

# Custody Abduction Risk Factors Unique to Islamic Countries

by Kristine Uhlman/UmHani

## I. Introduction

Custody abduction is the taking of a child by a non-custodial parent. It is an egregious act; a crime against a child by a child's own parent. Although the parent may be motivated by resentment or may be acting in retaliation against his spouse, a parent who abducts a child from the United States to the "Islamic Countries" often emphasizes the conviction that the act is in the best interest of the child. For the purposes of this paper, the Islamic Countries shall be understood as those countries that follow the *Shari'a* law in addressing family issues such as marriage, divorce, and child custody, and include the nations of Saudi Arabia, Egypt, The United Arab Emirates, Jordan, Syria, Iran, and the areas under the control of the Palestinian Authority.

Islamic Countries have become a safe-haven for those who commit custody abduction, due in part, to the gender-based custody and divorce laws found there – laws strongly supported by Muslim culture and religion. In the Islamic Countries, there are no legal processes that would require the return of an abducted child to the United States. Further, there is little cultural support for such a return, as the act of abduction is often seen as a courageous act of rescue from life in a country with traditions contradicting those of Islam.

Notwithstanding the foregoing, it must be noted that: a) although Islamic Countries have become a safe-haven for those committing custody abductions, the governments of the Islamic Countries **do not actively promote custody abduction**; and b) prohibition of access to a loving parent is **a non-Islamic act and not justified within the Muslim community**.

The U.S. Department of State, Office of Children's Issues, has kept statistics on the incidence of custody abductions from the United States since May 1997. Such statistics indicate that at least one dual-national American child is abducted into the Islamic Countries every week. Although several custody abductions

by mothers have been reported, the vast majority of abductors to the Islamic Countries are fathers. The purpose of this article is to provide an understanding of the legal authority of the father under Islamic law.

For U.S. citizens married to a Muslim foreign national from an Islamic Country, it is imperative that the basic legal rights and restrictions resulting from a mixed marriage, as well as from residency overseas, be understood. By understanding the Islamic cultural traditions and religious imperatives that could condone removal of a child from a parent following divorce, the risks of custody abduction pursuant to a divorce might be reduced. For example, a U.S. citizen should recognize and understand that in the Islamic Countries the physical custody of even an infant child will be transferred to its father with the remarriage of the mother. Further, exposing a Muslim child to a religion other than Islam may be perceived as putting the child's spiritual upbringing at risk, and custody could be transferred to the father. In the absence of an amicable divorce, the U.S. resident spouse should be aware of the protective measures available through the U.S. legal system to protect the child's right of access to both parents.

## II. Risk of Custody Abduction is a Function of Likelihood and Remedy

The risk of custody abduction is a function of two factors:

- the likelihood that a parent will abduct his or her child or children; and
- the legal remedy available to the left-behind parent providing for the return of the child.

The likelihood that a parent will abduct his or her child is closely linked to motivation. In the case of custody abductions to Islamic Countries, the motivation to comply with social and religious expectations is great for the devout Muslim, who wishes to provide the child with a "correct religious upbringing" and

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whose act of removing the child from the United States is often seen as a courageous act of rescue. With regard to legal remedies, in the Islamic Countries there are no legal processes to allow for the return to the United States of a child abducted by his or her father. The father ultimately holds both legal and physical custody of a child of divorce.

### III. The Likelihood of Abduction

In many custody abductions to Islamic Countries, abductors have sought to justify the removal of a child from the United States with reference to the *Koran*, the Islamic community and *Shari'a* law. According to the *Koran*, a Muslim is a man or woman who has submitted (the word "*Islam*" translates as "surrender") to God and His demand that human beings behave with one another with justice, equity, and compassion. Social justice being the crucial virtue of Islam, Muslims are commanded as their first duty to build a community characterized by compassion, placing the preservation of community and family above that of the individual. (See, Karen Armstrong, *Islam, A Short History*, Random House, New York, 2000.) This elevation of the responsibility to the community over that of the individual is crucial to understanding the application of Islamic law to the family. The community, the social traditions, and the religion become one and the same, with the laws governing the family taking the stature of the word of God.

