

# The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia – Summer 2012



Doubtful Family Violence? TEST!

# Editors' Corner

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Our Family Law Review is only as good as the articles we publish. As such, we take this opportunity to thank all of the attorneys and other professionals who have submitted articles over the years. During this past Family Law Institute, it was great not only to receive so many compliments about the Family Law Review, but also to be approached by so many of you who expressed an interest in submitting articles.



Please know that no article is too small, or too big. If you are interested in submitting an article, simply contact one of us and let us know the topic you wish to write about. As we have witnessed in the past, publication in the Family Law Review can serve as a start to subsequently presenting about your article in one of the seminars sponsored by the Family Law Section.

In our continuing effort to improve our publication, we are introducing in this edition a new section called "Committee Updates." The purpose of this new section is to inform our entire Section of the work and events of our recently created sub-committees. We hope you enjoy this edition and encourage you to submit articles for publication. *FLR*

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*.

IF YOU WOULD LIKE TO CONTRIBUTE ARTICLES TO THE FAMILY LAW REVIEW, OR HAVE ANY IDEAS OR CONTENT SUGGESTIONS FOR FUTURE ISSUES, PLEASE CONTACT MARVIN L. SOLOMIANY, MSOLOMIANY@KSFAMILYLAW.COM.

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# Chair's Comments

by Kelly Anne Miles  
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**T**HANKS to all of you for choosing the area of family law in which to practice. What you do will have touched the lives of your clients and their families forever.

I am proud to say that the Family Law Section is the third largest Section of the State Bar. Our membership is right at 1800! As such, I believe that we have an obligation to help other sections of the Bar in any way that we can. Consequently, our Section is currently working closely with the newly formed Child Protection and Advocacy Section (and with the Military-Veterans Law Section. Did you know that Georgia has over 700,000 Service Members and 10 military bases? I hope you will seriously consider agreeing to serve on the list of lawyers maintained by the State Bar's Military Legal Assistance Program. This is a great service provided to our military service members who call the State Bar seeking an attorney to help them. The Program has assisted hundreds of those who serve us and our Country and is a great way for us to give back to them. So, please contact Norman Zoller, the Coordinating Attorney for the Military Legal Assistance Program at the State Bar, normanz@gabar.org or 404-527-8765, for more information.

I am grateful for all of the emails and calls I have gotten from many of you giving me great feedback and ideas. I am excited about the many Committees that are up and running and I hope you will contact the Liaisons listed beside each committee to become more involved (the email address of the Liaisons are on the back cover of this newsletter):

- Diversity (Marvin Solomiany and Ivory Brown)
- Sponsorship (Gary Graham and Ivory Brown)
- Military and Federal Employees (John Collar)
- Technology/Social Media (Sean Ditzel)
- Community Service (Jonathan Tuggle and Rebecca Crumrine)
- POP--Practicing Outside the Perimeter (Kelley O'Neil Boswell and Regina Quick)

We had good attendance at the first meeting of these committees at the Institute in May and follow up meetings are currently being scheduled.

John Collar heads up our Legislative Committee which is currently considering proposals for new legislation. Any new legislation or changes to existing legislation recommended by our Section must be approved by the State Bar's Advisory Committee on Legislation and the Board of Governors. So, if any of you have input, suggestions, or ideas, please contact John Collar.

The Family Law Section will begin to offer free webinars to our Section members in the early Fall. These will be during the lunch hour and will be focused on current topics in family law as well as on how to make your practice better. While these will not provide CLE credit, they will be a great way to learn while munching on your sandwich at your office. So, stay tuned for more details via email blast!

Thanks for all of the hard work that Rebecca Crumrine has put into this year's Nuts and Bolts of Family Law. The agenda, and diverse group of speakers, looks awesome. This seminar will be held in Savannah on Aug. 17 and in Atlanta on Sept. 14. You won't want to miss it!

Coming up on Oct. 18 at 6 p.m. is the "Supreme Cork", sponsored by the Young Lawyers Division of our Section. This event will be at 5 Seasons Brewery and will raise money for a selected charity. Please come support this event! For more info, contact Sean Ditzel.

Finally, thank you all for your kind remarks to me regarding the Family Law Institute. I had a blast chairing it and I am looking forward to serving as your Section Chair for this upcoming year!

Thanks for being a Family Lawyer! *FLR*

## Upcoming ICLE Section Events

Sept. 14, 2012

**Nuts and Bolts of Family Law (6/1/1/3)**

**Seminar Number - 8025**

**Early Registration: \$160**

**On-Site Registration: \$180**

**Bar Center, Atlanta**

Sept. 14, 2012

**Stewards of Children (3/0/1\*/0)**

**Seminar Number - 8030**

**Early Registration: \$105**

**On-Site Registration: \$125**

**Bar Center, Atlanta**

**Register online at [www.iclega.org](http://www.iclega.org)**

# Doubtful Family Violence? TEST!

by Hon. Christopher C. Edwards

*Objective psychological testing of the propensity for family violence is underutilized by the bench and bar. Move for these inexpensive objective psychological tests (not a psychologist's opinion even if based on tests).*

We have all heard it hundreds of times: "I want custody because my ex-spouse is on drugs." Like family violence, claims of drug use can be real or not, difficult to prove or disprove, without testing. What testing? Shall you move for a psychologist's expensive interview and opinion on the parties' drug use? No, because the best science is an objective, quick hair follicle drug test. The drug test is an objective test, not just an opinion. Disputed paternity is resolved by objective scientific DNA testing. So, you already use objective scientific testing in your family practice. Likewise, objective psychological testing is available, but underutilized in family violence cases.

Like allegations of drug use, allegations of family violence can be faked, and its denial can be faked. The bench and bar abhor the prospect of false allegations to obtain quick, dramatic, inexpensive remedies, and false denials to avoid consequences. What can we do when family violence is a "she said/he said" credibility contest with no persuasive witness, no medical evidence, and no other persuasive corroboration? What about the case of seeming mutual family violence but no clear proof of who is the primary aggressor? The risk of misplaced judicial reliance on mere allegation and denial is tremendous.<sup>1</sup>

Psychologists have long acknowledged that "robust specialized family violence instruments, tests, and questionnaires" are "underutilized" by the profession and there is a "need for developing practice standards in this domain."<sup>2</sup> The court may order objective psychological testing of both parties as expressly authorized by law<sup>3</sup> to identify the psychological propensity for family violence, to aid in the determination of whether family violence occurred, and if so, to identify the primary aggressor.<sup>4</sup> The judicial use of reliable objective social science to determine facts is gaining acceptance.<sup>5</sup> "Considerable research ... shows that [psychological] clinicians' judgmental accuracy does not surpass that of laypersons."<sup>6</sup> Objective scientific testing, not a psychologist's opinion, provides a faster proven more reliable, cheaper method to discover truth.

The tests mentioned below each have a test printout that shows a propensity for family violence, or for violence generally. Each test's own conclusion is easy to read and understand. For reasons explained below, it may be best to move for objective scientific testing *without* opinion and interpretation by a psychologist. Of course, the psychologist may be necessary to lay the foundation for admissibility of the test result in proving the testing

protocol and the peer reviewed validity of the tests, unless admissibility is stipulated in advance.

Why order only objective testing instead of a psychologists' subjective opinion?

Psychologists study psychologists, and psychologists conclude the opinions of psychologists offered in court are not as reliable as we think. Actuarial, or objective, testing is proven generally more reliable than a psychologist's opinion, *even when the opinion is ostensibly based on some testing*. "When actuarial procedures are applicable and intelligible to laypersons, the expert's involvement in the interpretive process is unnecessary. In fact, the expert will most likely move the jury further from the truth, not closer to it, given the common tendency to countervail actuarial conclusions and thereby decrease overall judgmental accuracy."<sup>7</sup> "Forensic experts frequently appraise the potential for violent behavior... Studies on the prediction of violence are consistent: clinicians are wrong at least twice as often as they are correct."<sup>8</sup> ". . . [A]ctuarial methods, which eliminate the human judge [psychologist] and base conclusions solely on empirically established frequencies, consistently equal or outperform professionals and laypersons."<sup>9</sup> "In psychology, the selective pursuit of supportive evidence is especially pernicious ... clinicians typically expect to find abnormality, and a search for supportive evidence will almost always 'succeed' regardless of the examinee's mental health. In one study that enhanced the expectancy to find abnormality, every psychiatrist who heard a script portraying a well-adjusted individual nevertheless diagnosed mental disorder. This tendency to assume the presence of abnormality and then seek supportive evidence fosters 'overpathologizing', that is, the frequent misidentification of individuals as abnormal."<sup>10</sup>

In other words, the therapeutic and forensic uses of psychology must be distinguished. The forensic reliability of a psychologists' opinion is not proven by the psychologist's training, experience, or therapeutic effectiveness. If properly challenged, it is doubtful that much of the psychological testimony commonly admitted in Georgia civil cases without much objection would be admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), and O.C.G.A. § 24-9-67.1 (Effective Jan. 1, 2013), O.C.G.A. § 24-7-702 (Effective Jan. 1, 2013). Much psychological opinion testimony, such as "syndrome" opinion testimony, fails to meet the key Daubert criteria of falsifiability and reliable error rates.<sup>11</sup> The bench and bar should be aware of "expert evidence industries" with "'product champions' ... who promote the use of a scientific idea as evidence", and the "social and political factors that shape the ongoing production of evidence for the court."<sup>12</sup> Objective psychological testing is proven generally more reliable than a psychologists' opinion and it is certainly faster and cheaper.

Two objective psychological tests with internal truthfulness validity scales are particularly useful scientific measures of the propensity for family violence: first, the family violence inventory (FVI); and second, the Substance Abuse Questionnaire III (SAQIII). The MCMI is also useful to identify personality traits correlated to family violence.<sup>13</sup> Typically, a psychologist can administer these tests for a few hundred dollars and, without further interpretation, simply print out the objective test result (not raw data, and not the psychologist's interpretation, but the easy to read test results). The internal validity scale means that if a test taker lies, or is very inconsistent for some reason, he or she gets caught "faking good" by inconsistent answers. Since faking good is common, the fee arrangement with the psychologist should include an agreement that each test will be re-administered once if the internal validity scale for truthfulness is compromised. Of course, invalid test results must also be printed and provided to show the test taker did not meet the test standards for consistency or truthfulness in administration on the first test. When filing a motion for these psychological tests, make sure you have a letter or email from a local neutral psychologist stating the total fee and willingness to administer the tests, and the fee to testify about the test administration and results if not stipulated in evidence in advance. You should also make sure your psychologist has purchased the tests and is ready to administer them. The judge is not going to do your calling around for you, and is not going to want a second hearing to decide who administers the test.

Any judge can read these objective psychological test results and be the judge, instead of deferring to the conclusions of experts "interpreting" a different result by offering opinions on what typically needs no interpretation. Of course, any party can offer any other admissible evidence on the tests or results. The gatekeeper may need to know what specific peer reviewed studies support the reliability of "interpreting" peer reviewed tests to vary the test result.

"As the courts and the public come to realize the immense gap between experts' claims about their judgmental powers and the scientific findings, the credibility of psychology and psychologists will suffer accordingly. Psychological research should eventually yield certain knowledge and methods that provide meaningful assistance to the trier of fact."<sup>14</sup> In this simple inexpensive testing protocol, law and science meet, enhancing reliable judicial decision making. In this judge's experience, when two or more independent highly reliable objective scientific tests prove or disprove a propensity for violence, it is usual for the issue to be conceded one way or the other. Including objective scientific testing in the search for truth serves our duty to obtain just, speedy and inexpensive adjudication.<sup>15</sup> *FLR*



*Judge Christopher Edwards received his B.A. from Vanderbilt and his J.D. from Nova Southeastern Law School. He began his career as an Assistant District Attorney in the Griffin Judicial Circuit, and then continued as an Assistant District Attorney in the Brunswick Judicial Circuit. He*

*then served as a county public defender and also on an indigent defense panel program. After 17 years of jury trials as a lawyer, Edwards was elected Superior Court Judge in August 1998 and began his first four year term January 1, 1999. He was re-elected in 2002, 2006 and 2010 without opposition.*

#### (Endnotes)

- 1 Twenty-two percent of murders are family violence murders. Matthew R. Durose et. al., Family Violence Statistics, U.S. Dept. of Justice, Bureau of Justice Statistics (2002), <http://www.ojp.usdoj.gov/bjs/abstract/tvs.htm>.
- 2 James N. Bow & Paul Boxer, Assessing Allegations of Domestic Violence in Child Custody Allegations, *Journal of Interpersonal Violence*, Vol. 18 No. 12, December 2003, at 1394.
- 3 OCGA §9-11-35; OCGA §19-13-4(a)(11). *Everette v. Goodlove*, 268 Ga. App. 536, 602 S.E.2d 284 (2004); *Rose v. Figgie International, Inc.*, 229 Ga. App. 848, 495 S.E.2d 77 (1977); *Roberts v. Forte Hotels, Inc.*, 227 Ga. App. 471, 489 S.E.2d 540 (1997).
- 4 Obviously no test can conclusively prove or disprove the actual occurrence of domestic violence. Psychological testing is a tool not a talisman, and undue reliance is no substitute for judicial decision making. Joan S. Meier, *Domestic Violence, Child Custody and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 *Am. U.J. Gender, Soc. Policy, and the Law*, Vol. 11 No. 2 2002 at 657.
- 5 Monaghan and Walker, *Social Science and Law* (Foundation Press, 2011).
- 6 Faust and Ziskin, *The Expert Witness in Psychology and Psychiatry*, *Science*, vol. 241. p. 31, 1 July, 1988 at p. 34.
- 7 Faust and Ziskin, *Id.*, p. 33.
- 8 *Id.*, p. 32.
- 9 *Id.*, p. 32-33.
- 10 *Id.*, p. 33.
- 11 Gerald Ginsburg and James Richardson, 'Brainwashing' Evidence in Light of Daubert, *Law and Science, Current Legal Issues 1998*, Vol. 1 (Oxford University Press, 1998), p. 268.
- 12 Shirley A. Dobbin and Sophia I. Gatowski, *The Social Production of Rape Trauma Syndrome as Science and as Evidence*, in *Science in Court*, Chapter 7 (Dartmouth: Ashgate Press, 1998).
- 13 The personality disorders of antisocial, aggressive-sadistic, passive-aggressive, and narcissistic can also be identified by a third test, the Millon Clinical Multiaxial Inventory (MCMI). Robert J. Craig, *Use of the Millon Clinical Multiaxial Inventory in the Psychological Assessment of Domestic Violence: A Review*. *Aggression and Violent Behavior*, Vol. 8 No.3, May 2003, at 235.
- 14 Faust and Ziskin, p. 35.
- 15 O.C.G.A. § 9-11-1.

