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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

December 2, 1996

The Honorable Glenn G. Reese
Senator, District No. 11
117 Sun Valley Drive
Inman, South Carolina 29349

Dear Senator Reese:

You have enclosed a letter from two of your constituents, Mr. and Mrs. Waters, and you have sought advice regarding their dilemma. You have asked "what course of action should they take to get their daughter and granddaughter back to South Carolina without criminal charges being filed against her."

Your constituent's daughter was divorced in California and was given physical custody of her daughter. However, the California Court ruled that the mother and daughter could not leave California. Their letter to you summarizes the problem as follows:

> [o]n October 10, 1996, the final hearing was held. For reasons unknown to any of us, including Alicia's attorney, the judge ruled that Alicia and Caitlin would have to remain in Calif. indefinitely. It was stated that the father had too many financial obligations, therefore he would not be able to afford to visit his daughter in South Carolina. Alicia offered to help pay expenses and / or totally give up child support to help the father with expenses. This was unacceptable to the judge because he was behind in his support.
>
> Our whole family is from South Carolina. We have tried to understand and go along with the courts in Calif., but this is

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> not right. Alicia and Caity are being punished for something that is out of their control.

I am very sympathetic with your constituents' concerns. They are obviously very devoted to and care deeply for their daughter and granddaughter. Unfortunately, however, it would appear that their legal options are somewhat limited. These will be discussed more fully below.

Our Supreme Court has written the following with regard to child custody matters:

> ... once a custody decree has been entered, the continuing jurisdiction of the decree state is exclusive. ... If the decree state's jurisdiction continues, a person seeking to modify the decree must petition the decree state for modification. Continuing jurisdiction is not affected merely by the fact that another state has become the child's "home state." Kumar v. Superior Court of Santa Clara County, 32 Cal.3d 689, 186 Cal.Rptr. 772, 652 P.2d 1003 (1982). If one parent continues to reside in the decree state, and substantial evidence remains there, its jurisdiction may continue.

Sinclair v. Albrecht, 287 S.C. 20, 336 S.E.2d 485 (1985). (emphasis added).

In addition, the Alabama case of Russo v. Myers, 588 So.2d 887 (Ala.1990) is also instructive with respect to your constituents' situation. There, parents were divorced in Alabama and the mother was granted custody of the child. She and the child moved to Florida and the father continued to reside in Alabama. The mother was subsequently held in contempt several times by the Alabama trial court for violating the terms of visitation contained in the order. Subsequently, the trial court modified its custody order giving custody to the father because of the mother's refusal to answer the father's petition or appear in court. The mother was again found in contempt for failure to turn the child over to the father, as ordered.

The mother then sought to modify the Alabama court's orders in the Florida courts. She attacked the Alabama Court's finding of contempt. The Florida Court held that it had jurisdiction under the Uniform Child Custody Jurisdiction Act. However, when the mother returned to Alabama, the mother was jailed for contempt. On appeal, the question of which Court, Alabama or Florida, had jurisdiction was resolved by the Court. The Court had this to say:

[i[n determining questions of jurisdiction in interstate child custody cases, we must look to the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. § 1738A (West Supp. 1990), and Alabama's Uniform Child Custody Jurisdiction Act (UCCJA), §§ 30-3-20 through -44, Ala.Code (1975). In areas of conflict between the two on matters of jurisdiction, the federal provision, the PKPA, prevails. Blankenship v. Blankenship, 534 So.2d 320 (Ala.Civ.App.1988).

The PKPA, 28 U.S.C.A. § 1738A, provides, in pertinent part, as follows:

"(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

"....

"(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if--

> "(1) it has jurisdiction to make such a child custody determination; and
>
> "(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination." ... .

Therefore, in order to modify the custody determination of the Alabama court, the Florida court must not only have jurisdiction to make such a determination, but the Alabama court must either no longer have jurisdiction or must have declined to exercise such jurisdiction. Clearly, the trial court has not declined to exercise jurisdiction over this matter; so we must now determine whether the jurisdiction of the trial court continues.

> Under the PKPA, if the original child custody determination was entered in accordance with the act, and all indications in the present case are that the custody determination was so entered, then the original court retains continuing jurisdiction and the exclusive right to modify as long as the child or one of the parties remains a resident of that state, PKPA, 28 U.S.C.A. s 1738A(d), and other states are required to enforce that decree and generally cannot modify such an order. PKPA, 28 U.S.C.A. § 1738A(a); In re McBride, 469 So.2d 645 (Ala.Civ.App.1985).
>
> While we sympathize with the plight of the mother in this instance, we must find that the trial court retains continuing jurisdiction and the right to modify. As we noted earlier, the father has remained a resident of this state, and the Alabama trial court has not declined to exercise jurisdiction. Consequently, the Florida court is required to give full faith and credit to the Alabama decree and is powerless to modify the order of the trial court.

