The Family Law Review

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Jurisdictional Defenses – Opportunities And Responsibilities

Editors' Corner

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Wow, it is 2014 already. 2013 was an excellent year. Regina Quick chaired phenomenal Nuts and Bolts seminars in Savannah and Atlanta, and Rebecca Crumrine's plans for the 2014 Family Law Institute already look amazing. We have seen continued growth at our seminars, and our leadership (the executive committee) has continued to move the section forward. We again invite you to submit articles, stories and photos for inclusion in the next issue of the Family Law Review. We also welcome your calls, emails, and input for stories, suggestions and ideas. We hope you enjoy this issue of the Family Law Review. *FLR*

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

If you would like to contribute an article or have an idea for content, please contact Marvin L. Solomiany, msolomiany@ksfamilylaw.com.

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Chair's Comments

by Jonathan Tuggle
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I hope this FLR finds you well and enjoying holiday festivities. It is hard to believe another year has come and gone. I am proud to report on the recent hard work of your Executive Committee and some of the exciting things happening in the Section.

As part of the Section's 2013-14 Community Service Initiative, we have solicited input from the chief judge in every circuit as to family law related organizations and causes the Section could support and partner with in community service projects. We have already received numerous responses and suggestions, and welcome continued input from other judges and section members around the state, as well as volunteers, particularly outside Metro Atlanta, who are interested in coordinating these efforts on a local level. We are weighing all of these worthy causes, and will be reporting further to the Section. If you have an interest in joining the Community Service Subcommittee, please let me or any member of the Executive Committee know.

Through the leadership of Kelly Miles, Ivory Brown and Marvin Solomiany, the Diversity Subcommittee has been very active and has drawn growing involvement and interest from section members. As part of these efforts, the Section is conducting a survey primarily to obtain the demographics of our section. The goal is to enable us to better serve all of the 1,800 plus members of our section. As you read this, you should have received a blast email from the State Bar with a link to the survey. Please take a moment to participate. It will take you no more than 2 minutes to complete. We hope to announce the results at our Annual Meeting on Jan. 9, 2014, at 5 p.m. Please let me or any Executive Committee member know if you have an interest in joining the Diversity Subcommittee.

Our Legislative Liaison John Collar and Regina Quick have also worked diligently and put in countless hours studying and drafting new pieces of legislation on behalf of the Section, including proposed changes to O.C.G.A § 19-3-62(a) to eliminate confusion about the validity of the execution of antenuptial agreements by requiring them to be in writing and attested by at least two witnesses, one of whom may be a notary public. We are hopeful this piece of legislation will be presented during the upcoming 2014 legislative session.

For those of you who attended the YLD Family Law Committee's Eighth Annual "Supreme Cork" wine tasting and silent auction on Oct. 17, you helped raise $23,000 for the benefit of AVLF's Guardian ad Litem Program and Domestic Violence Project/Safe Families Office. Congratulations to YLD Family Law Committee Co-Chairs, Kelly Reese and Jamie Perez, for a successful event!

Congratulations as well to Regina Quick who chaired this year's Nuts & Bolts Seminar held in Savannah on Aug. 23, and broadcast live across the state from GPTV in Atlanta, on Nov. 22. Both programs were well attended as Regina put together a great panel of topics and speakers.

If you have not already done so, make your plans now to attend the Annual Meeting of the Section on Thursday, Jan, 9, 2014, at 5 p.m. at the Intercontinental Buckhead, 3315 Peachtree Road NE, Atlanta, Ga. 30326. At the conclusion of the meeting, we will have our Family Law Section Reception with an open bar until 6:30 p.m. Your attendance at the Annual Meeting is welcomed and encouraged, as it will include a report from the Nominating Committee and the election of our Section officers for the 2014-15 year.

Immediately prior to the Reception, the Family Law Section will also host its annual "A View From The Bench" CLE (1 hour credit) beginning at 4 p.m. The program will cover trending family law issues through Q&A with a great panel of the following judges:

- Hon. Robert E. Flournoy III, Superior Court Judge, Cobb Circuit, Marietta
- Hon. N. Jackson Harris, Chief Superior Court Judge, Blue Ridge Circuit, Canton
- Hon. Bensonetta Tipton Lane, Superior Court Judge, Atlanta Circuit, Atlanta

- Hon. Kathryn M. Schrader, Superior Court Judge, Gwinnett Circuit, Lawrenceville
- Hon. Wendy L. Shoob, Superior Court Judge, Atlanta Circuit, Atlanta
- Hon. Robert "Bobby" Reeves, Superior Court Judge, Middle Circuit, Swainsboro
- Hon. Bill Reinhardt, Chief Superior Court Judge, Tifton Circuit, Tifton

Thank you to Marvin Solomiany and Tera Reese-Beisbier for their hard work in organizing the day's events.

In January, we will also be resuming our Lunch and Learn webinar programs. Gary Graham and Kelly Miles have put together a great lineup of presenters and topics. The schedule will be published shortly so be on the lookout. Like last year, the presentations will also be available for viewing on the Family Law Section website. This is a great way to get involved, so let me or an Executive Committee member know if you are interested in doing a presentation.

Mark your calendar for March 12, when we will be having another Section mixer. This event will be in Buckhead at Seven Lamps, in the Shops Around Lenox. More details will follow. Thank you to Ivory Brown and Kelly Miles for their hard work in planning this event.

Lastly, make your plans to attend the Family Law Institute at the Ritz-Carlton, Amelia Island, Amelia Island, Fla., on May 24-26. Rebecca Crumrine has put together an incredible three day program. Be on the lookout for the brochure and registration information which will be going out in February. Also, please consider being a sponsor of the Institute. It is through our sponsors that the Section is able to put on great Institute programs, and sponsoring is a great way to market your firm. If you wish to be a sponsor of the Institute, please contact Eileen Thomas at eileen@ethomaslaw.com.

As always, thank you to Randy Kessler and Marvin Solomiany for such a first class newsletter. Keep up the good work.

Happy holidays! Here's to a great 2014. I look forward to seeing everyone soon. *FLR*

Past Family Law Section Chairs

Kelly Ann Miles	2012-13
Randall Mark Kessler	2011-12
Kenneth Paul Johnson	2010-11
Tina Shadix Roddenbery	2009-10
Edward Coleman	2008-09
Kurt Kegel	2007-08
Shiel Edlin	2006-07
Stephen C. Steele	2005-06
Richard M. Nolen	2004-05
Thomas F. Allgood Jr.	2003-04
Emily S. Bair	2002-03
Elizabeth Green Lindsey	2001-02
Robert D. Boyd	2000-01
H. William Sams	1999-00
Anne Jarrett	1998-99
Carl S. Pedigo	1997-98
Joseph T. Tuggle	1996-97
Nancy F. Lawler	1995-96
Richard W. Schiffman Jr.	1994-95
Hon. Martha C. Christian	1993-94
John C. Mayoue	1992-93
H. Martin Huddleston	1991-92
Christopher D. Olmstead	1990-91
Hon. Elizabeth Glazebrook	1989-90
Barry McGough	1988-89
Edward E. Bates Jr.	1987-88
Carl Westmoreland	1986-87
Lawrence B. Custer	1985-86
Hon. John E. Girardeau	1984-85
C. Wilbur Warner Jr.	1983-84
M.T. Simmons Jr.	1982-83
Kice H. Stone	1981-82
Paul V. Kilpatrick Jr.	1980-81
Hon. G. Conley Ingram	1979-80
Bob Reinhardt	1978-79
Jack P. Turner	1977-78

Jurisdictional Defenses – Opportunities And Responsibilities

by Caroline C. Kresky and Malone W. Allen

Jurisdictional defenses often arise in family law. Take, for example, the following scenario. Wife was temporarily living in Gwinnett County with her family. Husband, who held a green card and was not a United States citizen, was living outside the county. The couple had last resided together in Dubai, and he had not resided in this country for years, if ever. Unhappy with the marriage, Wife served Husband with a divorce complaint, filed in the Gwinnett County Superior Court, as he exited customs at Hartsfield-Jackson International Airport. Despite Husband's engagement of a premier local divorce firm, when he filed his answer and counterclaim for divorce, he never alleged lack of jurisdiction or improper venue. Instead, having waived his jurisdictional defenses by failing to assert them, he was forced to litigate his divorce "in a foreign and perhaps hostile court."[1]

Here is another typical example. The parties live in California but have a vacation home on the Georgia coast. Husband files for divorce in Georgia and Wife, who is visiting Georgia, is served with a complaint. When she answers, she fails to raise the jurisdictional defenses of lack of personal jurisdiction or improper venue, and she too ends up litigating her divorce in a foreign court, far from where she resides.

