

**REPORT OF THE OFFICE OF THE EXECUTIVE
SECRETARY SUPREME COURT OF VIRGINIA**

**ENHANCED TRAINING FOR
MAGISTRATES IN THE
HANDLING OF CHILD ACCESS
OR VISITATION INTERFERENCE
CASES**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



HOUSE DOCUMENT NO. 12

**COMMONWEALTH OF VIRGINIA
RICHMOND
1997**

REPORT OF THE EXECUTIVE SECRETARY, SUPREME COURT OF VIRGINIA
HOUSE JOINT RESOLUTION NO. 229

In response to House Joint Resolution 229, the Office of Executive Secretary, Supreme Court of Virginia has provided additional training to magistrates on the handling of child access and visitation interference cases. On March 11-12, and March 16-19, 1996, the Technical Assistance Department presented a one-half hour seminar on Virginia Code Sections 18.2-49.1 and 18.2-47 to all magistrates at the Spring Magistrate's conference in Roanoke, Virginia. Policy set by the Committee on District Courts required each magistrate to attend this conference. Each magistrate received a copy of a handout outlining the elements of the crimes of parental abduction and violating a court order regarding custody and visitation. A copy of this handout is attached to this report.

The Technical Assistance Department provided further training on Section 18.2-49.1 at the June, 1996 New Legislation Review seminars. The Department held these seminars at Charlottesville, Williamsburg, Wytheville, and Fairfax. While magistrates were not required to attend these seminars, nearly all magistrates chose to participate.

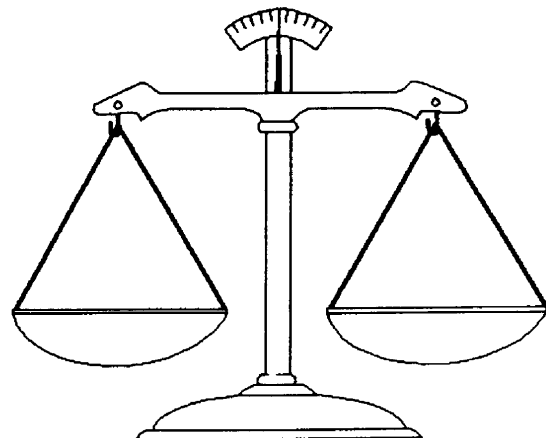
The Office of Executive Secretary provides each magistrate a copy of the Magistrate Manual. This manual sets forth procedures for magistrates to follow covering the magisterial duties authorized by law. The manual also serves as a legal reference guide. Pages IV-30 through IV-34 provides instructional information to the magistrate in regards to violations of custody and visitation orders. The Department of Technical Assistance added a question concerning the violation of visitation and custody orders in the July, 1996 update to the Virginia Magistrate Manual Progress Quiz Book. Chief magistrates must periodically administer quizzes contained in this book to all newly appointed magistrates during the training required by the Code of Virginia. The Department designs these quizzes to ensure that magistrates understand the information contained in the Magistrate Manual. Additionally, newly-appointed magistrates must attend a week-long training course sponsored by the Office of Executive Secretary during the first six months of their terms. Magistrates receive information regarding correct procedures to following when confronted with a case involving a violation of a custody or visitation order.

**VIRGINIA MAGISTRATE
CONFERENCE
1996**

**VIOLATIONS OF COURT
ORDERS REGARDING CUSTODY
AND VISITATION - §18.2-49.1**

**PARENTAL ABDUCTION
§18.2-47**

SPONSORED BY:
THE DEPARTMENT OF
TECHNICAL ASSISTANCE
THE SUPREME COURT OF
VIRGINIA



March, 1996

Violations of Court Orders Regarding Custody and Visitation

§ 18.2-49.1

I. Elements of § 18.2-49.1 Subsection A.

A. This subsection requires that a court has issued an order specifically regarding custody or visitation.

1. The order may come from a Virginia juvenile or domestic relations district court, a Virginia circuit court, or an out-of-state court.

a. The court will issue copies of its order to the parties involved. The magistrate should examine a copy of the order to verify its contents during the probable cause hearing.

b. Virginia Commonwealth's Attorneys may be reluctant to prosecute cases involving crimes based upon out of state court orders. Before issuing a warrant based upon an out of state order, the magistrate may want to confer with the Commonwealth's attorney.