# Drafting a Solid Mediated Agreement

by Andy Flink

After a very difficult day at work, a mom came home to find her two children in the kitchen arguing over an orange. There was only one left and each child was trying to wrestle it out of the others hands. In frustration the mom grabbed the fruit and quickly sliced it down the middle, handing each of the children their half. Both children walked away crying.

One of them actually needed the rind of the orange for an art project and the other wanted to eat the orange. What we all think are logical and obvious answers are not always as they appear. I consistently remember this story when I draft mediated agreements at the conclusion of a session. If we've been at it for 8 or more hours and are at the point where all of us are completely exhausted I still have to be ready to write an agreement that works for everyone. It is crucial at this moment that all of the issues that were resolved during the day are memorialized accurately and that every point is understood and *clear* to the parties.

In mediations that are complicated and last many hours the concept of capturing all of the points can be daunting. For example, we have a solid parenting time arrangement but what if we omit who will provide transportation at the inception and conclusion of the visits? Perhaps the parents could work this out in their future but why leave it to chance? Small points that get overlooked today can become enormous problems tomorrow. You cannot assume to know what everyone is thinking.

Here are six ways to assure that any drafted agreement is solid, to the point and leaves no room for interpretation, no matter how long the session lasts.

1. **Listening carefully.** During the session, in order to remember what is truly important to each of the parties the mediator has to be a focused listener. It also helps to be tedious and WRITE DOWN every point. Sounds elementary, but if this is not done there's a chance something very important to one or both sides can be overlooked.
2. **Repeat it back.** Every position you take must be stated back to you in an effort to be sure that it was *heard* correctly. Perhaps something was assumed that should not have been or maybe it was unclear. Reiterating each point as it was heard will eliminate confusion, especially in cases where the majority of the time is spent in caucus. Mediators that create this atmosphere of clarity will also build trust with each client and their counsel.
3. **Match up the agreed to points.** No matter *when* parties agree to a specific issue during a session it must be acknowledged and memorialized accordingly. Since sessions can take on many

tangential directions, doing this reassures everyone that matters which have been settled aren't raised later as contentious, thereby turning settlement into impasse.

4. **Templates.** Good mediators bring laptops with effective agreements they have drafted in previous sessions that are solid in covering every point imaginable. Equipped with this arsenal of information one can edit and correct an existing document and use a list to make certain nothing is missed.
5. **Knowing what the judge requires.** Ultimately this paperwork may be used in the formation of a final settlement agreement (if the mediated agreement isn't used) and therefore must comply with the requirements of each court. While it is obvious that the draft has to make it past the approval of client and counsel, the final approval is from the judge, and any agreement that is not clear and straightforward will be questioned.
6. **Realizing I'm human.** Once the agreement is drafted I hand the documents over to the parties and their counsel. Perhaps I did overlook an item or maybe there is a misunderstanding. It happens. However, if I get 98 percent of the points correct, fixing a small one at the conclusion is part of the process. It's the agreements where half the issues aren't clear that have a tendency to fall apart.

While the best written agreements cannot possibly cover every point imaginable, utilizing these strategies will help minimize mistakes and errors. The sessions that go long into the night, when everyone is ready to be anywhere else, is prime time for problems and assumptions. Don't let this happen, whether you are simply hungry or have that art project due. *FLR*



*Andy Flink is a contributing author on post divorce and trained mediator and arbitrator. He is familiar with the aspects of divorce from both a personal and professional perspective. He is experienced in both business and divorce cases, and has an understanding of cases with and without attorneys. Flink is founder of Flink*

*Consulting, LLC, a full service organization specializing in business and domestic mediation, arbitration and consulting. At One Mediation, he serves as a mediator and arbitrator who specializes in divorce and separation matters and has a specific expertise in family-owned businesses. He is a registered mediator with the state of Georgia in both civil and domestic matters and a registered arbitrator.*

# To the Family Law Section

Thanks to the support of the leadership, as well as many members, of the Family Law Section, the Child Protection and Advocacy Section has been established. With nearly 200 members, the Child Protection and Advocacy Section membership represents a broad spectrum of the Bar that practices in Juvenile Court. The membership includes SAAGs who represent DFCS, Child Welfare Specialists who represent parents, GALs who represent children, juvenile prosecutors and defenders, adoption lawyers, lawyers who represent children in education-oriented scenarios, such as IEP meetings, 540 hearings, and school tribunals, as well as lawyers who represent school Boards, lawyers involved in quasi-judicial matters advocating for children in Social Security disability, Medicaid eligibility matters, and other miscellaneous venues. A number of Juvenile and appellate judges and mediators are also members. It is an interesting, varied group of lawyers with one thing in common: we have concentrated our legal practices on working with children and families, focusing on the needs of the children.

The Section will be co-sponsoring upcoming CLEs with the Supreme Court of Georgia Committee on

Justice for Children and the Georgia Association of Counsel for Children in October, and in December, will host its own CLE entitled, "Where's the Money?" focusing on discovering and utilizing resources available for children in need of services regarding education, medical needs, disabilities and other areas. The first edition of a newsletter will be published in September and work has begun to expand the Bar's on-line Section website. (If you had trouble with some of the acronyms, our Newsletter and Web Page will have a section identifying acronyms, much like a glossary).

The leadership of the Child Protection and Advocacy Section appreciates the help and encouragement the Family Law Section continues to provide, and we look forward to continuing to work closely with you through the years. We hope that our members can serve as resources to you for information regarding more esoteric areas of children's needs that you encounter in your family law work, just as we rely on you for your expertise when we and our clients' families need it. *FLR*

Nicki Vaughan  
Chair, Child Protection and Advocacy Section

## Income Withholding Procedure for Child Support

Most of you are already aware that Federal Office of Child Support Enforcement (OCSE) and the Office of Management and Budget (OMB) issued a revised Income Withholding Order (IWO) on May 31, 2011 that is required to be sent to employers with ALL income deduction orders issued on or after May 31, 2012. The consequence of not using the required IWO form is that the employer must reject the income deduction order and return it to the sender, potentially causing an unnecessary delay in the custodial parent receiving the child support.

Income deduction is and continues to be a complicated, burdensome procedure. This additional requirement does nothing to alleviate that. However, inspired by the release of the revised IWO and the potential consequences of not

following the procedure correctly, we collaborated with the Georgia Division of Child Support Service (DCSS) to create a guideline to help streamline this process. We are hopeful that you will use this guide in your practice and will find it helpful. The guide, along with frequently asked questions, forms and other resource materials are available at the following website: [www.georgiacourts.gov/csc/iwo](http://www.georgiacourts.gov/csc/iwo).

Special thanks to DCSS Legal Policy Specialist Stephen Harris, Child Support Guidelines Coordinator Elaine Johnson with my office, and the rest of our workgroup for their contributions to this project. As always, we welcome your comments and feedback. *FLR*



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Welcome to the Georgia Income Withholding Order Website

# Avoiding Client Dissatisfaction Related to the QDRO Process

by Matthew L. Lundy

When it comes to client satisfaction, an attorney cannot totally control the outcome of a case. However, an attorney has absolute dominion over the expectations that they create in their clients. Family law attorneys often make the same mistakes when it comes to managing the retirement account division process (i.e. the QDRO process). These mistakes often lead otherwise satisfied clients to being dissatisfied—sometimes long after the case is thought to be over. With a proper explanation to a client, combined with the effective execution and completion of the QDRO process, client dissatisfaction at the end of a case is substantially less likely. This article addresses some of the common mistakes made by family law attorneys when it comes to setting client expectations related to the QDRO process, and offers recommendations for how to avoid those mistakes.

## Timing of Completing a QDRO or Similar Order

By far the most common mistake that family law attorneys make when it comes to setting client expectations related to the QDRO process is in assuming that the QDRO process comes with some kind of guarantee as to timing. This is to say, when your client asks you long it will take to get their money from the other party's account, you should know that 29 U.S.C. § 1056(d)(3)(G)(i)(II) provides:

within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

As a practical matter, this means that the plan administrator has no precise time limit as to how long they can take to review and administer an order. While certain timetables may be safely assumed, generally, promising a client that the QDRO process will be quick can lead to unrealistic expectations. If an attorney is not familiar with a particular plan (keep in mind there are over 100,000 plans nationwide and growing) and its qualification process, it is best to avoid estimating anything shorter than several months from the time that the QDRO is prepared.

## Timing of Entry of a QDRO or Similar Order

The appropriate time in a case to have a QDRO entered is—at the absolute latest—simultaneously with a final divorce decree. Ideally however, it will be entered even sooner. In the event that a final decree is entered and a QDRO has not yet been completed, a participant could die, retire, and/or engage in wrongdoing that may cause irreparable harm to the payee spouse (who may be your client).

For example, imagine that an alternate payee has been granted 50 percent of a participant's Bank of America defined benefit pension plan, plus survivor benefits. A final decree is entered, but no QDRO. The participant spouse leaves the courthouse, and makes an irrevocable election to receive his or her benefits immediately as a single life annuity, thereby foreclosing the possibility of the alternate payee spouse from ever getting their survivor benefits. Now imagine that instead of retiring, the participant spouse dies while walking out of the courthouse. Their retirement plan then goes to their estate, to which the payee spouse no longer has an entitlement. Whose fault is this? Who will the Alternate Payee blame?

## Which Plans Require QDROs?

Not all retirement plans require "QDROs." This you may already know. For example, Individual Retirement Accounts (IRAs) do not necessitate the use of a QDRO to effectuate division of such accounts. I.R.C. § 414(p)(1)(B) (along with ERISA 29 U.S.C. § 1056 (d)(3)) defines what a QDRO is, and QDROs only apply to plans subject to the anti-alienation rules of IRC § 401(a)(13). Only plans subject to the anti-alienation rules of I.R.C. § 401(a)(13) are governed by I.R.C. § 414(p). I.R.C. 401(a)(13) lays out a series of anti-alienation rules that do not apply to IRAs because IRAs are set up for individuals, and not



by employers, which is the common thread of the anti-alienation provisions).

But is there a law that prevents IRAs from requiring that a QDRO or QDRO-like order be prepared that directs the IRA custodian to effectuate a transfer? The answer is no. In fact, many IRA and annuity custodians demand that they be directed by QDRO (although that term is sort of a misnomer in this context) to effectuate any transfers to a former spouse as a part of a domestic relations case. Thus, unless you know with absolutely certainty that a particular IRA does not require a QDRO, it is best to make sure that you reserve jurisdiction for the entry of a such orders, and to look into the matter as early as possible.

Note that government retirement plans are exempt from ERISA, but many around the country have QDRO-like orders that go by different names (Such as COAP or DRO or PADRO). Each of these plans, like IRAs, and most ERISA-based accounts, have unique rules that one must be acquainted with to properly divide them. Thus, if an attorney is not acquainted with the processes established by a particular plan, it is best to avoid making assumptions that one plan is similar to another.

## Tax Consequences

Generally, the distributee of a payment from a retirement plan is going to be taxed on said distribution. See I.R.C. § 72(a)(1). Thus, when a QDRO or similar order is administered, and direct payment is made from a retirement plan to an alternate payee, the participant will not experience any tax consequences, but an alternate payee will.<sup>1</sup>

When dealing with a defined contribution plan, there are generally two tax consequences and one exception to each that you need to know about. First, any distribution made to a party from a defined contribution will be subject to regular income tax, unless said payment is made from a Roth IRA and/or 401(k). See I.R.C. § 408A(d). Second, any distribution made from a defined contribution plan prior to age 59 ½ will be subject to a 10 percent penalty. A limited exception to the 10 percent penalty exists when a distribution is made pursuant to a QDRO. To be clear, when an ERISA-based qualified defined contribution plan<sup>2</sup> is divided pursuant to a QDRO, the payee spouse have the option of taking a distribution (versus a rollover) that will be subject to regular income tax, but not subject to the 10 percent penalty, even if the payee is younger than 59 ½. See I.R.C. § 72(t).

This becomes a useful rule to know about if you are trying to use a QDRO during a case to pay fees or temporary support, since both parties can potentially benefit from this 10 percent penalty exemption.

