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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

July 1, 2004

The Honorable Ricky W. Chastain
Sheriff, Laurens County
P. O. Box 68
Laurens, South Carolina 29360

Dear Sheriff Chastain:

You have raised a number of questions involving the situation in which a person alleging that he is the father of a child takes that child from possession of the child's mother, who is the child's legal custodian, and refuses to return the child. By way of background, you state the following:

> A mother has a child while married to John Doe #1, divorces from this marriage and marries another man, John Doe #2 who may or not be the biological father that was born during the prior marriage to John Doe #1.
>
> Facts: Divorce Decree establishes John Doe #1 as the father and gives the mother custody of the child and orders child support.
>
> John Doe #2 states that he is the father and has reared the child most of its natural life.
>
> John Doe #2 states that mother has acknowledged that he is the father but now denies that allegation.
>
> John Doe #2 separates from mother with mother taking the child in question.
>
> John Doe #2 takes the child from possession of mother and refuses to return child stating mother is unfit, he is the father and he has petitioned the court for custody.
>
> Attorney for John Doe #2 states that this is a civil matter and law enforcement has no authority in enforcing the mother's right to the child.
>
> Only court order that can be located is that of the divorce decree with John Doe #1 where mother is awarded custody.

Request Letter

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Your questions are:

> Does John Doe #2 have any legal rights to custody without a court order?
>
> Does John Doe #2 have any right to seize the child from its mother with refusal to return the child based on the fact that he has petitioned the court for custody and alleges the mother is unfit.
>
> Has John Doe #2 violated criminal laws by his actions?
>
> Has law enforcement the authority to physically place the child in possession of the lawful custodian based upon a court order establishing custody and to what scope may law enforcement go to in effecting this?
>
> Does any parent, individual have the right to withhold a child from the legal custodian?
>
> Is there any recourse for an individual who withholds a child from the legal custodian based upon advice from legal counsel?
>
> To sum things up and receive direction, we are often confronted with these scenarios where one individual has legal custody yet others refuse to let the custodian exercise their right to this. Reasons range from having orders pending or "this is what my attorney told me to do." I feel that is a problem that needs clarification for attorneys and law enforcement alike.

Law / Analysis

We note at the outset certain fundamental principles governing obedience of court orders. Generally, "... a court order must be followed unless and until judicially modified or set aside on appeal." Op. S.C. Atty. Gen., March 18, 2003. As we stated in an Opinion, dated May 8, 1995, "'... an order, judgment, or decree of a court having jurisdiction of the parties and the subject matter ... must be obeyed by the parties until it is reversed, modified, or vacated by direct, orderly and proper proceedings ...." In that same opinion, we emphasized that

> "disobedience of an order made by a court within its jurisdiction and power is contempt, although the order may be clearly erroneous, or defendant may sincerely believe that the order is ineffective and will finally be vacated, and even though the act on which the order is based is void."

Id. Relief from any judicial order should be sought through the courts rather than through disobedience of the order as "[c]ourts have no more important function to perform in the administration of justice than to ensure their orders are obeyed." State v. Bevilacqua, 316 S.C. 122, 128, 447 S.E.2d 213, 216 (Ct. App. 1994).

These same principles apply with equal force to child custody orders and decrees. In Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 915 (1982), our Supreme Court upheld a contempt finding for failure to return two children in accordance with the terms of a custody order. A 1973 custody order provided the appellant with a three week summer visitation with his children in Reno, Nevada. However, the children were not returned in compliance with order. The Family Court judge found appellant in contempt and sentenced him to one year imprisonment provided that he be allowed to purge himself of contempt by the payment of $14,960.43 to respondent and her family.

The South Carolina Supreme Court upheld the contempt finding and sentence, concluding as follows:

> [t]he power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. McLeod v. Hite, 272 S.C. 303, 251 S.E.2d 746 (1979); State v. Goff, 228 S.C. 17, 88 S.E.2d 788 (1955). In the present case, the appellant willfully disregarded a previous South Carolina family court order. He obtained possession of the children solely under visitation privileges granted him under the South Carolina order. He knew that the order obligated him to return the children to the respondent in South Carolina at the end of the three weeks. The court did not find any justifiable explanation for his failure to comply at the end of the three week period. Contempt results from the willful disobedience of an order of the court, and before a person may be held in contempt, the record must be clear and specific as to the acts or conduct upon which such finding is based. Edwards v. Edwards, 254 S.C. 466, 176 S.E.2d 123 (1970); Bigham v. Bigham, 264 S.C. 101, 212 S.E.2d 594 (1975). The record clearly reflects that the appellant was held in contempt for disobeying the previous South Carolina family court order.

