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**NEVADA STATE CHILDREN'S ADVOCATE**

**NEVADA CLEARINGHOUSE FOR  
MISSING AND EXPLOITED CHILDREN**

May 28, 2013

Honorable Gloria O'Malley  
Eighth Judicial District Court  
Family Court - Department B  
601 North Pecos Road  
Las Vegas, Nevada 89101

Re: Enforcement of Custody Orders/Orders for the Return of Missing Children

Dear Judge O'Malley:

Based on recent experiences of the Clearinghouse in cases regarding missing and abducted children, including cases of parental custodial interference, the long-standing issue of the enforcement of custody orders and orders for the return of missing children has again been raised. In a recent case involving a telephonic judicial conference under the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act (the "UCCJEA"), both my Office and the Las Vegas Metropolitan Police Department were criticized by an out-of-state judge for "disregarding" an out-of-state custody order and a local pick up order, when the Clearinghouse had investigated the case and uncovered a foundational jurisdiction problem with that custody order, leading to the conference call itself. We are aware that such criticism arises from time to time in the enforcement context when judges and attorneys draw the conclusion that enforcement procedures for civil custody orders are weak. Because the discussion in the hearing raised issues of both enforcement and communication, it seems prudent to use the opportunity to communicate with the members of the family court bench to continue a broader discussion of custody order enforcement. It is important for the family court bench, and the bar as well, to have a clear picture of what the various police agencies and the Clearinghouse do in the enforcement realm, what they do not do, and what they cannot do. Clearinghouse staff thinks that the belief that custody

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orders are commonly not enforced stems from practitioners' unfamiliarity with the activities of the Clearinghouse and police agencies, and our overall efforts in the missing child recovery effort.

Clearinghouse staff agree that, historically, the enforcement of custody orders has been ineffective overall. The problem is one of national scope, and raises many complex issues. Since being appointed as the Nevada State Advocate for Missing and Exploited Children and the Director of the Missing Children's Clearinghouse seven years ago, the Children's Advocate has initiated a number of new policies within the Missing Children's Clearinghouse relating to the recovery of missing kids. Several of the initiatives we have undertaken were designed to foster better coordination, synchronization if you will, between the family courts, attorneys, the police, and the Clearinghouse. In the past seven years the Children's Advocate has moved on multiple fronts to take an active role in strengthening coordination among interested system players. In this endeavor, the Clearinghouse has undertaken several new directives.

- First, as many of you are aware, the Children's Advocate appeared as an invited speaker at the 2012 Ely conference to introduce the Clearinghouse to the family court bench and bar. The comments were introductory in nature, designed to introduce the Clearinghouse to the bench and bar. As we had hoped, that appearance resulted in a substantial increase in communication between the Clearinghouse and the family court bench and bar, and increased the number of referrals to our unit regarding missing children cases. We count these contacts as a success based on better communication and outreach. We hope for more such speaking engagements on focused topics in the future.
- Second, since being appointed to the Clearinghouse, the Children's Advocate has taken the opportunity offered by NRS 432.157(4) to make special *amicus curiae* appearances in family court in a limited number of custody cases, approximately 20-25, relating to missing children. Prior to the appointment of the current Advocate, these special appearances were never made. These special appearances have been limited to extraordinary cases where the provision of independent and unbiased investigative information is believed to be of assistance to the judge presiding in that case. We intentionally keep these appearances to a minimum due to their extraordinary nature. In these appearances the Advocate does not advocate for any party, but appears to provide facts as the Clearinghouse investigation has uncovered them.
- Third, we have dramatically increased the number of missing children's investigations and prosecutions. Although the Clearinghouse has just two staff members, and the Advocate works only 1/4 time in that position, maintaining a large federal habeas corpus case load as well, annually the Clearinghouse receives over 2500 telephone, walk-in and e-mail requests for information, assistance and investigation services, and has a running average of over 300 active investigations. Our requests for assistance and investigation come from local police agencies, civil attorneys representing left-behind parents, the

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National Center for Missing and Exploited Children, federal agencies like the U.S. Departments of Justice and State, out-of-state police agencies and private attorneys, and foreign governments.

