidnappings and could result in a
flood of family-related litigation.

The three dissenting justices appeared to be moved by the harsh
facts of John Larson's seven-year ordeal. The dissent argued that the
law should protect against intentional interference with custodial
rights and discourage non-custodial parents from resorting to self-

For an extensive survey of jurisdictions ruling on the issue, see id. at 44 n.3. See also supra notes 52-54.
90. Larson, 460 N.W.2d at 44, 45, 47. The majority consisted of Justices Keith, Wahl, Simonett and Coyne.
91. Id. at 47 (Popovich, J., dissenting). Justices Kelley and Yetka joined in the
dissent. Id. at 53.
92. Id. at 45.
93. Id. at 46.
94. Id.
95. Id. at 47.
96. Id. For a discussion of the damages recoverable under Minnesota's victim's
rights and parental kidnapping statutes, see infra text accompanying notes 122-28.
97. Larson, 460 N.W.2d at 46.
98. Id.
99. Id. at 47 ("Expanding the adversarial process to include this new tort is con-
trary to the best interests of children and will only intensify intrafamily conflict grow-
ing out of marriage dissolution without deterring parental abduction.").
help measures.\textsuperscript{100} The dissent concluded that deprivation of John Larson's right to custody in clear violation of a court decree and denial of Jessica's right to a relationship with her father deserved some form of tort redress.\textsuperscript{101}

In reaching the conclusion that John Larson should be permitted to recover damages, the dissent considered the public policy implications of a new tort for custodial interference. Tort law has long been used to protect relational interests.\textsuperscript{102} In addition, the dissent noted numerous gaps in remedies currently available to the victims of parental kidnapping in Minnesota.\textsuperscript{103} The dissent argued that the approach espoused by section 700 of the \textit{Restatement (Second) of Torts} could effectively fill those gaps and help to make the victimized parent whole.\textsuperscript{104}

The dissent suggested that the tort of intentional infliction of emotional distress be used as an alternative means of recovery for a victimized parent.\textsuperscript{105} The justices recognized that the \textit{Larson} facts may fit this recognized cause of action, and suggested that John Larson be permitted to recover damages for emotional distress under either the tort of intentional interference with custodial rights or the tort of intentional infliction of emotional distress.\textsuperscript{106}

Although the dissent agreed with the majority that the legal system is a poor place to settle family disputes,\textsuperscript{107} the justices recognized that family relationships have been wounded by the divorce and kidnapping, long before a law suit is filed. Depriving the victimized parent of redress will not necessarily promote healing.\textsuperscript{108} The dissent concluded that a tort remedy for custodial interference was appropriate, despite persisting family discord, because the tort could compensate the aggrieved parent, encourage the return of the child, and promote respect for custody decrees.\textsuperscript{109}

\section*{IV. Analysis of the \textit{Larson} Decision}

In \textit{Larson}, both the majority and the dissent wrestled with the policy implications of a tort remedy for custodial interference. The court considered the effects of a tort remedy on the abducted child

\begin{itemize}
\item \textsuperscript{100} \textit{Id.} at 48.
\item \textsuperscript{101} \textit{Id.} at 52.
\item \textsuperscript{102} \textit{Id.} at 48.
\item \textsuperscript{103} \textit{Id.} at 51. The dissent distinguished the custodial interference cause of action from the disfavored remedy of alienation of affections. \textit{Id.}
\item \textsuperscript{104} \textit{Larson}, 460 N.W.2d at 49-50.
\item \textsuperscript{105} \textit{Id.} at 52.
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} \textit{Id.} at 48.
\item \textsuperscript{108} \textit{Id.}
\item \textsuperscript{109} \textit{Id.} at 52.
\end{itemize}
and the need for tort relief given the legal remedies currently available to victimized parents in Minnesota. The court ultimately failed, however, to adequately address either concern.

A victimized parent in Minnesota continues to bear the emotional and financial burdens that result from the abduction of a child. The court’s refusal to recognize John Larson’s claim under any tort theory violates basic notions of fairness and provides no substantial contribution to the child’s welfare.