588 So.2d at 888.

Likewise, our own Supreme Court, interpreting the Uniform Child Custody Jurisdiction Act, S.C. Code Ann. Sec. 20-7-788 et seq., Sec. 20-7-810, has concluded in Sinclair v. Albrecht, supra that only where "connection with the decree state [the state originally issuing the custody decree] ends, ... [may] ... another state ... assume jurisdiction to modify the decree." That means, said the Court, that only

> ... if all the parties involved have moved away or contact with the decree state has otherwise become slight ... . Even if the state has continuing jurisdiction under local law, it has lost interstate jurisdiction.

And in Knoth v. Knoth, 297 S.C. 460, 377 S.E.2d 340 (1989), our Supreme Court summarized the purpose of Section 20-7-810 as follows:

> [c]ourts which render a custody decree normally retain continuing jurisdiction to modify the decree under local law. Courts in other states have in the past often assumed jurisdiction to modify the out-of-state decree themselves without

> regard to the preexisting jurisdiction of the other state (citations omitted). In order to achieve greater stability of custody arrangements and avoid forum shopping, subsection (a) [S.C.Code Ann. Sec. 810, (1976)] ... declares that other states will defer to the continuing jurisdiction of the court of another state as long as that state has jurisdiction under the standards of this Act. In other words, all petitions for modification are to be addressed to the prior state if that state has sufficient contact with the case to satisfy section 3 [jurisdictional requirements]. The fact that the court has previously considered the case may be one factor favoring its continued jurisdiction.

297 S.C. at 463.

Finally in Clark v. Gordon, 313 S.C. 240, 437 S.E.2d 144 (Ct.App. 1993), our Court of Appeals rendered a decision where a custody decree in another state was not given Full Faith and Credit in South Carolina. In Clark, a Missouri order granted custody of the minor child to the father. The issue was whether such order could be modified by the Family Court in South Carolina. The trial court held that the propriety of the Missouri decree should be determined by the courts in Missouri.

On appeal, however our Court of Appeals reversed. The Court referenced previous decisions which had held that "'[s]ections 20-7-790 and 20-7-808 unmistakable declare that our family courts need afford full faith and credit to custody orders of other states only if those orders are competently entered in accordance with standards set forth in subarticle 2 of Chapter 7 of the Children's Code.'" 437 S.E.2d at 147, quoting Purdie v. Smalls, 293 S.C. 216, 222, 359 S.E.2d 306, 309 (Ct.App.1987). In the particular factual circumstances, it was alleged that the Missouri custody order was entered without the requisite notice to the mother required by the Children's Code. In addition, since the mother and daughter had lived in South Carolina for more than six months, it was deemed that South Carolina was the "home state" of the child in accordance with Section 20-7-788. The Court thus concluded:

> [t]he purpose of the UCCJA requiring notice is to preserve the fairness of the hearing. It is of vital importance to both the child and the parent that the hearing meet constitutional standards of fairness. See Thorne v. Thorne, 344 So.2d 165, 169 (Ala.Civ.App.1977). To the extent the trial court refused to consider or determine whether it had authority to consider

> the validity of the Missouri order, it was in error. ... Clearly, the trial court had the authority to and should have determined whether the Missouri order was entered in accordance with the notice requirements of §§ 20-7-790 and 20-7-792 before it dismissed the Clarks' action for lack of jurisdiction.Id.

Accordingly, our courts have generally held that so long as the original decree state where custody was ordered retains jurisdiction, (i.e. evidence of the child's present or future care remains in such State) any effort to modify such decree must be brought in the State where the order was rendered. If, however, South Carolina has become the "home state of the child" pursuant to Section 20-7-788 and substantial evidence of the child's future care exists here, and contacts with the decree state are slight, our courts have jurisdiction under the Uniform Child Custody Jurisdiction Act, to modify such order. Sinclair v. Albrecht, supra. Moreover, if the child's home state is South Carolina, and even if the non-custodial parent still lives in the state where custody was rendered, the Clark decision concludes that the South Carolina Court can look to see if the custody decree was rendered, consistently with our Children's Code before it is required to give full Faith and Credit to the original decree. In other words, even where the custody decree state may retain jurisdiction and where a South Carolina Court also acquires jurisdiction as the child's "home state", the South Carolina Court is not required "to enforce custody orders of other states where those orders are entered contrary to the requirements of the Act." Clark, supra.

The foregoing constitute the general "ground rules" in the area of attacking out-of-state custody decrees in South Carolina. Such is not easy and, of course, in all instances would be controlled by the particular facts and circumstances.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph