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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **PARENTAL CHILD ABDUCTION**

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## **ABSTRACT:**

Child abduction is referred to as taking off or kidnapping the child from the person who is legally responsible for taking custody of that child. From the perspective of parental child abduction, it happens in cases where the child's parents are not together. If the child's parents were judicially separated or divorced and the court gave an order or decree regarding the right of the parent to take physical custody of the child, in this case, the other parent, who wouldn't have the right to take physical custody of the child, tried to take the child from the person who had the legal responsibility to take care of the child. The grounds for this parental child abduction are in many ways dependent on the parents will or the intention of the other parent's family member. The non-legal custody parent or other family member or his or her agent will be convicted of parental kidnapping if they take the child from the other parent, or in general, any concealment of the child by the family member or parent or the agent of the parent from the legal custodian or other parent who has the right of visitation of the child will be convicted of parental abduction or kidnapping. This article will examine the laws in India pertaining to parental abduction, as well as the measures implemented to avert and address such incidents with the deepest knowledge about issues regarding it, the cases relating to parental child abduction, and the grounds for conviction.

**Keywords:** Child abduction, parental child abduction, kidnapping, judicial separation, divorce, legal custody, physical custody, custodians, conviction.



## **1. INTRODUCTION:**

In India, keeping the child from another parent is not a criminal offence, but an act of concealment of a child by the parent or their agent and family members from the visitation rights of another parent or legal custodian is said to be parental kidnapping. It is a commitment of kidnapping to take the child from the parent who has sole physical custody of that child because the court may grant the right to the parents not based on the parent's preference but based on the best interest of the child. The court considers various factors to make this determination, which may include the child's age, need, preference, parent's willingness to support, their working schedule, their ability to meet the living standards of the child, and also the physical and mental health of each parent, so it may not be fair to take the child from the parent who has legal custody.

## **2. NATURAL GUARDIAN:**

In general, the natural guardian is said to be the father, as per Section 6(a) of the Hindu Minority and Guardianship Act, 1956. Next to the father, the mother is said to be the natural guardian of the child. If the child is under the age of 5 while giving the custody order, then the child will give the custody of the mother because they consider the best interests, benefits, and health of the child. Other than these people, no one will be the natural guardian of the child. Still, there will be a guardian if the child has no parents, but they were not mentioned as a natural guardian.<sup>1</sup>

### **CASE:**

#### **GITA HARIHARAN vs. RESERVE BANK OF INDIA (1999) 2 SCC 228:**

In this, the Apex Court has read down the word 'after' in section 6(a) to mean 'in the absence of'. The father's absence from the minor's care can be "for any reason whatever". Hence, in such situations, the mother can act as the natural guardian of the minor during the lifetime of the father, who would be deemed to be 'absent'.<sup>2</sup>

This case was more important because it was the first to establish that both parents can be the natural guardians of the minor Hindu child, and the mother cannot be the natural guardian only after the death

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<sup>1</sup><http://assets.publishing.service.gov>

<sup>2</sup> <https://www.sconline.com/Members/SearchResult.aspx>



of the father, because that was not only discriminatory but also against the welfare of the child. Both parents can be natural guardians if they are capable and willing to take care of the child; it is not necessary to be the father first.

### **3. OVERVIEW OF PARENTAL CHILD ABDUCTION IN INDIA:**

When one parent removes a child from the other without the other's permission or authorization, it's known as parental child abduction. This can occur for a number of reasons, including disagreements about relocation, visiting rights, and child custody. In India, these situations frequently result in court battles where the parents defend their respective rights and interests. We must examine the laws and procedures in place to deal with parental child abduction in order to gain a deeper understanding of this problem.<sup>3</sup>

### **4. WHEN THE PARENT IS ENTITLED TO TAKE THE CHILD:**

- 1) If they were married and there is no court order of custody.
- 2) They should get divorced, and the parents who are taking the child should have sole physical custody of the child. If these two grounds were there, then the parent is entitled to take the child with them.

