

INTERFERENCE WITH CUSTODY
(N.J.S.A. 2C:13-4a(4))

Count _____ of the indictment charges the defendant with the crime known as interference with the custody of children. Specifically, Count _____ alleges that the defendant:

[Read the relevant count of the indictment].

The statute upon which this count of the indictment is based reads, in pertinent part, as follows:¹

A person, including a parent, guardian or other lawful custodian, is guilty of interference with custody if he:

After the issuance of a temporary or final order specifying custody, joint custody rights or parenting time, takes, detains, entices or conceals a minor child from the other parent in violation of the custody or parenting time order.

In order for you to find the defendant guilty of the crime of interference with the custody of children, the State must prove beyond a reasonable doubt the following elements:

1. That there was in existence at the time alleged in the indictment a **[choose relevant terms]** temporary or final court order specifying custody, joint custody rights or parenting time;
2. That _____ was/were [a] minor child[ren] at the time alleged in the indictment;
3. That the defendant took, detained, enticed or concealed _____ [the minor child(ren)] from the other parent;
4. That this taking, detaining, enticing or concealing was in violation of the court's custody or parenting time order; and
5. That the defendant acted knowingly.

The first element that the State must prove beyond a reasonable doubt is the existence of a court order during the time period alleged in the indictment which is either a temporary or final order specifying custody, joint custody rights or parenting time. Such an order would establish the rights under which each parent is guaranteed custody, joint custody rights or parenting time

¹ Throughout this charge, the trial judge should select the appropriate terms that are relevant to the charges and delete reference to the other terms. For example, select "custody" or "parenting time" or select the appropriate alleged course of action from the choices of "takes, detains, entices or conceals."

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with his or her minor child[ren]. A “parent” as used in this statute means a parent, guardian or other lawful custodian of a minor child.²

The second element that the State must prove beyond a reasonable doubt is that _____ was/were [a] minor child[ren]. A minor child is one who is/was less than eighteen years of age at the time alleged in the indictment.³

The third element that the State must prove beyond a reasonable doubt is that the defendant took, detained, enticed or concealed _____ [the minor child(ren)] from the other parent.⁴

The fourth element that the State must prove beyond a reasonable doubt is that this taking, detaining, enticing or concealing was in violation of the custody or parenting time order. The defendant’s act must have actually deprived ____ (the other parent) of those rights.⁵

[CHARGE WHERE APPROPRIATE:⁶]

The defendant contends that the evidence shows that [the other parent] had, by (his/her) conduct, waived (his/her) rights to custody or parenting time under the court order, or, alternatively, that (he/she) and the defendant had, by their mutual conduct, modified the terms of the agreement regarding custody or parenting time. The State must disprove this contention beyond a reasonable doubt before you can find that it has carried its burden of proving this fourth element beyond a reasonable doubt.]

[CHARGE IN ALL CASES]

Finally, the State must prove beyond a reasonable doubt that the defendant acted knowingly. A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that his/her conduct is of that nature, or that such circumstances exist, or he/she is aware of a high probability of their existence. A person acts

² N.J.S.A. 2C:13-4g.

³ See 1971 Commentary as reprinted in Comments to N.J.S.A. 2C:13-4 (Cannel, Criminal Code Annotated (Gann, 2001-02 Ed.)).

⁴ State v. Jones, 346 N.J. Super. 391 (App. Div. 2002). The terms “took,” “detained,” “enticed” or “concealed” are to be given their ordinary definitions as used by “ordinary citizens in everyday conversation.” Id. at 400 (quoting State v. Afanador, 134 N.J. 162, 171, 175 (1993)).

⁵ Jones, 346 N.J. Super. at 401 .

⁶ Jones, 346 N.J. Super. at 401, 403. It is the court’s obligation to relate the law to the facts, especially where the evidence indicates that the parties may have modified the court order or agreement. Id. at 401.

