

CUSTODIAL INTERFERENCE BY RELATIVE

This instruction is drafted under the felony branch of G.L. c. 265, § 26A. It may be adapted for the misdemeanor branch of the same offense by eliminating the fifth element and the corresponding statutory language.

The defendant is charged with having violated section 26A of chapter 265 of our General Laws, which provides as follows:

“Whoever, being a relative of a child less than eighteen years

old,

without lawful authority,

holds or intends to hold such a child permanently or for a

protracted period,

or takes or entices such a child from his lawful custodian

[and does so] by taking or holding [the] child

(outside the Commonwealth)

(or) (under circumstances which expose the [child] taken

or enticed from lawful custody to a risk which

endangers his safety)

shall be punished”

In order to prove that the defendant is guilty of this offense, the Commonwealth must prove five things beyond a reasonable doubt:

First: That the defendant is a relative of the child involved;

Second: That the child was less than 18 years of age at the time;

Third: The Commonwealth must prove *either* that the defendant held or intended to hold the child permanently or for a protracted period, *or* that the defendant took or enticed the child from his (her) lawful custodian;

Fourth: The Commonwealth must prove that the defendant did so without lawful authority; and

Fifth: The Commonwealth must prove that the defendant *either* took or held the child outside Massachusetts *or* did so in a way which exposed him (her) to a risk which endangered his (her) safety.

NOTES:

1. **Custody of child born in wedlock.** “In making an order or judgment relative to the custody of children pending a controversy between their parents, or relative to their final possession, the rights of the parents shall, in the absence of misconduct, be held to be equal, and the happiness and welfare of the children shall determine their custody or possession.” G.L. c. 208, § 31. A parent who takes minor children from the other spouse and removes them from the Commonwealth at a time when there were no pending proceedings concerning the marriage or their custody cannot be convicted under G.L. c. 265, § 26A. *Commonwealth v. Beals*, 405 Mass. 550, 541 N.E.2d 1011 (1989).

2. **Custody of child born out of wedlock.** “Prior to or in the absence of an adjudication or voluntary acknowledgment of paternity, the mother shall have custody of a child born out of wedlock.” G.L. c. 209C, § 10(b).

3. **Defendants with legal custody.** A commentator has suggested that the “takes or entices” branch of § 26A may be applied even to a parent with legal custody or joint legal custody who interferes with the visitation or joint custody rights of the other parent. Green, “The Crime of Parental Kidnapping in Massachusetts,” 70 Mass. L. Rev. 115 (1985).

4. **Related offenses.** General Laws c. 265, § 26A also punishes anyone, whether or not a relative, who “takes or entices from lawful custody any incompetent person or other person entrusted by authority of law to the custody of another person or institution.” This branch of the statute would apparently apply to a non-relative’s interference with child custody if a kidnapping charge (G.L. c. 265, § 26) is unavailable because the interference was

consensual.

5. **Removal of child from Commonwealth after divorce.** “A minor child of divorced parents who is a native of or has resided five years within this commonwealth and over whose custody and maintenance a probate court has jurisdiction shall not, if of suitable age to signify his consent, be removed out of this commonwealth without such consent, or, if under that age, without the consent of both parents, unless the court upon cause shown otherwise orders.” G.L. c. 208, § 30.

6. **Statement of reasons required if imprisonment not imposed.** A jury session judge sentencing for this or one of the other crimes against persons found in G.L. c. 265 who does not impose a sentence of incarceration “shall include in the record of the case specific reasons for not imposing a sentence of imprisonment,” which shall be a public record. G.L. c. 265, § 41.