Family lawyers often overlook the opportunities and responsibilities that arise under O.C.G.A. § 9-11-12(b) because they are not familiar with the way in which jurisdictional defenses are raised, preserved, and used.[2] For the sake of brevity, this article will limit its discussion to the following Jurisdictional Defenses: lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process. O.C.G.A. § 9-11-12(b)(2)-(5).[3]

Definition Of Jurisdictional Defenses

Before discussing the opportunities and responsibilities presented by Jurisdictional Defenses, it is important to understand them. Improper venue, O.C.G.A. § 9-11-12(b)(3), is often confused with lack of jurisdiction over the person or lack of jurisdiction over the subject matter. They are very different. "Subject matter jurisdiction is established by our laws, and there is nothing parties to a suit can do to give a court jurisdiction over a matter that has not been conferred by law."[4] For instance, subject matter jurisdiction in divorce and alimony actions requires a valid marriage, and plaintiff must be a "bona fide resident of this state for six months" prior to filing the complaint. O.C.G.A. § 19-5-2.

A plaintiff submits himself personally to the jurisdiction of the court by filing a complaint. "The defendant may also voluntarily submit his person to the jurisdiction of the court by acknowledgment and waiver of personal service or by failing to object to personal service and pleading to the merits of the claim."[5] A lack of jurisdiction over the person is often the result of an insufficiency of process or insufficiency of service of process.

Venue relates to the county in which the suit is tried.[6] Divorce cases must be tried in the county in which the defendant resides if he is a resident of the state.[7] Unless improper venue is raised in the initial responsive pleading and/or by motion, it is waived.[8] Venue can be conferred by consent but only "where defendant voluntarily, clearly and specifically, by affidavit, waives any objection to venue."[9] Provided improper venue has been properly asserted, selecting the wrong venue should not be fatal as the remedy is to file a motion to transfer the case to the county in which venue exists.[10]

The defense of insufficiency of process means there is a defect in the summons.[11] O.C.G.A. § 9-11-4(b) describes the contents of a proper summons. "Proper service of the summons is necessary for the court to obtain jurisdiction over the defendant."[12] There are many examples of insufficiency of process, but common ones include the failure to attach a summons to the complaint or the failure to identify the parties to the complaint in the summons. Insufficiency of process also occurs when a petitioner initiates a contempt proceeding but fails to properly serve the respondent with a rule nisi.[13] The rule nisi replaces the summons and gives the defendant "notice of the charges and the opportunity to be heard at a specified time and place."[14]

By comparison, the defense of insufficiency of service of process arises when the papers are not properly served. Sometimes it occurs when the sheriff's return of service is erroneous or service is made on the wrong person.[15] Unless the divorce is not yet concluded, mailing a contempt petition to opposing counsel "constitutes no service at all on the defendant … and since the record fails to show that defendant waived service of the petition and rule nisi, the judgment holding her in contempt is a nullity for want of the court's jurisdiction of her person."[16]

Jurisdictional Defenses Are Lost If Not Preserved

Jurisdictional Defenses must be preserved or they are lost. See O.C.G.A. § 9-11-12(h).[17] "A general appearance by a defendant in an action in a court having jurisdiction of the subject matter amounts to a waiver of the issuance of, or defects in the process served, and confers jurisdiction of his person regardless of the fact that process was not served on him or that service may have been defective."[18]

Preserving Jurisdiction Defenses

There are two choices under O.C.G.A. § 9-11-12(b) to preserve Jurisdictional Defenses. They can be asserted in the initial responsive pleading (however, not in an amended pleading[19]) and/or they can be asserted by motion in writing "before or at the time of the pleading." O.C.G.A. § 9-11-12(b). If by motion, defense counsel must file the motion to dismiss before the filing of the answer or contemporaneously with it.

A. Jurisdictional Defenses May Be Raised By Answer And Must Be Resolved At A Preliminary Hearing Before Trial.

If Jurisdictional Defenses are raised by answer but no motion is filed, defense counsel must make application to have them "heard and determined before trial unless the court orders the hearing and determination thereof be deferred until trial." O.C.G.A. § 9-11-12(d).[20] Where the Jurisdictional Defenses are interwoven with the merits of the case, the court may exercise its discretion to reserve the preliminary hearing until the trial of the case.[21] In exercising this discretion, the court "must balance the need to test the sufficiency of the defense or objection and the right of party to have his defense or objection promptly decided and thereby possibly avoid costly litigation against such factors as the expense and delay the hearing may cause, the difficulty or likelihood of arriving at a meaningful result at the hearing, and the possibility that the issue to be decided on the hearing is so interwoven with the merits of the case that a postponement until trial is desirable."[22]

Failure to seek the preliminary hearing before trial or to include Jurisdictional Defenses in a pretrial order constitutes waiver.[23] Some courts will allow the application for a preliminary hearing to be made orally. In one case, defendant, having preserved the defense of improper service, was permitted orally to move to dismiss for improper service on the date the case was scheduled for trial. On appeal, the court held that there was no need "to file a particularized application prior to the date set for trial…."[24] Nevertheless, the better practice is to file a written application.

However, if a "party [who has preserved his jurisdictional defenses] later engages in conduct so manifestly indicative of an intention to relinquish a known right or benefit that no other reasonable explanation of his conduct is possible," the court may find waiver. In *Oasis Goodtime Emporium I, Inc. v. Cambridge Capital Group, Inc.*, the court found waiver where defendant asserted in his answer that the court lacked jurisdiction due to insufficient process and insufficient service of process but he never raised the issue again until after the plaintiff was finished presenting its case at trial.[25] At that point, defendant made an oral motion to dismiss, which the court denied, finding waiver due to lack of notice that defendant intended to rely on his jurisdictional defenses.[26]

In sum, defendant must do more than raise his Jurisdictional Defenses in his answer. He must preserve them by including them in a pretrial order and demand a preliminary hearing before the commencement of the trial. The preliminary hearing will be conducted by the court, and all issues of fact and law will be resolved by the judge.[27]

Once defendant's Jurisdictional Defenses have been properly preserved by answer, he may participate in or be required to participate in extensive discovery.[28] In one instance, the Court of Appeals of Georgia found no waiver where defendant, having raised improper venue by answer, participated in two years of discovery and entered five consent orders extending the discovery period.[29] If defendant waits until the eve of trial to request the preliminary hearing or the court defers defendant's application for a preliminary hearing until trial, the client may have to bear the expense of discovery and pretrial preparation before his Jurisdictional Defenses are heard and determined. This can be expensive.

B. Jurisdictional Defenses May Be Raised By A Timely Motion To Dismiss And Discovery Is Automatically Stayed.

If, however, defendant files a written motion, raising his Jurisdictional Defenses at the

time he answers or in lieu of including them in his answer, he can take advantage of O.C.G.A. § 9-11-12(j), which automatically stays discovery for up to 90 days upon the filing of a motion to dismiss.[30] The timing within which to file the motion cannot be extended and is jurisdictional.

"If a party files a motion to dismiss before or at the time of filing an answer and pursuant to the provisions of this Code section, discovery shall be stayed for 90 days after the filing of such motion or until the ruling of the court on such motion, whichever is sooner. The court shall decide the motion to dismiss within the 90 days provided in this paragraph." O.C.G.A. 9-11-12(j)(1). The court cannot extend the stay. O.C.G.A. § 9-11-12(j)(3). Further, "the discovery period and all discovery deadlines shall be extended for a period equal to the duration of the stay imposed by this subsection." O.C.G.A. § 9-11-12(j)(2). In addition, discovery concerning some of the jurisdictional defenses, raised in the motion, is permitted. O.C.G.A. § 9-11-12(j)(4).

The defendant may save substantial fees and expenses by staying discovery until the Jurisdictional Defenses are decided, and there is no downside because the discovery period will be extended up to 90 days if he loses the motion.

C. Consolidation Of Defenses Required If Raised By Motion

A motion is subject to O.C.G.A. § 9-11-12(g) that requires the consolidation of certain defenses in the motion.[31] "If a party makes a motion under this Code section but omits therefrom any defense or objection then available to him which this Code section permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted…." O.C.G.A. § 9-11-12(g). Fortunately, "a defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable … and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under subsection (a) of Code Section 9-11-7, or by motion for judgment on the pleadings, or at trial on the merits." O.C.G.A. § 9-11-12(h)(2).

Thus, a defendant is required to consolidate his motion with some, but not all of the Jurisdictional Defenses. If the defendant files a motion, he must bring his claims for lack of jurisdiction of the subject matter or person, improper venue, insufficiency of process, and insufficiency of service of process or lose any one of them not addressed in the motion.