A. Advantages of a Tort Remedy for Custodial Interference in Promoting the Child’s Welfare

The Minnesota Supreme Court considered whether a new means of intrafamily litigation was in the best interests of abducted children. The original custody award is made considering the best interests of the child. However, once custody is determined, the child’s best interests are generally best served by providing stability in the custodial arrangements. Custodial stability is most effectively achieved by respecting, and if necessary, by enforcing the original custody decision.

Parental kidnapping laws further the dual objectives of deterring abductions and providing for swift return of the child to the parent with lawful custody. However, no single remedy has proved sufficient to accomplish both of these objectives. Therefore, flexibility in the application and development of legal remedies is crucial.

110. See, e.g., Curtiss v. Hagen, 280 Minn. 296, 159 N.W.2d 193 (1968). At common law, the father was recognized as the legal custodian of the child. Early custody cases thus usually awarded custody to the father. Eventually, the rule evolved into a presumption that when the child was under the ages of twelve to fourteen, the mother’s custody was preferable. This was called the “tender years” doctrine. Committee on the Family of the Group for the Advancement of Psychiatry: New Trends in Child Custody Determinations 22, 29-30 (1980) [hereinafter New Trends].

Modern custody determinations are sex-neutral and are made on a case-by-case basis. In awarding custody, the court attempts to determine which arrangement would be in the “best interests of the child.” Id. at 35-38. The criteria used to determine the child’s best interests frequently include: the wishes of the parents; the wishes of the child; the interaction and interrelationship of the child with his parents, siblings and others; the child’s adjustment to his home, school and community; and the mental and physical health of all individuals involved. Id. at 38 (citations omitted).

111. See J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 31-34 (1979). Goldstein, Freud and Solnit’s recommendations rely heavily on psychoanalytic theory and the clinical experiences of two of the authors. They argue that stability after the determination of custody is crucial to the psychological well-being of the child. Id. See also New Trends, supra note 110, at 42, 46 (noting that courts recognize that psychiatric principles are highly relevant in determining what arrangements are in the child’s best interests).

112. See Comment, supra note 32, at 235-36.
Although state criminal penalties address the problem of parental kidnapping, they do not serve as a complete deterrent to parents who believe they act in the child’s best interests. While the threat of tort damages may not deter these parents, the possibility of civil litigation may convince third parties not to provide needed assistance with the abduction. Additionally, the threat of civil liability may avert a prolonged period of abduction by discouraging family and friends from concealing information essential to locating the child.

While criminal and judicial sanctions are typically the first remedies used by an aggrieved parent to secure a child’s return, the sanctions’ effectiveness is limited in situations similar to Larson, where the abducting parent has fled the court’s jurisdiction. A tort action for custodial interference would supplement the existing criminal and judicial sanctions. A judgment for money damages could put a parent in a more advantageous position from which to finance a search or negotiate for the return of a child.

B. Policy Implications of Permitting Tort Recovery for Custodial Interference Against Family Members

Both the Larson majority and dissent acknowledge that any benefits flowing from a tort remedy for custodial interference may be outweighed by negative policy implications. Of particular concern is the potential effect a custodial interference tort remedy may have on family relationships.

113. LEGAL REMEDIES, supra note 27, at 73; CHILD SNATCHING, supra note 30, at 98.
114. Reynolds, supra note 2, at 263.
115. Fortunately, victimized parents in Minnesota can draw on the resources of the Parent Locator Service and the services of the FBI made available through the PKPA. See supra notes 26–28 and accompanying text.

Although the authorization of FBI involvement under the PKPA suggests the availability of great assistance, the FBI often is reluctant to act. Note, Tortious Interference With Custody: An Action to Supplement Iowa Statutory Deterrents to Child Snatching, 68 IOWA L. REV. 495, 505 (1983). Historically, the FBI has been hesitant to become involved in “family dispute[s]” and divert its limited resources away from “violent criminals, organized crime, white collar crime, and public corruption.” Id. at 505-06 (citing Justice Dept’l Scored for Flouting Parental Kidnapping Act’s Mandate, 7 FAM. L. REP. (BNA) 2739, 2741 (Oct. 6, 1981)).