The Clearinghouse handles three general categories of missing children issues: (1) those where both parents reside in Nevada and the child has remained in the state; (2) those where a Nevada child has been taken out of the state; and (3) those where an out-of-state child has been brought to Nevada. In the past several years, for example, we have assisted in child recoveries in out-of-state domestic cases from more than twenty states, including Colorado, California, Arizona, Ohio, Michigan, Wisconsin, Mississippi, among others, and we have assisted in international abduction cases from Canada (multiple cases), France (multiple cases), Israel, Australia, Sweden, Taiwan and Korea. The Unit's investigator, a P.O.S.T. category I sworn law enforcement officer, has received accolades from police attaché officials of the French Embassy in Washington, D.C., as well as local prosecutors and attorneys in both Versailles and Lyon, France for her work in locating abducted children in a speedy and efficient manner, recoveries that exceeded the expectations of the State Department by their sheer speed. The Clearinghouse's criminal case load is at its highest level ever. Current criminal prosecutions initiated for violations of NRS 200.359 (Detaining, Concealing or Removing a Child) and 200.310 (Kidnapping) number approximately 64 open criminal prosecution cases, either in the active stage or with criminal complaints filed and active arrest warrants issued by the various justice court judges.

- Fourth, The Clearinghouse has researched, drafted and sponsored legislation in the Nevada legislature to foster the rights and welfare of missing children. Two sessions ago, Clearinghouse staff drafted the language in NRS 125.480 relating to the risk factors associated with abducted children and the best interest of the child in custody cases when evidence of a past abduction or kidnapping arises in a custody case. Last session the Clearinghouse drafted and sponsored the language of NRS 432.207 relating to the ability of the Children's Advocate to apply for a warrant to recover an abducted or kidnapped child. This statute is unique in the nation, and its terms are fully compliant with federal constitutional standards under the Fourth and Fifth Amendments relating to lawful searches and seizures and due process. The warrant process has been utilized in approximately 25 cases in the past twenty two months before seven or eight Clark County family court judges, and has proved itself to be extremely successful in appropriate child recovery cases.
- Fifth, the Clearinghouse has submitted articles in professional journals like Nevada Lawyer to keep members of the family law bench and bar informed of contemporary issues relating to custody and custody enforcement. The most recent submittal was an article published in the June 2012 issue of Nevada Lawyer on constitutional issues relating to Grandparent visitation.

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- Sixth, Clearinghouse staff meet regularly with representatives of the missing persons unit of the Las Vegas Metropolitan Police Department, the unit that handles missing children's cases within that jurisdiction, as well as representatives from the North Las Vegas Police Department and the Henderson Police Department, to discuss current issues relating to the law, investigative protocols, and criminal submittals to the Clearinghouse. These meetings are designed to foster both communication and coordination of missing children's cases.

On the issue of custody enforcement, the Children's Advocate shares the frustration felt by family court judges and victim parents when custody orders are disregarded. Historically, the enforcement of family court orders has been the weak link in the custody chain. The problem of the enforceability of these orders has been a national problem for several decades in the face of parental non-compliance and a lack of appropriate sanctions and remedies. But judges and practitioners must understand both sides of the historic enforcement problem: a lack of enforcement on the one hand, and unlawful enforcement actions taken by police agencies on the other. An overriding goal of the Clearinghouse and the police agencies in Southern Nevada is to get recalcitrant parents back into the family court process using the least intrusive method that is reasonably possible. Only a small number of custodial interference/parental abduction cases lead to criminal charges being filed. One fact unknown to family court judges and attorneys is that the Clearinghouse and police agencies in Southern Nevada resolve substantially more than half of all reported cases of parental custody interference without the family courts ever knowing about the case or its resolution. Because these resolutions are "invisible" to judges, having occurred outside the judicial realm, courts remain unaware of many of the efforts expended and successes attained by law enforcement in the custody enforcement system. At the same time, the police can do nothing when a report of an abduction is not made.

It is important that judges and practitioners understand both what the police and Clearinghouse can do and what they cannot do in the enforcement context. Police agencies operate under a number of constitutional limitations in that effort. The legal and constitutional issues that impact the police function in the child recovery effort are far more complicated than may appear at first blush to civil law practitioners. While it may be tempting to criticize the police and the Clearinghouse for decision-making in a particular case, an understanding of, and respect for, the larger legal and constitutional viewpoint will answer many questions that arise in various recovery situations.

The first point is that family court custody and custody-enforcement cases operate within the civil law context. A custody order or a pick up order is valid against the civil law litigant over whom the court obtained jurisdiction. The primary function of such orders is to bring about compliance with the judge's findings and conclusions vis-à-vis the parties in the case. Custody orders and pick up orders operate upon the parties to the litigation.

