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CHARLES MOLONY CONDON
ATTORNEY GENERAL

November 27, 1996

The Honorable Jack I. Guedalia
Charleston County Magistrate
P. O. Box 32412
Charleston, South Carolina 29417

Re: Informal Opinion

Dear Judge Guedalia:

You have asked the following questions:

1. May a Family Court Judge set an appearance bond for a Family Court defendant?

2. The enclosed correspondence casts light on the suggestion that it would benefit the system if a Family Court Judge could set bail on a defendant rather than incarcerate him or require he be placed on work release.

3. Also, would you consider it appropriate for estreated bonds to be assigned to defendant's victims under the auspices of the Family Court? This may take legislation.

I understand that your principal concern is in the area of persons jailed for contempt for failure to pay child support.

LAW / ANALYSIS

S.C. Code Ann. Sec. 20-7-840 et seq., part of the South Carolina Children's Code, provides for the support of children. Section 20-7-840 states that "[a]ny interested persons may file a petition to the court [Family Court] requesting "the court to order persons

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Request Letter

legally chargeable to provide support as required by law." An agreement for support must be reduced to writing and approved by the court.

Section 20-7-860 provides that the Family Court shall "in a proper case" issue a summons or rule to show cause "requiring the respondent to appear at the court at a time and place named to show cause why the order for support prayed for by the petition shall not be granted." Furthermore, pursuant to Section 20-7-870,

> [w]here a respondent shall neglect or refuse to obey an order for support or upon agreement signed by the respondent and approved by the court, and the court is satisfied thereof by competent proof, it may, with or without notice, issue a warrant to commit the respondent to jail until the order is obeyed or until the respondent is discharged by law. (emphasis added).

Section 20-7-880 stipulates a number of situations where a defendant may be arrested and brought before the Family Court pursuant to a warrant authorized by Section 20-7-890. Among these, is where "a respondent on bond or on probation has failed to appear... ." In such instances, warrants issued "shall be valid throughout the State ...", and the Family Court Judge "may issue ex parte orders for temporary child support, temporary custody and restraining orders where conditions warrant." Section 20-7-890 establishes the form of the arrest warrant issued by the Family Court, such warrant ordering the defendant to be committed to jail until he or she "can be brought before the Court or otherwise released in accordance with the law."

Pursuant to Section 20-7-900, where a respondent is arrested under a warrant of the court "when the court is not in session, "he is to be taken before a magistrate and arraigned. Thereupon, "the magistrate ... shall hold the respondent, admit him to bond, or parole him for trial before the court. All subsequent proceedings shall be had in the court."

Section 20-7-910 provides for bond in lieu of punishment. Such Section states:

> [i]f the defendant in any proceeding brought under the provisions of Section 20-7-90, either before or after conviction, shall give bond, with one or more sureties approved by the clerk of the court, in the sum of not less than one hundred dollars nor more than three thousand dollars under such terms and conditions as the court in its discretion

> may deem wise and proper for the maintenance and support of the defendant's wife or minor unmarried child or children, he shall not be imprisoned or the fine imposed unless the condition of such bond is broken.

In addition, Section 20-7-920 reads as follows:

> [i]f the respondent be admitted to bond, the condition of the undertaking shall be for his future appearance according to the terms thereof, or in default of such appearance, that the surety will pay the clerk of court a specified sum as therein set forth. Instead of entering into such an undertaking a respondent may deposit money in an amount to be fixed by the court. If the respondent fails to appear in accordance with the terms of the undertaking, the court shall enter the fact of such nonappearance upon the record, and the undertaking for his appearance, or the money deposited in lieu thereof, shall be forfeited and upon order of the court the sum recovered shall be applied by the clerk of the court for the benefit of the petitioner. However, the court may, in its discretion, remit such forfeiture. (emphasis added).

And Section 20-7-420 (22) authorizes the Family Court

> [t]o require a person ordered to support another to give security by a written undertaking that he will pay the sums ordered by the court for such support and, upon the failure of any person to give such security by a written undertaking when required by order of the court, to punish such person for contempt and, when appropriate, to discharge such undertaking.