*Shari'a* law assigns responsibilities within the family by gender of the parent and age of the child. Religious affiliation is determined by that of the father. Although a man may marry a non-Muslim woman, the children are always considered Muslim. A Muslim woman may not marry a non-Muslim man, as the religious upbringing of the children of the marriage would be in jeopardy. Differences between the religious sects, the larger two being the *Shia'* and *Sunni* traditions, as well as regional and tribal affiliations, may contribute to slight variations, but generally the preceding is true across most of the Islamic Countries.

According to the *Koran*, God created man and woman "of the same cell" and they are equal in their responsibilities in the sight of God, the only distinction being in their marriage. The *Koran* states that every unit must have a leader; the man is seen as the leader of the family, and thus, in the Islamic social system, the

husband has the final authority over the family. Therefore, if a father perceives his religiously mandated responsibility to his children is in jeopardy, he is likely to remove his children to a jurisdiction where he can exercise his authority.

#### A. Spiritual Guardianship of Children

According to Islam, the most important responsibility of a parent is the role of spiritual guardian to assure the Islamic upbringing of the child. The spiritual guardian is usually the biological father; but may be a full-blooded male relative of the father. As the male is considered the authority over the woman within the family, spiritual leadership is inconsistent with the woman's role, therefore, spiritual guardianship cannot be carried through the mother nor through the mother's line.

The responsibility for spiritual guardianship lasts until puberty for a male child (considered to be fifteen lunar years), unless such child is not considered to be responsible by that time. A female child remains under the authority of the spiritual guardian as long as she remains a virgin, unless she remains unmarried past the customary age or acquires sufficient understanding to manage her own affairs.

As the spiritual guardian of his children, the father can claim with justification in the Islamic Countries that allowing his child to remain with their mother in the United States would violate his spiritual duties under Islam. Spiritual guardianship might best be understood in Western terms as the role of legal guardian. Like the legal guardian, the spiritual guardian must provide financial support for the child. As the spiritual guardian, the father always has the right and responsibility to decide where a child lives, if the child can travel, and how the child is to be educated. Notwithstanding the fact that the father maintains legal custody of the child, there is a period of physical custody that may be held by the mother.

#### B. Physical Custody and Guardianship Custodial Transfer

The biological mother is responsible for the weaning, physical care and upbringing of a young child until the child is of the age of spiritual awareness and ready for guardianship custodial transfer. In the absence of the moth-

er; the responsibility devolves upon the mother's family, although expenses are borne by the father or are paid from the child's property. The age at which the period of physical dependence terminates varies: some local interpretations fix it at the age of seven years for a son and nine for a daughter; others at nine and eleven years, respectively. Certain Islamic jurists have not set an age limit but have left it at the age when the child can do without a woman's help, dress and feed himself/herself, and look after his/her household affairs. In the case of divorced parents, it is permissible for a daughter to remain with her mother if the parents agree, but such an agreement cannot be made for a son, who, after the age of physical dependence, "needs to learn what is customary for men to know." *Al-Bukhari Hadith, 2.1.8*

Except under extreme and unusual circumstances, an un-weaned infant cannot be legally separated from his Muslim mother. Indeed, the cultural and religious tradition within the Islamic world honors the bond between mother and child to the extent that if a mother is imprisoned, her young children often remain with her in her prison cell. Over half of the population of the Riyadh Woman's Prison (Saudi Arabia) consisted of children and infants during the author's imprisonment in 1983.

Many American women have followed their children into their ex-husband's country of residence so as to exercise their Islamic responsibilities as physical guardian of their young children. To do so, however, the mothers have had to litigate in *Shari'a* court to obtain permission to have access to their children and recognition of their responsibilities to wean their children. In some instances, the fathers have successfully convinced the court that a child's religious upbringing would be jeopardized if raised by his/her biological mother, and the mother's responsibility of physical guardianship has been terminated. In all circumstances, physical custody of the child transfers to the father, or the father's family, after expiration of the period of physical dependence.

#### IV. Lack of Legal Remedies

It is important to understand the basics of Islamic law as they relate to the custody of children because the roles and responsibilities

of the Muslim father have been cited by overseas Islamic courts as justification for removal of a disputed child from the United States following divorce.

Although separating a child from access to a loving parent is a non-Islamic act and not justified within the Muslim community, the responsibilities of a child's upbringing always remain with the father. The father (or his family) is not considered by the courts to be an abductor if he exercises his responsibility to hold physical custody of his child following a divorce.