Plaintiff Has A Duty To Cure Jurisdictional Defects

After a defendant has raised the defenses of lack of personal jurisdiction, insufficiency of service of process, insufficiency of process or improper venue in a motion to dismiss, the plaintiff may cure the defect and proceed with his case by accomplishing proper service before the hearing on the motion to dismiss.[32]

Plaintiffs have a duty to exercise due diligence in the service of the complaint and to correct any jurisdictional defects – especially those related to service defects.[33] A plaintiff's failure to read the answer f does not excuse him from his obligation to cure the service defects raised in that answer.[34] "Receipt of the answer raising insufficiency of service of process should have put Exum and his counsel on notice of a possible jurisdictional flaw, invoking the related duty to exercise the greatest possible diligence to perfect timely service." [35]

Further, plaintiff does not need to sit back and wait for defendant to file his motion to dismiss; he can force the issue at any time during the pendency of the case by a motion, challenging the jurisdictional defenses raised by defendant in his answer and seeking an order, requiring defendant either to waive the defenses or address them in a response to his motion. [36]

Jurisdictional Defenses Are Pleas In Abatement

Jurisdictional Defenses are defenses in abatement that do not reach the merits of the case.[37] They cannot be raised by a summary judgment motion because a summary judgment ruling is adjudication on the merits. "Before adjudicating on the merits of the case, the proper procedure would have been to consider the defenses in abatement in a hearing pursuant to OCGA § 9-11-12(d), or, considering the substance rather than the nomenclature of the defendant's motion, treat the motion for summary judgment as a motion to dismiss on the venue and jurisdictional issues."[38]

Any dismissal, based on Jurisdictional Defenses, must be without prejudice.[39] (However, if a statute of limitations or repose has run in the interim, the dismissal may be with prejudice.) Even though the dismissal is without prejudice, the plaintiff must start the process all over again, and the loss can be a deterrent to further litigation - especially where a client has already spent a great deal of money and lost on preliminary matters.

Conclusion

Jurisdiction Defenses cannot be ignored. Prior to answering a complaint, defense counsel has a duty to explore the circumstances surrounding jurisdiction, venue, and service. If warranted, he also has the duty to raise appropriate Jurisdictional Defenses by answer or motion. He has a further duty to preserve them in any pretrial order and have his client's Jurisdiction Defenses ruled upon prior to the commencement of the trial of the case. Having properly asserted and preserved them, defendant can, thereafter, engage in discovery, if he so chooses, or raise them by motion and obtain a stay of discovery. On the plaintiff side, counsel has an obligation promptly to review the answer to see if Jurisdictional Defenses have been raised. If so, plaintiff should cure the defects if possible, and if defendant delays, force a ruling on their sufficiency by filing a motion that makes defendant rely on them or abandon them.

Jurisdictional Defenses present obligations and opportunities that, if properly handled, can result in a cost effective victory on preliminary matters that may set the tone for final victory in the litigation. ***FLR***

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(Endnotes)

1 *Williams v. Williams,* 259 Ga. 788, 397, 533 S.E.2d 334 (1990) ("[t]he purpose of the State Constitution's venue requirement is to protect defendants in divorce actions from having to respond in a foreign, and perhaps hostile court").

2 O.C.G.A. § 9-11-12(b)(1)-(b)(5) provides as follows: How defenses and objections presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion in writing: (1) Lack of jurisdiction over the subject matter; (2) Lack of jurisdiction over the person; (3) Improper venue; (4) Insufficiency of process; (5) Insufficiency of service of process. A motion making any of these defenses shall be made before or at the time of pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.

3 This article will not address lack of jurisdiction over the subject matter, failure to state a claim upon which relief can be granted, or failure to join a party, because they are treated differently under the law and arise infrequently in domestic relations actions. O.C.G.A. § 9-11-12(b)(1),(6),(7).

4 *Snyder v. Carter*, 276 Ga. App. 426, 427, 623 S.E.2d 241, 243 (2005) (defining subject matter jurisdiction).

5 Dan E. McConaughey, Georgia Divorce, Alimony, and Child Support § 6.5 (38th ed. 2012-2013).

6 GA. Const. Art. VI, § II, ¶ I.

7 GA. Const. Art. VI, § II, ¶ I.

8 *Hamner v. Turpen*, 319 Ga. App. 619, 737 S.E.2d 721 (2013) (general denial of the allegation that defendant lived in Florida was not sufficient to raise defense of improper venue); O.C.G.A. § 9-11-12(b)(h).

9 *Parris v. Douthit*, 287 Ga. 119, 120694 S.E.2d 655, 656 (2010).

10 GA. Const. Art VI, §1, ¶ VIII ("Any court shall transfer to the appropriate court in the state any civil case in which it determines that jurisdiction or venue lies elsewhere").

11 *Fairfax v. Wells Fargo Bank*, 312 Ga. App. 171, 718 S.E.2d 16 (2011) (granting motion to dismiss because summons failed to identify McCurdy as a defendant); O.C.G.A. § 9-11-4(b) (stating contents of a proper summons).

12 *Fairfax v. Wells Fargo Bank*, 312 Ga. App. 171, 173, 718 S.E.2d 16, 19 (2011).

13 *Brown v. King*, 266 Ga. 890, 892, 472 S.E.2d 65 (1996); *Connell v. Connell*, 221 Ga. 379, 380, 144 S.E.2d 722, 723 (1965).

14 *Braden v. Braden*, 260 Ga. 269, 392 S.E.2d 710, 711 (1990).

15 *Miller v. Hands*, 188 Ga. App. 256, 372 S.E.2d 657 (1988) (sheriff served hospital administrator with renewed complaint against hospital and nurse but incorrectly stated in his return of service that he had served the nurse personally). See also *Seabolt v. Edghill*, 192 Ga. App. 715, 386 S.E.2d 376 (1989) (service on defendant's mother at her residence, not at defendant's residence, constituted insufficient service of process).

16 *Connell v. Connell*, 221 Ga. 379, 380, 144 S.E.2d 722, 723 (1965).

17 O.C.G.A. § 9-11-12(h)(1) provides as follows: Waiver or preservation of certain defenses. (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived: (A) If omitted from a motion in the circumstances described in subsection (g) of this Code section; or (B) If it is neither made by motion under this Code section nor included in a responsive pleading, as originally filed.

18 *Brown v. Fokes Properties 2002, Inc.*, 283 Ga. 231, 232, 657 S.E.2d 820, 821 (2008).

19 *Security Ins. Co. of Hartford v. Gill*, 141 Ga. App. 324, 233 S.E.2d 278, 279-80 (1977).

20 O.C.G.A. § 9-11-12(d) provides: Preliminary hearings. The defenses specifically enumerated in paragraphs (1) through (7) of subsection (b) of this Code section, whether made in a pleading or by motion, and the motion for judgment mentioned in subsection (c) of this Code section shall be heard and determined before trial on application of any party unless the court orders that the hearing and determination thereof be deferred until the trial.

21 *Georgia Power Co. v. Harrison*, 253 Ga. 212, 214-15, 318 S.E.2d 306, 309 (1984); Parris v. Douthit, 287 Ga. 119, 694 S.E. 2d 655,656 (2010) ("The trial court was authorized to defer jurisdictional issues until after the temporary disposition of a modification action").

22 *Georgia Power Co. v. Harrison*, 253 Ga. 212, 215, 318 S.E.2d 306, 309 (1984).

23 *Long v. Marion*, 257 Ga. 431, 432-33, 360 S.E.2d 255, 257 (1987) (waiver of insufficient service defense by failing to make a motion in the nine month period before trial and failing to include the defense in the pretrial order); *Carnes v. Reece*, 271 Ga. App. 490, 610 S.E.2d 135 (2005) (once raised by answer and preserved in the pretrial order, defendant could orally move to dismiss for improper service on the date that the case was scheduled for trial); *Exum v. Melton*, 244 Ga. App. 775, 776, 536 S.E.2d 786, 789 (2000) (properly preserved jurisdictional defenses "can be raised as late as the pretrial conference, although they are waived if omitted from the ensuing pretrial order").

24 *Carnes v. Reece*, 271 Ga. App. 490, 491, 610 S.E. 2d 135, 136, 137 (2005).

25 *Oasis Goodtime Emporium I, Inc. v. Cambridge Capital Group, Inc.*, 234 Ga. App. 641, 642, 507 S.E.2d 823, 825 (1998)

26 234 Ga. App. at 643, 507 S.E.2d at 825.

27 P*ryor v. Douglas Shopper-The Coffee County News*, 236 Ga. App. 854, 856, 514 S.E.2d 59, 61 (1999); *Hardy v. Arcemont*, 213 Ga. App. 243, 444 S.E.2d 327, 328 (1994); O.C.G.A. § 9-11-12(d).