277 S.C. at 381. The Court distinguished its previous decision of Cannon v. Cannon, 260 S.C. 204, 195 S.E.2d 176 (1973), a case in which the Court had previously held that because the children were physically present in South Carolina when the father commenced a custody action, there was no contempt. The Curlee Court noted that in Cannon, "there was no prior order of any court; there was merely a separation agreement." However, the facts in Curlee were very different from those in Cannon, concluded the Court, stating that

> [i]n contrast, by a previous South Carolina order, appellant was require to return the children at the end of the three week visitation. Under these circumstances, the court did not err in holding appellant in contempt.

Id. at 383.

Additionally, in Eaddy v. Oliver, 345 S.C. 39, 545 S.E.2d 830 (Ct. App. 2001), the Court of Appeals held that a former wife should have been held in contempt for violating the terms of a child visitation order. Such case involved a mother's deference to her son's wishes not to visit his father for two weeks in accordance with the custody and visitation order. The Court of Appeals reversed the circuit court, concluding that the father had made out a prima facie case of contempt by showing noncompliance with the Family Court order:

> Oliver contends he made a prima facie case for contempt by producing the order and testifying as to Eaddy's noncompliance, and claims the burden then shifted to Eaddy to provide a defense or explanation for noncompliance. He specifically asserts Eaddy did not meet this burden because she failed to testify or present any evidence in response. We agree .... Indeed, the family court stated that "it is undisputed perhaps that [Oliver] hasn't had visitation according to the order." Thus, upon presentation of his case, the burden shifted to Eaddy to produce at least some evidence tending to establish a defense or explanation for failing to comply with the family court order. Because Eaddy chose to produce no evidence, including her own testimony, we find she did not meet this burden. As a result, the family court abused its discretion in refusing to hold her in contempt. We therefore remand the case to the family court for a determination on the propriety of appropriate sanctions.

345 S.C. at 43.

See also, Satterwhite v. Satterwhite, 280 S.C. 228, 312 S.E.2d 21 (Ct. App. 1984) [wife's refusal to permit husband's visitation of children on designated weekend supported finding of contempt where order required husband to have weekend visitation with children at regularly scheduled intervals.]

Thus, it is clear that the willful failure to obey an order relating to child custody can subject the person in violation thereof to contempt. Moreover, under certain circumstances, even a nonparty to an order may be held in contempt for willful disregard of that order. See, Johnson v. State, 444 So.2d 1031 (Fla. 1984). As the Supreme Court of Iowa stated in Hutcheson v. Iowa District Court for Lee County, 480 N.W.2d 260 (Iowa 1992).

> [i]t is not only the parties to whom a court order is directed who may be found to be in contempt for violation of the order, but also nonparties to the litigation and the order if certain requirements are met. Those requirements are that the nonparty have

> notice or knowledge of the court's order and either act in concert or be in privity with a person to whom the court's order is directed.

480 N.W.2d at 260, quoting Annotation, "Violation of State Court Order by one Other Than Party as Contempt," 7 A.L.R. 4th 893 §2 (1981 & Supp.). Depending upon the facts, a person's nonparty status does not necessarily insulate that individual from being held in contempt for hiding a child during a child custody proceeding.

In Hendershot v. Handlan, 162 W.Va. 175, 248 S.E.2d 273 (W.Va. 1978), the Court addressed the question of whether a grandparent who absconded with a child in defiance of a custody order could be held in contempt. Concluding that contempt was an appropriate remedy, the Court stated:

> [w]hile petitioner was not a party to the divorce proceeding, he was a witness at the hearing and the pleadings disclose that he had actual notice of the Court's decision to award custody of the infant to the mother. It seems apparent that because of his relationship to his son and, having physical custody of the child, he was acting in concert with him to frustrate the court's order. A person may be adjudicated in contempt of court for violating an order of which he has actual knowledge, notwithstanding that at the time of the violation the order had not yet been formally drawn up. Belden v. Scott, 150 Ohio St. 393, 83 N.E.2d 58 (1948). Likewise, a person not a party to the proceeding who had actual knowledge of the court's order may be charged with contempt for violating such order if he is acting in concert or privity with a party. Chase National Bank v. City of Norwalk, 291 U.S. 431, 54 S.Ct. 475, 78 L.Ed. 894 (1934); Alemite Mfg. Corp. v. Staff, 42 F.2d 832 (2nd Cir. 1930).