In addition, the Islamic courts have not recognized divorce/custody decisions made within the jurisdiction of a foreign secular court. The Islamic Countries are not parties to the *Hague Convention on the Civil Aspects of International Child Abduction*, The Hague, October 25, 1980, 42 U.S.C. §11601, et seq.), and there are no bilateral treaties in effect between the United States and each of the Islamic Countries that address parental child abduction. In sum, there are no legal means by which an abducted American child can be returned to the United States if taken into an Islamic Country by a biological father:

##### A. The Muslim Father Ultimately Holds Legal Custody

According to the *Koran*, the Muslim father is always responsible for the religious upbringing of the child. Because of this responsibility, the father, or a family member selected by the father, is ultimately granted custody.

The father always has the right and responsibility to decide where a child lives, if such child can travel, and how the child is to be educated. Because of this, a child of any age, or custodial mother and child, can be prohibited from travel outside the jurisdiction of the Islamic country of residence. Many American mothers of children abducted to the Islamic Countries have re-entered the resident country of the father and have obtained legal physical custody of the children through the *Shari'a* courts. However, in all instances, the mothers and children were not allowed to travel, including to return to the United States, without the father's permission. In addition, in Saudi Arabia, a father can prohibit travel into the country of a non-Saudi biological mother hoping for visitation with her abducted child.

This is consistent with the Islamic prohibition for women traveling without a *mahram* (escort) and the Saudi requirement for Saudi sponsorship to obtain an entry visa – if the woman does not have a *mahram* who is also a Saudi national, she must obtain permission from her ex-husband to enter the country. All travel to the Kingdom must be sponsored by a Saudi national – up until recently there were only three entry visa classes: Family, Business, and *Haj* (pilgrimage).

Exiting an Islamic Country without appropriate documentation and permission could result in the serious risk of arrest and imprisonment if the woman ever was to attempt to re-enter the country. Many American mothers who have illegally exited several of the Islamic Countries have been charged with traveling without their husband's permission, and the warrants for their arrest have been documented with the U.S. Department of State. A decision from the *Shari'a* court, as translated from the Arabic and transmitted to the U.S.-based mother by the Ministry of Foreign Affairs for the United Arab Emirates, states:

...The Court has, in presence, decreed that the Defendant's ("Jane Doe," American citizen) right in custody of the children of the Plaintiff ["Abdullah" \_\_\_\_\_, American citizen] .... is forfeited unless she resides with them [the children] in the country where their father resides and, she is hereby obliged to bear the costs of the case.

*Claim of Fadi Mitri, before the Abu Dhabi Shari'a Court of First Instance, Personal Jurisdiction Dept., Case NO. 87/2000 registered 23-5-1999. Translation and notification received from the United Arab Emirates Ministry of Foreign Affairs, November 11, 1999.*

In this particular case, the mother had been resident in the United States with her children the year previous to the Islamic Court order, and was not notified of the hearing until after the decision had been made. The Muslim religion of the father allowed him the right to take his divorce action before the *Shari'a* court in the United Arab Emirates; he had established residency in the United Arab Emirates by employment.

## B. Islamic Divorce And Remarriage

A left-behind parent in the U.S. entering the abductor's Islamic Country of residence to lit-

igate for access to her abducted children can do so only if she has been divorced by the abductor; otherwise she would be returned to her husband's household and her freedom to travel is controlled by him. However, divorce is not a simple matter.

A complete Islamic divorce consists of three divorce declarations documented by the *Shari'a* court. The Islamic divorce process recognizes that the initial declaration of divorce may be the result of words spoken in anger; and the need to obtain three independent declarations allows for the careful consideration of the repercussions of the divorce. This process has often been cited as encouraging reconciliation between the spouses, as the parties are still considered married until the third declaration.

Until the third declaration of Islamic divorce, the divorce process is revocable in Islam, as seen in wording below from the *Shari'a* court and translated from the Arabic and transmitted by the Ministry of Foreign Affairs of the United Arab Emirates — a case where an American woman illegally fled the United Arab Emirates without her husband's permission to travel.

...[the husband is granted] A first revocable divorce, therefore, as long as she is in her viduity period, he may take her back without her consent and without a new [marriage] contract and dowry, she may start her viduity period as of the date of divorce...