116. LEGAL REMEDIES, supra note 27, at 69. See also notes 69-73 and accompanying text.

117. Larson v. Dunn, 460 N.W.2d 39, 45-46 (Minn. 1990) (“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 Larson majority compared the custodial interference tort to the disfavored remedy of alienation of affections. The majority reasoned that the same policy reasons which resulted in abolition of the “heart balm” torts in Minnesota barred recognition of a custodial interference tort. See id. at 46 (quoting Bock v. Lindquist, 278 N.W.2d 326, 327-28 (Minn. 1979), in which the court refused to recognize a parent’s
The court’s concern that the law promote domestic harmony reflects a longstanding ambivalence regarding the proper role of the courts in intrafamily litigation. Despite this concern, litigation between family members is permitted. Preventing an aggrieved parent from recovering damages will not make the abduction any less acrimonious or painful for the child or for other family members. In fact, leaving one parent to bear the financial and emotional burdens resulting from the abducting parent’s wrongful conduct may exacerbate an already volatile situation.

The Larson majority voiced concern over the effect that a custodial interference tort suit would have on the child. The burden on the child would likely be minimal. The cause of action requires only that the plaintiff-parent establish a custodial right to the child and that the defendant violated that right. The child’s testimony or participation in a civil lawsuit to establish custodial interference is no more necessary than in a criminal prosecution against the parent or co-conspirators.

C. Adequacy of Existing Remedies

The Larson majority reasoned that tort recovery in a parental kidnapping situation is unnecessary because existing laws provide adequate relief for victimized parents. This decision brings the inadequacy of current remedies under Minnesota law into sharp focus.

1. Damage Recovery Under State Criminal Law

In denying John Larson an opportunity to pursue a tort claim, the court suggested that financial compensation is available to victimized cause of action against a third party for alienation of a child’s affections). Other courts used similar reasoning in declining to adopt a tort remedy for child abduction. See Schuppin v. Unification Church, 435 F. Supp. 603, 609 (D. Vt.) (applying Vermont law), aff’d, 573 F.2d 1295 (2d Cir. 1977); Bartanus v. Lis, 332 Pa. Super. 48, 55, 480 A.2d 1178, 1181 (1984).

As the dissenting justices and the court of appeals’ panel in Larson correctly recognized, a cause of action for alienation of affections is very different from a cause of action for custodial interference. “The alienation tort . . . focuses on the change in mental attitude of the spouse or child. The custody tort, by contrast, focuses on the physical removal of a child from the custody of the parent.” Larson v. Dunn, 449 N.W.2d 751, 757 (Minn. Ct. App.), rev’d in part, 460 N.W.2d 39 (Minn. 1990). The problems of proof and resulting opportunities for abuse that led the Minnesota Legislature to abolish the “heart balm” causes of action are not present in the custodial interference cause of action which requires only objective proof of a right to custody of the child. Larson, 449 N.W.2d at 757.

118. See Prosser and Keeton, supra note 38, at 901 (noting that few topics in the law of torts have proved to be more difficult than torts between family members).
119. See id. at 902-04.
120. See supra notes 48-49 and accompanying text.
parents under Minnesota's parental kidnapping and victim's rights statutes.\(^\text{121}\) A review of the relevant provisions provides ample support for the dissent's claim that numerous gaps exist in these laws.

Under Minnesota's parental kidnapping statute, "[i]n addition to any sentence imposed, the court may assess any expense incurred in returning the child [to the lawful custodian] against any person convicted of violating the statute."\(^\text{122}\) However, recovery by the victimized parent is limited because a conviction must first be obtained.\(^\text{123}\)

Recovery for the aggrieved parent is possible under Minnesota's victim's rights statute.\(^\text{124}\) The victim's rights statute is a post-charge remedy and is part of the disposition of a criminal charge against an offender.\(^\text{125}\) Financial recovery is in the form of restitution, and any award to a crime victim rests in the discretion of the trial court.\(^\text{126}\) Recovery under the victim's rights statute is potentially broader than recovery under the parental kidnapping statute because it includes "any out of pocket losses resulting from the crime, including medical and therapy costs, [and] replacement of wages and services . . . ."\(^\text{127}\) While damages are not limited to those enumerated in the statute, the victim's rights statute provides for recovery of restitution damages only.\(^\text{128}\)

The typical victimized parent is in need of money to finance a search for the child or to help force information about the child's location from third-party participants. A tort recovery could compensate the aggrieved parent for damages, such as loss of society and emotional distress, that are not covered by Minnesota's current parental kidnapping laws.\(^\text{129}\)

\(^{121}\) Larson v. Dunn, 460 N.W.2d 39, 46 (Minn. 1990).

