South Carolina Bar
Continuing Legal Education Division

2024 SC BAR CONVENTION

Family Law Supplemental Materials

Hollywood Squares

Friday, January 19, 2024

SC Supreme Court Commission on CLE Course No. 240025

South Carolina Bar
Continuing Legal Education Division

Hollywood Squares Returns: Who Knows the Law?

(Questions & Answers)

The Honorable C. Vance Stricklin, Jr.
The Honorable Holly H. Wall

HOLLYWOOD SQUARES
SUPPLEMENTAL QUESTIONS

1. **Q. DOES A LITIGANT HAVE THE RIGHT TO COUNSEL IF THE PETITIONER IS SEEKING CRIMINAL CONTEMPT?**

   A. YES.

   Bloom v. Illinois, 391 U.S. 194, 88 S. Ct. 1477, 20 L.Ed.2d 522 (1968). Additionally, the standard is beyond a reasonable doubt and the sentence may not exceed six months.

2. **Q. WHAT IS THE BURDEN OF PROOF FOR A FINDING OF CIVIL CONTEMPT?**

   A. CLEAR AND CONVINCING EVIDENCE.

   Poston v. Poston, 331 S.C. 106; 502 S.E.2d 86 (1998).

3. **Q. DOES THE COURT HAVE TO APPOINT A GAL IN ALL PRIVATE CUSTODY ACTIONS?**

   A. NO.

§ 63-3-810. Appointment.

Currentness

(A) In a private action before the family court in which custody or visitation of a minor child is an issue, the court may appoint a guardian ad litem only when it determines that:
(1) without a guardian ad litem, the court will likely not be fully informed about the facts of the case and there is a substantial dispute which necessitates a guardian ad litem; or
(2) both parties consent to the appointment of a guardian ad litem who is approved by the court.
(B) The court has absolute discretion in determining who will be appointed as a guardian ad litem in each case. A guardian ad litem must be appointed to a case by a court order.

4. **Q. IS THE COURT ALLOWED TO RESERVE THE ISSUE OF ALIMONY IF NOT AWARDED AT THE TIME OF DIVORCE?**

A. YES.

299 S.C. 353

Supreme Court of South Carolina.

Janis F. DONAHUE, Respondent,

v.

James M. DONAHUE, Appellant.

No. 23083.

Heard May 3, 1989.Decided Sept. 25, 1989.

V. RESERVATION OF ALIMONY

"The general rule is that alimony may be granted after a decree of divorce if [the] right to have it subsequently determined is reserved in the divorce decree." *Taylor v. Taylor*, 241 S.C. 462, 466, 128 S.E.2d 910, 912 (1962). Where the divorce decree does not provide for alimony and there is no reservation of jurisdiction in the decree, such is final and absolute and the wife cannot be allowed alimony in any subsequent proceeding. *Id.* While reservation of alimony is a mechanism available to family court judges in proper cases, it is not to be used to avoid reaching the issue of whether alimony should or should not be awarded under the facts of a particular case. It should not be routinely included in the decree of divorce, for this unnecessarily prolongs the marital litigation.

5. Q. CAN THE COURT HEAR A DIVORCE BASED ON ADULTERY IF THE PARTIES ARE STILL LIVING TOGETHER?

A. YES.

319 S.C. 92

Supreme Court of South Carolina.

John T. (Tommy) WATSON, Appellant,

v.

Tracy E. WATSON, Respondent.

No. 24281.

Heard May 30, 1995.Decided July 24, 1995.

If we were to require physical separation of the parties in order to bring a divorce action, divorcing parents who seek custody of their children would have these choices: either vacate the home, taking the children with them and thereby cause

additional disruption in the children's lives; vacate the home and abandon the children to their spouse; or continue in the marriage. We hold that public policy permits a party to remain in the home and institute divorce litigation premised on fault grounds other than desertion. In such cases, the living arrangements of the parties and the children during the pendency of the litigation should be decided at the temporary hearing.

6. **Q. SHOULD THE COURT CONSIDER THE LENGTH OF TIME NECESSARY FOR A LITIGANT TO PAY THE OPPOSING PARTY'S ATTORNEY FEES?**

A. YES.

431 S.C. 170

Court of Appeals of South Carolina.

Charles Ashley COUCH, Appellant,

v.

Rita Ana Del Carmen Patinto Tejada COUCH, Respondent.

Appellate Case No. 2017-002031Opinion No. 5744

Submitted May 8, 2020Filed July 15, 2020

D. Ninety Day Payment Period

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As stated above, we agree with the family court's decision to award Mother fees and costs and with the amount awarded. Even so, given Father's balance sheet, it is difficult to see how ninety days was a realistic amount of time for Father to assemble approximately $250,000. .....

In some ways, we think the family court was in an impossible position. One struggles to identify what realistic options were at the family court's disposal. If the family court had ordered installment payments, for example, those payments would need to be substantial **268 to make any meaningful headway on the amount owed. Yet, Father's financial declaration suggests he could not afford any sort of substantial payment plan.

7. **Q. WHAT ARE THE STATUTORY FORMS OF ALIMONY?**

A. Code 1976 § 20-3-130

§ 20-3-130. Award of alimony and other allowances.

(1) Periodic alimony
(2) Lump-sum alimony
(3) Rehabilitative alimony
(4) Reimbursement alimony
(5) Separate maintenance and support
(6) Such other form of spousal support, under terms and conditions as the court may consider just, as appropriate under the circumstances without limitation to grant more than one form of support.

8. **Q. DOES SOUTH CAROLINA STILL RECOGNIZE COMMON LAW MARRIAGE?**

A. YES, SO LONG AS THE MARRIAGE WAS ESTABLISHED PRIOR TO JULY 25, 2019.

428 S.C. 79

Supreme Court of South Carolina.

A. Marion STONE, III, Respondent,

v.

Susan B. THOMPSON, Petitioner.

Appellate Case No. 2017-000227Opinion No. 27908

Heard June 13, 2019Filed July 24, 2019Rehearing Denied October 16, 2019

Our review in this case has prompted us to take stock of common-law marriage as a whole in South Carolina. We have concluded the institution's foundations have eroded with the passage of time, and the outcomes it produces are unpredictable and often convoluted. Accordingly, we believe the time has come to join the overwhelming national trend and abolish it. Therefore, from this date forward—that is, purely prospectively—parties may no longer enter into a valid marriage in South Carolina without a license.

9. **Q. CAN DIVORCED PARENTS BE REQUIRED TO CONTRIBUTE TO A CHILD'S COLLEGE EDUCATION?**

A. YES. *McLeod v. Starnes,* 396 S.C. 647,723 S.E2d 198 (2012) reinstated *Risinger v. Risinger,* 273 S.C. 36, 257 S.E.2d 652 (1979) and reversed *Webb v. Sowell*, 387 S.C. 328, 692 S.E.2d 543 (2010).

HOLLYWOOD SQUARES

1. **Q. IS CORROBORATION REQUIRED IN EVERY CASE TO OBTAIN A DIVORCE?**

A. NO.

McLaughlin v. McLaughlin, 244, S.C.265, 136 SE2d 537 (1964) states, "In *Brown v. Brown*, 215 S.C. 502, S.E.2d 300, 15 A.L.R.2d 163, the Court held with respect to the necessity of corroboration in divorce actions that a divorce will not be granted on the uncorroborated testimony of a party or the parties to the suit; however, as the main reason for the rule is to prevent collusion, it is not generally deemed inflexible and may be relaxed where it is evident that collusion does not exist." *McLaughlin* goes on to state, "In South Carolina the rule requiring corroboration is not mandatory and the necessity of such to a large extent depends upon the facts and circumstances of each case.

Harvley v. Harvley, 279 S.C. 572, 310 S.E.2d, 161 (Ct. App. 1983) states, "The main reason for the rule requiring corroboration is to prevent collusion. Where it is evident that collusion does not exist, this rule may be relaxed. *McLaughlin v. McLaughlin,* 244 S.C. 265, 136 S.E.2d 537 (1964). Upon a review of the entire record, there is no evidence that parties colluded to obtain this divorce. The husband admitted his adulterous behavior on several occasions. There is no need to corroborate the uncontradicted admission of appellant against his own interests. The ground for divorce is sustained.

2. **Q. AFTER THE ORIGINAL SUMMONS AND COMPLAINT IS FILED, IS IT PROPER TO HAND DELIVER A COPY REQUESTING AN EMERGENCY HEARING TO THE COURT SO LONG AS YOU:**

a. Email a copy to the opposing attorney;
b. Mail a copy to the opposing attorney;
c. No notice to the opposing attorney is required;
d. None of the above

A. d. Rule 5(b)(3) of the South Carolina Rules of Civil Procedure states:

Service of Proposed Orders and Other Papers. Any party providing a proposed order, proposed findings of fact or conclusions of law, or proposed judgment or other paper to the court for its consideration in any pending matter shall serve the same on all counsel of record at the same time and by the same means.

3. **Q. RULE 21 OF THE SOUTH CAROLINA RULES OF FAMILY COURT STATES: Motion for Temporary Relief. A written motion for temporary relief, and notice of the hearing thereof, shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by order of the court.**

DO YOU INCLUDE THE WEEKEND AND/OR HOLIDAYS IN YOUR CALCULATION?

A. NO. Rule 6(a) of the South Carolina Rules of Civil Procedure states:

Computation. In computing any period of time prescribed or allowed by these rules, by order of the court, or by any applicable statute, the day of the act, event, or default after which the designate period of time begins to rule is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a State or Federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday.

4. **Q. TRUE OR FALSE.**

ALL AFFIDAVITS MAY BE SERVED AT THE TIME OF THE HEARING IN FAMILY COURT CASES.

A. FALSE. Although Rule 21 Temporary Relief of the South Carolina Rules of Family Court states:

(c) Service of Affidavits. Notwithstanding the provisions of Rule 6(d), SCRCP, affidavits filed at a temporary hearing need not be served on the opposing party prior to the temporary hearing.

Rule 6(d) of the South Carolina Rules of Civil Procedure states:

For Motions—Affidavits. ... When a motion is to be supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), additional or opposing affidavits may be served not later than two days before the hearing, unless the court permits them to be served at some other time. The moving party may serve reply affidavits at any time before the hearing commences.

5. **Q. TRUE OR FALSE.**

IN SEEKING EX PARTE RELIEF, A LAWYER ONLY HAS TO PRESENT HER CLIENT'S SIDE OF THE STORY.

A. FALSE.

Rule 407, SCACR, Rules of Professional Conduct, Rule 3.3 states:

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

6. **Q. TRUE OR FALSE.**

SERVICE OF A RULE TO SHOW CAUSE IS PROPER SO LONG AS IT IS SERVED 10 DAYS PRIOR TO THE HEARING AND IN COMPLIANCE WITH RULES 4(c) AND 4(d) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

A. FALSE.

The Rule to Show Cause must be served by personal delivery upon the responding party.

Rule 14. Rule to Show Cause

(d) **Notice**. The rule to show cause, and the supporting affidavit or verified petition, shall be served, in the manner prescribed herein, not later than ten days before the date specified for the hearing, unless a different notice period is fixed by the issuing judge within the rule to show cause. In an emergency situation, the notice period of ten days may be reduced by the issuing judge.

(e) **Service; Proof of Service.**

(1) Personal Service. The rule to show cause shall be served with the supporting affidavit or verified petition by personal delivery of a duly filed copy thereof to the responding party by the Sheriff, his deputy or by any other person not less than eighteen (18) years of age, not an attorney in or a party to the action.

The manner of service provided by Rule 14, SCRFC, is consistent with standard practice in all courts as provided by Rules 4(c) and 4(d), SCRCP, with the exception that the rule to show cause and supporting affidavit or verified petition are to be served by personal delivery upon the responding party.

7. **Q. TRUE OR FALSE.**

IN ADDRESSING ATTORNEY FEES IN A RULE TO SHOW CAUSE, THE FAMILY COURT JUDGE IS REQUIRED TO ADDRESS THE FACTORS SET FORTH IN E.D.M. V. TAM AND GLASSCOCK V. GLASSCOCK

A. FALSE.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

3. We find the **family court** did not err by awarding Wife's **attorney's fees** without considering the parties' relative financial conditions.

Under a **compensatory contempt** theory, the **family court** can award **attorney's fees** to reimburse the party for bringing the **contempt** action. *See* Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 609, 567 S.E.2d 514, 520 (Ct. App. 2002) ("Courts, by exercising their **contempt** power, can award **attorney's fees** under a **compensatory contempt** theory.") (quoting *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 178, 557 S.E.2d 708, 711-12 (Ct. App. 2001)). When awarding **attorney's fees** as reimbursement for **contempt**, the court should limit the award to the party's actual loss. *See* Whetstone v. Whetstone, 309 S.C. 227, 235, 420 S.E.2d 877, 881 (Ct. App. 1992) ("**Compensatory contempt** is money awarded to a party who is injured by a contemnor's action to restore the party to his original position."); *id.* (holding the **family court's** award was proper when it awarded litigation fees and costs incurred as a result of the **contempt**); Poston v. Poston, 331 S.C. 106, 114, 502 S.E.2d 86, 90 (1998) ("[T]he award of **attorney's fees** is not part of the punishment; instead, this award is made to indemnify the party for expenses incurred in seeking enforcement of the court's order."); Miller v. Miller, 375 S.C. 443, 463, 652 S.E.2d 754, 764 (Ct. App. 2007) (noting the standard for award of **attorney's fees** in a domestic action is not the controlling standard for awarding fees in a **contempt** action); E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992) (setting forth factors the **family court** should consider when deciding whether to award **attorney's fees** in a divorce action); Noojin v. Noojin, 417 S.C. 300, 318, 789 S.E.2d 769, 778 (Ct. App. 2016) ("Because we affirm the **family court's** overall **contempt** findings, we also affirm the award of **attorney's fees** and costs.").

Here, Wife testified she incurred **attorney's fees** and costs totaling $2,993.15 for bringing the **contempt** proceeding, and the **family court** ordered Husband to pay that amount due to his willful **contempt**. On appeal, Husband acknowledges the **family court's** power to award **attorney's fees** under the theory of **compensatory contempt**. Because we find the **family court** did not err by finding Husband in willful **contempt**, we find the court did not err by awarding $2,993.15 in **attorney's fees** and costs. Further, we find the **family court** was not required to consider the parties' financial conditions or any other factors set forth in *E.D.M v. T.A.M.* because its award was made under a theory of **compensatory contempt**.

8. **Q. PRIOR TO A COURT ORDER, WHO HAS CUSTODY OF AN ILLEGITIMATE CHILD?**

A. MOTHER

§ 63-17-20. Jurisdiction.

(B) Unless the court orders otherwise, the custody of an illegitimate child is solely in the natural mother unless the mother has relinquished her rights to the child. If paternity has been acknowledged or adjudicated, the father may petition the court for rights of visitation or custody in a proceeding before the court apart from an action to establish paternity.

(C) All actions commenced under this article must be dealt with as separate proceedings before the court without a jury. The general public is to be excluded from these proceedings and only those persons whom the judge finds to have a direct interest in the proceeding or in assisting the court in its work are to be permitted to attend.

(D) Any proceeding commenced under this article is a civil action. The natural mother of the child and the alleged father are competent to testify and may be compelled by the court to appear and give testimony.

9. **Q. TRUE OR FALSE.**

IN A PENDING ACTION FOR DIVORCE, EITHER PARTY MAY REQUEST AN ORDER OF PROTECTION BY FILING A MOTION.

A. TRUE: 20-4-40

§ 20-4-40. Petition for order of protection.

There is created an action known as a "Petition for an Order of Protection" in cases of abuse to a household member.

(d) In a pending action for divorce or separate support and maintenance, the petition for relief shall be brought in the form of a motion for further relief and shall be served on counsel of record, if any. Where no action is pending, the petition shall be filed and served as an independent action. A pending motion or petition for relief shall not be dismissed solely because the underlying action is dismissed.

10. **Q. TRUE OR FALSE.**

IF YOU ARE THE NON-CUSTODIAL PARENT, YOU NEED A COURT ORDER TO GET YOUR CHLD'S EDUCATIONAL AND HEALTH CARE RECORDS.

A. FALSE: 203-5-30

§ 63-5-30. Rights and duties of parents regarding minor children.
The mother and father are the joint natural guardians of their minor children and are equally charged with the welfare and education of their minor children and the care and management of the estates of their minor children; and the mother and father have equal power, rights, and duties, and neither parent has any right paramount to the right of the other concerning the custody of the minor or the control of the services or the earnings of the minor or any other matter affecting the minor. Each parent, whether the custodial or noncustodial parent of the child, has equal access and the same right to obtain all educational records and medical records of their minor children and the right to participate in their children's school activities unless prohibited by order of the court. Neither parent shall forcibly take a child from the guardianship of the parent legally entitled to custody of the child.

Holly's Questions for Hollywood Squares

1. True or False. A Family Court judge may order that a psychiatrist can use his/her discretion in awarding a parent unsupervised visitation.

FALSE Hardy v. Gunter, 571 SE 2d 2331 (2003)

2. How many prongs are in the test for the party to be considered a psychological parent?

FOUR. Middleton v. Johnson, 633 SE 2d 162 (20060

3. True or False. The grounds for termination of parental rights must be proven by a preponderance of the evidence.

FALSE Clear and convincing evidence is the standard. Hooper v. Rockwell, 513 SE 2d 358 (1999)

4. True or False. The Family Court retains jurisdiction to rule on an action seeking the equitable apportionment of marital property after one of the parties dies during the pendency of an action.

TRUE Seels v. Smalls, 877 SE 2d 351 (2022)

5. The proper appellate standard of review in Family Court matters is always *de novo.*

TRUE. Grantham v. Weatherford, 819 SE 2d 765 (2018)

6. True or False. Although there is no rule of law requiring custody to be awarded to the primary caretaker, there is an assumption in the Family Court that custody will be awarded to the primary custodian.

TRUE. Patel v. Patel, 599 SE2d 114 (2004).

7. True or False. "Fault" is the one statutory factor for the Court to consider in awarding attorney's fees.

FALSE EDM v TAM, 415 SE 2d 812 (1992)

8. True or False. Abandonment/ Desertion was abolished as a statutory ground for divorce in 2020.

FALSE still on the books! 20-3-10(2)

9. Rivenbark v. Rivenbark grants the Family Court the authority to grant a legal separation.

FALSE SC does not recognize legal separation. Rivenbark v. Rivenbark 391 SE 2d 232 (1990)

10. The standard of proof required to obtain temporary relief is a _____ showing.

PRIME FACIE Armaley v. Armaley, 266 SE 2d 68 (1980)

1. Which court in South Carolina has the authority to determine "any issue affecting the validity of a marriage contract?"

a. Family Court
b. Common Pleas
c. Probate Court
d. All of the above

D The jurisdiction of the Family Court to determine the validity of a marriage is "exclusive" according to S.C. Code Ann. §63-3-530.
However, S.C. Code Ann. §20-1-510 vests the court of common pleas with authority to hear and determine "any issue affecting the validity of a marriage contract."
Additionally, in Campbell v Christian, 235 S.C. 102, 110 S.E.2d 1(1959) our Supreme Court affirmed a decision of the probate court on an issue of the validity of a marriage.

2. A custodial parent may withhold visitation if the non-custodial parents fails to make child support payments. True or False

FALSE Custodial parent cannot withhold visitation because of a non-custodial parent's failure to make child support payments.
Garris v. McDuffie, 288 S.C. 637, 344 S.E.2d 186 (Ct. App. 1986)

3. A party may properly ask leading questions of the witness during cross-examination.

TRUE. Rules of Evidence 611(c): Leading questions should not b used on the direct examination of a witness....Ordinarily, leading questions should be permitted on cross-examination.

4. Testimony of the child repeated by a custodial parent or guardian *ad litem* is a hearsay exception in Family Court.

FALSE. Unless it is covered by another Rule, the child's words are still hearsay in court.

5. An attorney has 10 days after the final merits hearing to file the Motion to Alter or Amend a Judgment (Rule 59(e)) True or False

FALSE Must be filed not later than 10 days after receipt of the **written notice of the entry of the order.**

HOLLYWOOD SQUARES

1. Can issues of child custody and visitation be submitted to binding arbitration?

NO. Singh v. Singh

2. The Plaintiff in a case serves a Summons and Complaint for Divorce on the Defendant on April 1 and serves Requests for Production on the Defendant on the same day. The Defendant flips the discovery and sends Requests for Production to the Plaintiff on April 5. Are the Defendant's answers due before the Plaintiff's?

NO . SCRC Rule 34(b) "The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant."

3. In a Child Support action, the Plaintiff makes $240,000.00 gross per year and the Defendant makes $75,000 gross per year. Do the SC Child Support guidelines apply?

YES. It falls below the annual combined income amount the parties may earn to stay within the guidelines, but it is proposed to increase in 2024.

4. Mother petitioned the Court for an Order of Protection from her husband and seeks to have the Order extend to the parties' minor child and her daughter from a prior relationship, can the Court extend the Order of Protection to stepchildren?

YES. Taylor v. Taylor, 439 S.C. 272, 886 S.E.2d 716 (S.C. App. 2023)

5. Husband is granted a divorce from Wife due to her habitual drunkenness and adultery. Husband and Wife were married for 18 years that overlapped Wife's military service. Wife retires from the Army after 20 years of service. Husband seeks to receive 50% of Wife's total, gross military retirement pay as his equitable apportionment due the Wife's marital misconduct. Can the Court award this amount?

NO. NDAA 2017 10 U.S.C.§1408 states that the portion of military retirement pay that is divisible by Federal law is the amount of the basic pay payable to the member for the member's pay grade and years of service at the time of the court order, as increased by each cost of living adjustment that occurs . . .between the time of the court order and the time of the member's retirement. Also, Mullarkey v. Mullarkey, 397 S.C. 182, 723 S.E.2d 249 (S.C. App. 2012) states that the portion of the retirement pay not yet earned, regardless of whether it is vested, cannot be divided.

6. What is the name of the payroll entity that pays military service members and finctions like a tPlan Administrator for division of military retirement pay?

Defense Finance Accounting Service (DFAS)

7. At trial, Wife's counsel offers an affidavit from the minor child's school teacher under Rule 7 of the South Carolina Family Court Rules. Is it admissible?

No.

It is none of the exceptions

RULE 7
ADMISSIBILITY OF CERTAIN DOCUMENTS

The following documents and written statements shall be admissible in evidence without requiring that the persons or institution issuing the documents or statements be present in court:

(a) A written statement of a child's attendance at school, signed by a school principal or duly authorized school official.

(b) The school report card showing a child's records of attendance, grades on subjects taught and other pertinent information, provided that this be a report sent out at periodic intervals by the school.

(c) The written statement by a physician showing that a patient was treated at certain times and the type of ailment.

(d) Except in cases where the particular agency is a party, a written report of the Department of Social Services or other agency, reporting the home investigation or any other report required by the court.

(e) A written statement of an employer showing wages either weekly or monthly for a given period of time and W-2 statement, income tax returns and other reports of like nature.

8. A Wife testified that her best friend told the Wife that the best friend's parent had just died before the best friend crashed into the Husband's car. Opposing counsel objected to the statement from the third party because they were not available to testify. Is it admissible?

Yes.

Rule 803(1) **Present Sense Impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

9. The Court can issue an Order to garnish VA disability pay for the payment of alimony?

Yes.

5 CFR 581.103 authorizes Courts to garnish wages to pay alimony (see attached).

10. The military acronym TAD stands for "Termination of Active Duty status". True or False?

False. Temporary Active Duty

397 S.C. 182
723 S.E.2d 249

Peggy Ann MULLARKEY, Respondent,
v.
David D. MULLARKEY, Appellant.

No. 4936.

Court of Appeals of South Carolina.

Heard Oct. 4, 2011.Decided Jan. 25, 2012.Rehearing Denied March 2, 2012.

[723 S.E.2d 250]

Peggy M. Infinger, of Charleston, for Appellant.

Katherine Elizabeth Graham, of Beaufort, for Respondent.

THOMAS, J.

[397 S.C. 184] David D. Mullarkey (Husband) appeals the family court's denial of his motion to enforce, or in the alternative, to modify certain provisions within a 1999 order of separate support and maintenance concerning his military retirement benefits. We reverse and remand.

FACTS AND PROCEDURAL HISTORY

The parties married in 1980. By that time, Husband had served several years in the United States Navy. He continued his military career for the duration of the marriage.

In 1998, Peggy Ann Mullarkey (Wife) left the marital residence and filed an action for separate support and maintenance. The family court heard the matter on February 25, 1999, and issued a separate support and maintenance order on April 11, 1999.

In the order, the family court directed Husband to pay Wife periodic permanent alimony of $700 per month. In addition, the court ordered as follows:

14. [Wife] shall receive 43.80% of [Husband's] disposable monthly military retirement pay and any cost of living increases attributable to [Wife's] portion of retirement pay. Payment to [Wife] shall commence at the time [Husband] begins receiving the retirement benefits and shall be by direct payment from the military finance center. Each party shall pay the income taxes attributable to his or her portion of the retire[ment] pay. This division of retirement benefits is part of the parties' property division. It is the intention of both parties as well as the Court that this Final Decree has the effect of a QDRO [qualified domestic relations order].

....

[723 S.E.2d 251]

[397 S.C. 185] 18. It is the intent of this Court that this order has the effect of [a] Qualified Domestic Relations Order with regard to the distribution of [Husband's] military retire[ment] pay. Upon the date of [Husband's] retirement, [Wife] shall receive 43.8% of the [Husband's] monthly retirement benefit. Each party is responsible for payment of the income tax attributable to his or her respective percentage.... [Husband] is an O–3 in the United States Navy. He enlisted on June 16, 1977. Said benefits shall be sent directly to [Wife] from the U.S. Government. The Plan [A]dministrator shall immediately notify counsel for [Wife] in the event this Order does not meet the necessary qualifications of acceptance and counsel for [Wife] shall prepare an appropriate supplemental Order which meets the Plan Administrator's guidelines.

When the family court issued this order, Husband had accumulated a total of twenty-one years of military service, eighteen years and five months of which the parties were married. According to the briefs submitted in this appeal, the award to Wife of 43.8% of Husband's military retirement was equivalent to awarding Wife 50% of the marital portion of the 252 months of military service that Husband had accumulated when the support order was issued.

Husband moved for reconsideration of the support order, requesting among other relief that the family court clarify that Wife's 43.8% share of his military retirement was to be based only on the portion he earned during the marriage. The family court held a hearing on the motion and later issued an order denying reconsideration. As to Husband's concern about Wife's allocation of his military retirement benefits, the family court stated as follows:

2. As to [Husband's] request to amend the Order of Separate Support and Maintenance with regard to the wording of those portions of the Order setting forth [Wife's] allocation of retirement benefits, I find that, pursuant to the case of *Ball v. Ball,* 314 S.C. 445, 445 S.E.2d 449 (1994) (Military retirement pay, whether vested or nonvested, is essentially compensation for past services and accordingly, is property subject to equitable distribution), that my award of 43.8% of [Husband's] disposable military retirement benefits as whole [sic] is proper[,] and accordingly, I deny [397 S.C. 186] [Husband's] request to amend the portion of the Decree with regard to the retirement benefits awarded.

Neither party appealed the 1999 support order.[1]

Wife filed for divorce in 2000. Husband did not file an answer, and on May 10, 2000, immediately following a hearing, the family court issued an order granting Wife a divorce based on a one-year separation. In addition, the court accepted the parties' agreement that Husband would name Wife as the survivor benefit plan (SBP) beneficiary of his military retirement and noted all other issues were adjudicated in the 1999 support order. The court incorporated the 1999 order into the divorce decree with the proviso that the QDRO was amended "with regard to the designation of SBP beneficiary only."

On January 15, 2004, pursuant to an action by Husband to modify his alimony obligation, the family court issued an order approving an agreement between the parties to reduce alimony to $350 per month and terminate the alimony altogether upon Husband's discharge from the Navy.[2] Pursuant to the parties' agreement, the court ordered that if Wife's equitable share of Husband's military retirement amounted to less than $700 per month, which was the amount of alimony awarded to Wife in the 1999 support order, Husband was to pay her the difference so that she would receive no less than $700 per month from Husband's military retirement.

Husband retired from the Navy on August 1, 2009. By then, he accumulated an additional 125 months of service after the entry of the 1999 support order. When Husband notified the Department of Defense Finance

[723 S.E.2d 252]

and Accounting Service (DFAS) to process his retirement pay, the DFAS calculated Wife's 43.8% share based on Husband's entire time of service, including the 125 months he accumulated after the issuance of the 1999 order. Husband's attorney then drafted a supplemental decree clarifying that Wife's share was to be based on only the military retirement benefits he had accrued when the family court issued the 1999 support order; however, Wife [397 S.C. 187] refused to consent to it, claiming she was entitled to 43.8% of Husband's entire monthly benefits.

Husband then filed a motion in the family court to enforce the 1999 support order, or in the alternative, to modify it pursuant to Rule 60(b)(5), SCRCP, so that Wife's share of his military retirement would be limited to 50% of the portion he accrued during the parties' marriage. After counsel argued the motion before the family court, Wife filed a return in which she expressed her opposition to the motion, arguing (1) the family court lacked jurisdiction to modify the property division, (2) Husband was essentially re-litigating an issue that he should have raised in an appeal, and (3) Husband's decision to remain in the military delayed her receipt of the benefits to which she was entitled and prolonged the period that she received a reduced amount of alimony. Subsequently, the family court issued the appealed order, in which it denied Husband's motion to enforce or modify the 1999 order and

awarded Wife $1,500 in attorney's fees. Specifically, the court held (1) Husband should have appealed the 1999 support order and (2) under *Ball,* the family court had the discretion to award nonvested as well as vested retirement benefits. Husband moved for reconsideration of this order, arguing (1) the family court erroneously relied on *Ball;* (2) the court erroneously exercised jurisdiction over his nonmarital military retirement benefits earned after the dissolution of the parties' marriage; (3) the court failed to consider his argument that Rule 60(b)(5), SCRCP, should be applied to this case on the ground that prospective application of the 1999 order was no longer equitable; and (4) the court failed to address the requisite factors in awarding attorney's fees to Wife. The family court declined to alter or amend its order, and Husband filed this appeal.

ISSUES

I. Did the family court exceed its authority in awarding Wife a percentage of the portion of Husband's retirement benefits that were earned after the issuance of the 1999 support order?

[397 S.C. 188] II. Did the family court err in holding that Husband's failure to appeal the 1999 support order barred him from seeking relief?

III. Should Husband be entitled to seek relief under Rule 60(b)(5), SCRCP, to have Wife's future share of his retirement benefits based solely on the portion that he earned during their marriage?

IV. Did the family court give adequate consideration to the requisite factors in awarding attorney's fees to Wife?

STANDARD OF REVIEW

The facts in this matter are not in dispute, and this appeal involves only the interpretation of statutes, case law, and prior orders issued in conjunction with the parties' marital litigation. Our standard of review, therefore, does not require any deference to findings of fact by the family court. *See E.D.M. v. T.A.M.,* 307 S.C. 471, 473, 415 S.E.2d 812, 814 (1992) (noting the appellate court has authority to correct errors of law in appeals from family court orders).

LAW/ANALYSIS

I. Military Retirement Benefits Subject to Division

Husband argues that the 1999 order correctly and unambiguously awarded Wife 43.8% of only the 252 months of military retirement benefits that he had accrued as of the time the order was issued, rather than 43.8% of his entire military retirement benefits. Husband further claims he is entitled to an order directing the DFAS to recalculate Wife's benefits retroactive to the date payments commenced. We agree.

In *Ball v. Ball,* 314 S.C. 445, 445 S.E.2d 449 (1994), the South Carolina Supreme

[723 S.E.2d 253]

Court, affirming an opinion by this court, held a spouse's nonvested military pension was marital property subject to equitable distribution. The court gave the following explanation to support its decision:

> Whether vested or nonvested, pension plans are deferred compensation.... *[T]o the extent that Wife participated in Husband's military career, she also contributed to the service for which he will be compensated in the future.* We hold that Husband's participation in the pension plan was *[397 S.C. 189] an actual right existing at the time of the divorce,* even though the compensation, if received, is deferred.

Id. at 447, 445 S.E.2d at 450 (emphasis added). The focus of *Ball* was on nonvested retirement benefits, in other words, benefits that, though earned by a participant, are subject to forfeiture under certain conditions. It is readily apparent from the above-quoted language that although benefits do not need to be vested in order to be subject to equitable division, they are not marital property unless they are earned during the

marriage. To hold otherwise would allow a family court to exceed its jurisdiction by equitably dividing assets that do not meet either of the two statutorily mandated requirements to be considered marital, namely, that they be (1) acquired during the marriage and (2) owned by the parties when dissolution proceedings begin. S.C.Code Ann. § 20–3–630 (Supp.2010).[3] *Cf. Shorb v. Shorb,* 372 S.C. 623, 629, 643 S.E.2d 124, 127 (Ct.App.2007) (stating that although the Equitable Apportionment of Marital Property Act "does not specifically define pension benefits as marital property, ... this Court has consistently held that both vested and nonvested retirement benefits are marital property *if the benefits are acquired during the marriage and before the date of filing*." (emphasis added)); *Jenkins v. Jenkins,* 345 S.C. 88, 101, 545 S.E.2d 531, 538 (Ct.App.2001) ("Contributions to an I.R.A. *during the term of marriage* constitute marital property subject to division." (emphasis added)).

We therefore hold that although the family court correctly cited Ball in the appealed order for the proposition that it has the authority to award retirement benefits "whether vested or not," this authority does not include the equitable division of benefits yet to be earned by a spouse.

II. Failure to Appeal the 1999 Order

Husband also challenges the family court's holding that his failure to appeal the 1999 support order precluded him from seeking a supplemental order. He argues the order [397 S.C. 190] issued pursuant to his motion for reconsideration of the 1999 support order clarified that the family court granted Wife an equitable share of only the military retirement benefits that he had earned when the 1999 order was issued and, therefore, he had no need to appeal this order. We agree.

In the 1999 support order, the family court expressly ruled that the division of Husband's military retirement benefits was "part of the parties' property division" rather than in the nature of spousal support. Furthermore, in its order on Husband's motion for reconsideration, the family court, referencing Ball, stated that "[m]ilitary retirement pay, *whether vested or nonvested,* is essentially compensation for *past* services." (emphasis added). The family court correctly omitted from this discussion any treatment of unearned retirement benefits that would result from future service by a military employee.

Moreover, in her return to Husband's motion for reconsideration, Wife responded as follows:

In the instant case, [Husband] had previously agreed that [Wife] was entitled to 50% of his disposable pay calculated at the rank of Lt. *with 18 years, 5 months of service* .... [Husband] then went on to calculate the proportion [Wife] was entitled to using the formula which divided the length of the marriage (parties are still married, however as of date of filing, they lived together for 221 months) over the number of years in the service (252 months) and multiplied that amount by .50 to come up with 43.75%. Using the same formula, [Wife] came up with 43.85% of the retirement benefits. The Court awarded

[723 S.E.2d 254]

[Wife] 43.8% of [Husband's] military retirement benefits. The formula already takes into account and "discounts" [Wife's] portion of entitlement by the length of the parties' marriage.[4]

[397 S.C. 191] (emphasis added). It is apparent from these statements that both parties correctly understood Wife's benefits were to be based on only that portion of Husband's military retirement that he had accrued as of the time the 1999 order was issued. Because Husband was not aggrieved by this order, he could not have appealed it. *See* Rule 201(b), SCACR. We therefore reverse the family court's ruling that Husband's failure to appeal the 1999 separate support and maintenance order bars him from seeking further relief.

III. Entitlement to Supplemental Order

Husband further contends that under Rule 60(b)(5), SCRCP, he is entitled to a supplemental

order to avoid the inequitable effect of the DFAS's interpretation of the 1999 orders. We agree with Wife that relief under Rule 60(b)(5) is available only in cases of fraud upon the court or "rare, special, exceptional or unusual circumstances that may warrant equitable relief, including accident or mistake." *Mr. T v. Ms. T,* 378 S.C. 127, 135, 662 S.E.2d 413, 417 (Ct.App.2008) (citing 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2868 (2d ed.1995)). Nevertheless, although Husband cannot obtain "relief" from the 1999 support order under Rule 60(b)(5), we hold he is entitled by statute to a supplemental order clarifying the terms of that order. *See* S.C.Code Ann. § 63–3–530(A)(30) (2010) (giving the family court exclusive jurisdiction "to make any order necessary to carry out and enforce the provisions of this title").

IV. Attorney's Fees

Finally, Husband challenges the award of attorney's fees to Wife, arguing the record and the order are silent as to specific factors on which the fees were based. Based on our reversal of the division of Husband's military retirement benefits earned after the 1999 order, we reverse and remand the issue of attorney's fees as well. *See Eason v. Eason,* 384 S.C. 473, 482, 682 S.E.2d 804, 808 (2009) (holding the family court should reconsider the issue of attorney's fees on remand based on the appellate court's disposition of another issue on appeal). On remand, the family court shall give appropriate attention to all factors stated in [397 S.C. 192] *Glasscock v. Glasscock,* 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991), and, as required by Rule 26(a), SCRFC, set forth specific findings of fact and conclusions of law to support its decision.

CONCLUSION

We hold the family court erred in refusing to issue a supplemental order clarifying that Wife's share of Husband's retirement benefits is limited to those benefits he had accrued as of the issuance of the 1999 separate support and maintenance order. We further hold Husband is entitled to have the DFAS calculate Wife's benefits based on an award of 43.8% of 252 months of his monthly military retirement benefits, retroactive to the date payments commenced. We remand the matter to the family court for (1) issuance of a supplemental order incorporating these terms and providing for reimbursement to Husband for prior excess payments to Wife and (2) reconsideration of whether Wife is entitled to attorney's fees in view of our disposition of the other issues in this appeal and, if so, the amount to be awarded.

REVERSED AND REMANDED.

FEW, C.J., and KONDUROS, J., concur.

Notes:

[1.] Further, until Husband retired, neither party requested further action after the family court denied his motion for reconsideration.

[2.] According to Husband's complaint in this action, Wife's income had increased as a result of a change in her employment.

[3.] We further note that, under *Ball,* if Husband had remarried, his second wife would have a claim to any retirement benefits he would have accrued during the subsequent marriage by virtue of her participation in his military career and contribution to his service.

[4.] In her return as well as in her respondent's brief, Wife makes assertions to the effect that she is entitled to 43.8% of Husband's entire military retirement benefits because Husband, in opting to continue in the service even though he was eligible for retirement, "delayed" her receipt of these benefits. If, however, Wife anticipated receiving these benefits earlier, that expectation could easily have been documented in the numerous proceedings between the parties. We further note it appears alimony was modified because Wife's financial circumstances had improved rather than because she anticipated

receiving her share of Husband's military retirement benefits.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gunjit Rick Singh, Petitioner,

v.

Simran P. Singh, Respondent.

Appellate Case No. 2020-000457

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Gordon B. Jenkinson, Family Court Judge
Judy L. McMahon, Family Court Judge
Jocelyn B. Cate, Family Court Judge
Jack A. Landis, Family Court Judge
Daniel E. Martin, Jr., Family Court Judge

Opinion No. 28057
Heard June 17, 2021 – Filed September 8, 2021

AFFIRMED AS MODIFIED

Robert N. Rosen, of Rosen Law Firm, LLC, of Charleston, Sheila McNair Robinson, of Moore Taylor Law Firm, P.A., of West Columbia, and Katherine Carruth Goode, of Winnsboro, for Petitioner.

O. Grady Query, Michael W. Sautter, Michael Holland Ellis, Jr., and Alexander Woods Tesoriero, all of Query Sautter & Associates, LLC, of Charleston, for Respondent.

JUSTICE HEARN: The question presented in this case is whether South Carolina law permits issues relating to child custody and visitation to be submitted to binding arbitration with no oversight by the family court and no right of review by an appellate tribunal. We believe the answer is clearly and unequivocally no.

FACTS/PROCEDURAL HISTORY

After nearly seventeen years of marriage, Respondent Simran Singh (Mother) and Petitioner Gunjit Singh (Father) separated in January of 2012. They subsequently entered into a settlement agreement later that year which resolved all issues arising from their marriage, including custody and visitation matters involving their two children, then aged eleven and two.[1] Pursuant to that agreement, Mother received primary custody, and the parties consented to submit any future disputes regarding child support or visitation to a mutually agreed-upon arbitrator, specifically providing that his or her decision would "be binding and non-appealable." The family court approved the agreement and granted the parties a divorce in February of 2013.

Approximately nine months later, Father filed an action in family court seeking modification of custody, visitation, and child support, alleging Mother had violated a provision of the agreement when she failed to return to South Carolina with the children after embarking on a cross-country tour as a motivational speaker. From January through August of 2014, four family court judges issued decisions—one dismissing Father's complaint due to the parties' decision to arbitrate; a second issuing a consent order to arbitrate; and two approving amended agreements to arbitrate. The agreements contained the following provision: "The parties fully understand that the decision of the Arbitrator is final and binding upon them and that they do not have the right to apply to this Court or to any other Court for relief if either is unsatisfied with the Arbitrator's decision."[2]

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[1] The parties' older child is now emancipated.

[2] Our review of the settlement agreement and the subsequent agreements to arbitrate reveals that each amended version strengthened the arbitration provisions. For example, the settlement agreement approved by the family court in February 2013 provided for arbitration of future disputes pertaining to child support, relocation, and visitation, but it did not specifically address custody. Further, the family court judge stated this on the record during the hearing on the approval of the settlement agreement:

The two judges who ruled on the amended agreements found them to be "fair and equitable" as well as enforceable by the court. The arbitrator—a well-respected Charleston family law attorney and mediator—issued a "partial" arbitration award in August, finding a substantial and material change of circumstance affecting the welfare and custody of the minor children, and awarding Father temporary custody. A thirty-two-page final arbitration award was issued the next month, awarding custody to Father. A fifth family court judge issued an order in January of 2015 confirming both the partial and final arbitration awards.

However, within days of the arbitrator's final award and months before the family court approved it, Mother—represented by new counsel—filed a motion for emergency relief, asking the court to vacate the arbitration awards and the prior court orders approving the parties' agreements to arbitrate. Following a hearing on that motion, the court issued an order confirming both the partial and final arbitration awards "with finality" and denied the motion seeking to vacate the awards as premature. It thus appears that four different family court judges approved—at times apparently without a hearing—the parties' agreements to arbitrate the issues

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> [A]s to that part of your agreement which deals with your two children, I want you to understand that even if I approve this agreement, if there happens to be some change in circumstances in the future, either of you may be able to come back before me, or another judge, and ask the court to make changes in that part of the agreement.

In January of 2014, following the Father's request for modification of custody, the family court approved an agreement to arbitrate the issues—including custody—and additionally stated that the arbitrator's decision was final and not appealable. In March, the parties amended their agreement to arbitrate, which was approved by the family court, by reiterating the finality of the arbitrator's decision and adding a $10,000 monetary penalty as a consequence of challenging that decision. In August, the family court approved a supplemental amended agreement to arbitrate, which retained the aspects above in addition to a new provision acknowledging the arbitration rules do not expressly authorize arbitration of children's issues, but releasing any potential claims against the arbitrator or the parties' attorneys for exceeding "their authorization and/or the authorization of the applicable ADR rule of the Family Court." Thus, both the scope of the issues subject to arbitration and the parties' implicit recognition of the uncharted legal territory of arbitrating children's issues expanded from the time of the settlement agreement to the supplemental amended agreement to arbitrate.

involving the children, and a fifth judge confirmed the validity of the arbitration award.

Thereafter, Mother filed five separate Rule 60(b)(4), SCRCP, motions to vacate all the orders approving the parties' agreements to arbitrate. Although Mother requested the motions be consolidated for a hearing before a single judge in the interest of judicial economy, that motion was denied. Five separate hearings ensued, all of which ultimately resulted in orders denying mother's motions. Mother thereafter filed five notices of appeal from orders denying her motions, and the court of appeals consolidated them. The court of appeals issued its unanimous decision in December of 2019, holding that the parties could not divest the family court of jurisdiction to determine issues relating to custody, visitation, and child support. *Singh v. Singh*, 429 S.C. 10, 30, 837 S.E.2d 651, 662 (Ct. App. 2019).[3] One month prior thereto, another panel of the court of appeals issued a decision in *Kosciusko v. Parham*, 428 S.C. 481, 505, 836 S.E.2d 362, 375 (Ct. App. 2019), holding the family court did not have subject-matter jurisdiction to approve the binding arbitration of children's issues.[4] We granted certiorari in this case because the court of appeals based its decisions on slightly different grounds, and affirm as modified.

ISSUE

Did the court of appeals err in concluding the family court could not delegate its exclusive jurisdiction to determine the best interest of the child?

STANDARD OF REVIEW

Generally, appellate courts review the decision of the family court de novo, with the exception of evidentiary and procedural rulings. *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011); *Stoney v. Stoney*, 422 S.C. 593, 595 n.2, 813 S.E.2d 486, 487 n.2 (2018) ("*Lewis* did not address the standard for reviewing a family court's evidentiary or procedural rulings, which we review using an abuse of discretion standard."). While this consolidated appeal results from multiple orders denying Mother's Rule 60(b) motions, the underlying question stems from the family

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[3] We note the court of appeals concluded the $10,000 penalty provision was "astonishing." Because neither party has challenged the monetary penalty before us on appeal, we express no opinion as to whether that provision is enforceable.

[4] Following the issuance of the court of appeals' decision in *Kosciusko*, the parties in that case apparently settled their differences and no petition for certiorari was filed.

court's legal authority to delegate its jurisdiction to an arbitrator, which is a question of law for the Court to review de novo.

DISCUSSION

We begin our analysis with the recognition that family courts are statutory in nature and therefore possess only that jurisdiction specifically delegated to them by the South Carolina General Assembly, which was granted authority over these issues in Article V, section 12 of the South Carolina Constitution. Pursuant to that constitutional grant of authority, the General Assembly created the family courts and established the parameters of their jurisdiction. S.C. Code Ann. § 63-3-530 (2010 & Supp. 2020) (stating the family court has exclusive jurisdiction over forty-six matters listed); *State v. Graham*, 340 S.C. 352, 355, 532 S.E.2d 262, 263 (2000) ("The family court is a statutory court created by the legislature and, therefore, is of limited jurisdiction."). Accordingly, the family court's jurisdiction is "limited to that expressly or by necessary implication conferred by statute." *Graham*, 340 S.C. at 355, 532 S.E.2d at 263. Significantly, subsection 63-3-530(39) provides the family court with exclusive jurisdiction:

> [T]o require the parties to engage in court-mandated mediation pursuant to Family Court Mediation Rules or to issue consent orders authorizing parties to engage in any form of alternate dispute resolution *which does not violate the rules of the court or the laws of South Carolina*; provided however, the parties in consensual mediation must designate any arbiter or mediator by unanimous consent subject to the approval of the court[.]

S.C. Code Ann. § 63-3-530(39) (2010) (emphasis added). While this provision envisions arbitration in some areas, our court rules and jurisprudence confirm that children's matters are not within the ambit of issues subject to arbitration.

Our Alternative Dispute Resolution Rules (ADR) contemplate both mediation and arbitration of family court matters, but implicitly limit binding arbitration to issues of property and alimony. *See* Rule 3(a), SCADR (requiring "all contested issues in domestic relations actions filed in family court" be subject to mediation unless the parties agree to conduct arbitration); Rule 4(d)(1), SCADR (providing "[i]f there are unresolved issues of *custody or visitation*, the court may . . . order an *early mediation* of those issues upon motion of a party or upon the court's own motion") (emphasis added); Rule 4(d)(2), SCADR (stating "the parties may submit the issues of property and alimony to binding arbitration in accordance with subparagraph (5)"); Rule 4(d)(5), SCADR (noting "[i]n lieu of mediation, the parties may elect to submit

issues of property and alimony to binding arbitration in accordance with the Uniform Arbitration Act, S.C. Code Section 15-48-10 et. seq., or submit all issues to early neutral evaluation pursuant to these rules"). We agree with the court of appeals' decision in *Kosciusko*, 428 S.C. at 498, 836 S.E.2d at 371, which applied the canon of construction *expressio unius est exclusio alterius*, meaning to express or include one thing implies the exclusion of another. Accordingly, because the drafters of Rule 4(d), SCADR, expressly included arbitration of property and alimony but only addressed custody and visitation in the context of early mediation, it can be fairly implied that the rule does not permit binding arbitration of children's issues.[5] Thus, to the extent that the court of appeals' opinion in this case suggests our ADR rules do not prohibit arbitration of children's issues, we modify that portion accordingly.

Further, our construction of the ADR rules mirrors the jurisprudence of this state, which has consistently recognized the authority of the family courts over issues regarding children. In the seminal decision of *Moseley v. Mosier*, this Court stated that "family courts have continuing jurisdiction to do whatever is in the best interests of the child regardless of what the separation agreement specifies." 279 S.C. 348, 351, 306 S.E.2d 624, 626 (1983). Following *Moseley*, the court of appeals decided *Ex parte Messer* involving a separation agreement which contained an arbitration provision. 333 S.C. 391, 395, 509 S.E.2d 486, 487-88 (Ct. App. 1998). The court held the provision invalid as not meeting the requirement of conspicuousness, but it reiterated that "*Moseley* makes it clear that *except for matters relating to children*, over which the family court retains jurisdiction to do whatever is in their best interest, parties to a separation agreement may 'contract out of any continuing judicial supervision of their relationship by the court.'" *Id.* (quoting *Moseley*, 279 S.C. at 353, 306 S.E.2d at 627) (emphasis added). Approximately a year after *Messer*, the court of appeals again emphasized the distinction between arbitrating issues pertaining to

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[5] We acknowledge that the Uniform Family Law Arbitration Act contemplates arbitration of children's issues while also granting the family court the power to vacate an unconfirmed arbitration award if the moving party demonstrates the award is not in the best interest of the child. *See* Unif. Family Law Arbitration Act § 19(b) (Nat'l Conference of Comm'rs on Unif. State Laws 2016). In determining the best interests of the child, the drafter's of this model legislation provided two choices for reviewing the arbitration award—either de novo or limited to "the record of the arbitration hearing and facts occurring after the hearing." *Id.* at § 19(d). Only four states have enacted this legislation, and South Carolina is not one of them. *See Family Law Arbitration Act*, UNIFORM L. COMMISSION, https://www.uniformlaws.org/committees/community-home?CommunityKey=ddf1c9b6-65c0-4d55-bfd7-15c2d1e6d4ed (last visited Sept. 7, 2021).

children versus property and alimony matters. In *Swentor v. Swentor*, the court declined to set aside an arbitration award concerning the equitable apportionment of the marital estate, but specifically limited its decision to property and alimony issues. 336 S.C. 472, 486 n.6, 520 S.E.2d 330, 338 n.6 (Ct. App. 1999) ("Our holding, of course, is limited to arbitration agreements resolving issues of property or alimony, and *does not apply to agreements involving child support or custody*.") (emphasis added).

Accordingly, we reject Father's contention that the General Assembly has in any way authorized family courts to approve agreements to arbitrate children's issues. Instead, our reading of the statutes and court rules is consistent with the analysis of the court of appeals in *Kosciusko*: by specifically providing for the arbitration of property and alimony issues in the ADR rules, the General Assembly intended that children's issues not be subject to arbitration. We likewise reject Father's contention that the statements in *Messer* and *Swentor* placing children's issues in a different category from property and alimony matters was mere dicta; rather, that language was integral to those decisions because it delineated the scope of permissible arbitration in family court.

Moreover, apart from the ADR rules and our case law, children's fundamental constitutional rights are at stake here. *See Ex parte Tillman*, 84 S.C. 552, 560, 66 S.E. 1049, 1052 (1910) ("[T]here is a liberty of children above the control of their parents, which the courts of England and this country have always enforced."). As the court of appeals so aptly stated: "Longstanding tradition of this state places the responsibility of protecting a child's fundamental rights on the court system." *Singh*, 429 S.C. at 23, 837 S.E.2d at 658. We agree with the court of appeals that the family court cannot delegate its authority to determine the best interests of the children based on the *parens patriae* doctrine.[6] Parents may not attempt to circumvent children's rights to the protection of the State by agreeing to binding arbitration with no right of judicial review. This has never been the law in South Carolina, and our decision today unequivocally holds arbitration of children's issues is not permitted.[7]

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[6] *Parens patriae* is Latin for "parent of the country." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600 n.8 (1982). This doctrine recognizes that it is the State's duty to protect those who cannot protect themselves, including minor children in this context. *Id.* at 600 (discussing the origins and development of *parens patriae*).

[7] In denying Mother's Rule 60(b) motions, two of the five family court judges found Mother was estopped from challenging the validity of the court orders and the

CONCLUSION

Consistent with the reasoning herein, we affirm as modified the opinion of the court of appeals vacating the arbitration award and the underlying orders approving the parties' right to arbitrate issues involving their children. Custody of the minor child will continue to remain with Father until otherwise ordered by the Charleston County Family Court.

AFFIRMED AS MODIFIED.

BEATTY, C.J., KITTREDGE, FEW and JAMES, JJ., concur.

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arbitration award. Father contends Mother did not appeal the estoppel finding, rendering it the law of the case and invoking the two issue rule. We believe Mother sufficiently challenged the estoppel findings both before the family court and on appeal. While Mother did not use the term "estoppel" in her opening brief before the court of appeals, she did argue the family court erred by focusing on the parents' conduct rather than the children's constitutional rights. *Buist v. Buist*, 410 S.C. 569, 575, 766 S.E.2d 381, 383-84 (2014) (noting that a party need not use the precise legal term to preserve an issue, but "the party nonetheless must be sufficiently clear in framing his objection so as to draw the court's attention to the precise nature of the alleged error"). Further, Mother specifically argued that parents cannot waive the type of constitutional rights at issue, and while waiver and estoppel are distinct concepts, the doctrines sometime "merge into each other with almost imperceptible gradations, so that it is difficult to determine the exact point where one doctrine ends and the other begins." *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 388 (1992) (citation omitted). *See also Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007) ("[*L*]*ack* of subject matter jurisdiction in a case may not be waived and ought to be taken notice of by an appellate court."). Accordingly, the procedural doctrines Father relies on do not apply. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (stating preservation rules are not a "gotcha" game aimed at embarrassing attorneys or harming litigants and noting it is "good practice" to reach the merits when preservation is unclear).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Diannia R. Taylor, Appellant,

v.

