

## Snubbing Parental Child Snatchers

### Civil Damages Against Moms And Dads Who Kidnap Would Deter Such Acts

By Fred Silberberg

In the spring of 1999, the media broadcast the story about the Palm Beach land developer who was arrested and charged for kidnapping his two daughters from their mother in Massachusetts in 1979, when they were 2- and 5-years-old. The developer, Steven Fagan, had changed his last name to Martin and kept their whereabouts from their mother, Barbara Kurth. Fagan lied to the children, telling them that their mother had died in a car accident. In fact, their mother was alive and still living in their childhood home in Massachusetts where she kept their childhood bedroom with all their belongings intact.

When caught, Fagan's plea bargain required him to pay a \$100,000 fine and perform 2,000 hours of community service with no jail time. While Fagan was in the public eye, his daughters publicly supported him and his actions, and refused to communicate with their mother. The fine paid by the father was slight considering his finances. The damage sustained by Kurth and the children, on the other hand, could never be repaired, nor was she compensated for it. So much for justice.

I was reminded about Barbara Kurth earlier this week in reading the opinion of the 1st District Court of Appeal in the case of *Dunkin v. Boskey*. That case held that a father could maintain an action for breach of an anonymous-donor artificial insemination agreement, the breach being the mother's cutting off the father's relationship with the daughter. These unmarried cohabitants signed an agreement with a fertility clinic that stated that they would provide support, education and care for the child that would result from the insemination. After the child's birth, the family lived together until, just shy of their daughter's second birthday, the mother suddenly moved to Wisconsin with the child and refused to allow the father any contact. As shocking as this may seem, there are parents all over the United States who forbid their children to have contact with the other parent.

Raymond Dunkin, the father in this recent opinion, had been thrown out of a California trial court when he sought custody and visitation, for lack of standing because he was not the biological father. In this classic case of disregard for the welfare of the toddler



who had an ongoing relationship with her father up until then, Dunkin was left with little in the way of possible remedies until the court of appeal reversed a trial court's decision to bar his breach of contract suit. The court concluded that the contract was enforceable and that Dunkin had a right to damages. The court determined that Dunkin had agreed to raise the child, and that although he was not the legally presumed or natural father he shouldn't be treated any differently from one who is. Because Dunkin hadn't appealed the denial of his custody action, the court could not reinstate his right to seek custody. The court limited its decision only to the issue of whether damages were an appropriate remedy.

Father than seizing a rare opportunity to grant a badly needed weapon of deterrence against parental kidnapers, the court stated that father could not sue for emotional distress or for any loss of relationship with his child. No punitive damages would be allowed. The only thing that Dunkin could get would be compensation for his economic loss. In failing to seize the moment, the court determined that allowing

damages might be harmful to the child and to society. So much for the child's best interests. So much for justice.

The *Dunkin* decision represents a lost opportunity to protect the deserted parent's custodial rights and to punish with punitive damages the parents who snatch their children from the other parent. The absconding parent takes it upon himself or herself to decide the other parent's fitness, a decision that should be left to the family law court. In the end, both the disenfranchised parent and the children suffer. And as the Fagan situation represents, criminal penalties do little in the way of deterring such abhorrent conduct.

Where such custodial interference has occurred, damages, especially punitive ones, should be allowed. After all, we are talking about the wrongful breakup of families in the era of "family values." Surely, Fagan would not have left that courthouse smiling if he had been ordered to pay Kurth a cool million. Perhaps Boskey would have thought twice about taking her child to Wisconsin if she knew that she might spend years working to pay off Dunkin.

It is not unreasonable to conclude that Kurth, Dunkin or the children suffered emotional distress. We award damages in tort actions where someone has lost a child or a limb. We should also award damages where a parent has unreasonably caused another parent to lose a child. In theory such litigation could be damaging to children, but so is the loss of the other parent's love and affection.

We compensate for damages monetarily. The damages sustained by people such as Dunkin and Kurth are worthy of compensation. True, money will never make up for the harm that has come to themselves and their children. It also doesn't replace lost limbs or loved ones killed due to negligence. But it might help end such horrendous conduct.

