

**CUSTODIAL INTERFERENCE IN THE FIRST DEGREE**  
**(Relative of a Child)**  
**Penal Law § 135.50(1)**  
**(Committed on or after July 27, 1981)**

The (*specify*) count is Custodial Interference in the First Degree.

Under our law, a person is guilty of custodial interference in the first degree when, being a relative of a child less than sixteen years old, intending to hold such child permanently or for a protracted period, and knowing that he or she has no legal right to do so, he or she takes or entices such child from his or her lawful custodian and, with the intent to permanently remove the victim from this state, he or she removes such person from the state.<sup>1</sup>

The following terms used in that definition have a special meaning:

RELATIVE includes a:  
*[Select appropriate relative:*  
parent, ancestor, brother, sister, uncle, or aunt.<sup>2]</sup>

INTENT means conscious objective or purpose.<sup>3</sup> Thus, a person acts with intent to permanently remove another from this state when that person's conscious objective or purpose is to do so. And a person who is intending to hold a child permanently or for a protracted period is a person whose conscious objective or purpose is to do so.

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<sup>1</sup> The statute defining this crime, Penal Law §135.50, begins: "A person is guilty of custodial interference in the first degree when he commits the crime of custodial interference in the second degree ..." This charge incorporates the definition of custodial interference in the second degree as defined in Penal Law §135.45(1).

<sup>2</sup> Penal Law § 135.00(3).

<sup>3</sup> See Penal Law § 15.05(1).

Under our law, knowledge by the defendant of the age of the child is not an element of the offense and therefore it is not a defense to a prosecution for this offense that the defendant did not know the age of the child or believed his/her age to be sixteen years or more.<sup>4</sup>

In order for you to find the defendant guilty of this crime, the People are required to prove, from all of the evidence in the case, beyond a reasonable doubt, each of the following six elements:

1. That on or about (date), in the county of (county), the defendant, (defendant's name), took or enticed (specify) from his/her lawful custodian;
2. That the defendant did so knowing that he had no legal right to do so;
3. That the defendant did so intending to hold (specify) permanently or for a protracted period;
4. That the defendant was a relative of (specify), and (specify) was a child less than sixteen years old;
5. That the defendant removed (specify) from the state; and
6. That the defendant did so with the intent to permanently remove (specify) from the state.

*[NOTE: If the affirmative defense does not apply:*

If you find the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of this crime.

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<sup>4</sup> Penal Law § 15.20(3).

*[NOTE: If the affirmative defense applies:*

If you find that the People have not proven beyond a reasonable doubt any one or more those elements, you must find the defendant not guilty of Custodial Interference in the First Degree as charged in the \_\_\_\_\_ count.

On the other hand, if you find that the People have proven beyond a reasonable doubt each of those elements, you must consider an affirmative defense the defendant has raised. Remember, if you have already found the defendant not guilty of Custodial Interference in the First Degree as charged in the \_\_\_\_\_ count, you will not consider the affirmative defense.

Under our law, it is an affirmative defense to this charge of Custodial Interference in the First Degree that the victim had been abandoned or that the taking was necessary in an emergency to protect the victim because he/she has been subjected to or threatened with mistreatment or abuse.<sup>5</sup>

Under our law, the defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

In determining whether the defendant has proven the affirmative defense by a preponderance of the evidence, you may consider evidence introduced by the People or by the defendant.

A preponderance of the evidence means the greater part of the believable and reliable evidence, not in terms of the number of witnesses or the length of time taken to present the evidence, but in terms of its quality and the weight and convincing effect it has. For the affirmative defense to be proved by a preponderance of the evidence, the evidence that supports the affirmative defense must be of such convincing quality as to outweigh any evidence to the contrary.

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<sup>5</sup> Penal Law § 135.50.

Therefore, if you find that the defendant has not proven the affirmative defense by a preponderance of the evidence, then, based upon your initial determination that the People had proven beyond a reasonable doubt each of the elements of Custodial Interference in the First Degree, you must find the defendant guilty of that crime as charged in the \_\_\_\_\_ count.

On the other hand, if you find that the defendant has proven the affirmative defense by a preponderance of the evidence, then you must find the defendant not guilty of Custodial Interference in the First Degree as charged in the \_\_\_\_\_ count.