28 *Exum v. Melton*, 244 Ga. App. 775, 776, 536 S.E. 2d 786, 788-89 (2000).

29 *Williams v. Willis*, 204 Ga. App. 328, 419 S.E.2d 139, 140 (1992).

30 O.C.G.A. § 9-11-12(j)(1),(2),(4) provides as follows: Stay of discovery. (1) If a party files a motion to dismiss before or at the time of filing an answer and pursuant to the provisions of this Code section, discovery shall be stayed for 90 days after the filing of such motion or until the ruling of the court on such motion, whichever is sooner. The court shall decide the motion to dismiss within the 90 days provided in this paragraph. (2) The discovery period and all discovery deadlines shall be extended for a period equal to the duration of the stay imposed by this subsection. (4) If a motion to dismiss raises defenses set forth in paragraph (2), (3), (5), or (7) of subsection (b) of this Code section or if any party needs discovery in order to identify persons who may be joined as parties, limited discovery needed to respond to such defenses or identify such persons shall be permitted until the court rules on such motion.

31 O.C.G.A. §9-11-12(g) provides as follows: Consolidation of defenses in motion. A party who makes a motion under this Code section may join with it any other motions provided for in this Code section and

then available to him. If a party makes a motion under this Code section but omits therefrom any defense or objection then available to him which this Code section permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in paragraph (2) of subsection (h) of this Code section on any of the grounds there stated.

32 *Swain v. Thompson*, 281 Ga. 30, 31, 635 S.E.2d 779, 781 (2006) (defect in service can be cured at any time prior to the hearing on the motion to dismiss).

33 *Pryor v. Douglas Shopper-The Coffee County News*, 236 Ga. App. 854, 856, 514 S.E.2d 59, 61 (1999).

34 *Pryor v. Douglas Shopper-The Coffee County News*, 236 Ga. App. 854, 856, 514 S.E. 2d 59, 61 (1999) (denying motion to amend to correct service defects 16 months after answer served because "receipt of the defendants' answer asserting insufficiency of service should have put Pryor on notice and inspired him, through counsel, to exercise the greatest possible diligence to ensure proper and timely service").

35 *Exum v. Melton*, 244 Ga. App. 775, 777, 536 S.E.2d 786, 789 (2000).

36 *Williams v. Willis*, 204 Ga. App. 328, 329, 419 S.E.2d 139, 141 (1992) (finding no waiver when defendant raised improper venue in his answer but waited until the hearing on plaintiff's motion for summary judgment to make an oral motion to transfer the case for lack of venue, and chastising plaintiff's counsel for doing nothing to illicit a ruling on the venue question prior to the summary judgment motion hearing.)

37 *Deberry v. Johnson*, 13 FCDR 2754, 747 S.E.2d 886, 887 (2013).

38 *Hight v. Blankenship*, 199 Ga. App. 744, 745, 406 S.E.2d 241, 243 (1991); *South v. Montoya*, 244 Ga. App. 52, 53, 537 S.E.2d 367, 369 (2000) ("[s]ince the trial court lacked personal jurisdiction over Montoya, it then lacked the authority to decide any issues on the merits").

39 O.C.G.A. § 9-11-41(b)(2) (dismissal for lack of jurisdiction or improper venue does not operate an adjudication on the merits); *Wilson v. Ortiz*, 232 Ga. App. 191, 193-94, 501 S.E.2d 247, 251 (1998) (defenses enumerated in O.C.G.A. § 9-11-12(b), except failure to state a claim, are matters in abatement and any dismissal must be without prejudice).

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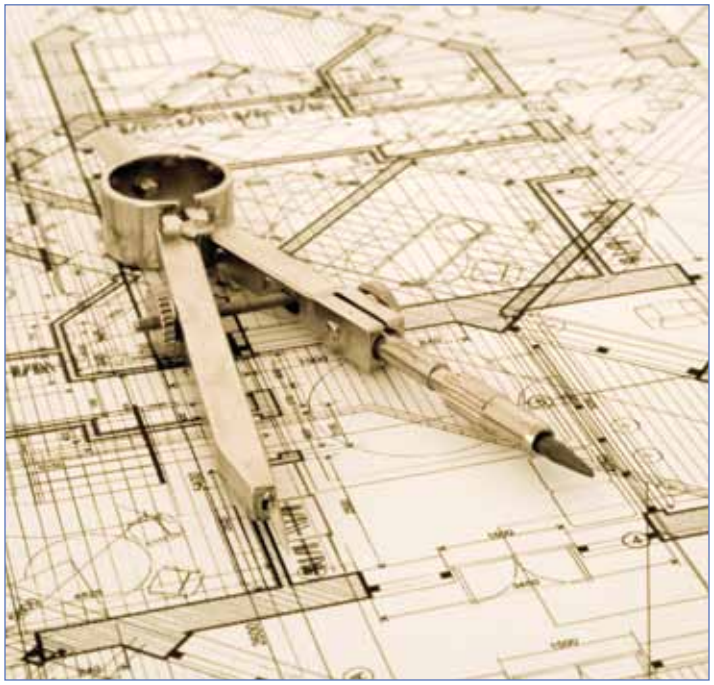
A Blueprint for Mediation

by Andy Flink

We all know the purpose of mediation is to initiate discussion that will ultimately lead to settlement; however, there is a good chance your client will appear at mediation feeling nervous, anxious and quite uneasy. Who could blame them? They are about to negotiate with a soon to be or current ex-spouse over very important issues, and a deal if reached will affect them and their family for years to come.

My job is to ensure that everyone in the room is at ease and that your client becomes very comfortable talking to me. While I need to hear the legal side from you I want to hear the personal side of the dispute from them. They are about to share information that is extremely personal, emotional and sensitive in nature. As the guardian of the process I must assure them that I am not only listening but really hearing what they have to say. Perhaps this is the first time they have been given an opportunity to share their concerns with someone outside of their immediate "circle." Giving your client that opportunity is critical to their attitude and will affect how invested they become in the session.

At the onset I'm watching everyone's body language. Who is appearing open and engaged and who is off to the side arms folded looking down and focused solely on their laptop? If in a joint session any party is showing these signs I will immediately break to caucus (and most likely stay in caucus). Although offers will then be relayed back and forth between each room I remind both clients and attorneys that they may receive an initial offer they'll consider highly unreasonable. It may take anywhere from four to six or more rounds of negotiations before the parties start to feel they are making progress or reach a deal. Rarely does the first offer get accepted.



There are all kinds of tools I can use in mediation to help parties along if the negotiations begin to bog down and progress slows to a halt. Two shifts I may initiate is to either meet alone with the attorneys or alone with the parties. That is where I hope to recreate a venue of progress and when I will try to be as detailed as possible about what the real issues are that both sides are trying to settle. Small misunderstandings can turn into large gaps in mediation, and what might be trivial to one side could be monumental to the other. I must also make sure I manage my time reasonably and do my best to provide each side a similar amount of time and the same opportunity to explain their side of the equation.

But is that really the case? Does "being fair" mean that I must spend the same amount of time with each side? I've had parties state they would only pay 25% of my fee since I spent 25% of the total time with them. In other cases parties are appreciative I spent most of my day in the other room. One attorney put it best by stating: "we want you in there, not in here. If you are talking to them and reality testing with them it stands to reason that you are explaining to them why our offer makes sense." "By nature we believe that means they are helping us get closer to our terms."

Regardless of which room I am in, the more engaged all of the parties are in the mediation process, the greater the chance there will be progress and perhaps a settlement. Your mediator needs to get everyone on that "same page" and once they do must focus on details and issues that are paramount to each side. If the mediation progresses to this point then the probabilities of making significant progress are increased exponentially. There's even a chance that the case you never thought would ever settle in mediation ends up reaching full agreement.

That's a blueprint for mediation: the combination of creating actions and ideas that allow those involved to maintain an open mind and positive attitude – leading to continued negotiations within an atmosphere of common ground eventually leading to a positive conclusion. ***FLR***

Andy Flink is a trained mediator and arbitrator. He is familiar with the aspects of divorce from both a personal and professional perspective, and is experienced in business and divorce cases. He 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.

Interview with Hon. H. Patrick Haggard

Judge of Superior Court, Western Judicial District

by Lane Fitzpatrick

Judge H. Patrick Haggard was appointed a Superior Court judge of the Western Judicial Circuit consisting of Athens-Clarke and Oconee Counties by Gov. Nathan Deal on June 15, 2011. He replaced Hon. Steve C. Jones who had ascended to the federal bench in the Northern District of Georgia. Jones was and is much loved and a hard act to follow. However, Haggard has very ably stepped in and established his own style which is to allow the lawyers to present their cases without interference from the bench. His calm, polite demeanor sets the tone he expects and receives from the parties and their lawyers. He is so well respected he ran for election in July, 2012 without opposition. A native of Athens, Judge Haggard practiced law for 28 years before taking the bench. The following is an interview with him at his office in Athens:

What is your background before becoming a member of the bar?