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knowingly with respect to a result of his/her conduct if he/she is aware that it is practically certain that his/her conduct will cause such a result. “Knowing,” “with knowledge,” or equivalent terms have the same meaning.

Knowing is a state of mind and cannot be seen and can only be determined by inference from conduct, words or acts. Therefore, it is not necessary that witnesses be produced by the State to testify that a defendant said that he/she knowingly did something. His/Her knowledge may be gathered from his/her acts and his/her conduct and from all he/she said and did at the particular time and place and from all the surrounding circumstances reflected in the testimony [and from the evidence adduced at the trial].

AFFIRMATIVE DEFENSES

[Charge when applicable; select appropriate section(s)]

- I⁷ -

In this matter, the defendant has presented evidence that the taking, detaining, enticing or concealing of the minor child[ren] was done for the following reason(s):

(1) The defendant reasonably believed that the action was necessary to preserve the child (or children) from imminent danger to (his/her/their) welfare. However, no defense shall be available pursuant to this subsection if the defendant did not, as soon as reasonably practicable but in no event more than 24 hours after taking (detaining, enticing, or concealing) a child (or children) under his/her protection, give notice of the child’s (or children’s) location to the police department of the municipality where the child[ren] resided, the office of the county prosecutor in the county where the child[ren] resided, or the Division of Youth and Family Services in the Department of Human Services; or

(2) The defendant reasonably believed that the taking or detaining of the minor child[ren] was consented to by the other parent, or by an authorized State agency; or

(3) The child, being at the time of the taking or concealment not less than 14 years old, was/were taken away at (his/her/their) own volition and without purpose to commit a criminal offense with or against the child[ren].

⁷ N.J.S.A. 2C:13-4c. The affirmative defenses set forth in this subsection must be proved by the defendant by clear and convincing evidence. Ibid. Please note that this subsection refers to an “actor,” and therefore, may not be limited to a “parent” as defined by N.J.S.A. 2C:13-4g.

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**[CHARGE FOLLOWING PARAGRAPHS WHEN SUBSECTIONS 1 OR 2
ARE ALLEGED]**

“Reasonably believes” designates a belief the holding of which does not make the actor reckless or criminally negligent.⁸

A person acts recklessly when he/she consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his/her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him/her, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor’s situation.⁹

A person acts negligently when he/she should be aware of a substantial and unjustifiable risk that the material element exists or will result from his/her conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his/her conduct and the circumstances known to him/her, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.¹⁰

An actor is “reckless” or “criminally negligent” when the actual result must be within the risk of which the actor is aware or, in the case of criminal negligence, of which he/she should be aware, or, if not, the actual result must involve the same kind of injury or harm as the probable result and must not be too remote, accidental in its occurrence, or depend on another’s volitional act to have a just bearing on the actor’s liability or on the gravity of his behavior.¹¹

[CHARGE IN ALL CASES]

The defendant must prove this defense by clear and convincing evidence. By clear and convincing evidence, I mean evidence which produces in your minds a firm belief as to the truth of the precise fact being asserted. This is a lesser burden of proof than beyond a reasonable doubt. Evidence may be uncontroverted, but yet not clear and convincing. On the other hand, evidence may be clear and convincing even in the absence of corroboration, and even if it has

⁸ N.J.S.A. 2C:1-14j.

⁹ N.J.S.A. 2C:2-2b(3).

¹⁰ N.J.S.A. 2C:2-2b(4).

¹¹ N.J.S.A. 2C:2-3c.

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been contradicted.

Although the burden rests upon the defendant to establish this affirmative defense by proof of clear and convincing evidence, the burden of proving the defendant guilty of the offense charged here beyond a reasonable doubt is always on the State, and that burden never shifts.

If you are satisfied by clear and convincing evidence that the defendant has established the affirmative defense just mentioned above, then you must find defendant not guilty.

