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Family Law—Child Stealing—State v. McCormick, 273 N.W.2d 624 (Minn. 1978)

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stances, the overall effect of *Wakefield* is beneficial. Allowing the state repeatedly to introduce evidence that the defendant was found not guilty in previous prosecutions contravenes basic notions of fairness. The Minnesota court has decided this result would be too high a price to pay for the additional convictions that prior acquittal evidence might secure.

Family Law—CHILD STEALING—*State v. McCormick*, 273 N.W.2d 624 (Minn. 1978).

The growing rate of marriage dissolutions in the United States has precipitated a deluge of family-related litigation in the courts.¹ Among the most ardently contested issues in dissolution actions is the right to custody of children.² Although the overriding consideration is the best interests of the child, courts must also decide the individual rights of both parents.³ An unfortunate consequence of many custody decrees is the

intercourse. *See id.* at 488, 250 N.W.2d at 449. When the identical method used by defendant was described by all four victims, however, it became readily apparent that defendant was guilty. *See id.* The *Wakefield* standard applied to this case would have resulted in a remand since prior acquittal evidence had been introduced. *Compare* *State v. Wakefield*, 278 N.W.2d at 309 (prior acquittal evidence inadmissible) *with* *People v. Oliphant*, 399 Mich. 472, 498-500, 250 N.W.2d 443, 454 (1976) (prior acquittal evidence admissible absent collateral estoppel or double jeopardy). While the testimony of the woman who had not pressed charges against defendant may have been used in the second trial, it is possible that a dangerous rapist would have been acquitted for a third time.

1. The marriage dissolution rate has increased drastically in the last decade. An estimated 1,122,000 divorces were granted in 1978, nearly double the number in 1968. *See* 27 U.S. DEPT OF HEALTH, EDUCATION, AND WELFARE, MONTHLY VITAL STATISTICS REPORT NO. 12, at 2 (1979). In Minnesota, there was almost one marriage dissolution for every two marriages in 1978, with over fourteen thousand divorces being granted. *See id.* at 5, 7.

2. *See* Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978, 979 (1979); Hudak, *Seize, Run and Sue: The Ignominy of Interstate Child Custody Litigation in American Courts*, 39 MO. L. REV. 521, 521 (1974); Comment, *Best Interests of the Child: Maryland Child Custody Disputes*, 37 MD. L. REV. 641, 641 (1978). It is estimated that each year some 900,000 children are affected by the divorce of their parents and become a potential issue in the dissolution litigation. *See* 123 CONG. REC. S2982 (daily ed. Feb. 24, 1977) (remarks of Sen. McGovern).

3. *See* *Fisher v. Devins*, 294 Minn. 496, 498, 200 N.W.2d 28, 30 (1972) (duty of the court is to determine best interest and welfare of child); *Wallin v. Wallin*, 290 Minn. 261, 265, 187 N.W.2d 627, 630 (1971) (overriding consideration is child's welfare). *See generally* Comment, *Protecting the Interests of Children in Custody Proceedings: A Perspective on Twenty Years of Theory and Practice in the Appointment of Guardians Ad Litem*, 12 CREIGHTON L. REV. 234 (1978); Comment, *Child Custody: Best Interests of Children vs. Constitutional Rights of Parents*, 81 DICK. L. REV. 733 (1976-1977).

The parental rights doctrine, requiring that a parent be awarded custody unless proven unfit, is based on the assumption that the interests of the child are best served by preserving the parents' right to custody. *See* McCough & Shindell, *Coming of Age: The Best Interests of the Child Standard in Parent—Third Party Custody Disputes*, 27 EMORY L.J. 209, 212

dissatisfaction of one of the parents. The noncustodial parent often resorts to the self-help tactic of "stealing"⁴ the child from the custodial parent and fleeing from the jurisdiction of the court that rendered the custody decree. The frequency of such child snatching has reached startling proportions in recent years.⁵ Because most courts are willing to modify prior custody decrees from other jurisdictions,⁶ noncustodial par-

(1978). The doctrine is most often applied in parent/third-party disputes. *Id.* at 214 & n.24. The majority of American courts apply the best interests of the child standard in custody disputes between parents, which allows the court to consider a number of factors including the fitness of the contesting parties. *Id.* at 213 & n.23. See generally Schiller, *Child Custody: Evolution of Current Criteria*, 26 DE PAUL L. REV. 241 (1977).

The Minnesota child custody statute states in part:

"The best interests of the child" means all relevant factors to be considered and evaluated by the court including:

- (a) The wishes of the child's parent or parents as to his custody;
- (b) The reasonable preference of the child . . . ;
- (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
- (d) The child's adjustment to his home, school, and community;
-
- (g) The mental and physical health of all individuals involved.
-

. . . . In determining the parent with whom a child shall remain, the court shall consider the best interests of the child and shall not prefer one parent over the other solely on the basis of the sex of the parent.

MINN. STAT. § 518.17 (1978).

4. The terms child stealing, child snatching, and parental kidnapping are used synonymously in this Case Note and refer to the act of abducting or concealing a child by a noncustodial parent or guardian in contravention of a court order.

