

Child Stealing: s 363

Legislation

363 Child-stealing

- (1) Any person who, with intent to deprive any parent, guardian, or other person who has the lawful care or charge, of a child under the age of 16 years, of the possession of such child, or with intent to steal any article upon or about the person of any such child—
 - (a) forcibly or fraudulently takes or entices away, or detains, the child; or
 - (b) receives or harbours the child, knowing it to have been so taken or enticed away or detained;

is guilty of a crime, and is liable to imprisonment for 7 years.

- (2) It is a defence to a charge of any of the offences defined in this section to prove that the accused person claimed in good faith a right to the possession of the child, or, in the case of a child whose parents were not married to each other at the time of its conception and have not since married each other, not being a child who has been adopted as aforesaid, is its mother or claimed in good faith to be its father.

- (3) In this section—

corresponding parentage order means an order under a law of another State that provides for a parentage order similar to a parentage order under the *Surrogacy Act 2010*.

parent includes—

- (a) for a child who has been legally adopted in Queensland or in another State—a person who has adopted the child; or
- (b) for a child whose parentage has been transferred by a parentage order under the *Surrogacy Act 2010* or a corresponding parentage order—a person who is a parent of the child under the order; or
- (c) for a child whose parentage has been transferred under a cultural recognition order made under the *Meriba Omasker Kaziw Kazipa*

(Torres Strait Islander Traditional Child Rearing Practice) Act 2020—
a person who is a parent of the child under the order;

but does not include a natural parent of the child.

Commentary

It is an offence to forcibly or fraudulently take, entice away or detain a child under 16 with the intention to deprive a parent, guardian or carer of possession of the child or to steal any article on the person of a child (**‘offence A’**).

It is also an offence to receive or harbour the child, knowing the child has been taken, enticed away or detained: (**‘offence B’**)

Meaning of ‘forcibly or fraudulently took or enticed away or detained’

To ‘take’ a child, 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.

To entice away a child means to take away the child by means of deception rather than force.

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.

The taking or enticing or detaining must be forcible or fraudulent. 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. The force or fraud may be practiced on the child or parent or guardian: *R v Bellis* (1893) 62 LJMC 155.

Intention

The defendant must have intended to deprive the parent, guardian or other person who had lawful care of the child or possession of the child or steal any article upon or about the person of the child.

The term ‘parent’ includes adoptive parents to the exclusion of any natural parent: s363(3).

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

Defence

It is a defence to either offence A or offence B above to prove that the defendant claimed in good faith a right to the possession of the child. Alternatively, 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, it is a defence to prove that the defendant is the child's mother or claimed in good faith to be the child's father: s363(2).

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.

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 s 22 may be applicable to the interpretation of s 363(2): *R v Campbell* [\[2009\] QDC 61](#) (McGill DCJ).

Suggested Direction

A. Offence A (s363(1)(a))

The prosecution must prove that:

1. The defendant took or enticed away or detained 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.

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:

(a) deprive the parent, guardian or other person who had lawful care of the child or possession of the child; or

(b) 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 child.

B. Offence B (s363(1)(b))

The prosecution must prove that:

- 1. The defendant received or harboured**
- 5. A child under 16 years**
- 6. Knowing the child to have been so taken or enticed away or detained.**
- 7. The defendant intended to:**
 - (a) deprive the parent, 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.