I grew up in Athens and attended public schools. My undergraduate degree is from the University of Georgia. I worked for two years after college. I enrolled in John Marshall Law School because I just wanted to know about the law. At the time I was looking for a business to get into. I did not intend to practice law.

Q. When you were practicing, what were your areas of practice?

General civil litigation.

Q. What percentage of your practice was family law?

70 to 75 percent.

Q. What is the most striking difference between being a lawyer advocating for a client and being a judge?

Preparation. I no longer have to prepare for court, time will not allow me to do so. I usually look at the file for the first time when I come into the courtroom, except when I know there are unusual issues in the case. I listen, usually to two good lawyers, both with good positions. It is not so clear anymore as it was when I was a lawyer advocating for one side.

In the family law cases you have handled as a judge thus far, what has surprised you the most in a positive way?

How many cases are settled at some point. I am not called upon to rule as often as I thought I would be.

In a negative way?

The lack of preparation, even by experienced lawyers.

What has stood out?

It is my perception that lawyers don't seem to have as much control over their clients as they had in the past.

To lawyers, a judge's predictability is one of the most important, if not the most important, factor in presenting a case before a judge. Realizing that you must judge each case on its merits, what are your guiding principles on the following issues:

With regards to failure to pay child support, How many free passes can a father who does not pay child support expect to get before you send him to jail?

None. I have put fathers in jail when they show an obvious disregard for the court's judgment and have the ability to pay coupled with not having made an effort to pay. My ultimate goal is to have the paying parent get compliant, pay the money.

How do you feel about visitation every other weekend - during the week - during the week on off weeks - major holidays - and summer?

Parties and their lawyers spend an inordinate time on visitation. It is fertile ground for arguing.

Have you considered publishing a standard visitation schedule?

I am somewhat in favor of a standard visitation schedule, but I have not published one. It would save lawyers and litigants headaches if we had a standard visitation schedule.

What are your thoughts on dividing the final decision making power on the issues of education - medical treatment - extracurricular activities - religion?

Generally, the primary physical custodian should have final decision making power with some exceptions if I see another way of division to make it fair.

What about situations where a child participates in extracurricular activities and the child has a scheduled activity on the non-custodial parent's weekend? Some judges take the position the child's interests come first and require the non-custodial parent to take the child to the scheduled activity. Then we have a decision from the appellate court that seems to say the non-custodial parent can do whatever he or she chooses to do with the child on the weekend. What are your thoughts?

I sometimes see a custodial parent scheduling extracurricular activities on the non-custodial parent's weekend as a tool for the custodial parent to punish the other parent. Generally, a child should participate in extracurricular activities regardless of whose weekend it is.

Do you strictly follow the Child Support Worksheet and Schedules or do you look for deviations?

I don't like parties who say "we can settle if I pay $200 per month" and that is not the presumptive amount of child support by the Worksheet. I do not look for deviations. I follow the Child Support Worksheet, but I will listen to arguments requesting a deviation.

The big conversation lately has been regarding Temporary Protective Orders. When approached, do you insist on a proper case being made according to the statute?

I do not sign every one that comes in. I insist the evidence conform to the statute as far as the parties being related. Then I ask myself, is it really violence or the threat of violence, or is it something else?

What is your philosophy on handling lawyers and clients who file pleadings or take positions that are not supported by the law or the facts? Have you assessed attorney's fees against clients and lawyers who do so?

I have assessed attorney's fees. I want the lawyers to do their jobs. They can disagree on the law or the facts. But if it is clear there is no basis for a pleading or a position that is being taken, it is my duty to respond.

Have you considered having a set day each month or every so often to handle only pro se cases?

I set a pro se calendar every so often.

How do you handle pro se divorces?

My law clerk uses a checklist to determine if the required documentation is in the file. If not, a letter is sent pointing out what is missing. Sometimes multiple letters must be sent. In conjunction with the Family Law Section of the Western Circuit Bar we are now in the process of implementing a "help desk" to deal with pro se divorces.

Do you complete forms for pro se litigants?

I do not.

Q. Do you require a Parenting Plan if the Settlement Agreement specifies visitation times? Will you allow the Final Decree to state a Parenting Plan is not required due to the visitation being specified in the Settlement Agreement?

I prefer to have a Parenting Plan, but sometimes I do not insist on one under certain circumstances.

Q. Do you require a Child Support Addendum?

Yes, I require one.

Do you allow a Final Judgment and Decree to be delivered to your office for your signature if there is a Settlement Agreement?

Yes, but I will not sign the decree without the Settlement Agreement. My law clerk has a checklist to review all cases to find out if all the appropriate documents have been filed.

Q. When a Settlement Agreement is brought to you, do you scrutinize it before approving it?

I look at it and I look at it closely if there is only one lawyer in the case or if it is a pro se case.

Do you allow lawyers to request a particular mediator regardless of who is assigned as the mediator by the Alternative Dispute Resolution office in court ordered mediations?

No, you cannot select a mediator in the ADR program, but I always allow parties to pick a private mediator.

In a request for a rule nisi how much time you would like?

Send me a letter with the rule nisi giving me contact information on both lawyers.

When you send me a final decree if you have already filed the Settlement Agreement, Parenting Plan and Child Addendum, send me a copy of each one marked "copy" so I can review each document and then throw them away without having to send them back. Doing so saves time and money. *FLR*

Loss of Consortium

by Darren Tobin

As a Family Law Attorney, you are regularly called upon to help families going through a difficult period. Often, prospective clients are unsure what type of attorney they need and have sought your help simply because of your title, Family Law Attorney. In many such cases, the difficulty these families face stems not from the actions of any one family member, but instead from an external problem that someone outside of the family has caused. This article addresses loss of consortium claims in the State of Georgia, and how the laws of this State treat a physically uninjured spouse who nonetheless has experienced an injury as a result of his or her spouse's injuries.

Under Georgia law, a loss of consortium claim includes "society, companionship, love, affection, aid, services, cooperation, sexual relations and comfort, such being special rights and duties growing out of the marriage covenants." *Smith v. Tri-State Culvert Mfg. Co.*, 126 Ga. App. 508, 510 (1972). A loss of consortium claim is not only about a couple's private sexual relationship. Though it certainly does include the couple's physical intimacy as one factor, it also encompasses the disruption of a couple's overall quality of life. An injured spouse who cannot perform his or her usual household duties (i.e. driving the children to and from extracurricular activities, cooking meals for the family, cleaning the house, running errands, volunteering at school activities, etc.) will inevitably be forced to rely on the uninjured spouse to pick up the slack. Invariably that additional work not only imposes an added time commitment, but it also introduces a new element of stress on the uninjured spouse. Moreover, the uninjured spouse likely has to contend with his or her injured spouse's changing personality and likely complaining. This emotional distress is recoverable through a loss of consortium claim, and belongs exclusively to the uninjured spouse.

Nonetheless, simply determining that the uninjured spouse has a viable loss of consortium claim, does not automatically mean he or she can bring an action. A loss of consortium claim is a derivative claim, meaning that it only exists as long as the primary injury claim from which it derives exists. *Miller v. Crumbley*, 249 Ga. App. 403, 404, (2001). Thus, if the injured spouse settles his or her claim, then the loss of consortium claim disappears. In the unusual event that the injured spouse is late in filing an action and his or her statute of limitations has run (in Georgia the statute on most personal injury actions is two years from the date of injury O.C.G.A. § 9-3-33), it does not necessarily mean that the loss of consortium claim has expired as well. *Parker v. Silviano*, 284 Ga. App. 278, 280, (2007). A loss of consortium claim has a four year statute of limitations so even if the underlying action is dismissed or barred from being filed by the two year statute, the uninjured spouse can still pursue his claim. O.C.G.A. § 9-3-33.

A consortium claim has two elements: liability and damage. Liability is established by showing solely that the responsible party (neither spouse) has tortiously injured the consortium claimant's spouse; damages are established as in any other tort case. (*Smith v. Tri-State Culvert Mfg. Co.*, supra at 511.)