248 S.E.2d at 274. It can be seen from this case that persons acting in concert to violate a custody order may be subject to contempt.

In addition, it should be recognized that the General Assembly has now enacted a criminal statute to deal with the situation of interfering with an existing custody order. S.C. Code Ann. Section 16-17-495 provides as follows:

> (A)(1) When a court of competent jurisdiction in this State or another state has awarded custody of a child under the age of sixteen years or when custody of a child under the age of sixteen years is established pursuant to Section 20-7-953B, it is unlawful for a person with the intent to violate the court order or Section 20-7-953B to take or transport, or cause to be taken or transported, the child from the legal custodian for the purpose of concealing the child, or circumventing or avoiding the custody order or statute.

Subsection (B) makes a violation of subsection A(1) a felony and upon conviction the offender may be fined in the discretion of the court or sentenced to up to five years imprisonment. Moreover, in Op. S.C. Atty. Gen., Op. No. 87-28 (April 9, 1987), we concluded that 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 or adjudicated, could possibly constitute kidnapping pursuant to § 16-3-910. We referenced § 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. In that opinion, we recognized that each situation would be governed by its unique facts. Depending upon the particular facts, therefore, a charge of custody interference under § 16-17-495 or kidnapping under § 16-3-910 may be warranted.

Further, another statute – § 20-7-610 – provides for the emergency protective custody of a child. Such provision states in pertinent part:

> (A) A law enforcement officer may take emergency protective custody of a child without the consent of the child's parents, guardians, or others exercising temporary or permanent control over the child if:
>
> (1) the officer has probable cause to believe that by reason of abuse or neglect the child's life, health, or physical safety is in substantial and imminent danger if the child is not taken into emergency protective custody, and there is not time to apply for a court order pursuant to Section 20-7-736. When a child is taken into emergency protective custody following an incident of excessive corporal punishment, and the only injury to the child is external lesions or minor bruises, other children in the home shall not be taken into emergency protective custody solely on account of the injury of one child through excessive corporal punishment. However, the officer may take emergency protective custody of other children in the home if a threat of harm to them is further indicated by factors including, but no limited to, a prior history of domestic violence or other abuse in the home, alcohol or drug abuse if known or evident at the time of the initial contact, or other circumstances indicative of danger to the children;
>
> (2) the child's parent, parents, or guardian has been arrested or the child has become lost accidentally and as a result the child's welfare is threatened due to loss of adult protection and supervision; and
>
> (a) in the circumstances of arrest, the parent, parents, or guardian does not consent in writing to another person assuming physical custody of the child;
>
> (b) in the circumstances of a lost child, a search by law enforcement has not located the parent, parents, or guardian.

Again, depending upon the facts, this statute may be applicable to the situation you reference.

A brief examination of the powers and duties of the sheriff in South Carolina is also necessary herein. The Sheriff is a constitutional officer pursuant to Art. V, § 24 of the South Carolina Constitution. A sheriff possesses both common law and statutory powers. See, Scott v. Vandiver, 476 F.2d 238 (4th Cir. 1973). The sheriff is, of course, the chief law enforcement officer of the county. Op. S.C. Atty. Gen., July 28, 1997; Op. S.C. Atty. Gen., July 10, 1996; Op. S.C. Atty. Gen., May 8, 1989. A Sheriff's jurisdiction encompasses the entire county.

With respect to the Sheriff's relationship to the courts of this State, the Sheriff is in a somewhat unique position. The State Supreme Court decision of State v. Brantley, 279 S.C. 215, 305 S.E.2d 234 (1983) is particularly instructive as to the recognition that the Sheriff and deputies are officers of the court. In Brantley, the trial judge was presiding over a guilty plea proceeding in Hampton County. Learning that the Sheriff of Jasper County was in possession of certain records, the trial judge asked the Solicitor's Office to notify the Jasper County Sheriff to appear in court with the records at a designated time. The Sheriff refused to appear, choosing to forward the records via a deputy. Upon the Sheriff's failure to appear, the trial judge sent word back to the Sheriff to appear in court the next morning "without fail." The Sheriff again refused.

The trial judge held the Sheriff in contempt. On appeal, the Sheriff argued that the lower court erred in holding him in contempt because he had received no subpoena or subpoena duces tecum and because he had no jurisdiction beyond his own county of Jasper.