5. Estimates of the number of children annually kidnapped by one of the parents range from 25,000 to 100,000. Compare Note, *Prevention of Child Stealing: The Need for a National Policy*, 11 LOY. L.A.L. REV. 829, 830 (1978) (25,000 - 100,000) with Krauskopf, *Child Custody Jurisdiction Under the U.C.C.J.A.*, 34 J. MO. B. 282, 282 (1978) (100,000 abductions annually). The National Conference of Commissioners on Uniform State Laws, in a survey regarding the child-stealing problem, found that "the 'rule of seize and run' is indeed rampant throughout the country" Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1216 (1969).

6. The United States Supreme Court has stated that custody decrees are not entitled to full faith and credit, *see* U.S. CONST. art. IV, § 1, because they are subject to modification and therefore lack the requisite finality. On four occasions the Supreme Court has refused to give full faith and credit to custody decisions. In *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947), the Court held that since a custody decree is subject to modifications, and hence, not a final judgment, "the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered." *Id.* at 615. In *May v. Anderson*, 245 U.S. 528 (1953), in which it was decided that a court, in an *ex parte* proceeding, could not deny custody to a parent over whom it had no personal jurisdiction, the concurring opinion reasoned that "the child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another State's discharge of its responsibility at another time." *Id.* at 536 (Frankfurter, J., concurring). In *Kovacs v. Brewer*, 356 U.S. 604 (1958), the Court again eschewed the constitutional question by

ents have employed the highly successful strategem of abducting their children and relitigating custody in a more favorable forum.⁷

stating that full faith and credit is inapposite when circumstances have so changed to warrant modification of the foreign decree. *Id.* at 608. Finally, in *Ford v. Ford*, 271 U.S. 187 (1962), the Court again followed the *Halvey* rationale. *See id.* at 194.

In recent years, courts have exercised restraint in modifying a foreign decree by applying the clean hands doctrine. The basic principle is that he who seeks equity must do so with clean hands. *See* A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 293 (1962); Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345, 357 (1953); Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 798 (1964). The Minnesota court has recognized this principle but has not applied it uniformly. *Compare* *Tureson v. Tureson*, 281 Minn. 107, 111-12, 160 N.W.2d 552, 556 (1968) (surreptitious removal of children from the state in which they are domiciled does not change their domiciliary) and *State ex rel. Glasier v. Glasier*, 272 Minn. 62, 68, 137 N.W.2d 549, 554 (1954) (same) with *Hughes v. Hughes*, 276 Minn. 380, 381, 150 N.W.2d 572, 573 (1967) ("clean hands" are not necessary when the removing parent or guardian has acted to insure proper care of the child). Courts have also exercised restraint by judicially adopting the doctrine of comity, under which a foreign decree is recognized. *See* 11 WASHBURN L.J. 305, 307 (1972). The doctrine of comity is exercised only at the discretion of the court and, hence, the doctrine has not been applied consistently, particularly when changed circumstances allow modifications of prior decrees. Thus comity's effectiveness in recognizing and enforcing foreign decrees is weakened immensely. *See* Note, *supra* note 5, at 838.

7. The Prefatory Note of the UNIFORM CHILD CUSTODY JURISDICTION ACT [hereinafter UCCJA] reads in part:

In this confused legal situation the person who has possession of the child has an enormous tactical advantage. Physical presence of the child opens the doors of many courts to the petitioner and often assures him of a decision in his favor. It is not surprising then that custody claimants tend to take the law into their own hands, that they resort to self-help in the form of child stealing, kidnapping, or various other schemes to gain possession of the child.

UCCJA, Commissioners' Prefatory Note. *See generally* Bodenheimer, *supra* note 5, at 1210-11. The Minnesota Supreme Court has relied on various grounds for ignoring foreign custody adjudications. *See In re Giblin*, 304 Minn. 510, 232 N.W.2d 214 (1975) (trial court instructed to use UCCJA as guide in determining propriety of foreign decree); *Ray v. Ray*, 299 Minn. 192, 217 N.W.2d 492 (1974) (state of child's domicile has power to determine custody); *Barker v. Barker*, 286 Minn. 214, 176 N.W.2d 99 (1970) (prolonged custody by resident parent warrants an evidentiary hearing as to validity of a foreign decree); *Hughes v. Hughes*, 276 Minn. 380, 150 N.W.2d 572 (1967) (decree of foreign court suspect when child's domicile has not been established in foreign jurisdiction); *Azine v. Azine*, 265 Minn. 105, 120 N.W.2d 324 (1963) (when Minnesota domicile has been established with acquiescence of parents, Minnesota courts have jurisdiction notwithstanding foreign decree); *MacWhinney v. MacWhinney*, 248 Minn. 303, 79 N.W.2d 683 (1956) (no deference given to foreign decree obtained by parent acting in violation of Minnesota decree); *In re Adoption of Pratt*, 219 Minn. 414, 18 N.W.2d 147 (1945) (foreign decree not entitled to full faith and credit when foreign jurisdiction was not domiciliary of child); *State ex rel. Larson v. Larson*, 190 Minn. 489, 252 N.W. 329 (1934) (when foreign decree gave each parent custody for alternating 6-month periods, Minnesota court had jurisdiction to re-determine custody during child's 6-month domicile in Minnesota); *State ex rel. Aldridge v. Aldridge*, 163 Minn. 435, 204 N.W. 324 (1925) (foreign custody decree not enforced when nonresident custodian has acquiesced to child's domicile in Minnesota). The Minnesota court has also refused to relitigate foreign decrees for varying reasons. *See, e.g., In re Longseth*, 282 Minn. 28, 162 N.W.2d 365 (1968) (Minnesota is *forum non conveniens*); *Tureson v.*

