The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia – Fall 2015

The Impact of the "Marriage Equality" Decision Upon Child Custody Rights for Same-Sex Couples

Editors' Corner

by Scot Kraeuter
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It is my honor and a great privilege to be the incoming editor of *The Family Law Review* (FLR). I hope to be able to continue the tradition of excellence established by my esteemed predecessors. To that end, the editorial board will continue to collaborate on articles, features and overall content of the FLR. As in the past,the board consists of Randy Kessler, Editor Emeritus, Kelly Miles (Gainesville), Kelley O'Neill-Boswell (Albany), David Marple (Atlanta) and William Sams Jr. (Augusta). Please feel free to contact any one of us if you are interested in submitting an article or have any questions or comments. As always, we are on the lookout for quality content to publish and any ideas to enhance this tremendous resource for our section.

We hope you enjoy this FLR.

Editor Emeritus

by Randy Kessler
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As another year draws to a close, I want to reiterate my appreciation for Gary Graham and his time as editor, and for Scot Kraeuter and the energy he has brought as the new editor, of *The Family Law Review*. I am pleased to announce that the Family Law Institute will be early next year. For the first time, it will take place one week prior to Memorial Day. Chaired by Marvin Solomiany, it is shaping up to be one of the best ever. I look forward to seeing many of you there.

On another note, Gary Graham should be commended for the huge success of the Nuts and Bolts programs in Savannah and Atlanta .

As always, feel free to send your contributions, comments or thoughts for potential future inclusion in the Family Law Review to Scot or me, or any others on the editorial committee as we continually try to improve *The Family Law Review*. ***FLR***

Inside This Issue

***The Family Law Review* is looking for authors of new content for publication.**

If you would like to contribute an article or have an idea for content, please contact Scot Kraeuter at scot@jdklawfirm.com

Chair's Comments - A Change Would Do You Good[1]

by Regina M. Quick
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"Change is the law of life. And those who look only to the past or present are certain to miss the future."
- John F. Kennedy

This edition of *The Family Law Review* officially commemorates the beginning of a new year for the Section. I am honored to serve as 2015-16 Chair, but am aware there are big shoes to fill. Please take a moment to look at the back of the newsletter and become acquainted with the members of Executive Committee. The mission which each of us has accepted is to serve family law practitioners and trial judges across the state of Georgia. To succeed, we need your input - and your help.

The Section will continue its past work by sponsoring high quality seminars such as the Nuts and Bolts of Family Law (Atlanta - Oct. 2), Bill Sams' 11th Annual Family Seminar in Augusta (Oct. 16) and the 34th Annual Family Law Institute (Jekyll Island, May 18-21, 2016.) The Section will continue to have a presence under the Gold Dome during the 2016 Session of the Georgia General Assembly. Legislative Liaison Pilar Prinz and her committee will analyze and monitor proposed legislation that may affect the practice of family law and provide expert testimony to assist lawmakers. Please contact Pilar with your input on legislative matters.

In September, the Section launched the Child Support Helpline - a free service to provide one-time assistance for producing Child Support Worksheets for filing in the state's superior and juvenile courts. Thanks to the vision of Immediate Past-Chair Rebecca Crumrine, experienced lawyers (including Executive Committee members) are now serving Georgia's children outside the Metro area as volunteers.

Finally, the Section looks to the future. Please help us help you by finding ways to:

- Increase Membership. Encourage judges and attorneys to stay current and receive important updates. Members receive the Family Law Review and targeted email blasts during the year.
- Host a family law event for your Judicial Circuit. Child support training and other forms of outreach are being scheduled all over the State.
- Communicate/Share your Expertise. Give us your feedback. Help younger lawyers. Provide judges with proposed orders and bench briefs.
- Attend and Sponsor the Family Law Institute. For the first time in over 15 years, the FLI will be held in the State of Georgia to showcase the Jekyll Island Convention Center and the new Westin. Substantial investment and foresight by businesses, the Georgia General Assembly and the Jekyll Island Authority have translated into a venue now large enough to accommodate the 600+ attendees of the FLI and the Section is proud to bring tax revenue back to Georgia.

Gandhi said,

"The best way to find yourself is to lose yourself in the service of others."

From my perspective, service starts with Section leadership. Hopefully, the leadership example your Executive Committee sets this year will also inspire you to serve family law practitioners and the judges with whom we work on a daily basis. If we all do our part with an eye toward the future of the practice of family law, the change we see will do us all good.

The most direct way to reach me is my cell, which is 706.207.3520. I look forward to hearing from you as the year progresses. ***FLR***

1 With sincere apologies to Sheryl Crow and with admiration and affection for John F. Lyndon, Esq. and The Specific Deviations.

2015-16 Editorial Board for *The Family Law Review*

- **Randy Kessler, Editor Emeritus, Atlanta**
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The Impact of the "Marriage Equality" Decision Upon Child Custody Rights for Same-Sex Couples

by Georgia K. Lord

The recent Supreme Court "Marriage Equality" decision in *Obergefell v. Hodges*[1] promises to transform the way in which Georgia's courts evaluate custody rights regarding children of same-sex relationships. There are many open questions regarding the reach of the holding in the case. This means that, for now, there is tremendous uncertainty regarding the extent to which many individuals who are or were in same-sex couples have standing to seek custody of the children born or adopted into those relationships.

Under the *Obergefell* decision, the state must recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state. The decision also requires Georgia to issue same-sex marriage licenses on the same basis that it would issue licenses authorizing marriages by spouses of different sexes. Georgia's Attorney General and Council of Municipal Court Judges have announced that Georgia's officials will comply with these holdings. *Obergefell* remedies the prior gaping inequity that existed regarding the treatment of same-sex couples,[2] but it leaves many questions in its wake.

Up until the issuance of the decision on June 26, Georgia law refused to recognize the fact that some families include two parents of the same sex. In the pre-*Obergefell* legal landscape, custody litigation between LGBTQ individuals often hinged upon whether an individual who had functioned as a parent would be recognized as such under the prevailing rules of law without regard to either the realities of the situation or the best interest of the child. A partner who lacked any legal standing was deemed a stranger to the child in the eyes of the law, and any claim they made for custody was subject to dismissal on that basis.

Some of the situations which will arise are:

- One partner is the biological parent and the other partner is the adoptive parent through a second parent adoption or step-parent adoption.
- The partners had a marriage ceremony and license in a state that recognized same-sex unions, lived in Georgia, and had a child while they were living in Georgia. They did not go through an adoption process.
- One partner is the biological parent and the other has not adopted the child but has been informally recognized as a co-parent from the time of the child's birth. The partners were not married in a state that legally recognized their relationship, although they may have had a non-licensed ceremony.
- The partners had a non-licensed ceremony in Georgia and lived in Georgia at the time they had a child. They entered into a parenting agreement. They separated before the Obergefell decision.
- One partner provided the egg used to create the child and the other partner carried and gave birth to the child.
- An egg donor provided eggs used to create fraternal twins for male spouses, with one partner providing the sperm that fertilized one of the eggs, and the other partner providing the sperm that fertilized the other egg.
- Partners had a state-sanctioned marriage when one was a man and one was a woman, but now have a same-sex relationship because one has transitioned to a different sex.

Numerous Georgia statutes addressing an individual's standing to seek custody are based upon many outdated assumptions: e.g., that a child can only have one biological mother, that a child cannot have two legal mothers or two legal fathers simultaneously, and that a marriage consists of a man and a woman. The result is unclear whether and how particular statutory language will apply to same-sex relationships. None of us know what governing principles will emerge from this blend of old and new rules. The best we can do is examine the existing lines of authority that appear to be the most relevant, and leave it to future litigation to determine what results emerge when these arguments are made. Some of the existing rules **appear** to be:

1. In *Bates v. Bates*, 317 Ga. App. 339, 341-42, 730 S.E.2d 482, 484-85 (2012), the Supreme Court of Georgia discussed the concept of second parent adoption by a same sex partner but declined to reach the question of whether the law permits such adoptions. The case concerned a biological mother who participated in a second parent adoption of her child by her partner at the time. After the relationship ended, the biological mother asked the court that had entered the adoption to set it aside. Her motion was denied as untimely. She attempted to bring a discretionary appeal from this denial but was unsuccessful. The adoptive parent brought a custody action, which was dismissed on the basis that Georgia law did not permit second parent adoption. The Court reversed, finding that *res judicata* barred the biological mother from contesting the validity of the adoption. The Court commented

in dicta that, "The idea that Georgia law permits a "second parent" adoption is a doubtful one, … and the arguments that Nicole presses about the validity of a decree that purports to recognize such an adoption might well have some merit," *citing Wheeler v. Wheeler*, 281 Ga. 838, 840, 642 S.E.2d 103 (2007) (Carley, J., dissenting from denial of cert.), and O.C.G.A. § 19–3–3.1(a) (prohibiting marriages between persons of the same sex). The Court also noted a potential defense of judicial estoppel, saying:

> *In the original proceedings on the petition for adoption, [the biological mother] not only affirmatively invoked the jurisdiction of the Fulton County court, but her own lawyer prepared the decree that she now contends is void. To some of us, it seems that the present attack upon the validity of that decree amounts to an attempt to play the courts for fools, and that is the sort of thing that judges ought not tolerate. Nevertheless, because res judicata is sufficient to dispose of this appeal, we do not reach the question of judicial estoppel.*

317 Ga. App. at 344 n. 5.

The decision in *Bates v. Bates*, 317 Ga. App. at 342-44 & n. 2, also relied upon the facts that the Fulton Superior County had determined that a second parent adoption "was one authorized by the statutes," and that "the Fulton County court was competent … to consider whether it properly had jurisdiction when it entered the adoption decree." The decision further acknowledged that Georgia law expressly prohibited any recognition of a same sex marriage, but noted that the "second parent's" standing to seek custody did not arise from the relationship between the women but instead from the adoption decree that had been entered. *Bates*, 317 Ga. App. at n. 2, *citing Ga. Const., Art. I, Sec. IV, Par. I(b)*. The Court explained:

> *The parental right to seek custody that Tina asserts in her custody petition is a right that arises, if at all, by virtue of the Fulton County adoption decree, not as an incident of her relationship with Nicole, a relationship with no legal significance. No doubt, Tina and Nicole may have been motivated to petition for adoption as a result of their relationship with one another, but such a motivation does not strip the courts of jurisdiction. After all, the existence of a relationship between two persons of the same sex might motivate them to do a lot of things—to open joint accounts, to acquire and own property jointly, and to contract with one another—and no one would seriously contend that the Constitution strips the courts of jurisdiction to decide disputes about such things just because the parties to those disputes once were involved in a same-sex relationship.*

Presumably, the *Obergefell* decision will mean that legally married same-sex couples who live in Georgia will be able to use the standard step-parent adoption procedure, rather than attempting the second parent type of adoption that some Georgia judges have refused to grant.

2. If one partner is the biological parent and the other is an adoptive parent via step-parent adoption, the adoptive parent stands on the same footing and has the same rights and obligations as a biological parent. Custody is determined by the best interest of the child rule. *Hastings v. Hastings*, 291 Ga. 782, 784, 732 S.E.2d 272, 274 (2012); *see also Ivey v. Ivey*, 264 Ga. 435, 445 S.E.2d 258 (1994), *cited in Ga. Divorce, Alimony, & Child Custody* § 25:1, n. 10. Under this precedent, it appears that if a same-sex partner adopts a child through a step-parent or second parent adoption, that parent stands on equal legal footing with the biological parent.