The Supreme Court upheld the lower court's finding of contempt. Reasoning that the trial judge's oral order directed to the Sheriff was binding, the Supreme Court stated:

> [t]he court's order was valid, was directed to appellant [Sheriff] in his official capacity as an officer of the court, and his wilful failure to comply constituted a constructive contempt of court, which tended to "obstruct and embarrass or prevent the due administration of justice." Long v. McMillan, et al., 226 S.C. 598, 609, 86 S.E.2d 477 (1955).

279 S.C. at 217.

Several statutes are also relevant to the Sheriff's function as an officer of the court. Section 23-15-80 provides that

> [t]he sheriffs or their deputies shall attend all the circuit courts that may be held within their respective counties and enforce such rules as such courts may establish. During the term time of any such court any sheriff or his deputy shall serve any rule of such court or writ of attachment for any contempt thereof on any party or witness in any part of this State. The party moving for such service shall be liable to pay such

> sheriff the costs in cash for such service on the return of such rule or writ of attachment.

Similarly, with respect to the Family Courts of South Carolina, § 20-7-1450 provides:

> [i]t is made the duty of every county, town or municipal official or department to render such assistance or cooperation within his or its jurisdictional power to further the objects of the Family Court Act. Law enforcement officers' "jurisdictional power" includes both the arrest and transportation of prisoners. The policy enunciated in this section indicates the intention of the legislature that all public officials and departments cooperate with Family Courts, and this applies to the officers of the County in which the Family Court is sitting as well as to the officers of the county in which on arrest warrant might be sent for execution.

A number of decisions in other jurisdictions have addressed various questions surrounding the enforcement by law enforcement officer of an order of custody where the officer is not affirmatively ordered to do so by the court which issued the custody order. Typically, these cases involve a suit against the law enforcement officer or law enforcement agency who acted to enforce the order of custody or similar authority. In most instances, the person from whom the law enforcement officer took custody of the child assert a constitutional interest of privacy, due process or familial association.

In Lowrance v. Pflueger, 878 F.2d 1014 (7th Cir. 1989), for example, the Court of Appeals for the Seventh Circuit addressed the issue of whether a sheriff who had applied for an arrest warrant had an objectively reasonable basis to believe probable cause existed to arrest the father for kidnapping his child pursuant to Tennessee law. Based upon the information provided to the Benton County Sheriff's Office, i.e. marital problems, a pending divorce action and ex parte custody and restraining orders, the Sheriff's Office sought an arrest warrant under a Tennessee statute for kidnapping a child under the age of sixteen from the lawful custodian. Subsequently, the father sued the Sheriff pursuant to 42 U.S.C. § 1983 for violation of his civil rights under the federal Constitution.

The child's father abducted the child and took her to his parents' home in Kenosha, Wisconsin. He did not return her and the mother sought the assistance of the Benton County Sheriff upon the advice of her attorney to seek an arrest warrant. An arrest warrant was signed and the Sheriff then sent a teletype message to the City of Kenosha Police Department requesting assistance. Subsequently, Kenosha officers arrested the father based upon the County of Benton warrant.

Three days later, a Kenosha County Court Commissioner found the Benton warrant to be defective. Benton County subsequently dismissed the charges against the father. The § 1983 action ensued, the father claiming that the Benton Sheriff violated his constitutional rights by having him arrested

without verification of his knowledge of the ex parte custody and restraining orders issued to the mother.

The Seventh Circuit Court of Appeals concluded that the sheriff and his deputies were entitled to qualified immunity from suit. The Court held as follows:

> ... we are convinced a law enforcement officer might very reasonably conclude under the circumstances presented that the appellant took Heather from Tennessee to Wisconsin in violation of § 39-2-303 [child kidnapping from lawful custodian]. Sheriff Shannon knew the appellant and Mrs. Lowrance had a history and were presently undergoing serious marital problem, possibly culminating in a divorce, and that Mrs. Lowrance had legal custody of Heather . He also could reasonably assume the couple had argued over Heather and Mrs. Lowrance told him (and the Affidavit of Complaint recites) that the appellant had previously threatened to take the child to Canada. In addition, the appellant transported the child several hundred miles from Benton County, Tennessee, in the direction of Canada on December 1, 1983, without Mrs. Lowrance's knowledge or consent. Furthermore, the appellant took Heather on the very day the custody and restraining orders issued, on his wife's petition, a coincidence which in our view could logically lead an officer reasonably to conclude that the appellant knew his wife was going to or had obtained the custody and restraining orders, even though service apparently had not been accomplished. ... . [W]e have little doubt that Sheriff Shannon might very reasonably have concluded that the appellant's conduct resulted from an "intent to detain or conceal" Heather within the meaning of § 39-2-203, and thus was entitled to reasonably believe there was probable cause for his arrest. We therefore affirm the district court's grant of summary judgment to Sheriff Shannon on qualified immunity grounds....

