

The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia

Spring 2011

Child Dependency Exemption – Still Better for Lower Income Taxpayers!

by Linda J. Schaeffer and Elizabeth J Garrett

Many high income taxpayers have taken notice that the 2010 Tax Relief Act which extends the elimination of the phase out of personal exemptions for individuals whose Adjusted Gross Income (AGI) exceeds certain amounts to Dec. 31, 2012. This means that family law attorneys and mediators who had previously become accustomed to allocating the dependency exemption to the lower income spouse, have begun to rethink that position under the presumption that the higher income spouse may now receive a benefit that previously had little or no tax effect. However, the lack of understanding about Alternative Minimum Tax and its effect to high income earners, as well as a loss of many tax credits to the lower income taxpayer, means this change in thinking could end up costing taxpayers thousands of dollars each year.

The IRS has determined that the custodial parent is generally entitled to take the dependency exemption for a child. The custodial parent is the parent with whom the child resides for the greater number of nights during the year.¹ If a child spends an equal number of nights with each parent, the parent with the higher income would be considered the custodial parent. The regulations also offer several points of clarification should certain issues arise:

1. If a child is temporarily absent from a parent's home, they are considered to be spending the night with the parent they would normally have been with.²
2. If someone other than the parents (i.e. grandparents) have normal custody of the child on certain nights, these are not considered in determining either parent's percentage.³
3. If a parent works at night but has the child a greater number of days, they would be considered the custodial parent.⁴
4. A night that straddles two taxable years is allocated to the taxable year the night begins.⁵

For children who have reached the age of 19, neither parent is considered as having custody. The dependency exemption may be taken by the parent who provides one-

half of the child's support if the child is a student and has not yet reached the age of 24.⁶

A noncustodial parent could take the dependency exemption if the custodial parent waives the right to the exemption. The noncustodial parent *is required* to attach a written declaration to their tax return from the custodial parent stating that he or she will not take the dependent for the taxable year. The declaration can have no conditions for the years the declaration is in effect. The IRS form to release the dependency exemption is Form 8332. A written declaration other than Form 8332 must conform to the substance of Form 8332 and must be a document executed for the sole purpose of serving as the written declaration to release the dependency exemption. **A copy of the settlement agreement or court order will no longer serve as authority to waive the dependency exemption.**⁷ Declarations signed prior to July 3, 2008 are still valid.

SEE EXEMPTION ON PAGE 10



Editor's Corner

by Randall M. Kessler and Marvin Solomiany

rkessler@kssfamilylaw.com

msolomiany@kssfamilylaw.com

www.kssfamilylaw.com



This year is shaping up very nicely for the Family Law Section. Our Family Law Institute has come together and we have over forty Judges planning to attend the seminar this year. We hope to have a "lawyer to judge" ratio of ten to one so that we may all have the opportunity to meet the Judges and have quality conversations with them not only at the seminar but at the various breaks, cocktail receptions, beach, pool, golf and tennis outings. The program will be one of substance giving us information on

new trends and new issues ranging from gay marriage to international custody to military issues in family law. Please make your plans now to attend as the rooms are going quickly.

The legislature has been active and our legislative liaison, John Collar, has been actively monitoring the bills and legislation along with the entire executive committee. Special credit is due and owing to Regina Quick who has been very involved in assisting John Collar and the executive committee in monitoring new family law legislation.

Please remember, if you have articles you wish to submit, or photos, or ideas, we invite you to submit them. Please let us know what topics you would like covered in future issues and at future seminars. This is your section.

We look forward to seeing everyone at this year's Family Law Institute from May 26 - 29, and to having a great rest of the year for our section and for each of us personally. *FLR*

If you would like to contribute to The Family Law Review, or have any ideas or suggestions for future issues, please contact Marvin L. Solomiany, co-editor at msolomiany@kssfamilylaw.com.

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 the editor of *The Family Law Review*.

Inside This Issue

CHILD DEPENDENCY EXEMPTION — STILL BETTER FOR LOWER INCOME TAXPAYERS!	1
CHAIR'S COMMENTS	3
CONFESSIONS OF A GUARDIAN AD LITEM	4
FAMILY LAW SECTION HISTORY UPDATED.....	5
DEATH AND PRENUPTIAL AGREEMENTS	6
TOP TEN E-MAIL TIPS	8
29TH ANNUAL FAMILY LAW INSTITUTE	11
A VIEW FROM NORTHEAST GEORGIA	12
CASE LAW UPDATE	16
A POSSIBLE ALTERNATIVE OR SUPPLEMENT FOR A PRENUPTIAL AGREEMENT	24
2011 LEGISLATIVE UPDATE (04/08/11)	25
2010-11 FAMILY LAW SECTION EXECUTIVE COMMITTEE.....	28

Correction:

The article "Obama Care and Family Law" that appeared in the Winter 2011 issue of *The Family Law Review* was written by Jim Holmes, not James Holmes.

Chair's Comments

by K. Paul Johnson
kpj@mccorklejohnson.com
www.mccorklejohnson.com



They say time flies when you are having fun and I can certainly say that my tenure as your chairman has flown by. As we approach this year's Family Law Institute at Amelia Island, my term in office will soon end. It has truly been an honor serving as your chairman and serving on the executive

committee of the section since 2004, back when my good friend Richard Nolen asked me to join. During my time on the executive committee, I have had the privilege of working with the finest family lawyers in this state, each of whom has shown time and again their commitment to improving the practice of family law for us all. As my time on the

committee comes to a close and I look at the new talent coming up on the executive committee, I can say without a doubt that the section is in very good hands indeed.

I look forward to seeing all of you at this year's Institute at Amelia Island Plantation. If you haven't already done so, it is time now to make your plans and reservations. Our incoming chair, Randy Kessler, has been planning a spectacular Institute for over a year. He tells me that he plans to have upwards of 40 judges in attendance. If last year's numbers are any indication, we can expect to have over 500 total attendees this year. I am also told that the Section's own band, The Specific Deviations, will again be playing at this year's seminar. In short, this year's Institute is going to be a blast! I'll see you at the beach. *FLR*

PAST FAMILY LAW SECTION CHAIRS

TINA SHADIX RODDENBERY	2009-10	JOHN C. MAYOUE	1992-93
EDWARD COLEMAN	2008-09	H. MARTIN HUDDLESTON	1991-92
KURT KEGEL	2007-08	CHRISTOPHER D. OLMSTEAD	1990-91
SHIEL EDLIN	2006-07	HON. ELIZABETH GLAZEBROOK	1989-90
STEPHEN C. STEELE	2005-06	BARRY MCGOUGH	1988-89
RICHARD M. NOLEN	2004-05	EDWARD E. BATES JR.	1987-88
THOMAS F. ALLGOOD JR.	2003-04	CARL WESTMORELAND	1986-87
EMILY S. BAIR	2002-03	LAWRENCE B. CUSTER.....	1985-86
ELIZABETH GREEN LINDSEY	2001-02	HON. JOHN E. GIRARDEAU	1984-85
ROBERT D. BOYD.....	2000-01	C. WILBUR WARNER JR.	1983-84
H. WILLIAM SAMS	1999-00	M.T. SIMMONS JR.....	1982-83
ANNE JARRETT	1998-99	KICE H. STONE	1981-82
CARL S. PEDIGO	1997-98	PAUL V. KILPATRICK JR.....	1980-81
JOSEPH T. TUGGLE	1996-97	HON. G. CONLEY INGRAM	1979-80
NANCY F. LAWLER	1995-96	BOB REINHARDT	1978-79
RICHARD W. SCHIFFMAN JR.	1994-95	JACK P. TURNER.....	1977-78
HON. MARTHA C. CHRISTIAN	1993-94		

Confessions of a Guardian Ad Litem

The GAL at Trial

by M. Debra Gold

Uniform Superior Court Rule 24.9, Subsection 7 provides that should a custody case proceed to trial, it is “expected” that the GAL will be called to testify as the Court’s witness. Under this rule, the GAL is subject to examination by the parties as well as the Court. Courts handle this in different ways. Some Courts put the GAL on the stand as the first witness while others end the custody trial with the GAL’s testimony. Either way, the GAL’s testimony and recommendations will likely have a significant impact on the outcome of your case. Your examination of the GAL can either make or break your case and serious thought should be given as to how to approach it. The below tips should be helpful in preparing for your examination of the GAL at trial and may make the difference for the outcome.

1. **Read the GAL’s report carefully.** Pursuant to USCR 24.9, the report “shall summarize the GAL’s investigation, including identifying all sources the GAL contacted or relied upon in preparing the report.” The report may reveal that the GAL left stones unturned in his or her investigation. You may find that the GAL’s logic or reasoning was flawed. It may also be possible to impeach the GAL if he or she testifies to something different than what was reported. Not being 100 percent familiar with the GAL’s report at the time of trial can be

the kiss of death to your custody case.

2. **Do your homework.** Sometimes the basics bear repeating. Familiarize yourself with *all* of the facts of your case. If you have not adequately prepared, then how can you effectively impeach the GAL?

3. **Perform adequate discovery.** Do not forget that the GAL is also subject to discovery. Upon order of the Court, the GAL’s file can be made available for the parties and counsel to review and copy pursuant to Subsection 6(c) of USCR 24.9. This can provide a treasure trove of information as the GAL’s file may include documents and other evidence which will help you gain insight into the GAL’s recommendation. If your client has the funds, it may also be advisable to depose the GAL prior to

trial in order to discover the pitfalls and strengths of the investigation and recommendations.

4. **Pick and choose your battles.** Your best battles are the strengths of your case and the weaknesses in the opposing party’s case. It can be very risqué to attempt to impeach a GAL if it is not handled with finesse. In fact, attacking the GAL can often do more harm than good. Remember, the GAL is an officer of the court and most judges appoint GALs in whom they have trust and confidence. Therefore, an unwarranted and unsupported attack on the GAL should be avoided.

Guardian Ad Litem Checklist

- Read the GAL’s report carefully.
- Do your homework.
- Perform adequate discovery.
- Pick and choose your battles.
- Focus on the GAL’s performance.
- Understand the GAL’s reasoning.
- Know your GAL.
- No personal attacks.
- DO NOT release report.

5. **Focus on the GAL's performance.** It may be possible to neutralize the GAL by showing holes in the investigation. You may be able to impeach the GAL if he or she disregarded or failed to follow up on pertinent information your client provided to him or her. This is effective, however, only if the missing information is significant enough to impact the recommendation. Harping on the small inconsequential facts will only serve to irritate the judge. The bottom line is that without a complete investigation of all relevant matters, a GAL cannot make a fully informed recommendation. It is perfectly acceptable to question such a lack of diligence.
6. **Understand the GAL's reasoning.** Is the GAL's recommendation based on flawed logic and reasoning? Did the GAL fully understand the evidence and witnesses or did he or she misconstrue the facts? Did the GAL make incorrect assumptions? Are there other interpretations that can be drawn from the evidence that the GAL did not consider? Delving into these questions may be another effective way to neutralize the GAL's recommendation. Handled skillfully, you may even hit the jackpot with this approach by putting the GAL in a position of questioning his or her own recommendation.
7. **Know your GAL.** Is the GAL qualified under USCR 24.9 Subsection 2 to serve as a GAL? Does the GAL have a good understanding and grasp of family dynamics, child development, family law and the other areas included in the GAL training pursuant to Subsection 2? In how many cases has the GAL served? While it is true that the GAL is already qualified as an expert witness on the best interests of the children pursuant to USCR 24.9, Subsection 7, some expert witnesses are better than others. This may be a good way to attack the GAL, but tread lightly. If the GAL did a thorough job and provided a well-reasoned report and recommendation, then attacking in this manner will likely not be effective.
8. **No personal attacks.** Suggesting that the GAL is influenced because of his or her own nasty custody battle is usually not a good approach. Similarly, suggesting any type of bias will not help you gain points with the judge, unless the allegation is supported by incontrovertible evidence. If there is not good solid evidence to support your position, attacking the GAL's veracity is not a good idea.
9. **DO NOT release report.** Remember to ensure that the report is not disseminated to anyone other than counsel, counsel's staff, experts and the parties. The prohibition against dissemination and the resulting sanctions contained in USCR 24.9, Subsection 6(d) apply not only to the parties, but also to the attorneys. Be sure that your clients understand this rule. Reports are filed with the Clerk under seal "in order to preserve the security, privacy and best interests of the children at issue" pursuant to Subsection 6(e) and there is a very good reason for this rule. It could be devastating to the children, or to the parties, if a wrongfully disseminated report gets into the wrong hands or into the hands of the children themselves. *FLR*



M. Debra Gold serves as a guardian ad litem and a parent coordinator throughout Georgia. She can be reached at debbie@mdgoldlaw.com.

