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September 14, 1987

Representative Dill Blackwell
House of Representatives
335-A Blatt Building
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Dear Representative Blackwell:

I refer to your letter of July 20, 1987, to Attorney General Medlock, in which you raised two questions relating to §16-17-495, S.C. CODE ANN., 1976:

1. Does §16-17-495 apply to a custodial parent who takes a child, leaves the state, and thereafter does not comply with court-ordered visitation rights but is otherwise in compliance with the court order?
2. Is a felony violation under the statute "pursued" by a solicitor, upon the complaint of any citizen?

Section 16-17-495 provides, in part:

When any court of competent jurisdiction in this State shall have awarded custody of a child under the age of sixteen years, it shall be a felony for any person with intent to violate the court order to take or transport . . . such child from any point within this State to any point outside the limits of this State . . .; provided, that keeping a child outside the limits of the State in violation of a court order for a period in excess of seventy-two hours shall be prima facie evidence that the person charged intended to violate the order at the time of taking; . . . (emphasis added)

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Words used in a statute are to be given their plain and ordinary meaning. 1/ The plain meaning of the phrase "any person" could clearly apply to either a custodial parent or a non-custodial parent. The significant factor, under the statute, would be to establish that the removal of a child from the State was done with an intent to violate a court order. Naturally, this would depend, first, on the provisions of the individual court order and, second, whether there was an intent to violate any of the provisions.

Your second question is, in effect, jurisdictional. The Circuit Court (a court of general jurisdiction) has original jurisdiction "in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts . . ." South Carolina Constitution Article V, §11 (as amended by 1985 Act No. 9). The jurisdiction of the Family Court is delineated in Title 20, Chapter 7, Article 5 (§20-7-390, et seq.). The Family Court is a court of limited jurisdiction and may exercise only those powers expressly conferred by statute or those which are incidentally necessary for the exercise of statutorily conferred jurisdiction. Peake v. Peake, 284 S.C. 591, 327 S.E.2d 375 (S.C. App. 1985). The Family Court lacks the jurisdiction to hear a felony charge, and the proper forum would be the Circuit Court. Therefore, an alleged violation of §16-17-495 would generally be prosecuted by a Solicitor.

You have asked whether violation of the statute would be "pursued" upon the complaint of any citizen. Addressing only the first step in a criminal proceeding, any person may make an initial complaint or accusation; that is, give a sworn affidavit, on which an arrest warrant might be issued. 22 C.J.S. Criminal Law, §§300-305. Whether or not a magistrate would find that probable cause exists upon which to issue an arrest warrant, would depend upon the individual facts. Further, it is inappropriate to attempt to comment on other facets of a criminal proceeding (for example, personal jurisdiction of an "out-of-state" defendant, the sufficiency of evidence to "pursue" a case to trial, etc.) since such matters depend largely upon the facts and circumstances of each individual case.

1/ Hughes v. Edwards, 265 S.C. 529, 220 S.E.2d 231 (1975); Worthington v. Belcher, 274 S.C. 366, 264 S.E.2d 148 (1980); Citizens Committee for John's Island v. Office of Secretary of South Carolina, 290 S.C. 465, 351 S.E.2d 342 (1986).

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As a final comment, I note that your questions are raised in the context of enforcement of visitation rights. From the practical standpoint, while a conviction under §16-17-495 might result in a fine and/or prison sentence, the enforcement or modification of visitation rights falls under the jurisdiction of the Family Court. You might wish to note that the Family Court has the authority to fine and/or imprison any adult who wilfully violates a Family Court Order, as a contempt of court, under §20-7-1350.

I trust the foregoing has satisfactorily responded to your inquiry. Please advise if you need additional assistance or clarification.

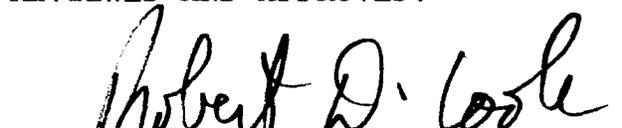
Yours sincerely,



Jane McCue Johnson
Assistant Attorney General

JMJ/rho

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