While courts have rewarded the abducting parent with favorable custody decrees, legislatures have attempted to combat this crisis with criminal sanctions against the child snatcher.⁸ Since 1967, a Minnesota statute has made it a crime for a noncustodial parent intentionally to detain his own minor child outside the state of Minnesota contrary to an existing court order.⁹

Recently, the Minnesota Supreme Court struck down as unconstitutional the Legislature's attempt to deter child stealing. In *State v. McCormick*,¹⁰ the court held that because the child-stealing statute prohibited conduct occurring solely outside the state's boundaries, the law created an unconstitutional extension of the state's jurisdiction.¹¹ The decision reveals the inherent defect of criminal child-stealing statutes—the question of constitutionality of extending a state's criminal jurisdiction to acts committed outside its borders. As a result, the statutes fail to deal effectively with the crisis of interstate child stealing.¹² The importance of the *McCormick* decision lies in its dictum. The Minnesota court stated that the solution to the child-stealing problem lies not in state criminal sanctions, but in federal legislation.¹³ The Minnesota Legislature, however, has since amended the statute in response to *McCormick*.¹⁴

The defendant in *McCormick* obtained a divorce in California. Custody of the children was granted the defendant's wife. After the divorce, the mother and children moved to Minnesota. The defendant, who had remained in California, was subsequently denied visitation pursuant to a Minnesota district court order. Defendant, however, picked up the children one day as they walked to school and took them to California to

Tureson, 281 Minn. 107, 160 N.W.2d 552 (1968) (Minnesota applied clean hands doctrine); *State ex rel. Glasier v. Glasier*, 272 Minn. 62, 137 N.W.2d 549 (1965) (foreign custody decree recognized unless changed conditions require modification).

8. See MINN. STAT. § 609.26 (Supp. 1979); N.Y. PENAL LAW §§ 135.45, .50 (McKinney 1975).

9. Criminal Code of 1963, ch. 753, 1963 Minn. Laws 1185, 1203-04, as amended by Act of May 18, 1967, ch. 570, 1967 Minn. Laws 1148 (current version at MINN. STAT. § 609.26 (Supp. 1979)) stated:

Whoever intentionally detains his own child under the age of 18 years outside the state of Minnesota, with intent to deny another's rights under an existing court order may be sentenced to imprisonment for not more than two years or to payment of a fine of not more than \$2,000, or both.

As originally enacted, Minnesota's child-stealing statute contained no reference to acts committed outside the state. See Criminal Code of 1963, ch. 753, 1963 Minn. Laws 1185, 1203-04.

10. 273 N.W.2d 624 (Minn. 1978).

11. See *id.* at 628.

12. See notes 40-46 *infra* and accompanying text.

13. See 273 N.W.2d at 628.

14. See Act of May 29, 1979, ch. 263, § 1, 1979 Minn. Laws 576, 576-77 (amending MINN. STAT. § 609.26 (1978)). For a discussion of the new statute, see notes 25-46 *infra* and accompanying text.

relitigate custody. Approximately three months later, defendant was arrested,¹⁵ returned to Minnesota, and charged with a violation of Minnesota's child-stealing statute.¹⁶ The trial court determined that no Minnesota court could assert jurisdiction over the offense defined in the statute and dismissed the complaint.¹⁷ On appeal the Minnesota Supreme Court affirmed the trial court's ruling, holding that the offense defined in the statute was an invalid exercise of extraterritorial criminal jurisdiction.¹⁸

In reaching its decision, the Minnesota Supreme Court relied on two general rules governing criminal statutes. First, the court observed that criminal statutes must be strictly construed.¹⁹ Applying this rule, the court interpreted the language "detains . . . outside the state"²⁰ to mean detention solely outside the state's boundaries.²¹ Once this interpretation of the statute was reached, the *McCormick* court dismissed the state's argument that Minnesota's general jurisdiction statute,²² which extends

15. Over three months elapsed before federal agents found McCormick in California. Appellant's Brief and Appendix at 7.

16. See 273 N.W.2d at 625. Defendant was also charged with second degree criminal sexual conduct, a charge not involved in the appeal.

