

ROSEN LAW FIRM, LLC

ATTORNEYS AND COUNSELORS AT LAW

THE PEOPLES BUILDING

P.O. Box 1840 (29402)

18 BROAD STREET, SUITE 201

CHARLESTON, SOUTH CAROLINA 29401

www.rosen-lawfirm.com

PHONE (843) 377-1700

FAX (843) 377-1709

Honorable Glenn F. McConnell, Chairman
Senate Judiciary Committee and
President *Pro Tempore*
101 Gressette Building
Columbia, SC 29401

Honorable Vincent A. Sheheen
506 Gressette Building
Columbia, SC 29201

Re: Bill H. 4614 (joint custody)

Dear Senator McConnell and Senator Sheheen:

The South Carolina Chapter of the American Academy of Matrimonial Lawyers commends the General Assembly for focusing on the issue of joint custody which definitely needs clarification in the Family Courts of this State. The members of the Academy believe, however, that this issue is complex, emotional, and divisive and that the bill needs to be thoroughly studied and discussed by the general public, the medical, counseling and psychology professions, family court judges, and other groups, including other legal organizations as well as individual members of the South Carolina Bar who practice in this field. Therefore, we urge that the bill be referred to the appropriate committee for more input.

We would, however, make the following observations and recommendations at this time:

1. Other states have significant experience with joint custody. The experience of those states should be evaluated.
2. Custody determinations have always been made and continue to be made in each state based on the best interests of the child.
3. Family Court judges are uniquely qualified to determine what is in each child's best interests based on the unique facts and circumstances of each case.
4. By common law in South Carolina, Family Court judges are currently dissuaded from awarding joint custody except for extraordinary circumstances. Scott v. Scott, 354 S.C. 118, 579 S.E.2d 620 (2003).

5. The term and concept of joint custody has many and varied interpretations and applications.
6. The General Assembly could improve the Family Court judicial system by better defining the meaning of the term "joint custody" very precisely and providing such other definitions as may tend to avoid confusion and create stability for custody arrangements.
7. We agree that joint custody should be ordered when it is in the best interest of the child, not just in exceptional circumstances.
8. We agree that the Family Court should use the term "parenting plans" and change terminology which is offensive or causes problems.
9. We disagree with a presumption in favor of either joint or sole custody and recommend leaving that decision to our able Family Court judges. Bill H. 4614 gives joint custody a presumption.

We disagree with the current versions of 63-15-230(C): "If custody is contested or if either parent seeks an award of joint custody, the court must consider joint custody and shall issue an order containing findings of fact as to why joint custody was or was not awarded." We think joint custody should be an equal option, not a presumption.

We disagree with the current version of 63-15-250(A): "When a final order is issued awarding joint custody and thereafter the parents are unable to agree on a significant decision concerning the child that does not require a modification of the court order, either parent may seek to have the matter arbitrated by a court-approved arbitrator. The parties shall equally pay the cost of the arbitration; however, the arbitration order may require the prevailing party be reimbursed for all or part of the costs associated with the arbitration."

This section puts the custodial parent and/or the lower income parent at the whim of the other party if there is no agreement. A parent of moderate means would have to advance funds for the arbitration with only the possibility of getting reimbursed if they prevail. In our experience, this will be abused by angry or bullying former spouses. This will create problems, not solve them.

This provision also appears to mandate arbitration on motion of one party which is not legal under South Carolina law. Arbitration is a voluntary process. See generally, §15-48-10 *et seq*, S.C. Code, The Uniform Arbitration Act. This bill essentially delegates decisions (apparently even against the will of one of the parties) to an arbitrator picked by the court. This would be an unlawful delegation of judicial authority. See Hardy v. Hardy, 353 S.C. 128, 577 S.E.2d 231 (Ct. App. 2003); Stefan v. Stefan, 320 S.C. 419, 465 S.E.2d 734 (Ct. App. 1995). Only judges can issue orders concerning children.

We agree, however, that arbitration is a very important tool in family law cases and should be used and encouraged, provided both parties agree. We suggest the following should be added to the bill:

“Parties in marital litigation may arbitrate any and all issues before the Family Court, including custody and visitation, pursuant to the Uniform Arbitration Act, §15-48-10 *et seq.*, S.C. Code.”

We would alter the definition of “joint custody” as follows:

‘Joint custody’ means both parents have equal rights and responsibilities for major decisions concerning the child, including the child’s education, medical and dental care, extracurricular activities, and religious training; however, a judge may designate one parent to have sole authority to make specific, identified decisions while both parents retain equal rights and responsibilities for all other decisions or the court may designate a final decision-maker as to all issues. Joint custody does not mean that a child must spend an equal amount of time with each parent.

‘Sole custody’ means a person, including but not limited to, a parent who has temporary or permanent custody of a child and, unless otherwise provided for by court order, the rights and responsibilities for major decisions concerning the child, including the child’s education, medical and dental care, extracurricular activities, and religious training. The custodial parent shall have final decision-making authority. A noncustodial parent may have rights to visitation or parenting time as provided for by court order.

The American Academy of Matrimonial Lawyers is a national organization founded in 1962 to provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law. There are currently more than 1600 fellows in 50 states. See, www.AAML.org.

Sincerely yours,



Robert Rosen
President, South Carolina Chapter AAML

cc: Members of the South Carolina Senate

Ann Stirling, Esq.	Joseph M. Ramseur, Jr., Esq.	Richard N. Tapp, Esq.
William Epps, Esq.	Ken Lester, Esq.	Robert Stevens, Esq.
Catherine Hendrix, Esq.	Lon H. Shull, Esq.	Ryan McLeod, Esq.
David Gravely, Esq.	Mark Taylor, Esq.	Sandy Parise, Esq.
Diane C. Current, Esq.	Melissa Brown, Esq.	Thomas Bultman, Esq.
Dixon Lee, Esq.	Michael Self, Esq.	Tim Madden, Esq.
Eugene Rogers, Esq.	Michael Taylor, Esq.	
Jack Lawrence, Esq.	Monét Pincus, Esq.	
James T. McLaren, Esq.	Pam Deal, Esq.	
John McDougall, Esq.	Richard G. Whiting, Esq.	