The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

March 22, 1995

The Honorable J. Gary Simrill
Member, House of Representatives
742 Gatewood Avenue
Rock Hill, South Carolina 29730

Re: Informal Opinion

Dear Representative Simrill:

Attorney General Condon has referred your letter to me for reply. You have requested our opinion "regarding the Family Court not having a trial by jury system." You note that you have received numerous questions from your constituents as to the constitutionality of no jury trial being provided in Family Court.

BACKGROUND TO RIGHT OF JURY TRIAL IN SOUTH CAROLINA

By way of background, both the Federal and State Constitutions provide for the right to trial by jury. Article 3, Section 2 of the United States Constitution requires that "[t]he trial of all crimes, except in cases of impeachment, shall be by jury ..." and the Sixth Amendment also imposes the requirement of a jury trial in all criminal proceedings. In addition, a right to trial by jury in criminal cases has been extended by the United States Supreme Court to state prosecutions by virtue of the Due Process Clause of the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

Yet a jury trial is not guaranteed by the federal Constitution in all criminal proceedings. Specifically, the federal right to trial by jury does not extend to petty crimes. Frank v. United States, 395 U.S. 147, 89 S.Ct. 1503, 23 L.Ed.2d 162 (1969). These are usually defined as crimes whose maximum penalty is six months imprisonment or less. Duncan, supra.

Neither does the United States Constitution mandate a jury trial in all civil cases. The Seventh Amendment of the federal Constitution provides:

> [i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

This amendment has been determined to embrace "all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they assume to settle legal rights." Therefore, the Seventh Amendment requires "a jury trial on the merits in those actions that are analogous to suits at common law, but those actions which are analogous to 18th century cases tried in courts of equity or admiralty do not require a jury trial ..." 47 Am.Jur.2d, Jury, § 4.

By contrast to the right to a jury trial in criminal cases, the United States Supreme Court has not extended the protections of the Seventh Amendment to the states, so that there is normally no federal right to a jury trial in state civil cases. Hawkins v. Bleakly. 243 U.S. 210, 37 S.Ct. 255, 61 L.Ed. 678 (1917); Xeapapas v. Richardson, 149 S.C. 52, 146 S.E. 686 (1929). As a result, with respect to cases not involving criminal prosecutions (and as to criminal prosecutions only where the maximum punishment is greater than six months), the South Carolina Constitution, not the federal, governs the right to trial by jury in South Carolina's courts.

Article I, Section 14 of this State's Constitution (1895 as amended) provides in pertinent part:

> [t]he right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury ....

This provision governs both civil and criminal cases. Best v. Barnwell Co., 114 S.C. 123, 103 S.E. 479 (1920). In State v. Gibbes, 109 S.C. 135, 139-140, 95 S.E. 346 (1918), our Supreme Court construed Art. I, § 14, noting that the provision by no means granted a jury trial in every case:

> [t]rue, the Constitution ... provides that the right of trial by jury shall be preserved inviolate. A similar guaranty will be found in every Constitution adopted by the people of this

> State. But such provisions have been uniformly held by this Court and others to mean that the right shall be preserved only in those cases in which parties were entitled to it under the law or practice existing at the time of the adoption of the Constitution.

Other cases in South Carolina are in complete accord. See, Commissioners v. Seabrook, 2 Strob. 560 (1846); Frazee v. Beattie, 26 S.C. 348, 2 S.E. 125 (1886); City v. O'Donnell, 29 S.C. 355, 7 S.E. 523, 1 L.R.A. 632, 13 Am.St.Rep. 728 (1888); Richards et al. v. City of Cola., 227 S.C. 538, 88 S.E.2d 683 (1955); McGlohon v. Harlan, 254 S.C. 207, 174 S.E.2d 753 (1970).