3. A child's biological mother is the only recognized parent of the child, unless: a) the mother is married at the time the child is born (or within the usual period of gestation); b) she thereafter marries the reputed father of the child and the reputed father acknowledges the child as his; c) the biological father legitimates the child; or d) there is a voluntary acknowledgement of paternity under the process set out in O.C.G.A. § 19–7–22(g)(2*). See Ga. Divorce, Alimony, & Child Custody* § § 11:64 & 25:6; O.C.G.A. § 19-7-25; *Ernst v. Snow*, 305 Ga. App. 194, 699 S.E.2d 401 (2010); *Edwards v. Cason*, 237 Ga. 116, 226 S.E.2d 910 (1976); *see also Ray v. Hann*, 323 Ga. App. 45, 46, 746 S.E.2d 600, 602 (2013). Unless one of these listed circumstances apply, the father has no custodial rights over the child (but may nonetheless be required to assist in supporting the child). The process of voluntarily acknowledging paternity pursuant to O.C.G.A. § 19–7–22(g)(2) gives very limited rights to the father (such as the right to object to the adoption of the child); it does not, standing alone, give the father any right to custody or parenting time.[3]

   In addition, under O.C.G.A. § 19–7–20, "All children born in wedlock or within the usual period of gestation thereafter are legitimate." Does this section, when considered in conjunction with O.C.G.A. § 19-7-25(a), set out above, mean that a child born to a woman who is legally married at the time of birth or conception is also the child of the birth mother's spouse, whether that spouse is male or female? A "best guess" is that a child born to a woman who is in a legally recognized marriage with another woman will also be deemed

to be the child of the birth mother's spouse, and, with regard to custody, both spouses will have the same rights and obligations as the birth mother. Custody will be determined by the best interest of the child rule.

4. The statutory language may be more problematic for male spouses: O.C.G.A. § 19-7-22 provides that a "father of a child born out of wedlock" can petition to legitimate the child. This appears to limit legitimation actions to men who are the biological father of the child but are unmarried.

   In addition, only a biological father, and not a step-parent, may bring a legitimation action. *See Phillips v. Phillips*, 316 Ga. App. 829, 730 S.E.2d 548 (2012), *quoting Veal v. Veal*, 281 Ga. 128, 636 S.E.2d 527 (2006) (Opinion noted there is no clear process by which a non-biological father can seek custody or even visitation of a child to whom he has bonded, encouraged legislature to provide a remedy); *In re C.L.*, 284 Ga. App. 674, 676-680, 644 S.E.2d 530, 532-34 (2007) (Grant of legitimation to biological father displaced original legal father, causing him to lose status to seek custody, because, "[t]he statutes do not contemplate a child having two legal fathers;" Andrews, P.J., in dissent, argued that the original legal father had standing because he should be considered a "parent" within the meaning of O.C.G.A. § 19–7–1(b.1)); *Davis v. LaBrec*, 274 Ga. 5, 549 S.E.2d 76 (2001), *aff'g* 243 Ga. App. 307, 534 S.E.2d 84 (2000) (Best interest rule applied to custody contest between legal father and biological father); *see also Ga. Divorce, Alimony, & Child Custody* § § 25:6 & 25:17.

5. Under O.C.G.A. § 19-7-21, "All children born within wedlock or within the usual period of gestation thereafter who have been conceived by means of artificial insemination are irrebuttably presumed legitimate if both spouses have consented in writing to the use and administration of artificial insemination."[4] Does this provide another statutory vehicle by which same-sex couples can each be recognized as a parent of the child? Will identification of each spouse on the birth certificate (and perhaps the agreements signed at the time of the assisted reproduction procedure) be sufficient to establish the parent-child relationship, or will an adoption or parentage petition still be required (particularly when neither spouse gave birth to the child)? *See generally* O.C.G.A. Title 19 Chapter 8 Article 2 (relinquishment of embryo to intended parents via adoption or parentage petition). Presumably bringing a petition would be the safer route, but some couples may not be able or willing to pay the financial costs associated with such a petition – and some couples may simply assume that the *Obergefell* decision took care of this problem. Another "best guess" is that a man who is in a legally recognized marriage with the biological father of a child born during the marriage will have standing to seek custody of his spouse's child. It is unclear whether one or both of these men will be required to initiate a legal proceeding to establish their right to custody and it is very uncertain what type of legal proceeding would be appropriate.

6. Just how does Georgia law define the term "parent"? The portion of the Georgia Code which contains several general rules governing the parent / child relationship (i.e., Title 19, Chapter 7) fails to explicitly define the term "parent". The absence of a definition was noted in *Bailey v. Kunz*, 307 Ga. App. 710, 712, 706 S.E.2d 98, 100 (2011), *aff'd*, 290 Ga. 361 (2012).

   The opinion in *Bailey,* 307 Ga. App. at 712, also pointed out that Georgia's Adoption Code defines the word "parent" "for the purposes of the adoption statute." Review of O.C.G.A. § 19-8-1 reveals that, within the context of the Adoption Code, "'Parent' means either the legal father or the legal mother of the child." "Legal father" means a male who has legally adopted a child; was married to the biological mother of that child at the time the child was conceived or was born, unless such paternity has been disproven; married the legal mother of the child after the child was born and recognized the child as his own, unless such paternity has been disproven; or has legitimated the child and has not had his parental rights terminated. "Legal mother" is defined as "the female who is the biological or adoptive mother of the child and who has not surrendered or had terminated her rights to the child." O.C.G.A. § 19-8-1 at § § (6) – (8). The code defines, "biological father" as, "the male who impregnated the biological mother resulting in the birth of the child." O.C.G.A § 19-8-1(6). It is unclear whether these definitions would have any application outside of cases arising out of adoption. If they do, the gender-specific language may be problematic. The Juvenile Code also uses the same definition for "biological father." O.C.G.A. § 15-11-2 (6). Neither section defines the term "biological mother."

   These definitions from the Adoption Code and the Juvenile Code also do not appear to fit comfortably into situations involving commonly used assisted reproduction technologies. For example, if one woman provided the egg used to create a child and another woman carried and gave birth to the child, it is unclear whether the egg donor, the birth mother, or both, would be "biological mothers" of the child. If artificial insemination or another assisted reproduction process was used, hopefully the respective rights of all parties involved were spelled out in an agreement executed at the time the procedure was performed. The rights and procedures set out in O.C.G.A. Title 19 Chapter 8 Article 2 provide a path that can be used to effectuate these contract rights in certain situations.

   As to the parents who have transitioned to a different sex or gender, or who have come out with a different sexual orientation, "best guess" is that they would retain the same parental and custodial rights they possessed before such transition. In the event that parents who have transitioned to a different sex go back to court, however, the statutory language restricting certain actions to those of a specified sex may limit their options.

7. Does it matter whether the couple ended their relationship before the *Obergefell* decision? We find ourselves in a situation in which many couples have made commitments to each other, parented together, and then parted without any means of establishing legal recognition for their family relationships. Prior to 1997, Georgia law provided a means by which its courts could treat a couple's relationship like a marriage whether or not the participants had obtained a license or had a ceremony: common-law marriages were given legal recognition. Current Georgia law provides that valid common-law marriages entered into prior to Jan. 1, 1997, shall continue to be recognized but abolishes common-law marriages entered into after Jan. 1, 1997. O.C.G.A. § 19-3-1.1. Does this prevent a court from treating an unlicensed relationship between same-sex partners like a marriage? Would recognition of a common-law or "virtual" marriage for same-sex couples during this period of transition constitute an equal protection violation?

   It appears likely that in situations in which partners have not had a licensed marriage, and the non-biological parent has not adopted the child, the partner who is neither the biological parent nor an adoptive parent will lack legal standing to seek custody. A "best guess" is that neither the fact that they may have had a non-licensed ceremony, nor the fact that the non-biological parent may have been informally recognized as a co-parent from the time of the child's birth, will be sufficient under current Georgia law to support standing to pursue custody.

   Virtual adoption is an equitable remedy utilized in probate situations when the conduct of the parties creates an implied adoption without a court order. *Morgan v. Howard*, 285 Ga. 512, 512, 678 S.E.2d 882, 883 (2009). The remedy can only be used after the parent's death, however: "Despite its name, virtual adoption does not result in a legal adoption or the creation of a legal parent-child relationship." *Sanders v. Riley*, 296 Ga. 693, 698, 770 S.E.2d 643 (2015).

8. To what extent will a parenting agreement executed by partners who were not legally married be enforceable? *See generally Lathem v. Hestley*, 270 Ga. 849, 850, 514 S.E.2d 440 (1999)(Petition against former domestic partner for property not subject to dismissal; Court reasoned that claim was not based upon alleged status as domestic partners, but instead upon implied constructive trust); *See also Brown v. Gadson*, 288 Ga. App. 323, 324, 654 S.E.2d 179 (2007)(Rejected argument that agreement executed at time of artificial insemination was void as against public policy; Court relied, in part, on fact that agreement was executed in Florida and was authorized by Florida law).

   Provisions in parenting agreements **may** be enforceable on contract grounds. *See, generally*, *Taylor v. Taylor*, 280 Ga. 88, 623 S.E.2d 477 (2005) (Trial court has authority to disregard any agreement between the parties in making award of custody, since the welfare of the child is the controlling factor in the court's determination of custody); *Turman v. Boleman*, 235 Ga. App. 243, 510 S.E.2d 532 (1998) (Settlement provision imposing particular condition upon mother's visitation rights violated express public policy, and was therefore unenforceable).

9. Some argue that child custody standing rules should accord less weight to the precise biological and legal relationship between the parties and the children at issue, and more weight to the strength and quality of the relationship between the parties and the children. They argue that individuals who have served as "psychological parents" should have standing to pursue custody. In the 1976 case of *Drummond v. Fulton Cnty. Dep't of Family & Children Servs.*, 237 Ga. 449, 451, 228 S.E.2d 839 (1976), the Georgia Supreme Court rejected such an argument. It remains to be seen whether Georgia's courts or Legislature will revisit this issue in the future.

   Although it is too soon to know how such questions may be addressed in the future, language in the majority opinion in *Obergefell* **may** provide some support for those urging courts, legislators, and other public officials to look past the question of whether the couple entered into a government licensed marriage: the public official may, instead, be guided by the children's interest in having their parents' relationship viewed as legitimate. In describing the reasons for according constitutional protection to the right to marry, the *Obergefell* majority opinion said:

   A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See, e.g., Pierce v. Society of Sisters, *268 U. S. 510. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material*

costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples.

135 S. Ct. at 2590.

This language is reminiscent of a prior Georgia line of authority that recognizes a strong public interest in presuming that a child is legitimate and in preventing parties from "delegitimizing" their children. *See, e.g., Williamson v. Williamson*, 302 Ga. App. 115, 117, 690 S.E.2d 257(2010) ("The public policy favoring the presumption of a child's legitimacy is one of the most firmly-established and persuasive precepts known in law."); *Baker v. Baker*, 276 Ga. 778, 779-84, 582 S.E.2d 102 (2003)("[T]his Court has recently held that the 'best interests of the child' standard should be applied when a party seeks to 'delegitimize a legitimate child and to break up an existing legally recognized family unit already in existence.'), *citing Davis v. LaBrec*, 274 Ga. 5, 7, 549 S.E.2d 76 (2001); *cf. Pruitt v. Lindsey*, 261 Ga. 540, 541, 407 S.E.2d 750 (1991)(Smith, J., in dissent, argues eloquently that children born out of wedlock should be protected from stigma).

To the extent that I have suggested answers to these questions, these answers are very uncertain and may change very rapidly, as more decisions are rendered and new states administrative rules are promulgated.[5] Particularly during this period of transition, all the current question marks may mean that it will take longer and be far more expensive to resolve custody disputes through litigation. This may give reasonable people additional incentive to settle – and unreasonable people more ways in which to stretch out the battle! ***FLR***

Georgia Lord's Atlanta practice encompasses family law, public access rights under the Americans with Disabilities Act, and estate planning. Prior to her 2014 return to private practice, she served in the Fulton Superior Family Court for 6 years as Staff Attorney to Judge Bensonetta Tipton Lane.

(Endnotes)

1 135 S. Ct. 2584 (2015).

2 In this paper, the term "couple" is intended to include persons who are currently in a marriage or domestic partnership with each other as well as those who were formerly in one with each other. Similarly, the term "partner" is intended to encompass both individuals who are currently in a domestic partnership, **and** those who were previously in such a relationship but are now estranged.