The single most-utilized mechanism for enforcement of the Family Court's order of child support is the court's power of contempt. Section 20-7-1350 states that "[a]n adult who wilfully violates, neglects, or refuses to obey or perform a lawful order of the court, or who violates any provision of this chapter, may be proceeded against for contempt of court." In that same vein, our Court has stated that

> [c]ontempt results from the willful disobedience of a court order ... . Before a court may find a person in contempt, the

> record must clearly and specifically reflect the contemptuous conduct. Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 915 (1982). ... A finding of contempt rests within the sound discretion of the trial judge. Hazelwood v. Sullivan, 283 S.C. 29, 230 S.E.2d 499 (Ct.App. 1984).

In Curlee, the Court distinguished between civil and criminal contempt. While the principal purpose of criminal contempt is punishment, when contemnors "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." 277 S.C. at 384. The Court in Curlee also noted that "[j]udicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two proposes: to coerce the defendant into compliance with the court's order and to compensate the complainant for losses sustained." Id. at 386.

Of course, jail is not the only means of enforcement available to the court in contempt proceedings. In Op.Atty.Gen., Op.No. 82-55 (August 18, 1982), this Office addressed the question whether a Family Court was empowered to place support contemnor on probation under the supervision of an adult criminal probation officer. We concluded that in the context of civil contempt for failure to pay support, the Family Court possessed no such authority. We noted that numerous provisions of the Children's Code gave the Family Court the authority to release a contemnor from jail and place the person on "probation" in non-support situations. See, Sections 20-7-420 (23 and 24), 20-7-880 and -900 and §§ 20-7-930 and -940. However, in construing such provisions, we noted that

> [f]rom the context in which the term 'probation' is used in these statutory provisions, it is clear that the authority of the Family Court to place a person on 'probation' is limited only to those situations wherein a parent has been place under a support order, he has failed to comply with that order, and has, consequently, been brought before the Court in a supplemental enforcement proceeding for civil contempt. The Court would then use these provisions as a remedial, not punitive, means of enforcing its original order. If the individual was found to be in contempt and a jail sentence was imposed under Section 20-7-1350 of the Code, the contemnor would be allowed to purge himself of this contempt and avoid serving his sentence by complying with certain probationary conditions designed to insure compliance

> with the previously issued support order, such as paying the arrearage under the order and making all future payments in a timely manner. What is actually allowed by these provisions is a conditional sentence similar to the one imposed in the recent case of Curlee v. Howle, ____ S.C. ____, 287 S.E.2d 915 (1982).
>
> In Curlee, the appellant had been brought before the Greenville County Family Court on a Rule to Show Cause for violating provisions of a child custody order. As a result of the appellant's violations, the respondent had incurred expenses in excess of $12,000 to obtain a return of lawful custody of her children. The Court found the appellant in contempt, sentenced had to one year imprisonment, but provided that he be allowed to purge himself of the contempt by paying the expenses incurred by the respondent. The issue on appeal was whether the Court had the authority to issue such an excessive sentence without a jury trial. In examining the sentence, the Supreme Court correctly characterized the action as one for civil contempt, not criminal contempt, its purpose being 'to compel appellant to pay the expenses, not for punishment.' Therefore, the Court concluded '[t]he conditional nature of the imprisonment, based entirely upon appellant's refusal to pay respondent's expenses, justified the civil contempt proceeding without a jury trial.' 287 S.E.2d at 919.

Thus, it is clear that "[a] large degree of discretion is lodged in the court, in the matter of punishment for a civil contempt, as to conditions on which contempt may be purged ... ." 17 Am.Jur.2d, Contempt, § 230.

Likewise, the Court in Scheibner v. Wonderly, 279 S.C. 212, 305 S.E.2d 232 (1983) noted that Section 20-7-1350 does not require the court to punish for contempt; rather it permits punishment. Family Court is empowered to find and punish for contempt, but it is not required to impose sanctions upon such finding. Taylor v. Taylor, 294 S.C. 296, 363 S.E.2d. 909 (S.C.App. 1987). Sanctions, in other words, are not mandatory. Sutton v. Sutton, 291 S.C. 401, 353 S.E.2d 884 (S.C.App.1987).