Family Law Section History Updated

The History of the Family Law Section has been updated and is posted on the section website! Amy K. Sullivan and Jonathan J. Tuggle updated the history originally written by Elizabeth Green Lindsey to include news and accomplishments of the section in the past several years, as well as highlights from the black-tie dinner hosted by the Executive Committee in February 2010 honoring 35 years of the section and its past-chairs.

Some of the new features of the on-line history include a video of the Past-Chairs dinner; a link to online access of the Family Law Review; and lists of the many awards and accomplishments of the section. This includes being awarded Section of the Year on five occasions since 1995. Further, the section has been instrumental in aiding the many legislative and judicial accomplishments which have occurred over the last few years. To learn more about the history of our section and to recognize those who made it what is today go to:

http://www.gabar.org/sections/section_web_pages/family_law/section_history/

Death and Prenuptial Agreements

by Gwenn Dorb Holland and Lucy M. Martin

As domestic lawyers, we usually think about prenuptial agreements in the context of divorce, with one spouse waiving certain rights to which they would otherwise be entitled at divorce. In contrast, estate planning lawyers think about prenuptial agreements in the context of death.

Prenuptials in which a spouse waives his rights in the other spouse's estate at death have long been legal in Georgia.¹ This article outlines some interesting issues which arise in the context of death and prenuptials.

Waiver of Year's Support

Year's Support is a statutory right² designed to meet the immediate financial needs of the surviving spouse at the expense of the decedent's estate, or as colorfully described, "to prevent a family being turned away houseless, a widow and children and cast upon the world in their forlorn condition."³ Its purpose is to provide for the support of the surviving spouse and children until they receive that portion of the decedent's estate as they may be entitled to, either under the terms of the will or as heirs at law. Year's Support is viewed as a necessary cost of the administration of the deceased's estate, taking precedence over the debts of the decedent's estate.

The waiver of the right to Year's Support by the surviving spouse in a prenuptial agreement is enforceable. In *Hiers v. Estate of Hiers*,⁴ the wife of the decedent filed a petition for Year's Support from her husband's estate and the husband's son objected on the basis of a prenuptial agreement signed by the wife prior to the marriage. In the prenuptial she had agreed that she would only inherit \$5,000 from the estate of her spouse to be. Both parties agreed to not make any claim against the other's estate and waived and renounced all rights of inheritance each party had from the other, including any right to Year's Support. With Ms. Hiers present, Mr. Hiers executed his will and bequeathed to her the sum of \$5,000 as set out in the prenuptial agreement. When Mr. Hiers died nine years later, Ms. Hiers received the expected \$5,000 from his estate and about \$95,000 in cash from jointly-held bank accounts. The bulk of Mr. Hiers \$6 million estate went to his son. When Ms. Hiers filed for Year's Support

after his death, the trial court granted summary judgment for the decedent's son against Ms. Hiers, finding the prenuptial agreement to be enforceable. The Court of Appeals affirmed, determining that the prenuptial agreement met the requirements for a valid agreement set out in *Scherer v. Scherer*.⁵

Waiver of the Right to Inherit from the Decedent by Will or as an Heir at Law

A spouse may also waive his right in a prenuptial to inherit from the other by will or as an heir at law.

In *Sieg v. Sieg*,⁶ the Supreme Court of Georgia held that an individual's waiver of the right to inherit from the other party's estate in a prenuptial agreement was enforceable, and that third party beneficiaries had standing to enforce the terms of the prenuptial by which those rights were waived. In *Sieg*, the husband and wife executed a prenuptial agreement in which the wife waived her rights as an heir at law in her husband's estate. When the husband died without a will, the widow was appointed administrator of her husband's estate and distributed all of his assets to herself as his sole heir. Four years after she was discharged as administrator of his estate, the decedent's mother and sister brought suit against her alleging that she had improperly distributed the estate assets to herself because she had waived her rights as an heir at law in the estate in the prenuptial agreement.

The widow claimed that the mother and sister had no standing to



enforce the prenuptial agreement. Citing O.C.G.A. § 19-3-66,⁷ the Supreme Court of Georgia held that the rights of the parties had vested under the prenuptial agreement and that the mother and sister did have standing to enforce the prenuptial agreement.

Law Firm Does Not Have Duty To Provide Copy Of Prenuptial To Third Party Beneficiaries

In *Bowen v. Hunter, Maclean, Exley & Dunn*,⁸ the trial court granted summary judgment to the defendant law firm in an action by the intestate decedent's heirs who claimed the defendant law firm breached a fiduciary duty to them by not giving them a copy of the prenuptial agreement between the decedent and his widow.

The Georgia Court of Appeals affirmed the trial court, holding that the law firm did not owe a fiduciary duty to the mother and sister. The court also rejected the argument of the mother and sister that the widow failed to rescind the prenuptial agreement once she became aware that it was invalid. Noting that the only consideration received under the prenuptial was the marriage itself, the widow could not "rescind" her marriage once her husband had died. She could not "return" the marriage, which was the only benefit she had received under the prenuptial agreement.

Despite the holding of *Bowen*, it is good practice with your prenuptial clients to provide a copy of the prenuptial agreement to those who naturally care about their assets, including the people they've named as executor and those who will inherit from them.

If the participant dies before the annuity starting date, the spouse must be provided with a qualified preretirement annuity; if the participant dies after the annuity starting date, payments must be exclusively in the form of a qualified joint and survivor annuity. A spouse can waive his or her right to benefits from the plan subject to the requirements of 26 U.S.C. § 417(a) and 29 U.S.C. § 1055, which require the spouse to do so in writing, and in addition, require that an alternative beneficiary be designated. As noted, these spousal rights to a survivor annuity cannot effectively be waived in a prenuptial agreement because the putative waiving spouse is not yet a spouse and so the prenuptial agreement does not meet the statutory requirements for a valid consent.

Thus, in *Hagwood v. Newton*,⁹ the father and the estate of the deceased employee sued the deceased employee's husband, employer, and the employer's stock and savings plans seeking to enforce a premarital agreement to bar the husband from recovering spousal rights in plans conferred on husband by ERISA. The plaintiffs also asserted claims for declaratory judgment, fraud, constructive fraud, breach of contract, conversion and breach of fiduciary duty. The husband requested a declaratory judgment that he was the proper and legal beneficiary under the plans. The trial court granted summary judgment for the husband and the Fourth Circuit Court of Appeals affirmed, holding that the premarital agreement did not satisfy the requirements for the waiver of husband's survivor spouse rights in the plans under ERISA or under the terms of the plans (at the time of the waiver in the prenuptial agreement he was not yet her husband and so did not have the spousal rights conferred on him by federal law) and holding that the agreement did not satisfy the requirement, under ERISA, that the waiver include a designation of another beneficiary for survivor benefits.¹⁰

In contrast to a waiver of rights at death, a waiver of rights at divorce will generally be honored in the case of a divorce. In *Stewart v. Stewart*,¹¹ the court found that unlike survivor benefits payable after the death of the plan participant, a waiver in a prenuptial agreement of any interest in a spouse's retirement benefits upon divorce is not subject to the spousal waiver requirements of ERISA and is enforceable.¹²

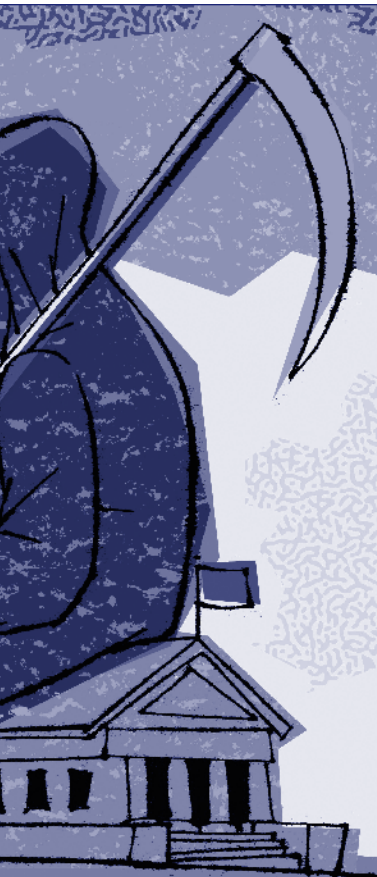
A variety of techniques have been tried to enforce the prenuptial provisions relating to the waiver of ERISA plan spousal benefits, generally without success. These include claims for: constructive trust over the benefits, suit for specific performance and breach of contract.¹³

Clearly, it is advisable to include language in the prenuptial requiring the waiving putative spouse to sign all documents necessary to waive the right to plan benefits immediately after the marriage. What else might be included in the prenuptial to maximize the potential for future enforceability, in the event the non-participant refuses to execute the necessary waiver documents after

Waiver of Retirement Benefits/ERISA Plan Survivor Benefits

A simple waiver, without more, in a prenuptial agreement of any interest in a spouse's retirement benefits upon death is generally unenforceable, because of the federal spousal waiver requirements to which many forms of retirement benefits are subject. Essentially, the problem is that the rights being waived in the prenuptial are spousal rights, and the individual waiving those rights is not yet a spouse.

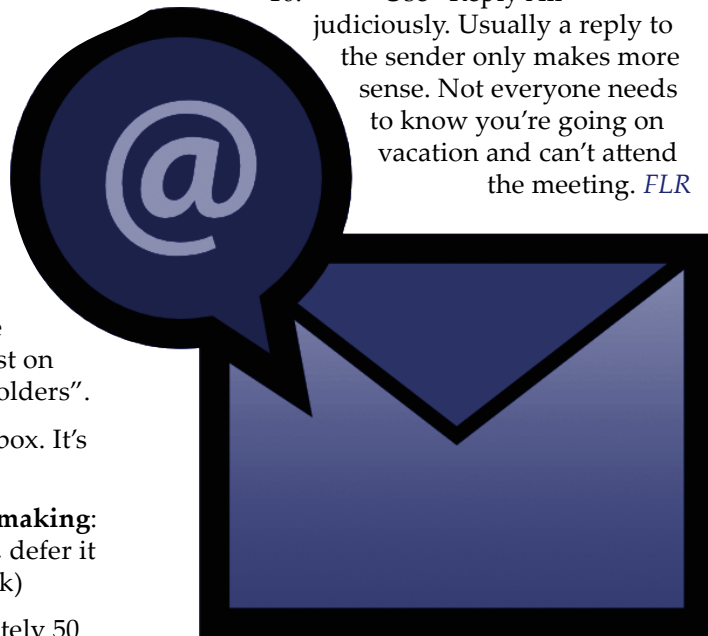
By way of background, all qualified pension plans, non-exempt profit sharing plans and most 403(b) arrangements are subject to the Retirement Equity Act qualified preretirement survivor annuity (QPSA) and qualified joint and survivor annuity (QJSA) requirements.



Top Ten E-mail Tips

by Leslie Walden

1. Schedule a block of uninterrupted time daily to process and organize e-mails.
2. Sort e-mail by sender or subject – you'll be amazed how quickly you can go through your inbox.
3. Set up specific folders so you or assistant can move e-mail to appropriate folder.
 - Examples of folders:
To Do, Waiting For (or Pending), Read & Review, Upcoming Meetings/Events, Cases, Clients, Projects.
4. Move frequently-used file folders to the top of the list on the left under "Favorite Folders".
5. Move e-mail out of the inbox. It's not a filing cabinet.
6. Use the **4D's of decision-making**: delete it, do it, delegate it, defer it (source: Microsoft Outlook)
 - *Delete it* – approximately 50 percent can be deleted; ask yourself:
 - Must I keep this?
 - Can I access this information somewhere else if I ever need it?
 - Will this information be obsolete by the time I need it?
 - Am I ever going to read it (be honest!)?
 - *Do it* – if it takes < 2 minutes.
 - *Delegate it* – 30 percent falls into the do it or delegate it category.
 - *Defer it* – 20 percent of e-mail needs to be handled by you directly. Move the e-mail into task list or calendar.
7. Move the e-mail to the file folder to the left of your inbox or another location such as your desktop, personal documents or shared files.
8. Change the e-mail subject line so it is clear what the next step is.
9. Be vigilant about sending e-mails – a face to face conversation is sometimes better, especially if it's a sensitive issue.
10. Use "Reply All" judiciously. Usually a reply to the sender only makes more sense. Not everyone needs to know you're going on vacation and can't attend the meeting. *FLR*



Leslie Walden, CPO® is a well-known professional organizer and educator who has appeared on CNN and Fox Television, as well as in The Atlanta Journal-Constitution and on radio. She organizes businesses, home offices and individuals and trains other professional organizers.



Barbara Skutch Mays holds leadership positions with the Georgia chapter of the National Association of Professional Organizers (NAPO). She is director of the Buckhead Women's Business Group where she frequently works with business owners on time management and organization.