3 A father may also be awarded parenting time in the course of a paternity action. *See, e.g.*, *Petersen v. Tyson*, 253 Ga. App. 431, 433, 559 S.E.2d 164 (2002).

4 Neither the statute nor the cases interpreting it define "artificial insemination," so it is unclear whether the term would encompass the full range of commonly used assisted reproductive technologies, e.g., egg donation, gamete donation, and in vitro fertilization. *See also Pruitt v. Lindsey*, 261 Ga. 540, 541 n. 2, 407 S.E.2d 750, 753 n. 2 (1991) (Court notes in dicta that in cases of artificial insemination, "biological paternity does not correspond with a duty to support.").

5 One resource to check for emerging developments is the website for Lambda Legal. See http://www.lambdalegal.org/blog/state/georgia.

What Do You Mean I Need a Business Valuation?

by Dwight A. Ensley

One of the more difficult assets to divide in property division is an ownership interest in a closely held business. This article will deal with the preliminary issues the family law judge and practitioner must address in situations in which a closely held business is part of the marital estate. I begin by defining "what is a business" for property division. Second, I discuss when a business must be valued for property division. Last, I discuss the malpractice issues a family lawyer may face for failure to identify the business to the client and to explain the necessity of having the business valued.

What is a Business and when must it be valued?

Defining "what is a business" for property distribution in divorce can become convoluted. Ownership interests in corporations and partnerships clearly qualify as an interest in a closely held business. A professional practice or sole proprietorship also clearly qualifies as an interest in a business. However, the lines become blurred when the party's source of income is a franchise or agency agreement of some sort. Generally, if a party has a source of income from a franchise or agency agreement, the court will consider it a business, and a valuation of that business will be required for the purpose of property distribution.

Registered Entities and Sole Proprietorships

There are four recognized business organizations for tax purposes; 1) Corporations, 2) Partnerships (General or Limited, 3) Limited Liability Companies (LLC), and 4) Sole Proprietorships. Corporations, most partnerships, and LLC's must be registered with the Secretary of State, or similar agency by a different name, in the state in which the entity is organized. Most entities must also file a tax return separately from the tax returns of the owners. Sole proprietorships and general partnerships are not required to be registered. Sole proprietorships and single owner LLC's are not required to file a separate tax return for the entity. Instead, the business activities are reported on the owner's personal tax return on form 1040, schedule C.

Thus, the family lawyer can initially determine if the source of income is from a business by the entity type or tax treatment of the income.

Professional Practices

Professional practices are generally considered businesses for property distribution. Professional practices include medical practices, dental practices, law practices, accountants, architects, financial consultants, IT consultants, and other consulting services. The practicing party does not necessarily have to be required to be licensed by a governing agency to be considered a professional.

Generally, the issue in the valuation of the professional practice is the value of "personal goodwill" vs. "entity goodwill." Personal goodwill is the value of the professional practitioner's contribution to the business. Entity goodwill is the value of the practice's business absent the practitioner. The allocation of personal and entity goodwill varies among the states. Thus, the family lawyer must insure that the business valuator properly allocates goodwill in the valuation of the practice, if required by the state's property division law.

Other businesses

An agency or franchise, based upon an agreement, may be deemed to be a business and a marital asset, even though the agent may not have transferable ownership rights in the agency or franchise. Case law in this area varies among the states. Following are a few examples:

- In North Carolina, the Court of Appeals held that a Nationwide Insurance agent, working as an independent contractor, had value as a business. The agent worked under an exclusive representation agreement with Nationwide and could not sell the business or any insurance policies in the business. The court held that even though the agent could not sell the business, "the agency still had value above and beyond a salary or the net worth of the agency's fixed assets which could be sold." *Hamby v. Hamby*, 547 S.E.2d 110 (N.C. App., 2001).
- In contrast, the New Jersey Superior Court, Appellate Division held that an Allstate Insurance agent, working under an agent compensation

agreement, did ***not*** have goodwill value as a business. The agent operated as an exclusive Allstate agent under the name of the Ersel Seiler Agency. The agent received a commission from Allstate. The agent did not own the fixed assets and could not sell the business or any policies in the business. The court held that the agent was an employee of Allstate and any goodwill value was the property of Allstate. *Seiler v. Seiler*, 706 A.2d 249 (N.J. Super. A.D., 1998).

- In Washington, the Court of Appeals held that a State Farm Insurance agent, working under a State Farm agency agreement, did ***not*** have goodwill value as a business. The agency was incorporated and operated as an exclusive State Farm agent under the name of the Zeigler Insurance Agency, Inc. The agency received a commission from Allstate. The agent did not own the fixed assets and could not sell the business or any policies in the business. The court held that the agency had no goodwill value and any goodwill value was the property of State Farm. *In re Marriage of Zeigler*, 849 P.2d 695, (Wash. App. Div. 3, 1993).
- In West Virginia, the West Virginia Supreme Court of Appeals held that a real estate development management company, working as an independent contractor under contract for one large developer, did **not** have goodwill value as a business. The company operated exclusively for a large real estate development company, did not have employees, and maintained one office location. The company received a fee at the completion of each development project equal to a percent of the profit earned by the project. However, the court held that management contracts in place at the date of separation were marital property and the value of those contracts was subject to division. *Wilson v. Wilson*

When must I have the business valued?

The general rule among the states is that all marital property must be valued for the purpose of property division. If neither party offers evidence of the value of marital property to the court, the court may assign a zero value to the property. Further, restrictions or buy agreements for the sale of a business interest are not reliable appraisals of the business's value. This has happened many times in property division cases. The following are a few examples:

- In North Carolina, the Court of Appeals held that the husband's business was not subject to distribution under the Equitable Distribution Act of North Carolina where neither party had presented creditable evidence of the value of the business. *Grasty v. Grasty*, 482 S.E.2d 752 (N.C. App., 1997). The appeals court held that the trial court did not err by rejecting the wife's expert's testimony as to the value of the husband's business as "wholly incredible and without reasonable basis." *Id.* The husband did not present any evidence as to the value of the business. Further, the court held that the trial court did not err by ***not*** appointing an expert to value the husband's business. Finally, the court held that because the trial court properly refused to assign a value to the husband's business, the husband's interest in the business ***was not subject to distribution*** under the Equitable Distribution Act of North Carolina. Thus, the court held that the trial court therefore erred in distributing the business to the husband in the equitable distribution proceeding.

- In Ohio, the Ohio Court of Appeals, Fifth District, held that the trial court did not err by not setting a value on the husband's business. It found that the wife "made no effort" to have an expert value the business or submit a report for trial. *Greene v. Greene*, 2001 Ohio 1675 (Ohio App. 2001).
- In Mississippi, the Mississippi Court of Appeals held that the trial court did not err when it did not include any value of the husband's automobile body shop in the equitable distribution. The husband operated the business as a sole proprietorship and the business had no tangible assets. The court found that in the absence of any valuation evidence beyond the business's tax returns, the trial court appropriately characterized the business's only asset as goodwill, which should not be considered for equitable distribution of a sole proprietorship in Mississippi. *Fogarty v. Fogarty*, 922 So.2d 836 (Miss. App., 2006).
- In Georgia, the Supreme Court of Georgia held that "the value established in the buy-sell agreement of a closely-held corporation, not signed by the non-shareholder spouse, is not binding on the non-shareholder spouse but is considered, along with other factors, in valuing the interest of the shareholder spouse." "The rationale … is simple - the buy-sell price in a closely-held corporation can be manipulated and does not necessarily reflect true

market value." *Barton v. Barton*, 639 S.E.2d 481, 281 Ga. 565 (Ga., 2007).

- In Illinois, the Appellate Court of Illinois, Second Division, was not sympathetic to the parties where the parties relied on the sale restrictions in the operating agreement of an LLC to value the business for equitable distribution. The court held in *Schlichting v. Schlichting* the following:

Valuation of marital property is a question of fact, not to be disturbed if in the range of competent evidence presented at trial. *Moll*, 232 Ill. App. 3d at 752. It is the parties' burden to present valuation evidence. *Id*. An appellate court will not remand for an evidentiary hearing on value when a party had ample opportunity to present valuation evidence and failed to do so.

Schlichting v. Schlichting, 2014 IL App (2d) 140158 (Ill. App., 2014) citing In re Marriage of Moll, 597 N.E.2d 1230, (Ill. App. 2 Dist., 1992).

Malpractice Issues

Malpractice Overview

Legal malpractice occurs when an attorney intentionally or negligently mishandles a case and causes injury to a client. Statistics indicate that family lawyer malpractice is a significant problem in the United States and that the number of family law legal malpractice claims brought each year is increasing faster than the growth of the legal industry.

Elements of Legal Malpractice

Clients bring legal malpractice claims when they feel that they have been harmed in some way by their attorney's representation. To succeed in a legal malpractice claim, a client must prove four distinct elements. First, a client must show that an attorney-client relationship existed between the two parties. An attorney-client relationship typically arises when an attorney gives or promises to give legal advice to any person. Second, a client must prove that the attorney acted negligently, or with the intent to harm the client. Attorney negligence is defined as the failure to exercise the care, skill and diligence commonly possessed by a member of the legal profession. Third, the plaintiff must show that the attorney's actions were the cause of the plaintiff's injury. Finally, the plaintiff must convince the court that without the attorney's improper behavior, the plaintiff would have been successful in the underlying case. The final element is often the most difficult to prove. If the injury may have occurred, despite the attorney's actions, no cause of action for legal malpractice will be admitted. In order to preserve a claim for legal malpractice, a client must file a complaint within the statute of limitations period. The length of the statute of limitations for legal malpractice claims varies among states. Failure to file a claim within the limitations period bars the plaintiff from pursuing legal action against the attorney.

The family lawyer representing a client in a property division case has a duty to the client to reasonably attempt to value all marital property. ***Failure to advise*** the client that a business, which is all or partially marital property, should be valued is a breach of this duty. While the client may decline to have a professional valuation of the business conducted, because of costs or other reasons, the family lawyer who overlooks this important asset subjects herself to a potential malpractice claim.

Model Rules of Professional Conduct

The Model Rules of Professional Conduct state "a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Model Rules of Prof'l Conduct R. 1.1 (2013). Further, the rules state "a lawyer shall act with reasonable diligence and promptness in representing a client." Model Rules of Prof'l Conduct R. 13. (2013).

A client with a legal malpractice claim may also report the attorney to the state disciplinary board. Each state has a licensing board (generally known as the "state bar") which is responsible for regulating the ethical behavior of all attorneys within that particular state. While the client is unlikely to recover damages, potential disciplinary sanctions include disbarment or the payment of fines to the state bar association for improper handling of a valuation issue.

Conclusion

The family law judge and practitioner should have a basic understanding of the valuation of a closely held business for property division. The preliminary issues in dealing with a closely held business that is part of the marital estate are: 1) defining "what is a business"; 2) recognizing when a business must be valued; and 3) understanding the malpractice issues a family lawyer may face for failure to identify the business to the client and to explain the necessity to have the business valued. If it is determined that an interest in a closely held business is part of the marital estate, the family law practitioner should advise the client of the importance to obtain the services of a professional business valuator to appraise the value of the interest. Otherwise, an "unequitable" division of the property may result. ***FLR***

Dwight A. Ensley, , JD, MBA, BBA, CVA, is a Certified Valuation Analyst and a North Carolina licensed attorney. He is the founder and principal of ValuePointe.biz, a valuation firm that performs valuations of closely held businesses across the U.S. and valuations of defined benefit pension plans for divorce cases in North Carolina. His credentials include Juris Doctor, Masters of Business Administration, Bachelors of Business Administration, and Certified Valuation Analyst. He can be reached at dae@valuepointe.biz or 336-932-9293.