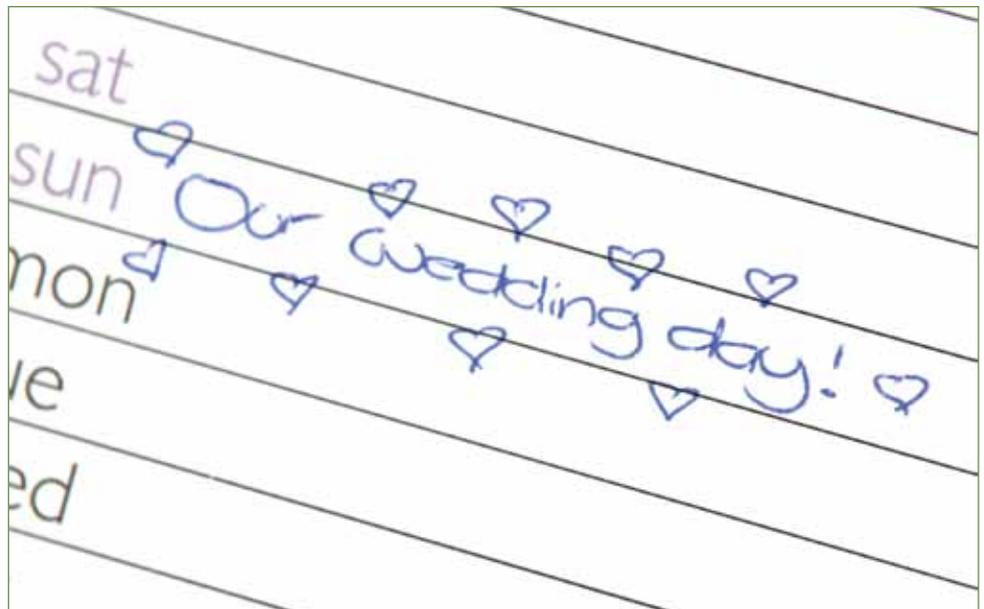
## Valuation dates; Passive Gains and Losses

Neither a valuation date, nor passive gains and/or losses should be presumed, and especially if you are trying to set appropriate client expectations. When parties execute a settlement agreement, they often fail to specify a valuation date. Under Georgia law, the cut-off date for marital assets is the date of marriage. See generally *Crowder v. Crowder*, 281 Ga. 656, 642 S.E.2d 97 (2007). However, parties may agree to use virtually any date of their choosing, as long as it is allowable under a particular retirement plan. When parties' use ambiguous settlement agreement language, such as stating a dollar amount or percentage without specifying a valuation date, the potential for unnecessary litigation is created. This is particularly true when the market is volatile, or there has been a long divorce case and a pension has changed in value through the case.

The same issue arises when parties and their attorneys fail to specify whether or not passive gains/losses apply to an award from a defined contribution plan. Parties often wait months or years to have their QDROs or similar orders drafted and administered, and accounts will likely wildly fluctuate in value during that time. So, if you simply specify a dollar amount in a settlement agreement, and that dollar amount represents a certain percentage of an account as of an intended date, that amount when actually distributed may represent significantly more or less of the account, which may in turn lead to a dissatisfied client.

## Survivor Benefits

There is no more important, nor more misunderstood ancillary economic benefit related to retirement accounts than survivor benefits. Again, it is critical that the family law practitioner specify whether or not the payee spouse will receive all or a portion of any pre- or post-retirement survivor benefits, or they may be lost completely. See *Morgan v. Morgan*, 288 Ga. 417, 704 S.E.2d 764 (2011) (holding that retirement benefits must be specifically allocated to enforceable). Otherwise, there may be grounds



for litigation, or worse yet, a payee spouse may complete lose the benefit of being awarded a portion of the pension. Note that most survivor benefits come at a cost in the form of a reduction to the monthly pension annuity, and that although they are generally only associated with defined benefit plans, they can also come into play with annuitized defined contribution plans.

## Federal and Military Age 55 Rule

If you represent the payee spouse of a member of the military or a federal civilian employee who is entitled to a pension, it is critical that you advise your client that if they remarry prior to age 55, then they are not entitled to survivor benefits. See 10. U.S.C. § 1450(b); 5 C.F.R. § 831.644(b). Advising your client of this is not only important for the purpose of setting client expectations, but also in order to give your client the opportunity to make informed decisions

about what assets they actually want as part of their divorce, and to properly plan for their future. *FLR*



*Matthew L. Lundy is the founder and managing attorney of a law firm with offices in Georgia and Florida that focuses on the preparation of QDROs and similar orders. He also advises attorneys, mediators and parties on how to properly address issues related to QDROs. He can be reached via email at matt@precisionqdros.com or by phone at 855-737-6529.*

(Endnotes)

- 1 Under existing law, this tax liability cannot be shifted as far as I am aware, although parties can gross up the amount to an alternate payee to account for taxes and penalties.
- 2 This does not include government plans or IRAs.

# Committee Updates

## Diversity Committee

The Diversity Committee of the Family Law Section started with its first meeting at this past Family Law Institute of Amelia Island. We are proud to announce that over 35 attorneys attended this initial meeting and participated in a comprehensive discussion as to the goals of this Committee.

One of the main purposes of our committee will be to increase awareness as to the many different types of members we have in our section and to address specific issues which these members deal with in our daily practices. Irrespective of our gender, race, or sexual orientation, our committee will work to ensure that our Section is as diverse as the many different types of clients we represent.

It is our goal to have at least quarterly meetings and social activities. If you are interested in joining our committee, please contact Marvin Solomiany (msolomiany@ksfamilylaw.com) or Ivory Brown (ivorybrown@aol.com). We look forward to working with you.

## Practicing Outside the Perimeter

The committee met on May 24 at the Family Law Institute. The purpose of the committee is to involve members outside of Atlanta in the section and to provide more local education opportunities. We agreed to divide the state into regions and host seminars for each region. The local seminars would have local speakers and judges in a lunch and learn format. The state will be divided into 5 regions with a representative for each region, Northwest (vacant), Northeast (Coleman), Southwest (Boswell), Southeast (Grill) and Middle (Kaplan).

## Sponsorship Committee

Thank you to those who have volunteered to join and assist with the Sponsorship Committee, and to those who were sponsors of the Family Law Institute. The Sponsorship Committee will meet in the upcoming weeks to discuss sponsorship for the 2013 Family Law Institute, as well as other possible sponsorship opportunities. If anyone is interested in becoming a sponsor for the 2013 Family Law Institute, please contact Eileen Thomas (eileen@ethomaslaw.com) or Gary Graham (gary@stern-edlin.com). If anyone is interested assisting with the Sponsorship Committee, please contact Gary Graham or Ivory Brown (ivorybrown@aol.com).

## Technology Committee

Technology and Social Media Sub-Committee: This committee had our inaugural meeting at the 2012 Family Law Institute in Amelia Island, where we had a wonderful showing of approximately 15 attorneys (including a Superior Court Judge and a former chairperson of the Family Law Section). We are committed to the discussion of and education about recent developments in the areas of technology and social media, and the effect thereof on the practice of family law. We have discussed using the committee to put on a semi-annual webinar about such topics, and we are open to suggestions on other ways our committee can benefit the section. For more information and to be added to the sub-committee Google Group, please email Sean Ditzel (sditzel@ksfamilylaw.com).

# Be Careful: Someone May Be Watching

By Vic Brown Hill

Every family law attorney is faced eventually with the client who explains about the great electronic gadget that s/he has found to “get the goods” on an offending spouse. Time after time we explain about privacy laws and the potential consequences of violating those laws. The door for electronic surveillance of a spouse has been opened just a crack more. The “reasonable expectation of privacy” may mean something a little different after a recent case from the Court of Appeals of Georgia.

In *Rutter v. Rutter*, 2012 WL 2866416, the Court of Appeals created a new rule (or perhaps confirmed the existence of a previous rule) that gives guidance to practitioners faced with the need to advise a client regarding secret surveillance under limited circumstances. Under those certain circumstances, those rights to privacy are not what we once thought they were.

On July 13, 2012, the Court of Appeals published its opinion in *Rutter v. Rutter*, 2012 WL 2866416. In that opinion, the Court affirmed the trial court’s decision to admit video recordings made by cameras hidden in a marital residence by one spouse – without the other spouse’s knowledge or consent – of the other spouse’s activities.

In *Rutter*, the parents were “nesting” – rotating turns in and out of the house on a daily basis while the children remained consistently in the home. The mother was fearful that the father was abusive to the minor children in her absence. To protect the children, the mother installed hidden cameras in the common areas of the home. The cameras provided both live feed video of activities within the common areas, and recorded the activities. The mother could access the live feed or the recordings via the internet from any computer.

After learning of the surveillance, the father brought a motion to exclude the recordings from evidence. The father claimed that the recordings were unlawful pursuant to O.C.G.A. 16-11-62(2) – a penal statute. That statute makes it unlawful to conduct secret surveillance of another in a private place, out of public view and without that person’s consent. The father maintained that he had a reasonable expectation of privacy in the common areas of the marital residence and that the mother had violated that privacy.

The trial court relied on an exception contained in O.C.G.A. 16-11-62(2)(c) to admit the recordings. Pursuant to subsection 2(c), one may use electronic equipment to record activities within the curtilage of one’s residence for “security purposes, crime prevention, or crime detection”. The mother testified that her purpose was to guard against crimes being committed against the children by the father, thus the trial court applied subsection 2(c) and ruled that the recordings were admissible at trial. The father filed an interlocutory appeal of the trial court’s ruling.

The Court of Appeals affirmed the trial court and ruled that the mother’s surveillance was permissible pursuant to O.C.G.A. 16-11-62(2)(c) – the curtilage exception. The Court reasoned that the mother met the elements of the exception contained in subsection 2(c), and that the interior of the home was within the curtilage. It was important that the mother remained a resident of the home, and that she conducted the surveillance for security purposes, crime prevention or crime detection.

Prior to this holding, an attorney may have been reluctant to advise a client to install equipment for clandestine surveillance of the other party. The lines between permissible and illegal use of such surveillance were blurred at best. Thus, the safe course of action was advise against any kind of secret surveillance.

While *Rutter* DOES NOT issue a license for non-consensual surveillance in every case, it does provide guidance as to when such surveillance may be lawful. Prior to *Rutter*, there was little case law addressing this issue between spouses. Now the lines are not quite as blurred. The law is now that secret surveillance is permissible under certain circumstances. How far those certain circumstances extend remains to be tested in the future. *FLR*



Vic Brown Hill is a trial attorney in Marietta, and partner in the firm Hill-Macdonald, LLC. His practice is limited to divorce and other matters of family law. He is a member of the Family Law Section, the Charles Longstreet Weltner Family Law Inn of Court, the Cobb County Bar Association, Phi Delta Phi and other professional and civic organizations. Hill and Hill-Macdonald, LLC, represented the Appellee in the appellate phase of the *Rutter* case. Hill and his family are residents of Cobb County.



# Getting Government Records into Evidence

by Mark E. Sullivan

- Q. How do you get government records into evidence if you have to go to trial and the other side won't stipulate to their admissibility?
- A. You'll need to check your state's rules of evidence to find out the requirements for admission of business records. Each state is different. Some have adopted the Federal Rules of Evidence (FRE), and some have their own evidence codes. The business records rule is contained at FRE 902 (11), but your rule might be slightly or entirely different. Make sure you know what is needed as essential statements in the affidavit.
- Q. Don't these agencies have a template they can use for the affidavit? I'm being told that I have to submit to the agency a sample of what the wording should be.
- A. "One size fits all" is not the rule in this area. There are no standard affidavits which are universally used among the agencies. It is a common practice to require the applicant's attorney to draft the affidavit, which is then reviewed and revised by the legal office in the agency. You must submit the wording to the federal office which has the records, which can adopt or adapt the language as needed.
- Q. So do they just say that they've provided the records and they're accurate?
- A. In terms of trial practice, that would be a major mistake. How will the court know what records were provided? How will the judge know that the documents which you have are the ones that the agency sent to you? The records must be attached to the affidavit, not merely referred to.
- Q. But the agency sends the affidavit to me, right? Or is it sent to the court?
- A. That's your decision. If the records and affidavit – the "packet" – is sent to the court under seal, then there can be no legitimate question as to whether

you have substituted documents or altered them. The judge is the one who will open the packet and determine what records have been provided. On the other hand, unless you get an extra copy of what's in the packet, you won't know what is in the records until the court opens them. This leads to three alternatives:

1. Get a copy from the agency (by consent of the individual concerned or by court order or judge-signed subpoena). Then request the documents again, along with a business records affidavit that accompanies your request.
  2. Get the documents (as above) from the agency, and then send them back to the agency with your business records affidavit, so they can certify that these are indeed the records provided, and then can attach them to the affidavit.
  3. Have the agency send the packet to the court but also send copies to the attorneys.
- Q. This is all so complicated. Do you have an example that I can use for these affidavits?

A. Of course. It's on the next page... *FLR*



*Mark E. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, N.C. and is the author of THE MILITARY DIVORCE HANDBOOK (Am. Bar Assn., 2<sup>nd</sup> Ed. 2011) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Sullivan has been a board-certified specialist in family law since 1989. He works with attorneys nationwide as a consultant on military divorce issues and to draft military pension division orders. He can be reached at 919-832-8507 and [mark.sullivan@ncfamilylaw.com](mailto:mark.sullivan@ncfamilylaw.com).*





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**Regional Office**  
**123 Green Street**  
**Blacksboro, North Carolina**  
**Phone: 919-832-6677**

**BUSINESS RECORDS DECLARATION**  
**Pursuant to 28 U.S.C. § 1746**

**This is a certification of authenticity of domestic business records pursuant to Federal Rules of Evidence 902 (11).**

I, Larry G. West, attest under the penalties of perjury (or criminal punishment for false statement or false attestation) that:

- 1) I am employed by the United States Department of Veterans Affairs (DVA).
- 2) My official title is Paralegal.
- 3) I am a custodian of records for the DVA.
- 4) Each of the records attached hereto is the original record or a true and accurate duplicate of the original record in the custody of the DVA, and I am a custodian of the attached records.
- 5) The records attached to this certificate were made at or near the time of the occurrence of the matters set forth.
- 6) The records attached were made by (or from information transmitted by) a person with knowledge of those matters.
- 7) Such records were kept in the course of a regularly conducted business activity of the DVA.
- 8) Such records were made by the DVA as a regular business practice.

