

# Splitting The Baby

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## A Wise Guy's Look At Child Custody Enforcement

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Once again we find ourselves in the busy Christmas season – we've got shopping to do, parties to attend, presents to wrap, black and white movies to watch...the list goes on and on. So let's jump right into today's legal update with our good friend, Mr. Hypothetical Question.

It is a dark and stormy December night. As you are settling in as watch commander you receive a phone call from a lawyer.<sup>1</sup> This lawyer tells you in a very condescending and patronizing manner that her client is the mother of a 12 year old girl named Mary<sup>2</sup> and that Mary is currently living in High Point with her biological father. The lawyer informs you that he has obtained a court order from a District Court judge in New Hanover County granting temporary custody of Mary to the mother. Furthermore, the mother is on her way to the police station so that an officer can go with her to the father's house to retrieve the child.

At precisely that moment, you are notified by another officer that a woman is waiting in the lobby to speak with you. Indeed, it is this very mother, wired from drinking five cups of coffee on the way here from Wilmington, and holding the official court document entitled "Temporary Custody Order" and signed by a District Court judge. The order says that "law enforcement officers are authorized to use whatever means necessary to enforce the order." The mother tells you that she is 100% certain that her "no-account worthless philandering ex-husband" will not give up the child without a fight. She then asks whether you are carrying a TASER.

What do you do? What can you do? Why do these situations always happen on your watch? Why didn't the cold medicine you took ameliorate<sup>3</sup> your head cold symptoms? These are all good questions.

First of all, let me say that a perfectly acceptable solution to this hypothetical is to call your agency's legal advisor. In fact, if you are ever faced with a situation that involves the words "court order" or "a lawyer wants me to [blank]" or "whatever means necessary," and you are the least bit uncertain as to what you can or should do, you SHOULD call me. I would much rather be bothered on vacation or woken up in the middle of the night and have to spend 15 minutes on the phone with you than get to work and realize that the decision you made has plunged our department into

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<sup>1</sup> The fact that a lawyer is calling is clue #1 that it is going to be a long night.

<sup>2</sup> No, not that Mary. The "Mary" in our hypothetical is not with child nor is she returning to her betrothed's hometown to be registered in a census ordered by a Roman emperor.

<sup>3</sup> Ameliorate is a verb which means "to make better" or "to improve." It is also hard to say five times fast unless you have small lips.

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litigation that will take me two years and a lot more work to handle.<sup>4</sup> The other advantage to calling me is that you now have a scapegoat when it all hits the fan.<sup>5</sup>

The biblical King Solomon once faced such a quandary. You might know that King Solomon was known for his wisdom.<sup>6</sup> On one occasion two women came to him, both claiming to be the real mother of the same baby.<sup>7</sup> In fact, one of the women had inadvertently smothered her baby by laying on it during the night and had swapped the dead baby with the live baby of the other woman. The second woman then woke up and realized the dead baby she was holding was not hers. The two women then came to Solomon to settle the dispute.

Solomon called for a sword and ordered the baby cut in two and one half given to each woman. The woman who had already lost a child was happy with that solution but the true mother of the living child cried out and begged Solomon to let the child live with the other woman. Solomon then ordered the child given back to the woman who would rather relinquish her rights as a parent than see her child killed, as this reaction is what the real mother would be expected to have.

Let me be clear: I do not advise that you cut, or threaten to cut, the child in half as your solution to our hypothetical. But if you want to be wise like King Solomon, call your legal advisor. When you do call, I'm going to tell you the information contained in the rest of this legal update.

A child custody order is a civil order. It is not a crime to violate a civil child custody order.<sup>8</sup> As a result, law enforcement officers may not use force<sup>9</sup> to enforce such an order by, for example, taking the child from one parent and giving the child to the other parent. This is true even though the court order has language purporting to give law enforcement officers permission to use such force. The court cannot give you legal authority that it does not have the power to give.<sup>10</sup>

So applying this to our hypothetical situation, officers may certainly accompany the mother to the father's house and request that he comply with the court order. If he refuses, the mother must pay her lawyer to go back to court and have the judge find the father in contempt of court. Our only role at this point is to keep the peace between them.<sup>11</sup>

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<sup>4</sup> This is a better deal than the ones some of you went out at midnight to get on Black Friday. As I said last year in this space, if you catch me out shopping on Black Friday something has gone terribly wrong and I would like for you to investigate.

