**South Carolina General Assembly**

120th Session, 2013-2014

**H. 4063**

**STATUS INFORMATION**

General Bill

Sponsors: Reps. Pitts, Brannon, Bannister and Rutherford

Document Path: l:\council\bills\nbd\11225vr13.docx

Introduced in the House on April 30, 2013

Currently residing in the House Committee on **Judiciary**

Summary: Family Court mediation

**HISTORY OF LEGISLATIVE ACTIONS**

Date Body Action Description with journal page number

4/30/2013 House Introduced and read first time ([House Journal‑page 21](file:///h:\HJ%20Archive\2013\04-30-13.docx))

4/30/2013 House Referred to Committee on **Judiciary** ([House Journal‑page 21](file:///h:\HJ%20Archive\2013\04-30-13.docx))

**VERSIONS OF THIS BILL**

[4/30/2013](file:///p:\pprever\2013-14\4063_20130430.docx)

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING CHAPTER 11 TO TITLE 20 SO AS TO REQUIRE MEDIATION AS A MEANS OF RESOLVING CERTAIN FAMILY COURT MATTERS, CONSISTENT WITH TITLE 20, TITLE 63, AND CHAPTER 48, TITLE 15; TO PROVIDE CERTAIN REQUIREMENTS TO SERVE AS A MEDIATOR; TO PROVIDE RULES FOR CONDUCTING MEDIATION CONFERENCES; TO ASSURE ACCESS TO THE FAMILY COURTS OF THIS STATE UPON COMPLIANCE WITH MEDIATION REQUIREMENTS; AND TO PROVIDE FOR MEDIATOR FEES AND EXPENSES AND THE ASSESSMENT OF CERTAIN PENALTIES.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Title 20 of the 1976 Code is amended by adding:

“CHAPTER 11

Family Court Mediation

Section 20‑11‑10. This chapter governs court‑annexed mediation in South Carolina family courts. The intent of the chapter is to promote the just, speedy, inexpensive, and collaborative resolution of actions involving domestic relations.

Section 20‑11‑20. As used in this chapter:

(1) ‘ADR’ means alternative dispute resolution.

(2) ‘Board’ means the South Carolina Supreme Court Board of Arbitrator and Mediator Certification.

(3) ‘Certified’ means a mediator who is approved by the South Carolina Supreme Court Board of Arbitrator and Mediator Certification to be eligible for court appointment pursuant to this chapter and applicable rules of court.

(4) ‘Commission’ means the Commission on Alternative Dispute Resolution.

(5) ‘Court’ means a South Carolina family court.

(6) ‘Mediation’ means an informal process in which a third‑party mediator facilitates settlement discussions between parties.

(7) ‘Mediator’ means a neutral person who acts to encourage and facilitate the resolution of a domestic relations dispute.

(8) ‘Proof of ADR’ means a form created by the Supreme Court and signed by the mediator to verify that the mediation conference has been held pursuant to this chapter and stating whether the conference has resolved the issues in dispute.

(9) ‘Roster’ means an official list of certified mediators and arbitrators maintained and published by the South Carolina Supreme Court Board of Arbitrator and Mediator Certification.

(10) ‘Supreme Court’ means the South Carolina Supreme Court.

Section 20‑11‑30. (A) All contested issues in domestic relations actions filed in family court, except issues set forth in subsection (B), are subject to mediation pursuant to this chapter before the issues may be heard by a court; provided, however, the parties may elect to submit issues of property and alimony to binding arbitration in accordance with the Uniform Arbitration Act, Section 15‑48‑10, et seq, and may choose, in lieu of mediation, to submit all contested issues to arbitration as allowed by the Supreme Court.

(B) Except as otherwise ordered by the Supreme Court, mediation is not required for:

(1) requests for temporary relief;

(2) appeals;

(3) contempt of court proceedings; and

(4) family court cases initiated by the South Carolina Department of Social Services.

(C) In cases not subject to mediation pursuant to this chapter, the chief administrative judge for the circuit in which the action is pending, may, upon a motion of a party or on its own initiative, order a case to mediation, except as prohibited by the Supreme Court.

Section 20‑11‑40. (A) A mediator may be a person who:

(1) is a certified mediator pursuant to rules of the Supreme Court; or

(2) is not a certified mediator but, in the opinion of the parties, is otherwise qualified by training or experience to mediate all or some of the issues in the action.