The enclosed records are:

- Letter to Jacob Harris Stein, XXX-XX-5566, dated April 12, 2010, titled “Your Original VA Disability Rating and Reasons for the Rating” and
- Letter to Jacob Harris Stein, XXX-XX-5566, dated June 15, 2012, titled “Your Revised VA Disability Rating and Reasons for the Rating.”

Dated: July 13, 2012

**Larry G. West**

Larry G. West, Paralegal

Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 2012.

\_\_\_\_\_  
Notary signature

\_\_\_\_\_  
My commission expires:

# Interview with Hon. Reuben Green

by Gary Graham

## The 2011 Family Law Institute (“FLI”)

Judge Green enjoyed attending the FLI. As he is new to family law cases, the FLI gave him the opportunity to learn and meet the family lawyers. He found that the materials provided were the most beneficial aspect of the FLI, and he also enjoyed getting to know people through the social activities. Green thought the Judges’ discussions were good; however, the only improvement he would recommend is that each session with the Judges is broken down into a separate subject, i.e. an opening statement, direct examination, cross examination, argument on a motion and closing argument.

## How Attorneys can help Judge Green in his Courtroom:

Green likes attorneys who are organized, who explain the problem/issue, have a solution to the problem/issue, provide statutory/case law to support the solution, and provide a proposed order for the Judge’s signature. He prefers to rule from the bench, rather than taking issues under advisement.

Green believes that family law attorneys are in a unique position to settle the cases between themselves and their clients. He is open to pre-trial conferences when both attorneys agree it may be of assistance to resolving the case or pending issues. With regard to settlement agreements, his staff reviews them first and then he reviews them. If both parties are represented by counsel, then he does not focus too much on the details of the agreement. If a party is *pro se*, he will pay more attention to the details of the Agreement and will sometimes scrutinize the agreement more for fairness.

Green encourages attorneys to move the cases along. When he came on the bench, he recognized a need to increase the number of domestic court days on the court’s calendar. He prefers smaller calendars so that he can give the appropriate amount of time per case, without making attorneys and parties wait around for their turn. Green has at least 1 domestic day for cases with attorneys, 1 domestic pro se day and 2 - 4 days per month for specially set cases. He usually reads the file and motions before any hearing or trial, especially if the case is specially set. Forty percent of his current workload is domestic cases. He started out with 3,000 pending cases, but has reduced his case load to approximately 1,200 pending cases. Through aggressive case management he has reduced his case load by more than one-half. Green believes that most cases should not take as long as they do, and that most divorce cases should be resolved in less than one year.

With regard to continuances, he will usually grant the first or second continuance, but will not automatically grant any continuances after that. Unless there is a good

reason or a conflict, attorneys should not continue family law cases given the emotional nature of these disputes.

He prefers the parties attend mediation, although he does not require it prior to a temporary or final hearing. He also feels that the judicially hosted mediation with the senior judges is not used often enough. Senior Judges are able to accurately value the case, and their result is usually the right result and on the mark. In order to attend a judicially hosted mediation, you need to obtain an order from the judge assigned to the case.

## The Hardest Decisions in Family Law

Custody is the toughest issue in family law cases, especially when both parents are either good or bad parents.

In addition to custody, one of the most difficult family law decisions is how to force someone to pay in contempt cases. This is particularly true when the person is unemployed and has no income. One solution when they are employed is to incarcerate them and recommend them to the Sheriff’s Work-Release program. This allows them to continue to work and pay their obligations while also punishing their contemptuous conduct.

Green has observed the family violence statutes being used as leverage in divorce cases. He recommends obtaining a temporary hearing as soon as possible after the ex-parte hearing because of the severity of the remedies in a family violence action. Regarding family violence cases, Green, if he hears them, is not as likely to enter a temporary protective order without independent evidence, such as bruises, photos, police reports, etc.



## Requests for Custody as Leverage in a Divorce Case

If custody is truly an issue, Green appoints a guardian ad litem (GAL). He sees some parties using custody as leverage even though they are the breadwinners in the family and the other spouse has been a stay-at-home spouse. If he feels that the custody dispute is for leverage in the divorce case, he will make that party pay for the GAL, or depending on the outcome of the custody evaluation, he may make an adjustment for the cost at the end of the case based on the parties' incomes. Often times when he tells a party they will be responsible for paying the GAL fees for the custody dispute, they will back down from their request for custody when it is a leverage based custody situation.

Having been a trial lawyer, Green believes that he can frequently tell when the witnesses are exaggerating their position or outright lying. So be careful how you and your clients conduct yourselves while in the courtroom.

## The Use of Affidavits at the Temporary Hearing

Green will rely on affidavits produced at a temporary hearing depending on the relationship of the affiant, such as a non-biased witness like a teacher, family psychologist, etc. It is the quality, not the quantity, of the evidence in the affidavit. He can usually tell by listening to the parties' testimony as to the truth of the allegations without the need for much in the way of affidavits.

## Does Conduct Matter?

In short, yes, but it depends on the circumstances, such as whether a child will be harmed, and the physical evidence supporting the conduct. As to adultery, he will not focus so much on that, but it will be in the back of his mind. He feels that dealing with the children is the most important aspect in dealing with the conduct of the parties.

## Judge Green's Background

Green received his J.D. with Honors from Emory University School of Law and a Bachelor of Arts Degree in Political Science from Lewis & Clark College in Portland,

Ore. At Lewis & Clark, he was one of approximately 10 members of the Young Conservatives. He and his other members were obviously in the minority.

Before attending college, he served on active duty in the United States Marine Corps. While serving as a Marine, he received the Good Conduct and National Defense Medals, was meritoriously promoted twice and was Honorably Discharged after four years of active duty. Green stated that he would have dropped out of high school if the Marines had not required a high school diploma to enlist.

Green began his law career at King & Spalding, where his practice focused on employment discrimination, product liability and general civil litigation. He was working at the Washington, D.C. office of King & Spalding on Sept. 11, 2001. After witnessing the events of 9/11, he decided to become a prosecutor. Immediately prior to coming onto the bench, Green was a special assistant United States attorney in the Northern District of Georgia, where he prosecuted drug trafficking organizations and violent career criminals. He also served as an assistant district attorney for Cobb County, where he handled the prosecution of over a thousand felony criminal cases.

Green and his wife have two children and are Cobb County Foster Parents.

Green feels that his criminal prosecution background shapes him as a judge because he tried many cases as a litigator. Because of his criminal prosecution background, he understands litigation, trial work, having witnesses lined up and objections to evidence. He feels that generally in domestic cases it is better to have a bench trial than a jury trial. However, if the facts are right, then a jury trial may be beneficial but you should be able to justify the additional time and cost to your client. *FLR*

*Gary P. Graham is a partner in the family law firm of Stern and Edlin, P.C., where he has exclusively practiced divorce and family law since February 2000. He received his Bachelor of Science Degree in Justice Studies from Georgia Southern University where he was a member of the Golden Key National Honor Society. He received his Juris Doctor, Cum Laude, from Mississippi College School of Law in May of 1999.*

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# Effect of Supersedeas in a Hotly Contested Divorce Case

by Patrick Meriwether and Emily Yu

## Introduction

Even with the Supreme Court of Georgia's "Pilot Project" for Discretionary Appeals in domestic relations cases, most family law cases are not appealed. With "abuse of discretion" as the most common standard of review for a contested custody or support case, most clients do not wish to pay for an appeal after their counsel has explained the uphill battle that they will surely face. With the Supreme Court extending its Pilot Project, however, more and more family law practitioners are learning the complicated rules surrounding appellate advocacy, as well as the narrow exceptions applied in family law cases.

During the pendency of the appeal (or a Motion for New Trial in some cases), common questions asked by clients include "Which order am I supposed to follow?" and "How do I handle custody and visitation during the appeal?" Under O.C.G.A. § 5-6-46, a notice of appeal to a final order serves as supersedeas, depriving the trial court of jurisdiction to take further action towards the enforcement of the judgment superseded. The parties must then look to the provisions of the temporary order as it relates to support. Sounds simple enough on the surface, but a host of questions can arise during the pendency of the appeal that may put your client in a very difficult position.

For example, how do you advise your client if the support payments under the final order are significantly less than the support payments under a temporary order? Your client wants to pay under the final order but, while the case is pending appeal, only the provisions of the temporary order are in effect. What happens if your client cannot manage to make the higher payments throughout the duration of the appeal? If the final order is affirmed, does your client get a credit for the higher support payments he made during the pendency of the appeal? If so, going back to what date? In the alternative, if the support payments under the temporary order are less than the support payments ordered under the final order, can the opposing party seek to be paid the higher support payment from the date the final order was entered?

The same question applies to custody provisions when a case is under appeal. Suppose that the custody and visitation provisions in the final order are in your client's favor. The opposing party has filed for an appeal. Your client is strongly against going back to operating under the provisions in the temporary order because they severely limited his ability to see his children. Or, for whatever reason, a temporary order was never entered in the case. What are your client's options? What advice do you give your client?

We address the answers to these questions in this article and address the effect of supersedeas in a hotly litigated divorce or modification case. We have divided the analysis between support and custody because the answers can differ depending on the issue your client is facing.

## Support Payments on Appeal: A History of Conflicting Case Law

When it comes to support payments, the case law had been nothing short of confusing until recently. One line of Supreme Court decisions supported the proposition that, while a case is under appeal, a temporary order governing temporary support continued in full force and effect until a final order was confirmed in the case. In these cases, such as *McDonald v. McDonald* or *Bickford v. Bickford*, it did not matter that a party could have paid hundreds or thousands more under the provisions of a temporary order than under the final order.<sup>1</sup> The new support payment amount was not considered in effect until the final order was affirmed and remitted back to the trial court.<sup>2</sup> The obligor received no credit for his or her excess payments between the time the final order was entered by the trial court and affirmed on appeal.

On the other hand, there is another line of Supreme Court decisions which stood for the opposite proposition. If a final order was affirmed on appeal, these cases held that the provisions of a final order were considered to be in effect as of the date the final order was initially entered. These cases, such as *Nicol v. Nicol* or *DuBois v. DuBois*, discussed below, suggest that there should be adjustments made for any payments made while the case was on appeal.<sup>3</sup> A party who was ordered under the temporary order to pay higher support payments received a credit towards future payments after the final order was affirmed.

Addressing first the line of case law that supports the most literal reading of the Georgia Code, *McDonald v. McDonald* was a case where a Husband sought credit for alimony payments he made under a temporary order in a subsequent Contempt hearing.<sup>4</sup> Under the temporary order, the Husband was ordered to pay periodic alimony to the Wife.<sup>5</sup> Under the final order, however, he was not.<sup>6</sup> The final order was affirmed on appeal.<sup>7</sup> The Wife brought a Contempt action against the Husband for his failure to make certain payments under the final order, and the Husband argued that he should receive a credit for the alimony he had paid to his Wife during the pendency of the appeal.<sup>8</sup> The Supreme Court disagreed with the Husband and held that a judgment for temporary payments continues in full force and effect until a final order in a case.<sup>9</sup> In this case, the appealed final order was not a "final" order until it was affirmed on appeal and remitted to the trial court.

Almost 30 years later, the same reasoning was applied to a slightly different situation. In *Langley v. Langley*, periodic support payments were ordered under the temporary order and a lump sum payment was ordered under the final order.<sup>10</sup> The facts were slightly different in this case and involved the application of temporary alimony payments to a permanent award of lump sum alimony pursuant to the terms of an ante-nuptial agreement.<sup>11</sup> At the trial court and on appeal, the Husband argued that the payments of temporary alimony during the course of the case should offset his obligation to pay the lump sum payment under the final order.<sup>12</sup> The Supreme Court rejected this argument.

The Supreme Court again held firmly to the idea that “Until the permanent award of alimony becomes final, the parties are bound by the interlocutory order of the trial court.”<sup>13</sup> In addressing the argument, the Court noted that “the very nature of temporary alimony militates against the offset of such amounts” because of the different character and purposes of temporary alimony as compared to permanent alimony.<sup>14</sup> The Court stated that the purpose of temporary alimony was to “take into account the peculiar necessities of the spouse at the time and provides the means by which that spouse may contest the issues in the divorce action” and “to meet the exigencies arising out of the domestic crisis.”<sup>15</sup>

Contrary results, however, were reached in another line of cases such as *Nicol v. Nicol*, and *DuBois v. DuBois*.<sup>16</sup> In *Nicol v. Nicol*, the Supreme Court indicated that the “the effect of the supersedeas of the final order was to suspend all proceedings for the enforcement of the judgment, and when the judgment was affirmed, it had full force and effect as of the date it was entered.”<sup>17</sup> In *Nicol*, the permanent awards of alimony and child support were greater than under the temporary order.<sup>18</sup> Because the final order was affirmed on appeal, the Supreme Court stated that the

greater sums of alimony and child support came due on the date the final order was entered during the appeal and that those greater sums still had to be paid.<sup>19</sup> The amount owed was merely subject to a set-off from the temporary alimony and child support amounts that had already been paid for the period of the appeal.<sup>20</sup> Essentially, the new, higher support payment became due retroactively.

