

The State of South Carolina



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April 9, 1987

The Honorable Parker Evatt
Member, House of Representatives
522B Blatt Building
Columbia, South Carolina 29211

Dear Representative Evatt:

In a letter to this Office you referenced the taking of an illegitimate child by the putative father from the child's natural mother without her permission and where paternity has neither been acknowledged nor adjudicated. You have questioned whether such a taking would constitute kidnapping within the prohibitions of Section 16-3-910 of the Code. Such provision states:

(w)hoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by a parent thereof, shall be guilty of a felony.... (emphasis added.)

In raising your question, you have also referenced Section 20-7-953(B) of the Code which provides:

(u)nless the court orders otherwise, the custody of an illegitimate child is solely in the natural mother unless the mother has relinquished her rights to the child. If paternity has been acknowledged or adjudicated, the father may petition the court for

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rights of visitation or custody in a proceeding before the court apart from an action to establish paternity. 1/

It is generally held that a parent or person in loco parentis, in the absence of a custody order in favor of a particular parent, cannot be found guilty of kidnapping or a similar offense for taking and concealing his or her own child. 20 A.L.R. 4th 823 at 826; State v. Walker, 241 S.E.2d 89 (N.C. 1978). Section 16-17-495 of the Code is also consistent with the above. Such provision states:

(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 the intent to violate the court order to take or transport, or cause to be taken or transported, any such child from any point within this State to any point outside the limits of this State or to keep any such child outside the limits of this State....

Section 16-3-910 is almost identical to the federal kidnapping statute in specifically excepting the taking of a child by a parent. See: 18 U.S.C. § 1201. However, in Miller v. U.S., 123 F.2d 715 (8th Cir. 1942) (rev'd on other grounds) the court determined that the exception for parents in the federal kidnapping statute was not applicable to a defendant charged with the kidnapping of an illegitimate minor where the defendant had married the minor's mother but had not accepted any of the duties or liabilities or exercised any of the rights of one who stands in loco parentis.

1/ Such provision is in accordance with decisions of the United States Supreme Court in several cases recognizing the rights of certain unwed fathers who had contacts with their children. See: Stanley v. Illinois, 405 U.S. 645 (1972) (court held that unwed father was constitutionally entitled to a hearing as to his parental fitness before his child was removed from his custody.) cf: Lehr v. Robertson, 463 U.S. 248 (1983) (court held that natural father's rights under the due process and equal protection clauses were not violated by failing to require notice and an opportunity to be heard before his child was adopted where the father had never had any significant custodial, personal or financial relationship with the child); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979).

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As determined by the court in Miller, an individual who has failed to establish any parental relationship with a child generally does not come within the exception provided parents in the federal kidnapping statute. Consistent with such is the holding of a California appeals court in People v. Carrillo, 208 Cal. Rptr. 684 (1984) which upheld the conviction of a natural unwed father for stealing a child from the child's mother under a California statute which prohibited the taking of a child from a person having lawful custody by a person "not having a right of custody." The court particularly noted that in the situation before it the unwed father had never sought legal custody of his daughter and had never taken any steps whatsoever to establish paternity, secure visitation or provide any financial assistance to the child. As a result, the father failed to qualify as a "presumed father" under California law which would have given him custody rights.

Referencing the above, and especially Section 20-7-953 (B) which grants custody of an illegitimate child to the mother where the father's paternity has not been adjudicated or acknowledged, it appears that in the situation described by you where there is the taking of an illegitimate child by a putative father from the child's mother without the mother's permission, an argument may be made that such taking would constitute kidnapping under Section 16-3-910. However, each situation would have to be carefully considered to assure that the father has made no efforts toward establishing his paternity as to the child. Also, of course, this letter should be considered solely as providing general legal advice and should not be construed as commenting on any pending case.

If there is anything further, please advise.

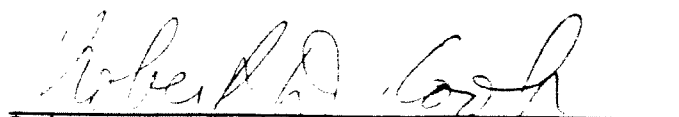
Sincerely,



Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:



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