878 F.2d at 1019.

In State v. Williams, 914 S.W.2d 940 (Tenn. Ct. Crim. App. 1995), the very same Tennessee abduction statute involved in the Lowrance case was at issue. Appellant failed to turn over his child after visitation pursuant to the custody decree which granted custody to the mother. After several efforts to have the child returned, an arrest warrant for custodial interference was issued. The warrant was executed and the mother was reunited with her child.

Apparently, the father based the abduction on his assertion that the mother was guilty of neglect. His efforts to turn the child over to personnel of the Department of Human Services failed. Appellant was advised that the custody order gave the mother custody and that he should return the child to the mother. He claimed he was "scared to death" for the child's safety and refused to relinquish the child until he was arrested pursuant to the warrant. A prosecution followed, the appellant was convicted, and he appealed.

On appeal, the father argued that he voluntarily returned the child before the arrest warrant was issued and that the Sheriff's Office was, in reality, enforcing the custody order. However, the Court rejected any argument that custodial interference under Tennessee law is a felony and that the father could have thus been arrested without a warrant upon probable cause. Moreover, the Court noted that the deputy who executed the warrant, in deference to the father's wishes that the child not see her father's arrest, allowed the child to accompany the father until the warrant was executed later in the evening. However, the father was always in control of the deputy, concluded the Court. Therefore, the Court held that,

> [i]n summary, the appellant did not "voluntarily and before arrest or the issuance of a warrant for arrest" return the child to Mrs. Williams. The appellant still had the child in his custody when he was arrested by the Roane County deputy sheriff. Thus, the evidence is clearly sufficient to support a finding by a rational trier of fact that the appellant was guilty of custodial interference beyond a reasonable doubt ... .

914 S.W.2d at 947.

In Smith v. Eley, 675 F.Supp. 1301 (D. Utah 1987), the Court refused to afford qualified immunity to deputies who had assisted a mother in obtaining possession of a child from the father. The mother presented the deputies with a custody order which was valid on its face and which awarded custody to the mother. However, the mother did not advise the deputies that a subsequent order had given temporary custody to the father. The father sued the deputies under 42 U.S. § 1983 for depriving him of his child.

The District Court concluded that a colorable claim against the deputies had been presented and that the deputies were not entitled to qualified immunity. In the Court's view,

> [a]ssuming the very doubtful proposition that county sheriffs should assist in the enforcement of valid custody orders, absent express direction from the court, this Court concludes that a reasonable officer must know he may not assist a parent in obtaining custody in violation of a court order. In fact, Utah has made custodial interference a class A misdemeanor. .... Questions of rightful custody between parents are not to be resolved other than by the courts. Thus, in a situation like this where both parties claim custody as of right, a reasonable officer must know that he may not assist in any charge of custody absent direction from the court. Here it is alleged that the officers assisted Peggy Smith in obtaining custody of Shannon Smith, and that the officers' assistance continued after they were informed that Carlos Smith claimed custody of Shannon as of right. The court's conclusion that under this view of the facts the sheriffs would not be immune from suit is supported by their alleged failure to wait for the return of Carlos Smith before the change of custody was effected.

675 F.Supp. at 1307-1308. (emphasis added).

Wimer v. Vila, 37 F.Supp. 2d 1351 (M.D. Fla. Tampa Div. 1999) involved a situation where deputies took children from a father and provided them to the mother. The father sued the deputies under 42 U.S.C. § 1983 alleging that he had been deprived of his constitutionally protected due process right of access to his children. Apparently, no order had been rendered giving sole custody of the children to the mother. Father alleged that the deputies did not comply with Florida statutes requiring a determination that the children had been abused, neglected or abandoned and were in imminent danger while in custody of the father.

