

Child Stealing s 363

A. (s363(1)(a))

The prosecution must prove that:

1. The defendant took¹ or enticed away or detained² the child.

Entice away means simply to take away by means of deception rather than by force.

2. The taking or enticing or detaining was forcible or fraudulent.³

The word fraudulent refers to the means used to take, entice away or detain. The means used must involve some deception or false pretence or some other trickery.

3. The child was at the time under 16 years.

4. The defendant intended to:

5. deprive the parent,⁴ guardian or other person who had lawful care of the child or possession of the child; or

6. steal any article upon or about the person of the child.

Child stealing is an offence against the possessory rights of a parent or other person having the lawful care of the child. There must be an intention to deprive the parent or other person of the possession of the child. It is not necessary that the defendant intended to permanently deprive the parent of possession. It would be sufficient to intend to only temporarily deprive the parent of possession of the child⁵.

B. (s363(1)(b))

The prosecution must prove that:

¹ As to the meaning of “took”, the defendant must have in some way contributed to the child’s leaving the possession of the parent or arranged or actively participated in the child’s leaving: See *R v Johnson* [1957] St R Qd 594; *R v Timmins* (1860) Bell CC276.

² The term “detain” should be given its ordinary and natural meaning. It has a variety of meanings including “keep in confinement”, “hold back, delay, stop”. See *R v Awang* [2004] 2 Qd R 672 per Williams JA.

³ Force or fraud may be practiced on the child or parent or guardian: *R v Bellis* (1893) 62 LJMC 155.

⁴ s363(2) provides that “parent” includes adoptive parents to the exclusion of any natural parent.

⁵ *R v Baille* (1859) 8 Cox CC 238; *R v Timmins* (1860) Bell CC 276

1. **The defendant received or harboured**
2. **A child under 16 years**
3. **Knowing the child to have been so taken or enticed away or detained.**
4. **The defendant intended to:**
 - (a) **deprive the parent⁶, guardian or other person who had lawful care of the child of possession of the child; or**
 - (b) **steal any article upon or about the person of the child.**

It is a defence to either A or B above to prove that the defendant claimed in good faith a right to the possession of the child, or, in the case of a child, not being an adopted child, whose parents were not married to each other at the time of conception and have since not married each other, to prove that the defendant is the child's mother or claimed in good faith to be the child's father (s363(3)).

Subsection (3) provides a defence where the onus is on the defendant to prove the defence on the balance of probabilities: *R v Seery* [1995] QCA 389. It is suggested that the authorities on the interpretation of s22 may be applicable to the interpretation of s363(3): *R v Campbell* [2009] QDC 61 (McGill DCJ). The defendant must prove that at the relevant time he or she in good faith believed he or she had a right to take possession of the child. In this context the term "in good faith" simply means honestly. The term "claimed" does not mean that the defendant has to make an express claim out loud at the time.

⁶ s363(2) provides that "parent" includes adoptive parents to the exclusion of any natural parent.