

The State of South Carolina



Opinion 15-71

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July 26, 1985

The Honorable David H. Maring, Sr.
Resident Judge, The Family Court of
the Fifteenth Judicial Circuit
P. O. Box 806
Georgetown, SC 29442

Dear Judge Maring:

In your letter of June 25, 1985, you have asked the opinion of our Office on the following questions:

1. When a respondent has failed to answer within the the thirty (30) days required by law, what are his rights to notice when the issues are as follows:
(a) divorce, or (b) equitable division, or (c) alimony, or (d) child support, or (e) restraining order, or (f) adoption, or (g) custody?
2. If the respondent is entitled to notice, is he limited to cross-examination under Howard v. Holiday Inns, Inc., 271 S.C. 236, 246 S.E.2d 880 (1978)?
3. When a respondent appears personally at the temporary hearing but files no pleadings, is he entitled to notice of the final hearing?

In regards to Question one (1), Rule 5(a) of the new South Carolina Rules of Civil Procedure requires that a party in default be given notice of any trial or hearing on unliquidated damages. Therefore, it would appear that when the issues are alimony, equitable division or child support, a respondent would be given notice since unliquidated damages would be involved. Rule 16 of the Family Court Rules allows the court to hear a respondent who does not file an answer on issues of custody, alimony, support and counsel fees. This rule does not deal with the specific issue of notice and is not inconsistent with Rule 5(a) of the Rules of Civil Procedure. Therefore, as previously stated, Rule 5(a) would control as to the issues of equitable division, alimony and child support. As to the areas of restraining orders, adoptions or custody, it would appear that no notice would be required, but should the party appear and

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wish to be heard, the court, under the authority of Rule 16, could allow the party to be heard.

In regards to Question two (2), the new South Carolina Rules of Civil Procedure handbook, at page 77, reads that Rule 5(a) incorporates case law. Howard v. Holiday Inns, Inc., 271 S.C. 238, 246 S.E.2d 880 (1978). It has also come to my attention through conversation with Mr. Frank Sloan, who is a member of the Rules Committee, that the intent of the Rules Committee was to maintain Howard as the law and let the courts settle the matter. As it stands, a respondent would be limited to cross-examination on issues involving unliquidated damages, i.e., alimony, equitable division or child support. It also appears that, pursuant to McLaughlin v. Strickland, 279 S.C. 513, 309 S.E.2d 787 (S.C. App. 1983), where the respondent is a defaulting party in an adoption proceeding, his participation is limited to cross-examination of witnesses and objections to evidence. As to the other two (2) areas mentioned in your letter, restraining orders and custody, it would be the opinion of this Office that the same logic would apply and that the respondent should be limited to cross-examination. To hold otherwise would allow a situation in which the defaulting respondent could take unfair advantage by withholding from the other side, until the hearing, information such as names of witnesses and evidence which would otherwise be discoverable.

Finally, in regards to Question three (3), Rule 55(b)(1) of the Rules of Civil Procedure reads that a party in default who has appeared in the action shall be given written notice at least three (3) days prior to a hearing on the judgment. Therefore, it is our opinion that a respondent would be entitled to notice if he had personally appeared at the temporary hearing even though he had filed no pleadings.

I hope this information will sufficiently answer your questions. If you have any further comments or questions, please feel free to contact me.

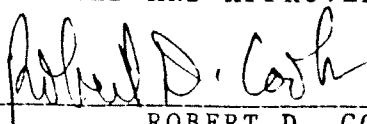
Sincerely,



B. J. Willoughby
Assistant Attorney General

BJW/rho

REVIEWED AND APPROVED:



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