*Claim of Fadi Mitri, Id.*

The viduity period is that period of time that is necessary to establish the woman is not pregnant, and typically corresponds with proof of menses. If pregnant, divorce cannot proceed until forty-five days after the birth of a child. Until the final and third declaration of the intent to divorce, the wife remains legally bound to her husband and she cannot travel or reside outside of his household without his permission. As the order above indicates, the husband "may take her back [to his household] without her consent." *Id.*

The *Shari'a* court does not recognize divorces obtained in secular courts of law, and perhaps surprisingly, Islamic divorces outside the home country of the husband may not always be recognized. For example, Egyptian divorce law states that if one of the parties of a divorce is

Egyptian, then Egyptian law is the only enforceable law and the divorce action must occur in Egypt. Al Alami and Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World*, 1996. Several American women, having obtained Islamic divorces from mosques in the U.S., have entered the resident country of their abducted children in an effort to litigate for access, only to discover that they have not been legally divorced from their ex-husbands and are subject to their husbands' authority.

A change in marital status of a custodial mother may exacerbate a Muslim father's concern for the appropriate upbringing of a disputed child and thereby increase the risk of abduction. Indeed, according to the religious tenets of Islam, as well as its cultural underpinnings, custody is considered voluntarily relinquished by a custodial mother if she remarries. Faced with the remarriage of his former spouse, a responsible Muslim father might feel obligated to take responsibility over the upbringing of his children, and likely to seek legal custody of his children or may even decide to abduct the children.

A devout Muslim American woman divorced her Egyptian husband under both an American civil order and under *Shari'a* law from a Texas mosque. She later re-married another Muslim man. The Egyptian father abducted their 3-year old son to his homeland, and then accused his ex-wife of infidelity because the initial divorce was not concluded in Egypt. Not only did she lose rights of physical custody of her infant son, but given the fact that she had re-married, she was found to have committed infidelity and polygamy. She received the following legal notification in response to her efforts to gain access to her kidnapped son:

*...As for infidelity (that) was committed between the defendant, who professed Islam [the Muslim American mother], and [her new Muslim husband], in the presence of official document, the marriage contract, before being divorced of the claimed [her Egyptian ex-husband], so she committed infidelity and polygamy. The punishment of said crime, by virtue of Allah Holly Sharea [sic], is stoning till death or keeping her in house till death."*

*Claim of Mr. Said El Arabia Mohammed, before the South Cairo Court for Personal Affairs, January 18, 1999.*

So as to reduce the risks of custody abduction, following completion of a divorce under U.S. secular law, where the ex-wife is American and the ex-husband is from an Islamic Country, if the parties are still amicable, it is recommended that the Muslim father from an Islamic Country obtain a complete Islamic declaration of divorce from the *Shari'a* court of his homeland.

## V. Protective Measures to Reduce the Risk of Abduction

American parents (both mothers and fathers) face particular difficulties in attempting to gain access to an abducted child through the court systems in Islamic Countries. To date, there has never been the return of an abducted dual-national American child to the United States through the *Shari'a* legal process. Due to this evident lack of legal remedy, the identification of the likelihood of abduction and the establishment of preventative measures are important to protecting the child at risk.

A project conducted by the American Bar Association (ABA), *Obstacles to the Recovery and Return of Parentally Abducted Children, Training, Technical Assistance, and Project Resources*, under the direction of Linda K. Girdner, Ph.D., Center on Children and the Law, evaluated risk factors and suggested protective measures to reduce the risk of abduction. Although the study evaluated both domestic and international incidents of abductions, many of the results are pertinent to clarification of risk and obstacles to recovery of abduction to the Islamic Countries.