The same line of reasoning was followed in *DuBois v. DuBois*.<sup>21</sup> In *DuBois*, however, the scenario was reversed such that the payments under the temporary order (when you include all the bills the Husband was paying) were higher than the payments under the final order.<sup>22</sup> The Husband in this case had been paying higher temporary support (in total) to the Wife under the provisions of a temporary order during the appeal.<sup>23</sup> The Supreme Court relied on its reasoning in cases like *Nicol v. Nicol* and stated that “Under the same reasoning, it is only equitable that a credit should be allowed in the converse situation where, . . . , the final decree awards overall lower alimony and child-support payments than did the temporary order . . .”<sup>24</sup>

## Support Payments: Reconciling the Case Law

The conflicting case law finally came to a head in the 2010 case of *Robinson v. Robinson*, which forced the Supreme Court to make a ruling in one direction or another.<sup>25</sup> In *Robinson*, the parties had a temporary order in place before the trial court entered a final order in November 2008.<sup>26</sup> The Husband filed an application for discretionary appeal that was denied.<sup>27</sup> The remittitur was entered in the trial court on July 28, 2009.<sup>28</sup>

Prior to the entry of the remittitur, the Wife filed a Motion for Contempt based on provisions of the temporary order. She later amended her Motion to reflect the payments as indicated in the provisions of the final order.<sup>29</sup> She initially sought to hold the Husband in contempt for failing to pay alimony, child support, and medical expenses under the temporary order for June, July, and August 2009, months after the final order had been entered.<sup>30</sup> The Wife’s amended Motion for Contempt sought unpaid child support under the provisions of the final order, which ordered higher child support payments, and included an additional claim for unpaid alimony payments under the provisions of the temporary order.<sup>31</sup>

In what appeared to be an effort to reconcile the conflicting case law, the trial court attempted to apply both lines of precedent when making a ruling on the Wife’s Motion for Contempt by distinguishing the cases factually. With respect to the child support payments, the trial court followed the *McDonald* line of reasoning and found that the Husband was not in contempt.<sup>32</sup> The trial court reasoned that the payments in question were controlled by the temporary order only until the entry of the remittitur and the payments under the final order did not take effect until the entry of the remittitur.<sup>33</sup>

On the other hand, the trial court used the *Nicol* line of reasoning when it came to the alimony payments.<sup>34</sup>



Even though the Wife was entitled to alimony under the temporary order, she was not so entitled under the final order. Because the remitter essentially affirmed the final order, the trial court held that no alimony was due as of the date of the final order and therefore the Husband was not under an obligation to pay.<sup>35</sup>

The Wife appealed the trial court's decision forcing the Supreme Court to resolve the differing *Nicol* and *McDonald* precedents. The question on appeal was, upon return of the remitter, do permanent awards in a final order take effect as of the date of the entry of the remittitur or do they "relate back" to the date of the final order, with adjustments made to reflect payments made under temporary orders during the pendency of an appeal.

In making its decision, the Supreme Court noted that the nature of temporary alimony militates against offsetting the payments from a permanent alimony order.<sup>36</sup> The Court stated that temporary alimony has a very specific character and purpose "intended to meet the exigencies arising out of the domestic crisis of a pending proceeding for divorce; it takes into account the peculiar necessities of the spouse at that time and provides the means by which that spouse may contest the issues in the divorce action."<sup>37</sup>

Ultimately, the Supreme Court relied on its holding in *McDonald* discussed above that a spouse is not entitled to credit against permanent alimony payments for payments made by that spouse pursuant to a temporary order while the final order was pending appeal.<sup>38</sup> The Supreme Court stated that

...*McDonald* and similar cases represent the proper rule; if not otherwise altered by the trial court, a temporary award continues in effect until the entry of the remittitur in the trial court, and it is from that date forward that any permanent award in a final judgment and decree of divorce as effect. *Nicol* and cases following its reasoning on this issue are hereby overruled.<sup>39</sup>

The Supreme Court held that the trial court erred in its ruling that the Husband was not obligated for temporary alimony amounts that had come due before the entry of the remittitur in the trial court but had correctly ruled as to child support.<sup>40</sup>

## Custody and Visitation Provisions:

Recent Case Law and Legislative Changes to Avoid the Supersedeas Dilemma

Luckily, dealing with custody and visitation provisions while a case is on appeal is far easier to handle than support payments. Previously, trial courts were given broad discretion and authority under O. C. G. A. § 9-11-62 to condition supersedeas upon the giving of a bond as a method of controlling an automatic supersedeas or to deny supersedeas completely. Subsection (b) of this statute provides that "The filing of a motion for a new trial or motion for judgment notwithstanding the verdict

shall act as supersedeas unless otherwise ordered by the court; but the court may condition supersedeas upon the giving of bond with good security in such amounts as the court may order."

A trial court's discretion and authority in this respect was examined by the Supreme Court of Georgia in cases such as *Frazier v. Frazier* and *Walker v. Walker*.<sup>41</sup> In *Frazier*, the Supreme Court affirmed the trial court's granting of a party's motion to exempt the custody provisions of the final order from automatic supersedeas.<sup>42</sup> In its decision, the Supreme Court partly relied on an earlier decision in *Walker v. Walker*, and expanded the time frame during which the trial court can exempt a provision of a final order from supersedeas.<sup>43</sup> The *Frazier* and *Walker* rulings were affirmed again in the recently decided case of *Blackmore v. Blackmore*.<sup>44</sup>

In *Blackmore*, the trial court entered an order on an emergency petition until a final order could be entered modifying the parties' custody and visitation arrangements.<sup>45</sup> After entry of the final order granting the Wife greater and more liberal visitation with the minor children, the Husband filed for an appeal and a motion to enforce supersedeas.<sup>46</sup> The trial court denied his motion and, in its order, expressly exempted the custody and visitation provisions of its order from any supersedeas effect.<sup>47</sup> On appeal, the Husband argued that since his notice of appeal of the final order and payment of appeal costs triggered automatic supersedeas of the final order, the trial court could not exempt the custody and visitation provisions once he filed his appeal. He also argued that the provisions of the emergency order should have remained in effect and governed custody and visitation pending the appeal of the final order.<sup>48</sup> The Court of Appeals disagreed and ruled that the trial court did not err by resolving the issue of supersedeas after the Husband had filed his appeal.<sup>49</sup>

Relying on the Supreme Court's decision in *Walker*, the Court stated that "Nothing in *Walker* indicates that the court must include the language at the time the order is entered in order to effectively modify the automatic supersedeas. Indeed, the Supreme Court referred to the party [in *Walker*] as "appellee," indicating that the party could seek such remedy after a notice of appeal had been filed."<sup>50</sup> Looking to the Supreme Court's decision in *Frazier* as well, the Court of Appeals stated "As it concerned the supersedeas effect of a motion for new trial, *Frazier* clearly contemplated a post-final-order adjustment to exempt the custody provisions of a final order from automatic supersedeas."<sup>51</sup>

In addition to the recent case law, the legislature has addressed this issue this year with O.C.G.A. § 5-6-34 and O.C.G.A. § 5-6-35. By adding subsection (e) to O.C.G.A. § 5-6-34 and subsection (k) to O.C.G.A. § 5-6-35, the legislature has resolved all questions regarding provisions of custody and visitation during an appeal. O.C.G.A. § 5-6-34(e) and § 5-6-35(k) provide that "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.” The only limitation on this new subsection is that it only applies to all notices or applications of appeal filed on or after July 1, 2011.

## Conclusion

With the continuation of the Pilot Project, family law attorneys will continue to be faced with difficult questions to answer and problems to address when considering an appeal. At least as to questions of support custody and visitation, the Supreme Court and legislature have provided some definitive direction to navigate these waters.

So, with the recent legislative changes and case law, you can confidently tell your client that the final order will control as it relates to the custody or visitation aspect of your case. When it comes to support, however, *Robinson* clearly establishes that the temporary order will control. If you represent the support obligor whose temporary obligation was reduced in a final order, you will have to perform a cost/benefit analysis that includes the extra support payments for which he or she will not receive a credit when considering whether to appeal. If the support obligor is not the one appealing, then at least you can save him or her the cost of researching this issue.

Of course, not every article can address every issue. If you have reached the end of this article and find yourself asking, “So what do I Tell the client who just won custody in a modification action and the other parent has appealed?” New statutory law clearly shows that your client would maintain custody pending the appeal, but does *Robinson* require him or her to pay child support, under an old order when he or she has custody of the kids? That question will be addressed in our next article. **FLR**



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## (Endnotes)

- 1 *McDonald v. McDonald*, 234 Ga. 37 (214 S.E. 2d 493) (1975); *Bickford v. Bickford*, 228 GA. 353, 355 (185 S.E.2d 756) (1971)
- 2 *Id.*
- 3 *Nicol v. Nicol*, 240 Ga. 673 (242 S.E. 2d 129)(1978). *DuBois v. DuBois*, 250 Ga. 271 (297 S.E. 2d 277) (1982).
- 4 *McDonald v. McDonald* , 234 Ga. 37 (214 S.E. 2d 493) (1975)
- 5 *Id.*
- 6 *Id.*
- 7 *Id.*
- 8 *Id.* at 39
- 9 *Id.* citing *Bickford v. Bickford*, 228 Ga. 353, 355 (185 S.E. 2d 756) (1971).
- 10 *Langley v. Langley*, 279 Ga. 374, 375 (613 S.E. 2d 614) (2005).
- 11 *Id.*
- 12 *Id.*
- 13 *Id.* at
- 14 *Id.* at 375 citing *Coleman v. Coleman*, 240 Ga. 417, 420 (240 S.E. 2d 870) (1977)
- 15 *Id.*
- 16 *Nicol v. Nicol*, 240 Ga. 673 (242 S.E. 2d 129) (1978), *DuBois v. DuBois*, 250 Ga. 271 (297 S.E. 2d 277) (1982).
- 17 *Id.* (*Emphasis added*)
- 18 *Id.* at 551.
- 19 *Id.* at 673-674.
- 20 *Id.*
- 21 *DuBois v. DuBois*, 250 Ga. 271 (297 S.E. 2d 277) (1982).
- 22 *Id.*
- 23 *Id.*
- 24 *Id.* at 272.
- 25 287 Ga. 842 (700 S.E. 2d 548) (2010).
- 26 *Id.*
- 27 *Id.*
- 28 *Id.*
- 29 *Id.* at 843.
- 30 *Id.*
- 31 *Id.*
- 32 *Id.*
- 33 *Id.*
- 34 *Id.*
- 35 *Id.*
- 36 *Robinson v. Robinson*, 287 Ga. 842 (700 S.E. 2d 548) (2010) (citing *Coleman v. Coleman*, 240 Ga. 417, 410, 240 S.E.2d 870 (1977))
- 37 *Id.*
- 38 *Id.* at 846.
- 39 *Robinson v. Robinson*, 287 Ga. 842, 847 (700 S.E. 2d 548) (2010).
- 40 *Id.*
- 41 *Frazier v. Frazier*, 280 Ga. 687 (631 S.E.2d 666) (2006), *Walker v. Walker*, 239 Ga. 175 (236 S.E.2d 263) (1977).
- 42 *Id.*
- 43 *Walker v. Walker*, 239 Ga. 175 (236 S.E.2d 263) (1977).
- 44 *Blackmore v. Blackmore*, 2011 Ga. App. LEXIS 873; 2011 Fulton County D. Rep. 3111
- 45 *Id.*
- 46 *Id.*
- 47 *Id.*
- 48 *Id.*
- 49 *Id.*
- 50 *Id.*
- 51 *Id.*

# Visitation Refusal: Realistic Response, Allied or Alienation

by Howard Drutman & Marsha Schechtman,  
Atlanta Behavioral Consultants

You have all had cases wherein a child of divorce refuses to visit or have meaningful contact with one parent. Sometimes the reasons are obvious. (Perhaps the child is the victim of abuse.) Other times there doesn't appear to be a logical reason for refusing visitation. Too often, the parents provide conflicting explanations for the child's refusal to see one parent. The parent whom the child refuses to see often accuses the aligned parent of poisoning the mind of the child. The aligned parent asserts that there are valid reasons for the child to refuse to visitation and defends the child's behavior as healthy, given the alleged inappropriate behavior of the other parent. As in all child custody conflicts, dichotomous thinking does not provide an accurate understanding of a particular set of behaviors. Rather, looking at a continuum from a healthy relationship between child and parent all the way to a completely cut off relationship will yield the complexity of factors that lead to the child refusing visitation.

In 1987, Richard Gardner wrote a book attempting to explain one possible dynamic that may lead to a child refusing visitation. His theory, Parental Alienation Syndrome, was initially defined as "... a disturbance in which children are preoccupied with depreciation and criticism of a parent-denigration that is unjustified and/or exaggerated (p. 67-68)." Dr. Gardner went on to say that:

The concept of parental alienation syndrome includes the brainwashing component, but it is much more inclusive. It includes not only conscious but subconscious and unconscious factors within the programming parent that contribute to the child's alienation from the other. Furthermore (and this is extremely important), it includes factors that arise within the child-independent of the parental contributions- that play a role in the development of the syndrome. In addition, situational factors may contribute, i.e., factors that exist in the family and the environment that may play a role in bringing about the disorder (p. 68).