The most obvious injury that the injured spouse must be shown to have suffered is a physical injury. But based on a reading of the case law, there is no requirement that a physical injury per se needs to be suffered. In *Sevcech v. Ingles Markets, Inc.*, a wife tried bringing a loss of consortium claim on the grounds that her relationship with her husband had deteriorated as a result of her husband's changed behavior after he was falsely accused of shoplifting. There, the wife ultimately was unsuccessful in recovering on her loss of consortium claim, however, her inability to recover had nothing to do with the fact that it was the husband's reputation that was injured (versus say the husband suffering a physical injury), but rather on the merits of the loss of consortium claim itself. Accordingly, the *Sevcech* case supports the proposition that a spouse can recover damages for loss of consortium even when his or her spouse has not suffered a physical injury. (See *Sevcech v. Ingles Markets, Inc.*, 222 Ga. App. 221, 225, (1996).) So long as one spouse has suffered enough of an injury – irrespective of whether that injury is physical, emotional, or by reputation – the uninjured spouse can recover damages if the injury is proven to have interfered with the marriage.

As you consult with a prospective client and you are unsure whether there is a loss of consortium claim worth pursuing, consider the following: was this couple having marital problems such as voluntary separation from one another at any time; have there been any allegations of

domestic abuse or family violence petitions filed; how engaged are they intimately; have they sought marital counseling; and what type of roles did they each play in their children's lives. Remember, you are asking these questions as they relate to the couple's relationship before the alleged injury occurred and as they relate to the couple's relationship after the alleged injury occurred. If it is plainly apparent that this couple's marriage was facing dissolution well before the injury ever occurred (i.e. constant arguing, a dormant sexual relationship, allegations of adultery etc.) then there is no conceivable way that the uninjured spouse can claim the dissolution of the marriage was caused by the injury. If however during the course of your consultation you realize that this marriage was a happy and healthy one, but that the dynamic was abruptly altered following the injury to the one spouse, then you may very well have a viable loss of consortium claim in front of you.

Establishing that your clients have a viable loss of consortium claim only means that a jury can award the uninjured spouse something. Like pain and suffering, the enlightened conscience of the jurors will guide the amount of damages awarded. (*Smith v. Tri-State Culvert Mfg. Co.*, supra at 511.) A claim for 'loss of consortium' does not include lost wages, medical expenses, or loss of earning capacity. *Branton v. Draper Corp.*, 185 Ga. App. 820, 821 (1988). Further, a spouse can only recover for the injuries as they exist during the joint lives of the husband and wife. (*Marzetta v. Steinman*, 117 Ga. App. 471 (1968).) Given the opportunity and the right set of facts, a jury will recognize a loss of consortium argument and value the extraordinary damage to an uninjured spouse and to the couples' marriage and partnership.

In addition, a claim for loss of consortium is based not upon injury to the body of the claimant but instead solely upon the claimant's property right arising out of the marriage relationship to the love, companionship, and conjugal affection of the spouse. (*Bartlett v. American Alliance Ins. Co.*, 206 Ga.App. 252, 254(1) (1992).) In a typical injury action (assuming there is insurance available to cover the incident), under a standard insurance policy, an uninjured spouse is not entitled to recover from the liability insurer (the insurance company) for damages for loss of consortium independent of the injured spouse's claim under the bodily injury liability coverage in the policy. (*Bartlett v. American Alliance Ins. Co.*, supra at 255(1).) In other words, most liability policies are written in such a way that loss of consortium claims are included within the "single injury" limits. When the per person's maximum insurance under the policy has been paid on account of the injury to the injured spouse, then the loss of consortium claim belonging to the uninjured spouse will not be paid by the liability insurer. (*State Farm Mut. Auto. Ins. Co. v. Hodges*, 221 Ga. 355 (1965); *Thompson v. Allstate Ins. Co.*, 285 Ga. 24, 26-27 (2009).) Practically, this means the husband and wife will have to share the recovery. ***FLR***

Darren. Tobin is a Plaintiff's Attorney practicing in the areas of Personal Injury and Wrongful Death. Tobin now focuses on helping families rebuild their lives after someone they care about has been injured as a result of someone's negligence or by some product's defective design. He is regularly brought in by other lawyers to help evaluate the strength of a potential personal injury lawsuit which is oftentimes used as bargaining leverage during a divorce. He can be reached at 404-419-9500 or dtobin@cssfirm.com.

Caselaw Update

by Vic Valmus

CONTEMPT

Smith v. Smith, S13F0682 (Sept. 9, 2013)

The parties were divorced after 24 years of marriage and the Final Decree was issued in 2012. The Wife subsequently filed contempt, among other things, for failing to turn over personal property awarded to the Wife in the Final Judgment and Decree of Divorce. After hearing, the Court directed the Husband to make required mortgage payments and insurance payments to the Wife and to pay fair market value of the personal property he failed to turn over. The Husband appeals and the Supreme Court affirms.

The Husband contends the Trial Court's contempt order improperly modified the Final Judgment by awarding the Wife monetary compensation in lieu of personal property originally awarded to her. The record indicates that items of personal property awarded to the Wife in the Final Decree were located in the marital residence which was occupied by the Husband prior to the entry of the Final Decree but were no longer in the marital home when the Wife took possession. Even though the Husband claimed no knowledge of the whereabouts of the property, the Wife presented evidence during the pendency of the divorce proceedings that he had moved at least one truckload of personal property from the home. She also presented uncontested evidence establishing the fair market value of the missing property. The purpose of civil contempt is to provide a remedy to obtain compliance with the Trial Court's orders. While the Trial Court is not authorized to modify the original Decree within a contempt proceeding, it may exercise its discretion to craft a remedy for contempt including remedying harm caused to an innocent party by the contemptuous conduct. Therefore, the award to the Wife for the monetary value of the items the Husband refused to return over is a permissible exercise of Trial Court's discretion to enforce its Orders.

CONTEMPT

Ziyad v. El-Amin, S13A1292 (Oct. 21, 2013)

The parties were divorced in 2009 and Ziyad (Husband) was awarded certain residential property and was to hold El-Amin (Wife) harmless. The Husband was ordered to refinance the indebtedness in his own name within 6 months or sell the property to pay off the indebtedness. Husband failed to do so and the Wife filed for contempt. The Trial Court found the Husband in contempt and to purge the contempt order, the Husband had to put the property up for sale immediately, and in addition, the Husband had to make payments toward the principal of the mortgage until the house sold or the indebtedness was otherwise repaid. The Husband appeals and the Supreme Court affirms.

Husband argues that the Trial Court improperly modified the Final Decree when it ordered him to pay down the principal. As a general rule, a court cannot modify a Final Decree of Divorce on a motion for contempt. However, a Court can fashion a remedy for contempt including remedying harm caused to an innocent party by contemptuous conduct. The Trial Court reasonably understood these requirements meant for the Husband to put up the property for sale upon terms that make it sellable. To the extent that outstanding indebtedness renders it unsellable, the Husband was responsible for making it sellable. Therefore, the Court had the discretion to order Husband to pay down the principal to purge his contempt.

CRIMINAL CONTEMPT

Carlson v. Carlson, A13A1300 (Sept. 23, 2013)

The parties were divorced in 2008. Afterwards, the Father filed a Petition for Modification of Custody and in May of 2012, the Trial Court entered an Order modifying custody of the child support from the couple's three children where the Father was granted primary physical custody with visitation granted to the Mother. The Father filed a Motion for Contempt asserting that the Mother had violated the May Order by failing to return the couple's 15-year-old daughter after scheduled visitation. The Trial Court found the Mother to be in criminal contempt, found her testimony not credible and ordered her to be incarcerated for 5 hours until 5 p.m. The Mother appeals and the Court of Appeals affirms.

The Mother appeals that she was not properly advised of her 5th Amendment rights against self-incrimination before testifying at her hearing. Because the contempt ordered asked for her to be sanctioned appropriately to include incarceration and the payment of attorney's fees, the contempt hearing was akin to a criminal proceeding and entitled her to 5th amendment rights against self-incrimination. However,

in Georgia whether or not to testify in one's own defense is considered a tactical decision to be made by the Defendant. There is no general requirement that the Trial Court interject itself into that decision making process. Here, the Mother was represented by counsel and made a tactical decision whether to testify or not and the Trial Court had no duty to advise her of the right to determine on the record whether she had decided to waive her 5th amendment rights.

In the absence of an express statement of the standard applied, we are obligated to presume that the Trial Court knows and applies the correct law. In any event, the Court finds sufficient evidence in the record to support a determination of the Mother's wilful violation of the Order and the Trial Court could have properly found beyond a reasonable doubt that the Mother's violation of May Order was wilful, subjecting her to the finding of criminal contempt.

The Mother also argues she had a constitutional right to a jury trial. Under O.C.G.A. § 15-6-8, the Superior Court's authority to punish for such contempt is limited to the imposition of fines not exceeding $1,000 and imprisonment not exceeding 20 days or both. The U.S. Supreme Court has determined that no constitutional right to a jury trial exists in cases of contempt imposing punishment of under 6 months. Even if the Mother had a right to a jury trial, she waived any such right by failing to demand a jury trial in response to the Father's Motion for Contempt and by participating in the hearing on the motion before the Judge without a jury. A litigant may impliedly waive her statutory right to a jury trial by this conduct.