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It is an affirmative defense to this prosecution that the defendant, a parent having the right of custody, reasonably believed that he/she was fleeing from imminent physical danger from _____ (the other parent), provided that the defendant, as soon as reasonably practicable,:

(1) Gives notice of the child's (or children's) location to the police department of the municipality where the child resided, the office of the county prosecutor in the county where the child resided, or the Division of Youth and Family Services in the Department of Human Services; or

(2) Commences an action affecting custody in an appropriate court.

A "parent" means a parent, guardian or other lawful custodian of a minor child.¹³

"Reasonably believes" designates a belief the holding of which does not make the actor reckless or criminally negligent.¹⁴

A person acts recklessly when he/she consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his/her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him/her, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.¹⁵

A person acts negligently when he/she should be aware of a substantial and unjustifiable

¹² N.J.S.A. 2C:13-4d. This subsection, by its definition, appears to be limited to a custodial "parent" as defined by N.J.S.A. 2C:13-4g. Unlike N.J.S.A. 2C:13-4c, this subsection does not place a burden on the defendant; rather, it requires the State to disprove the defense alleged. This distinction is noted throughout the text and the associated footnotes.

¹³ N.J.S.A. 2C:13-4g.

¹⁴ N.J.S.A. 2C:1-14j.

¹⁵ N.J.S.A. 2C:2-2b(3).

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risk that the material element exists or will result from his/her conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his/her conduct and the circumstances known to him/her, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.¹⁶

An actor is "reckless" or "criminally negligent" when the actual result must be within the risk of which the actor is aware or, in the case of criminal negligence, of which he/she should be aware, or, if not, the actual result must involve the same kind of injury or harm as the probable result and must not be too remote, accidental in its occurrence, or depend on another's volitional act to have a just bearing on the actor's liability or on the gravity of his behavior.¹⁷

If the State has failed to disprove any element of this affirmative defense beyond a reasonable doubt¹⁸, then you must find the defendant not guilty.

CHARGE IN ALL CASES

If you are satisfied, beyond a reasonable doubt, that the State has proven each of the elements of this offense, as I have defined them to you, [and you have found that the defendant has not proven by clear and convincing evidence the existence of the affirmative defense¹⁹,] or, [and you have found that the State has disproved an element of the affirmative defense beyond a reasonable doubt²⁰], then you must find the defendant guilty. If you find, however, that the State has failed to prove any of the elements of the crime beyond a reasonable doubt [or, if you have found by clear and convincing evidence that the defendant has proven the affirmative defense²¹,] or, [if you are satisfied that the State has not disproved any element of the affirmative defense beyond a reasonable doubt²²], then you must find the defendant not guilty.

GRADATION

¹⁶ N.J.S.A. 2C:2-2b(4).

¹⁷ N.J.S.A. 2C:2-3c.

¹⁸ State v. Galiyano, 178 N.J. Super. 393, 397 (App. Div.), certif. denied, 87 N.J. 424 (1981).

¹⁹ For an affirmative defense as set forth under N.J.S.A. 2C:13-4c.

²⁰ For an affirmative defense as set forth under N.J.S.A. 2C:13-4d.

²¹ For an affirmative defense as set forth under N.J.S.A. 2C:13-4c.

²² For an affirmative defense as set forth under N.J.S.A. 2C:13-4d.

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[CHARGE WHEN APPROPRIATE]

If you have found that the State has proven every element beyond a reasonable doubt [and found that the defendant has not established the affirmative defense by clear and convincing evidence²³,] or, [found that the State has disproved an element of the affirmative defense beyond a reasonable doubt²⁴], then you must further determine whether the State has proven (either or both of) the following additional element(s) beyond a reasonable doubt and record your finding(s) on the verdict sheet:

[CHOOSE APPROPRIATE SECTION(S)]

(1) Did the defendant take, detain, entice or conceal the child[ren] outside the United States; or

(2) Did the defendant take, detain, entice or conceal the child[ren] for more than 24 hours.

²³ For an affirmative defense as set forth under N.J.S.A. 2C:13-4c.

²⁴ For an affirmative defense as set forth under N.J.S.A. 2C:13-4d.