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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

June 9, 1998

The Honorable C. David Stone
Sheriff, Pickens County
216 L.E.C. Road
Pickens, South Carolina 29671

Re: Informal Opinion

Dear Sheriff Stone:

You have sought an opinion regarding the service of Family Court bench warrants on Sunday. You state that "[i]t has been our contention and belief that Family Court matters are civil in nature; however, once the civil matter has been dealt with and a contempt of the court order has taken place that the contempt is a separate and independent matter beyond civil that crosses the line to a criminal contempt of a court order and, therefore, the bench warrant issued by a Family Court for contempt may be served on Sunday."

Law / Analysis

Rule 5 of the South Carolina Rules of Civil Procedure provides that "[n]o civil process, except subpoenas and attachment proceedings, shall be served on Sundays." Likewise, S.C. Code Ann. Sec. 15-9-1010 prohibits civil process, except attachment proceedings, from being served on Sunday. Criminal process may not be served on Sunday except for treason, felony, violation of the law relating to intoxicating liquors, gambling, or illegal drugs, or breach of the peace. Our Supreme Court has interpreted the term "breach of the peace" broadly to mean a "violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence, which includes any violation of any law enacted to preserve peace and good order." State v. Poinsett, 250 S.C. 293, 297, 157 S.E.2d 570 (1967).

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Request Letter

The question thus becomes the nature of a so-called "Arrest Order" or bench warrant issued by the Family Court for failure to obey its Order. In other words, the issue here is whether such Order is "civil process" or "criminal process." If this type of Order falls into the former category, it is prohibited by law from being served on Sunday.

I would note that, even though the Order may be a bench warrant, its express purpose is to take the individual into custody, allegedly being in contempt of court for failure to obey the Family Court's Order such as failure to respond to a Rule to Show Cause. The purpose of a bench warrant is typically to serve as the process issued by a judicial officer for the arrest of the individual and is used to bring the individual back before the court for a specific purpose after the court has previously acquired jurisdiction over the defendant. Op. Atty. Gen., May 23, 1980. A Family Court possesses the authority to issue bench warrants. Op. Atty. Gen., November 16, 1976. Such process is usually issued by the Family Court to arrest an individual who has refused to obey an order of support and refused to respond to a Rule to Show Cause as to why he should not be held in contempt. Op. Atty. Gen., Op. No. 79-72 (June 5, 1979). Typically, the Bench Warrant commits the individual to jail until the Order is obeyed or until the respondent is discharged by law. Id.

Our Supreme Court has definitively distinguished between the various kinds of contempt in Curlee v. Howle, 277 S.C. 377 287 S.E.2d 915 (1982). In Curlee, the defendant disregarded a previous Family Court order wherein the Court allowed a divorced parent's child a three week visitation with their father in Reno, Nevada. Contrary to the Court's Order, the father did not return the children and the Family Court held the father in contempt. The Court sentenced the defendant 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."

One of the questions in Curlee was whether a judge may impose a sentence of more than 6 months without allowing the contemnor a jury trial. The Court held that the contempt was civil rather than criminal in nature and thus no jury trial need have been given. The Court explained its reasoning thusly:

> [I]n Shillitani v. U. S., 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966), two petitioners had been sentenced to two years imprisonment for contempt of court with the proviso that they would be released upon answering questions put to them by a grand jury. Their contemptuous conduct consisted of not testifying before a grand jury after both had been given immunity. One demanded a jury trial, but the request was denied; on both two year conditional sentences were imposed

> by a judge without the aid of a jury. The Court held that the conditional nature of the sentences rendered each of the actions a civil contempt proceeding, for which indictment and jury trial are not constitutionally required. The character and purpose of the proceedings rendered them civil rather than criminal contempt proceedings. The conditional imprisonment was for the obvious purpose of compelling the two grand jury witnesses to obey the Court's orders to testify. Continuing, the Court stated that when petitioners carry the keys of prison in their own pockets, the action is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees. If the petitioners had chosen to obey the court's order, they would not have faced jail. In Shillitani, both the District Court and the Court of Appeals called the petitioners' conduct criminal contempt. But despite the fact both petitioners were ordered imprisoned for a definite period, their sentences were clearly intended to operate in a prospective manner to coerce, rather than to punish. As such, their sentences related to civil contempt. While any imprisonment has punitive and deterrent effects, it must be viewed as remedial if the Court conditions the release upon the contemnor's willingness to obey the Court's order. The Shillitani test to determine whether contempt is civil or criminal is: What does the Court primarily seek to accomplish by imposing the sentence?
>
> In Shillitani, it was to obtain answers to the grand jury questions. Footnote 5 of the opinion stated that had the contempt been criminal, it would have been characterized by the imposition of an unconditional sentence for punishment or deterrence. The conditional nature of the imprisonment, based entirely upon the contemnor's continued defiance, justified holding civil contempt proceedings absent the safeguards of indictment and a jury.