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The second point relates to the first—the police and the Clearinghouse are not parties to any civil law case in family court. The assistance of police agencies and the Clearinghouse are typically sought after compliance with such orders by parties has been refused and the civil law process has broken down due to a lack of cooperation by the litigants. One primary value of this independence is that the police units involved and the Clearinghouse have the ability to do something the courts cannot do—conduct independent investigations of the background facts. While courts must rely on interested parties for obtaining facts, the police and the Clearinghouse are not so restrained, due to their independence. Therefore, issues like past criminal histories, jurisdictional facts, school records, residence, past or present CPS involvement, 432B orders, the existence of restraining orders, conflicting custody orders from other jurisdictions, and a myriad of other factual issues are discoverable in these independent police-initiated investigations. Many times a court entering an order without jurisdiction will be unaware of the complete background facts relating to conflicting orders already in existence until such an independent investigation has been conducted. It is not uncommon that an investigation in a custody interference or abduction case will uncover relevant facts well beyond those relating to the original complaint.

Third, police agencies, including the Clearinghouse, operate in a completely different constitutional context from that of civil proceedings, a fact that affects in a substantial way the rules of operation. Once the police have become involved, the case moves to a much higher constitutional level. All actions of the police implicate various constitutional standards that benefit suspects and criminal defendants, as well as targets of criminal investigations. These rights include the many various iterations of due process under the Fifth and Fourteenth Amendments, the right to be free from unreasonable searches and seizures under the Fourth Amendment, and other rights relating to freedom from self-incrimination and the general right to be left alone by agents of the State unless cause or consent are shown. Any violation of a constitutional right by a police agency can result in the filing of a federal civil rights lawsuit by an aggrieved person under 42 U.S.C. § 1983 and a judgment for liability and damages. Potential exposure to civil liability informs police conduct and the choice of intervention strategies.

Such lawsuits can be brought, and are brought increasingly, in cases alleging a "wrongful recovery" of a missing child, as well as the closely-related context of removals of children from their homes in abuse and neglect cases. A number of federal circuit courts of appeal, including our own Ninth Circuit in whose jurisdiction we are situated, have ruled in such civil rights cases against the police agencies involved. In such cases, ***the existence of a civil court order is not an automatic defense under a good-faith immunity theory.*** It is, therefore, a false assumption that police can engage in any type of enforcement action at their potential disposal simply by virtue of the issuance of an order in a civil case. Based on constitutional requirements, such a viewpoint is mistaken. One common erroneous belief that refuses to die a well-deserved death is that a civil custody or pick up order allows the police to make a non-consensual entry into a home to recover a child who is the subject of a custody interference dispute. It does not. A civil order is neither an arrest warrant nor a search

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warrant issued by a criminal judge on probable cause. It is not a criminal complaint nor a subpoena. It is, as stated above, no more than a civil order that operates against a civil litigant. Custody orders, pick up orders, orders for the return of a child, writs of assistance, and similar civil court orders do not comply with the mandates of the Fourth Amendment and severely restrict police options. ***In no case will such an order allow automatic police entry into a home or other Fourth Amendment protected space.*** Due to the Supreme Court's decisional law on the heightened expectation of privacy in one's home, there are no exceptions to this rule. The common belief among family law practitioners that a simple court order automatically allows such entry to recover a missing child is plainly wrong, and dangerous from a civil liability standpoint. More than once the Clearinghouse has been requested by a parent or an attorney to enforce a civil order by proceeding to the home and retaking the subject child. Such action would be unconstitutional and unlawful. It is potentially possible that, in a particular case under special facts, an exigency could allow non-voluntary entry. But the courts have not ruled that a parental abduction or concealment, without more facts clearly showing an impending danger to the child, ipso facto allows such an extraordinary entry into the protected space of a home under the Fourth Amendment.

Fourth, practitioners must remember that the police and the Clearinghouse define the definition of "enforcement" in a broad manner. Enforcement of a custody order can take on many manifestations on a continuum from less intrusive methods to more intrusive methods. These strategies include negotiation, the seeking of a civil warrant under NRS 432.207, probable cause arrests (within strict guidelines), and the filing of criminal charges. The protocols of the Clearinghouse provide that lesser-intrusive methods of enforcement should be initiated first, keeping in mind the simple reality that the two parents will have a continuing co-parenting relationship for many years, and the rash use of more intrusive enforcement methods can lead to the unnecessary breakdown of this relationship. Moreover, simple solutions are quicker, less expensive and result in fewer dysfunctional consequences.

One overriding policy of the Clearinghouse is to encourage parties to renew their cooperation with the family court. The Clearinghouse considers the return of a non-compliant parent to a cooperative stance with the family court to be a great success. Often times the police calling or appearing at the door is enough to get recalcitrant parents to return to a cooperative perspective in family court. Except in aggravated cases, Clearinghouse policy is to obtain, where possible, cooperation of parents with the family court. Our overriding preference is to convince disputants to resolve disagreements in court. When lesser-intrusive methods cannot accomplish resolution, more intrusive methods will be utilized. The Clearinghouse defines an aggravated case as one where it reasonably appears that a party has completely abandoned any cooperation with the court or with the other party, such as fleeing the state with the child, the concealing of the child in an unknown location, or the use of surreptitious means to detain the child. In such cases, negotiation is typically meaningless, and criminal charges are usually brought without recourse to lesser-intrusive methods.