Moreover, our Court has also contrasted cases at common law, where an action was extant at the time of the Constitution's creation, to cases in equity or which are equitable in nature. Art. I, Section 14's right to a jury trial was long ago determined by the Court to be inapplicable to cases within the equitable jurisdiction of our courts. For example, to the argument that an action for the foreclosure of a mortgage was entitled under the Constitution to a jury trial, the Court rejected the contention by saying:

> [t]his argument overlooks the fact that there are two general modes of trial, trials by Court and trials by jury. To the Court belongs all issues of law and all cases in chancery, and to the jury all questions of fact in cases at law for the recovery of money or of any specific real or personal property, Meetze v. Charlotte, Columbia & Augusta Ry. Co., 23 S.C. 1; but the constitutional declaration that "the right of jury trial shall remain inviolate" does not apply to cases within the equitable jurisdiction of the Court. Lucken v. Wichnan, 5 S.C. 411.

Collier v. Green, 244 S.C. 367, 373, 137 S.E.2d 277 (1964). Because the action was equitable, the parties were not entitled to a trial by jury "as a matter of right ...", but still, the presiding Judge could "in his discretion, cause to be framed an issue or issues of fact to be tried by a jury ...". 244 S.C. at 373-374. Similarly, in Miller v. British America Assurance Co., 238 S.C. 94, 104, 119 S.E.2d 527 (1961), the Court put it this way:

> ... for purposes of trial, legal and equitable issues must be distinguished ... and only those should be determine by the jury which are properly triable by jury, while those which are properly triable in equity, must be determined by the Judge in the exercise of his chancery powers.

See also 12 S.C. Jurisprudence, "Equity", § 5, p. 95 ["[t]his privilege of a jury trial does not extend to equity in South Carolina"].

Over the years, the question of whether a jury trial is constitutionally compelled in a particular instance has arisen often. For instance, in State v. Riddock and Byrnes, 78 S.C. 286, 58 S.E. 803 (1907), the Court held that an action by the Attorney General to enjoin a nuisance was one in equity and thus, a jury trial was not a matter of constitutional right. Moreover, Richards et al v. City of Cola., supra decided that the special and summary proceeding to determine whether a building was substandard was "not in the nature of a suit at common law ..." instead, being "created by statute subsequent to the adoption of the Constitution ...". Thus, a jury trial was not obligatory under the Constitution for this type of proceeding.

On the other hand, in Creed v. Stokes, 285 S.C. 542, 331 S.E.2d 351 (1985) the Court determined that a land title dispute was an action at common law extant at the time of the framing of the Constitution, and thus Stokes "had a right to a jury trial ...". 285 S.C. at 542. Likewise, in Medlock v. 1985 Ford F-150 Pick Up, _____ S.C. _____, 417 S.E.2d 85 (1992), the defendant-owner was entitled to a jury trial in a forfeiture action, even though the action was in rem, because such action was equivalent to one existing at common law at the time of the adoption of the Constitution. Here, the Court found that the jury trial was applicable not only to those forfeiture actions actually extant when the Constitution was adopted, but also that

> [t]he right to a jury trial encompasses forms of action that have arisen since the adoption of the Constitution in those cases where the later actions are of a like nature to actions which were triable at common law prior to the adoption of the Constitution.

417 S.E.2d at 86. See also, State v. Simons, 2 Speers 761 (1844) [Act allowing forfeiture of property after a hearing before two magistrates and five freeholders unconstitutional because it denies right to trial by jury]; Matthews Contracting co. v. S.C. Tax Commission, 267 S.C. 548, 230 S.E.2d 223 (1976) [right to recover taxes is not in the nature of a common-law action triable as such in 1868, but was created thereafter.]

Thus, for purposes of determining if a jury trial is compelled, our Court has usually looked to whether or not a particular action or its equivalent existed at common law at the time of the adoption of the Constitution. If the action is one in equity then, by definition, it did not exist at common law. Thus, it is helpful to examine briefly the nature of an equity action or equity jurisdiction as such jurisdiction contrasts with actions at law.

