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"YOU'RE GONNA NEED A BIGGER BOAT"[1]
The inevitable trend towards binding arbitration in the family courts of South Carolina – a new path forward for managing yourselves, your caseloads and your clients' lives

On November 3, 1973, I became licensed to practice law in South Carolina. I vividly remember leaving the South Carolina Supreme Court after the swearing-in ceremony on a chilly, but otherwise gorgeous day in Columbia. I was bedecked in a dark, wide-lapelled, triple-knit polyester suit with a perfectly coordinated polyester tie and perfectly coifed hair and perfectly shined black wingtip shoes. I attended a celebratory supper with my family where I was the star attraction (it was the only time I can remember in my entire adult life when every word out of "Attorney Knobel's" mouth came forth on the wings of wisdom, clarity, grace and charm). I also vividly remember trying to fall asleep that night while vividly remembering all those suffering hours studying for the bar exam (although I actually have no memory of taking the bar exam). But ultimately I drifted off to sleep with a great sense of pure joy and satisfaction for a job well done. I was now an attorney…an "Esq.".

And on November 4, 1973, when the alarm clock blared, reality bit.

I don't have a vivid memory of anything else in my professional life after November 3, 1973, except by the grace of God and good luck I have awakened as an attorney for the past 37

[1] From the 1975 movie, *"Jaws"*.

years; and like the "chains around Marley's Ghost"[2], I remain burdened by all those years of practicing family law in one form or another in this State.

I have a blurred memory of caseloads, of court deadlines (both real and imagined), of angry and disgruntled clients, of working late, of working on weekends, of working during family vacations, of nightmares and night sweats, and of rarely having anything close to that naive sense of achievement which I felt on November 3, 1973.

I began my legal career in Anderson, South Carolina, in January, 1975. It was the year of *"Jaws"*, and in those first months of my fledgling law practice, my jaws moved quite a bit. But it was different then. In 1975 every county in South Carolina had a "county-and-family-court judge" (the unified court system under which we all continue to practice law was instituted in 1976), and the ebb-and-flow of a family law practice in the 1970's was much different than it is now.

Back then we would file a complaint at the clerk's office and request a temporary hearing in our family court, knowing that this hearing would be scheduled for a day and time six months or longer after the filing date. The temporary hearings were actual trials, where you called and

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[2]From *"A Christmas Carol"*, by Charles Dickens ["The Ghost, on hearing this, set up another cry, and clanked its chain so hideously in the dead silence of the night, that the Ward would have been justified in indicting it for a nuisance. Oh! captive, bound, and double-ironed," cried the phantom, "not to know, that ages of incessant labour, by immortal creatures, for this earth must pass into eternity before the good of which it is susceptible is all developed…".]

cross-examined witnesses and presented evidence, and it was not at all uncommon for the temporary hearing to require a day or more of testimony.

The "agency cases" (such as the departments of Social Services and Juvenile Justice) did not dominate each week's family court dockets; nor did child support rules; nor did motions for discovery or motions to compel discovery responses; nor did contempt of court hearings; nor did *pro se* filings; nor did emergency hearings and domestic abuse hearings. Your uncontested final divorce hearings were conducted in the family court judge's office, by sworn affidavits, without a hearing record.

In the mid-to-late 1970's, no family law attorney ever heard of mediation or arbitration or alternative dispute resolution. Because it wasn't known, it wasn't needed. You simply informed your family court clients to be patient, they would have to "wait their turn", and there was nothing an attorney could do about it…it was the judicial system we had in place at that time. No harm, no foul, Mr. and Ms. Client. We'll let you keep your lives and your children's lives on hold until we get around to you.

We were all in the same boat – judges, lawyers, litigants.

We family law attorneys were in for a nasty surprise, however, when we learned that the South Carolina Supreme Court was not as enamored as the family law attorneys with "the pace of play" in the family courts. On February 9, 1983, a paradigm shift began to occur in the practice of family law. In its recognizing that the snail's pace of the practice enjoyed by the

family law bar contrasted with the litigants' outcry for a quicker resolution of their cases, the Supreme Court adopted sweeping changes to the South Carolina Rules of Family Court, with perhaps the most impactful rule being Rule 52 (temporary relief) (now Rule 21). In February, 1983, Rule 52 read as follows:

"Rule 52

> *Evidence received by the Court at temporary hearings in all domestic relations matters shall be confined to verified pleadings, affidavits, and the financial declaration prescribed by Rule 19 of the Rules of Practice for the Family Courts, unless good cause is shown to the Court why additional evidence or testimony may be necessary."*[3]

The current Family Court Rule 21 became effective five years later, on September 1, 1988, and it reads as follows:

"RULE 21
TEMPORARY RELIEF

> *(a) 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. In an emergency situation, such order may be made on ex parte application.*
>
> *(b) Evidence at Hearing. Evidence received by the court at temporary hearings shall be confined to pleadings, affidavits, and financial declarations unless good cause is shown to the court why additional evidence or testimony may be necessary.*
>
> *(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."*[4]

Now some 23+ years and over a *million* family court cases later – except for the advance notice requirement of the temporary hearing, and the lack of advance notice regarding the

[3] Order of the South Carolina Supreme Court, dated February 9, 1983.
[4] Order of the South Carolina Supreme Court, dated May 3, 1988.

contents of the opposing party's affidavits, not one single word has significantly changed the Rule governing temporary hearings, nor have there been any noticeable changes in the method or manner in which that Rule continues to be utilized in the family courts.

For those of you reading this article who are old enough to have remembered transitioning from the two-day trial of a temporary hearing to a 15-minute "affidavits presentation" before your family court judge, it was pretty jarring. In theory it was a brilliant move by the Supreme Court: a temporary hearing was just that – temporary – and it was intended to be both heard and decided expeditiously by the judge (as in, immediately at the conclusion of the hearing); it would provide your clients with intermediate, but nonbinding, relief until you could get back into the courtroom for your final hearings, with at least the expectation that this final hearing would be completed within several months of the commencement of the action.

And for those of you who today practice family law anywhere from Walhalla to Charleston, and from Aiken to Columbia to Rock Hill to Florence and on to Conway, how are your clients and you enjoying those temporary hearings this very day? In the Tenth Judicial Circuit (Anderson and Oconee counties), your temporary hearing will most probably be scheduled anywhere from 2 – 3 months after you have filed the complaint; depending on your work ethic and whether your hearing was before a visiting judge, your temporary order may be signed immediately or a month or more after you have sent it to your judge. Unless you are required to go back into court for further temporary hearings, then your clients' lives will continue to be "kept on hold", but nevertheless governed by the temporary order for the next 1 – 2 years.

Do you have any problems with that process? I mean, we are all still in the same boat, aren't we – judges, lawyers, litigants?

There is in fact a problem with this scenario, and it's a glaring one: in 1975 there were arguably 46 family court judges; in 2012, that number has "increased" to 52 (60, if you include the "retired but active" judges). According to the "Statistical Trends for Family Court"[5], there were 60,364 new case filings statewide in 1978, with 17,999 cases pending at the end of that calendar year. New filings continued to increase every year, reaching an apex in 1995, with 105,660 new filings, and then slowly declining annually, with there being 74,616 new case filings in FY 2010/11, and 38,971 cases pending at the end of that fiscal year. While the difference in new case filings in 1978 compared to 2010/2011 represents an approximate 25% increase, the number of cases pending during that same span of time has more than doubled.

These statistics are also misleading in terms of each family court judge's actual caseload. The "new case filings" represent those cases which are assigned a new file number when the case is commenced. It does not factor in the flood of other matters which a family court judge must handle every day during a typical week of court (non-temporary hearing motions, emergency hearings, contempt hearings, bench warrants, pro se filings, domestic abuse hearings, status conferences, pretrial conferences); additionally, agency-related cases now dominate every week of family court somewhere in the State, with there being very little docket time available for the

[5] See the South Carolina Judicial Department's website at www.sccourts.org.

judge to hear and resolve what we euphemistically term to be the "private cases docket" relating to divorce or custody matters.

Furthermore, if you exclude the "in chambers" weeks over the course of the year, and a judge's allowable vacation weeks, there are approximately 39 weeks available for "in-court time" every year. There is also a disparity, county-by-county, regarding (1) the number of "weeks of family court" docketed in that county per year, and (2) the number of assigned judges to that county per week of court, all dependent upon various demographics affecting that specific county (for example, the population of the county, that county's new case filings and cases pending per year, or the availability of family court judges to be assigned to the county).

In her February 8, 2012 State of the Judiciary Address, South Carolina Supreme Court Chief Justice Jean Toal informed the General Assembly that, according to the most recent national statistics, our State judges' caseloads averaged 5,011 cases per judge, a figure representing more than double the national average of "filings per judge". "People are hurting and are desperate in our family court system…real people who need help suffer because we don't have the family court time for them", Justice Toal stated, also noting that 20 percent of family court (time) is spent just on collecting child support.[6]

Judges, lawyers and litigants – you're gonna need a bigger boat.

[6] Chief Justice Jean H. Toal in the "2012 State of the Judiciary" address to the South Carolina General Assembly.

Increasing the size of the family court bench statewide by adding new judgeships will most certainly lend itself to reducing the number of cases-heard-per-judge and will be immediately beneficial to family court litigants and family law attorneys throughout South Carolina, and it is a recommendation that should be universally embraced and supported by this State's family law bar.