17. See *id.*

18. See *id.*

19. *Id.* at 627; see *United States v. Resnick*, 299 U.S. 207, 209-10 (1936); *Fasulo v. United States*, 272 U.S. 620, 629 (1926); *United States v. Bathgate*, 246 U.S. 220, 225 (1918); *Todd v. United States*, 158 U.S. 278, 282 (1895); *United States v. Brewer*, 139 U.S. 278, 288 (1891); *United States v. Lacher*, 134 U.S. 624, 628 (1890). Strict construction is a means of assuring fairness to individuals by providing a clear definition of the prohibited conduct. See, e.g., *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Snitkin v. United States*, 265 F. 489 (7th Cir. 1920); *State v. Moseng*, 254 Minn. 263, 95 N.W.2d 6 (1959).

20. Criminal Code of 1963, ch. 753, 1963 Minn. Laws 1185, 1203-04, as amended by Act of May 18, 1967, ch. 570, 1967 Minn. Laws 1148 (current version at MINN. STAT. § 609.26 (Supp. 1979)).

21. See 273 N.W.2d at 625. The only previous interpretation of the statute is in *Olsen v. State*, 287 Minn. 536, 177 N.W.2d 424 (1970), in which the court stated that "[d]etains' probably means the same as 'takes, confines or restrains.'" *Id.* at 538, 177 N.W.2d at 427. *Olsen* construed the statute before the 1967 amendment. See Criminal Code of 1963, ch. 753, 1963 Minn. Laws 1185, 1203-04. When faced with the facts of *McCormick*, the court chose to disregard the dictum in *Olsen* by stating that "[n]otwithstanding that dictum, the fact remains that a criminal statute must be strictly construed and we are not at liberty to read into it language intentionally omitted when it was amended by the legislature." 273 N.W.2d at 627. Thus, the court rejected the state's contention that the act of taking the child is included within the definition of the word "detains," which would have resulted in criminal conduct by the defendant within the boundaries of Minnesota. See *id.*

22. MINN. STAT. § 609.025 (1978) reads in part:

A person may be convicted and sentenced under the law of this state if:

- (1) He commits an offense in whole or in part within this state; or
- (2) Being without the state, he causes, aids or abets another to commit a crime within the state; or
- (3) Being without the state, he intentionally causes a result within the state prohibited by the criminal laws of this state.

the state's criminal jurisdiction to offenses committed in part outside the state, applied to the situation at hand. The court stated, "[w]e do not find these statutes adequate grounds for disregarding limitations on extraterritorial jurisdiction which have long been recognized as the law of the land."²³ Since the language of the child-stealing statute regulated conduct that could only occur outside of the state, the Minnesota court concluded that the statute violated a second general rule—a state's jurisdiction extends only to its borders.²⁴

In response to the infirmities found by the *McCormick* court and because of the importance of preserving the deterrent effect of the child-stealing statute, the 1979 Minnesota Legislature restructured and expanded the child-stealing law,²⁵ ignoring the court's opinion that only

Under subsections 1 and 2 of section 609.025, at least part of the crime must still be committed within the state in order to extend jurisdiction. *See id.* Under subsection 3, the result caused within the state must be prohibited by the state's criminal laws. *See id.* Since MINN. STAT. § 609.26 (1978) does not define or include any result occurring within the state as an element of the crime, section 609.025 cannot extend jurisdiction.

23. 273 N.W.2d at 625.

24. *See* 273 N.W.2d at 628. *See generally* State v. Stickney, 118 Minn. 64, 66-67, 136 N.W. 419, 420 (1912). Similarly both the federal constitution, U.S. CONST. amend. VI, and the Minnesota constitution, MINN. CONST. art. I, § 6, require the jury to be drawn from the district in which the crime was committed, thus restricting the venue for the criminal trial.

There are exceptions to the general rule that extends jurisdiction, *see* MINN. STAT. § 609.025 (1978), but some element of the crime must still occur within the state. One special exception to the rule is in nonsupport cases, in which courts have stated that although no overt act is committed within the state, the act of omission is committed in the state where the child resides. *See* People v. Jones, 257 Cal. App. 2d 235, 235-36, 64 Cal. Rptr. 622, 622-24 (1967). Hence, the situs of the crime is where the act should have been performed. The Minnesota court declined to equate *McCormick* with nonsupport cases, by stating that the "offense [of detaining a child is] committed not so much against the child as against the other parent." 273 N.W.2d at 627. The court's overriding rationale, however, was the strict construction of the criminal statute. *See id.* at 628.

25. *See* Act of May 29, 1979, ch. 263, § 1, 1979 Minn. Laws 576, 576-77 (amending MINN. STAT. § 609.26 (1978)), which reads in part:

Subdivision 1. Whoever intentionally takes, detains or fails to return his own child under the age of 18 years in violation of an existing court order which grants another person rights of custody may be sentenced as provided in subdivision 5.

Subd. 2. Whoever detains or fails to return a child under the age of 18 years knowing that the physical custody of the child has been obtained or retained by another in violation of subdivision 1 may be sentenced as provided in subdivision 5.

Subd. 3. A person who violates this section may be prosecuted and tried 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. A child who has been obtained or retained in violation of this section shall be returned to the person having lawful custody of the child. In addition to any sentence imposed, the court may assess any expense incurred in returning the child against any person convicted of violating this section.