(B) A certified mediator shall meet the eligibility, training, and continuing education requirements of the Supreme Court to become and remain certified and otherwise adhere to rules and orders of the Supreme Court applicable to certification.

(C) The board shall maintain a current roster of mediators certified pursuant to rules of the Supreme Court who are willing to serve in each county. The board shall make the roster available to the clerks of court for each county. A certified mediator shall notify the board if the mediator desires to be added to or deleted from the roster. The board and clerk of court for each county shall make this roster available to the public.

Section 20‑11‑50. (A) Early mediation in domestic relations cases is encouraged. When custody or visitation is an unresolved issue, early mediation is required. To that end, the parties shall undertake to facilitate court approval of a selected mediator or appointment of a mediator by the court, as appropriate, immediately upon filing an action governed by this chapter.

(B) If the parties agree on whom to use as a mediator, the parties shall seek the court’s approval of the mediator at the temporary hearing. If there is no temporary hearing, the parties shall submit the name of the proposed mediator in writing to the court for approval. If there are custody or visitation issues in dispute, the parties shall submit the name of the proposed mediator to the court for approval within fifteen days after custody or visitation becomes a disputed matter, if a mediator has not yet been appointed.

(C) If the parties have not selected a mediator by the time of a temporary hearing, the court shall appoint a mediator during the hearing. If there is no temporary hearing, the parties shall submit a written request to the court to appoint a mediator. If there are custody or visitation issues in dispute and the parties cannot agree on whom to use as a mediator, the parties shall notify the court of the need to appoint a mediator within fifteen days after custody or visitation becomes a disputed matter.

(D) The temporary order, or other court order if there is no temporary hearing, must designate a mediator in language substantially complying with a form approved by the Supreme Court. The designation must include the name, address, phone number, and electronic mail address of the primary mediator, whether the mediator was selected or appointed, and if appointed, the name, address, phone number, and electronic mail address of a secondary mediator.

Section 20‑11‑60. The parties shall notify the selected or appointed mediator to initiate scheduling of the mediation conference, which must be held in the county in which the action is pending. The mediator is authorized to select the site of the mediation and may coordinate with the parties about an appropriate location.

Section 20‑11‑70. The mediation conference must be held on or before the deadlines provided for in this chapter and must not be cause for delay of other proceedings in the case including, but not limited to, completion of discovery, filing and hearing of motions, or any other matter that would delay preparation of the case for trial, except by order of the court.

Section 20‑11‑80. In a case subject to mediation pursuant to this chapter, attorneys shall explain the mediation process to their clients, including the legal ramifications of mediating claims and issues. A party may file a motion to defer a mediation conference or exempt a case from mediation for case‑specific reasons. The chief administrative judge for the circuit in which the action is pending may grant the motion for good cause. The court must not schedule a merits hearing until a Proof of ADR has been filed with the court by the mediator.

Section 20‑11‑90. The mediator may schedule a mediation orientation, which must be held within thirty days of appointment or selection of a mediator. The mediator, the parties, and the parties’ attorneys must be present at the orientation and all related meetings required by the mediator.

Section 20‑11‑100. (A) At the beginning of the mediation orientation, or the mediation conference if there is no orientation, the mediator shall explain to the parties and parties’ attorneys:

(1) the mediation process, including the difference between mediation and other forms of conflict resolution;

(2) the fact that the mediation conference is not a trial, the mediator is not a judge, jury or arbitrator, and the parties retain the right to trial if they do not reach a settlement;

(3) the inadmissibility of conduct and statements during the mediation conference as evidence in any arbitral, judicial, or other legal proceeding;

(4) the circumstances under which the mediator may meet alone with either of the parties or with any other person;

(5) whether and under what conditions communications with the mediator must be held in confidence during the conference;

(6) the duties and responsibilities of the mediator and the parties;

(7) the fact that an agreement requires the mutual consent of the parties to be effective; and

(8) the costs of the mediation conference, including fees, expenses, and other charges.

(B) The mediator has a duty of impartiality and shall disclose circumstances that may affect impartiality or independence, including any bias, prejudice, or financial or personal interest in the resolution of the mediation, or a past or present relationship with the parties or their attorneys.

(C) The mediator is immune from liability to the same extent afforded judicial officers of this State.

