

# OFFICE OF THE ATTORNEY GENERAL



2000-081

**BILL PRYOR**  
ATTORNEY GENERAL  
STATE OF ALABAMA

February 10, 2000

ALABAMA STATE HOUSE  
11 SOUTH UNION STREET  
MONTGOMERY, ALABAMA 36130  
AREA (334) 242-7300

Honorable Terry R. Surles  
Sheriff, St. Clair County  
P.O. Box 549  
Ashville, Alabama 35953

## Sex Offenders — Community Notification Act — Residence

A sex offender placed on probation without incarceration who returns to an already established residence is not "establishing a new residence" under the Community Notification Act.

A sex offender's already established residence is not rendered illegal if a child care facility is subsequently established within 1000 feet of such residence.

A sex offender who has already established a residence with minor stepchildren may maintain that living arrangement unless the offender establishes a new residence.

A sex offender's being convicted and placed on probation would not cause the offender to establish a new residence.

If a court exempts a sex offender from the Act by issuing an order contrary to law, the district attorney of the judicial circuit in which the offender is located should petition the court to vacate its order.

Dear Sheriff Surles:

This opinion is issued in response to your request for an opinion from the Attorney General.

#### QUESTION 1

Would a convicted sex offender, convicted after implementation of Act No. 99-572 and placed on probation without incarceration, be considered to be "establishing a new residence" if he returns to his residence of ten years prior to the conviction?

#### FACTS AND ANALYSIS

For purposes of applying the Community Notification Act ("the Act"), a criminal sex offender will be considered to have "established a residence" whenever either of two events occur. The first, set out in section 15-20-23(b)(1), is when an offender is domiciled at a particular residence for five consecutive days or more. The second, set out in section 15-20-23(b)(2), is when an offender is domiciled following a period of incarceration imposed as a result of a conviction for a criminal sex offense. In the situation now presented, however, neither of these triggering events has occurred, at least not since the implementation of the Act. Because the offender in the question now posed was only placed on probation and was not incarcerated as a result of his conviction, the provisions of section 15-20-23(b)(2) are inapplicable. Moreover, since the offender would be returning to a long-established residence, nothing in the Act would operate to deem that offender to be "establishing a new residence."

### CONCLUSION

A criminal sex offender who is placed on probation without incarceration and returns to an already established residence is not considered to be "establishing a new residence" under the Act.

### QUESTION 2

If the answer to Question 1 is "no," would a convicted sex offender, convicted after implementation of Act No. 99-572 and placed on probation without incarceration, be considered to be establishing a residence under section 15-20-26(a) and be in violation of this section if his property line is less than 1000 feet of a day care facility that was established after his residence was established, but prior to his conviction?

### FACTS AND ANALYSIS

This Office has consistently stated that the legality of a residence is determined at the time the residence is established. *See* Attorney General's Opinion to Honorable William C. Young, dated October 29, 1998, A.G. No. 99-00029 at 3. Therefore, if an offender's residence was lawful when it was established ten years ago, it remains so today. Section 15-20-26(e) of the Code of Alabama demands this same result, stating:

Changes to property within 1,000 feet of an adult criminal sex offender's registered address which occur after an adult criminal sex offender establishes residency . . . shall not form the basis for finding that a criminal sex offender is in violation . . . of this article.

ALA. CODE § 15-20-26(e) (Supp. 1999). Consequently, if a child care facility were to be located in proximity to a criminal sex offender's residence after such residence was lawfully established, the mere location of that child care facility would not itself cause an offender to violate the Act.

### CONCLUSION

An already established residence of a criminal sex offender that is otherwise lawful is not rendered unlawful if a child care facility is subsequently established within 1000 feet of such residence.

### QUESTION 3

If the answer to Question 1 is "no," would a convicted sex offender, convicted after implementation of Act No. 99-572 and placed on probation without incarceration, be considered to be establishing a residence under section 15-20-26(c) and be in violation of this section if he lived, in marriage, with stepchildren for three years prior to his conviction and returns to that living arrangement?

### FACTS AND ANALYSIS

Again, the legality of a criminal sex offender's residence is determined at the time the residence is established. Therefore, if a criminal sex offender had already been lawfully residing with stepchildren prior to his conviction, he may maintain that living arrangement so long as he does not establish a new residence. Although in many cases a conviction would disrupt an offender's already established residence due to an ensuing period of incarceration, *see* ALA. CODE § 15-20-23(b)(2), such is not the situation in the question now posed. Accordingly, nothing in the Act would deem the instant offender to be establishing a new residence, and his being convicted and placed on probation would not render his previously established residence unlawful.

### CONCLUSION

A criminal sex offender who has already lawfully established a residence with minor stepchildren may maintain such a living arrangement so long as the offender does not subsequently establish a new residence. An offender's being convicted and placed on probation would not cause the offender to establish a new residence.

#### QUESTION 4

If a circuit court within the State of Alabama convicts a person of a criminal sex offense, then issues an order allowing that criminal sex offender to live with stepchildren in a different jurisdiction within the State of Alabama, what steps, other than arresting the criminal sex offender for violations under section 15-20-26(c), can be taken by the other jurisdiction to remedy the court's order when the criminal sex offender is in compliance with the sentencing court's decision?

#### FACTS AND ANALYSIS

Nothing in the Act bestows on a circuit court the authority to exempt an adult criminal sex offender from the residency restrictions of section 15-20-26(c). Consequently, any order purporting to exempt an adult criminal sex offender from the provisions of the Act, unless premised on a determination that the Act itself is somehow unconstitutional or otherwise invalid, would be contrary to law. Moreover, unless this Office is notified of a constitutional challenge to the Act, a circuit court would lack jurisdiction to adjudicate such a claim, and any order attempting to do so would be void. See ALA. CODE § 6-6-227; *Ex parte Father Walter Memorial Child Care Center*, 656 So. 2d 369, 370-71 (Ala. 1995); *Wallace v. State*, 507 So. 2d 466, 468 (Ala. 1987).

If, concomitant with a criminal prosecution, a circuit court enters an order without having proper jurisdiction or that is otherwise contrary to law, it is incumbent on the district attorney of that judicial circuit to challenge that order and, if necessary, to appeal the issue to an appropriate appellate court. In a case in which the circuit court's order has not been challenged, such as the situation in the question now posed, the district attorney of any judicial circuit affected by the court's order should file a petition with the offending court to have the order vacated.

Honorable Terry Surles  
Page 6

CONCLUSION

If a court in another judicial circuit purports to exempt an adult criminal sex offender from the provisions of the Act by issuing an order that is contrary to law, the district attorney of the judicial circuit in which the offender is located should file a petition with the issuing court to vacate its order.

I hope this sufficiently answers your questions. If this Office can be of further assistance, please contact Scott L. Rouse of my staff.

Sincerely,

BILL PRYOR  
Attorney General  
By:



CAROL JEAN SMITH  
Chief, Opinions Division

BP/SLR

16415/10932