The ABA project identified risk factors for abduction based on "similarities between characteristics of a particular case and social, demographic, psychological, and legal characteristics that describe actual abductors and their families." Girdner & Johnston, *A Judge's Guide to Risk Factors for Family Abduction and Child Recovery*, 22nd National Conference on Juvenile Justice, National Council of Juvenile and Family Court Judges and the National District Attorneys Association, May 21, 1995, at 2. The project also identified obstacles to recovery, referring "to the degree to which there are legal, procedural, policy and practical barriers to locating, recovering, and returning a child, in the event of an abduction." *Id.*

An extension to the ABA study addressed

protective measures (Johnston & Girdner, *Family Abductors: Descriptive Profiles and Preventive Interventions*, 2001) and consisted of a documentary study of six hundred thirty-four parental child abduction cases from all files opened by the district attorney in two California counties between 1987 and 1990. The study recommends several protective measures to reduce the risk of international abduction, some of which are paraphrased below:

- Children should be seen under supervised visitation, on a pre-determined schedule. Should the court decide that the non-custodial parent is to have unsupervised visitation, the following constraints are also recommended:

- Unsupervised visitation should occur only within the jurisdiction of the court and limited to locations accessible by automobile travel. Daily contact between the child and the custodial parent should be maintained, with travel plans, destinations, and daily contact telephone numbers provided to the custodial parent in advance of any travel.

- No air travel should be permitted. Minor children are not old enough to ascertain the ultimate destination of any air flight, and should not be put in a situation where they would have to decide if air travel is to a destination known to their custodial parent.

- The non-custodial parent should be restricted from removing the child from the jurisdiction of the court, and this restriction should be stated in the final custody/visitation order so as to facilitate enforcement action if an abduction were attempted.

- The non-custodial parent should be prohibited from applying for passports or obtaining a duplicate passport for himself or for the child without the written consent of the custodial parent or the court. It should be noted that there is no mechanism by which a foreign embassy would be obligated to reveal if a passport has been issued for a dual-national American child, and that it is not uncommon for a child to be added to a father's foreign passport based on documentation of paternity.

- Although it is recognized that multiple passports may exist, the non-custodial parent should be required to deposit his passports during scheduled visitations. It should be understood that regulations and policies

addressing the issuance of passports from the Islamic Countries are different than the approach taken by the U.S. government. Multiple and duplicate passports, sometimes in differing English spellings of the same name, have been found to be the norm.

- Orders pertaining to custody/visitation should be copied to the foreign embassy, with certification of receipt. However, it should be realized that the foreign embassy is not obligated to enforce Orders generated by the U.S. courts.

- The non-custodial parent should make every effort to obtain reciprocal orders from his native country or country of residence. In situations where the parents are not on amicable terms, this may be possible by offering in exchange for the reciprocal orders, the rights to unsupervised U.S.-based visitation with the child to the Islamic Country resident-father.

- The custody orders should reference the 1990 amendment to the *Immigration and Nationality Act*, which states that any alien who, in violation of a custody order issued by a court in the United States, takes or retains a child out of the United States may be excluded from the United States. 8 U.S.C. § (a)(9)(C)(I). In addition to parents who abduct their children, the exclusion should be applied to relatives or friends who assist in keeping the child abroad.

- The custodial parent should be encouraged to operate within the restrictions of the custodial orders, especially as they pertain to the non-custodial parent's rights of access to the child.

*Id.*

In addition to the recommendations above, it is also recommended that the non-custodial parent obtain a complete Islamic declaration of the divorce from his homeland or country of residence. The intent of obtaining a *Shari'a* declaration is to establish the legal personal status of the custodial mother prior to and in anticipation of any future need to travel to the father's country of residence. It should be recognized by the court that a *Shari'a* declaration of divorce does not address issues of custody, property distribution, or spousal maintenance.

## VI. Conclusion

Abducting parents are found in all countries and cultures, and are not unique to any one religion, but the clearly defined roles of parents in an Islamic marriage and their religious responsibilities may result in factors that could be perceived to condone the abduction of a child. Abducting parents, moreover, often seek refuge in locations familiar to them or otherwise supportive of this action.

In response to the risks of abduction, the U.S. citizen would be wise to become aware of actions to take to avoid such abductions. With respect to Islamic marriage, such actions include the acknowledgment of the importance of Islamic instruction for the child and the sensitivity to the cultural perspective of the father's loss of control over the responsibility for his children if the child was not to remain within his physical custody. An amicable relationship can sometimes be maintained between divorcing parents if the cultural and religious responsibilities towards the child are respected by both parents.

At a minimum, court orders relating to custody and visitation should state that the child may not be removed from the jurisdiction of the court, as once inside an Islamic Country the mother's access to the child can be limited, if not prohibited. In a heated custody dispute, however, protective measures such as supervised visitation may be the only means by which to assure the child maintains contact with both parents.



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