

Courts too lenient on parental abductors, lawyer says

KIRK MAKIN— JUSTICE REPORTER, The Globe and Mail, December 12, 2011

The abduction of children by one of their parents is one of the few offences to combine grave consequences for victims with lenient treatment for offenders.

In some cases, parental abductors emerge from hiding when their child is fully grown, give themselves up and walk away with minimal, if any, jail time.

Some in the family law community worry that lenient treatment of parental abductors makes a mockery of judicial custody orders as well as the suffering of a parent whose child has been stolen away for months or years. Nor, do the penalties reflect a loss the child may not even realize she has suffered, said Phil Epstein, a veteran family lawyer.

“Criminal penalties have been dramatically light,” Mr. Epstein said. “The family law bar would generally say that the sentences do not reflect the gravity of the offence and the rupture that deprives the child of a healthy relationship with one parent.”

About 50,000 children are abducted each year in North America, mostly by their mothers, Mr. Epstein said. “My guess is that about half are found and half are not,” he said. “This is a serious problem.”

The consequences for a parent whose child is abducted can be cataclysmic. They may not know for years whether their child is alive or dead. They often scour the country or the planet following up the slimmest leads or tips – as Joe Chisholm, did after his ex-wife, Patricia O’Byrne, allegedly disappeared with their daughter 18 years ago. The woman, who had moved to Victoria, B.C., is in jail, awaiting trial in Toronto.

Parental abductors are easily distinguishable from most other criminals. Unlike the average ne’er-do-well, they tend to be well-educated, articulate and able to afford a top lawyer who can weave strong sentencing submissions around their being a first-time offender with little likelihood of re-offending.

“The story is almost universally that I did this to protect the child,” Mr. Epstein said. “Once in a while, this may be true; the mother has legitimate concerns. But

quite often, the problem in these cases is the mother has a pathology where she believes the father is a danger to the child. If you give her a lie detector test, she would pass it with flying colours.”

The maximum sentence is 10 years in prison, but conditional discharges are common. In a decision last month – *R v Dara Lynn Neundorf* – the Ontario Court of Appeal even gave an absolute discharge to a woman who had abducted her two sons and kept them in Singapore for several months.

Mr. Epstein said that it can be difficult to prosecute parents because they may have convinced young children that the deprived parent was mean or dangerous. “If the child is 12, 15 or 16, a good psychologist can tell whether the child was brainwashed or had legitimate concerns about the other parent,” he added.

Joseph Di Luca, a Toronto criminal lawyer, said an abductor can create a reasonable doubt about whether she was genuinely abused. Allegations of abuse are easy to make and difficult to disprove, he said. “It’s a real challenge to go back years later and sort this out,” Mr. Di Luca said. “Courts have to be cognizant of the dangers of relying on allegations of abuse in those circumstances.”

Another unusual aspect of parental abduction cases is that a parent deprived of a child may fear alienating the child even more by demanding harsh treatment for the other parent. Sometimes, the deprived parent even tries to win his way into the child’s heart by asking that the abductor not be punished at all.

An Ontario judge familiar with the offence said it is very difficult to discern motives and gauge the damage done to an abducted child. “A judge has to be prepared, where necessary, to impose a sentence despite what the child says,” said the judge, speaking on condition of anonymity. “But imposing a sentence when the abducted child is weeping in your presence is not an easy thing to do.”

The judge said that trial judges have their hands tied by precedent. If they depart from established sentencing ranges, they risk being overturned on appeal. If a judge hopes to make a harsh sentence stick, the judge said, it is best to link it to the contempt that parental abductors show for court-issued custody orders.

“Sentencing is especially tough when you see a child who has been brought up well,” he added. “There is almost a temptation to see it as a victimless crime. But that’s clearly not true. It’s not just an estranged parent who is a victim, but the child – whether or not they appreciate it.”

Denied bail late last week, Ms. O'Byrne's defence counsel, Edward Greenspan, said he will appeal the decision based partly on how rare it is for a parental abductor not to be released pending his or her trial.