In tandem with an increased family court bench, however, there is already in place a viable option for expanding "the size of the boat", but only if you're clever enough to embrace it – it's called **binding arbitration.**

Take it from someone who never was one, but who has observed many over the past 37 years - family court trial lawyers in South Carolina comprise the very best trial lawyers in any court, at any level, in this State…period.

Think about it for a few minutes. No, seriously, think about it.

On a level of importance, is it more important to be able to successfully seek (and recover) insurance proceeds for someone injured in a car wreck…or to be able to win for a parent the custody (lives, souls, hearts) of their children? How important is it for a family court trial lawyer to anticipate the future financial needs of your client and then successfully provide for those needs? Can you compare trying a "road-closing" or condemnation case with defending a case where one side is attempting to forever terminate a parent's right to be with his or her children? How does a family court trial lawyer artfully remove (and then later skillfully use) the

emotions (anger, bitterness and hurt) in a case where a client's spouse has committed adultery (for many, the ultimate marital sin)?

A family court trial lawyer is both required and compelled to be, concurrently:

- Brilliant and mentally agile
- Eloquent
- A skilled therapist and counselor
- Prescient
- Empathetic
- Cool under pressure
- An exceptionally hard worker (always fully capable of outworking the opposition)
- Able to focus, laser-like, on the task at hand
- Personable (both inside and outside the family courtroom)
- An amazing, skilled negotiator
- Always overly-prepared and trial-ready
- Able to fully control, and remain in control of, the court process
- Able to win every appeal, whether representing the respondent or appellant

And with all these diverse skills, a family court trial lawyer has to impress only <u>one</u> person in the room. Not 12, not 6….just one, just a jury of one.

Hmmmm…let me think about this for just a moment. Give me a second. OK, a family court trial lawyer has the talent and the abilities to control every aspect of his or her case (client and witness preparation, evidence preparation, preparation for cross-examination). What's left to control? Oh, yes…you can't pick your decider and you don't have a clue when your case might be called to trial (don't you love those "A – B – C dockets"?). Pure luck of the draw there, man.

You have a great case for joint custody, but the family court judge who is to try your case never awards joint custody in a contested case, and rarely grants anything beyond "standard visitation". And for that matter, you've drawn a judge who has a reputation for rarely, if ever, awarding alimony.

Let's complicate the matter somewhat.

You're also charging your client $200 (or more) an hour for out-of-court time, $250 (or more) an hour for in-court time, and $90 an hour for paralegal time. Your bill is now up to $7,500, but you've been paid only a $2,500 retainer to date. You've also incurred pre-trial costs of over $2,000 to date, and you've had to hire a forensic expert. Your case is well over a year old and most probably has been closing in on 2 years. Your client has been recently (and maybe longer) second-guessing your skill level (all settlement negotiations have so far been a bust, the depositions didn't go so well, and you're having some "witness problems").

Now - and you knew this was coming - consider this for just one moment:

What if, just what if:

- You could pick your "judge".
- You could pick the date, time and location for the final hearing of your case.
- You can chose not to worry about following strict rules of evidence (no "I object, your Honor, that's irrelevant"….or no, "and Mrs. Smith what value would you place on that set of used Tupperware?").
- You could choose not to have a hearing record.
- You could schedule your hearing without ever worrying about docket time, without ever worrying about what you will tell your client when he/she asks you "what's taking so long".
- If you have expert witnesses, you never have to worry about their attending (and charging you) for court appearances where there is even a remote chance that your case might be continued (no more paying double fees for an expert traveling to court and sitting in a family court's waiting area).
- You can get a final decision within 30 - 60 days of your hearing.
- You can use the *South Carolina Uniform Arbitration Act* (see below), which provides for binding arbitration, so that your client is guaranteed a final resolution.
- The total fees and litigation expenses incurred by the parties will be far less than if this same, identical case went to a trial inside a family courtroom…and what if you have a much better chance of your being fully paid.

In arbitration, your arbitrator needs to have a detailed arbitration order in place, review the pleadings and know the issues beforehand…and start.

Unless in a family court case you have previously used binding arbitration under the *South Carolina Uniform Arbitration Act*, then let me take you there using the following "alternate routes": go to the Judicial Department's website at www.sccourts.org, then click on the "SC Code of Laws", then click Title 15 and Chapter 48; or, you can go to my website at www.knobelmediationservices.com, then click the "articles" menu and scroll down the list of "links". Read the code sections and you'll find them to be elemental.