Richard Gardner's theories focused on a suspected parent who engaged in a campaign to denigrate the other parent in the eyes of the child as well as on specific psychological vulnerabilities in the child, making them susceptible to the denigrating messages. Although he acknowledged other external influences, he remained focused on a joining together of a vulnerable child and an alienating parent.

In 2001, Joan Kelly and Janet Johnston wrote an article for the Family Court Review that reformulated the theories of John Gardner and others, and attempted to view child refusal in a way that was subject to scientific inquiry. The new theory would direct future research to clarify the

underlying dynamics involved in situations where children refuse visitation. The authors wrote:

*This formulation proposes to focus on the alienated child rather than on parental alienation. An **alienated child** is defined here as one who expresses, freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection, and/or fear) toward a parent that are significantly disproportionate to the child's actual experience with that parent. From this viewpoint, the pernicious behaviors of a "programming" parent are no longer the starting point. Rather, the problem of the alienated child begins with a primary focus on the child, his or her observable behaviors, and parent-child relationships. This objective and neutral focus enables the professionals involved in the custody dispute to consider whether the child fits the definition of an alienated child and, if so, to use a more inclusive framework for assessing why the child is now rejecting a parent and refusing contact (p. 251).*

Kelly and Johnston (2001) looked at many factors why children refuse visitation. They categorized those factors as follows:



*Resistance rooted in normal developmental processes (e.g., normal separation anxieties in the very young child), resistance rooted primarily in the high-conflict marriage and divorce (e.g., fear or inability to cope with the high-conflict transition), resistance in response to a parent's parenting style (e.g., rigidity, anger, or insensitivity to the child), resistance arising from the child's concern about an emotionally fragile custodial parent (e.g., fear of leaving the parent alone), and resistance arising from the remarriage of a parent (e.g., behaviors of the parent or stepparent that alter willingness to visit (p. 251).*

Kelly and Johnston (2001) described a relationship continuum between children and their parents that occurs post-separation or divorce. Although their focus was on children of separation and divorce, the continuum they describe also exists in the relationship between children and their parents in intact families.

On one end of the spectrum, described by Kelly and Johnston (2001), is a **Positive Relationship with both parents**. These children enjoy spending time and look forward to seeing each of their parents. The next step on the continuum is the child who has an **Affinity with one parent**. This child wants a relationship with both parents. Kelly and Johnston wrote about this type of parent-child relationship: "By reason of temperament, gender, age, shared interests, sibling preferences of parents and parenting practices, these children feel much closer to one parent than the other (p. 252)." This affinity can change from parent to parent over time. The third step on the continuum is the **Allied children**. Children that are allied have a consistent preference for one parent over the other. Although these children prefer time with one parent, they rarely cut off contact with the other parent. Kelly and Johnston described the children at this step as expressing ambivalence about the parent they are not allied with. The child in this type of parent-child relationship often expresses, "... anger, sadness, and love, as well as resistance to contact (p. 252)."

Kelly and Johnston's (2001) last two steps on the continuum describe relationships between a child and a parent that are severely disrupted. The first type of relationship in this category is labeled the **Estranged children**. These children are estranged from one of their parents due to inappropriate behavior from their parent. The behaviors can include verbal or physical abuse or neglect. Kelly and Johnston wrote regarding the estranged children, "Among this group of children who are estranged as a cumulative result of observing repeated violence or explosive outbursts of a parent during the marriage or after separation, or who were themselves the target of violence and abusive

behavior from this parent (p. 253)." They added: "Often, they can only feel safe enough to reject the violent or abusive parent after the separation (p. 253)." The last step, described as the **Alienated Child**, describes the child who rejects a parent, "...stridently and without apparent guilt or ambivalence (p. 254)." Kelly and Johnston wrote:

For the most part, these rejected parents fall within the broad range of "marginal" to "good enough," and sometimes "better" parents, who have no history of physical or emotional abuse of the child. Although there may be some kernel of truth to the child's complaints and allegations about the rejected parent, the child's grossly negative views and feelings are significantly distorted and exaggerated reactions (p. 254).

Often children who are alienated from a parent are unable to describe even one good quality in that parent. Many complaints center on normal parental behaviors that most children will find annoying. This child might complain that the parent limits their video game playing or makes them do their homework. A child may complain that the parent they refuse to see makes them practice their musical instrument before they go out to play. The child's complaints are disproportionate to the parental demand. The child may act as if the parent is torturing them when in fact the parent had not let the child play an inappropriate video game or see a movie that was not age appropriate. Some of these children will have complaints that include allegations of emotional and physical abuse and possibly sexual molestation. The alienated child often cuts off communication and refuses to visit with family members on the rejected parent's side of the family. This includes grandparents, aunts, uncles, and cousins, that the child enjoyed spending time with prior to the cut off from the parent. Commonly these children complain about things that children usually do not complain about. In more than one case the authors have been involved in, a child complained that they did not want to see their grandparents because, "All my grandparents ever want to do is go to places like Disneyworld, Universal Studios, or



take us to the beach.” Typically, children do not complain about going to such places with their grandparents.

Leslie Drozd (2009) wrote:

*Many divorce cases that include allegations of domestic violence now come with counterallegations of parental alienation. When assessing for one, it is necessary to assess for the other, just as assessment for substance abuse must be assessed concurrently with allegations of family violence and vice versa (p. 411).*

Drozd continued:

*Similarly, when evaluating alleged abuse one should screen for alienating behaviors, and when the presenting problem or allegation is alienation, one should investigate whether there has been abuse. The presence of abuse does not rule out alienating behaviors by the parent, nor does the presence of alienating behavior rule out the occurrence of abuse. It is possible to assess the extent to which alienation, alienating behavior, and abuse impact a child only through a systematic investigation of all possibilities (p. 411).*

When children refuse visitation, a child custody evaluation is one option to assess both parents, the children, and examine many factors that have led to this situation. A Guardian ad Litem evaluation is another method often used to assess these situations. One of the limits of the GAL evaluation is that it does not examine the depth of any psychopathology in the parents or the children that may be contributing to the child’s behavior. Any professional conducting an investigation must not assume that the child refuses visitation due to inappropriate behavior or abuse from the parent the child will not see, or assume that any type of alienation exists. Both positions can lead the examiner to approach the evaluation with confirmatory bias or other types of cognitive distortions that could lead to a biased evaluation or biased assessment of the data. David Martindale (2005) defined confirmatory bias as, “The inclination to seek information that will confirm an initially-generated hypothesis and the disinclination to seek information that will disconfirm that hypothesis.

The child custody evaluator must thoroughly assess the characteristics and behavior of the parents and the children. There must be a detailed history of the parent-child relationship prior to the visitation refusal. Interviews with collateral contacts are extremely important in obtaining a sense of the quality of the parent-child relationship before the refusal, after the refusal, and the events leading up to the refusal to visit. The conclusions of the evaluator must offer explanations about the process that has led the specific child to reject or refuse to visit a specific parent. The evaluator should also discuss alternative theories that might explain the child’s refusal.

As in most complex family law cases, there is danger in overly simple explanations for complex behaviors and relationships. Prior to the start of any child custody evaluation there needs to be a clear question of what behaviors are under examination. Having a court order

requesting a child custody evaluation to explore why a child is refusing visitation with a parent is a much better question than an order to assess if a parent has alienated a child against the other parent. The first approach opens the investigation to assessing the many reasons why a particular child refuses to see a parent. The latter approach attempts to fit a specific theory to a set of behaviors. That approach also sets up the evaluation for possible confirmatory and other types of bias. A child custody evaluation that conforms to the AFCC Model Standards of Practice for Child Custody Evaluation (2009) is the most likely procedure to answer the question of why a child refuses visitation. **FLR**

We welcome your comments, questions, and would appreciate your feedback.

Visit the Blog of the Atlanta Behavioral Consultants:  
[www.TheAtlantaBC.com](http://www.TheAtlantaBC.com).



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- The authors want to thank Judy Neukrug, for her assistance in the editing of this article.

# Caselaw Update

by Vic Valmus

## Direct Appeal

*Brabant v. Patton*. **A12A0294** (April 27, 2012)

The parties were divorced in 1997 in Muscogee County. The husband was named primary custodian of the couple's children. In 2010, the husband sent the child Allison, then 19, and her brother to visit the mother in Spokane, Wash. where she resided. Allison is mentally challenged and will require care and supervision her entire life. However, the mother did not return Allison to Georgia and instead filed a Petition for Limited Guardianship of Allison in the Superior Court of Spokane, Wash. and that Allison made an independent determination to remain in Washington.

The father filed a Petition for Declaratory Judgment and Petition for Citation of Contempt in the Superior Court of Macintosh County where he and Allison resided prior to her visit to Washington to see her mother. The petition declared that Patton was the lawful custodial parent of Allison and that the mother is required to pay child support until Allison reaches the age of 20 years. The mother filed an Answer and Counterclaim and a Motion to Dismiss the husband's petition.

The court determined that the Macintosh Superior Court had jurisdiction to determine the guardianship of Allison and the father was the primary custodial parent and the natural guardian of Allison and ordered the mother to return Allison within 15 days. The trial court also determined the Superior Court of Muscogee County had jurisdiction to consider the Citation for Contempt and the trial court transferred the Petition to Muscogee County. The mother timely appealed this order but the father moved to dismiss the appeal on the grounds that all appeals in domestic relations cases are discretionary pursuant to O.C.G.A. § 5-6-35. The father also argued that because the Order was interlocutory the mother was required to obtain a certificate of immediate review before she filed an appeal pursuant to O.C.G.A. § 5-6-34(b). The trial court granted the Motion and dismissed the mother's appeal. The mother appeals and the Court of Appeals reversed.

Under O.C.G.A. § 5-6-34(a)(11) direct appeals may be taken from all judgments or orders in child custody cases including, but not limited to, awarding or refusing to change custody or holding or declining to hold persons in contempt of such child custody judgments or orders. The Georgia courts have interpreted this section as permitting a direct appeal of an order in a child custody case regarding which parent has custody regardless of the finality and thus such orders are not subject to the interlocutory or discretionary appeal procedures. The trial court's order had the father retain primary custody of Allison even though she had reached the age of majority and in spite of the mother's petition for guardianship in Washington was a refusal to change custody and thus was directly appealable.

## ERISA

*Appleton vs. Alcorn, et al.* **S11G1145** (May 29, 2012)

Alcorn was the executrix of the estate of her father Richard Alcorn, and brought a breach of contract action in which they asserted that their father's second wife, Appleton, contractually waived her right to retain the proceeds of their deceased father's employer provided 401(k) plan and life insurance policy by entering a settlement agreement incorporated into an order of separate maintenance executed 1 year prior to his death. The parties do not dispute the terms of the employment benefits plan paying benefits to the second wife.

Alcorn asserts that she waived the right to keep funds under the settlement agreement which provided, that each party waive any interest they had in the other party's life insurance proceeds, cash value and otherwise; release any claims in any retirement account payment benefits privilege earned by the other; and waived all rights and claims in any interest or shares.

The second wife moved to dismiss the action pursuant to O.C.G.A. § 9-11-12(b)(6) arguing that the employee's retirement income secured the ERISA which barred Alcorn's state law claim. The trial court agreed with Appleton and ruled that the breach of contract claim was precluded because the waiver in the settlement agreement was not ERISA compliant. Alcorn appealed to the Court of Appeals which reversed the trial court. Certiorari was granted and the Supreme Court which upholds the Court of Appeals ruling.



The purpose of ERISA is two-fold, first to protect plan participants and their beneficiaries and to defray the reasonable expenses of administering employer provided benefit plans. Once the plan administrator has paid out the benefits to the rightful participant or beneficiary, there is no longer a need for such protection because the participant or beneficiary has received the funds and the plan administrator is no longer obligated to oversee that participant's or beneficiary's interest in the benefit plan. This court has previously held that ERISA covered benefits that have been paid to the participant or beneficiaries are not subject to the ERISA anti-alienation provisions. In fact, once funds from an ERISA covered plan are received by the proper participant and beneficiary, the participant or beneficiary is not judgment proof and the funds are not sheltered from state law causes of action. Since the proceeds of the ERISA covered plans were paid out to the Appleton and were no longer in the control of the plan administrator, the trial court erred when it dismissed the breach of contract claim.

### Minimum Contact/Jurisdiction

*Ennis v. Ennis*, **S12A0277** (April 24, 2012)

The husband filed an action for divorce on June 28, 2010, seeking a divorce, alimony, division of marital property and attorney's fees. The husband relied solely on the Georgia Long Arm Statute under O.C.G.A. § 9-10-91(5) for personal jurisdiction over the wife. Wife answered on Aug. 20, 2010, raising a lack of personal jurisdiction as her first affirmative defense and also filed a motion to dismiss for lack of personal jurisdiction. The trial court denied her motion to dismiss for lack of personal jurisdiction. The Wife appeals and the Supreme Court affirms in part and reverses in part.

The husband's only bases for arguing the court has personal jurisdiction over the wife is the Georgia Long Arm Statute. The Statute states that a court may have personal jurisdiction over a non-resident with respect to proceedings for divorce if the non-resident maintains a marital domicile in the state at the time of the commencement of the action or if the defendant resides in the state preceding the commencement of the action, whether cohabitating during that time or not. The court has set forth a three part test to determine if there are the minimum contacts need to confer personal jurisdiction over a non-resident: (1) the non-resident must purposely avail herself of the privileges of doing some act or consummating some transaction with or in the forum (2) plaintiff must have a legal cause of action against the non-resident that arises out of activities of the defendant within the forum, and (3) if the first two prongs are met, a minimum contact between the non-resident and the forum exists and then the assumption of jurisdiction must be found to be consistent with due process of fair play and substantial justice.