Section 20‑11‑110. All parties and attorneys for the parties must physically attend the mediation conference, unless otherwise agreed to by the mediator, the parties, and the parties’ attorneys, or as ordered or approved by the chief administrative judge of the circuit in which the action is pending. No person other than the individuals specified in this section may attend a mediation conference without the permission of the parties, the parties’ attorneys, and the mediator.

Section 20‑11‑120. The mediator shall schedule the mediation conference to take place no later than thirty days after the mediation orientation or no later than forty‑five days after the selection or appointment of the mediator if there is no orientation.

Section 20‑11‑130. (A) Prior to the scheduled mediation conference, the mediator may require the parties to provide a brief memorandum setting forth their position about the issues requiring resolution. The memorandum must be no more than five pages long, unless permitted by the mediator. The parties may exchange the memoranda.

(B) Parties shall participate in at least three hours of mediation, unless an agreement is reached sooner. The mediator shall determine when the mediation is not viable, that an impasse exists, or that the mediation should end. The parties must not end the mediation without the permission of the mediator.

(C) A mediator may recess a mediation conference at any time and set a time for reconvening. No further notification is required for a person present at the recessed conference. The requirement set forth in Section 20‑11‑70 to adhere to the deadlines established pursuant to this chapter applies regardless of a mediator’s decision to recess the conference.

Section 20‑11‑140. (A) Communications during a mediation conference are confidential. The parties, attorneys, mediator, and any other person present at a mediation conference shall execute an agreement that protects the confidentiality of the process on a form approved by the Supreme Court. To that end, the parties, attorneys, the mediator, and any other person present at the mediation conference shall maintain the confidentiality of the mediation. The parties may not introduce as evidence in an arbitration, judicial hearing, or other legal proceeding, an oral or written communication having occurred in a mediation proceeding including, but not limited to:

(1) written or oral statements of the other party, an attorney, or another person present at the conference;

(2) admissions made in the course of the mediation proceeding by the other party or another person present at the conference;

(3) written or oral statements of the mediator;

(4) a party’s unwillingness to accept a mediator’s proposal for settlement; and

(5) records, reports, or other documents created solely for use in the mediation.

(B) This section does not prohibit the parties and mediator from:

(1) submitting a disclosure stipulated by the parties;

(2) submitting a report to or an inquiry from the chief administrative judge of the circuit in which the action is pending regarding a possible violation of this chapter or applicable Supreme Court rules;

(3) disclosing a threat of harm or attempts to inflict physical harm during the mediation conference; and

(4) making disclosures required by law or a professional code of ethics.

(C) The mediator may meet and consult individually with a party and the party’s attorney during a mediation conference. The mediator must not, without a party’s consent, discuss with the other party or the other party’s attorney confidential information disclosed to a mediator in the course of a private consultation.

(D) No communication by a party or a party’s attorney to the mediator in a private session waives available attorney‑client privilege.

(E) The mediator may not be compelled by subpoena or otherwise to divulge any records or to testify in regard to the mediation in any adversary proceeding or judicial forum. All records, reports, and other documents received by the mediator while serving in that capacity are confidential.

Section 20‑11‑150. (A) Upon reaching an agreement and before adjourning the mediation conference, the parties shall reduce the agreement to writing, which the parties and their attorneys shall sign.

(B) If the parties envision a more formal agreement, the mediator shall require one of the parties’ attorneys to prepare the agreement. The attorney preparing the agreement shall provide a proposed agreement to the other party’s attorney for review and approval before filing with the court.

(C) The party designated by the mediator to prepare the agreement shall file the agreement and a consent judgment or voluntary dismissal with the court for approval. It is the obligation of the parties and the parties’ attorneys to seek approval of the mediation agreement by the court.

(D) Within ten days of the conclusion of the mediation conference, the mediator shall file with the clerk of court a Proof of ADR, providing copies to the parties and their attorneys. If the mediation does not resolve all of the issues in dispute, the parties may schedule the case for trial; provided, however, the case must not be scheduled for a merits hearing until a Proof of ADR is filed.

Section 20‑11‑160. (A) If the parties select a mediator, the parties and the mediator shall determine and agree upon compensation, including fees, expenses, and other costs.

(B) If the court appoints the mediator, the parties shall compensate the mediator at a rate approved by the court, such rate which must not exceed rates allowed by applicable rules of the Supreme Court.

(C) The Supreme Court shall establish allowable fees, expenses, and other costs that mediators may charge the parties. A court has the authority to allow a mediator to charge an amount higher than as established by Supreme Court rules for good cause. In such case, the court shall document in an order the basis for allowing the mediator to charge fees and expenses in excess of those allowed by Supreme Court rules.