Subd. 5. Whoever violates this section may be sentenced as follows:

(1) To imprisonment for not more than 90 days or to payment of a fine of

federal legislation can finally resolve the problem.²⁶ In an attempt to alleviate the constitutional weaknesses in the old statute, the new statute provides for no territorial limits and prohibits taking, as well as detaining, the child in contravention of a court order.²⁷ Therefore, the conduct prohibited by the new statute, the single act of taking, occurs within the state whether or not the child is eventually detained outside of Minnesota. Hence, if a *McCormick* fact situation, in which the noncustodial parent enters Minnesota, takes the child and then flees the state with intent to violate the court order, were to arise, the question of extraterritorial criminal jurisdiction would be avoided. The new statute fails to deal effectively, however, with the situation in which the noncustodial parent travels legally with the child outside the state.²⁸ If the parent's visitation period expires while outside the state, the criminal act takes place outside Minnesota's boundaries²⁹ and the question of extraterritorial jurisdiction would again arise. Based upon the *McCormick* decision, it is unlikely that a Minnesota court would constitutionally be able to assert jurisdiction over the parent.³⁰

The new statute also provides for the return of the child to the legal custodian and for an assessment of the cost of return against the convicted person, at the court's discretion.³¹ This provision ensures the ex-

not more than \$500, or both, if he voluntarily returns the child within 14 days after he takes, detains or fails to return the child in violation of this section;

(2) Otherwise to imprisonment for not more than one year and one day or to payment of a fine of \$1,000, or both.

Id.

26. See note 13 *supra* and accompanying text.

27. See MINN. STAT. § 609.26(1) (Supp. 1979).

28. See generally CAL. PENAL CODE § 784 (West Cum. Supp. 1979).

29. In this instance, the parent would be guilty of taking, detaining, or failing to return the child in violation of an existing court order. See note 25 *supra*. Stealing a child in another state, however, is not an offense against Minnesota law. Interpretation of the statute should be limited to those acts committed within the state's borders. See note 30 *infra*. Arguably, the failure to return the child could be considered an act of omission, similar to the courts' interpretation of nonsupport cases, see note 24 *supra*, and the situs of the crime would therefore be within the state. As in nonsupport cases, a Minnesota court could extend its jurisdiction to the act of omission committed in the state where the child resides. However, the *McCormick* court rejected this argument, distinguishing the violation of court orders involved. It reasoned that an act of omission in nonsupport cases violates a right that a child has wherever domiciled, while the act of detaining a child is more of an offense committed against the other parent. See 273 N.W.2d at 627.

30. Cf. *People v. Bormann*, 6 Cal. App. 3d 292, 85 Cal. Rptr. 638 (1970) (act of taking is a single act of seizure and therefore crime was complete the moment defendant took child while in Mexico). See generally notes 19-29 *supra* and accompanying text.

31. See MINN. STAT. § 609.26(4) (Supp. 1979). The new statute also provides for venue. See *id.* § 609.26(3). A person violating the statute may be tried in the county in which the child was taken or detained, or in the county of the child's lawful residence. See *id.* This subdivision, however, should not be read as seeking to regulate conduct beyond the state's borders. Rather, this provision should be construed merely to govern venue when acts occur in two or more counties of the state.

peditious return of the child with unnecessary cost to the lawful custodian. In addition, the provision ensures that the child does not become a temporary ward of the state. Obviously, the Legislature had the best interest of the child in mind in enacting this section, for the importance of a continuously stable environment cannot be minimized.³²

The final subdivision of the new statute provides for a criminal sanction.³³ The *McCormick* court questioned the validity of the penalty provision of the old statute on equal protection grounds. Under the old statute, a defendant who wrongfully detained a child within the state could only be found in contempt of court and punished for a misdemeanor,³⁴ while a defendant who detained a child in another state was punished for a felony.³⁵ The new statute resolves this problem by avoiding any discrimination on the basis of the location where the child is detained.³⁶ The criminal sanction is reduced, however, if the child is voluntarily returned within fourteen days.³⁷ Any detention of the child beyond the fourteen-day period is punishable as a felony.³⁸ The new statute's incentive for voluntary action may avoid weeks or months of futile searches on the part of the custodial parent and the authorities to locate the fugitive parent and may alleviate the need for the often uncooperative assistance of police and prosecutors in other states.³⁹

Although parts of the new statute may prove to be valuable, many of the constitutional infirmities contained in the law addressed by *McCormick* remain.⁴⁰ In addition to the constitutional problems, the effectiveness of the new statute must be questioned. First, under the new Minnesota statute, if one parent flees with the child before a custody decree is granted, that parent will not be guilty of child stealing since

32. Stability is one of the primary requisites for a child's development. When a child is kept in a state of flux, never knowing where his future home will be, his personality is not given a chance to develop properly. The Prefatory Note of the UCCJA states:

The harm done to children by these experiences can hardly be overestimated. It does not require an expert in the behavioral sciences to know that a child, especially during his early years and the years of growth, needs security and stability of environment and a continuity of affection.