CUSTODIAL PARENT/CHILD SUPPORT

Williamson v. Williamson, S1A0953

The Father filed a petition to modify custody, visitation, and child support. The Court ruled that the parties would continue to have joint legal custody but flip the division of parenting time to give the Father 60 percent of custodial parenting time and the Mother 40 percent. Child support was based on the monthly gross income of the Father of $6,570 and the Mother of $1,300. The Court found the presumptive amount of child support the Father would pay $1,359 and by the Mother $233. The Court found the Guidelines to be unjust and inappropriate. The Court found a deviation for parenting time with the Father in the amount of $272. The Father would pay $1,087 which is $1,359 minus $272 as monthly child support. The Father appeals, affirmed in part, reversed in part.

First issue raised by the Father is that the Court did not designate a custodial parent in the Final Order. However, the Court was not required to do so. Because the Order awarded the Father more than 50 percent of the custodial parenting time with the children, he is now the custodial parent and the Mother is the non-custodial parent for the purposes of applying the Child Support Guidelines.

The Father also argues that the Trial Court erred in requiring him to pay the Mother $1,087 of monthly child support because the custodial parent may not be ordered to pay child support to a non-custodial parent. However, in determining child support the standard is the best interests of the children. Here, the legislature has not specified that only non-custodial parents are to pay child support. Therefore, the final child support order does not require a payment from a non-custodial parent to the custodial parent. If the Court applies several deviations to subtract from the non-custodial parent, it could lead to a negative number which is another way of saying that the custodial parent must pay the non-custodial parent the amount to support the children.

In this case the child support incorporated only one deviation for increase parenting time of the Father in the amount of $272. However, the parenting time deviation is only allowed for a non-custodial parent based upon the non-custodial parent's court ordered visitation with the child. In addition, the Court subtracted a $272 deviation from the $1,359 presumptive child support calculated for the custodial father rather than from the presumptive $233 payment due to the custodial parent. The Court could apply a parenting time deviation for the Mother or a non-specific deviation to reduce the Mother's $233 presumptive child support amount so much that the net results the Father must pay child support to the Mother. Therefore, the Court incorrectly stated the Father's presumptive amount of child support and incorrectly applied the parenting time deviation.

LEGITIMATION

Chandler v. Rohner, A13A1407 (Aug. 14, 2013)

Chandler (Father) filed a petition to legitimate his two children against Rohner (Mother). In the legitimation petition, the Mother did not seek termination of the Father's parental rights but the Mother's current husband had initiated a separate petition for a stepparent adoption which was also pending before the Superior Court. At the close of the evidentiary hearing, the Superior Court orally denied the petition for legitimation and in a written order memorializing the ruling, the Superior Court took the additional step of terminating the Father's parental rights. The Father appeals and the Court of Appeals reverses.

Because this is a legitimation action, the Superior Court lacked jurisdiction to terminate the Father's parental rights. The Superior Court has jurisdiction to consider termination of rights of a putative Father only in conjunction with an adoption proceeding.

The Father also argues that the Superior Court erred by denying his motion for a new trial without having held an oral hearing. Pursuant to Uniform Superior Court Rule 6.3, unless otherwise ordered by the Court, a motion for new trial in a civil action shall be decided by the Court only after an oral hearing, even if the moving party does not request such a hearing. In this case, the Superior Court did not hold an oral hearing before a ruling on the Father's motion for new trial nor did it enter an order excepting the motion from the Rule 6.3 requirements.

MODIFICATION

Duncan v. Mughelli, A13A0890 (Nov. 5, 2013)

The Mother (Duncan) filed a Complaint to Establish Paternity and Child Support which ultimately lead to a Consent Order of Legitimation, Custody and Visitation. In 2010, the Father filed a Petition for Modification of Custody and Visitation and Contempt. The parties agreed to appointment of a Guardian Ad Litem and another Consent Order agreed to allow the Guardian Ad Litem to arbitrate this dispute. The Order provided that the Guardian Ad Litem's ruling shall be binding on the parties and shall be incorporated by him into the proposed final order that either side or the Guardian Ad Litem may submit to the Court as the final order in the case. The Guardian arbitrated the case and submitted an arbitration award to the Superior Court. The Guardian did not modify custody but modified the visitation time, stating that if the Father returns the child to the Mother on Tuesday later than the grace period provided, then he shall forfeit his next Tuesday visitation. The award also encouraged, but did not mandate that the parties seek co-parenting counseling. The Superior Court approved the arbitration award and incorporated it into the Final Order. In 2012, both parties filed contempt actions against each other. The Trial Court had a hearing on the cross motions for contempt and issued a ruling which, among other things, ordered that all forfeiture language be stricken and granted the Father's request for the appointment of a parenting coordinator. The Mother appeals and the Court of Appeals affirms.

The Mother argues that the Trial Court improperly modified the terms of the previous order on custody and was without authority to modify the terms of a custody order in the contempt proceeding. However, the Court made no modification of custody. The Court determined that the forfeiture provision is not in the best interest of the child because it had the effect of causing the child to go for extended periods of time without seeing the Father. By striking this provision of the arbitration award, the Court effectively modified visitation which it has the authority to do in a contempt proceeding. Likewise, the appointment of a parenting coordinator did not affect custody because counseling does not alter legal custody.

PARENTING PLAN

Gilchrist v. Gilchrist, A13A0335 (July 15, 2013)

The parties were divorced in 2008. Mother was awarded primary physical custody. Father was awarded visitation, including alternating weekends. In 2012, the Mother, pro se, filed a motion to modify the Parenting Plan seeking to increase the Father's visitation schedule to two days per week thereby decreasing her time with the child. The Trial Court denied the motion and in the written orders said the Father was a working firefighter and had a variable work schedule. The Father expressed that he did not want more time with the child because his current work schedule did not allow it. Trial Court found that there was no precedent requiring the Court to increase the Father's visitation time when he cannot conform to the current Parenting Plan. Mother appeals and the Court of Appeals affirms.

The Mother contends the Trial Court was required to adopt her modified Parenting Plan because the Father failed to file a competing parenting plan with the Court. Even though O.C.G.A. §19-9-1(a) provides that where the custody of any child is at issue between the parents, each parent shall prepare a parenting plan or the parties may jointly submit a parenting plan, the failure by one party to file a parenting plan does not compel the adoption of the plan submitted by the opposing party. The Mother's notice of appeal designated a record consisting of the appellate records from three prior appeals before the Supreme Court plus the original Parenting Plan, her Amended Motion to Modify the Parenting Plan and the Order Denying the Motion to Modify the Parenting Plan. The Notice of Appeal also recites that no transcript of the proceeding will be filed as the issue on appeal is one of law. Where the sufficiency of evidence is raised in a custody issue and no transcript of the evidentiary hearing or statutory substitute is filed, it must be presumed that the Trial Court's ruling was correct.

STEPPARENT ADOPTION

Dell v. Dell, A13A1068 (September 25, 2013)

The parties were divorced in 2004 with the Father (Dwain) was granted primary custody of the minor child. Between 2004 and 2006, the Mother (Leah) visited the child but only made $1,300 of child support payments. In 2007, Mother moved to Florida and the Father lost contact with Mother. The Father remarried in 2007 and had a daughter. In 2010, the Father filed a petition to terminate the Mother's parental rights and a stepparent adoption. Mother was personally served and completed a mandatory workshop but did not attend the final hearing. Following the trial, the Superior Court terminated Mother's rights based on abandonment of the child, failure to provide care and support for more than a year and a finding that the adoption was in the best interest. The Mother filed for reconsideration, but was denied. The Mother appeals and the Court of Appeals reverses.

Adoptions are governed by O.C.G.A. § 19-8-1 et seq. Pursuant to 19-8-6(a)(1) awarding stepparent adoption

applies only when the parent voluntarily in writing surrenders all of the rights. If the legal parent refuses to surrender parental rights, the Superior Court may still grant the stepparent adoption if the Superior Court determines by clear and convincing evidence that the child has been abandoned, and adoption is the best interests of the child after considering the physical, mental, emotional, and moral conditions and needs of the child. Without consent, the Superior Court may also grant step-parent adoption it it finds the parent for a period of one year or longer immediately prior to the filing of the petition for adoption, without justifiable cause, has significantly failed to (1) communicate or make a bona fide attempt to communicate with the child in a meaningful and supportive manner or (2) to provide for the care and support of the child as required by law or judicial decree. The stepparent has the burden of proving the termination of rights is warranted.