<sup>5</sup> "The lawyer told me to do it" (if true) will get you out of some sticky situations. And don't worry too much about me. I know a lot of different ways to weasel out of trouble – that's what good lawyers do.

<sup>6</sup> "The whole world sought audience with Solomon to hear the wisdom God had put in his heart." 1 Kings 10:24

<sup>7</sup> 1 Kings 3:16-28. Coincidentally, the Jerry Springer show got most of its ideas from ancient Israel as recorded in the Old Testament.

<sup>8</sup> The enforcement mechanism for civil orders is the court finding the violator to be in contempt of court which subjects them to fines, jail time, and the like (N.C.G.S. 50-13.3). Police officers generally aren't involved in that process – that's for the lawyers to fight about.

<sup>9</sup> The phrase "use force" here does not necessarily mean beating the crap out of dad. It means any seizure of either dad or the child in order to enforce the order. In other words, it's force even if you are really nice and gentle about it.

<sup>10</sup> Two N.C. Court of Appeals cases on this point are In re Bhatti, 98 N.C. App. 493 (1990) and Chick v. Chick, 164 N.C. App. 444 (2004). Before violating a signed court order, you really need to call me. In fact, I'm making that a rule: Call the lawyer before deciding to violate or ignore a court order. It's that simple.

<sup>11</sup> Fair warning: Not only is the mother going to get upset and call you all kinds of names and accuse you of not doing your job properly, but her lawyer probably will as well. Quite a few lawyers will be quite indignant and tell you that you have to follow an order of the court. They are wrong in this limited circumstance.

This hypothetical situation is what you will face with this issue the vast majority of times. However, let's look at some variations on that theme that might affect our ability to enforce a child custody order.<sup>12</sup>

### **Variation One: The Warrant To Take Physical Custody of A Child**

In certain circumstances, there is a way that a parent can get a court order that does give law enforcement the authority to take custody of the child. If a parent lives outside North Carolina and gets a child custody order in that other state,<sup>13</sup> they must "register" that order with a North Carolina court before it is enforceable here.<sup>14</sup> At that time, they would file a petition for enforcement of the order as well.<sup>15</sup>

If they can prove to the court that (1) the child is imminently likely to suffer serious physical harm OR (2) the child is imminently likely to be removed from North Carolina, the court can issue a warrant to take physical custody of the child.<sup>16</sup> This warrant orders law enforcement to take physical custody of the child immediately and will give instructions on who the child must be placed with after being taken into custody. You now have the ability to take possession of the child and you must obey the instructions on the warrant.

How will you know the difference? The Administrative Office of the Courts has a form for this particular document. You can download the form from their website at <http://www.nccourts.org/Forms/Documents/1003.pdf>. When you see this form, you have the right and obligation to take the child into custody. This will be a rare situation, however, because the proof required for the issuance of this warrant is difficult.<sup>17</sup>

### **Variation Two: A Crime Has Been Committed**

While law enforcement officers cannot use force to enforce civil child custody orders in most cases, you should always make sure that a criminal offense has not or is not being committed in connection with the custody of the child. For instance, G.S. 14-41 makes it a Class F felony to abduct or induce without legal justification or defense a minor child who is at least four years younger than the person to leave a person, agency, or institution lawfully entitled to the child's custody, placement, or care.

Another statute to know is G.S. 14-320.1, which makes it a Class I felony for a person to transport a child under 16 years old outside of this state with the intent to violate a court order awarding custody of the child to someone else. If the custody rights to the child were settled

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<sup>12</sup> As an aside, the fact that the custody order was issued by a North Carolina court rather than an out-of-state court is NOT a variation that makes a difference. Whether the court order is in-state, out-of-state, out-of-county, or off-planet does not change the analysis.