UCCJA, Commissioners' Prefatory Note; see Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 64-71 (1969).

33. See MINN. STAT. § 609.26(5) (Supp. 1979).

34. See *id.* § 588.20(4) (1978).

35. See Criminal Code of 1963, ch. 753, 1963 Minn. Laws 1185, 1203-04, as amended by Act of May 18, 1967, ch. 570, 1967 Minn. Laws 1148 (current version at MINN. STAT. § 609.26 (Supp. 1979)).

36. See MINN. STAT. § 609.26 (Supp. 1979).

37. See *id.*

38. See *id.*

39. In many states, police and prosecutors view a custody dispute as a family affair and display a "hands off" attitude. See Foster & Freed, *Child Snatching and Custodial Fights: The Case for the Uniform Child Custody Jurisdiction Act*, 28 HASTINGS L.J. 1011, 1016 (1977).

40. See notes 28-30 *supra* and accompanying text.

both parents are legally entitled to custody.⁴¹ Second, because the custodial parent's main concern is the return of the child, once custody is regained, not only is the parent often reluctant to pursue prosecution, but "prosecutors may be loathe to prosecute and courts or juries slow to convict."⁴² Third, the threat of a criminal penalty may provide a deterrent for some parents, but often the parent's strong paternal or maternal motives for stealing the child far outweigh the small penalty involved. A final weakness in the new statute is the difficulty inherent in the extradition process. Although part of the purpose for making the child stealing offense a felony is to facilitate extradition,⁴³ the procedure is discretionary.⁴⁴ Furthermore, if another state already has granted a new custody decree, that state might not be willing to grant the extradition.⁴⁵

The frequency of child stealing and custody disputes is such that a state acting alone has little hope of successfully resolving the problem. State criminal statutes are limited by restrictions on extraterritorial jurisdiction and are therefore ineffective in dealing with both interstate child stealing and custody disputes.⁴⁶ The new Minnesota statute, if held constitutional, is clearly effective only when the parent commits the crime within the state and remains in the state. The very common situation in which the parent flees the state with the child and shops for a more favorable forum in which to relitigate custody has yet to be dealt with effectively. It is clear that a coordinated nationwide effort is needed to solve the child stealing problem.

One alternative solution is the Uniform Child Custody Jurisdiction Act⁴⁷ (UCCJA) which has been enacted in thirty-one states, including

41. See *Willmore v. Willmore*, 273 Minn. 537, 541, 143 N.W.2d 630, 633 (1966) (father and mother equally entitled to custody absent unsuitability); *Spratt v. Spratt*, 151 Minn. 458, 464, 187 N.W. 227, 229 (1921); MINN. STAT. §§ 518.17(2), 525.54(1) (1978).

42. Foster & Freed, *supra* note 39, at 1016.

43. See 273 N.W.2d at 627. MINN. STAT. § 629.02 (1978) states in part, "it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime . . ." If child stealing was treated as a misdemeanor, and the abducting parent fled from the jurisdiction, the parent would not be subject to extradition.

44. See MINN. STAT. §§ 629.02-.06 (1978).

45. See Foster & Freed, *supra* note 39, at 1018.

46. Legislative sanctions against parents who snatch their children have proven ineffective, according to a number of authors. See, e.g., Foster & Freed, *supra* note 39, at 1016; Note, *Domestic Relations—Criminal Sanctions Against "Child-Snatching" in North Carolina*, 55 N.C.L. REV. 1277, 1282-85 (1977). Furthermore, the Federal Bureau of Investigation (FBI) generally will not attempt to locate the parent on the basis that no federal law has been violated. The FBI maintains that it has no jurisdiction in child-stealing cases since child stealing is presently exempt from the federal kidnapping statute. See Lindbergh Act, 18 U.S.C. §§ 1201-1202 (1976).

47. UCCJA §§ 1-28. The UCCJA was approved in 1968 by the National Conference of Commissioners on Uniform State Laws and the American Bar Association. For a general discussion of the UCCJA, see Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, 3

Minnesota.⁴⁸ The primary purpose of the UCCJA is to eliminate the relitigation of child custody in another state.⁴⁹ This is accomplished by encouraging interstate cooperation and by insuring that a custody decree is rendered in the jurisdiction in the best position to further the interest of the child.⁵⁰ In addition, the UCCJA requires that full faith and credit

FAM. L.Q. 304 (1969); Ehrenzweig, *The Interstate Child and Legislation: A Plea for Extrajudicial Proceedings*, 64 MICH. L. REV. 1 (1965); Note, *Stemming the Proliferation of Parental Kidnapping: New York's Adoption of the Uniform Child Custody Jurisdiction Act*, 45 BROOKLYN L. REV. 89 (1978); 60 MINN. L. REV. 820 (1976).