\(^{122}\) Minn. Stat. § 609.26, subd. 4 (1990). Reasonable expenses actually incurred to return the child are limited to "transportation costs, meals, and lodging from the time the child was located until the child was returned home." Minn. Stat. § 611A.52, subd. 8 (a)(6) (1990).

\(^{123}\) Id. § 609.26, subd. 4.

\(^{124}\) Id. § 611A.04, subd. 1.

\(^{125}\) See id.

\(^{126}\) Id. § 611A.04, subd. 1(c). The order for restitution is docketed and enforced as a civil judgment. Id. § 611A.04, subd. 3.

\(^{127}\) Id. § 611A.04, subd. 1(a).

\(^{128}\) See id. See also State v. O'Brien, 459 N.W.2d 131 (Minn. Ct. App. 1990) (discussing restitution recovery under the victim's rights statute).

The Larson court did not mention damage recovery, which is possible under the Minnesota codification of the UCCJA. The UCCJA's primary purpose, however, is to facilitate the enforcement of custody decrees across state lines, not to compensate the parent. Consistent with its purpose, the statute provides for the victimized parent to recover travel and other necessary expenses connected with the enforcement of the decree. See Minn. Stat. §§ 518A.01-.25 (1990).

\(^{129}\) See Legal Remedies, supra note 27, at 69. ("The childsnatching tort suit holds great promise for compensating [the parent] to the full extent of his or her damages, perhaps more so than any other existing remedies."); Child Snatching,
2. Tort Recovery for Lost Services of the Child

The Larson court noted that, because Minnesota already recognizes a cause of action for lost services of a child, a victimized parent might seek relief there. However, although precedent exists for awarding damages for lost services, Minnesota has never treated lost services as an independent tort or as a means for a parent to recover for direct injury to the parent-child relationship. Lost services have been employed as an item of consequential damages recoverable by the parent when the child has sustained direct injury caused by the tortious conduct of a third party.

For the victimized parent to recover damages through an action for "lost services," as the court suggests, the child (or the victimized parent on behalf of the child) would be required to establish a tort claim against the abducting parent. The court's suggestion avoids direct compensation for the victimized parent's damages and perpetuates the "outworn fiction" of lost services as the gravamen of the harm where direct interference with the parent-child relationship exists. To require the victimized parent to seek damages through a tort claim on behalf of the child and to impose the additional requirement of proof of lost services could unnecessarily complicate the law and lead to unfair results.

3. Tort Recovery for Intentional Infliction of Emotional Distress

The Larson court acknowledged that the tort of intentional infliction of emotional distress...
CUSTODIAL INTERFERENCE

dition of emotional distress could serve as a remedy for victimized parents in "egregious cases." The court acknowledged that "the conduct in this case [was] egregious, and done in defiance of a court order," but did not allow recovery of damages under IIED. John Larson presented a compelling set of facts that the court could have used to permit him, an aggrieved parent, to recover damages for intentional infliction of emotional distress.

To establish a prima facie case of IIED in Minnesota, conduct must be "extreme and outrageous" and "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." John Larson's case was certainly "intolerable." Less than twenty-four hours after John Larson was awarded sole c...

135. Larson v. Dunn, 460 N.W.2d 43, 46 (Minn. 1990).
136. Id. The majority did not explain why the defendants' conduct was insufficiently egregious to allow John Larson to establish his claim for IIED at the trial court.
137. Minnesota follows section 46 of the Restatement (Second) of Torts. For a discussion of section 46 and the elements of the IIED cause of action, see supra text accompanying notes 57-61. See also Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 438-39 (Minn. 1983) (recognizing that a cause of action could exist for intentional infliction of emotional distress without the necessity for physical impact).