It has been said that "equity" is

> [j]ustice administered according to fairness as contrasted with the strictly formulated rules of common law. It is based on a system of rules and principles which originated in England as an alternative to the harsh rules of common law and which were based on what was fair in a particular situation. One sought relief under this system in courts of equity rather than in courts of law. The term "equity" denotes the spirit and habit of fairness, justness and right dealing which would regulate the intercourse of men with men .... Equity is a body of jurisdiction, or field of jurisdiction, differing in its origin, theory, and methods from the common law; though procedurally, in the federal courts and most state courts, equitable and legal rights and remedies are administered in the same courts.

Black's Law Dictionary, "Equity", p. 484 (5th ed.) A good example of our Supreme Court's view of the powers of a court of equity as contrasted with a court of law is provided by Justice Woods in Coley v. Coley, 94 S.C. 383, 386-7, 77 S.E. 49 (1913). There, with respect to courts enforcing a particular contract, he said:

> [e]ven where there is no relation of public or private trust and no actual fraud courts of equity have uniformly refused to enforce or have given affirmative relief, against, contracts so unequal and unconscionable as to shock the sense of right of reasonable men.

The jurisdiction of the court of equity is decidedly complex, but possesses two basic facets. It has been written that

> [m]ost of equity's jurisdiction, however, falls generally into two categories. The one, generally exclusive, depends upon the substantive character of the right sought to be enforced; the other, generally concurrent, depends as a rule upon the inadequacy of the legal remedy. The former is predicated upon such fiduciary relationships as trusts, and other matters historically in the province of a Chancery Court. In the other class falls the case where a substantive right is merely legal, arising out of no chancery relationship, and the resort of

> equity is permitted because some extraneous circumstance makes it impossible to secure adequate relief at law.

27 Am.Jur.2d, Equity, § 6.

FAMILY COURT JURISDICTION

We now turn to application of these basic principles to proceedings in the Family Court. Many of the functions which are now performed by the Family Court in South Carolina were originally a function of other courts prior to the creation of a Family Court system. For example, with the adoption of the 1868 Constitution, the General Assembly enacted Act No. 33 of 1868, which created the Probate Courts in this State. Probate courts were given jurisdiction "in business appertaining to minors" and for the appointment and removal of guardians of minors. Divorce was authorized in this State following the adoption of the 1868 Constitution but only for a very brief period, from 1872 to 1878, and these matters were at that time assigned to the Court of Common Pleas. Brown v. Brown, 215 S.C. 502, 565 S.E.2d 330 (1949).

Gradually, over the course of years following adoption of the 1895 Constitution, the State on an ad hoc basis created a hodgepodge of county children's or juvenile and domestic relations courts to handle a wide variety of family law matters. These separate enactments created a plethora of varying jurisdictions, differing powers and overlapping authority. Concerned with these inconsistences and lack of uniformity, in 1968, the General Assembly enacted a comprehensive Family Court Act, to provide for the establishment of family courts on a unified basis. The Act required that henceforth all children's or juvenile and domestic relations courts must follow "the plans and procedures" set forth therein. See, Act No. 1195 of 1968.

Then, in 1972 and 1973, the people adopted and the General Assembly ratified, new Article V of the Constitution, requiring a unified judicial system in toto, designed to eliminate once and for all courts with overlapping and inconsistent jurisdictions and authority varying from county to county. The Amendment's effective date was April 14, 1973, but the General Assembly thereafter continued to enact a number of acts creating separate county courts, including Family Courts, and also failed to provide for a comprehensive unified judicial system. In State ex rel. McLeod v. Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1976) the Court declared these statutes unconstitutional as not in accord with the constitutional mandate of a unified judicial system.