*It's Time To Get Organized, LLC
404.303.8431
Info@ItsTimeToGetOrganized.com
www.ItsTimeToGetOrganized.com*

PRENUPTIAL FROM PAGE 9

the marriage? A provision that might be included would provide that if the non-participant receives monies from a plan in which she waived an interest in the prenuptial agreement, then that spouse would be entitled to that much less than he or she would otherwise have been entitled to under the terms of the prenuptial agreement. Alternatively, the putative spouse could agree that she will turn over the waived benefit subsequently received from the plan to the participant spouse's estate. Suggested language for the latter might be:

"[Putative spouse] hereby waives and releases any and all rights and claims he/she may have as a beneficiary of all ERISA plan funds of [the other party]. In the event that the plan participant dies prior to the removal of the [the non-plan] participant as a beneficiary to the plan participant's ERISA plans, then the non-plan participant spouse will be required to turn over all of the benefits and/or assets that he or she receives from the participant spouse's ERISA plans to the participant spouse's estate."

Prenuptial Agreement as a Contract to Make a Will

An individual's right to dispose of his or her estate at death as he pleases is highly protected. Nevertheless, a prenuptial may also serve as an enforceable contract restricting an individual's unfettered freedom to dispose of his or her estate as they choose in the future.

Thus, O.C.G.A. § 53-4-30 provides:

"A contract made on or after Jan. 1, 1998, that obligates an individual to make a will or a testamentary disposition, not to revoke a will or a testamentary disposition, or to die intestate shall be express and shall be in writing that is signed by the obligor."

Note that the will itself can be revoked, even though the prenuptial agreement remains valid and binding. In *Jones v. Jones*,¹⁴ the court stated "... he will itself could... be revoked, but... once an agreement to devise becomes fully executed... it cannot be defeated by a codicil or subsequent will."¹⁵ The court further stated, "We must keep in mind that a 'contract' to make a will and an executed 'will' are two separate and distinct instruments. They do not merge into one; each stands upon and is governed by different principles of law. For instance, a contract is binding upon the parties at the time it is executed. A will, though fully executed, is not effective or binding upon the testator until death."¹⁶

CONCLUSION

The enforceability of the terms of a prenuptial involves many practice areas: divorce, ERISA, contract, trusts and estates, and property law. The variety of law involved in drafting or challenging prenuptial agreements allows us

to be most creative in helping our clients. It is important to consider the effect that each of these areas of law may have on any prenuptial agreement that you draft or challenge. Doing so may provide an alternate means to help your client achieve his goals – whether it be guarding against potential challenges to or challenging the enforceability of a prenuptial agreement. *FLR*



Gwenn Dorb Holland is a Partner at Holland Roddenbery LLC. She practices in the areas of family law, wills, trusts and estate litigation, commercial litigation and employment disputes.



Lucy M. Martin is an associate at Holland Roddenbery LLC. She practices in the areas of family law, and wills, trusts and estate litigation.

(Endnotes)

- 1 Holmes v. Liptrot, 8 Ga. 279 (1850).
- 2 O.C.G.A. § 53-3-1(c) provides: "The surviving spouse and minor children of a testate or intestate decedent are entitled to year's support in the form of property for their support and maintenance for the period of 12 months from the date of the decedent's death."
- 3 Blassingame v. Rose, 34 Ga. 418, 421 (1866).
- 4 278 Ga.App. 242, 628 S.E.2d 653 (2006).
- 5 249 Ga. 635, 292 S.E.2d 662 (1982).
- 6 265 Ga. 384, 455 S.E.2d 830 (1995).
- 7 O.C.G.A. § 19-3-66 provides: "Marriage contracts and postnuptial settlements shall be enforced at the instance of all persons in whose favor there are limitations of the estate. Marriage articles, as defined in subsection (a) of Code Section 19-3-62, shall be executed only at the instance of the parties to the contract and the offspring of the marriage and their heirs; but, when executed at their instance, the court may execute also in favor of other persons and volunteers."
- 8 241 Ga. App. 204, 525 S.E.2d 744 (1999).
- 9 282 F.3d 285 (4th Cir. 2002).
- 10 See also Callahan v. Hutsell, Callahan & Buchino P.S.C. Revised Profit Sharing Plan, 14 F.3d 600, 1993 WL 533557 (C.A.6 (Ky.)) (agreeing with the district court that absent receipt by the plan administrator of a designation naming a non-spouse beneficiary and reflecting spousal consent, the pertinent provision of the plans say that the widow of the participant, (who had not signed a new beneficiary designation form after the marriage), was the beneficiary).
- 11 141 N.C. App. 236, 541 S.E.2d 209 (2000).
- 12 Id.
- 13 See Selected Issues in Planning for the Second Marriage, SP040 ALI-ABA 273, 293 (2009).
- 14 231 Ga. 145, 200 S.E.2d 725 (1973).
- 15 Id. at 728.
- 16 Id. at 727.

The exemption phase out has been eliminated for higher income taxpayers for tax years 2010, 2011 and 2012. However, higher income taxpayers often fall into the category of paying Alternative Minimum Tax (AMT) which limits deductions and recognizes certain income and expense items differently than regular tax. The deduction for personal exemptions is not deductible in calculating AMT, therefore the dependency exemption could be of no value to the high income earner. For example, a taxpayer making \$350,000 per year in 2010 would get a personal exemption of \$3,650 for themselves and each of their dependents. This decreases the taxpayer's taxable income and therefore, their regular tax also decreases. However, in calculating AMT liability, the exemption amounts are added back in determining taxable income. Frequently, the savings in regular tax is negated by the increase in the AMT.

In addition, the lower income parent is often eligible for both refundable and nonrefundable credits which are still subject to income phase outs and are not available unless the child is taken as a dependent. These credits include:

- 1. Dependent Care Credit.** This can only be claimed if the child is a dependent on the tax return and the taxpayer actually paid the expenses for childcare. This credit begins at 35 percent of the actual expenses paid and is gradually reduced to 20 percent for taxpayers with an AGI over \$43,000.

- 2. Child Tax Credit.** This credit of \$1,000 per child is not available to the custodial parent if the exemption is released. It is only available to the parent to whom the exemption is allowed. The credit is phased out by \$50 for each \$1,000 of AGI over \$75,000 for taxpayers filing Single or Head of Household.
- 3. College Tuition Credits.** These credits can only be claimed if the child is a dependent on the tax return. If the noncustodial parent pays the tuition and the custodial parent claims the child as a dependent, the credit can be claimed by the custodial parent.⁸ These credits are also phased out at AGI levels of \$90,000 or \$60,000 depending on the type of education credit claimed.

The chart below demonstrates the differences in taxes paid by both parents in varying situations of splitting four possible dependents. This example considers the elimination of the dependency exemption phase out, as well as tax credits accompanying the dependency exemption.

The table shows that because the father owes Alternative Minimum Tax, any reduction of regular tax due to the additional dependency exemptions is lost with the increase in AMT, making the net tax savings zero. However, because the mother has some earned income, and is responsible for paying childcare, she receives tax credits in addition to the dependency exemption which are both lost upon the reduction in dependents. Over five years, this could amount to approximately \$40,000 additional Federal

	Father - Single			Mother - HOH		
	No Dep	2 Dep	4 Dep	4 Dep	2 Dep	No Dep
Income						
Wages	350,000	350,000	350,000	24,000	24,000	24,000
Alimony	(60,000)	(60,000)	(60,000)	60,000	60,000	60,000
Adjusted Gross Income	290,000	290,000	290,000	84,000	84,000	84,000
Deductions						
Personal Exemptions	3,650	10,950	18,250	18,250	10,950	3,650
Standard or Itemized	55,706	55,366	55,026	8,400	8,400	8,400
Taxable Income	230,644	223,684	216,724	57,350	64,650	71,950
Tax						
Regular	61,229	58,932	56,636	9,191	11,016	12,841
AMT	5,110	7,407	9,703	312		
Dependent Care Credit				(960)	(960)	
Child Tax Credit				(3,550)	(1,550)	
Making Work Pay Credit				(220)	(220)	(220)
Total Federal Tax	66,339	66,339	66,339	4,773	8,286	12,621

Assumptions: Property Tax - \$12,000, Standard Deduction Taken, Mortgage Interest - \$30,000, Child Care - \$4,800, State Taxes Prepaid during year

A View From Northeast Georgia

by Regina Quick

When he took the bench on Jan. 1, 2009, Hon. Jeffrey S. Malcom brought along a great depth and breadth of trial experience. He had been an attorney with a thriving general trial practice in Hartwell for 21 years. The opening on the Northern Circuit bench was created by the retirement of Hon. Lindsay Tise. Tise's decision to step down at the end of a term meant a contested judicial election. Once Malcom expressed interest, there were no other qualifiers for the seat - a testament to both the man and the reputation he had built in the legal community.

I recently sat down with Judge Malcom as he concluded empaneling a jury in a criminal case at the Franklin County Courthouse in Carnesville to reflect on his time on the bench.

Interview with Judge Malcom

Quick: So, how long have you been on the bench now?

Malcom: This will be starting my third year. I took the bench Jan. 1, 2009, so 2011 is beginning my third year.

Quick: Now, when you were in practice, you handled domestic relations cases.

Malcom: Did a lot of them. Probably close to 50 percent of my practice from start to finish was domestic, and that was divorce, custody, and modifications. I think I mentioned to you the first civil case I tried to a jury as an attorney was a divorce case.

Quick: How that past experience translated for you onto the bench?

Malcom: Well, I think it has been very helpful because I would like to think that I understand the dilemmas that the attorneys have in representing a domestic client. To me, there was nothing more important than children and it still is the same today, and would say even more so.

Back when I was trying the cases, I was fighting for one side. Now in the job I am doing, I am responsible for those children, ultimately trying to make a decision today that affects them five, 10, 15 years or the rest of their life. Pretty tough responsibility I have found.

Quick: A lot more challenging in family law cases, I suppose, than representing one side or the other?

Malcom: Yes. All trial attorneys are fighting for their client. You realize your strengths and weaknesses, but your job is to fight for your client. The job that I now have requires me to listen to both sides and try to make the best decision I can for the children.

Quick: And what has been the biggest challenge for you in taking the bench just generally, because some people who are reading this may not know that you were an excellent trial lawyer.

Malcom: Well, I don't know about being an excellent trial lawyer. I always believed good clients and good facts made a good lawyer and I always heard "even blind hogs stumble on acorns." The biggest challenge is trying to make a decision today that will be the right decision for children for the rest of their lives.

Quick: Now, what would you say is the biggest difference in dealing with domestic cases from when you were practicing? You were practicing when the new child support guidelines came down.

Malcom: Oh yes, I started practicing in 1987, so I practiced 21 years before I took the bench. Certainly the paperwork (laughs) is a lot different when we all used to be able to do uncontested divorces with about four or five pieces of paper.

Now of course with the new guidelines, the parenting plan, the deviations that you are trying to deal and the mathematics, and of course you and I know firsthand because you were involved in a trial that involved presenting the child support issue to a jury. I don't know how many others have tried those, but that was the first one with the new system that had that had gone to trial for me.

Quick: That was in May of 2009. Have there been any since then that you have tried to a jury?

Malcom: No, not to a jury involving all the issues, I'll call it. We have had some property and alimony cases, but the custody and stuff was already worked out, but you and Mr. Fitzpatrick and Mr. Daniels were involved in that "maiden case" that I had (laughing).

Quick: We all learned together didn't we?

Malcom: We did with a late night, I believe. Didn't the jury come back about 11:30 p.m.?

Quick: There was plenty of pizza.

Malcom: It was late.

Quick: Well, could you recommend that process to litigants who could reasonably avoid trying their cases to a jury in the domestic context?

Malcom: No. If at all possible, avoid it. As you remember, we had three phase trial of sorts. Not something you have each day.

Quick: And I guess you see in your circuit...how many counties are covered in the Northern Circuit?

Malcom: We have five counties, Elbert, Franklin, Hart, Madison and Oglethorpe. I appear in each of them.

Quick: You see your share of *pro se* litigants, I suppose, in "riding the circuit"?

Malcom: Large amount and it's increased even since I have taken the bench.

Quick: How much of a challenge is that to you in what you do?

Malcom: It is a challenge because you sympathize with the folks from doing the work yourself. It is complicated, it's difficult, and that's with some form of expertise and experience in doing it.

A lot of these people, this is the first time they have ever gone through it. It is difficult for them to even know about either the acknowledgment of service, the 31 days or consent to trial, much less trying to go through the child support worksheets.

Quick: What's the answer there in these times of budget crunches? On the one hand, the General Assembly's cutting funding and on the other hand, the American Bar Association is talking about the need for a "Civil Gideon" to provide legal counsel for these folks who can't afford attorneys. What do you think our challenges are as we look at that issue?