The Court concluded that no substantive due process right was alleged. In the Court's view, the parents had equal rights to custody and thus "[h]ere, the state actors [deputies] delivered the children to a parent who, by the allegations of the complaint, had a right to custody." 37 F.Supp.2d at 1353. Likewise, no procedural due process right was violated by the deputies by failing to follow the emergency protective custody statute because such statute provided an adequate remedy to address plaintiff's concerns.

And, in Shields v. Martin, 109 Idaho 132, 706 P.2d 21 (1985), the Idaho Supreme Court held that a city police officer who assisted a mother in unlawfully obtaining her son from a day care center was not immune from § 1983 liability. The officer believed he not only had "civil stand by" authority to keep the peace, but also the authority to enforce a superseded custody order displayed by the mother. However, the captain of the police department testified that at the time, a Boise police officer did not have the authority to aid a parent or other party in actually obtaining physical custody of the child. He further testified that unlike a sheriff who is a constitutional officer, "... a Boise Police Department officer cannot enforce a civil custody order and take physical possession of a minor and then turn that minor over to another." 706 P.2d at 28. Based upon this testimony, the Court concluded the municipal police officer was not entitled to immunity.

Similarly, in Wooley v. City of Baton Rouge, 211 F.3d 913 (5th Cir. 2000), the Fifth Circuit refused to grant immunity to city police officers who removed a child from the home of the mother and child pursuant to an order granting custody to the child's grandparents. A Louisiana statute required that a civil warrant be "directed to law enforcement authorities to return the child to the custodial parent pending further order of the court having jurisdiction of the matter." The Court concluded that inasmuch as the officers had no "civil warrant" which had been directed to them and additionally there was no order signed by a judge in East Baton Rouge Parish and stamped with the words "Certified True Copy," the officers were not entitled to immunity from suit under 42 U.S.C. § 1983.

A number of other cases either grant or deny immunity to the law enforcement officer depending upon the particular facts. See, Glenn v. Meyer, 2002 WL 323 45376 (W.D.Wis. 2002) [Sheriff's deputies reliance upon Maryland order to show cause, together with proof it had been served and no response made thereto was sufficient to establish qualified immunity for officers'

transfer of custody from mother to father]; Renaud v. St. Lawrence County, 233 A.D.2d 710, 650 N.Y.S.2d 367 (1996) [officers' assistance in transfer of physical custody of children from grandparents to mother in situation in which mother was clearly the lawful custodian did not violate constitutional rights of paternal grandparents or father]; Morrell v. Mock, 270 F.3d 1090 (7th Cir. 2001) removal of physical custody by officers from mother in Illinois without notice and opportunity to be heard violated mother's procedural due process rights; however, such right was not clearly established in that it would not be clear that enforcement of New Mexico custody order without prior notice or opportunity to be heard in Illinois was unconstitutional]; Henderson v. Mojave County, Arizona, 54 F.3d 592 (9th Cir. 1995) [Arizona sheriff and deputy sheriffs were not entitled to qualified immunity in former wife's § 1983 action; deputies twice took custody of wife's daughter on authority of prior California custody decree granting custody to former husband and twice arrested wife after she showed officers a subsequent California court decree granting her custody]; Oldfield v. Benavidez, 116 N.M. 785, 867 P.2d 1167 (1994) [sheriff entitled to qualified immunity for temporarily removing children from home based upon probable cause that children were being abused or neglected by one or both parents; removal was necessary to ensure children's safety]; Truelove v. Hunt, 67 F.Supp.3d 569 (D.S.C. 1999) [no qualified immunity for sheriff's deputies alleged to have entered private home and seized minor child on basis of patently false, forged and fictitious court custody order].

We now turn to your specific questions. Of course, it must be recognized that each situation will turn on its own facts. There is no blanket rule which will govern all circumstances.

Moreover, we are assuming herein for purposes of addressing your questions that the custody order in question is valid on its face and is not superseded by any subsequent order or ruling which could overturn or limit the order of custody which is presented to you or your deputies. We also assume that the individual seizing the child or children is fully cognizant of such custody order and the terms thereof.

You first ask whether John Doe #2 has any right to seize the child from its mother with refusal to return the child based on the fact that he has petitioned the court for custody and alleges the mother is unfit. As a general rule, no such right exists. Of course, a custody order or decree remains in place unless and until there is demonstrated to the Family Court a change in circumstances which justifies a change in custody based upon the child's best interest. Hollar v. Hollar, 342 S.C. 463, 536 S.E.2d 883 (Ct. App. 2000). The party seeking the change in custody must meet the burden of showing such changed circumstances occurring subsequent to the entry of the previous custody order in question. Id. However, unless and until the Family Court changes custody or modifies the terms and conditions surrounding the previous custody order, such order remains binding on all persons – including third parties with notice thereof. In other words, such order must be obeyed. Willful disobedience of the order may result in contempt. Curlee v. Howle, supra.