As a result, the modern Family Court structure in South Carolina was born. Pursuant to Article V, the General Assembly created the present version of the Family

Court system with the enactment of Act No. 690 of 1976. The current jurisdiction and authority of the Family Court now appears in Title 20 of the Code, also known as the Children's Code. In a previous opinion, we described the nature of authority and jurisdiction of Family Courts in South Carolina:

> [t]he Family Courts of South Carolina are courts of limited jurisdiction, owing existence to creation by statute rather than the Constitution. Art. V, Section 1 of the Constitution of the State of South Carolina. Section 20-7-1460 of the 1976 South Carolina Code, as amended. As such the Family Court can exercise only such powers as are directly conferred upon it by statute and such as may be incidentally necessary to the execution of the power expressly granted. McCullough v. McCullough, 242 S.C. 108, 130 S.E.2d 77 (1963); Richland County Dept. of Public Welfare v. Mickens, 246 S.C. 133, 142 S.E.2d 737 (1965); 1980 Op. Atty. Gen. No. 80-23, pp. 48-50. Greenfield v. Greenfield, 245 S.C. 604, 141 S.E.2d 920 (1965).

Op. Atty. Gen., No. 83-80, p. 129, (October 10, 1983). Likewise, in S.C. Dept. of Mental Health v. State, _____ S.C. _____, 390 S.E.2d 185 (1990), our Supreme Court reiterated the nature of the Family Court's limited jurisdiction:

> [t]he family court is a statutory court created by the legislature and therefore is of limited jurisdiction. Its jurisdiction is limited to that expressly or by necessary implication conferred by statute. The jurisdictional authority of the court is set forth in the Children's Code.

See also, Sims v. Sims, 290 S.C. 190, 348 S.E.2d 835 (1986); Peake v. Peake, 284 S.C. 591, 327 S.E.2d 375 (1985).

The basic statutory authority and jurisdiction of the Family Court is, as stated, set forth in Title 20. Specific references include Sections 20-7-400 and -420. Jurisdiction assigned to the Family Court by the Legislature includes marital litigation such as divorce, separation, support and maintenance, custody and property matters involved in the dissolution of marriage; annulment and determining the validity of marriages; adoption; paternity and child support; termination of parental rights; guardianship for minors; contempt; and abuse, neglect and delinquency proceedings. While this enumeration of authority and jurisdiction is obviously not exhaustive, it is certainly representative for

purposes of our analysis and conclusion that the South Carolina Constitution generally does not require a jury trial for proceedings in Family Court.

SPECIFIC FUNCTIONS OF THE FAMILY COURT

As the Court stated in Brown v. Brown, supra, divorce was a matter for the ecclesiastical courts and "it has never been recognized as a part of our common law." 215 S.C. at 505. And in Mattison v. Mattison, 1 Strob. Eq. 387 (1847), the Court held that even a court of equity possessed no authority to annul, declare invalid or sever a marriage, such being left to the General Assembly to determine whether this power should exist in any court in South Carolina. Citing an earlier case, Rhame v. Rhame, McCord Eq. 197, the Court in Mattison reiterated that in the area of marriage, the only authority a court of equity possessed, was to grant alimony.

Because divorce was unknown at common law, and is a creature of statute, a jury trial has never been deemed to be compelled in divorce actions. It has been stated that "[a]s a general rule there is no right to a jury trial in an action for divorce." 50 C.J.S., Juries, § 16. With the enactment of our modern day law relating to divorce, the South Carolina courts have consistently held that a divorce case is now a matter in equity. Seawright v. Seawright, 305 S.C. 167, 406 S.E.2d 386 (Ct. App. 1991). Thus, as a proceeding within the jurisdiction of a court of equity, and unknown at common law, the action for divorce in South Carolina is not constitutionally entitled to a jury trial. This conclusion is consistent with a previous opinion of this Office. Op. Atty. Gen., March 17, 1981.