### **5. WHAT IS AN PARENTAL CHILD ABDUCTION:**

It is illegal when the parent takes the child from the parent who has sole physical custody of the child. After the visitation time, the parent who is not able to keep the child with them needs to bring the child back to the custodial parent, and if the parent has not proceeded with the child within the time limit, it may lead to disobeying the court order.<sup>4</sup>

### **6. LEGAL PROVISIONS:**

In India, there are several laws that apply to parental child abduction. These include;

The Guardians and Wards Act, the Code of Criminal Procedure (CrPC) and the Indian Penal Code

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<sup>3</sup> <https://ipleaders.in/parental-child-abduction-law-india>

<sup>4</sup> <https://www.inianlawoffices.com/legal-articles/child-abduction-by-parents>

(IPC).

Let's take a closer look at these legal provisions.

### **6.1. INDIAN PENAL CODE(IPC):**

Provisions against kidnapping, wrongful restraint, and abduction are found in the Indian Penal Code. These offences are covered under IPC sections 361 through 369. While kidnapping is defined in Section 363, abduction of children under the age of sixteen is covered in Section 361. It may be regarded as a criminal act, with potential consequences ranging from fines and imprisonment.

Parental child abduction may not be a serious offence but it may be taken to the level of kidnapping<sup>5</sup>. Because Section 359 of the Indian Penal Code defines the kinds of kidnapping,

- 1) Kidnapping from India
- 2) Kidnapping from lawful guardianship

And Section 361 of the Indian Penal Code defines kidnapping from lawful guardianship: Whoever takes or entices any minor under 1[sixteen] years of age if a male, or under 2[eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation—The words “lawful guardian” in this section include any person lawfully entrusted with the care or custody of such minor or other person.

(Exception) —This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.<sup>6</sup>

Abduction is defined under Section 362 of the Indian Penal Code.

Section 362 - whoever by force compels, or by any deceitful means induces, any person to go from

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<sup>5</sup> <https://gsbagga.com/blog/constitutes-parental-kidnapping-parental-abduction>

<sup>6</sup> <https://indiankanoon.org/doc/1515807/>

any place, is said to be abduct.<sup>7</sup>

**The necessary requirements to constitute an abduction of a person are:**

1. that the person must have been made to go from any place, and
2. Such going must be,
  - (a) under compulsion by the use of force or
  - (b) induced by deceitful means.

Abduction by itself is not punishable as a substantive offence; Section 362 deals with the problem of "abduction" of a "person". But in the crime of air-hijacking, the "aircraft" is a juristic "person". Moreover, at the time of committing the crime of air-jacking, there may be persons inside the aircraft, either as passengers, crew members, or both.

But legally, it will be very difficult to cover the crime of air-hijacking under Section 362 of the I.P.C., as this crime was never imagined by the framers of the Code. And as society progressed, revenge grew up, which germinated new crimes in society, and one of them is the modern crime of air-hijacking.<sup>8</sup>

Which says that any person who takes away the child from the lawful guardianship will lead to kidnapping, so if the other parent takes the child from the legal custodial parent, it may also be an act of kidnapping if the purpose is only with an illegal motive. In India, the act of abduction by parents may not be a strong offence.

**6.2. CODE OF CRIMINAL PROCEDURE(CrPC):**

The Indian judicial system's protocols for handling criminal matters are described in the CrPC. The CrPC offers the structure for filing a First Information Report (FIR) and starting a criminal investigation in the event of abduction of a child and it also directs the accused's arrest and trial procedures.