138. Hubbard, 330 N.W.2d at 439 (applying RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965)).

Allegations of extreme and outrageous conduct must meet a high threshold to withstand a motion to dismiss the complaint or summary judgment. See, e.g., Ruzicka v. Conde Nast Publications, Inc., 733 F. Supp. 1289, 1301 (D. Minn. 1990) (publishing information from an unnamed source when the publication was not written with the intent to breach the terms of an agreement to keep the source confidential was not extreme and outrageous conduct); Meyer v. Tenvoorde Motor Co., 714 F. Supp. 991, 994 (D. Minn. 1989) (suddenly terminating longtime employee without warning was not extreme and outrageous conduct by the employer); Thorkildson v. Insurance Co. of N. Am., 631 F. Supp. 372, 375-76 (D. Minn. 1986) (Supervisor's criticisms and statements about terminated female employee did not rise to the level of extreme and outrageous conduct.); Price v. Viking Press, Inc., 625 F. Supp. 641, 650-51 (D. Minn. 1985) (publishing the name of the city where an FBI agent and his family lived was not extreme and outrageous conduct), aff’d, 881 F.2d 1426 (8th Cir. 1989), cert. denied, 110 S. Ct. 757, reh’g denied, 110 S. Ct. 1312 (1990); Leaon v. Washington County, 397 N.W.2d 867, 873 (Minn. 1986) (Sheriff’s comment that a deputy would never work in law enforcement again was not extreme and outrageous conduct by the employer); Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 439-40 (Minn. 1988) (Employer's discipline and written and verbal criticism of an employee's job performance was not outrageous conduct.); Lee v. Metropolitan Airport Comm'n, 428 N.W.2d 815, 823 (Minn. Ct. App. 1988) (Where an employee's job promotion was delayed, office gossip about her was not extreme and outrageous conduct on the part of the employer.); Bohdan v. Alltool Mfg. Co., 411 N.W.2d 902, 908-09 (Minn. Ct. App. 1987) (Harassment by the employer regarding an employee's sexual preference and alcohol problem was not extreme and outrageous conduct.). But see Venes v. Professional Serv. Bureau, Inc., 353 N.W.2d 671, 674-75 (Minn. Ct. App. 1984) (Where debt collector threatened a debtor and was orally abusive, there was sufficient evidence of extreme and outrageous conduct to justify jury award for IIED.).

139. The Minnesota Legislature considers parental kidnapping sufficiently intoler-
tody of Jessica in a bitter dissolution and custody proceeding and, in brazen defiance of a court order, Loree Rigenhagen fled the state with the child. Loree Rigenhagen's parents, who provided financial assistance necessary for their daughter's escape, stubbornly refused to disclose her location, forcing John Larson to seek the assistance of private investigators and the FBI. John Larson spent seven years in a desperate search for his daughter. During this formative period of Jessica's development, John Larson was completely deprived of the opportunity to establish any relationship with his daughter. When Jessica was finally returned to him as a nine-year-old girl, her father was a complete stranger to her.

In Minnesota, a plaintiff asserting an IIED claim must allege severe mental distress. "The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." This requirement "reflects a strong policy to prevent fictitious and speculative claims." Accordingly, Minnesota courts are restrictive in permitting recovery for IIED.

In John Larson's situation, Loree Rigenhagen's abduction of Jessica in violation of a custody court order, her interstate flight, and her seven-year concealment of her daughter are strong evidence that severe emotional distress resulted. The extension of the traumatic event over such an extended time frame and the constant re-
minder provided by John Larson's continued search for his daughter strongly indicates that his emotional suffering was not contrived. Minnesota's extremely high threshold for allegations of emotional distress makes it difficult for a plaintiff to survive a motion to dismiss unless severe physical manifestations of mental suffering exist. As Minnesota courts currently apply the cause of action, IIED is virtually useless as a remedy for victimized parents whose emotional distress, although severe and genuine, provides insufficient tangible proof to withstand a motion to dismiss. Consequently, most victimized parents are left without a tort cause of action to recover damages for emotional distress.

V. Recommendations

The Larson court's hands-off approach to damage recovery in parental kidnapping cases leaves victimized parents in Minnesota without an adequate remedy to redress their injuries. This approach places the financial and emotional burdens created by the abducting parent on the parent whose legal right to custody has been intentionally violated.