Interview with The Hon. Todd Markle

by Charla E. Strawser, Stern & Edlin

It was my pleasure to sit down with Judge Todd Markle and his staff to discuss his recent appointment to the Family Law Division Bench in Fulton County Superior Court. We discussed those things he needs and those things he would like to see from the family law bar, and what we, as practitioners may expect from him and his staff. Judge Markle asks for the Family Bar's continued patience and understanding while he and his staff settle in and sort through his case load. Markle is appreciative of our Family Law Bar's collegial nature and finds it refreshing to see the vast majority of attorneys working well together despite our client's disagreements. To better assist him and his staff, Markle's top requests are as follows:

- Please use email as opposed to facsimile or telephone calls when communicating with his Staff. Emails allow the Court to keep track of attorney communications and the status of the case; whereas telephone discussions are often forgotten. Always copy opposing counsel with your email and put the style of the case, including the Civil Action File Number, in the subject line. Please do not copy Markle on any emails regarding a case.

- Communications regarding status conferences, including attorney leaves of absence and legal conflicts for status conferences, should be emailed to his Case Manager, Caretha German at Caretha.German@fultoncountyga.gov. Joint Compliance Certificates, attorney leaves of absence and legal conflict letters for status conferences must be emailed to her as soon as possible. If not delivered by the Friday prior to the hearing date, you risk dismissal of your case. Also, please remember that client conflicts are not legitimate legal conflicts and typically will not warrant a continuance absent extraordinary circumstances.
- There will be no scheduling of multiple 30 or 60 day status conferences. If you jointly opt out of a status conference, there will be no resets and the case will progress to the next status conference. Once a case reaches the 120-day status conference, it will be placed on a final trial calendar.
- Requests for a temporary hearing or a final trial date should be emailed to his Staff Attorney, Amy Abrames at Amy.Abrames@fultoncountyga.gov. Please be realistic in your time announcement. When appropriate, motions that do not require a hearing will be decided on brief pursuant to Uniform Superior Court Rule 6.3. If you do not require a hearing, please include a specific request to Ms. Abrames that a ruling be made by the Court on the motion or brief. Also, please be sure to hand-deliver or mail a courtesy copy of your motion and brief to Markle's chambers; do not rely on emailing alone. The Court does not have the time or resources to print extensive PDFs of pleadings and supporting exhibits, which can be many tens, if not hundreds, of pages long.
- Be concise and to the point. Markle's experience thus far has been that the issues before him are pretty straight-forward, so he does not need duplicative witnesses or to hear the same testimony several times over.
- Regarding temporary hearings, Markle reminds us that pursuant to Uniform Superior Court Rule 24.5, live witnesses are limited to the parties involved and one additional witness for each side. All other witnesses must testify by deposition or affidavit unless ordered by the court. Any affidavit must be served on opposing counsel at least 24 hours prior to the hearing. Please also hand-deliver copies of affidavits to Markle's chambers at the same time you serve them on the other side.
- Special setting of cases has proven problematic with attorney legal conflicts and leaves of absences. Markle and his staff are strongly considering moving

to a "rolling" calendar starting in October. He asks that the lawyers communicate in advance before requesting a special setting to ensure there are no resets that result in downtime on his calendar.

- Premark your exhibits and exchange them prior to coming into court. Bring Markle a courtesy copy of the exhibits so that he may review them as the evidence is presented. Also, be precise in presenting your documentary evidence as to whether it is an exhibit, demonstrative evidence, whether you want it filed with the court and/or attached to the transcript. Too much time is wasted in court dealing with and marking exhibits, so please be prepared.
- Comprehensive proposed orders including Child Support Worksheets should be emailed to Amy Abrames in Word and Excel formats, respectively, so that Markle can edit as he sees fit in his ruling.
- Communicate with the other side before coming to court to both narrow the issues and make all attorneys aware of legal conflicts.
- Markle will grant pretrial conferences under certain circumstances and if both sides agree to a pretrial conference. Please email Amy Abrames if you think a pretrial conference is warranted.
- The Court has considerable technology for use in presenting your case including, monitors, DVDs, computers, video-conference, etc.; however, please do not rely upon the Court to show you how to work the technology. You need to be prepared and know how to use the technology before coming to court. Technology staff is available to assist you in setting up and working the equipment prior to trial. You should contact Amy Abrames well in advance of your hearing to schedule time with the technology staff and coordinate access to the courtroom.
- Amy Abrames is working with the other Staff Attorneys, Judicial Officers and family law staff to develop a uniform Scheduling Order to be used by all sitting Judges on the Family Court Bench. The Order will assist the Court in scheduling cases based on numerous factors including the length of trial, number of witnesses, and complexity of the issues. Be on the lookout in the coming months for the uniform Scheduling Order.
- If a case settles, the Court will accept Motions for Judgments on the Pleadings if the accompanying supporting Affidavit is provided, along with a proposed Final Judgment and Decree of Divorce, stamped-filed copies of the Settlement Agreement and Parenting Plan, and Child Support Worksheets. No divorce will be granted unless both parties have attended the mandatory divorcing parents' seminar. Lack of attendance at the seminar has been such an issue that Markle is considering holding parties in contempt on the Court's own motion if a party fails to attend. Counsel should encourage their clients to attend the seminar at the beginning of the case, not the end, when the parties could actually benefit from the advice given at the seminar while going through their divorce. He will accept online participation in a divorcing parents' seminar.

As to substantive issues of family law, Markle is learning family law and encourages family law practitioners to bring statutory and case law to the courtroom to assist the Court in reaching an appropriate resolution. Highlight relevant portions of the case law to which you want the Court to pay particular attention.

Markle's primary focus is upon the children and their best interests. He has no prejudices when it comes to awarding custody of children and looks at each case individually with no preconceived notions.

As to equitable division, Markle starts at a 50/50 division and then evaluates the evidence to see if the facts warrant a different allocation of the assets. Adultery may or may not have an impact on his ruling in the case, but is most likely to do so where monies were spent on gifts or providing support to another.

He will award alimony to a stay-at-home mother or father, but the length and amount of alimony are dependent on the particular facts of the case including a party's age, education and ability to find employment.

He will award attorney's fees when warranted. Typically, in family law cases attorney's fees are not awarded by him for punitive reasons. You need to carefully lay out the rationale and supporting statutory authority for an award of attorney's fees. Most importantly, you need to show that a party has the ability to pay such an award of attorney's fees.

Finally, be nice to his staff: Amy Abrames, Staff Attorney; Caretha Nuckles German, Case Manager; Joy Howard-Smith, Judicial Assistant; and, Ionie Taylor, Court Reporter. They all work extremely hard and have his full support.

I thank Judge Markle for taking the time to speak openly about his upcoming tenure on the Family Court Bench. His commitment to the families of Fulton County is obvious, and we appreciate having a thoughtful decision-maker in the Family Law Division. ***FLR***

Charla Strawser has been handling complex marital and domestic partner dissolutions, including high asset property division, contested child custody, spousal and child support, paternity and legitimation, and custodial and non-custodial parent relocation for more than 15 years. She regularly drafts prenuptial and postnuptial agreements and also serves as the reviewing attorney for such agreements.

Strawser received her J.D. from Wake Forest University School of Law with high honors and a B.A. in philosophy from the University of North Carolina at Chapel Hill.

A Tale of Divorce, Offshore Accounts, and Government Interdiction

By Peter M. Walzer, Walzer Melcher LLP

Dr. Michael Brandner's visit to Panama was not a vacation. In 2007, his wife of 28 years filed for divorce in the Anchorage Superior Court. In an effort to hide marital funds, he bought $3.25 million in cashier's checks and drove 6,891 miles from Alaska to Panama. He opened up an account in the name of Dakota Investment at the Capital Bank in Panama and deposited the checks.

Auspiciously, the Panamanian banker who assisted Brandner in setting up the account was cooperating with the United States in another fraud investigation. The banker informed Brandner that he was required to file a Foreign Bank and Financial Accounts Report (FBAR). Brandner later transferred $1.26 million from an IRA held by the Pensco Trust Company to his Bank of America account in Dana Point, Calif. and then to the account in Panama.

Four years later, (April 19, 2011), the divorce decree was entered and the court awarded Mrs. Brandner the $1.5 million Pensco IRA. On May 11, 2011, the Panamanian banker recorded a telephone call with Dr. Brandner, who said, "my intention is to not hand it over to the court." Referring to the Pensco IRA, he asked the banker for advice on how to hide the funds. The call was monitored by the U.S. authorities. Dr. Brandner established Evergreen Capital LLC to conceal his identity as the holder of these funds and he opened up an account in the name of Evergreen Capital at the Bank of America in Seattle. He transferred $4.65 million to that Bank of America account. The U.S. Department of Homeland Security seized all of the funds in his Bank of America account on Sept. 12, 2011. On Feb. 9, 2012, the: U.S. Department of Justice filed a forfeiture lawsuit in the Central District of California titled *United States of America v. $4,646,085.10 IN BANK FUNDS* alleging that Brandner engaged in wire fraud and money laundering to conceal assets from his wife. On Sept. 18, 2013, a federal grand jury in Alaska returns an indictment charging Dr. Brandner with seven counts of wire fraud, failing to file an FBAR, and seeking forfeiture of $4.6 million in funds concealed from wife and divorce court.

An FBAR must be filed if one has a financial interest or signature authority in one or more foreign financial accounts with an aggregate value of more than $10,000. Taxpayers with specified foreign financial assets that exceed certain amounts must also report those assets to the IRS on Form 8938 in order to comply with the Foreign Account Tax Compliance Act.

The non-willful failure to file an FBAR penalty is $10,000 for each year the taxpayer failed to file. If the failure to file an FBAR is intentional, the penalty is 50 percent of the account value per year. The Treasury Department must sue you to collect the penalties and the defendant has a right to a jury trial. Defending a matter of this complexity is a very expensive endeavor. Your client may want to avail themselves of the Offshore Voluntary Disclosure Program. This program offers people with unreported taxable income from offshore financial accounts or other foreign assets an opportunity to comply with the tax and information reporting requirements, including the FBAR. The program allows persons to avoid a trial, as well as some civil penalties and criminal prosecution.

As a family lawyer, you may be the first one to inquire as to whether your client filed the FBAR and other tax forms. As a part of the discovery process, you will want to determine if your client or their spouse has any foreign income or assets. The place to start your search is form 1040, schedule B. (Part III Foreign Accounts and Trusts). This section of the return must be completed if the taxpayer has more than $1,500 of taxable interest or ordinary dividends, there is a foreign account, they received a distribution from, were a grantor of, or a transferor to a foreign trust. Form 1116 indicates whether the filer is claiming a Foreign Tax Credit. Form 8938 (Statement of Specified foreign Financial Assets) requires that the taxpayer report foreign financial accounts. Also look out for Form 3520 (Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts), Form 3520-A (Annual Information Return of Foreign Trust With a U.S. Owner), Form 5471 (Information Return of U.S. Persons With Respect to Certain Foreign Corporations), Form 8621 (Information Return by a Shareholder of a PFIC or Qualified Electing Fund), and Form 8865 (Return of U.S. Persons With Respect to Certain Foreign Partnerships). It may be prudent to obtain these forms directly from the IRS using form 4506 or 4506-T or by making a Freedom of Information Act request. The FBAR form will not be part of the tax return. In most cases, a tax professional will be filing this form online using the BSA E-Filing System (Department of Treasury).

A simple review of your client's tax returns, you may be able to uncover foreign assets and income sources. You may choose to encourage your client to clear up their past tax problems. By coming clean, they may avoid the extraordinary penalties that Dr. Brandner incurred and avoid a trip up the proverbial Panama Canal. ***FLR***

Peter M. Walzer is the founding partner of the Southern California law firm Walzer Melcher LLP focused exclusively on family law. He is a past president of the Southern California Chapter of the American Academy of Matrimonial Lawyers and is a vice-president of the American Academy of Matrimonial Lawyers.

State Bar of Georgia Family Law Section to Launch Helpline for Child Support Worksheets

Help for unrepresented low and moderate-income Georgians who need help with the state's mandated Child Support Worksheets is now available. The Family Law Section of the State Bar of Georgia has launched its Child Support Worksheet Helpline, a free service to provide one-time assistance for producing Child Support Worksheets for filing in the state's superior and juvenile courts.

