

1981 S.C. Op. Atty. Gen. 111 (S.C.A.G.), 1981 S.C. Op. Atty. Gen. No. 81-85, 1981 WL 96611

Office of the Attorney General

State of South Carolina

Opinion No. 81-85

October 20, 1981

***1 SUBJECT: Courts, Statutes Family Court, Rules of Court**

Under the statutes regarding pleadings, and the Rules of Practice for the Family Courts, a Notice of Motion is not a proper means of initiating an action and acquiring jurisdiction over a party. The proper means is either a Summons or a Rule to Show Cause, at the discretion of the Family Court.

TO: Honorable Curtis G. Shaw

Judge

Family Court

Eighth Judicial Circuit

QUESTION:

Is a Notice of Motion the proper pleading for initiating an action in the Family Court?

OPINION:

You have inquired concerning the legality of a procedure apparently used by attorneys in different parts of this State to initiate an action in the Family Court; specifically, the use of a 'Notice of Motion' instead of a Summons or Rule to Show Cause. Occasionally you have encountered a Notice of Motion with a Summons. You questioned whether or not such a pleading would be a proper document of origination of an action. Based upon the applicable statutory and case law, a 'Notice of Motion' is not a proper means for initiating a suit and obtaining jurisdiction over a party.

This conclusion is supported by the analysis of two areas of law in South Carolina. The first is the procedure, set forth by statute and by court rule, for the initiation of civil actions in general, and, more specifically, actions in the Family Court. The second is a broad examination of the use of Motions in South Carolina practice, and applicable rules of statutory construction.

First, there exists an apparent conflict in the statutes and rules regarding Family Court procedures. Family Court Rules Five and Six require that all civil proceedings be commenced by a written Summons counter-signed by the Clerk or Judge. This is consistent with [§ 15-9-10, CODE OF LAWS OF SOUTH CAROLINA \(1976\)](#), which states that all civil actions in courts of record shall be initiated by a Summons. However, [§ 14-21-860, CODE OF LAWS OF SOUTH CAROLINA \(1976\)](#), provides for an alternative in support cases of issuing a Summons or a Rule to Show Cause. (That Section has been removed intact to the new South Carolina Children's Code, §§ 20-7-10, et seq., § 20-7-960, which took effect May 19, 1981).

This apparent conflict may be resolved, allowing a Family Court Judge the discretion to require the filing of either a Summons or a Rule to Show Cause to initiate an action. [Section 15-9-10](#) is a general statute regarding pleading and practice in civil actions while [§ 14-21-860](#) is a special statute originally found in the Family Court Act. Where a special statute conflicts with a general statute, the special statute will prevail. [South Carolina Electric & Gas Company, et al. v. South Carolina Public Service Authority](#), 215 S.C. 193 54 S.E.2d 777 (1949); [Spartanburg County v. Pace](#), 204 S.C. 322, 29 S.E.2d 333 (1944); [Criteria Insurance Company v. Hoffman](#), 258 S.C. 282, 188 S.E.2d 459 (1972); 82 C.J.S., 'Statutes', § 369; [see also](#) Att'y. Gen. Ops.

October 16, 1980. In addition, it should be noted that Rules Five and Six were promulgated by the Supreme Court of South Carolina pursuant to its administrative-authority. Such authority is subject to statutory law. [Article V, § 4, Constitution of the State of South Carolina](#); [State v. Cottingham, 224 S.C. 181, 77 S.E.2d 897 \(1953\)](#), 21 C.J.S., 'Courts', § 177; Att'y. Gen. Ops., supra. Therefore [§ 14-21-860](#) and its alternative provisions for commencing an action in the Family Court would prevail.

*2 It is therefore proper, at the discretion of the Family Court, to initiate an action with either a Summons or a Rule to Show Cause. The Summons must be countersigned by the Clerk or Judge.

The second step of the analysis requires an examination of Motions and Notice of Motions in the context of our system of Code pleading. As stated above, the Code of laws requires that all civil actions be commenced by a Summons. [Section 15-9-10, CODE](#). Motions, as provided for in the statutes, address issues and other matters that have arisen as a result of the initiation of the action. Lightsey, Harry M. Jr., [South Carolina Code Pleading](#) 27, 28 (S.C. Bar 1976). And generally, therefore, Motions are divided into two groups: to correct defective pleadings (e.g., a Motion to Strike, or to Make More Definite and Certain), and to take advantage of existing defects and dismiss the action (e.g., Motion to Dismiss). *Id.* pp. 231 *et seq.* A Motion is thus an intermediate pleading, between the initiation of the action by acquiring jurisdiction over the Respondent or Defendant, and the resolution of the action by trial, settlement or dismissal. No authority can be found to support the use of a Notice of Motion to originate an action and obtain jurisdiction over a party.

Finally, the statutory provisions regarding use of a Summons, or a Summons or Rule to Show Cause, discussed above, appear to establish an intent by the legislature that those pleadings are the proper documents for initiation of an action in the Family Court, without exception. Where a general statute, such as [§ 15-9-10](#), contains no exceptions, it is generally presumed that no exceptions were intended. 82 C.J.S., 'Statutes', § 316, and cases cited therein. And where a special statute has been enacted at a later point in time, such as [§ 14-21-860](#) of the original Family Court Act, its provisions are generally held to stand as exceptions to the general statute. Thus the use of a Summons or Rule to Show Cause is allowed in the Family Court, at the discretion of the court. Application of the exception rule discussed above precludes the use of Notice of Motion or Motion to initiate an action in the, Family Court. 82 C.J.S., supra; see also 73 AmJur.2d, 'Statutes', § 257 and cases cited therein; and Att'y. Gen. Ops., supra.

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