You next ask whether John Doe #2 has violated any criminal laws. Again, such a determination depends upon the individual's guilt beyond a reasonable doubt. However, as

recognized above, § 16-17-495 makes it a felony, punishable by up to five years imprisonment, for any person "with the intent to violate [a custody] order or Section 20-7-953B [providing for the Family Court's issuance of a custody order] to take or transport, or cause to be taken or transported, the child from the legal custodian for the purpose of concealing the child, or circumventing or avoiding the custody order or statute." As noted herein, the custody order itself, together with surrounding circumstances, including those relating to John Doe #2's intent to violate the custody order in question, could provide a law enforcement officer the necessary probable cause to arrest an alleged violator for violation of § 16-17-495. Because a violation of § 16-17-495 is a felony, no warrant would necessarily be required for such arrest. Lowrance v. Pflueger, supra. Thus, depending upon the facts and circumstances, and whether there is evidence to establish guilt beyond a reasonable doubt, a violation of the criminal statute of interfering with a custody order (§ 16-1-495) could have occurred in the situation you present.

Your next question concerns "whether law enforcement has the authority to physically place the child in possession of the lawful custodian based upon a court order establishing custody and to what scope may law enforcement go in effecting this." We touched upon this specific question in Op. S.C. Atty. Gen., Op. No. 87-28 (April 9, 1987). There, we addressed the issue of "[e]nforcement of a child custody order by taking the child from the noncustodial parent and returning it to the custodial parent ... ." In that opinion, we stated:

> [n]o 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 § 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.

(emphasis added). Thus, while no court in South Carolina has, to our knowledge, so held, we have previously advised against a sheriff or other law enforcement officer enforcing a custody order without such enforcement being expressly directed by the Family Court.

Consistent with our above-referenced opinion, we have located no decision – even in other jurisdictions – which has directly held that a sheriff possesses the requisite authority to enforce a custody order by physically returning possession of the child to the legal custodian without being expressly ordered a court to do so. As noted above, several of the decisions cited herein question

such authority. While the Sheriff is clearly an officer of the Family Court, in those instances in which the Sheriff is asked to assist a person with legal custody of a child by enforcing the child custody order, the better practice would be for the Sheriff to make the Family Court aware of the fact that the child has been seized by the non-custodian in contravention of its order. If it deems appropriate, the Family Court could then order the Sheriff to enforce its custody order and, as noted above, determine whether to hold the non-custodian in contempt.

We would also note that despite the fact that it is an open question whether a sheriff possesses the authority to enforce a custody order without being ordered by a court to do so, in those instances in which the Sheriff does enforce the child custody order the courts as a general rule afford a qualified immunity to law enforcement officers engaged in such enforcement so long as the custody order is valid on its face and has not been superseded or modified by a subsequent order. This qualified immunity is consistent with the following long-held view that

> The sheriff is a ministerial officer. He is neither judge nor lawyer. It is not his duty to supervise and correct judicial proceedings; but being an officer of court, ministerial in character, he cannot impugn its authority nor inquire into the regularity of its proceedings. His duty is to obey. This principle applies alike to him, whether the execution exists from a court of general or limited jurisdiction.

Rogers v. Marlboro County, 32 S.C. 555, 558, 11 S.E.2d 383 (1890). Thus, as we noted in a previous opinion, "[w]here the order appears valid on its face, the officer is generally afforded immunity from suit ... in carrying out the orders of the Court." Op. S.C. Atty. Gen., March 13, 1996.

There are other circumstances in which the Sheriff or his deputies may take possession of a child. As noted above, § 16-17-495 makes it a felony to interfere with a custody order. If the Sheriff has probable cause or a warrant to arrest an individual for a violation of § 16-17-495 or some other offense he may, of course, as part of that process take possession of the child. Moreover, the Sheriff may, pursuant to § 20-7-610, take the child into temporary emergency protective custody if the conditions of that statute so warrant. See, S.C. Dept. of Social Services v. Gamble, 337 S.C. 428, 523 S.E.2d 477 (Ct. App. 1999) [South Carolina's emergency protective custody statute balances constitutional right to raise and care for a child with the fundamental right of child to be free from abuse or neglect]. Again, in any of these circumstances, the Family Court, as well as the Department of Social Services, must remain closely involved.