Malcom: Well, it is definitely the challenge - I don't have the solution. I don't have an answer that I could give you right now. I know, "back in the day" we would say, when I was coming up and I am sure you have experienced it too, we would be in the courtroom. If there was a *pro se* litigant, I had many judges say "Mr. Malcom, would you come up here please - here is the file. You are not representing this person. I simply want you to look over the file and inform the Court whether it's in order."

I think that was the way the Court wasn't in a position of giving legal advice or trying to basically do the work for the folks and yet it kind of pointed them in the right direction.

Quick: I don't see that much any more.

Malcom: I don't. I don't either.

Quick: You don't do it?

Malcom: No.

Quick: You don't draft people from the audience?

Malcom: No, I haven't. (Laughing) I don't know if that's just my scars from coming up or I just don't do it. But that was one way I guess and that was when it was really the exception rather than the rule to see a *pro se* person.

Quick: But I could never tell if it was a compliment or a punishment when Judge Grant would point me out when I was on the Motion Calendar up here in the Northern Circuit.

Malcom: Well, you know it was just one of those things. I am sure you did like I did, and you gladly accepted the role. (Laughing)

Quick: (Laughing) No one ever said no.

Malcom: No, nobody said no. I'm not saying that anybody would today if you asked them to do it, but that is just so much more complicated with the new guidelines which I think the average person just struggles with.

Quick: How do you handle the paperwork involved in the *pro se* and assisting in decrees with your staff constraints?

Malcom: Well, our circuit has one law clerk for three judges. We have the state funded law clerk. We don't have anyone else. Generally, the clerk is tied up or with a particular judge who is doing a jury trial, usually criminal trials, that type of thing. So to get back to it, you come in and the folks walk up and they hand you the papers. I just go through them. I know that takes up time from private attorneys who are out there and that costs their client. I



feel like that is part of what I am supposed to do, so I will go through it and look, and go down through in my mind what is supposed to be there. You know, do they have the Complaint? Has it been more than 31 days.... the stuff that you go through. Then, you try to look and see and if they don't have what they are supposed to, be it parenting plan, be it worksheets or schedule E or the stuff - I will tell them where ever they got the forms that "here's what is missing" - "here is what you've got to have to be able to complete the divorce". I don't do it for them on the bench, because generally in our circuit, sometimes we might have 30 cases and a wide variety of things on any given motion day, but I will at least tell them here is what I am looking for, here's what you've got to have. The website where you found the documents should have it on it, it should have a calculator on the software. If you can do it, that's great; if you can't, then you may need some legal advice.

Quick: But, is there really a place to send pro se litigants for ease of reference in getting that advice and getting that paperwork done in the Northern Circuit?

Malcom: No. No, we don't have a website with the forms and information. I think some of the metro circuits do and a lot of times we will see forms where they have "whited-out" or "X-ed" out Fulton County and written in one of our counties. I think they have a website there or they may just go on-line and look for it. It's just a thing that I think is going to be more and more of an issue simply because you have a down economy. You've got a lot of folks, if they are working, they have limited funds; if they are not working, they have no funds, and they are trying to do it on their own.

Quick: Are you seeing more circumstances where you ordering people to remain in the same home or within the same curtilage at least, because of economic circumstances?

Malcom: Well, not really from that, because I think one of your first concerns, is that is one of the most stressful times. I used to tell clients to me it was akin to a terminal illness of the factors that we hear about dealing with. You have hurt, anger, depression, denial and finally you have acceptance in some form or fashion. I used to tell them everybody is not going through it at the same time - you may be hurt and I may be angry; you may be depressed and I may be accepting it or whatever. I think again another responsibility in this job, you have to be aware that you don't want to put people in a situation where stress, anger, something flares up and somebody gets hurt. So, there are occasions that work, but not a large majority. I have, I think what we used to call it, several times I have done what's called "bird nesting". I have given the children "custody" of the house and told Mom and Dad they can alternate in and out.

Quick: And that's probably not an arrangement that folks would anticipate seeing in a more rural area like the Northern Circuit in that judges here would be on the "cutting edge" of family law in that way. Has it worked out?

Malcom: Well, you know the times that I have done it, I think it has and the reason, I am remembering back on

a few of the cases, everybody testified at the temporary hearing that the main concern was the child. The main concern was not to inconvenience the child. Each party in this particular case I am thinking about had family and relatives close by. So in my mind, I thought that well, if you want to make it at least convenient for the child, the child doesn't have to pack. Child can live at home and y'all can pack a bag and go each week. I haven't heard anything bad from it - yet. (Laughs)

Quick: What has been the most pleasant surprise since taking the bench?

Malcom: The pleasant surprise, and I won't really say a surprise, the pleasant aspect is that everybody has been very courteous. Everybody has been very patient and understanding, that as the new person on the job, I don't have that 10 and 15 years' worth of experience, of judicial experience. That I was learning and still am learning as I go. I have just been very thankful that everybody's just been patient and again very courteous and professional just like they were when we tried the cases. That has been fun.

Quick: And the flip side of that is, what's been your most unpleasant surprise? What has surprised you most in a bad way from the bench?

Malcom: Thankfully, not a whole lot. Sometimes people are not on time. Sometimes people are not quite as prepared as you would hope. Finally, the job isolates you more than when practicing as a trial attorney.

Quick: What advice would you have for family lawyers coming into your court - if you had to tell them the three most important things to preparing for a hearing with Hon. Jeff Malcom, what would they be - besides that they better be there on time even if they're driving from Atlanta?

Malcom: (Laughing) We'll just say some of those are a given, and that would be certainly, if you are there on time, then I would say be prepared. I mean know the case, know what the issues are. Most of the time, you might have a big pot full of issues, like any divorce has, but the temporary hearing may only involve two or three.

If it only involves two or three, just get to those two or three. Advise us that either you can take care of the rest of it or stipulate or put into the record "here's what we've agreed upon". But if you get to the issues and tell me the important part of it - I am trying to think of an example that just doesn't come off the top of my head, but you know if the issue is about one parent maybe conduct, drinking or drugs, then I am not really concerned about Adid they leave their socks on the floor when they were living together?".....I mean get to the important thing that's going to affect the family, especially if it is about children.

Have your witnesses prepared. I think that is something that I see that may be lacking. That can greatly affect your case, it's not that I hold that against anybody, but if I am not getting the information I need, then I am not going to be able to make the best decision I can.

So, trial preparation is not just having exhibit stickers on paper. It's taking time to talk with your clients and

your witnesses so they are familiar with the court process - here's kind of what's going to happen. Go over questions with them, that we have all done. You know you go over it with them so that when they get in there, they are able to properly tell me and communicate what their needs are and what their concerns are.

Quick: I suppose something basic like being clear on what it is that you are asking the judge to do?

Malcom: That pretty much hits the nail on the head.

Quick: And to that end, do you prefer attorneys have proposed Orders when they come in temporary hearings to outline the issues?

Malcom: Well, that is fine, because generally what I do on either a temporary or a final, I will usually ask, if it is something I am going to take under advisement, I will usually ask both sides to prepare a proposed Order, cite the law, give me the factual basis type thing. So, to go ahead and have it ahead of time, if you know what the issues are, that's fine. But I usually like to when we get through if I take it under advisement, will give attorneys sufficient time to go back because again, trials are not math - two and two don't always come out to four in a trial. We have all seen it, so sometimes if you had it prepared ahead of time, it might be something that either came out different or you wanted to add to it, which I would certainly let anybody do, but it is always helpful to know what the issues are and what you looking for.

Quick: And I suppose to get the lawyer prepared it might be helpful to have done the...

Malcom: That outline does help. (Laughing)

Quick: Have you developed a preference or a practice as to utilization of *Guardians ad Litem* in contested custody cases?

Malcom: As far as a practice or a general rule of what I do, no. There have been occasions where I have simply appointed a GAL on my own, but most of the time I feel like the parents, even if they are at odds about other issues, they know the child better themselves.

Generally, I look for the attorneys or the parties through their attorneys to say I think this would be helpful, I think this would be something that would help us resolve the case one way or the other. So, I really look to take that cue from the lawyers. I don't do that on a routine basis. I would rather see how it goes.

Quick: Are there any issues that you see on the horizon that are of great importance or great concern to family lawyers or trial lawyers in general?

Malcom: Well, I think the...just to me at the time I practiced, being a trial attorney and trying a lot of different, not just domestic cases, but other cases, I just believe in that fundamental right of being able to go into the courtroom if you can not resolve your dispute, more so than having it arbitrated or mandated somehow in some other form or fashion. Protecting that right would be my number one concern. I just believe that's something that lawyers who

are in the courtroom every day prioritize: protecting the individual's right to be able to come into a courtroom and be heard.

Quick: And do you have concerns about the new Rules of Evidence?

Malcom: Well,(laughs) I guess any change feels like it could be a little different. I've looked, obviously we have all had Federal Rules. But I think I only handled one case in federal court in 21 years. I did not practice in federal court, so just the initial impact of now it is going to be the Federal Rules. I think that causes raised eyebrows. But there are a lot of similarities - it's not really like apples and oranges. It's just a few areas that it will change significantly and we'll all adapt. We'll all be alright.

Quick: I suppose if we all survived the new child support guidelines, we can survive the new rules of evidence.

Malcom: (laughing) I would think, I would hope so. I think that it's going to be okay.

Quick: Any last words? I know when you were a practitioner, you attended the Family Law Institute with us on a regular basis. Any last remarks for family lawyers?

Malcom: Well, I can certainly appreciate the difficult job that family law practitioners have. I don't think there is any other area of the law that you deal with so much emotion because the stakes cannot be higher than when you are dealing with someone's child. So I guess my parting words would be - I can certainly understand the stress. I was there. Manage it well.

Quick: Thank you Judge. I appreciate it.

Malcom: You're welcome. *FLR*



Regina M. Quick practices family law in Athens. She is a member of the Executive Committee of the State Bar of Georgia Family Law Section and founding member and former Chair of the Family Law Section of the Western Circuit Bar Association. In 2008, she served the Georgia Child Support Commission as a member of both the Low Income Deviation Study Committee and the Electronic Worksheet Task Force and may be reached at rmqpc@mindspring.com.

Hon. Jeffery S. Malcom serves Elbert, Franklin, Hart, Madison and Oglethorpe Counties in the Northern Judicial Circuit. He was born and raised in Oconee County and is a graduate of Oconee County High School. According to his classmates, he performed pseudo-legal work throughout his life, as skillful negotiation skills frequently inured to the benefit of friends. As an employee of Southern Bell for a short period of time following graduation from college, he served as a union steward. In that capacity, he prevailed on a significant grievance proceeding representing many co-workers. With great encouragement and respect from his peers, friends and family, a legal career was born. Malcolm has been married to Christy, a pharmacist, for 27 years. They are the proud parents of three sons, Ryan, age 23, Robert, age 19, and Alex, who will soon turn 16.

Case Law Update

by Vic Valmus

CHILD SUPPORT

Simmon, v. Simmons, **S10F1818** (Feb. 28, 2011)

The wife filed for divorce after 16 years of marriage. The parties had one child, and after a bench trial, the trial court entered a final judgment and decree of divorce where it found, inter alia, that the husband was to pay monthly child support of \$1,137, maintain \$150,000 in life insurance on his life for the benefit of the minor child, and establish a trust in which to place the proceeds. The husband appeals and the Supreme Court affirms.

The husband contends that the trial court erred in calculating his child support by including his K-1 income in his gross income. The evidence showed that the husband was employed by and owns approximately 23 percent of a S-Corporation company and his mother is the other shareholder. The proportionate share of corporate income is reported on the IRS Schedule K-1. The husband argues that the K-1 income should not be considered in calculating the gross income for child support purposes because it is merely a bookkeeping entry and does not represent income that he actually receives. However, this argument has already been decided in *Applying v. Tatum* and the court knows that other amounts not actually received i.e. payroll taxes are included in gross income. The husband also claims that the court was unreasonable to use an average of his K-1 income over the past three years rather than the average calculated over a long period of time. However, the statutory guidelines provide only the income from a closely held corporation should be carefully reviewed and therefore there was no abuse of discretion.

Husband also claims that the trial court erred in calculating child support by improperly including certain employment benefits in his gross income. The trial court found the husband's gross monthly income to be \$10,869.40 which is made up of \$5,782.78 in wages, \$2,316.92 in K-1 income and \$2,769.70 in fringe benefits. Fringe benefits included the company's payment of \$1,200 a month on the loan for the company-owned truck used by the husband and its coverage of the vehicle expenses including gas, tags, insurance and repairs, the company's payment of the husband's cell phone, the husband's company issued credit cards including meals and social

activities. Because these benefits significantly reduce the personal living expenses, they are properly considered fringe benefits and included in gross income.