The facts here were not sufficient minimum contacts for the wife to reasonably anticipate being haled into court in Georgia. Wife has not lived in Georgia since 2003, the wife does not own any property in Georgia and has not

transacted any business in Georgia since 2003. The last marital domicile of the wife was in Richmond, Va. and the circumstances giving rise to the dissolution of the marriage occurred in Virginia. The wife's only connection with Georgia has been a brief visit during which she had no contact with the husband. Since the first 2 prongs have not been met, the court does not have personal jurisdiction over the wife.

However, Georgia courts do not need personal jurisdiction over the wife to grant a divorce. O.C.G.A. § 19-5-2 entitles the husband to gain access to Georgia courts for the purpose of dissolving the marriage so long as he has lived in the State for at least six months. Therefore, the trial court erred in denying the wife's Motion to Dismiss divorce proceedings but the Trial Court had jurisdiction to grant the Husband a divorce.

### Modification/Venue

*Viskup v. Visкуп*, **12A0276** (April 24, 2012)

The parties were married in 1998 and were divorced in 2006. They had a son that was born in 2000. The Final Judgment and Decree of Divorce entered in Cobb County gave the father the primary legal and physical custody of the child. In October 2008, the mother filed a Petition for Modification of Custody and Child Support in the Superior Court of Cherokee County. The father filed a Motion to Dismiss for lack of venue and the Trial Court denied and granted primary physical custody of the child to the mother. The father appeals and the Supreme Court affirms.

The father claims the Trial Court erred because child custody modification actions have to be filed in the legal custodian's county of residence. The mother filed her petition in Cherokee County on Oct. 17, 2008, and service was perfected on the father in Cherokee County on Oct. 24. The father sold his home in Cobb County in late May or early June of 2008 and rented an apartment in Cherokee County and enrolled the child in a Cherokee County school and entered a contract on Aug. 29 to purchase a home in Cobb County. The father spent the nights of October 14 - 15 in the new home and closed on the new home, registered his vehicle in Cobb County and changed his driver's license to Cobb County on Oct. 21. He removed the child from the Cherokee County school on Nov. 7.

The trial court ruled that while the father had the intent to return to Cobb County in September, the father was a resident of Cherokee County until his physical presence changed on Oct. 21, the day he closed the purchase on the Cobb County home and changed his Cobb County vehicle registration driver's license address. For the purposes of venue and other jurisdiction questions, a person's residence at the time of filing of the suit is the determining factor followed by service within a reasonable time. A change of residence by the defendant after the filing of an action but before trial does not change the proper venue. Since the mother filed her modification petition on Oct. 17 the father was not a resident of Cobb County until Oct. 21.

## Quantum Meruit

*Wallin et al. v. Wallin*, A12A0772 (June 27, 2012)

The parties filed for divorce and the wife then sued her father-in-law, Gene Wallin, claiming that he breached an oral agreement to deed a parcel of property to her and her husband. The wife alleges that she and her husband took over the property, made improvements and paid mortgages and in return, the father-in-law promised that the property would be theirs after the mortgages were paid. The wife filed the suit against the father-in-law but her husband refused to join and she added her husband as a co-defendant with her father-in-law.

The evidence at trial was the father-in-law agreed to let the husband and wife use the property, that they would pay both mortgages which equaled \$2700.00 a month and the taxes. When the mortgage was paid he would deed the property over to the parties. Wife testified that before her or her husband could take possession of the property they hauled off trash, used insurance money to build new structures, paid the mortgage insurance and taxes, cleaned up and painted the buildings. The parties paid \$80,000 toward one mortgage and \$73,740 toward the other mortgage, and at the time of trial, the building on the property was insured for \$262,000. The jury awarded damages to the wife of \$276,000 against the husband and the father-in-law on the claim of quantum meruit. The father-in-law and her husband appeal and the Court of Appeals affirmed in part and reversed in part.

The father-in-law argues that the evidence is insufficient to support damages against him. In order to recover on a claim of damages based upon quantum meruit, the wife had to present evidence that (1) her services were valuable to the father-in-law, (2) her services were either at the request of the father-in-law or were knowingly accepted by him, (3) the father-in-law's receipt of services without

compensating the wife would be unjust and (4) the wife expected compensation for her services at the time she provided them. Here, the fact finder must determine in what amount the party receiving was benefited and enriched by materials and services and must determine the reasonable value of the work to the recipient. There was evidence that the parties paid taxes and insurance on the property and over \$153,000 toward the mortgage, cleaned the property, renovated the property and rebuilt an existing building. Therefore the evidence was sufficient to support the verdict.

However, the wife was not able to recover from the husband. The evidence at trial was that the improvements and payments were made jointly by the husband and wife and therefore there was no evidence to support the wife's quantum meruit claim against her husband. As previously stated, there was no evidence at trial to support any of the required elements against the husband.

## Separate Property

*Jones-Shaw v. Shaw*, S12F0797 (June 18, 2012)

The parties were married in July, 2009 and in November, 2010 the wife filed a Complaint for Separate Maintenance. The husband counterclaimed for divorce and the suit was later converted to a divorce action. The wife sought equitable division of marital assets and attorney's fees. The primary asset the wife sought was division of a closely held non-profit corporation known as Georgia Tar Heel Sports, Inc. (GTS) which sponsored and held weekend sports tournaments for children in the metropolitan Atlanta area. The enterprise was started, but not incorporated, 9 years prior to the marriage of the parties. After the final hearing, the trial court found that the wife failed to establish that GTS was subject to equitable division of property or that GTS' appreciated during the approximately 16 months period that the parties lived together as husband and wife. The court denied any additional claims of the parties and ordered each one to retain their own personal property and each responsible for payment of his or her own personal debts and made no award of attorney's fees. The wife appeals and the Supreme Court affirms.

A closely held corporation may be a marital asset subject to equitable division in a divorce. Even a business which was started as a result of separate premarital funds may be subject to equitable division if there is any appreciation in value of the business during the years of the marriage due to the spouse's individual or joint efforts. However, appreciation of value during the marriage does not render the asset subject to equitable division if the growth is solely a result of market forces. Therefore, the threshold inquiry would focus on whether there is any increase in value of GTS during the marriage and if so what was the basis of the increase. In order for the trial court to determine whether any assets appreciated in value during the marriage there must be evidence of the value of the asset at the time of the marriage and at the time of the divorce. Here, there is no such evidence in the case. At trial, there were no expert witnesses as to GTS's value. The wife



testified in generalities about the source of revenue and that each team was charged about \$250 a game, GTS would host about 26 different teams on a Saturday and made about \$26,000 for one weekend from entry fees. GTS also received commissions from hotel chains for having teams stay at the hotel and would have a percentage from the concession stands on each day of the weekend. However, there is no evidence from which to determine the financial condition of GTS at the time of the parties' marriage.

## STRIKING PLEADINGS

*Pennington v. Pennington*, **S12F0539** (May 29, 2012)

After 13 years of marriage, the wife filed a petition for divorce and the husband filed an answer and counterclaim for divorce. In November, during a status conference, the court discussed with the parties its intent to schedule a jury trial to begin on Monday in early December, 2010. The court further informed the parties that consistent with its usual practice the child custody issues would be decided at a final hearing to be held on the Friday preceding the Monday of jury selection. The following day, notice of jury trial was mailed to the parties notifying them of a trial on Dec. 13 and on Nov. 30 notice of hearing was mailed to the parties notifying them of the child custody hearing to be held on Dec. 10, 2010. The night before the custody hearing, the husband and wife discussed settlement but she refused to sign a draft. The next morning the husband found a note on his windshield purportedly signed by the wife stating we can settle it without any dispute or delay and just fill in what the settlement is.

The wife did not communicate with either the court or the husband the morning of the final custody hearing which she chose not to attend. The court declined to accept unverified notice of proof of a settlement agreement between the parties and, based on the wife's failure to appear at the hearing, struck her pleadings from the docket including her demand for a jury trial, entered into evidence the Guardian Ad Litem's supplemental report and proceeded to enter a final judgment on the husband's counterclaim for divorce awarding the husband sole custody of the children and all marital property. Wife appeals and the Supreme Court affirms.

Wife contends the trial court abused its discretion by striking her pleadings and proceeding to a bench trial as a sanction for failure to appear. A trial court may strike a party's pleading as a proper sanction for willful refusal to participate in the proceedings pursuant to the Court's inherent power to sufficiently administer the cases upon its docket. Here, the court informed the parties at a November status conference of the final hearing to determine all issues related to child custody would be held on Friday before that trial. The trial court also specifically warned the wife, who that day agreed to her counsel's withdrawal, that she needed to check her mail in a timely manner because notices of upcoming hearings and trial dates would be sent to her at the post office address she provided to the court. Despite proper notice of the hearing, the wife voluntarily did not participate in the proceedings and did not

inform the court, either personally or by any authorized representative, of any reason for her failure to appear.

The wife also argued she was excused from appearing because she believed the matter was settled because she had attended all other hearings. However, her failure to appear is not excused by the fact that the night before the final hearing she left a note telling the husband to fill in what the settlement was. The Wife's claims regarding her participation are belied by the record which shows the wife previously failed to attend a scheduled settlement conference and failed to respond to the husband's discovery requests. The wife also contends the court erred by denying her the right to a jury trial or to present or object to the introduction of evidence. Because the trial court was authorized to strike her pleadings, including her jury trial demand, it was a proper sanction for her failure to participate in the proceedings.

## Surveillance

*Rutter v. Rutter*, **A12A0661** (July 13, 2012)

In the course of a divorce, the wife surreptitiously installed several video surveillance devices in the marital residence. The husband moved the court to exclude any evidence that his wife might have derived from the video surveillance. The motion was heard, but the trial court denied it and did not exclude the evidence gathered from the video surveillance. The husband appeals and the Court of Appeals affirms.

The husband contends pursuant to O.C.G.A. § 16-11-62(2)(c) the exception to the general prohibition of certain video surveillance did not apply. The pertinent part of subparagraph (2)(c) provides that it is lawful to use for security purposes, crime prevention or crime detection



any device to observe, photograph or record activities of persons who are within the curtilage of the residence of the person using such device. Husband argues that it does not apply because surveillance of persons within the residence itself is not surveillance or persons who within the curtilage of the residence. With regard to within the curtilage of the residence, Section 2(c) extends the surveillance within the curtilage. Therefore the common expression “within the curtilage” would mean within another and therefore inside the residence was within the curtilage.

Second he argues that his wife was not a resident of the marital residence at the time she installed and used the video surveillance devices. The evidence shows that she did not sleep at the marital residence and had another residential address but continued to keep clothes and other personal items at the marital residence. She also paid a portion of the mortgage for the residence, received some mail at the residence and spent some portion of every other day at the residence doing things like cooking, eating, bathing and washing clothes. The law recognizes that a person can have more than one residence.

The husband also contends that the video surveillance device was not for a permissible purpose, i.e. mainly security, crime prevention and crime protection. Here, the wife did not monitor live video feeds but instead viewed recordings of the video surveillance well after the events depicted in the recordings were complete. The court did find that the wife installed the devices surreptitiously and therefore did not deter criminal conduct. Instead, the court found the wife primarily was motivated by a desire to capture evidence of the husband doing things that would help her obtain custody of the children in the divorce proceedings and used video surveillance devices for the purpose of crime detection in so far as it was intended to provide video evidence of any crime committed by the husband, especially if the crime was committed against or in the presence of the children. In addition, the wife testified that she installed and used the video surveillance device in an effort to discover and to document any harm the husband might visit upon the children. Therefore, the Court affirmed the trial court’s denial of the motion to exclude.

## Termination of Parental Rights

*Brine v. Shipp*, **S12F0626**, (July 13, 2012)

The parties were married in 1997. Shortly afterwards, the Wife was pregnant and told Shipp (her previous boyfriend) that he was not the father of the child. The Husband was listed on the birth certificate as the Father. In 2010, the Husband filed for divorce and the Wife informed Shipp that she thought that he was the biological father of the child and a DNA test proved it. Shipp moved to intervene in the divorce action and filed a Petition for Legitimation. The superior court found that Shipp did not waive or abandon an opportunity interest in developing a relationship with the child and that it was in the child’s best interests to grant the legitimation petition as part of the divorce proceedings. The superior court terminated the Husband’s rights as the legal father and granted Shipp’s Petition to Legitimate and

awarded Shipp primary physical custody of the child. The Husband appealed and Supreme Court reverses.

Although the parties have not raised any objection to jurisdiction, subject matter jurisdiction cannot be waived or conferred on a court by agreement. This court has previously held that the superior court lacks jurisdiction to terminate parental rights in a divorce and child custody case. In some cases, the superior courts have terminated parental rights outside the adoption context, but the Appellate Court decisions in those cases do not address the issue of subject matter jurisdiction. Therefore, the superior court could have subject matter jurisdiction to sever the legal father’s parental rights, but this case depends on whether the issue is considered primarily as one involving legitimation or one involving termination. The juvenile courts have exclusive original jurisdiction over proceedings involving termination except in connection with adoption. Superior courts have jurisdiction over legitimation petitions filed by the father of a child born out of wedlock. The biological father’s petition to legitimate the child who was born in wedlock is in essence a petition to terminate the parental rights of the legal father. The case started as a divorce and child custody dispute between the husband and wife since all children born in wedlock are deemed legitimate by law. The superior court is faced with a situation where the biological father of the child sought to de-legitimate the child and sever the existing father and child relationship. Therefore, to grant the legitimation petition, the superior court had to first terminate the parental rights of the legal father. The superior court did not have jurisdiction to terminate the legal father’s rights.