In the wake of Larson, the Minnesota Legislature should remedy these inequities by enacting a statutory remedy for intentional interference with custodial rights. Recognition of a tort of custodial interference can be solidly grounded in Minnesota policy. The state constitution guarantees a remedy for wrongs to "person, property or character" for all persons in the state. In addition, Minnesota's parental kidnapping statutes, as well as the Minnesota Supreme Court's recognition of other torts for direct injury to intangible interests, provide strong policy basis for a tort remedy for intentional interference with custodial rights.

The following proposed legislation (Proposed Act) creates a com-

146. During the 1991 Session, companion bills were introduced in the Minnesota House of Representatives and Senate that were similar in form and substance to the one proposed here. H.F. 1297, 80th Leg.; S.F. 1024, 80th Leg. At the close of the legislative session, both bills remained in the Judiciary Committees of the House and Senate.
147. MINN. CONST. art. 1, § 8.
148. See supra notes 122-23 and accompanying text (discussing Minnesota's parental kidnapping statute).
149. See supra text accompanying notes 124-28 (discussing Minnesota's victim's rights statute).
150. See, e.g., Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 437-38 (Minn. 1983) (recognizing tort of intentional infliction of emotional distress arising out of an "invasion of a legal right likely to provoke a severe emotional disturbance").
prehensive tort remedy for victimized parents. By focusing on the objective criteria of the plaintiff-parent’s legal right to custody of the child, the statute avoids the volatile issue of custodial fitness. In addition, the Proposed Act includes mechanisms designed to encourage settlement of suits and curb abuses of the remedy.

A. Proposed Act for Interference with a Possessory Interest in a Child

Sec. 1. Definitions

(a) “Court order” includes provisions in a decree or judgment and temporary and permanent orders of the courts of this and other states and nations.

(b) “Possessory interest in a child” means a right of possession of or access to a child and includes custody and visitation rights.

Sec. 2. Liability for Interference with Child Custody

(a) A person who takes or retains possession of a child or who conceals the whereabouts of a child in violation of a court order that provides for possessory interests in a child may be liable for damages to the person who is denied a possessory interest in the child.

(b) The taking or retention of possession of a child or the child’s concealment is a violation of a court order if it occurs at any time during which a person other than the person committing the act is entitled under the court order to a possessory interest in a child.

151. The proposed statute is modeled after one adopted by the state of Texas in 1983. See Tex. Fam. Code Ann. §§ 36.01-.08 (1985). The Texas statute is the most comprehensive custodial interference statute in the nation. Dean Sheila Reynolds of the Washburn University School of Law also used the Texas statute as the basis for her proposed model act to expand tort remedies for custodial interference. See Reynolds, supra note 2, at 261-63. Eight other states have created a statutory cause of action for custodial interference. See supra note 53.

152. Temporary custodial orders are covered by the Texas custodial interference statute. See Tex. Fam. Code Ann. § 36.01 (1985). By including temporary orders within the scope of coverage, greater protection is provided to victimized parents.

153. This section expands the scope of recovery beyond that provided by section 700 of the Restatement (Second) of Torts and by most states. Section 700 requires the parent to establish a superior right to custody of the child. See Restatement (Second) of Torts § 700 (1977). The Restatement approach forecloses a tort remedy in parental kidnapping situations when the parents have joint custody or when a non-custodial parent has court-ordered visitation rights. Reynolds, supra note 2, at 246-47.

154. See Reynolds, supra note 2, at 258-59. In her proposed act, Dean Reynolds added a section, patterned on the cause of action for intentional infliction of emotional distress, to provide for recovery in pre-custody situations. Id. at 261. This author has chosen to adhere to the Texas approach which bases the grounds for recovery on the objective criteria of the parent’s legal right to custody or possession of the child.
(c) Each person who aids or assists in conduct for which a cause of action is authorized by subsection (a) of this section is jointly and severally liable for damages.

(d) A person who was not a party to the suit in which a court order was issued providing for possessory interests in a child is not liable under this chapter for a violation of the court order unless the person at the time of the violation:

(1) had actual notice of the existence and contents of the order; or

(2) had reasonable cause to believe that the child was the subject of a court order and that his actions were likely to violate the order; or

(3) had reasonable cause to believe that the child was about to suffer immediate harm or that the child would be subjected to immediate harm if it returned home, and the person acted for the purpose of saving the child from the threatening danger or of assisting the child to escape from such danger.