The husband also argues that the trial court erred in including in his gross income the payments for his life insurance and his medical insurance, its contributions to his 401(k) and \$11,078 loaned to him for the payment of taxes on his K-1 income. Employer paid standard benefits such as health insurance premiums, contributions to retirement plans are not included in fringe benefits. However, the trial court's order references these benefits separately from the fringe benefits and the husband has failed to show that these amounts are encompassed in his monthly gross income total.

The husband also argues that the trial court erred by requiring the husband to maintain life insurance on his life in the amount of \$150,000 with the sole beneficiary being a trust for the benefit of the minor child and the wife being named as trustee and that the husband is required to maintain life insurance in an amount that exceeds his cumulative child support obligation. The court may order either parent or both parents to obtain and maintain life insurance policies. O.C.G.A. § 19-6-34(a) does not limit the value of any such insurance to future child support obligations of the parent. In addition, there is no error in ordering the creation of a trust for life insurance proceeds. The husband additionally argues that the court failed to consider the cost of life insurance in calculating the child support obligation. The child support guidelines provide that the amount of premium for such life insurance *may be* considered as a deviation to the presumptive amount of child support. Therefore, the trial court did not abuse its discretion by declining to consider a deviation here.

CHILD SUPPORT/MODIFICATION

Stowell v. Huguenard, **S10A1700** (Feb. 28, 2011)

The parties were divorced in 2005. After experiencing a substantial change in employment, the father filed a motion to modify child support and alimony in August 2008. After the bench trial, the trial court entered an order modifying the 2005 divorce decree by reducing the father's child support obligation to \$981.25 per month plus an

annual payment of 25 percent of any gross commission or other regular income received above his \$3,500 monthly base salary. The father appeals and the Court of Appeals reverses.

Although the presumptive amount of child support is rebuttable, deviations subtracted from or added to the presumptive amount of child support must be supported by the required findings of fact and application of the best interests of the child standard and shall be entered on the child support schedule E deviations. Once the basic child support obligation is determined, the court must calculate each parents pro rata percentage of this amount to determine each parents pro rata share of the basic child support obligation. In the instant case, the trial court attached required child support worksheets to the modification order. The worksheets contained no reference to the trial courts requirement that the father pay 25 percent of any income over his base salary of \$3,500 every month and there were no deviations to the presumptive amount of child support included in the worksheets.

It is undisputed that the trial court did not articulate the required written and special interrogatories and findings and made no provision in Schedule E for the deviation. Instead, the court included a provision in the final judgment requiring an additional amount of child support. The courts are no longer entitled to do this under the revised guidelines. Therefore, the court was without authority to make a separate child support award outside the parameters of the child support worksheets. In effect, the trial court, by including the additional child support provision in its modification order, circumvented the guidelines' requirement that a court may only deviate from the presumptive amount of child support after making the required necessary findings of fact.

For example, under the trial courts modification order, if the father earns \$3,000 per month more than his base salary of \$3,500, then the father's child support amount will exceed the presumptive amount of child support required by the guidelines and will thus be a deviation without any specific findings. In addition, by applying the trial court's percentage, it is likely that the father will have a different child support obligation every year which flies in the face of the requirements of the presumptive child support amount which consists of a sum certain which may only be varied if the trial court specifically finds deviations or it is support by written findings of facts. Chief Justice Hunstein dissents.

CHILD SUPPORT

Draughn v. Draughn, S10A1599, S10A1600 (March 7, 2011)

The father filed a declaratory judgment regarding the termination of his child support obligation with his child that has turned 18 years of age. The mother filed a petition for contempt alleging the father's non payment of child support after the child turned 18 years of age. The trial court entered an order terminating the father's child support obligation and affirmed part of the mother's contempt. The mother appealed and the Supreme Court reverses.

The parties settlement agreement which required the father to pay child support stated that the monthly child support would continue until the child reached 18 years of age provided that if the child becomes 18 years old while enrolled and attending secondary school on a full time basis, then the child support shall continue until the child has graduated from secondary school or reaches the age of 20, whichever comes first. The child turned 18 on April 21, 2009. The father claimed that the child was not actually attending school following his 18th birthday. In February of 2009, the child had stopped attending private school in which he was enrolled in and with the agreement of the private school, had enrolled in an online high school program with the assurance that he would graduate as a student of the private school upon completion of the online course work. However, the child did not complete the course work and did not graduate from the private high school.

The trial court found that online classes satisfy the requirement of "attend" as per the agreed upon language in the child support modification clause. However, the trial court did not enter a judgment based on that finding. Instead, the trial court went on to assume, for the sake of argument, that the virtual attendance on the online class could satisfy the prerequisite that the child be attending school and found that the child failed to attend school on a full-time basis after June 9, 2009, and therefore, the mother failed to carry her burden of presenting a possible defense for the child's failure to attend school full time after June 9. As a result, the trial court found that the child abandoned his status as a full time student enrolled in and attending a secondary school on June 9. Based on these findings, the trial court terminated the father's child support obligation on July 1 and found him in contempt for his failure to pay child support for May and June of 2009.

Even though the trial judge did not base the ruling upon the online course, the Supreme Court concludes that once a child enrolls in approved online courses in an effort to graduate from secondary school, his online attendance constitutes attending school for the purposes of extending child support beyond the child's attainment of the age of majority.

The trial courts termination of child support as of July 1 was based upon the child's non-attendance at school from June 9 through July 31. However, the parties' agreement incorporated into the modification order did not require the child's "continued" attendance in school throughout the summer months, but required only his "full time" attendance in school. The Supreme Court considers a full time student as one that has been in continuous attendance throughout the normal school year, and therefore, full time student status did not entail his attendance in summer school during the summer months of a normal school year. Therefore, the trial court erred when it terminated the father's child support obligation on the grounds that the child was not enrolled in and attending school on a full time basis between June 9, 2009, and August of 2009.

CONTEMPT

Hunter v. Hunter, **S101792** (March 25, 2011)

The parties were married in July of 1995 and the wife filed for divorce in 2006. Through the pendency of this litigation, the wife took out a \$250,000 line of credit in violation of the order entered. In June of 2007, the parties mutually agreed to dismiss the case and attempted to reconcile. The parties were unable to reconcile and the wife filed an action for separate maintenance in February of 2008 and the husband counterclaimed for divorce. A bench trial was held in November of 2009 entering an order requiring the wife to pay \$76,000 into the registry of the court the money that she had testified was remaining from the \$250,000 line of credit that she took out of the parties' marital residence in violation of the 2006 divorce action. The wife filed a motion for new trial and the husband filed a motion for contempt for the wife failing to pay the full amount of the money into the court registry. The court denied the wife's motion for new trial and held her in contempt of the November 2009 final order. The wife appeals and the Supreme Court affirms.

The wife appeals, among other things, that the trial court erred in ordering her to pay the \$76,000 balance on the line of credit into the court registry arguing that she had no notice that such order would be issued and that because the order prohibiting the line of credit was part of the 2006 divorce action, it could not form the basis of the order in the 2007 action. The wife cannot claim that she lacked notice. At the conclusion of the trial, the trial court informed the parties that it was contemplating such an order and the wife voiced no objection. Likewise, the wife could hardly be surprised by the court's effort to protect the marital assets because the primary issue at trial was the division of the parties' property and much of the trial was consumed with evidence regarding the \$250,000 line of credit and regarding how the wife obtained it, how she spent the proceeds and how much remained.

Even if it was error for the court to refer to the order in the prior divorce action, the ruling must be affirmed. In a divorce action, the court may make probative or mandatory orders with or without notice or bond and upon such terms and conditions as the court may deem just. In the instant case, the court heard evidence that the wife had been dissipating a significant marital asset without notice to the husband, and therefore, it was well within the court's discretion to issue an order preserving the asset for distribution between the parties.

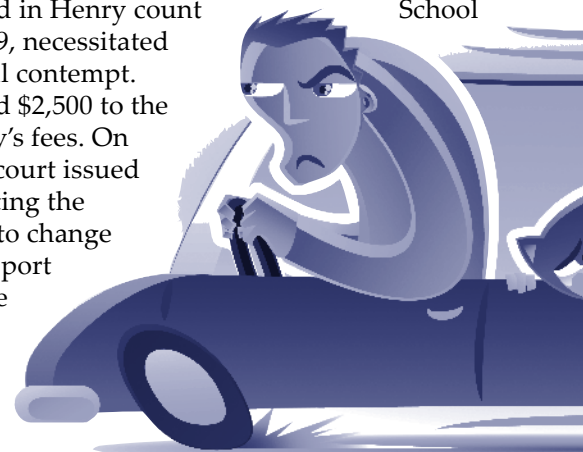
The wife also contends the trial court erred by holding her in contempt because the evidence shows that although she only paid \$68,000 of the \$76,000 into the registry of the court, she did not have the ability to pay the remaining \$8,000. However, the trial court has wide discretion to determine if a party is in contempt of its order and exercise of that discretion will not be reversed unless grossly abused. Although the wife testified that she did not have the ability to pay the remaining \$8,000, the trial court found that she did.

CUSTODY/VENUE

Roberts v. Kinsey, **A10A2122**, **A10A2123** (March 23, 2011)

The parties were divorced on July 25, 2008, and a handwritten memorandum of understanding of the parties which agreed to joint legal and physical custody of their 5 year old son was incorporated into the Final Judgment and Decree. The agreement provided that the father shall enroll the child in the Henry County Georgia School District during the school year of 2008 –09 and thereafter. It also provided that any change or relocation by the husband should be agreed upon by the parties, and if not, will be circumstance to trigger reevaluation of custody by the court. On Oct. 1, 2008, the mother filed a motion for contempt against the father in the Henry County Superior Court alleging that the father was a resident of Maryland and had taken the child to Maryland instead of enrolling him in the Henry County School System and was refusing to return their son to Georgia. On Dec. 2, 2008, the mother filed a motion for emergency ex parte order in the same action and on the same day, the court awarded her temporary sole legal and physical custody of the child and ordered the child to be immediately returned to Georgia. On Dec. 11, 2010, the father moved for an emergency hearing to set aside the emergency ex parte order arguing that he was a member of the United States Air Force and had recently been reassigned to Frederick County Maryland.

On Jan. 7, 2011, the mother filed a separate petition for change of custody in Henry County Superior Court and asserted that the father's conduct in absconding with the child and the father's failure to enroll the child in Henry County Schools created a substantial change in circumstance necessitating a change of custody. The father filed an answer to the petition to change custody on Feb. 3, 2009, and did not assert a venue defense. On June 5, 2009, the father filed a motion to dismiss the petition to change custody in which he inserted improper venue for the first time. The hearing was held on July 8, 2009, and the trial court denied the father's motion to dismiss because he waived the venue issue. Later in July of 2009, the court conducted a separate evidentiary hearing on the motion for contempt and petition to change custody. On Oct. 12, 2009, the court issued a detailed written order on the mother's motion for contempt and the court concluded that the defendant having admitted that he did not enroll the child in Henry county School System for 2008-09, necessitated a finding of willful contempt. The court awarded \$2,500 to the mother in attorney's fees. On Oct. 19, 2009, the court issued a final order granting the mother's petition to change custody, child support and visitation. The father appeals and the Court of Appeals affirms.



The father appeals, among other things, that the trial court erred by relying on a facially invalid self-executing custody provision in the parties' agreement citing *Scott v. Scott*. However, the agreement did not include a self-executing custody provision. Instead, it provided for reevaluation of custody by the court in the event the father moved outside of Henry County. This language provides for precisely the type of judicial scrutiny advocated by the Supreme Court in *Scott*.

The father also argues that the agreement effectively restricted him from establishing residence anywhere other than Henry County and constituted an unlawful attempt to retain jurisdiction over the child. However, the agreement provided only that judicial reevaluation of custody would be triggered if the father moved. The outcome of any reevaluation does not constitute an unlawful attempt by the court to retain jurisdiction.

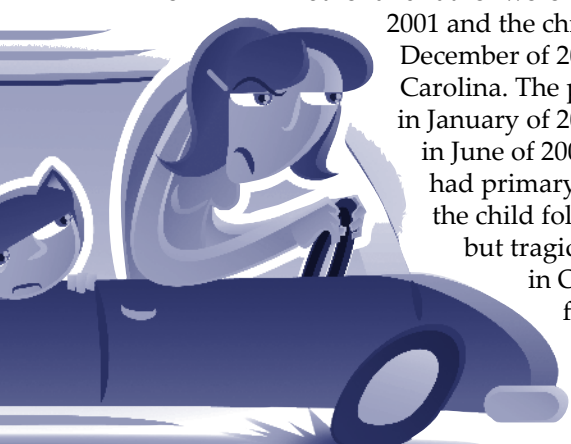
The father also asserts that the trial court erred by denying his motion to dismiss the petition to change custody based upon improper venue and by issuing a final order in a case with improper venue. This court cannot consider these claims because the father failed to raise the issue in his answer or by motion filed at or before the time he filed his answer.