## Third Party Custody

*Phillips v. Phillips*, **A12A0609**, (July 12, 2012)

The parties filed for a divorce but at the time the couples married, the wife had a young son, KB that was not the biological child of the husband. The husband was not the legal or the biological father of KB. During the marriage, the couple had a daughter KP. At the first temporary hearing, the court awarded joint physical custody of the daughter (KP) and granted the mother primarily physical custody of KB and awarded the father visitation with KB. The court also stated in the order the wife was not to be around Timothy White, the mother’s boyfriend. The husband filed for contempt saying the mother was still living with White and a hearing was held. The maternal grandmother and DFACS become involved in the situation because KB had bruises on his face. After the hearing, the trial court granted primary physical custody of KP to the husband and continued joint legal custody with KB. Another hearing was held in which the Guardian Ad Litem testified that it was in the children’s best interests for the husband to have primary custody and that KB was terrified to return home to his mother while she was living with White. The trial court entered a third temporary order awarding sole legal and physical custody of KP and KB to the husband and provided visitation to the maternal grandmother. The mother appealed and the Court of Appeals reverses.

Only the mother of a child born out of wedlock is entitled to custody unless the father legitimates the child as provided pursuant to Code Section 19-7-22. Otherwise, the mother may exercise all parental control over the child. Although the trial court in this case went to great efforts in making a factual determination that it was in the best interests of KB for the husband to have custody, the former step-father is not given the same status as a grandparent, great-grandparent, uncle, aunt, great aunt, great uncle, sibling or adoptive parent. The juvenile court is left with no discretion between the parties to determine which placement would be in the child's best interests.

## WAIVER

*Curran v. Scharpf*, **S11F1976** (March 23, 2012)

The parties were divorced following a jury trial but the wife contends, among other things, the trial court erred in upholding the final decree's jury's alleged erroneous findings that the Individual Retirement Account (IRA) in the husband's name was the husband's separate property and was not subject to equitable division. The husband claims on appeal that the wife waived any alleged errors in a jury verdict when her counsel stated affirmatively that the wife had no objections to the form of the verdict returned by the jury. The Supreme Court affirms.

The wife's failure to object to the form of the jury verdict does not mean that the wife has somehow waived her right to make a substantive challenge of the evidentiary basis for the jury's award on appeal. The wife's argument has nothing to do with the form of the verdict which may have been just fine. There is a difference between a problem as to form and a substantive challenge to the sufficiency of the evidence that goes to the heart of the jury's findings. This court has previously recognized that a failure to object to the form of a judgment, particularly in the domestic relations context, does not result in waiver of a party's right to make substantive challenge to the lower court's final judgment on appeal. Where a final order is approved by counsel for both parties in writing, it is not an approval of the substance (results) of the order (if it were, the right of appeal would be waived), but a showing that counsel has seen the proposed order and agrees that it contains what the court orally directed to be included in it. Counsel's approval of this is an indication of the approval of the content of the form of the order rather than its substance. Therefore, no waiver occurred in this case. With regards to the IRA account, because there was at least some evidence to support the jury's determination that the husband's IRA was his separate property we must affirm the Trial Court's decision. *FLR*



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# Federal Firearm Restrictions Under the Violence Against Women Act (VAWA)

by Vicky O. Kimbrell

Violence against intimate partners is widespread in Georgia. Law enforcement responded to more than 65,485 family violence incidents in 2010.<sup>1</sup> Georgia is sixth in the nation at the rate of men killing women.<sup>2</sup> Georgia had 966 family violence deaths from 2003-2010, with approximately fifty-six percent of those violent deaths as the result of firearms.<sup>3</sup> Children were present at the fatality in 41 percent of cases.<sup>4</sup> Research indicates that an abuser's ownership of a gun increases the victim's risk of being murdered by over five times and that removing guns from abusers lowers the fatality rates.<sup>5</sup> Therefore, to reduce serious injury and death in Georgia, we must do a better job of enforcing laws that bar batterers from possessing firearms.

## I. Federal Law on Firearms

The federal Violence Against Women Act (VAWA) restricts abusers' access to firearms: (1) during the pendency of a protective order, and (2) after they are convicted of domestic violence misdemeanors involving intimate partners or other family members.<sup>6</sup> This law trumps contrary case precedent, state laws, or judicial orders.<sup>7</sup>

### A. Qualifying Orders that Trigger Gun Restrictions

Respondents who are restrained from contact with family members or intimate partners by a qualifying protective order cannot possess a firearm or ammunition for the term of the order. To qualify, the TPO, stalking order, bond order, probation order, or other court order must:

1. Explicitly restrain the abuser from harassing, stalking or threatening an intimate partner.
  - Georgia's standardized statewide TPO form language meets this criterion.<sup>8</sup> Bonds and other interim orders in criminal cases that prohibit harmful interactions between the Respondent and the victim also invoke VAWA and restrict firearms possession until a final determination is made in the case.
2. Contain specific findings that the abuser represents a credible threat or prohibit the use of physical force
  - TPOs and divorce orders that find a credible threat and prohibit harassing, stalking, threatening, or injuring the victim subject the Respondent to firearm restrictions. Standing No Contact or No Violent Contact Orders in pending divorces are not likely to provide sufficient findings for victims threatened by an armed abuser to invoke the VAWA protections.

3. Be issued after notice and opportunity for hearing
  - In Family Violence Act TPO cases, the 12-month order triggers the gun restrictions because the Respondent has had notice and the opportunity for a hearing. However, this requirement may not be met by 30 day *ex parte* TPO proceeding. To protect a survivor, Judges who believe an abuser poses a threat to the victim's safety can use their equitable authority to order firearms removed at the *ex parte* hearing. These gun restrictions should be seriously considered by judges in the initial TPO proceeding because survivors are in the most danger from violence and death when they begin to take steps to separate from abusers.<sup>9</sup>
4. Be between persons with a relationship covered by federal law
  - Federal law defines an intimate partner as the spouse, former spouse, parent of a child, or an individual who cohabitates or has cohabited with the victim.<sup>10</sup> While not required, Georgia civil and criminal orders should specifically state the relationship between the parties to make it easier for authorities to determine if the Respondent is barred from possessing a weapon during the term of the order.

*Tom had threatened to kill Janie and her children if she ever tried to leave, but escape was her only hope. He found her as she hid under the bushes out in the back of the house. Tom had a gun that he had pointed at her often, now she knew he meant it. As he put the gun in her mouth, daring her to say anything, Janie knew that if she lived, she would leave. And she did. Janie was one of the lucky ones*

### B. The Military or Law Enforcement Official Use Exemption

Military or law enforcement personnel can be exempted from the gun provisions of the federal law under the official use exemption. Persons subject to a qualifying protection order are prohibited from possessing firearms and ammunition,<sup>11</sup> except that this prohibition does not apply to official use of firearms by certain federal,

state, and local government employees while on duty.<sup>12</sup> There is no official use exemption for federal, state, and local government employees, including military or law enforcement personnel, who have been convicted of a qualifying misdemeanor crime of domestic violence. The 18 U.S.C. § 925(a)(1) exemption explicitly excludes 922(d) (9), which is the portion of the statute relating to persons convicted of misdemeanor domestic violence crimes.

### C. Firearm Restrictions on Batterers Convicted of Misdemeanor Domestic Violence Crimes

If a Respondent is convicted of a misdemeanor of domestic violence, the batterer is restricted thereafter from possessing or transporting a firearm or ammunition unless the conviction is set aside, expunged, or pardoned.<sup>13</sup> To be a “misdemeanor crime of domestic violence,” the offense must be a misdemeanor under state or federal law; have, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon; be committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim; and incorporate certain procedural safeguards.<sup>14</sup> 18 U.S.C. § 921(a)(33)(A).

Battery misdemeanors in Georgia committed against an intimate partner, are subject to the federal gun restrictions.<sup>15</sup> The Eleventh Circuit held that “under the plain meaning rule, the ‘physical contact of an insulting or provoking nature’ made illegal by Georgia’s battery statute satisfies the ‘physical force’ requirement of § 921(a)(33)(A)(ii), which is defined in § 922(g)(9).”<sup>16</sup> Or more simply stated, the Georgia simple battery statute meets the federal statute’s standard of “physical force.”<sup>17</sup> The court also clarified in this holding that although “a domestic relationship must exist as part of the facts giving rise to the prior offense. . . it need not be an element of that offense.”<sup>18</sup> This holding broadened the range of protected relationships in Georgia that fall under the definition of misdemeanor domestic violence crimes.

Any case where the relationship falls into one of the specified categories is a case involving a “misdemeanor of domestic violence.” If the relationship is encompassed by the statute, any battery, simple battery, domestic violence battery, assault, simple assault, stalking, pointing a pistol at another, or other related misdemeanor could fall within the firearms restrictions. The crime qualifies as long as one of the elements is the use or attempted use of physical force or threatened use of a deadly weapon, regardless of the title of the offense.

Ideally, to assure that the misdemeanor case qualifies for protection, the relationship between the Respondent and the victim should be stated in all charges, pleadings, orders, and waivers to assist reviewers in determining whether the case triggers federal firearms restrictions. State courts can revoke probation or charge the abuser with an additional criminal violation if domestic violence continues to occur. Although federal prosecution is easier when the record indicates that the Respondent was on notice of the



restriction, the addition of this language does not *create* a limitation on possession or ownership of firearms. Nor does it violate any constitutional rights,<sup>19</sup> it simply puts the abuser on notice that any violation will result in swift consequences by Georgia courts<sup>20</sup> and law enforcement.

### Conclusion

To effectively protect victims and remove guns from batterers, family violence orders must comply with the federal VAWA requirements. These orders should include provisions identifying the relationship between the parties and requiring surrender of guns and ammunition to authorities by a specified time. Courts should routinely require compliance hearings that order batterers to return to court with proof of compliance and violators should be punished by contempt or revoked probation. Understanding and applying the federal law against firearms possession against batterers will promote the safety of victims, family members, and the community, and will reduce family violence fatalities in Georgia. *FLR*



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### (Endnotes)

- 1 GBI Crime Statistics at: [georgia.gov/gbi/crimestats/viewFamilyViolenceStatReport.do](http://georgia.gov/gbi/crimestats/viewFamilyViolenceStatReport.do).
- 2 Violence Policy Center, *When Men Murder Women*, p. 6, September 2011.
- 3 Georgia Domestic Violence Fatality Review Project Report (2011), Chart 4, at: <http://www.gcfv.org/files/2011-ga-fatality-review-web2.pdf>.
- 4 Georgia Domestic Violence Fatality Review Project Report (2011), Chart 4 at: <http://www.gcfv.org/files/2011-ga-fatality-review-web2.pdf>.
- 5 93 Am.J. Public Health 1089 (Jul. 2003); Bridges, Tatum, and Kunselman, *Domestic Violence Statutes and Rates of Intimate Partner and Family Homicide*, *Criminal Justice Policy Review*, Vol. 19, No.1 (March 2008).

- 6 18 U.S.C. § 922(g)(8) and (9).  
7 “An otherwise qualifying protection order will still trigger  
the federal prohibition even if the issuing judge rules that  
the Respondent is entitled to possess a firearm under state  
law.” 39 Court Review 38 (2002) of the American Judges  
Association.  
8 Copies of Georgia’s Family Violence Act petition, ex parte and  
12 month form orders are at: [www.glsp.org](http://www.glsp.org) or [www.gscca.org](http://www.gscca.org).  
9 A Department of Justice study showed that the instances of  
women killed by their husbands was 25 times higher when  
the women had separated than when they were still living  
together. Bureau of Justice Statistics Special report Violence  
Against Women: Estimates from the Redesigned Survey  
(NCJ-154348)  
10 18 U.S.C. § 921(a)(32).  
11 18 U.S.C. § 922 (g)(8).  
12  
13 18 U.S.C. § 922(g)(9).  
14 The following procedural safeguards much have been in  
place concerning the offense:  
1. The person was represented by counsel in the case or  
knowingly and intelligently waived the right to counsel; and  
2. If the person was entitled to a jury trial under the offense,  
the case must have been tried by a jury or the Defendant  
knowingly and intelligently waived the right to have the  
case tried by a jury. 18 U.S.C. § 921(a)(33)(B)(i).  
15 .U.S. v. Griffith, 455 F. 3d 1339 (11th Cir. 2006), cert. denied  
549 U.S. 1343 (2007).  
16 455 F.3d at 1340.  
17 The Georgia battery statutes are codified at O.C.G.A. § 16-5-  
23 and -23.1  
18 455 F.3d at 1346.  
19 The VAWA amendment has withstood a plethora of legal  
challenges throughout the country, including the Eleventh  
Circuit. The United States Court of Appeals held that 18 U.S.C.  
§ 922(g)(8) was constitutional and upheld an abuser’s conviction  
for illegal gun possession. United States v. Griffith, 455 F.2d  
1339, 1342 (11th Cir. 2006), cert. denied 127 S.Ct. 2029 (2007).  
20 An Intimate Partner Violence Full Faith and Credit Bench  
Card Checklist for Judges is at: [http://www.vaw.umn.edu/  
documents/judgefin/judgefin.pdf](http://www.vaw.umn.edu/documents/judgefin/judgefin.pdf)

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