Georgia's Child Support Worksheets provide the framework for determining the appropriate amount of child support under Georgia law. The child support calculator is used to enter the financial information of both parents to calculate the appropriate amount of child support according to Georgia's statutory Child Support Guidelines.

Volunteer lawyers from the State Bar of Georgia Family Law Section will assist callers with the calculator and preparing the required Child Support Worksheets. Un-represented litigants needing help with the child support calculator can call (404) 526-8609. A volunteer lawyer will then work with the caller to prepare Child Support Worksheets for his or her case. The Child Support Worksheets will be emailed or mailed to the caller.

The Family Law Section of the State Bar of Georgia has over 1800 members and seeks to educate its members through continuing education and monitoring and reporting on legislation. The Child Support Helpline is an opportunity for the Section members to give back to Georgians in need of legal services who cannot afford it. Georgia Legal Services Program, which serves 154 mostly rural counties outside metro Atlanta, is partnering with the Section to launch the pilot project. GLSP receives many calls daily from people looking for legal help in connection with child support. The legal aid program will refer many of those callers to the new Child Support Helpline. "We're very grateful to the Family Law Section for this innovative service. There's a great demand for basic information about child support and for help with child support calculations," says Mike Monahan, the director of the Pro Bono Project of the State Bar.

Rebecca Crumrine Rieder, the immediate past Chairman of the Family Law Section, made a pro bono project for the Section a priority of her tenure, "the Family Law Section is excited to be offering Georgians this service. There is a need for help with child support worksheets for unrepresented litigants and we are glad to marshal the Section's vast membership and provide a resource that will benefit not only the individuals who use it but also the courts and clerks who too often have to turn people away for not having the proper documents to complete their cases."

The Chairman of the Family Law Section, Regina Quick stated "Across Georgia, trial judges struggle with increasing demands on our judicial system created by pro se litigants in family law cases. The Family Law Section is proud to stand in service to Georgia's children by providing experienced lawyers to ensure adequate child support awards and access to justice for all – not just for those whose parents can afford it."

The State Bar of Georgia, with offices in Atlanta, Savannah and Tifton, was established in 1964 by Georgia's Supreme Court as the successor to the voluntary Georgia Bar Association, founded in 1884. All lawyers licensed to practice in Georgia belong to the State Bar. Its more than 47,000 members work together to strengthen the constitutional promise of justice for all, promote principles of duty and public service among Georgia's lawyers, and administer a strict code of legal ethics. ***FLR***

Interview with the Hon. J. P. Boulee

by Steven P. Shewmaker

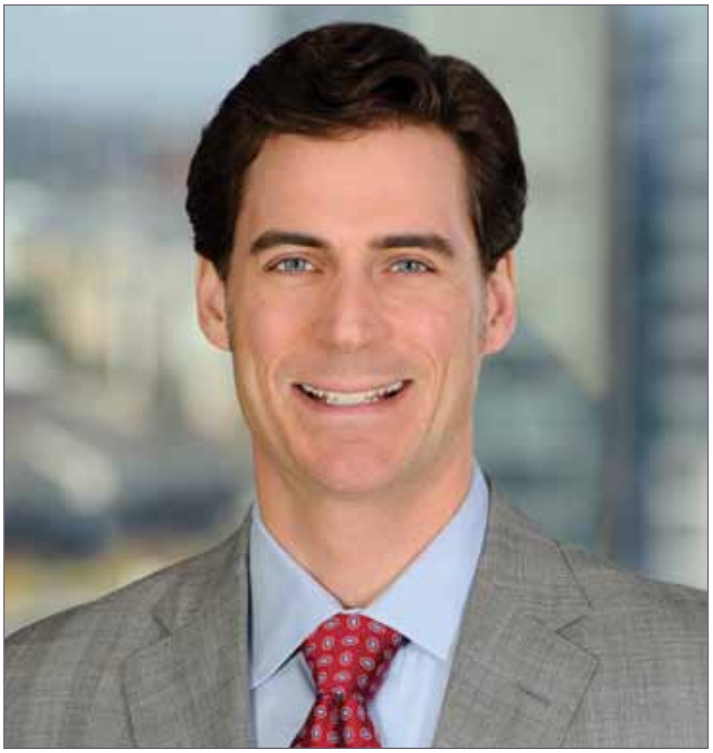
Gov. Nathan Deal appointed J. P. Boulee to the DeKalb County Superior Court to fill the seat that was previously held by Hon. Cynthia J. Becker in Division 6 since 2001. Right after Deal announced his appointment, Judge Boulee attended the 2015 Family Law Institute at Amelia Island, where I met him for the first time. On June 29, Deal swore in Boulee, and, on July 7, I had the great honor of interviewing him, the same day he first presided on the bench.

Judge Boulee grew up in DeKalb County and, as he proudly emphasizes, is "a product of DeKalb County public schools." His excellent high school performance earned him a four-year scholarship from the U.S. Army Reserve Officer Training Corps to attend Washington and Lee University in Virginia. In 1993, Boulee graduated Magna Cum Laude with a B.A. in Politics. At his graduation, the Army also recognized him as a Distinguished Military Graduate and awarded him the prestigious George C. Marshall Leadership Award.

After graduation, Boulee received a commission as a Second Lieutenant in the Army's Field Artillery Corps. He was granted an educational delay from the Army so that he could attend law school at the University of Georgia. While attending UGA Law School, he served as the executive editor of the Georgia Journal of International and Comparative Law, a competing member of the UGA Mock Trial team and as an Assistant Student Solicitor in Athens-Clarke County. He also completed summer clerkships with Hull Barrett in Augusta and Jones Day in Atlanta. In 1997, Boulee graduated cum laude from UGA and served for one year as a law clerk to the Hon. Orinda D. Evans, an appointee of President Jimmy Carter, on the U.S. District Court, Northern District of Georgia.

After his judicial clerkship, Boulee transferred from Field Artillery to the Army's Judge Advocate General Corps and returned to Virginia to attend the Judge Advocate General Officer Basic Course in Charlottesville, Va.. After his basic training, then First Lieutenant J. P. Boulee reported to Fort Campbell, Ky. to serve as a Legal Assistance Officer, primarily advising Soldiers on family law and related matters. Soon after, Captain Boulee transferred to the 2nd Brigade of the 101st Airborne Division (Air Assault) (aka "The Screaming Eagles" of "Band of Brothers" fame) to serve as its Staff Judge Advocate. As the Staff Judge Advocate, he split his time as the government's criminal prosecutor for the brigade and as the commander's personal legal advisor on operational law matters.

After serving as the Staff Judge Advocate for over a year, he volunteered to serve for two years as a criminal defense attorney for the Army's Trial Defense Service at Fort Campbell. Before leaving the Army in 2001, Captain Boulee prosecuted or defended more than courts martial and military separation hearings. He also demonstrated



superior competence and courage as a Soldier by becoming an Army Paratrooper and also graduating from the Army's Air Assault Course. Of his military experience, he says that it made him a better lawyer and believes it will make him a better judge because he was required to prosecute and defend, playing two opposing roles in a short time frame. He says that working as the equivalent of a public defender his last two years in the Army helped him realize that "there is some good in every person," even those charged with serious crimes.

In 2001, Boulee joined Jones Day in Atlanta as an associate. In his 14 years at Jones Day, Boulee has specialized in white collar criminal defense and business litigation matters. As a partner at Jones Day, he served on the firm's hiring, diversity and business development committees. He also served as the firm's hiring partner. In keeping with Jones Day's strong pro bono commitment, Boulee regularly represented citizens in criminal defense matters. In the year prior to taking the bench, Boulee committed more than 500 hours to pro bono criminal defense in state and federal matters.

He also believes strongly in community service. He is an active member of the Midtown Rotary Club and the American Legion (where he is the Chair of the Monument Restoration Committee); while at Jones Day, he also served on the Metro Atlanta Chamber of Commerce's Public School Committee and the Fernbank Museum of Natural History's Corporate Leadership Council. Among his efforts, Boulee helped lead the efforts of Jones Day, the American Legion

and the Midtown Alliance to restore and preserve the World War I Memorial at Pershing Point Park in Atlanta. Boulee is also a 2012 graduate of Leadership Atlanta and has been accepted into the 2016 Class of Leadership DeKalb. Boulee and his wife, Julie, live in Decatur with their two children.

On the day I interviewed him, he heard his first two family law matters. Though his experience in criminal and business litigation is vast, he believes that this same experience will guide him well through Division 6's large domestic case load. Boulee freely offers that his pet peeves are attorneys who come to court unprepared and when attorneys interrupt each other in court. He advises that discovery issues should be resolved to the greatest extent possible through counsel. He stresses to avoid - "like the plague" - bringing frivolous discovery disputes before the Court. Instead, he suggests that they be worked out because "no one should prefer the judge to referee it."

When it comes to complex financial exhibits and demonstrative evidence, he believes that the principle of KISS (Keep It Simple Stupid) that he learned in the Army, applies. He encourages demonstrative evidence and summary exhibits under Rule 1006. He finds technology in the courtroom to be very helpful but warns that "dry runs" and rehearsals prior to trial are a must because he is aware that "technology glitches remain prevalent for the unprepared."

When it comes to judicial discretion in family law matters, like appointment of guardians ad litem, the effect of conduct on property division and alimony awards, Boulee says he has formed no strong opinions yet and remains open-minded. Our newest DeKalb County Superior Court Judge asked me to convey one message above all:

> *Judge Boulee is guided by two very positive family law experiences. First, he and Julie are the devoted parents of two children they adopted. He sees family commitment and the safeguarding of children as a paramount concern. Second, he and his sister are children of divorced parents. Of his parents and their divorce, he stresses that "they did it right." His parents served as the perfect example through divorce. They never disparaged the other in front of the children. They always "kept at the forefront of their lives, the well-being of me and my sister". He expects all counsel and litigants to do the same.*

On behalf of the Family Law Section and the DeKalb County Family Law Section, I want to welcome Judge Boulee to Division 6. His diverse background and devotion to this nation and his community make him the ideal choice for DeKalb County. We all look forward to working with him in the many years to come. ***FLR***

Steven Shewmaker is the founding partner of Shewmaker & Shewmaker, LLC which represents clients in the full range of domestic law matters and specializes in domestic cases involving military members and retirees. He is the current chair of the American Bar Association Military Family Law Subcommittee and the Chief of Military Justice for the Alabama National Guard.

Past Family Law Section Chairs

Rebecca Crumrine Reider	2014-15
Jonathan J. Tuggle	2013-14
Kelly Anne Miles	2012-13
Randall Mark Kessler	2011-12
Kenneth Paul Johnson	2010-11
Tina Shadix Roddenbery	2009-10
Edward Coleman	2008-09
Kurt Kegel	2007-08
Shiel Edlin	2006-07
Stephen C. Steele	2005-06
Richard M. Nolen	2004-05
Thomas F. Allgood Jr.	2003-04
Emily S. Bair	2002-03
Elizabeth Green Lindsey	2001-02
Robert D. Boyd	2000-01
H. William Sams	1999-00
Anne Jarrett	1998-99
Carl S. Pedigo	1997-98
Joseph T. Tuggle	1996-97
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Richard W. Schiffman Jr.	1994-95
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H. Martin Huddleston	1991-92
Christopher D. Olmstead	1990-91
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Barry McGough	1988-89
Edward E. Bates Jr.	1987-88
Carl Westmoreland	1986-87
Lawrence B. Custer	1985-86
Hon. John E. Girardeau	1984-85
C. Wilbur Warner Jr.	1983-84
M.T. Simmons Jr.	1982-83
Kice H. Stone	1981-82
Paul V. Kilpatrick Jr.	1980-81
Hon. G. Conley Ingram	1979-80
Bob Reinhardt	1978-79
Jack P. Turner	1977-78

Caselaw Update

by Vic Valmus

ANTENUPTIAL AGREEMENT

Kwon, et al. v. Kwon, **A15A0049** (July 14, 2015)

The Kwons signed an Antenuptial Agreement on January 3, 2003 which included an alimony provision in the event of divorce and provided that if Mr. Kwon died first, Ms. Kwon would receive $200,000 and half of any life insurance proceeds for which she was a named beneficiary. The parties were married on Jan. 11, 2003. Mr. Kwon died intestate in December of 2010. Mr. Kwon's son was the administrator of the estate and started paying Ms. Kwon's bills and advancing estate funds but stopped in July 2012 when he located the Antenuptial Agreement in his father's papers. Ms. Kwon filed a Petition to determine Mr. Kwon's heirs and a Motion to Deny Enforcement of the Antenuptial Agreement. The Administrator answered and counterclaimed for declaratory judgment that the agreement was enforceable. The Court found that Ms. Kwon was not fully apprised of Mr. Kwon's assets and therefore the prenup was unenforceable. The Kwon's estate appeals and the Court of Appeals affirms.