2. The order must be the most recent regarding custody or visitation.

a. Courts often modify existing orders. The magistrate must require the complainant to verify whether the order in question is the last that a court has issued.

B. A person must "**knowingly, wrongfully and intentionally**" withhold a child from the child's custodial parent. There is no case law or opinion of the Attorney General that defines the phrase as it pertains to this statute.

1. "Knowingly" - As the court issues copies of its order to the parties involved, the magistrate may assume that they know the terms of the order.

2. "Wrongfully" - The magistrate may assume that the accused does the withholding wrongfully unless the facts suggest otherwise. Example of where the withholding might not be wrongful:

a. The child is on a three week visitation with his mother in South Carolina as mandated in the court order. Just before the visitation period is up, the child is hospitalized because of an accident. Because of this the mother is unable to return her son to his father in Virginia on time.

b. The magistrate should note that the parties to the court order may not change the provisions of the order by agreement. Only the court may modify its own order.

3. "Intentionally" - The magistrate may assume that the accused does the withholding intentionally unless the facts suggest otherwise. Examples of where the withholding might not be intentional:

- a. The child is on a three week visitation with her father in Alaska as mandated in the court order. The father takes his daughter on a wilderness tour. Flooding prevents the tour from returning on time, and the father is unable to return his daughter to her mother in Virginia pursuant to the order.
 - b. The child is on a two week visitation with his mother in Texas as mandated in the court order. On the trip back to Virginia the mother develops car trouble and is unable to return her son to his father on time.
 - C. The violation of the order must be "*clear and significant.*"
 - 1. There is no case law or opinion of the Attorney General that defines what constitutes a clear and significant violation.
 - 2. "Clear" - In determining if a violation is a "clear" one, the magistrate must read the exact wording of the order. Often the court orders are very broad and general. If after reading the order, the magistrate is unable to pinpoint how the withholding of the child from the custodial parent violates the order, then the action is probably not a clear violation.
 - 3. "Significant" - A minor violation of the order apparently does not qualify. For example, a child is on a two week visitation with her father in West Virginia. The order requires the father to return the child to her mother by 6:00 p.m. on February 29, 1996. The father has not arrived with the child by 7:00 p.m. and the mother requests that the magistrate issue a warrant for the violation. At this point, the violation is probably not significant. The magistrate should use common sense in deciding whether the withholding is a significant violation.
 - D. This subsection deals only with a violation of a custody or visitation order where a person withholds the child out of state from the "*custodial parent.*"
 - 1. There is no case law that defines the term "custodial parent." In order to preserve this issue for the court's decision, the magistrate should assume that the person entitled to custody during the period in which the violation occurs is the custodial parent.
 - 2. If the action involves withholding a child in state in violation of an order, or involves other types of violations other than withholding either in or outside of Virginia, subsection B of §18.2-49.1 applies.
 - E. A violation of this subsection constitutes a class 6 felony.
- II. Elements of §18.2-49.1 Subsection B.
- A. This subsection requires that a court has issued an order specifically regarding custody or visitation.

1. The order may come from a Virginia juvenile or domestic relations district court, a Virginia circuit court, or an out-of-state court.
 - a. The court will issue copies of its order to the parties involved. The magistrate should ask the complainant to see a copy of the order to verify its contents during the probable cause hearing.
 2. The order must be the most recent regarding custody or visitation.
 - a. Courts often modify existing orders. The magistrate must ask the complainant whether the order in question is the last that a court has issued.
- B. A person must "***knowingly, wrongfully and intentionally***" engage in conduct which violates the order. There is no case law or opinion of the Attorney General that defines the phrase as it pertains to this statute.
1. "Knowingly" - As the court issues copies of its order to the parties involved, the magistrate may assume that they know the terms of the order.
 2. "Wrongfully" - The magistrate may assume that the accused does the withholding wrongfully unless the facts suggest otherwise.
 3. An example of where the withholding might not be wrongful:
 - a. The child is on his weekend visitation with his mother as mandated in the court order. The mother is supposed to have the child back to his father by 6:00 p.m. on Sunday. On Sunday afternoon the child becomes sick and the mother takes the child to the hospital where he is admitted. Because of this the mother is unable to return her son to his father on time.
 - b. The magistrate should note that the parties to the court order may not change the provisions of the order by agreement. Only the court may modify its own order.
 4. "Intentionally" - The magistrate may assume that the accused does the withholding intentionally unless the facts suggest otherwise. An example of where the withholding might not be intentional would be where the mother is unable to return her son to his father on time because of unsafe weather conditions.
- C. Any action specifically prohibited or required in the order constitutes a violation.
1. Unlike subsection A of §18.2-49.1, a violation of subsection B of §18.2-49.1 is not limited to the withholding of the child from the custodial parent.