The father also argues that the court erred by failing to conduct an appropriate best interest of the child analysis. According to the father, the trial court concluded that the father's military assignment prevents him from providing a stable home environment for the child. The court found the father was an active member of the United States Military and his current military assignment makes the July 25, 2009, court order untenable for the minor child and, therefore, the previous custody order is not workable after the father's transfer to Maryland but did not link the father's military service to an unstable home environment. The trial record contained ample evidence for which the trial court could have determined that the father could not provide a stable home. Moreover, the trial court's order demonstrates that it made its custody determination based upon the best interests of the child.

GRANDPARENT VISITATION/SUMMARY JUDGMENT

Lightfoot v. Hollins et al., A10A1923 (Jan. 26, 2011)

The mother and father were married in 2001 and the child was born in December of 2002 in North Carolina. The parents separated in January of 2003 and divorced in June of 2004. The mother had primary custody of the child following divorce but tragically, she died in October of 2004 following a long battle with cancer. The father obtained



custody of the child at that time. In September of 2006, the father remarried and his wife adopted the child in North Carolina. The parties now live in Cobb County as of the date of this opinion. The maternal grandparents currently live in Maryland. In November of 2009, the grandparents petitioned the court for visitation privileges and averred that the daughter and the child lived with them on a daily basis for the first 22 months of the child's life, and since their daughter's death, the father has only allowed the grandparents visitation with the child twice in 2005. The grandparents also averred that the father thwarted their attempts to have contact with the child. The father filed a motion for summary judgment arguing that because his current wife had legally adopted the child, the grandparents rights to the child had been extinguished by operation of law and because the grandparents had not seen the child since August of 2005 or had any contact, there are no facts or circumstances that can be alleged in the face of this admitted non-relationship that would sufficiently satisfy the criteria necessary to be successful with the petition. The husband's current wife averred that the child does not have any memories of the maternal grandparents and does not know who they are.

In January of 2010, the grandparents moved for the appointment of a guardian ad litem and at the hearing on the motion for summary judgment, the grandparents invoked O.C.G.A. § 9-11-56(f) which authorized the court to refuse to grant summary judgment if the party opposing the motion shows that he or she is unable to present facts essential to justify opposition to the motion and they encourage the court to appoint a guardian ad litem to develop the facts of the case. In February of 2010, the trial court held that O.C.G.A. § 19-7-3 provides the basis for the grandparents claims despite the adoption. The father did not contest this finding. The court held that lack of contact between the grandparents and the child over 4 years prior to the petition was not sufficient, standing alone, to resolve all of the facts relevant to the petition. The court appointed a guardian ad litem for the purpose of representing the best interests of the child. The father appeals the denial of summary judgment and the Court of Appeals affirms.

The father contends that the trial court erred in denying his summary judgment because the grandparents failed to produce clear and convincing evidence that the health or welfare of the child would be harmed absent their visitation. He also contends that the lack of contact for over 4 years was sufficient as a matter of law to resolve the issues before the court. Pursuant to O.C.G.A. § 19-8-19, it is clear that the grandparents' rights are not affected by an adoption by a step parent. In addition, the grandparents' visitation statute provides that a court may grant a grandparent reasonable visitation rights only when the court finds that the health and welfare of the child would be harmed unless such visitation is granted and the best interests of the child would be served by such visitation. It is irrelevant to the constitutional matter that in many instances that it may be better or desirable for a child to maintain contact with the grandparents or its an additional benefit for the child. These factors should not factor into

the court's consideration and the affect on the grandparents themselves of separation from the child is irrelevant.

In this case, the trial court denied the motion for summary judgment and simultaneously appointed a guardian ad litem. Although the trial court did not state that it was operating under O.C.G.A. § 9-11-56(f), in its order, it is apparent from the proceedings that the court chose to allow the case to go forward under that code section as it had discretion to do so. There was some evidence that the father had thwarted attempts by the grandparents to visit with the child and thus a lack of relationship between the grandparents and the child might not be the fault of the grandparents. Likewise, the trial court had discretion to deny the motion for summary judgment and allow the guardian to investigate the facts.

INDISPENSABLE PARTIES

Huling, et al vs. Huling, S10F 1591 (March 7, 2011)

The husband filed for divorce from the wife after 23 years of marriage. The wife moved to join as indispensable parties the husband's father and sister along with Huling Enterprises, Inc. and Laura Island Food Mart, Inc. alleging that marital property had been transferred to these parties in an attempt to defraud the wife of her claim to equitable division of such assets. A jury trial was held and at the charging conference, a lengthy discussion took place regarding the format and content of the verdict form. The jury returned a verdict finding that the husband and third party plaintiffs had conspired to defraud the wife and awarded her a total of \$490,750 as equitable division of assets, \$500 in damages for fraud, and \$23,750 in punitive damages. The trial court incorporated the verdict into its final judgment and decree of divorce and ordered the awards to be entered jointly and severally against the husband and third party plaintiffs. Plaintiff filed for new trial or judgment notwithstanding the verdict and those motions were denied. The plaintiffs appealed and the Supreme Court affirms.

The plaintiffs (third party plaintiffs) contend a judgment against a third party plaintiff cannot stand because, *inter alia*, an equitable division claim cannot be brought against third parties to a marriage. Although a third party may be joined to a divorce action for the limited purpose of determining relative rights to marital property, a money judgment against a third party cannot be entered in such circumstances. However, any error in the judgment against third party plaintiffs was induced by the appellants. At the charging conference, counsel for the husband requested the proposed verdict form prepared by the wife's counsel be simplified, stating that they are seeking equitable division and that is all. These are all the parties in one boat, so why can't a verdict form just say, as an equitable division of property, wife is awarded blank dollars or blank percentage in blank corporation. When counsel for the wife expressed concern that the husband's claim that he did not have any of the assets at issue and that the jury could only give the wife a judgment against the husband, the trial court responded that the judgment is going to be against all three

plaintiffs. Counsel for the husband immediately interjected, "it's joint and severally." They stand together, all the parties. At the close of the charge conference, the trial court asked counsel for the third party plaintiffs who had not contributed to the discussion whether he agreed; counsel stated that he did. Because the appellants induced and expressly acquiesced in the allegedly erroneous judgment, they will not be heard to complain here. A party cannot induce error then benefit from it.

NEW TRIAL

Tremble v. Tremble, S10F1810, S10F1811 (February 28, 2011)

The wife filed for divorce on May 12, 2006. A jury trial was held on July 17, 2009, and the court entered a final judgment and decree of total divorce reflecting the jury's award. After the trial court's term expired, the trial court then entered another final judgment and decree of divorce on Sept. 14, 2009, that was on its face, identical to the previous order. The husband filed a motion for new trial challenging the substance of the trial court's Sept. 14, 2009, final decree and the wife filed a motion to set aside the September 14, 2009 final judgment arguing that the trial court did not have jurisdiction to enter this order. The trial court denied both motions in an order dated Jan. 26, 2011. Both parties appeal, with the husband contending that the trial court erred in denying his motion for new trial and the wife contending that the trial court erred in denying her motion to set aside the Sept. 14 final decree after the term of court. The husband's appeal is affirmed and the wife's appeal is reversed.

Following the May jury trial, the trial court entered an unsigned final judgment and decree of total divorce on June 18, 2009. On July 10, 2009, the husband's counsel attempted to file a motion for new trial to challenge this unsigned order, however, because the judge did not sign it, the clerk did not stamp "filed" the motion. On July 17, 2009, the trial court issued a signed final judgment and decree reflecting the jury's award and incorporating a QDRO that effectuated the award of a portion of the husband's 401(k) account to the wife. By the affidavits, the deputy clerk of the superior court stated that the husband had attempted to file the response to the unsigned Order and it was inadvertently never filed, stamped and made a part of the official court record, but should have been, but no motion for new trial was filed following the entry of the July 17, 2009, final decree. On Sept. 14, 2009, the trial court entered another final judgment and decree of divorce that was identical to the July 17 order, but did not have the QDRO attached to it. The trial court stated that the Sept. 14, 2009, was made pursuant to O.C.G.A § 9-11-60 (g) which provides for the correction of clerical mistakes and orders even outside the term of court within which the original order was issued.

The judge's power to revise, correct, revoke, modify or vacate judgment does not extend beyond the same term of court unless a motion to modify or vacate, etc was filed within the same term of court. Here, there was no motion filed to modify or vacate the July 17, 2009, Order

in the same term of court. However, O.C.G.A § 9-11-60 (g) states clerical mistakes in judgments, orders or other parts of the record and errors therein arising by oversight or omissions may be corrected by the court at any time on its own initiative or on motion of any party and after such notice, if any, as to the court orders. Here, the husband claims that the clerk committed a clerical mistake by failing to stamp "file" the premature motion for new trial that he had attempted to file 7 days before the trial court issued its July 17, 2009, final decree. Therefore, the trial court was authorized to correct the clerical mistake by issuing the Sept. 14, 2009, order that gave him an opportunity to file a motion for new trial. Here, a motion for new trial that is filed prior to the entry of a judgment on the verdict is premature and invalid and no amendment can be filed to such a void motion. Even if the clerk made a clerical mistake by failing to later stamp and file the husband's premature motion for new trial as a response to the trial court's July 17 order, such a clerical mistake could not be corrected by the trial court's issuing a second final decree after the May term of court had ended. In fact, in order for a clerical mistake to be corrected, it must appear and be corrected in the actual judgment, order or other part of the record in which the mistake has arisen. Here, there were no clerical mistakes made with respect to the July 17 order itself. The husband never took the steps to file a timely motion for new trial after the trial court entered its July 17 order. Therefore, the trial court cannot correct any mistakes relating to the handling of the husband's motion for new trial by issuing a September order that was based on the July 17 order that contains no clerical mistakes.

PATERNITY

Venadle v. Parker, **A10A1617** (Feb. 16, 2011)

The mother gave birth on May 9, 2008, and it is undisputed that the parties engaged in one sexual encounter approximately 9 months prior to the child's birth. On June 4, 2009, the parties signed a voluntary acknowledgment of paternity indicating that Parker was the natural father of the child, but he could rescind his acknowledgment within 60 days of the signature on the form, or up to the date of an order establishing paternity, whichever occurred first. Additionally, the paternity acknowledgment stated that after 60 days have passed, Parker would have given up his rights to DNA testing. The father did not seek rescission within 60 days of signing the acknowledgment. On Dec. 5, 2008, the mother filed a verified petition to establish paternity and child support pointing out that the father had duly recorded the paternity acknowledgment. The same day, a settlement agreement was established on paternity and child support and on Dec. 11, 2008, the trial court entered a final order establishing paternity and child support, incorporating the terms of the settlement agreement.

In May of 2009, the father moved to set aside the paternity acknowledgment and the final order based upon fraud and mistake of fact. According to the father, he had recently learned that the mother was involved with another

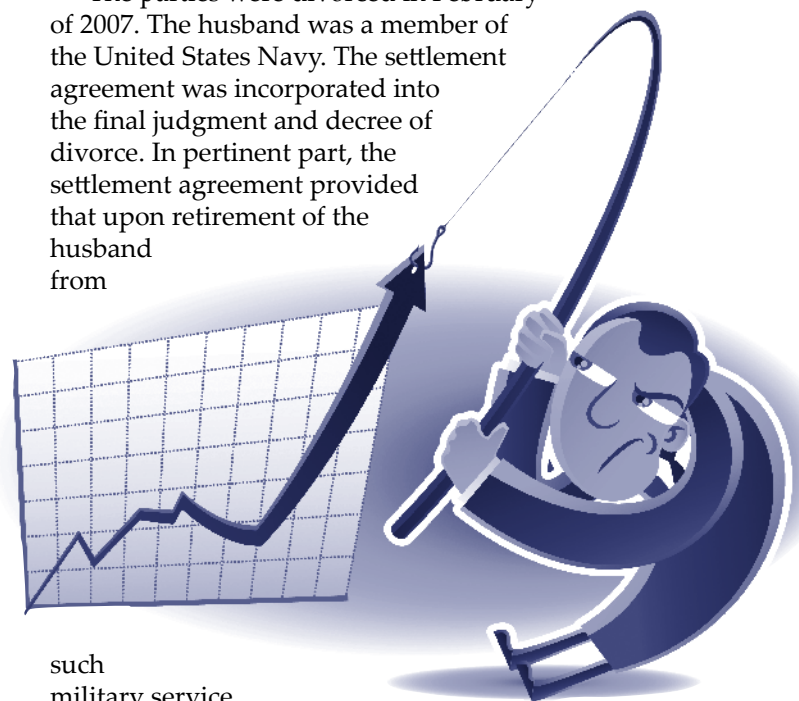
man at the time of their sexual encounter raising a strong probability that he was not the father of the child. The father alleged that because the mother had fraudulently misrepresented the child's paternity, he was entitled to have the acknowledgment and final judgment set aside and be given an opportunity to have a paternity test. The court held an evidentiary hearing on the motion to set aside where both parties testified. Following the hearing, the trial court found the father's testimony was contradictory and did not support an order setting aside paternity on the grounds of fraud or mistake of fact. Based on these findings, the trial court denied the motion to set aside but nevertheless, in the same order, the trial court ordered the parties to undergo genetic testing on the grounds that it would be in the best interests of the child to establish whether Parker was the biological father. The mother appeals and the Court of Appeals reverses.