When considering whether an Antenuptial Agreement is valid pursuant to *Scherer*, the first prong is that the party seeking enforcement must show both there was a full and fair disclosure of assets of the parties prior to the execution of the Antenuptial Agreement and that they entered the Antenuptial freely and voluntarily with understanding of the terms. In the instant case, the agreement stated that each party gave a substantial accurate disclosure of the other assets and incomes and attached as Exhibit "A" of all of Mr. Kwon's assets currently comprising his separate estate and Ms. Kwon had no property or assets and that each party freely and voluntarily entered into the agreement with the full knowledge and holdings of the other party and waived and relinquished any right to obtain any further knowledge about the holdings. In January of 2003, Mr. Kwon gave her a one-page document and told her she needed to sign it before the marriage. Ms. Kwon testified that she did not speak or read English, but relied on Mr. Kwon's representation of the document as needed for the marriage and she never saw the first nine pages. Nor did Mr. Kwon explain what she was signing or discuss how they would divide the assets if they got divorced. If she had understood the document she would not have married him. The lawyer who prepared the agreement was deceased at the time of the hearing and the woman that notarized Ms. Kwon's signature did not remember the transaction. At the hearing, the administrator testified that some of the assets not listed on the Antenuptial Agreement existed before the marriage. The Trial Court found that Ms. Kwon understood English well enough to have appreciated the impact of the import of what she was signing based on her having lived and held a job in the United States for a long time. Even if she only saw the signature page it should put her on notice of its binding effect. Therefore, she had a duty to ascertain the contents of the document. The Trial Court also held that under Georgia law, Ms. Kwon shared no confidential relationship with Mr. Kwon before they were married and therefore was not excused from her duty to read the contract or have it interpreted for her. Therefore, being required to sign the agreement as a condition of marriage did not constitute legal duress under Georgia law.

However, neither party's assets were fully disclosed to the other and Mr. Kwon's failure to fully disclose his assets to Ms. Kwon made the agreement unenforceable. The record established that Mr. Kwon owned assets that were not listed on the Antenuptial Agreement and Ms. Kwon testified that she was never told what he owned. The administrator had the burden of establishing Mr. Kwon fully and fairly to disclose his assets to Ms. Kwon, but failed to do so. The administrator also argues that Ms. Kwon had waived her right to challenge the adequacy of Mr. Kwon's disclosure, that the agreement stated each party made a substantial accurate disclosure of all assets to the other and did not want an independent audit of the other's assets and specifically waived and relinquished any right to obtain further knowledge with regards to said holdings. However, this Court has held that a party does not waive her right to a full and fair disclosure of assets based on the contract's waiver provision. If so, a party could avoid making any disclosure simply by including that provision in an Antenuptial Agreement.

ATTORNEY'S FEES

Cole v. Cole, **A15A0977** (September 2, 2015)

The parties were divorced in June of 2013. In June of 2014, the Husband filed a contempt against the Wife asserting multiple grounds. After hearing the evidence, the trial court dismissed the contempt petition as groundless. The Court further found that the Husband's petition was frivolous and lacked substantial evidence and was effort to "nit-pick" the Court's prior orders rather than to view the spirit and overall intent of the Court's prior orders. The Court awarded the Wife $3,000 in attorney's fees finding, the fees awarded were reasonable and customary given the nature of the case, and the level of defense counsel's preparation and years of experience. The Husband appeals and the Court of Appeals vacates and remands.

The Husband argues that the Trial Court erred in the attorney's fees award because the Wife never filed a separate motion for fees and because the Husband was not offered a separate hearing on the issues. However, the Husband never objected to the Trial Court's consideration of attorney's fees during the contempt hearing and thus he

waived the issue for review. The Husband also argues the Trial Court erred in awarding attorney's fees to the Wife absent evidence of the parties' financial circumstances or a motion for fees under O.C.G.A. § 9-15-14. Here, the Trial Court did not cite the authority for its fees award but found that the contempt petition was frivolous and brought without substantiating evidence. Because the Trial Court failed to make findings sufficient to support such an award under either section, the judgment is vacated and remanded.

BENEFICIARY

Gooch v. Gooch, **S15A0202** (June 1, 2015)

The parties were divorced in 2012. As part of their settlement agreement, the Husband was required to select a certain option for his retirement benefits and to designate the Wife as the survivor beneficiary under that option. The Husband will receive lifetime benefits with a guarantee of 10 years of payments such that should he die within that period, payments will continue to his designated survivor beneficiary for the remainder of the guaranteed period referred to as life with 10 year guarantee. However, the Husband did not comply and instead selected a different retirement option naming his new wife as survivor beneficiary. This designation was irrevocable in December, 2013. The Wife filed to hold the Husband in contempt for his failure to comply with this portion of the Decree. The Trial Court entered an Order finding the Husband in willful contempt of his obligations under the Decree but determined there was no available remedy that existed. The Wife appeals and the Supreme Court reverses and remands.

At the hearing, there was testimony of a financial planning expert was that there were remedies currently available including an annuity to provide payments for a certain period of time such as the 10 years specified in the Decree or a life insurance policy. The Husband argues that the Trial Court is correct because there was no need for any remedy unless and until Husband dies within the 10-year period. However, this ignores the obligation placed upon him by the Final Decree. The Wife's potential receipt of survivor benefits would not be dependent on the Husband's control of his own assets with the hope that he would leave an estate sufficient to meet the remaining obligation. The Husband also argues that if the Trial Court ordered him to purchase an annuity to serve the same function as the obligation he ignored, would constitute a modification of the Decree because no such annuity was set forth therein. A Trial Court cannot modify a decree, but the Trial Court could certainly exercise its discretion to craft a remedy for contempt including remedy to harm cause to an innocent party by the Husband's contemptuous conduct. Therefore, the evidence presented at trial was sufficient to authorize the Trial Court to order the Husband to acquire an annuity or insurance policy that would conform to his original court ordered obligation.

CHILD SUPPORT ARREARAGE

Wright v. Burch, **A14A2089** (March 30, 2015)

The parties were divorced in Tennessee in 2003. Pursuant to the agreement, the Father would pay the Mother child support in the amount of $600 per month except when the child was living with the Father. The child lived with the Mother and resided in Georgia until July of 2013, when the child elected to live with the Father in Maryland. In May of 2013, the Father filed the instant petition to domesticate the Tennessee Divorce Decree and for money had and received. The Father also alleged that DHR had erroneously garnished his paychecks in excess of his child support obligation and misstated his arrearage by more than $39,000 . The Mother also wrote to the Father's counsel that DHR had made a severe error in reaching its estimate on the arrearage. In October, the parties reached an agreement to modify both custody and child support, The draft Consent Order provided that: all arrearage issues are resolved by this Order and no back support is owed by the Father to the Mother; that the Mother would pay the Father $385 per month in child support; and the Mother would pay child support directly to the Father. In December, the Mother's new counsel filed a counterclaim for contempt arguing that no settlement agreement had been reached. The Father filed a motion to enforce the settlement agreement. At the hearing, Mother's counsel agreed the parties had reached an agreement but asserted that such agreement was illegal because both parties under Tennessee and Georgia law were not authorized to modify child support arrangements retroactively or informally. The Father argued that the parties were free to enter into an agreement as to their arrearages already owed. The Trial Court held the settlement agreement was enforceable, entering the Consent Order as a part of the judgment and awarding Father $2,500 in fees against Mother under O.C.G.A. § 19-15-14(b). The Mother appeals and the Court of Appeals reverses.

An order modifying child support may operate only prospectively. A reduction in child support arrearage constitution improper retroactive modification of child support obligations. Pursuant to these holdings, the parties' 2003 marital dissolution agreement provided that no action by the parties will be effective to reduce the child support set forth herein after the due date of each payment. A Trial Court can modify child support obligations and enter orders regarding repayment of past due amounts pursuant to O.C.G.A. § 19-11-12(e) but it cannot simply forgive or reduce the past due amount owed under a valid child support order. The Trial Court was authorized to determine the true amount of arrearage at issue here and to enter orders as to its repayment. The Trial Court erred when enforcing the settlement agreement to the extent that it reduced the Father's arrearage as to child support payments past due as of October, 2013.

CHILD SUPPORT ARREARAGE

Partridge v. Partridge, **S15F0038** (June 1, 2015)

The parties were divorced in June, 2014. As part of the Final Decree, the Court ordered that the Husband continue to make monthly payments on the minor child's automobile currently in her possession until the automobile is paid in full and the Husband pay alimony to the Wife in the amount of $38,460 , payable over 36 months in the amounts of: $345 per month from June 1, 2014 for 12 months; $940 per month for the next second 12 months; and $640 per month for the last 12 months. The Husband appeals and the Supreme Court affirms.

The Husband contends the Trial Court erred by ordering him to pay alimony to the Wife when the Wife affirmatively waived any right to collect alimony in light of her testimony at the final hearing in which she claimed that she did not want alimony. When cross-examined by the Husband's counsel, the Wife stated that she was not asking the Husband to support her and she wasn't making any claim on any of the Husband's property, alimony or otherwise. But when asked by own counsel does she feel she needs some economic assistance from the Husband to be able to maintain her lifestyle and to be able to support her children, her response was "yes". Therefore, it cannot be said the Wife unequivocally relinquished her claim to receive alimony based upon her testimony at the final hearing. To the extent that the testimony of alimony at the final hearing can be viewed as conflicting, such conflicts were for the Trial Court to resolve.

The Husband also argues the Trial Court erred by ordering him to pay car payments on the minor child's automobile. The Husband asserts that these car payments constitute an improper deviation from the amount of child support that the Husband is legally required to pay. However, the Husband characterization of these payments as child support is misplaced. The testimony at the hearing established a car was purchased during the marriage and that both the Husband and Wife are joint obligors on the indebtedness owed on the car and accordingly, this marital debt could be properly addressed by the Court through its equitable division of marital property. Therefore the Husband's responsibility for continued payments on the marital debt is part of equitable division of marital property.

COLLEGE PAYMENTS

Mims v. Mims, **S15A0106** (May 11, 2015)

The parties were divorced in 2008. The Husband agreed to pay the cost of a college education for all four of the children as follows: "For so long as the child(ren) maintains passing grades and attends school full time, the Husband agrees to pay the cost of college education in an amount not to exceed the cost of tuition, books, student activity fees, housing, food, etc. for a full time, in state student, to obtain a 4 year undergraduate degree at Valdosta State University or another accredited university upon which the parties agree." In 2010, their youngest daughter enrolled in college and, in February, 2012, the Wife filed a contempt against the Husband alleging that he had failed to pay the college expenses for their daughter. The Trial Court entered an order directing the Husband to pay the daughter's college expenses for all nine semesters that she had attended; minus amounts credited for the daughter's receipt of the HOPE scholarship and Pell grants, but declined to hold the Husband in contempt because he had not received notification of the expenses incurred by the daughter prior to the Wife's filing of her complaint. The Husband appeals and the Supreme Court affirms.