Sec. 3. Damages

(a) Damages under this chapter may include:

(1) the actual costs and expenses of the petitioner in locating the child;

(2) the actual costs and expenses of the petitioner in recovering possession of the child, if the petitioner is entitled to possession of the child;

(3) the actual costs and expenses, including attorney's fees, of the petitioner in enforcing the court order that was violated;

(4) the actual costs and expenses, including attorney's fees, of bringing the suit under this chapter; and

(5) the value of mental suffering and anguish incurred by the petitioner because of a violation of the court order.

(b) If liability arises under section 2 of this chapter and the person liable acted with malice or an intent to cause harm to the person who is denied a possessory interest in the child, the court or jury may award punitive damages.

Sec. 4. Affirmative Defenses

Affirmative defenses under this chapter include:

(a) that the person violated the order with the express consent of the petitioner; and

(b) that after receiving notice of violation under this section, the person promptly and fully complied with the order.

Sec. 5. Immunity

Spousal immunity shall not apply to actions brought pursuant
to this chapter.  

Sec. 6. Venue

A suit under this chapter may be brought in any county where the petitioner or the respondent resides or in which a suit affecting the parent-child relationship concerning the child who is the subject of the court order may be brought.

Sec. 7. Remedies Not Affected

This chapter does not affect any other civil or criminal remedy available to any person, including the child, for interference with child custody nor does it affect the power of a parent to represent the interest of a child in any suit brought on behalf of the child.

Sec. 8. Notice

(a) As a prerequisite to the filing of suit under this chapter, a person who has been denied a possessory interest in a child in violation of a court order shall give written notice of the specific violation of the order to the person violating the order.

(b) The notice shall be by certified or registered mail, return receipt requested, to the last known address of the person alleged to be in violation of the order.

(c) The notice shall include a statement of the intention of the sender to file suit no less than thirty days after the date of the mailing unless the order is promptly and fully complied with.

(d) Notice need not be given to persons aiding or assisting in

155. Many states, including Minnesota, have abolished both spousal and parental immunity. See Anderson v. Stream, 295 N.W.2d 595, 601 (Minn. 1980) (abolishing the doctrine of parental immunity); Beaudette v. Frana, 285 Minn. 366, 373, 173 N.W.2d 416, 420 (1969) (abolishing the doctrine of interspousal immunity). However, in states that have retained the doctrine of spousal immunity, spousal immunity may bar an action for custodial interference when parental kidnapping occurs before the issuance of the divorce decree. Similarly, the doctrine of parental immunity may bar a suit brought by or on behalf of the child.

Even states which have barred the two immunity doctrines have shown some reluctance to completely abrogate their effect with regard to some intentional torts committed between family members. For example, although Beaudette abolished interspousal immunity in negligence actions, the status of the doctrine with regard to intentional torts between husband and wife is still unclear. Beaudette declared that one spouse may not recover damages from the other “without substantial evidence that the injurious contact was plainly excessive or a gross abuse of the normal privilege.” Beaudette, 285 Minn. at 373, 173 N.W.2d at 420.

156. This provision would permit suits by victimized parents for pre-custodial abduction when the facts support a cause of action for IIED. The victimized child could also recover damages from the abducting parent in certain circumstances. One possible cause of action for an abducted child is IIED. Another is false imprisonment. See Kajtazi v. Kajtazi, 488 F. Supp. 15, 19 (E.D.N.Y. 1978) (Child recovered damages against abducting parent for false imprisonment.).
conduct for which a cause of action is authorized under this chapter.

(e) Evidence that notice has been given under this subsection may be introduced in any proceeding under this chapter.

Sec. 9. Frivolous Suits

A person sued for damages under this section is entitled to recover attorney's fees and costs if:

(a) the claim for damages is dismissed or judgment is awarded to the defendant; and

(b) the court or jury finds that the claim for damages is frivolous, unreasonable, or without foundation.