Moreover, with respect to Section 20-7-870, which authorizes the Family Court to commit the respondent to jail until the child support order is obeyed "or until the respondent is "discharged by law", we noted that

> [u]nder the final phrase "discharged by law" it appears that the court has the authority to release a respondent (not necessarily imposing probation) on the basis of something less than full compliance with the support order. (emphasis added).

With respect to release on bond, in lieu of imprisonment, as a method of assuring both the defendant's appearance and compliance, our courts have recognized these as well. In Satterwhite v. Satterwhite, 280 S.C. 228, 312 S.E.2d 21 (1984), our Court stated:

> Finally, with respect to visitation, Mrs. Satterwhite has on numerous occasions willfully failed to comply with that part of the court's order requiring her to meet her husband halfway on the weekends that he is entitled to the children. Accordingly, the finding of contempt for the visitation violations is affirmed as is the requirement that Mrs. Satterwhite put a $5,000 bond to insure her future compliance.

And in S.C.D.S.S. v. Chico Johnson, 272 S.C. 351, 252 S.E.2d 558 (1979), the Court stated that "[i]n August 1977, respondent was cited for contempt for failure to comply with the support order. Respondent posted a cash bond which was subsequently applied toward his arrearage."

And in Fender v. Fender, 256 S.C. 399, 182 S.E.2d 755 (1971), the Court commented upon the authority of the Family Court to require security to insure compliance with a child support order. The Court concluded:

> [t]he remaining questions concern the provisions, which require the husband (1) to make monthly deposits in a savings account for the child's future needs and (2) to provide an insurance policy to assure that funds are available for the higher education of the child.
>
> The parties agree that the purpose of the savings account is to provide security for the payment of child support.

> The power of the court to require, in proper cases, that security be given to assure compliance with its orders touching the care, custody and maintenance of children is expressly granted by statute. Section 20-115, 1962 Code of Laws. [Section 20-3-160].
>
> Whether such security will be required rests within the sound discretion of the court.
>
> In order, however, to justify a requirement that security be given, the record should show that it was reasonably necessary to assure compliance with the order of the court. This record contains no such showing and that portion of the order requiring that the savings account be established as security for the payment of child support is reversed. If it subsequently appears that security is necessary, the continuing jurisdiction of the lower court affords ample opportunity to require that it be given.

182 S.E.2d at 788. Fender relied upon Section 20-3-160 which provides that

> [i]n any action for divorce from the bonds of matrimony the court may at any stage of the cause, or from time to time after final judgment, make such orders touching the care, custody and maintenance of the children of the marriage and what, if any, security shall be given for the same as from the circumstances of the parties and the nature of the case and the best spiritual as well as other interests of the children may be fit, equitable and just.

Based upon the foregoing, I see no reason why a Family Court Judge may not require security in the form of an appearance bond or performance bond to insure compliance with the support order. Section 20-7-920 clearly provides for an appearance bond and such forfeiture upon order of the Court "shall be applied by the clerk of court for the benefit of the petitioner." Section 20-7-420 (22) provides for a bond to secure compliance with the support order. Likewise, Section 20-7-910 authorizes a bond "under such terms and conditions as the court in its discretion may deem wise and proper for the maintenance and support of the defendant's wife or minor unmarried child or children ... ." In addition, our courts, have on several occasions recognized the use of a bond to secure the defendant's compliance with the court's support order and, as well, the

application of such bond upon forfeiture to the petitioner's support has also been recognized. Finally, the Court has generally acknowledged the use of security to insure compliance with its order whether such security be an insurance policy, a savings account, a bond or whatever form of security the Court deems necessary.

In summary, it is my opinion the Family Court possesses broad authority to secure enforcement of child support orders. In addition to a fine and/or imprisonment, the Court may require in lieu thereof the posting of an appearance bond or a performance bond to insure that the Order of support has been implemented and complied with.

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/ph