The Husband argues the Trial Court erred by requiring him to pay his daughter's college expenses incurred after the Fall semester of 2010. He asserts that because his daughter withdrew from some of the classes during the spring of 2011 and only completed 11 of the 15 credit hours for which she was registered, she did not attend school on a full time basis. The Husband contends that regardless of the school's definition of a full time student, the plain language of the settlement agreement required the daughter to successfully complete and obtain an academic credit for a full time load each semester or his obligation to pay her college expenses would terminate. There were two conditions required to be met in the parties' settlement agreement, (1) to maintain passing grades and (2) attend school full time. It is undisputed that the daughter maintained passing grades so that the primary issue is whether she attended school on a full time basis. The Husband assets use of the phrase "so long" as combined with the requirements to attend school on a full time basis meant the daughter must continuously enroll as a full time student, but the Court found the language of the parties' agreement did not demand such an interpretation. Nor was there any evidence that the phrase "full time student" to mean continuous attendance during the whole school year. Although Valdosta State defines a full time student as one who is registered for 12 or more semester hours, this definition was not incorporated in the parties' settlement agreement, nor did the parties' agreement address the treatment of summer school attendance.

The Trial Court determined that the use of the phrase to attend school full time only imposes a requirement on the daughter that she not interrupt her college career by taking time off during normal college year. There was no evidence that the parties intended to assess the daughter's attendance at school in terms of credit hours taken. Because the daughter was in continual attendance at college during the normal school year in the Fall semester of 2010 through the Fall semester of 2013 and maintained passing grades, she had met both conditions and the Husband was required to pay.

EQUITABLE DIVISION

Mallard v. Mallard, **S15F0401** (June 1, 2015)

In 2009, the Wife acquired a house in her sole name. The parties were married in 2010 and divorced in 2011

and the house was not mentioned in the final decree. Shortly after their first divorce, the parties resumed their relationship and lived together. In April, 2011, the Wife executed a Quitclaim Deed transferring ownership of the property to herself and her husband as joint tenants with the right of survivorship. The property was not refinanced to put the Husband's name on the mortgage. The parties remarried in January, 2012. In April, 2012, the Husband paid off with his separate estate funds the debt of $268,314 . In January, 2013, the Wife filed for divorce and asked for 50 percent of the equity in the residence. An appraisal of the property in September, 2013 showed a fair market value of $252,000. The Court entered a Decree denying the Wife's request to partition the property or to give her any share of it; awarding the property entirely to the Husband. The Trial Court determined that, at the time of the parties' remarriage, there was no equity in the property and the balance on the outstanding loan of the property was paid off by the Husband's separate funds, which was more than the fair market value of the property a year after the payoff. In addition, there was no evidence that the Husband intended to make the payment of the debt a gift to the Wife or to the marital unit. The Court applied the source of the funds rule pursuant to *Maddox v. Maddox*, and determined there was no marital investment in the property. The Wife appeals and the Supreme Court reverses and remands.

The evidence supports a finding that the initial property was considered to be the separate property of the Wife but by her own hand, she made it the joint property of the Wife and the Husband as joint tenants with the right of survivorship and, therefore, each party held an interest in the property. If the non-marital property appreciates in value during the marriage, and such appreciation results from the efforts of either of the spouses, the appreciation becomes a marital asset subject to equitable division. In this case, there is no evidence of the property's fair market value during the parties' subsequent marriage. Thus, the appreciation of the fair market value of the property fails to provide a basis for the application of any method of equitable division, including the source of the funds rule. But, the Husband paid off the entire indebtedness on the property during the parties' second marriage. Here, the Trial Court made an express finding that the Husband's payment of the debt was not a gift to the Wife or to the marital estate. However, the Husband's undisputed testimony was that he paid off the debt in order for him and the Wife to live a debt free life as a married couple and it was his intent that they would both have the benefit of those funds. Therefore, there is a manifest intent to make the payment of the debt a gift to the marital unit. Moreover, in circumstances involving conveyances of real property or the payment of certain funds between spouses, there has been a presumption in Georgia law that a conveyance or payment is a gift and has a status of marital property. Even if the Trial Court discounted the Husband's uncontroverted testimony which was against the Husband's own interest, such a presumption remained. Therefore, the Trial Court erred in finding that the Husband's payment of the debt was not a gift to the marital estate.

Although the Trial Court has wide discretion as the trier of fact to determine equitable division of property, the Trial Court solely awarded the property to the Husband upon unsupported factual finding that the payment of the debt on the property was not a gift to the marital unit.

GRANDPARENT JOINT CUSTODY

Stone v. Stone, et al., **S15F0064** (June 24, 2015)

The Husband and Wife have been married to each other twice and have one minor son. The parties divorced a second time in January of 2014 and the Parenting Plan awarded joint legal custody of the minor child to the Husband and the maternal grandmother. The Wife was found to be unfit and was given only potential future visitation. The Husband appeals and the Supreme Court reverses.

In the Georgia Code, it clearly indicates that joint custody arrangements do not include third parties when one or both parents are suitable custodians. O.C.G.A. § 19-9-3(d) states an express desire to preserve the sharing of rights between parents and visitation with parents and grandparents. Joint legal custody is defined by both parents having equal rights and responsibilities of major decisions concerning the child. Therefore, the definition of joint legal custody furthers the express policy of encouraging shared rights and responsibilities between parents. To a similar end, the statute states that joint physical custody means that physical custody is shared by parents in such a way as to assure the child of substantially equal time and contact with both parents. Therefore, grandparents are excluded from an arrangement for joint custody. The Trial Court had no power to grant joint custody to the Husband and the grandmother and must be reversed. However, O.C.G.A. § 19-7-3 provides a mechanism for a grant of visitation rights to grandparents when necessary to insure and preserve the contact and, in situations where neither parent is suitable to have custody, a grandparent might be a person qualified to have sole custody of the minor child. But in situation where a parent is suitable to exercise custody over a child, the statute does not allow that parental custody be limited by joint custody arrangements with grandparent or for that matter, any other person.

GRANDPARENT VISITATION

Fielder, et al. v. Johnson, **A15A0032** (July 16, 2015)

The parents of a minor child were divorced and the Father was awarded sole custody. Afterwards, the Father remarried and the child's mother died. The Father's new wife adopted the child in 2012. In May of 2013, the Mother's parents (grandparents) sought visitation with the minor child of their deceased daughter. The Father filed an answer and motion to dismiss. In the Father's affidavit, he stated that the child's mother had died, that his current wife has adopted the child, that at all times, the child has lived with both him and the wife, and neither of the parties are incapacitated nor presently incarcerated. The Trial

Court granted the motion to dismiss and the grandparents appealed and the Court of Appeals reverses.

The Trial Court relied on *Kunz* in expressly rejecting the grandparents' argument pursuant to the grandparents' visitation statute at O.C.G.A. § 19-7-3(b) stated in pertinent part that this subsection will not authorize an original action where the parents of the minor child were not separated and the child was living with both of the parents. In *Kunz*, the Mother died and the Father remarried and the stepmother adopted the child. Therefore, the grandparents did not have standing to file a petition for visitation. Shortly after the *Kunz* decision, the General Assembly added subsection (d) which stated, in pertinent part, notwithstanding provisions of subsection (b) and (c) of this Code section, if one of the parents of the minor child dies, the Court may award the parent of the deceased parent of such minor child reasonable visitation with such child during her minority if the Court's discretion finds such visitation to be in the best interests of the child. The custodial parent's judgment as to the best interests of the child regarding visitation shall be deferred to by the Court, but shall not be conclusive. The language eliminates the provisions of subsection (b) and (c) from impeding an award of reasonable visitation individuals particularly designated by subsection (d). Therefore, the grandparents are the parents of the deceased parent of such minor child and they fall within the ambit of subsection (d). Therefore, the grandparents had standing to petition for visitation.

PENSION BENEFICIARY

Pollard v. Pollard, **S15A0041** (April 20, 2015)

The Wife filed a Complaint for Divorce in 2012, and shortly after, retired and commenced receiving her retirement benefits from the Teacher's Retirement System of Georgia. The Wife elected not to provide survivor benefits thereby entitling her to receive the maximum monthly benefits during her life. A Final Decree of Divorce was entered on July 31, 2013. The Final Decree recited the Husband had already named the Wife as the sole beneficiary with survivor rights of his pension plans which he was ordered not to change so long as the Wife was alive and the Wife was ordered to restore the Husband as her sole beneficiary with survivor rights within 30 days of the date of the Order. By the time the Final Judgment was entered, the Wife was precluded from changing her survivor beneficiary election. Whether or not she was aware, it was too late to revive the survivor beneficiary. She apparently did not discuss that fact with the Trial Court or to the Husband. The Husband filed a pro se contempt action. The Court found it was impossible for the Wife to comply with the Court Order since she had already commenced receiving benefits prior to the Final Decree and was precluded from making a change. The Court found the Final Decree contemplated the Husband's receipt of the portion of the Wife's pension if he survived her, which would between $1,414 and $1,433 per month, depending on which plan was chosen. The Court did not find the Wife to be in contempt, but the Court ordered the Wife to take out a life insurance policy in an amount no less than $50,000 naming the Husband as a sole beneficiary, or alternatively, to establish a bank account payable on her death to the Husband in an amount no less than $50,000 . The Wife appeals and the Supreme Court reverses.

It is well settled that a court cannot modify a divorce decree in a contempt action but may interpret and clarity its previous decree. In this case, the contempt order cites no evidence and contains no analysis to support the conclusion of $50,000 assets to be paid to the Husband upon the Wife's death is in any way equivalent to naming the Husband as the beneficiary with rights of survivorship to the Wife's pension. No evidence was cited nor any conclusion reached regarding the relative life expectancy of either party or the cash value of the pension benefits awarded to the Husband in the divorce decree. In sum, the Court provides no support for the conclusion that a $50,000 payable on death account or life insurance policy that would pay $50,000 to the Husband if he survives the Wife is the equivalent to the estimated value of the Husband of the contingency pension survivor benefits. Therefore the Trial Court's action amounted to an improper modification in terms of the original Divorce Decree. However, the reversal of the contempt order did not leave the parties without recourse with respect to the controversy over allocation of retirement benefits. Therefore, the parties could set aside the Divorce Decree on the grounds of mutual mistake.

PRENUPTIAL AGREEMENT/MOTION FOR SUMMARY JUDGMENT

Steis v. Steis, **S15A0244** (July 6, 2015)

Prior to the marriage, the Husband worked as an oncologist with the Atlanta Cancer Center ("ACC"), and the Wife also worked in an administrative capacity. Two days before their wedding, the parties signed a lengthy Prenuptial Agreement and were married on September 16, 2000. In October of 2012, the Wife filed a petition for divorce and the Husband filed an answer and counterclaim. The Wife filed a motion to enforce the prenuptial agreement and the Husband responded with a motion for partial summary judgment claiming that all of the property created during the marriage was derived from two sources: the assets listed in Exhibit A of the Prenuptial Agreement and his salary from his medical practice; all of which he asserted were classified as separate property. The Trial Court denied the Husband's motion and ruled that the Husband's personal income from the medical practice, as opposed from passive income from his 9 percent ownership in the ACC, was not separate property but instead was marital property. The Court added there were genuine issues of material fact of how much his salary was his separate property and, even if his salary were not marital property, there would be genuine issues of material fact as to whether some or all of the jointly titled assets were intended as gifts to

the marital unit. The Husband appeals and the Supreme Court affirms.

The Husband contends the Trial Court erred in holding that his personal income from ACC, as opposed to his passive income from the 9 percent ownership interest in the medical practice, was not his separate property under the Prenuptial Agreement. Reading the Prenuptial as a whole, it was clear Exhibit A that "sources of income" would not be congruent with the "property" owned by the Husband prior to the marriage. In addition, Exhibit A is not titled separate property, but rather a financial statement which is intended to provide a financial disclosure not only of significant assets but also liabilities and income. Therefore, Exhibit A was simply a disclosure of the approximate annual income at the time the agreement was entered. The Husband also argues that his salary from ACC qualifies as separate property under the Prenuptial Agreement, which states that income from any kind of any separate property is itself separate property. The Wife does not dispute that the Husband's 9 percent interest in ACC which was owned prior to marriage was his separate property. However, the Husband's W2 salary from ACC as an employee of the corporation was like the Wife's salary from ACC prior to the marriage. It was an expense of the business and is not income to its owners or to the Husband as his capacity as a shareholder. Even if the Husband's salary did constitute other income derived from his ownership interest of ACC, there is nothing that showed that his salary was paid exclusively from his 9 percent ownership interest.