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<sup>7</sup> <https://indiankanoon.org/doc/390542/>

<sup>8</sup> <http://www.advocatekhoj.com/lawreports/theindianpenalcode>

### **6.3.GUARDIANS AND WARDS ACT,1890:**

The main topic of this act is the designation of guardians for minors. When a parent abducts their child, the court may use this legislation to decide who gets custody of the child. The welfare of the child is the court's top priority, and it has the authority to order the child's return to the custodial parent.<sup>9</sup>

### **6.4. INTERNATIONAL SCENARIO:**

#### **THE HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION:**

The United States is one of the numerous nations that have ratified the Hague Abduction Convention. The Convention aims to organise or ensure the effective rights of access to a child and shield children from the detrimental effects of an international parent abducting them. It also encourages the rapid return of abducted children to their country of habitual residence. The concept is that the appropriate court in the nation where the child resides habitually should normally decide custody and visitation disputes. The Convention gives partner countries access to a shared civil remedy with an emphasis on the child. The Convention offers a framework for nations to collaborate in particular ways to address situations of international abduction. Key components of the Convention consist of: A Central Authority is necessary for any nation that has ratified or joined the Convention. When it comes to abduction situations, the Central Authority is the primary point of contact for parents and other governments. Generally speaking, the Central Authority is responsible for assisting in the recovery of kidnapped children, promoting peaceful resolutions to parental abduction cases, and facilitating the safe return of children when necessary. All papers filed with the Central Authority as part of the application are acceptable in partner country courts without the usual formalities, courts impose when accepting foreign materials. To demonstrate that their custodial rights were violated when the child was removed from their country, a parent does not always need to show a custody order. The Convention permits proof in accordance with the laws of the child's habitual residence, which typically entails proving parenthood or marriage. The immigration status or nationality of a child or their parents has no bearing on whether or not they should be sent back to their habitual residence, or on whether or not they have access or visiting rights<sup>10</sup>

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<sup>9</sup> <https://www.indiancode.nic.in/handle>

<sup>10</sup> <https://travel.state.gov>



Although India does not ratify The Hague Convention, it does have bilateral agreements in place with a number of nations on the handling of cases involving international child abduction. These agreements frequently offer a framework for kidnapped children to be returned to their nation of origin.

#### **6.5.BELOW MENTIONED ARE THE GROUNDS OF FILING PETITION:**

Because of the lack of proper laws on the concept of parental child abduction the petition can be filed in the following ways:

**6.5.1.Guardianship and wards act:** Under Section 9 of the Guardians and Wards Act, 1890, a guardianship petition can be filed against the parent who disobeys the court's custody order.

**6.5.2. Habeas Corpus petition:** In cases where the child's whereabouts are unknown, the aggrieved parent can file a writ of habeas corpus, compelling the abducting parent to produce the child in court. In a habeas corpus petition, the high court has to examine whether the other person is taking the child under lawful or unlawful custody.

**6.5.3. Mediation:** Family court often recommend counselling and mediation to resolve custody disputes amicably. This can help avoid the emotional trauma of litigation for the child. The mediation is voluntary, and both parents of the child should agree to it. If both aggrieved parents have concerns, they have the option of opting for mediation services.

**6.5.4. Jurisdiction of the Family Courts:** The family court has jurisdiction over the custody of minor children in India.

#### **6.5.6 Filing a Police Complaint:**

Citing the abduction, the parent who is left behind may file a police complaint or a formal I report (FIR) in accordance with the relevant IPC and CrPC sections. The investigation will be started by law enforcement.

## **CASES:**

### **LAHARI SAKHAMURI v. SOBHAN KODALI;**

It was held that the Family Courts in India would not have any jurisdiction over custody matters of minor children who are foreign citizens and do not ordinarily reside within the jurisdiction of the Family Court.<sup>11</sup>

In **ELIZABETH DINSHAW v. ARVAND M. DINSHAW**, it was held that it is the duty of courts to see that a parent doing wrong by removing children from the country does not gain any advantage from their wrongdoing.<sup>11</sup>

## **7. WAYS TO PREVENT PARENTAL CHILD ABDUCTION:**<sup>12</sup>

Since parental child abduction can have serious emotional and psychological impacts on the child, it is imperative to prevent it. To lessen the chance of abduction, a number of actions and safety measures can be taken:

### **7.1. Orders for custody:**

Getting a court-issued legal custody order can aid in the prevention of kidnapping. Who has legal custody of the kid is made clear by this ruling, which also outlines visitation rights and custody arrangements.