B. Comments Regarding the Proposed Act

The Proposed Act could be a powerful addition to the criminal and civil sanctions currently available to victimized parents in Minnesota. The Proposed Act provides the flexibility necessary to tailor a remedy to the plaintiff-parent's particular needs and expands the scope of potential defendants to permit complete recovery of damages frequently suffered by victimized parents. At the same time, the Proposed Act expressly encourages the use of existing tort remedies to fill gaps and offer damage recovery in particularly wrongful situations not covered under the Proposed Act.

After enactment of the Proposed Act, the use of criminal sanctions, judicial contempt, or the writ of habeas corpus would remain as the victimized parent's first step to secure the speedy return of the child. These remedies would also serve as the primary means of deterring parental abductions. However, when such approaches fail to work, the statute would provide economic leverage to the victimized parent.

The Proposed Act is designed to minimize the adverse effects on the abducted child. Recovery is barred in the absence of a court order granting the plaintiff-parent custody or visitation rights. When such an order exists, the plaintiff must prove only a knowing interference by the defendant. Since no other proof of the defendant's intent or actions is required, the plaintiff-parent would not need to join the victimized child as a party or obtain the child's testimony to recover damages.

When third parties actively aid or assist the abductor, they may be held jointly and severally liable to the victimized parent for damages. Possible third-party defendants include family members or

157. See generally supra text accompanying notes 33-37 (discussing judicial contempt and the writ of habeas corpus).

158. See generally supra notes 69-73 and accompanying text (discussing recovery against third parties). See also MINN. STAT. § 609.05, subd. 1 (1990) ("A person is
friends who assist in the abduction. However, liability does not attach unless the third party acts with actual knowledge of the custody order or has reasonable cause to believe that the child is the subject of a court order that the party’s actions are likely to violate. A separate defense is available when the third party acts in the reasonable belief that he is saving the child from the threat of immediate danger or harm.159

The possibility of a flood of litigation is controlled by notice requirements and provisions awarding costs and attorney fees for suits deemed frivolous.160 These provisions should help reduce the number of lawsuits brought solely as a means of harassment or revenge. In addition, the dispute may be resolved without resort to trial when the abducting parent’s compliance with the court order is an affirmative defense.

The Proposed Act provides a single, comprehensive remedy for the victims of parental kidnapping. Recoverable damages include the costs and expenses incurred in locating and recovering possession of the child and in enforcing the violated court order. The value of mental suffering incurred by the victimized parent is also compensable.161 Punitive damages could be recovered in situations where the defendant acted with malice or with an intent to cause harm to the plaintiff. Thus, the Proposed Act compensates the aggrieved parent more completely than IIED or any other remedy currently available in Minnesota.

CONCLUSION

After Larson v. Dunn, victimized parents in Minnesota are significantly less protected than their counterparts in other states. The Larson court confidently asserted that Minnesota’s existing parental kidnapping laws offer sufficient redress to victimized parents and children. However, judicial sanctions do not offer financial compensation, and Minnesota’s statutory remedies provide only restitutionary recovery. Judicial and statutory remedies provide aggrieved parents and children with only piecemeal compensation.

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159. Cf. Restatement (Second) of Torts § 700 comment e (1977). See also Minn. Stat. § 609.26, subd. 2 (1990) (setting forth affirmative defenses to the charge of depriving another of custodial or parental rights).

160. Cf. Minn. R. Civ. P. 11 (1991) (permitting recovery of reasonable expenses, including attorneys’ fees, when a pleading is interposed for purposes of harassment or to cause unnecessary delay or needless increase in the cost of litigation).

161. Cf. Restatement (Second) of Torts § 700 comment g (1977). See also supra notes 47-56 and accompanying text (discussing remedies available under section 700).
To remedy this situation, the Minnesota Legislature should enact a statutory tort remedy for custodial interference. A law such as the one proposed here would wholly compensate the aggrieved parent and help deter future parental abductions. Such a law would advance important social objectives without placing an undue burden on abducted children or the judicial system.

Although John Larson cannot regain the precious seven years he lost when his daughter was snatched from his custody, other parents can be spared such a fate. Recognition of a custodial interference tort is in the public interest of the state of Minnesota.

Sharon McDonnell Dobbs