Our Court has also determined that numerous other proceedings in Family Court are equitable in nature and, therefore, a jury trial is not constitutionally obligatory therein. For example, adoption is a matter in equity heard by the judge alone. Phillips v. Baker, 284 S.C. 134, 325 S.E.2d 533 (1985). A paternity suit is an equity action tried alone by the Family Court judge. Baron v. Dyslin, 279 S.C. 475, 309 S.E.2d 767 (1983). So too is an action for child support. Schadel v. Schadel, 268 S.C. 50, 232 S.E.2d 17 (1977). Child custody is equitable in nature, Malpass v. Hudson, _____ S.C. _____, 424 S.E.2d 470 (1992) as is termination of parental rights. Children's Bureau of S.C. v. Johnson, 269 S.C. 453, 237 S.E.2d 893 (1977). And in Roof v. Roof, an action seeking child custody, legal separation, the award of separate support and maintenance, the equitable distribution of marital property, child support, and the right of visitation by the husband were all deemed by the Court to be equitable in nature. Alimony and support and maintenance were determined to be equitable in Arial v. Arial, 295 S.C. 486, 369 S.E.2d 146 (Ct. App. 1988). Matters relating to guardianship, likewise, are within the equitable jurisdiction of the court. Lee v. Lee, 251 S.C. 533, 164 S.E.2d 308 (1968) as is civil contempt for

disobedience of a court order by the Family Court. Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 915 (1982). In none of these matters, therefore, is a jury trial constitutionally secured. See generally, Op. Atty. Gen., March 17, 1981.

Moreover, the Court has consistently stated that minors or infants are peculiarly within the jurisdiction of the court of equity. In Caughman v. Caughman, it was stated that persons under a legal disability are wards of the court of chancery. As long ago as 1850, in Bofil v. Buckner, 3 Rich.Eq.Cas. 1 1850), the Court held that a court of equity has the power to sell the estate for an infant remainderman.

The primary focus in determining custody of a child is the child's best interest. Thus, matters involving the care and custody of children are peculiarly within the discretion of a court of equity. Machado v. Machado, 220 S.C. 90, 66 S.E.2d 629 (1951) and are tried solely before the Family Court judge.

Likewise, in juvenile delinquency proceedings, no jury trial is constitutionally mandated under the federal Constitution. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1926, 29 L.Ed.2d 647 (1971). In addition, it is well recognized that "[u]nder the view that juvenile court proceedings are not criminal in nature, it has been generally held that constitutional provisions guaranteeing a jury trial are not applicable to such proceedings." 47 Am.Jur.2d, Juvenile Courts, § 88. In South Carolina, a delinquency proceeding is not "criminal" in nature and a finding of delinquency is not a criminal conviction. Matter of Skinner, 272 S.C. 135, 249 S.E.2d 746 (1976).

Elsewhere, it has been held that a juvenile has no constitutional right to a jury trial in a delinquency proceeding under a constitutional provision identical to South Carolina's. In People In Interest of T. M., 742 P.2d 905 (Colo. 1987), the Supreme Court of Colorado held that the State's role in such proceedings was in a parens patriae rather than a prosecutorial capacity. Such proceedings were deemed to be of a "unique nature", requiring informality and flexibility in approach. Thus, the Colorado Constitution was not considered as guaranteeing to a juvenile a jury trial when so tried in a delinquency proceeding. Likewise, there would be no constitutional obligation for a jury trial in a delinquency proceeding in South Carolina. Of course, if the juvenile is tried as an adult, the same constitutional guarantees would apply as would they for an adult.

Finally, notwithstanding the federal and South Carolina Constitution, Rule 9 of the Rules of Family Court provides that "[a]ll hearings in the family courts shall be conducted by the court without a jury ...". [emphasis added]. This Rule recognizes and reinforces the longstanding view that virtually every proceeding conducted in Family Court is

equitable in nature and is "tried to the family court judge alone ...". Gandy v. Gandy, 297 S.C. 411, 377 S.E.2d 312 (1989).

CONCLUSION

As a rule, there is no constitutional right to a jury trial in Family Court. While we have not attempted herein to exhaust the list of each and every proceeding in Family Court, it is clear that virtually every proceeding therein is equitable in nature and thus was not recognized at common law. The purpose of Family Court proceedings, by their very nature, require the Family Court Judge to make a determination based upon equity, fairness, as well as the best interest of a child, where relevant. Such proceedings are simply not conducive to jury trials. Moreover, the Rules of the Family Court recognize and require that all hearings in Family Court shall be tried by the Family Court without a jury.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

Very truly yours,

Robert D. Cook
Deputy Attorney General

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