There is an unappealed and unmodified final order which was predicated on a settlement agreement and paternity acknowledgment expressly consented to by the father acknowledging that he was the father of the mother's child. While Parker moved to set aside the final order, the trial court found he had failed to meet his burden and denied the motion. Thus, the application of the doctrine of res adjudicata clearly described the trial court's reconsideration of the issue of paternity. Accordingly, the trial court's order requiring that the parties submit to paternity blood testing was erroneous. Therefore, the trial court is reversed to the extent that it required the parties to undergo genetic testing.

RETIREMENT BENEFITS

Morgan v. Morgan, **S10A1365** (Jan. 1, 2011)

The parties were divorced in February of 2007. The husband was a member of the United States Navy. The settlement agreement was incorporated into the final judgment and decree of divorce. In pertinent part, the settlement agreement provided that upon retirement of the husband from



such military service, the wife shall be entitled to receive from his retirement benefits only such portions of such benefits as the Navy requires to be paid to her. In

the event that such payments to the wife are required by the Navy, the husband is to sign any documents required by the Navy to ensure that the wife receives any such required amount. After divorce, the parties learned that the Navy did not “require” any division of the husband’s benefits and had no legitimate authority to determine the allocation of retirement pay between ex-spouses. The wife proposed an agreed domestic relations order (ADRO) in which the wife would receive 50 percent of the designated marital portion of the husband’s retirement benefits. The husband refused to sign the documents. In July of 2008, the wife filed a petition to hold the husband in contempt for refusing to sign and seeking clarification as to her entitlement of the military survivor benefits which were not specifically addressed in the settlement agreement or otherwise in the divorce decree. In the alternative, the wife requested the court to set aside the divorce decree based upon the parties mutual mistake as to the Navy’s authority to allocate the husband’s retirement benefits and failure of the decree to address the wife’s entitlement to survivor benefits.

Both parties testified to the understanding that the husband’s military retirement benefits were marital assets. The husband was consistent in insisting that he would agree to do no more than the Navy required. In its final order, the court found that the parties had a mutual misunderstanding of what the Navy regulations define as a former spouse’s share of the military retirement benefits. Rather than setting the divorce decree aside on that basis, the court declared the agreement ambiguous on this point and purported to exercise its inherent powers to interpret the agreement. The court determined the parties intended to divide the marital portion of the husband’s retirement benefits on an equal basis as well and awarded the wife 50 percent of the husband’s retirement that accrued during the time they were married. The court held the husband in contempt for refusing to sign the ADRO and held that the wife’s share of the military retirement benefits must be construed to include converge under the Department of Defense’s Survivor Benefit plan. The husband appeals and the Supreme Court reverses.

A party cannot be held in contempt for violation of a court order unless the order informs him in definite terms as to the duties thereby imposed upon him. Given the trial court’s express findings of ambiguity of the provisions regarding the allocation of the husband’s retirement benefits, it follows that the court’s adjudication of contempt was in error.

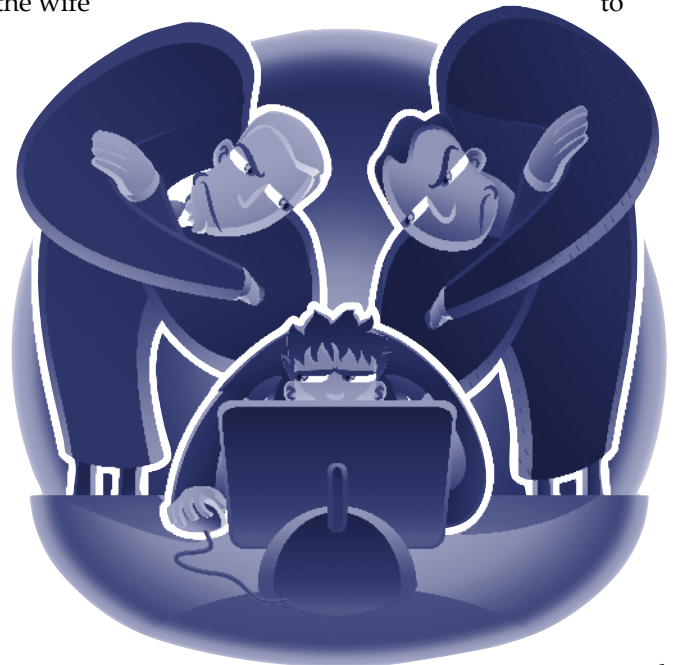
It is also well settled that a trial court lacks authority to modify the terms of a divorce decree in a contempt proceeding. In supplying the missing percentage allocation of the husband’s military retirement benefits, however, the trial court here did more than construe or clarify imprecise language in the agreement. The trial court eschewed the plain language of the agreement allocating the wife only such amounts as the Navy would require and substitute for the provision of a 50 percent allocation. The trial court used the contempt proceedings to substantially alter the

final decree and thus made an unauthorized modification. The Supreme Court noted that this outcome does not leave the parties without recourse as to the uncertainty that exists regarding the allocation of the husband’s military retirement benefits as the trial court on remand may consider the wife’s alternative motion to set aside the divorce decree.

TAX RETURN

Symms v. Symms, **S10F1783** (March 7, 2011)

The wife filed for divorce and the husband filed a responsive pleading and counterclaim for divorce. Neither party raised the issue of tax compliance or tax liability. During the final hearing in the divorce action, there was testimony and some documented evidence regarding the wife’s photography business which she had been pursuing in addition to her job at her medical office. There was also testimony stating that the parties had failed to report income of the photography business for the purposes of assessing the payment of income tax. During the hearing, the court stated its displeasure with the fact the parties did not report on their tax return the proceeds from the wife’s business and in the March 2010 final order, it included certain provisions addressing the tax issues with respect to that business. First, the court ordered both parties to amend their 2005-2008 federal and state income taxes to reflect an income from the wife’s photography business, mandated that the husband and wife be equally responsible for any tax liability for the business and for the payment of the consequent taxes, interest and penalties. It further ordered the wife to



accurately report her income from the business for 2009 and to pay all taxes, interest and penalties as applicable. The court specified the exact dollar amounts for the minimum gross receipts and profits to be reflected on the amended 2005-2008 tax returns and ordered the actual gross receipts and profits be reflected on the 2009 returns, and that the returns would be filed by May 21, 2010, with

signed copies delivered to the court. Both parties appeal, and the Supreme Court reverses.

As a general matter, our state courts are not authorized to impose income tax liability. Moreover, any determination of this case that the parties are joint and severally liable for any and all taxes, interest and penalties resulting from the amended returns appear to be premature because of the husband's contested claim that he qualifies as an "innocent spouse" with respect to the wife's photography business under the federal tax law. In addition, these amounts are premised upon figures called into question by the parties' testimony at the hearing which essentially rendered such amounts either largely speculative, merely ballpark or blatant misrepresentations. Therefore, the record before the court shows that the superior court lacked accurate and complete documentation or other evidence necessary to calculate such amounts.

UCCJEA

Belleu v. Larese, S10A1334 (Feb. 7, 2011)

The parties were married in Italy in June of 2002. The wife (Larese) is an Italian national and the husband (Delleu) is a citizen of the United States. There was one minor child born in Italy on Nov. 12, 2002, who had dual citizenship. The parties resided in Georgia from August, 2004-07. They claimed the Homestead exemption and filed joint state and federal income tax returns. In May of 2007, the wife left for Italy with the child for family vacation but did not return. On Aug. 1, 2007, the mother filed for divorce and custody proceedings in Italy. The husband was served with this action on Nov. 15, 2007. The husband filed for divorce on Sept. 17, 2007, in Athens Clark-County with service by publication order on Oct. 18, 2007. The mother made a special appearance on November 15, 2007, referenced the filing in Italy and she filed a conditional answer on Nov. 19, 2007. On Nov. 27, 2007, the trial court entered an order giving sole physical custody of the child to the father. The child remained in Italy. A hearing was conducted in Italy in which the father did not appear and that court entered an order on Feb. 28, 2008, exercising jurisdiction over the divorce and granted exclusive custody of the child to the mother, the father being allowed visitation. The mother moved to stay the Georgia trial court proceedings and for the trial court to communicate with the Italian court asserting that such was required on UCCJEA. On April 15, 2009, the Italian court entered an order reiterating that jurisdiction lay in Italy accepting the application of Georgia law as to divorce and allowing the case to proceed. The trial court corresponded with the Italian court and on Jan. 7, 2010, issued an order dismissing the father's complaint stating that the Italian court is a proper forum for this action based upon the provisions of UCCJEA. The father appeals and the Supreme Court reverses.

A court has jurisdiction to make an initial child custody determination only if the court's state is the home state of the child on the date of the commencement of the proceedings or was the home state of the child within 6 months before the commencement of the proceeding and

the child is absent from the state but a parent or person acting as a parent continues to live in the state. Under the UCCJEA, a foreign nation is treated in the same manner as would be sister state of the United States. A foreign child custody determinate must be enforced if it was made under factual circumstances in substantial conformity with the jurisdictional standards of the UCCJEA. The mother asserts that the Italian court ruling was done in substantial compliance with the UCCJEA. The trial court's subject matter jurisdiction to make an initial child custody determination is heavily dependent on the question of whether the court is in the home state of the child. Pursuant to O.C.G.A. § 19-9-41(7), Georgia is the only state including Italy that can qualify as the home state of the child at the time either the Italian custody proceeding or the Georgia proceeding was commenced and at the time the trial court entered its initial child custody order. Therefore, the trial court had jurisdiction to make the initial custody determination under the UCCJEA.

The mother asserts that the expression of jurisdiction by the Italian court was substantially in conformity with the UCCJEA. However, the Italian court determined jurisdiction on two bases: (1) that the wedding was performed in Italy, and (2) that at least one spouse was an Italian citizen. The Italian court undertook no analysis of the home state of the child or other factors that could be a substitute for such. Under the UCCJEA, however, physical presence of or personal jurisdiction over a party or a child is not necessary or sufficient to make a child custody determination. In addition, another purpose of the UCCJEA is to combat parental forum shopping. If this court were to find that the jurisdictional findings by the Italian court suffice under UCCJEA, it would render meaningless the statutory requirement that a court of this state defer to the court of another state only if that court had jurisdiction substantially in conformity with the UCCJEA. *FLR*



Vic Valmus graduated from the University of Georgia School of Law in 2001 and is a partner with Moore Ingram Johnson & Steele, LLP. His primary focus area is family law with his office located in Marietta. He can be reached at vpvalmus@mijs.com.

The section would like to thank Vic Valmus for his consistent contribution to the *Family Law Review*. His summation of updates to Case Law benefits all members of the section. His hard work is deeply valued and greatly appreciated.

A Possible Alternative or Supplement for a Prenuptial Agreement

by Martin S. Varon and Sue K. Varon
www.armvaluations.com

Many of us have heard of or dealt with a client whose prenuptial agreement was being challenged. Some of us have drafted prenuptial agreements only to discover later that the client did not have the emotional fortitude to ask his/her fiancée to sign it. Finally, many of us have clients who have adult children who are about to be married and our client (mom and dad) is worried about their child ultimately retaining assets in the event of a divorce.

Is there an alternative to a prenuptial agreement? Or is there something that may supplement a prenuptial agreement in the event of your child's future marital split up? One legal scholar called this alternative the equivalent of wearing a belt and suspenders. However, we have all had clients who needed every legal protection possible.

If there is a need for additional protection, consider recommending the use of a trust to transfer assets to your adult children contemplating marriage. The attributes of a trust vehicle may make sense in your fact situation:

- To create a trust, the owner (typically mom and/or dad and also know as the "grantor") transfers the legal ownership of property to another person, the trustee.