48. ALASKA STAT. § 25.30 (1977); ARIZ. REV. STAT. ANN. §§ 8-401 to -424 (Cum. Supp. 1979-1980); ARK. STAT. ANN. §§ 34-2701 to -2725 (Cum. Supp. 1979); CAL. CIV. CODE §§ 5150-5174 (West Cum. Supp. 1980); COLO. REV. STAT. §§ 14-13-101 to -126 (1973); CONN. GEN. STAT. ANN. §§ 46b-90 to -114 (West Cum. Supp. 1980); DEL. CODE ANN. tit. 13, §§ 1901-1925 (Cum. Supp. 1978); FLA. STAT. ANN. §§ 61.1302-.20 (West Cum. Supp. 1979); GA. CODE §§ 74-501 to -525 (Cum. Supp. 1979); HAWAII REV. STAT. §§ 583-1 to -26 (1976); IDAHO CODE §§ 5-1000 to -1025 (1979); IND. CODE ANN. §§ 31-1-11.6-.24 (Burns Cum. Supp. 1978); IOWA CODE ANN. §§ 598A.01-.25 (West Cum. Supp. 1979-1980); KAN. STAT. ANN. §§ 38-1301 to -1326 (Cum. Supp. 1979); LA. REV. STAT. ANN. §§ 13:1700-1724 (West Cum. Supp. 1980); MD. ANN. CODE art. 16, §§ 184-207 (Cum. Supp. 1979); MICH. COMP. LAWS ANN. §§ 600.651-.673 (West Supp. 1968-1979); MINN. STAT. §§ 518A.01-.25 (1978); MO. ANN. STAT. §§ 452.440-.550 (Vernon Cum. Supp. 1980); MONT. CODE ANN. §§ 40-7-101 to -125 (1978); N.Y. DOM. REL. LAW §§ 75-a to -z (McKinney Cum. Supp. 1979-1980); N.C. GEN. STAT. §§ 50A-1 to -25 (1979); N.D. CENT. CODE §§ 14-14-01 to -26 (1971); OHIO REV. CODE ANN. §§ 3109.21-.37 (Page Cum. Supp. 1980); OR. REV. STAT. §§ 109.700-930 (1977); PA. STAT. ANN. tit. 11, §§ 2301-2325 (Purdon Cum. Supp. 1979-1980); R.I. GEN. LAWS §§ 15-14-1 to -26 (Cum. Supp. 1979); S.D. CODIFIED LAWS ANN. §§ 26-5-5 to -52 (Supp. 1979); VA. CODE §§ 20-125 to -146 (Cum. Supp. 1979); WIS. STAT. ANN. §§ 822.01-.25 (West 1977); WYO. STAT. §§ 20-5-101 to -125 (1977). Minnesota initially adopted the UCCJA judicially in *In re Giblin*, 304 Minn. 510, 232 N.W.2d 214 (1975).

49. The general purposes of the UCCJA are:

- (a) To avoid jurisdictional competition and conflict with courts of other states in matters of child custody and to promote cooperation with the courts of other states so that a custody decree is rendered in the state which can best decide the case in the best interest of the child;
- (b) To deter abductions and other unilateral removals of children undertaken to obtain custody awards;
- (c) To avoid relitigation of custody decisions of other states in this state insofar as feasible, and to facilitate the enforcement of custody decrees of other states;
- (d) To promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and
- (e) To make uniform the law of those states which enact it.

MINN. STAT. § 518A.01 (1978).

50. The UCCJA specifies four standards for determining jurisdiction. *See id.* § 518A.03. Specifically, the forum court can make a custody determination by initial or modification decree if this state is the home state of the child or if this state had been the home state within six months of the commencement of the proceeding and the child is absent because of his removal or retention by a person claiming custody and parent continues to live in the state. Second, the forum court can assume jurisdiction if it is in the best interest of the child because there are significant connections with this state. The third basis for jurisdiction arises when the child has been subject to neglect or abandonment. The only prerequisite is physical presence of the child. The fourth basis is when it

be given to foreign decrees unless the custody court has lost jurisdiction.⁵¹ The UCCJA discourages child stealing because the parent can no longer expect to legalize possession of the child in a state that has adopted the Act.⁵² Furthermore, a more uniform treatment of interstate custody disputes has resulted in UCCJA jurisdictions because courts are required to follow the provisions of the Act before altering a foreign child custody decree.⁵³ Thus far, however, the UCCJA has failed to provide a comprehensive solution to the child-stealing problem because its effectiveness is dependent upon adoption by all fifty states.⁵⁴

A second alternative solution to the child-stealing problem is legislation that has been introduced in the United States Congress.⁵⁵ The bill prescribes a three-prong approach. The first section amends title 28 of the United States Code, and adopts the principal jurisdictional provisions of the UCCJA.⁵⁶ This section also requires state courts to give full

appears that no court in another state would have jurisdiction under the first three bases or has declined to exercise jurisdiction because this state is more appropriate to the best interests of the child. *See id.*

51. *See id.* §§ 518A.12-14. Section 518A.14 delegates substantial discretion in the exercise of jurisdiction, for the forum court may modify a foreign decree if it appears that the court "does not *now* have jurisdiction under jurisdictional prerequisites substantially in accordance with sections 518A.01 to 518A.25." *Id.* § 518A.14 (emphasis added). Hence, a Minnesota court, in its discretion, could modify a foreign decree if it feels a modification is in the child's best interest and the child and a contestant have significant connections with this state. *See id.* § 518A.03(1)(b).