(D) Unless otherwise agreed to by the parties or ordered by the court, the parties shall pay equal shares of the mediator’s fees and the mediator’s expenses and other costs for the mediation conference*.* The mediator shall provide the parties an itemized accounting of the fees, expenses, and other costs at the mediation conference before requiring payment by the parties. Payment is due upon conclusion of the conference unless other arrangements are made with the mediator or unless a party notifies the mediator of the intent to file a motion to be exempt from payment of the mediator’s fees and expenses pursuant to subsection (E).

(E) A party may file a motion with the court to be exempt from payment of mediator fees and expenses based on indigency. A person shall file an application for indigency no later than ten days after the conclusion of the mediation conference. Determination of indigency is in the sole discretion of the court.

Section 20‑1‑170. (A) If, by the time required by the court or pursuant to this chapter or rules of the Supreme Court, no Proof of ADR has been filed with the clerk of court, and the court has not exempted the case from mediation or deferred the time for mediation, the court may issue a rule to show cause why sanctions should not be imposed against the parties, the mediator, or a combination thereof. Sanctions against the parties may include, but are not limited to, fines, the dismissal of an action without prejudice, and the striking of a pleading. Sanctions against a mediator may include, but are not limited to, fines, removal as mediator from the case, and decertification of a certified mediator.

(B) If a party, mediator, or other person subject to this chapter violates another provision of the chapter without good cause, the court may, on its own motion or motion by a party, impose upon that party a lawful sanction including, but not limited to, contempt of court, payment of attorney fees, mediator fees, and expenses incurred by a person attending the mediation conference, and other sanctions authorized by the Supreme Court.

Section 20‑11‑180. If a mediation conference does not resolve all of the issues in dispute, a party may request that the court schedule a merits hearing. The party shall attach to the request a copy of the Proof of ADR received from the mediator pursuant to Section 20‑11‑150(D). The court must not schedule a merits hearing until the mediator has filed a Proof of ADR with the court.

Section 20‑11‑190. (A) A person serving as a mediator, whether certified or not:

(1) shall comply with the provisions of this chapter and all standards of conduct for mediators approved by the Supreme Court; and

(2) may be held in contempt of court, is subject to monetary penalties, and may be removed from serving as the mediator by the court, as appropriate, for failing to comply with subsection (A)(1).

(B) The Supreme Court may revoke a mediator’s certification upon a determination that the mediator:

(1) no longer meets the Supreme Court’s certification requirements;

(2) has violated a provision of this chapter; or

(3) has violated ethical standards established by the Supreme Court, or other conduct showing an unfitness to serve as a mediator.

(C) A certified mediator who violates the provisions of this chapter, the ethical standards of the Supreme Court, or who has engaged in conduct showing an unfitness to serve as a mediator may, in addition to decertification, be subject to discipline by the Supreme Court. This discipline may include any sanction the Supreme Court determines appropriate, including an order publicly reprimanding the mediator for the conduct, an order barring the mediator from serving as a mediator in a court of this State for a definite or indefinite period of time, an order requiring the mediator to complete additional training, and assessment of a fine. If the mediator is an attorney, the fact that the Supreme Court disciplines the attorney‑mediator pursuant to this subsection does not preclude the Supreme Court from taking disciplinary action against the attorney‑mediator pursuant to Supreme Court rules governing attorney misconduct, as appropriate.

(D) A party or other person alleging that a certified mediator has engaged in misconduct may file a complaint with the board. Misconduct includes conduct or other circumstances that would warrant decertification or discipline pursuant to standards and rules of the Supreme Court. Complaints of misconduct must be investigated by the board and, upon a finding of probable cause, forwarded to the Commission on Alternative Dispute Resolution for a hearing before a hearing panel consisting of three members of the commission. Subject to the requirements of applicable Supreme Court rules, the commission shall adopt regulations governing the processing of these complaints, which must be approved by the Supreme Court.

Section 20‑11‑200. Clerks of court in each county shall perform all duties required pursuant to this chapter relating to record keeping, notifications to the court, parties, attorneys, and mediators, docket control, maintenance of rosters, and service of orders.”

SECTION 2. The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

SECTION 3. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 4. This act takes effect upon approval by the Governor.

‑‑‑‑XX‑‑‑‑