- The trustee has a fiduciary responsibility to help manage the property for the benefit of your child, the beneficiary.
- The trust is taxed as a separate legal entity and may be a conduit of the income being generated off the property and payable to the beneficiary.
- The trust may provide an additional layer of protection from creditors, although this will depend upon state law in determining how effective the protection will be.
- A Subchapter S corporation may be owned by certain type of trusts (the right trust will work, but THE WRONG TYPE OF TRUST WILL DESTROY THE Sub S ELECTION).

Many trusts are used for estate and tax planning purposes. However, isn't it possible that the same type of vehicle may work to protect assets in the event of a future divorce? It is advisable to consult with a financial specialist to insure tax savings and appropriate tax structuring. *FLR*

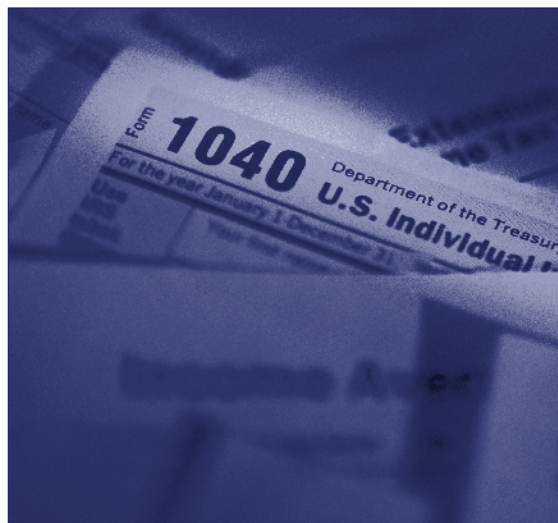


Martin S. Varon (CVA, CPA, JD) and Sue K. Varon are co-owners of Alternative ResolutionMethods, Inc. (www.armvaluations.com).

Marty focuses on business valuations and valuations of marital estates. He also serves as an expert witness at trial in the areas of family law, business litigation and estate litigation. Sue Varon (retired from the practice law) continues to serve as a mediator in the family law and



civil law arena, and is a resource for local counsel on discovery projects and trial preparation. Please feel free to call Marty or Sue with any questions at (770) 801-7292.



2011 Legislative Update

By: John L. Collar Jr.

The 2011 legislative session is over and the State Bar Family Law Committee has actively participated in several key pieces of legislature that affect the practice of our members. The following is an overview of legislation passed which will be sent to Gov. Nathan Deal for signature. The topics are:

- **House Bill 41** – Appellate Record Fees Relief;
- **House Bill 24** – Comprehensive Evidence Code Revision;
- **House Bill 46** – Uniform Interstate Deposition Act;
- **Senate Bill 112** – Military Parents Rights Act;
- **Senate Bill 115** – Modify Child Support to Exclude Foster Care Payments from Gross Income Calculation;
- **Senate Bill 139** – Child Custody Appeals/Personal Jurisdiction; and
- **Senate Bill 172** – Adoption Requirement Revisions.

House Bill 41:

Last year, the legislature inadvertently increased the per page appellate fee charge from \$1.50 to \$10.00. House Bill 41 reduced the clerk's fee, which is charged for the preparation of an appellate record and transcript, from \$10 per page down to \$1 per page.

The legislation passed the House of Representatives by a vote of 162-1 and passed the Senate by a vote of 51-0. On March 16, 2011, House Bill 41 was signed into law by Governor Deal and immediately went into effect.

House Bill 24:

House Bill 24 is comprehensive legislation that is a substantial revision and modernization of Title 24 (the rules of evidence). The General Assembly's intent is to adopt the Federal Rules of Evidence, as interpreted by the Supreme Court of the United States and the United States circuit courts of appeal as of January 1, 2013, to the extent that such interpretation is consistent with the Constitution of Georgia. In the event there are any conflicts related to the interpretation of the federal rules of evidence between the decisions of the various circuit courts of appeal, the General Assembly considered and deferred to the decisions

and interpretation of the 11th Circuit Court of Appeals.

The General Assembly was also cognizant that there were several issues regarding the current rules of evidence that are not covered by the Federal Rules of Evidence, so in those situations the former provisions of the current rules of evidence, as they existed on Dec. 31, 2012, would be retained.

If this legislation is signed by Governor Deal, it will become effective on Jan. 1, 2013.

House Bill 46:

House Bill 46 amends the rules of evidence to repeal the "Uniform Foreign Depositions Act" and replace it with the "Uniform Interstate Depositions and Discovery Act." The legislation provides for the following: (a) the method for the issuance of a Georgia subpoena which originates from a foreign jurisdiction (another state) seeking discovery; (b) the method utilized by the clerk of court in this state when an out of state subpoena is received; (c) the manner and process in which witnesses in Georgia may be compelled to appear and testify at depositions; and (d) the method for application for a protective order or to enforce, quash, or modify a subpoena.

This legislation becomes effective on July 1, 2011 and applies to subpoenas served on or after July 1, 2011 and in actions filed on or after July 1, 2011. Further, once the revised evidence code becomes effective January 1, 2013, HB 46 will become a part of the revised evidence code.

Senate Bill 112:

Senate Bill 112, also known as the Military Parents Rights Act, passed and significantly amends the general child custody provisions to provide enhanced protections and rights to members of the armed forces in child custody disputes.

SB 112 amends the Parenting Plan provisions in O.C.G.A. § 19-9-1 to include the following subsection:

"(G) If a military parent is a party in the case:

- I. How to manage the child's transition into **temporary physical** custody to the non-deploying parent;

- II. The manner in which the child will maintain continuing contact with the deployed parent;
- III. How the noncustodial deployed parent's parenting time may be delegated to his or her extended family;
- IV. How the plan will be resumed once the deployed parent returns from deployment; and
- V. How this arrangement serves the best interest of the child."

SB 112 also amends the provisions in O.C.G.A. § 19-9-3(b) related to child custody modifications, to significantly expand a military parent's rights, including specifically prohibiting a court from considering a military parent's absence caused by the performance of his or her deployments, or the potential for future deployments, as the sole factor in support of a claim of any change in material conditions and circumstances of either party or the child.

SB 112 also provides additional significant amendments to O.C.G.A. § 19-9-3(b), including but not limited to the following provisions:

- Prohibiting a court from entering a final order modifying parental rights until 90 days after a military parent's deployment ends;
- In the event of a deployment, ensuring contact between the child and the deploying parent on a temporary basis, including a provision that requires the non-deploying parent to facilitate opportunities for the non-deploying parent to have regular and continuing contact with the child by telephone, e-mail, Internet video, or any other similar means;
- Upon petition by the deploying parent and if found to be in the best interests of the child, the court has the authority to delegate for the duration of the deployment any portion of the deploying parent's parenting time with the children to anyone in his or her extended family, including but not limited to an immediate family member, a person whom the deploying parent cohabitates with, or another person having a close and substantial relationship to the child; and
- A provision requiring the non-deploying parent to provide reasonable parenting time to the deploying parent both before and after his or her deployment, as well as during any leaves.

SB 112 also amends O.C.G.A. § 19-9-6 (the general custody definitions section) to include definitions specifically related to these proposed revisions, including terms such as "deploying parent," "armed forces," "military family care plan," and "military parent."

SB 112 will become effective once executed into law by Gov. Deal.

Senate Bill 115:

Senate Bill 115 proposes to amend the child support

guidelines to exclude foster care payments from the calculation of gross income for determination of child support obligations.

Specifically, SB 115 proposes the following additional subsection to O.C.G.A. § 19-6-15(f)(2) – Exclusions from Gross Income:

"(C) Foster care payments paid by the Department of Human Services or a licensed child placing agency for providing foster care to a foster child in the custody of the Department of Human Services; ..."

Senate Bill 139:

Senate Bill 139 creates additions to appellate practice provisions (O.C.G.A. §§ 5-6-34 and 5-6-35) related to child custody appeals, as well as revisions to the personal jurisdiction requirements over nonresidents in domestic cases (O.C.G.A. § 9-10-91).

SB 139 amends O.C.G.A. § 5-6-34 to add the following subsection:

"(e) Where an appeal is taken pursuant to this Code section for a judgment or order granting nonmonetary relief in a child custody case, such judgment or order shall stand until reversed or modified by the reviewing court unless the trial court states otherwise in its judgment or order."

SB 139 amends O.C.G.A. § 5-6-35 to add the following subsection:

"(k) Where an appeal is taken pursuant to this Code section for a judgment or order granting nonmonetary relief in a child custody case, such judgment or order shall stand until reversed or modified by the reviewing court unless the trial court states otherwise in its judgment or order."

SB 139 amends O.C.G.A. § 9-10-91, the Georgia Long Arm Statute as follows:

"(5) With respect to proceedings for divorce, separate maintenance, annulment, or other domestic relations action or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not, ~~notwithstanding the subsequent departure of one of the original parties from this state and as to all obligations arising from alimony, child support, apportionment of debt, or real or personal property orders or agreements, if one party to the marital relationship continues to reside in this state.~~ This paragraph shall not change the residency requirement for filing an action for divorce.; or (6) Has been subject to the exercise of jurisdiction of a court of this state which has resulted in an order of alimony, child

custody, child support, equitable apportionment of debt, or equitable division of property, notwithstanding the subsequent departure of one of the original parties from this state, if the action involves modification of such order and the moving party resides in this state, or if the action involves enforcement of such order notwithstanding the domicile of the moving party.”

This bill becomes effective on July 1, 2011, and Sections 1 and 2 applies to all notices or applications for appeal filed on or after July 1, 2011.

Senate Bill 172:

Senate Bill 172 amends the adoption provisions (O.C.G.A. § 19-8-1, et. seq.), to require a home study by an evaluator prior to the placement of a child into the home of adoptive parents by a third party who is neither a stepparent nor a relative and for the home study to recommend the placement.

SB 172 also amends various adoption provisions, including: a) certain provisions relating to surrender/termination of parental or guardian’s rights where a child is to be adopted by a third party b) provisions relating to the filing and contents of a petition for adoption; c) provisions relating to the timing of an adoption hearing, the required records, and filing; and d) to change the contents of the form used for surrender of rights for adoption.

If you have any questions, please feel free to contact me at jcollar@boydcollar.com.



John L. Collar Jr. is a shareholder with Boyd Collar Nolen & Tuggle, L.L.C. in Atlanta, Ga. a firm specializing in Divorce and Family Law. He is a graduate of Cumberland School of Law, Samford University, is currently the legislative liaison for the State Bar of Georgia Family Law Section and is a member of the Florida

Bar Association. He is listed in The Best Lawyers in America since 2008 and can be reached at jcollar@boydcollar.com.

The section would like to thank John L. Collar Jr. for his consistent contribution to the *Family Law Review*. His Legislative Updates benefit all members of the section. His hard work is deeply valued and greatly appreciated.

Need Help Finding Health Insurance?

Contact BPC Financial, the State Bar of Georgia’s recommended broker for members’ health, dental and vision plans.

BPC FINANCIAL
INSURANCE • PLANNING • ADMINISTRATION

FOR MORE INFORMATION:
800-282-8626
www.memberbenefits.com/SBOG

Products and services are administered, sold and serviced by the State Bar of Georgia’s recommended broker, BPC Financial. The State Bar of Georgia is not a licensed insurance entity and does not sell insurance products.

Family Law Section
State Bar of Georgia
Randall M. Kessler, co-editor
Marvin Solomiany, co-editor
104 Marietta St., NW, Suite 100
Atlanta, GA 30303

Presorted
Standard Mail
U.S. Postage Paid
Atlanta, GA
Permit No. 1447



2010-11 Family Law Section Executive Committee

Paul Johnson, chair
kpj@mccorklejohnson.com

John F. Lyndon, member-at-large
jlyndon@lawlyndon.com

Randall M. Kessler, chair-elect/co-editor
rkessler@kssfamilylaw.com

Andrew R. Pachman, member-at-large
andy@prfamilylaw.com

Kelly A. Miles, secretary/treasurer
kmiles@sgwmfirm.com

Jonathan J. Tuggle, member-at-large
jtuggle@bcntlaw.com

Tina Shadix Roddenbery, immediate past chair
troddenbery@hsrblaw.com

Rebecca Crumrine, member-at-large
rcrumrine@dmqlaw.com

Marvin L. Solomiany, co-editor
msolomiany@kssfamilylaw.com

Karen Brown Williams, member-at-large
thewilliamsfirmnpc@yahoo.com

Gillian O'Nan
YLD Family Law Committee chair
gonan@levinesmithlaw.com

Kelley O'Neill Boswell, member-at-large
kboswell@wslc-attorneys.com

John L. Collar Jr., legislative liaison
jcollar@bcntlaw.com

Regina Michalle Quick member-at-large
rmqpc@mindspring.com