The Husband also contends the Trial Court erred in denying his partial summary judgment on his claim that the parties' jointly titled assets are his separate property. As explained above, there is at least a genuine issue of fact as whether the Husband's salary was marital property or his separate property. In addition, there was a factual dispute of whether the jointly titling of properties was intended to create marital property. Paragraph 15 of the Prenuptial Agreement stated that nothing contained in this agreement shall preclude either party from receiving the benefit of any of the assets of the other whether made by gift or otherwise. Even assuming that the Husband's salary was his separate property, the jointly titling of assets purchased from the salary qualifies as evidence of his intent to transform the separate property into marital property. This case is only to decide whether the Trial Court properly denied the Husband's motion for partial summary judgment.

UIFSA

Anderson Anesthesia, Inc. v. Anderson, **A15A0120 (**June 9, 2015)

The parties were divorced in Louisiana. An Income Withholding Order ("IWO") was issued and the Wife was awarded support. The Husband created Anderson Anesthesia, Inc. ("AA"), an Alabama corporation. The Husband became delinquent in making support payments. The Wife filed an UIFSA petition in Georgia against Premier to withhold income pursuant to the IWO. The IWO was served on Premier and AA (Husband) filed a petition to stay its enforcement asserting that the Louisiana court lacked authority to issue an order seizing income because it never had personal jurisdiction over AA. After the hearing, the Court found that under UIFSA, any obligor may contest the validity of an enforcement of an IWO issued in another state and received directly by an employer in Georgia. UIFSA defines obligor as an individual or estate of a decedent. Then, the Trial Court attempted to confer with the Louisiana court but was unable to. The Trial Court gave several weeks to allow AA to file the appropriate motions in Louisiana to set aside the income deduction order. Four months later, AA failed to provide the Court with any evidence that it had initiated any motion or made any type submission to the Louisiana court seeking to have the IWO set aside. Therefore, the Trial Court dismissed AA's petition. AA appeals and the Court of Appeals affirms.

AA asserts the Georgia Trial Court erred by concluding that it had no subject matter jurisdiction to inquire whether the Louisiana income support order qualified for full faith and credit in Georgia and concluding that it had no personal jurisdiction over the Louisiana resident and entering a final order without any supporting evidence. Here, the Georgia Trial Court never expressly concluded it lacked substance matter jurisdiction or whether the IWO was entitled to full faith and credit in Georgia. Instead, the Trial Court dismissed the action because AA failed to establish it had taken an action in Louisiana to contest the income withholding order. However, the Trial Court was correct to question AA's standing to file the petition challenging the IWO. Under Georgia's UIFSA, only an individual or an estate meeting the criteria may petition a Georgia court to contest an IWO issued by another state. AA filed a petition under UIFSA, but does not fall within the statutory definition of an obligor under the act. Although the Husband would qualify as an obligor under the act, AA, a self-styled independent corporation, does not. Therefore, AA lacked standing to contest the income withholding order under UIFSA.

AA also argues the Georgia Trial Court nevertheless should have considered the validity of the income withholding order under O.C.G.A. § 9-12-16 or under the provisions of the Uniform Enforcement of Foreign Judgment Laws (UEFJL). However, AA expressly invoked the provisions of UIFSA in filing all three versions of its petition and because AA filed the petitions without standing Georgia Trial Court had no jurisdiction over them and no basis to consider the validity of IWO. Moreover we note that the Wife never sought to enforce the IWO under the provisions of UEFJL but rather served the order on Premier under the provisions of UIFSA. ***FLR***

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Why Bracketing Won't Always Settle Cases in Mediation (and what you can do about it)

by Andy Flink

Bracketing is a strategy used in mediation to set a range of negotiation that establishes a high and low where parties will agree to continue settlement discussions. For example, let's say in a personal injury case that the Petitioner's opening offer is a (highly unreasonable) $500,000 figure and the Respondent counters with (an even more unrealistic) $10,000. Now that everyone is keenly aware that neither side is willing to engage in the process, a tactic that the mediator might suggest is a second offer whereby the Petitioner reduces their number to $350,000 but "brackets" the Respondent's amount to $50,000 thereby establishing a range. This potentially moves the session into a more reasonable settlement zone to allow everyone to continue negotiating by reducing the spread from $490,000 to $300,000.

With so many moving parts in a domestic mediation it is impossible to place all issues within a numerical range of settlement. While bracketing can be effective when discussing finances, it is an imperfect format where sentiments, children, custody, memories (both good and bad) are front and center. What do you do when one or both parties are so immersed in the emotional aspects of the conflict they do not see numbers, they only see obstacles? When we can't rely on logic and have to consider addressing these hurdles, a very effective method is to remind everyone about the different phases of negotiation and what questions to ask. These points can help the parties work through the emotions to get us back on track:

Investigation and Introduction:

Both parties arrived at the mediation with a set of expectations regarding a reasonable settlement amount. You certainly were clear about your own position, and perhaps you knew what your bottom line was; however, at this point in the session did you remember to consider what the other side wanted? Sometimes we get so bogged down in our position that we forget that it takes two to negotiate. Bargaining requires give and take, and your position now shouldn't be the same as where you were to begin the day. Review where you started and compare it to where you are. Have you made any movement?

Determine your BATNA:

What is your best alternative to a negotiated agreement? What does going to court look like? Does the client understand the toll litigation takes, both financially and emotionally? If you began the session with the intent of reaching an agreement, your client needs to understand and evaluate the cost of *not* settling. It is often difficult for clients to comprehend the impact of litigation. Now is the time to talk them through their "let's just go to court so I can get what I believe is right from the judge" stance.

Clarification and Justification:

Are you and the mediator articulating your position and the "why" behind your requests? Sometimes parties are so emotionally thrown by the other person's demands that they justify our response with rapid judgement and not by careful evaluation. Break it down into smaller pieces and remind your client that this is a process. The complexion, leverage and tone of the session will be constantly changing throughout the day if we are progressing towards settlement.

Compromise and Flexibility:

The rigidity that comes with parties' positions and expectations is a constant in most mediations. At the same time both sides want and need to settle. The problem is that you cannot "get there" unless you are willing to compromise and are also

able to be flexible. Remind your client that this is the pinnacle of movement in a mediation. If your client is willing to move, *your* client will ultimately achieve more of what they want and need.

Closure:

You are present in mediation with the intent to get a deal done. Since it can only work if both sides agree, this has to occur before the process of moving towards closure can begin. Restate to your clients that what they are feeling and going through will only change if they can get this "done" and begin the healing process.

….and, if we are still at a point where it appears the parties will never agree, there is always the final option that I'll utilize, commonly known as….

The mediator's proposal:

When both sides reach a place of "stuck" a very effective method of resolution is to ask the mediator to propose what he/she believes is required by both sides, i.e., what each needs to give and get in order to reach a settlement. I've used this as a very effective tool to get all parties thinking about a resolution that is objective in nature and worthy of consideration by everyone.

Ironically, however, the mediator will most likely evaluate the total settlement within a range; thereby doing their own evaluation of the case within the concept that may be considered as….bracketing. ***FLR***

Andy Flink is a trained mediator and roster member of the 9th District (Cherokee and Forsyth County, etc.), Cobb, DeKalb and Fulton County Superior Court ADR programs. Familiar with the aspects of divorce from both a personal and professional perspective, Flink is experienced in business and divorce cases and has an understanding of the components necessary to help parties reach comprehensive terms in both financial and non-financial matters.

Flink is founder of Flink Mediation and Consulting, LLC, a full service organization specializing in business and domestic mediation and consulting services. He mediates both private and court connected cases and has specific expertise in closely held businesses. He is a registered mediator in the State of Georgia and the GODR for both civil and domestic cases.

2016 Family Law Institute - May 18-21

by Marvin L. Solomiany

On behalf of the Family Law Section of the State Bar of Georgia, we are excited to invite everyone to the 34th Annual Family Law Institute. For the first time in over 15 years, the Institute will be held in the State of Georgia to showcase the recently completed Jekyll Island Convention Center. From May 18 through May 21, 2016, (which is the week before Memorial Day Weekend) the brand new Westin Hotel will serve as the main hotel for our guests with the Jekyll Island Club Hotel, and brand new Holiday Inn Resort and Hampton Inn Resort serving as additional hotels.

The substantial financial investment made by the Georgia General Assembly and the hard work of the Jekyll Island Authority have translated into a beach venue now large enough to accommodate the size of our Institute and bring tax revenue back to Georgia.

We urge everyone to book their rooms as early as possible by contacting the hotels as follows. Each hotel is within 1.5 miles of the convention center and provides a different type of environment and associated costs which is something that our members have asked to be considered when planning future Institutes.

- Westin Hotel: https://www.starwoodmeeting.com/events/start.action?id=1505114257&key=7BF9262
- Hampton Inn & Suites, (912) 635-3733
- Jekyll Island Club Hotel, (912) 635-2600 or reservations@jekyllclub.com
- Holiday Inn Resort, (912) 602-2017

See you in Jekyll!

The opinions expressed within *The Family Law Review* are those of the authors and do not necessarily reflect the opinions of the State Bar of Georgia, the Family Law Section, the Section's executive committee or editor of *The Family Law Review*.

THE STATE BAR OF GEORGIA ANNOUNCES ITS ANNUAL

FICTION WRITING COMPETITION

DEADLINE: JANUARY 15, 2016

The editorial board of the Georgia Bar Journal is pleased to announce that it will sponsor its Annual Fiction Writing Contest in accordance with the rules set forth below. The purposes of this competition are to enhance interest in the Journal, to encourage excellence in writing by members of the Bar and to provide an innovative vehicle for the illustration of the life and work of lawyers. For further information, contact Sarah I. Coole, Director of Communications, State Bar of Georgia, 404-527-8791 or sarahc@gabar.org.

1. The competition is open to any member in good standing of the State Bar of Georgia, except current members of the Editorial Board. Authors may collaborate, but only one submission from each member will be considered.
2. Subject to the following criteria, the article may be on any fictional topic and may be in any form (humorous, anecdotal, mystery, science fiction, etc.). Among the criteria the Board will consider in judging the articles submitted are: quality of writing; creativity; degree of interest to lawyers and relevance to their life and work; extent to which the article comports with the established reputation of the Journal; and adherence to specified limitations on length and other competition requirements. The Board will not consider any article that, in the sole judgment of the Board, contains matter that is libelous or that violates accepted community standards of good taste and decency.
3. All articles submitted to the competition become the property of the State Bar of Georgia and, by submitting the article, the author warrants that all persons and events contained in the article are fictitious, that any similarity to actual persons or events is purely coincidental and that the article has not been previously published.
4. Articles should not be more than 7,500 words in length and should be submitted electronically.
5. Articles will be judged without knowledge of the author's identity. The author's name and State Bar ID number should be placed on a separate cover sheet with the name of the story.
6. All submissions must be received at State Bar headquarters in proper form prior to the close of business on a date specified by the Board. Submissions received after that date and time will not be considered. Please direct all submissions to: Sarah I. Coole, Director of Communications, by email to sarahc@gabar.org. If you do not receive confirmation that your entry has been received, please call 404-827-8791.
7. Depending on the number of submissions, the Board may elect to solicit outside assistance in reviewing the articles. The final decision, however, will be made by majority vote of the Board. Contestants will be advised of the results of the competition by letter. Honorable mentions may be announced.
8. The winning article, if any, will be published. The Board reserves the right to edit articles and to select no winner and to publish no article from among those submitted if the submissions are deemed by the Board not to be of notable quality.

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