277 S.C. at 384.

The Curlee Court deemed the order in question remedial, rather than punitive. Concluded the Court,

> [a]ppellant was allowed to purge himself of his one year sentence by paying to respondent compensatory contempt in the amount of $14,960.43, $12,658.79 for her expenses and her husband's, and $2,301.64 for her parents' expenses.
>
> Compensatory contempt is a money award for the plaintiff when the defendant has injured the plaintiff by violating a previous court order. The goal is to indemnify the plaintiff directly for harm the contemnor caused by breaching the injunction.

Thus, the principal issue is whether the particular Order in question is primarily civil or primarily criminal in nature. If the defendant carries "the keys of the prison in [his] ... own pockets" and the nature of the action is essentially a civil remedy designed for the benefit of other parties ..." it is more than likely civil contempt rather than criminal. On the other hand, where the primary purpose of the proceeding is to preserve the court's authority and to punish for disobedience of its orders, the contempt is generally deemed criminal in nature. State v. Bevilaqua, 316 S.C. 122, 447 S.E.2d 213 (1994). This Office has previously characterized "arrest orders" for failure to pay child support or obey a child support order of Family Court as "civil" in nature. Op. Atty. Gen., May 18, 1966. Our courts have similarly characterized contempt actions for failure to pay child support as typically civil in nature. See, e.g. Taylor v. Taylor, 294 S.C. 296, 363 S.E.2d 909 (1987); In the Matter of Mixson, 258 S.C. 408, 189 S.E.2d 12 (1972).

In the Taylor case, the Court noted the following:

> [t]he evidence indicates and the trial judge found, the husband was in a perilous financial situation. He sentenced him to six months in jail but provided he could purge himself by paying ($60) per month. By ordering the husband to pay the arrearage in this manner, he was ensuring the payments could be made by him. The primary purpose of civil contempt is to exact compliance with the court's order, not to punish the contemnor. McMiller v. McMiller, 77 N.C. App. 808, 336 S.E.2d 134 (1985).

363 S.E.2d at 910-911. And in Mixson, the Court emphasized that

> ... under the circumstances, ... [respondent's] civil contempt sentence is not a ground for disciplinary action. The contempt power was involved in respondent's case not as a punishment

> but in an effort to secure compliance with his obligations of alimony and child support. Civil contempt in such cases, though a drastic remedy, does not differ in purpose from other civil remedies available for use in enforcing a money judgment. It carries, per se, no connotation of moral dereliction.

189 S.E.2d at 13.

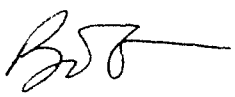
Based upon the foregoing, it would appear to me that the Bench Warrant in question is primarily one for civil contempt. As in Curlee and the other cases referenced herein, its principal purpose is to compel the Defendant to comply rather than as punishment, even though the Respondent may be incarcerated as a result. Although it is possible that a particularly recalcitrant defendant will be the subject of criminal contempt, most failure to pay child support is enforced through the civil contempt mechanism. If the failure to pay is enforced as a civil contempt, its process generally could not be served on Sunday. Of course, each case will have to be examined in light of the facts and circumstances of that matter.

However, even if the civil contempt process is improperly served on Sunday, our Court has determined that any defect in such service may be waived by appearance. As the Court stated in In re Chisholm v. Klinger, 229 S.C. 8, 91 S.E.2d 538 (1956), any "defects in the process and the service of it were waived by the appearance of appellants by counsel where they subjected themselves to the jurisdiction of the court ... ." 91 S.E.2d at 541.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an