2. Examples:

- a. The court orders that the father is to have custody of his two children every other weekend. The mother refuses to allow the father to see his children on his scheduled weekend.
- b. The court order specifies that the mother is to have visitation every other Monday night with her child only at her grandmother's home while the grandmother is there to supervise. Instead of seeing her son at her grandmother's house, the mother takes him to her boyfriend's house.

D. The violation of the order must be "*clear and significant*."

1. There is no case law or opinion of the Attorney General that defines what constitutes a clear and significant violation.
2. "Clear" - In determining if a violation is a "clear" one, the magistrate must read the exact wording of the order. Often the court orders are very broad and general. If after reading the order the magistrate is unable to pinpoint how the specific conduct violates the order, the action is probably not a clear violation.
3. "Significant" - A minor violation of the order apparently does not qualify. For example, the father was late thirty minutes in returning the child to her mother.
 - a. The complaining party may enforce minor violations by petitioning the appropriate court.

E. The first violation of this subsection is a class 4 misdemeanor, and consequently the magistrate would issue a Summons [DC-319].

F. A second conviction within twelve months of the first conviction enhances the penalty to a class 3 misdemeanor, and the magistrate would issue a Summons [DC-319] for a violation.

G. A third conviction within twenty-four months of the first conviction enhances the penalty to a class 2 misdemeanor.

III. Section 18.2-49.1 statute is silent as to venue and there is no case law on point. Section 19.2-244 states that "*the prosecution of a criminal case shall be had in the county or city in which the offense was committed.*" Arguably, venue would be proper either in the locality in which the court issued the order, or where the action occurred that caused the violation of the order. If one court transferred the custody or visitation order to a court in another locality, venue would lie in the locality to which the order was transferred and not in the locality from which the order transferred.

A. For example, the Lee County Juvenile and Domestic Relations District Court issued a custody and visitation order giving the mother custody of her son, but allowing the father visitation every other weekend. The mother moves to Wythe County. When the father comes to pick up his son for visitation, the mother refuses to allow the father to have him. Arguably, this violation could be prosecuted either in Lee County or in Wythe County.

Parental Abduction §18.2-47

- I. Elements of §18.2-47 as it pertains to parental abduction.
 - A. A parent must "**seize, take, transport, detain, or secrete**" the child.
 - B. The parent must seize, take, etc., the child "**by force, intimidation or deception.**"
 - C. The parent must have no legal justification for seizing, taking, etc., the child.
 1. Where a court has not established which parent has custody, and no proceeding is pending, both parents have a legal justification for taking the child, and consequently no crime has occurred when one parent withholds or conceals the child from the other parent.
 - D. The parent must have either the intent
 1. to deprive the child of his or her personal liberty,
 - a. In the Diehl case, the parents chained their child to the floor of a bus, and subjected the child to torture and abuse. This case involved parents depriving their child of his personal liberty and did not involve the parents withholding or conceal the child from an entity entitled to the child's charge. The Court in Diehl also held that since there was no proceeding pending in court involving the child or the parents, the crime was punishable as a class 5 felony.
 2. or, to withhold or conceal the child from a person or entity "**entitled to his charge.**"
 - E. The parent's action must be punishable as contempt of court in a pending proceeding.
 1. If a court has issued a custody or visitation order, this statute does not apply. §18.2-49.1 is the appropriate statute.
 2. If there is no pending proceeding or no custody or visitation order, neither §18.2-47 nor §18.2-49.1 apply where a parent withholds or conceals his or her child from the other parent.
 - F. If the parent withholds or conceals the child within Virginia, a violation of §18.2-47 constitutes a class 1 misdemeanor.
 - G. If the parent withholds or conceals the child outside of Virginia, a violation of §18.2-47 constitutes a class 6 felony.