### **7.2. Communication:**

To make sure that both parents are in agreement about custody and visitation, open and honest communication is crucial. Misunderstandings that could result in abduction can be avoided with clear communication.

### **7.3. Restrictions on Travel:**

Parents can ask the court to place travel limitations on the other parent, particularly with regard to overseas travel, if there is a risk of abduction. The custodial parent may withhold the child's passport in order to stop unapproved travel.

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<sup>11</sup> <https://www.sconline.com/Members/SearchResult.aspx>

<sup>12</sup> <http://www.ojp.gov>

#### **7.4. Awareness:**

Children can learn from their parents about the possible dangers and how to react if they ever find themselves in a situation where abduction is attempted. Encouraging them to recognise trustworthy individuals to seek assistance from is crucial.

#### **7.5. Notifying Regulators:**

Parents can report custody arrangements and abduction risk to the local police, school officials, and other pertinent agencies in the event of a potential threat.

### **8. CHALLENGES AND CONCERNS:**

In India, situations of parental child abduction present a number of difficulties and worries.

#### **8.1. Delayed Court Cases:**

The slow-moving Indian legal system might result in protracted court cases and uncertainty for the child.

#### **8.2. Abductions- across borders:**

Cases involving the abduction of children abroad may become even more complex because of variations in international treaties and legal frameworks

#### **8.3. Impacts on child:**

Instances of parental child abduction frequently result in emotional anguish and stress for the children involved. Their grief may be worsened by the legal process itself.<sup>13</sup>

#### **8.4. Resource Constraints:**

Disparities in access to justice may result from parents' lack of financial resources to fight long-term legal fights.

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<sup>13</sup> <https://www.linkedin.com>

### **8.5. Lack of awareness:**

The situation is made more difficult by the fact that many parents are ignorant of their legal rights and what to do in the event of an abduction.

### **8.6. Best interest of the child:**

The court prioritize the best interest of the child when making decisions in custody disputes. The child's emotional, psychological and physical wellbeing are paramount.<sup>14</sup>

## **9. RECOMMENDATION:**

When a parent abducts their child, it's critical to act quickly and appropriately to put an end to the situation and protect the child's welfare first. In order to handle these instances, the following recommendations may to handle these;

### **9.1. Seeking a court order:**

A request for an order directing the child's immediate return can be made to the family court by the parent who wants their child back. When making this determination, the court will take the child's best interests into account.

### **9.2. Orders for Temporary Custody:**

When a child is abducted, the court may grant temporary custody orders to specify the child's residence while the case is pending. Orders to stop the kidnapping parent from leaving the jurisdiction may also be issued by the court.

### **9.3. Collaboration with Law Enforcement:**

Collaborating with the appropriate authorities in the country of the abduction parent is essential in cases of international abduction. The ministry of external affairs in India and the corresponding embassies may be able to assist in getting the child back.

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<sup>14</sup> <https://www.jstor.org>



#### **9.4. Implementation of Directives:**

Ensuring the enforcement of court-issued orders regarding the child's return is crucial. Coordination with law enforcement and other pertinent authorities may be necessary for this.

### **CONCLUSION:**

Parental child abduction is a serious issue in India, with legal provisions in place to address and prevent such occurrences. The laws aim to protect the rights and wellbeing of children and ensures that disputes between parents are resolved in the child's best interest. However, it is essential for parents to be aware of their legal rights and responsibilities and seek legal remedies when faced with parental child abduction. It is also crucial for the legal system to act swiftly and efficiently to ensure the child's welfare and prevent emotional trauma, it is a painful problem that impacts the child's wellbeing in addition to the parents who are engaged. India provides methods to settle conflicts and protect the best interests of the child, as well as legislative provisions to deal with these kinds of circumstances. It is essential to prevent abduction by means of unambiguous communication and legal protections; handling such incidents necessitates swift legal action and collaboration with pertinent authorities. To guarantee a more successful and efficient settlement of parental child abduction cases in India. This article conveys the consequences, preventing measures, grounds of approaching court and grounds of reason for parental child abduction which has some lack of laws in India.

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