<sup>13</sup> A child custody order from another state is called a "foreign child custody order" and courts outside our state are sometimes referred to as "foreign courts." If you've ever attended court in South Carolina, you probably understand why.

<sup>14</sup> G.S. 50A-305.

<sup>15</sup> G.S. 50A-308.

<sup>16</sup> G.S. 50A-311. I have just taught you something that a great number of lawyers (even domestic lawyers) don't know. Don't get the big head, though.

<sup>17</sup> There is an even rarer situation that I mention here for the sake of thoroughness. G.S. 50A-315 allows a prosecutor or other public official to step into a child custody case in very limited circumstances and G.S. 50A-316 gives law enforcement the authority to "take any lawful action reasonably necessary" to assist the prosecutor or public official.

before the non-custodial parent took the child, then one of the above laws may have been broken and you certainly have the authority to investigate and enforce the criminal law.

Finally, if the custody order is part of a Domestic Violence Protective Order under Chapter 50B, then you have authority to enforce that order under G.S. 50B-4(c).<sup>18</sup> You may also evaluate whether you have probable cause to arrest for a violation of a valid protective order.

### **Variation Three: The Juvenile is Abused, Delinquent, Dependent or Undisciplined**

If during your investigation into the custody situation you find that the juvenile is an “abused juvenile” as defined by G.S. 7B-101(1), a “neglected juvenile” as defined by G.S. 7B-101(15), or is a “dependent juvenile” as defined by G.S. 7B-101(9),<sup>19</sup> you should notify the Department of Social Services. In addition, you may take the child into temporary custody under G.S. 7B-500 if you have reasonable grounds to believe that the juvenile will be injured otherwise.

Obviously, if the juvenile has committed a crime that would justify the arrest of an adult (the juvenile is delinquent), is “undisciplined,”<sup>20</sup> or is an escapee from a state training school or detention facility, you may take the juvenile into custody under the juvenile code.

### **Variation Four: The Parent Commits Some Other Crime**

As mentioned above, your role in the standard civil custody order scenario is simply to keep the peace. However, if you are unsuccessful in that role, and the parent with the child flips out and commits some crime such as Communicating Threats, Drunk and Disruptive,<sup>21</sup> Disorderly Conduct, or Assault With A Deadly Weapon With Intent To Kill Inflicting Serious Injury,<sup>22</sup> you should take appropriate enforcement action. The child should then be placed with the parent who has custody rights according to the custody order.

That concludes our in-depth look at child custody enforcement issues. Since this update has been heavy on the information and light on the humor, I’ll leave you with this Christmas story...

It was just before Christmas and the magistrate was in a happy mood. He asked the prisoner who was in the holding cell, 'What are you charged with?'

The prisoner replied, 'Doing my Christmas shopping too early.'

'That's no crime', said the magistrate. 'Just how early were you doing this shopping?'

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<sup>18</sup> G.S. 50B-4(c) says that “A valid protective order entered pursuant to this Chapter shall be enforced by all North Carolina law enforcement agencies without further order of the court.”

<sup>19</sup> It is less obvious what a dependent juvenile is as compared to an abused or neglected juvenile. A dependent juvenile is one in need of assistance or placement because he has no parent, guardian, or custodian, or his parent, guardian, or custodian is unable to provide suitable care or supervision. The juvenile is “dependent” on help from the State.

<sup>20</sup> This is defined in G.S. 7B-1501(27). It means quite a bit more than “little Johnny wouldn’t clean up his room when I told him to.”

<sup>21</sup> Did you know that being an alcoholic is a complete defense to a charge of Drunk and Disruptive? It says so right in the statute. That seems odd to me.

<sup>22</sup> If this crime occurs while you are “keeping the peace,” we’ve got some serious performance issues to deal with.

'Before the store opened', answered the prisoner.

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**ABOUT THE AUTHOR: Brian Beasley is the Legal Advisor for the High Point Police Department. This legal update is provided free of charge to the SR&S Webpage in the hopes that officers across the state would be able to benefit from it. Brian is not an attorney with Smith, Rodgers, & Strickland, PLLC but he thinks they're pretty cool guys.**



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