As to your question of whether any parent or individual "has the right to withhold a child from a legal custodian," we are aware of no such right. Indeed, as discussed above, § 16-17-495 makes such withholding a felony punishable by a fine in the discretion of the court and up to five years imprisonment. Moreover, as we have stated, defiance of a custody order may constitute contempt of court. Once the Family Court has deemed a particular individual to be the lawful custodian, such custody may not be changed except where the Family Court has determined there to be a change in circumstances. Custody must be determined on the basis of the child's best

interest. If a person has concerns regarding abuse or neglect by the legal custodian, he or she should report such to DSS and law enforcement authorities. There is no "right," however, to seize the child in defiance of a custody order. To the contrary it is against the law.

With respect to your question as to whether there is any recourse for an individual who withholds a child from the legal custodian based upon advice of counsel, the individual should contact the appropriate law enforcement and social services government agencies for assistance. He or she could also seek such assistance from the Family Court. If there is a valid claim of abuse or neglect, he or she could contact DSS. However, neither the pendency of a petition for a change in custody nor the advice of legal counsel would generally serve as a defense to contempt or a criminal charge under § 16-17-495.

Conclusion

1. A child custody order remains valid and binding until set aside, superseded or a new custody order is issued.

2. Such order must be obeyed even by those not a party to the order. Failure to do so, or aiding or abetting another in the violation of the custody order may result in contempt of court. Contempt may, of course, be sought by the legal custodian not only against the person abducting the child, but anyone aiding or abetting such abduction. Moreover, as an officer of the Family Court, the Sheriff should bring violations of the Court's orders to the Court's attention.

3. Section 16-17-495 makes it a felony punishable by a fine and up to five years imprisonment for interfering with a custody order with intent to do so. Section 16-17-495 makes no distinction in whether an individual violating the statute is the biological father or not. As a felony, arrest can be made for violation of this statute upon probable cause or by obtaining a warrant upon probable cause demonstrated to the magistrate. In certain circumstances, discussed above, we have also concluded that a violation of this State's kidnapping laws may also be involved. Moreover, a number of cases in other jurisdictions have, depending upon the facts, upheld convictions for kidnapping where a person abducts a child from the legal custodian who has custody by virtue of a legally valid court order. See, 20 A.L.R. 4th, Supra at §5.

4. It is unclear whether the Sheriff has the authority to enforce a custody order by taking possession of the child from the non-custodian without being directed or ordered to do so by the Family Court. A previous opinion of this Office has concluded that no such authority exists. To our knowledge no case in other jurisdictions has squarely addressed this question, although several cases, discussed above, appear to have frowned upon the practice of law enforcement officers assisting in gaining repossession of a child taken from the lawful custodian by the other parent, putative parent or a third party. The better practice clearly is

for the Sheriff to notify the Family Court of any violations of the custody order and to rely upon the Family Court's guidance and direction with respect to any enforcement of the order.

5. Case law, however, also indicates that where the Sheriff does take possession of a child exclusively by means of enforcement of the child custody order and such custody order is regular, appears valid on its face, and has not been superseded or replaced by a new order, he and his deputies would be entitled to a qualified immunity from any suit.

6. There are additional circumstances in which the Sheriff may take possession of the child. If the individual holding the child is arrested for violation of § 16-17-495 or some other offense, of course, the child could be taken into possession of the Sheriff. Likewise, § 20-7-610 provides for emergency temporary custody of a child whose health or safety is in imminent danger. We would advise that in such circumstances, the Sheriff should work closely with the Family Court and DSS.

7. We know of no right of a person to take the law into his own hands by seizing a child in contravention or defiance of a custody order. Nor is there any right to aid or abet such violation of the order. If the individual believes that the person in legal custody has abused or neglected the child, he or she should report such matter to the proper authorities. Neither the pendency of a petition for change in custody nor advice of legal counsel may serve to validate or justify seizure of a child from the legal custodian in defiance or violation of a child custody order. Advice of legal counsel is generally not recognized as a defense in contempt matters. Cola. Water Power Co. v. Columbia, 4 S.C. 388 (1873); Op. S.C. Atty. Gen., Op. No. 84-86 (July 25, 1984).

Very truly yours,

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