Be aware, however, that binding arbitration under the *Uniform Arbitration Act* is a completely different mechanism for reaching a final resolution of your client's case than the arbitration process set forth in the rules governing Alternative Dispute Resolution (ADR), and this difference, albeit a significant one, can be found in the following two ADR rules:

"Rule 12
Non-Binding Arbitration Hearing and Award

(a) Scope. *This rule applies only to non-binding arbitrations. Nothing in this rule shall be construed to apply to binding arbitration pursuant to the Uniform Arbitration Act as adopted in South Carolina. Arbitrations selected by the parties under these rules are deemed non-binding arbitrations unless otherwise expressly agreed by the parties.*

(d) Trial De Novo as a Right. *Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial de novo of right upon filing a written demand for trial de novo with the court, and service of the demand on all parties on a form approved by the Supreme Court or its designee within thirty (30) days after receipt of the arbitrator's award. No evidence that there has been an arbitration proceeding or any fact concerning the arbitration may be admitted in a trial, or in any*

subsequent proceeding involving any of the issues in or parties to the arbitration, without the consent of all parties and the court's approval."

It should also be of significance to you that the important case of Swentor v. Swentor, *336 S.C.472, 520 S.E.2d 330 (1999)*, has held the following, in pertinent part:

"*Given our determination that the Arbitration Act and the family court's general power to review and approve agreements in domestic relations cases are fundamentally incompatible, we conclude that the Arbitration Act prohibits the family court from exercising this power when presented with arbitration agreements. This Court must presume that, at the time the Arbitration Act was enacted, the legislature was aware of the family court's power to review and approve property and separation agreements. See, e.g., State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 197-98 (1997) ("The General Assembly is presumed to be aware of the common law."); Berkebile v. Outen, 311 S.C. 50, 53, 426 S.E.2d 760, 762 (1993) ("A basic presumption exists that the legislature has knowledge of previous legislation when later statutes are passed on a related subject."). If the legislature had intended family courts to exercise this power over arbitration agreements and awards, it would have either exempted domestic relations matters from the scope of the Act, or it would have expressly provided that arbitration awards involving domestic relations matters could be set aside if the family court determined that the award was unfair. Instead, we conclude that the purpose and framework of the Arbitration Act, as well as the limited grounds upon which the Act permits an arbitration award to be set aside, reveal the legislature's intention that the agreements to arbitrate and the resulting arbitration awards be treated the same in family court as in any other court. See Nuckolls v. Great Atlantic & Pacific Tea Co., 192 S.C. 156, 161, 5 S.E.2d 862, 864 (1939) ("[I]t is not presumed that the Legislature intended to abrogate or modify a rule of the common-law by the enactment of a statute upon the same subject; that it is rather to be presumed that no change in the common-law was intended unless the language employed clearly indicates such an intention . . . .").*

Accordingly, we conclude that family courts presented with arbitration agreements and awards must proceed, as any other court, in accordance with the terms of the Arbitration Act. Thus, an agreement to arbitrate may be set aside by the family court only upon proof of "grounds as exist at law or in equity for the revocation of any contract." S.C. Code Ann. § 15-48-10(a) (Supp. 1998). The court may correct or modify an arbitration award only in accordance with the provisions section 15-48-140, and the court may vacate the award only upon the establishment of one of the grounds set forth in section 15-48-130, or the rarely applied non-statutory ground of "manifest disregard or perverse misconstruction of the law." Trident, 286 S.C. at 108, 333 S.E.2d at 787. Otherwise, the family court must confirm the arbitration award. See S.C. Code

Ann. § 15-48-120 (Supp. 1998) ("Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in §§ 15-48-130 and 15-48-140."). [6. 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. See Moseley, 279 S.C. at 351, 306 S.E.2d at 626 ("[F]amily courts have continuing jurisdiction to do whatever is in the best interests of the child regardless of what the separation agreement specifies.").”

As a family court trial lawyer, with all the skills and talents you bring to the table, and they are many, the only reason for your not considering binding arbitration is that constant, age old, often unspoken, “professional Mount Everest” known as “the right to appeal”; that proverbial “second bite of the apple”. That “concern” works perfectly if (1) your client can afford to pay for the appeal…or you choose not to charge your client for handling it, and (2) your client prefers to have his or her life on hold for another 2 years while the appeal winds through the appellate process.

In consideration of all the above, it would seem to me that in this 21st century, modern-day practice of family law in South Carolina, there is no logical reason for a family law attorney’s failure or refusal to consider the “binding arbitration” option in every single case.

And if we accept, without blithely ignoring, the difficult and stressful realities inherent in our profession, but with a newfound understanding that we family law attorneys have the opportunity to expand our options for bringing about a final resolution to so many of our pending cases, while controlling so many variables in bringing about that final resolution – in “building that bigger boat” – isn’t it time to embrace these opportunities?

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Biographical submission:

Mr. Knobel is a retired South Carolina family court judge and a certified family court mediator with a statewide ADR practice (mediations and arbitrations) limited to family law cases. He has also created "Family Court Litigation Support Services". Mr. Knobel can be visited at his website – www.knobelmediationservices.com.