52. *See id.* § 518A.08(2), which reads, in part:

Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody.

Id. Physical presence in the forum state is not alone sufficient to confer jurisdiction. *See id.* § 518A.03(2). However, a non-resident abducting parent still may be able to get a favorable decree in the forum state if the parent can show the child was taken in the child's best interest because the child had been abandoned or neglected. *See id.* §§ 518A.03(1)(c), .08(1). Nevertheless, under Minnesota's present child-stealing law, the abducting parent would be subject to criminal sanctions because the statute does not contain the UCCJA defense.

53. *See, e.g.,* Kulko v. Kulko, 19 Cal. 3d 514, 564 P.2d 353, 138 Cal. Rptr. 586 (1977); *In re Marriage of Schwander*, 79 Cal. App. 3d 1013, 145 Cal. Rptr. 325 (1978); Olsen v. Priest, 564 P.2d 122 (Colo. 1977); Wakefield v. Little Light, 276 Md. 333, 347 A.2d 228 (1975); McDonald v. McDonald, 74 Mich. App. 119, 253 N.W.2d 678 (1977); *In re Giblin*, 304 Minn. 510, 232 N.W.2d 214 (1975); Giddings v. Giddings, 228 N.W.2d 915 (N.D. 1975); Carson v. Carson, 29 Or. App. 861, 565 P.2d 763 (1977).

54. At the present, only 31 states have adopted the UCCJA in whole or in part. *See* note 48 *supra*.

55. *See* Parental Kidnapping Prevention Act of 1979, S. 105, H.R. 1290, 96th Cong., 1st Sess. (1979). The bill was originally introduced in the Senate in January, 1979, by Senator Malcolm Wallop and is currently sponsored by 16 senators.

56. *See* Wallop, *Children of Divorce and Separation: Pawns in the Child-Snatching Game*, 15 TRIAL 34, 36 (1979). The proposed section applies to both custody and visitation rights,

faith and credit to foreign custody determinations, except under specified circumstances. The third section of the bill authorizes the parent locator service of the Department of Health, Education, and Welfare to search for parents who take or conceal the child.⁵⁷ The section also amends the present kidnapping law, which exempts parents from prosecution,⁵⁸ by making it a federal misdemeanor for any parent or person to restrain or conceal a child and transport the child across state lines in violation of a custody decree.⁵⁹ Finally, section 3 authorizes the Federal Bureau of Investigation to investigate child-stealing cases.⁶⁰

The proposed federal legislation, by promoting cooperation between the federal government and the states, is a more effective solution to the child-stealing problem than a single state's efforts to locate the fugitive parent, for under the proposed federal law, a parent could not evade the reach of the law by crossing state lines. The federal child-stealing legislation, however, has been pending for several years. It should be clear to the members of Congress that efforts by the state courts and legislatures have proven ineffective to combat the child-stealing problem. The civil and criminal provisions of the proposed legislation not only solve the problem of non-uniform enactment that inhibits the effectiveness of the UCCJA, but also circumvents the restrictions on extraterritorial jurisdiction inherent in the existing state criminal laws. The main concern of all child-stealing legislation is the best interest of the child in custody litigation. Therefore, more effective measures should be enacted to bring uniformity and order to the area, for it is the child who pays the ultimate price for confusion. In light of the *McCormick* case, the limitations of the child-stealing statute, and the non-uniform enactment of the UCCJA, the solution to the child-stealing problem lies in federal legislation.

including temporary and initial orders. One of the major incentives for child stealing will be eliminated by the adoption of the "home state" basis for jurisdiction whereby the home state retains jurisdiction in custody determinations for six months after the child leaves or is taken from the state. *See* MINN. STAT. § 518A.03 (1978). If a snatching occurs before a final custody decree, the parent in the home state has six months to obtain a custody decree which would then be entitled to full faith and credit, except in certain circumstances. *See* Wallop, *supra*, at 36.

57. This section would amend section 453 of the Social Security Act, 42 U.S.C. §§ 301-1396 (1976 & Supp. 1977), which established the Parent Locator Service (PLS). This service, established in all 50 states, was designed to locate parents who have defaulted on child support payments. In 1978 the federal government collected over \$1 billion from defaulting parents. Based upon the success rate of the PLS, the service should prove highly effective in child-stealing cases. *See* Wallop, *supra* note 56, at 36.

58. *See* note 46 *supra*.

59. *See* Wallop, *supra* note 56, at 37. The offenses of restraining a child and concealing a child would be punishable by a maximum of 30 days imprisonment and/or \$10,000, and a maximum of six months imprisonment and/or \$10,000, respectively. *See id.*

60. *See id.* The proposed legislation postpones FBI involvement until 60 days after local law enforcement officials and the state and federal PLS have been alerted and mobilized. *See id.*