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Office of the Attorney General

Opinion No. 88-5  
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October 31, 1988

Sheriff E. Joe Wallace  
Sheriff of Cherokee County  
125 Baker Boulevard  
Gaffney, SC 29340

Dear Sheriff Wallace:

You asked this Office for an opinion as to two separate issues, both of which involved enforcement of Family Court orders. These inquiries necessarily involve analysis of a particular Family Court order and the jurisdiction under which the order was issued. This Office cannot foretell the provisions Family Court orders might contain specifically authorizing sheriffs to take particular actions. Therefore, this opinion is issued with the caveat that it applies only to Family Court orders which do not specifically authorize either of the below actions.

First, you asked whether the Sheriff's Department may enforce child visitation provisions of a Family Court order by picking the child up and returning the child to the custodial parent when the visiting parent has failed to return the child at the appointed hour. Enforcement of a child custody order by taking the child from the noncustodial parent and returning it to the custodial parent necessarily involves the Sheriff taking custody of the child, even if only for a brief period. No provisions of South Carolina law authorize an officer to take custody of a child solely on this basis.

The circumstances in which an officer may take a child into custody in the absence of a criminal offense are outlined in §20-7-610 S.C. Code Ann. (1976). Under §610(a), a law enforcement officer may take a child into emergency protective custody if (1) he has probable cause to believe that by reason of abuse or neglect there exists an imminent danger to the child's life or physical safety; (2) parents or guardians are either unavailable or do not consent to the child's removal from their custody; and (3) there is not time to apply for a court order pursuant to

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§20-7-736. As this section makes clear, emergency protective custody is justified only where there is a threat to the child's physical safety. In other circumstances, a Family Court order must be obtained in order to take a child into custody.

Secondly, you asked whether you may arrest an individual for violation of a Family Court restraining order even when that individual "has left the premises and is no longer in the area of the subject who obtained the original court order." That question has been passed to this Office previously, and was answered by a letter to The Honorable Joseph W. Board dated December 7, 1983 (a copy of that opinion has been enclosed for your convenience). Judge Board asked "may a sheriff or deputy sheriff arrest an individual for violation of a Family Court order where the sheriff or deputy sheriff has probable cause that the individual is or has been violating the Family Court order." Briefly, in that opinion, this Office concluded unless an individual has committed a criminal offense, that a sheriff may not arrest that individual solely for violation of a Family Court order without some judicial process authorizing that arrest.

The law remains unchanged except for one large and important exception. In 1984, the South Carolina Legislature enacted the Protection from Domestic Abuse Act (Abuse Act), codified at §§20-4-10 to 130, S.C. Code Ann., as amended, (1984). The Abuse Act provides that the Family Court may issue an order

- "(1) Temporarily enjoining the respondent from abusing, threatening to abuse, or molesting the petitioner or the person or persons on whose behalf the petition was filed.
- (2) Temporarily enjoining the respondent from communicating or attempting to communicate with the petitioner in any way which would violate the provisions of this chapter and temporarily enjoining the respondent from entering or attempting to enter the petitioner's place of residence, employment, education, or other location as the court may order."

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Violation of an order specifically issued pursuant to the Abuse Act is a crime. In fact, for the order to be proper, it must conspicuously state "Violation of this order is a criminal offense punishable by thirty days in jail or a fine of two hundred dollars or may constitute contempt of court punishable by up to one year in jail and/or a fine not to exceed fifteen hundred dollars." Section 16-25-70, S.C. Code Ann., as amended, (1984), specifically addresses arrest pursuant to violations of Family Court orders issued under the Abuse Act. It provides

"A law enforcement officer may arrest, with or without a warrant, a person at his place of residence or elsewhere if the officer has probable cause to believe that the person is committing or has freshly committed any misdemeanor or felony under the provisions of §16-25-20 or §16-25-50 even if the act did not take place in the presence of the officer. The officer may, if necessary, verify the existence of an order of protection by telephone or radio communication with the appropriate police department.

In effecting a warrantless arrest under this section, a law enforcement officer may enter the residence of the person to be arrested in order to effect the arrest where the officer has probable cause to believe that the action is reasonably necessary to prevent physical harm or danger to any family or household member.

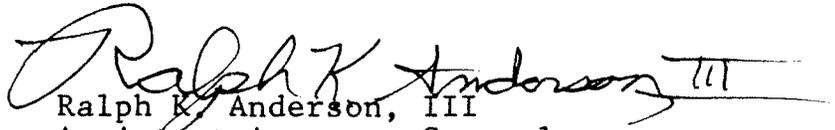
No evidence other than evidence of violations of this article found as a result of a warrantless search shall be admissible in any court of law."

Thus, violations of orders issued under the authority of the Protection from Domestic Abuse Act are misdemeanors, and an officer may arrest according to the procedures directed above. However, apart from orders issued pursuant to the Abuse Act, a

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sheriff must follow the procedures set out in the enclosed opinion letter to Judge Board.

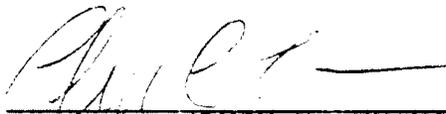
Sincerely,

  
Ralph K. Anderson, III  
Assistant Attorney General

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Enclosure

REVIEWED AND APPROVED BY:

  
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