Reginald B. Taylor, Respondent.

Appellate Case No. 2019-002084

Appeal From Greenville County
Tarita A. Dunbar, Family Court Judge

Opinion No. 5978
Submitted December 1, 2022 – Filed April 12, 2023

REVERSED

Melinda Q. Taylor, of Collins Family Law Group, of Monroe, North Carolina, and Tamika Devlin Cannon, of S.C. Victim Assistance Network, of Taylors, both for Appellant.

Walter Christopher Castro, of ALAW, of Greenville, for Respondent.

HILL, A.J.: Diannia Taylor (Mother) petitioned the family court for various relief, including for an order of protection under the Protection from Domestic Abuse Act[1] (the Act) based on allegations her husband, Reginald B. Taylor (Husband), had physically and sexually abused her. Mother also alleged Husband had molested

[1] S.C. Code Ann. § 20-4-10 to -160 (2014 & Supp. 2022).

A.R., her minor daughter from a previous relationship. Mother sought protection from Husband for herself and A.R., as well as custody of the couple's minor sons.

At the emergency hearing, Mother and Husband indicated they had reached an agreement as to the order of protection for Mother but not as to an order of protection for A.R. The family court granted the order of protection as to Mother, finding Husband abused Mother and A.R. However, the family court ruled it could not include A.R. in the order of protection because A.R. did not meet the definition of "household member" under the Act. Mother now appeals.

I. DISCUSSION

Mother argues the family court erred in ruling the Act does not allow orders of protection to be granted to minor household members such as A.R. who are not spouses of, former spouses of, previous cohabitants with, or who have a child in common with the alleged abuser.

This appeal turns on the Act's legislative intent. In construing this intent, we begin by reviewing the text of the Act. When the text is plain and unambiguous, we must enforce it as written. *Smith v. Tiffany*, 419 S.C. 548, 555–56, 799 S.E.2d 479, 483 (2017). We have no license to alter or shade the plain meaning in an effort to stretch or shrink the scope of a statute. *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013). Nor do we have any authority to isolate the words of a statute and ignore our obligation to interpret the statute as a whole, harmonizing the statutory scheme by giving each section effect. *Id.*

The phrase "household member" is plainly defined by the Act as:

> (i) a spouse;
> (ii) a former spouse;
> (iii) persons who have a child in common;
> (iv) a male and female who are cohabiting or formerly have cohabited.

S.C. Code Ann. § 20-4-20(b) (2014 & Supp. 2022). This definition does not include a minor such as A.R. *See Fruehauf Trailer Co. v. S.C. Elec. & Gas Co.*, 223 S.C. 320, 325, 75 S.E.2d 688, 690 (1953) (legislative definition "should be followed in the interpretation of the act or section to which it relates and is intended to apply"). However, our inquiry into whether the legislature intended A.R. to be entitled to an order of protection under the Act does not end here. This is so because, as we shall

see, the Act unquestionably refers to protecting "minor" household members several times, without further definition.

To advance our inquiry, we first consider what the words of the Act tell us about its intended scope. "'Order of protection' means an order of protection issued to protect the petitioner or minor household members from the abuse of another household member . . . ." S.C. Code Ann. § 20-4-20(f) (2014). "'Abuse' means: (1) physical harm, bodily injury, assault, or the threat of physical harm; (2) sexual criminal offenses, as otherwise defined by statute, committed against a family or household member by a family or household member." S.C. Code Ann. § 20-4-20(a) (2014). "A petition for relief under this section may be made by any household members in need of protection or by any household members on behalf of minor household members." S.C. Code Ann. § 20-4-40(a) (2014).

We pause to acknowledge that since the Act's passage in 1984, the legislature has tweaked the definition of "household member" several times. 1994 Act No. 519, §§ 2, 3; 2003 Act No. 92, § 11; 2005 Act No. 166, § 7. The evolution of the definition of the term shows the legislature has consistently narrowed it down to its current definition as shown above. This could suggest the legislature intended to make the Act inapplicable to most minors, as few minors would meet the current definition of "household members." However, we find the language the legislature has left in the Act is more compelling then what it has taken out. Despite the Act's several revisions, the legislature has retained the phrase "minor household members" in § 20-4-20(a) and § 20-4-40(a). By keeping the phrase "minor household members" in the Act, we infer the legislature intended to allow minors who do not meet § 20-4-20(b)'s definition of "household members" to receive orders of protection from domestic abuse. After all, there would be no need for the legislature to include the word "minor" before "household members" if it intended for the Act to only protect minors who already met the narrow definition of "household members." Such minors would simply be "household members," leaving the word "minor" with no work to do. *See CFRE, LLC v. Greenville Cnty. Accessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (providing courts "must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.'" (alterations in original) (quoting *State v. Sweat*, 379 S.C. 367, 377, 382, 665 S.E.2d 645, 651, 654 (Ct. App. 2008))).

We conclude the Act extends protection to minor household members such as A.R. This construction of the Act best comports with the purpose and intent of the Act. *See Doe v. State*, 421 S.C. 490, 505, 808 S.E.2d 807, 815 (2017) (stating the "overall

legislative purpose [of the Act] is to protect victims from domestic violence that occurs within the home and between members of the home"); *Moore v. Moore*, 376 S.C. 467, 476, 657 S.E.2d 743, 748 (2008) ("The Protection from Domestic Abuse Act was enacted to deal with the problem of abuse between family members. The effect of the Act was to bring the parties before a judge as quickly as possible to prevent further violence."); *see also* 2A Sutherland *Statutory Construction* § 47.7 (7th ed.) (statutory definitions may not bind courts when they "defeat a statute's major purpose"). Our conclusion gathers further support from the text of § 20-4-60(a) (2014), which provides orders of protection "shall . . . protect the petitioner or the abused person or persons on whose behalf the petition was filed . . . ." As we have seen, the only persons who may have a petition filed on their behalf are "minor household members." § 20-4-40(a). If the only minors the Act protected were minors who are spouses of, former spouses of, cohabitants with, or who have a child in common with the abuser, it would be unlikely in such instances that there would also be an adult who met the technical definition of "household member" so as to allow the adult to file a petition for protection on the minor's behalf. That would mean such minors would not have access to the courts to enforce the Act.

Interpreting the Act as only protecting minors who meet the definition of household members thwarts the purpose and intent of the Act. It would also leave us with an Act that allows a petitioner living in a household with a domestic abuser to deploy the Act to protect their pets but not their children. *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) ("We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention."); S.C. Code Ann. § 20-4-60(C)(8) (Supp. 2022) (providing in an order of protection, the family court may prohibit the respondent harming or harassing "any pet animal owned, possessed, kept, or held by: (a) the petitioner; (b) any family or household member designated in the order; (c) the respondent if the petitioner has a demonstrated interest in the pet animal"); *cf. State v. Walker*, 422 S.C. 89, 90–91, 810 S.E.2d 38, 39 (2018) (holding § 16-25-10(3)'s definition of "household member" for purposes of determining early parole eligibility for persons convicted of crimes against a household member did not apply to defendant who had murdered father who had abused him).

We therefore interpret the term "minor household member" as used in the Act to include all minors who need protection and who live in the same household as a petitioner and an abusive household member, not just minors who meet the strict definition of "household member" set forth in section 20-4-20(b). Because A.R. was

a minor living in the same home as the petitioner (Mother) and the alleged abuser (Husband), we find the family court erred by not granting an order of protection to A.R.

REVERSED.[2]

GEATHERS and MCDONALD, JJ., concur.

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.