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Fifth, virtually all cases referred to the Clearinghouse are investigated to some extent. The extent of the investigation differs from case to case based on the facts presented. This dependency on further investigation may surprise some judges and practitioners, who might take the position that the simple fact of the existence of a custody order or a pick up order ought to automatically result in enforcement efforts of some level. The Clearinghouse's protocol to investigate referrals has its genesis in several historical facts. The first is set forth above. When the police or the Clearinghouse receive a complaint in a custodial interference or abduction case, they do not know whether other custody orders, 432B-type orders, or D.V. TPO's referring to the same children are in existence. Second, over one-third of all referrals to the Clearinghouse turn out to be false, unsupported in law or fact, or are wholly manufactured, bogus reports made by a party intent on mischief or malice. After having been lied to many times, the Clearinghouse has learned the hard way to view referrals with a dose of skepticism. The Clearinghouse has been requested in the past to enforce orders which were obtained by fraud against the issuing court based on fabricated allegations of jurisdiction, service of process, or the lack of an existing custody order from a different court. These requests are not uncommon. One extreme case comes to mind. Several years ago the Clearinghouse received a request to enforce a facially-valid order from a father whose parental rights had been terminated for severe child abuse. The order he presented preceded that termination, and appeared valid; it was signed by a judge; it was file stamped. But it was, of course, completely illegal due to intervening court action in the TPR proceedings in a different court. Had the Clearinghouse enforced that earlier, superseded order, and had one of those children been abused or killed, the liability for the Clearinghouse would have been astronomical. And the Clearinghouse would have been directly responsible for that tragedy. That order was not enforced due to the investigation. The Clearinghouse will not knowingly enforce any order obtained by fraud, or superseded by a newer order, assuming all jurisdictional prerequisites have been met.

This discussion brings up related issues: many of our cases evidence the entry of multiple orders affecting or potentially affecting custody of the same children. Whether inconsistent orders are entered by the same court, or by different courts in different jurisdictions, the not-uncommon problem of the existence of inconsistent and conflicting orders has a substantial effect on our enforcement decisions. Contrary to popular belief, the UCCJEA has not completely solved this problem. Custody orders come in a variety of contexts and procedures—standard custody orders, CPS abuse and neglect orders placing children's custody with the agency (NRS Chapter 432B in Nevada), emergency TPO's in domestic violence cases that contain custody language, guardianship orders, and others. Remember that the second and third types override the first, due to emergency considerations, although only temporarily under the UCCJEA, if its provisions are complied with. And recall that some custody orders are self-terminating by law or by their terms. A judge who questions why his or her order is not being enforced may be wholly unaware that multiple other orders have been entered in that same court or other courts in a myriad of contexts that affect the validity of the other order. That judge may also be unaware of the fact that an independent police investigation has revealed that the court had been defrauded by an overzealous litigant,

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or lacked jurisdiction. As set forth above, courts do not have the ability to conduct investigations; they rely on representations of interested parties. That court's custody order may have been unlawfully entered either due to a jurisdictional failure, fraud on the court by a party, or a failure of service of process, either express or by fraud. In more than thirty percent of our cases, such failures are uncovered through the investigation. The Clearinghouse presumes that courts want to be informed of these investigative findings.

In conclusion, it should be readily obvious that police agencies and the Clearinghouse are actively engaged in custody order enforcement. While it may sometimes appear to judges and practitioners that the custody order enforcement effort is not effective in a particular case, the enforcement system is busy and active. The majority of reported cases of custodial interference, when brought to the attention of the police or the Clearinghouse, are resolved quickly through negotiation without the knowledge or involvement of the courts. At the same time, when no report is made to a police agency, no action can be taken by them. A minority of cases require more intrusive enforcement efforts. Some of these, including international abduction cases, may take a long time for resolution. Criminal warrants can sit in the national criminal database for many years with no hits. And, in international cases, not all countries will enforce an arrest warrant based on a parental abduction and many will refuse to extradite. Likewise, many countries are not signatories to the Hague Convention on International Abductions, so the remedies available in that treaty are unavailable in non-signatory countries. In short, the enforcement context is complex and fact-specific to each individual case. It is not an area of law where easy answers are attainable.

Cordially,

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