In this case the Superior Court's Order was deficient because it did not adequately address the criteria set out for termination of parental rights pursuant to O.C.G.A. §15-11-94. The Superior Court only stated that the Mother had abandoned the child for a period of longer than a year and had failed to provide care and support and that it is in the best interests of the child to be adopted. In addition, the Mother has not paid child support for several years and has not made efforts to visit with the child through the courts. It did not include specific findings of fact showing that the Mother abandoned the child and did not include specific findings showing that she failed to provide care and support for the child without justifiable cause. The Superior Court's conclusion that the adoption of a child is in the best interests also lacked particularity. The Court emphasizes that a judgment having such a final and significant result of severing the rights of a parent to a child must conclusively show compliance with the statutory criteria as a condition precedent and is strictly construed. Accordingly, the Order is vacated and remanded.

SUPERSEDAS

Taylor v. Taylor, S13A0911 (Sept. 23, 2013)

The parties were divorced in June of 2010. The Father was awarded primary custody of two children. Three months later, the Father filed a Petition to modify alleging that circumstances had changed and seeking sole legal custody of the children as well as more child support. The Trial Court granted the modification award of sole legal custody to the Father; increased the amount the Mother was to pay in child support and also awarded attorney's fees. The Mother appeals and the Supreme Court affirms.

The Mother appeals, among other things, that the Trial Court denied her due process rights. The Trial Court entered a temporary modification order with the same terms as a permanent modification order. The Mother states the temporary order was entered just before the permanent order and was designed to deny her the benefit of supersedes during her appeal from the entry of the permanent order under O.C.G.A. § 5-6-46. However, temporary and permanent custody orders have different purposes, are of different natures and are governed by different rules. A temporary order is intended to merely insure that the children are adequately cared for until the further order of the Court and a temporary order does not decide the final issues between the parties. The Trial Court had the discretion to safeguard the children from such change in circumstances pending the resolution of the modification proceeding, including any appeal from the final modification order.

SURVEILLANCE

Rutter v. Rutter, S12G1915 (Oct. 7, 2013)

In the process of divorce, the Wife surreptitiously installed several video surveillance devices in the marital home. Prior to trial, the Husband moved to exclude the video recordings derived from the use of the surveillance devices on the grounds they were made in violation of O.C.G.A. § 16-11-62(2). The Trial Court denied the Motion but certified its ruling for immediate review. The Court of Appeals upheld the Trial Court's ruling. The Husband applied for certiorari which was granted. The Supreme Court reverses the Court of Appeals and the Trial Court.

Pursuant to O.C.G.A. § 16-11-62(2)(c) it is unlawful to observe, photograph, or record the activities of another which occur in private places and out of the public view without consent. The purpose of the statute is to protect all persons from invasion upon their privacy including invasions made upon the privacy of one spouse by the other in a private place. Subparagraph 2(c) was an exception stating it is lawful to use for security purposes, crime prevention, or crime detection any device to observe, photograph, or record the activities of a person who is within the curtilage of the residence of the person using such device. This was set forth in House Bill 1576 but not in Senate Bill 316. The Senate Bill did not include the exception and was signed into law approximately one week after House Bill 1576. Absent an express repeal, Courts must construe statutes to avoid an implied repeal unless differences cannot be reconciled or the most recent enactment appears to cover the whole law on the subject. In the House Bill, one who surreptitiously records the activities of another within the curtilage of his or her own home has done nothing unlawful. Under the subsequent Senate Bill, the same conduct is deemed unlawful. Therefore, the two statutes pertaining to the same conduct are irreconcilably inconsistent and cannot stand together. Therefore, there is no curtilage exception. ***FLR***

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Marriage, Separation, Divorce & Other Torts

by David N. Rainwater and Benjamin Lee Wright Jr.
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Abstract

Marriage is a status being husband and wife that enables the couple privileges not offered to unmarried persons. Modern privileges of marriage allow a spouse to do tasks such as sign legal documents for the other spouse, be granted tax breaks, and have a right to inherit from their deceased spouse. At first glance these spousal privileges seem to be the product of convenience, however they are instead the fruits of history. Another product of the history of marriage is the doctrine of interspousal tort immunity which bars tort claims between spouses. This article discusses the origin of interspousal tort immunity and its survival from ancient times to present day. Rationales for the abolition of the doctrine are presented, and a trend showing its ignorance to public policy in light of the separation and subsequent divorce of spouses is outlined by recent case law.

Introduction

In 2004, after practicing law for 32 years, I tried my first "jury" trial in a divorce case against a well-know divorce lawyer from Macon. That same year, in concert with some other trial lawyers, I also helped to try the largest personal injury case in my career for some local clients in Cordele. The personal injury trial was settled in the middle of the trial for eight figures, but absolutely no one, outside the jurors, bailiffs and family, heard about the results of our three and one-half year, sixty-five deposition and $450,000 out-of-pocket investment. To my knowledge, I have never received a case referral for the results in that case. After the divorce trial, however, an explosion of information occurred in the "divorce network" causing multitudes of high asset cases from all over the state to come pouring into my firm. This ultimately dictated a shift in my practice. I learned an important lesson: Do a credible job in a domestic case and you have a client, their family, their friends and acquaints who forever will tell anyone, with time to listen, how "their lawyer" got justice for their daughter, relative or friend. As a small town litigator, domestic cases were what I did in between everything else. I never gave much value to them or realized their importance.

Since most of my background had been in torts, I began to add counts for assault, battery, fraud and other intentional injury claims to my domestic cases. I also began looking at domestic cases, structurally, the same way I did with tort matters. I wanted to make sure all the interests and burden of proofs were properly aligned, as in any declaratory judgment/tort case, and to maximize my jury verdict form to expand the case to allow additional recoveries when authorized by the evidence and the law. I wanted as many chances as possible for my clients to receive an award, in addition to the standard "alimony, child support and equitable division" blanks on the verdict form. A recovery in an intentional personal injury or fraud action is similar to alimony in that both types of awards are non-dischargeable under bankruptcy laws.[1] In fact, I discovered that the tort portion of the case seemed to help garner higher portions of the assets in the equitable division portion of the verdict, and rightly so. The battered spouse deserved more for enduring such conduct, if presented within the appropriate statute of limitations period.[2] This article is to offer both the history and current law of torts within a marriage and subsequent divorce, in hopes that the bar will realize all issues which should/could be litigated and resolved within a domestic matter.

I. Inter-spousal Tort Immunity Within a Divorce

The general purpose of tort law is to compensate an injured party from acts or omissions by a tortfeasor which are the cause of injury. Property division divorce cases in Georgia are based on the concept of "equitable division" with the cause of the separation being a relevant matter in making the division. Many of the causes may constitute torts. However legal fiction within the law of torts created by common law hundreds of years ago, provided certain exceptions, defenses and immunities to parties of a marriage from compensating the injured spouse despite the fact that such injury was intentionally or maliciously inflicted. One such exception is the doctrine of inter-spousal tort immunity. Inter-spousal tort immunity is based on the common law theory of coverture, in which a legal fiction was developed to consider a husband and wife as one entity. Under the doctrine, a spouse is barred from receiving compensation for injuries merely because the tort which created the injury was privileged due to the tortfeasor's status.

A. A Brief History of the Doctrine of Inter-Spousal Tort Immunity

Modern law is a product of history. To gain a complete understanding of a law one must first understand where and why a law came into being. Laws regulating domestic relations are perhaps the earliest to arise and become societal standards. For this reason archaic conditions have been preserved for millennia.[3]

The earliest recognition of the idea of inter-spousal immunity was in the Code of Hammurabi[4] in 2250 B.C. which allowed a husband to have dominion over his wife.[5] Under the code husbands could exercise control and command their wife without punishment. This ancient concept was also recognized by the Roman Empire under the theory of *pater familias*, which allowed the husband nearly absolute control over his household including his wife without legal penalties.[6]

In the Middle Ages, Anglo-Saxon law continued this ideology. The Anglo-Saxon law would eventually be absorbed into the laws of England. In the 18th century, English law was still consistent with these ancient laws in regards to intermarital torts. Married women, as feme coverts, had no legal status and their marriage relationship was analogous to a master-servant relationship.[7] In his Commentaries on the Laws of England, William Blackstone noted that English civil law gave a husband the right to severely beat his wife using whips and sticks with no significant threat of punishment.[8] During this time period, the United States of America declared their sovereign independence from Great Britain, yet the new nation was completely dependant upon their former nation's legal system. English common law was still followed by the United States' young judicial system with the English ideology of the relationship of married couples included.

In early America, wives faired slightly better than their English counterparts. In America, women were allowed to enter into some commercial transactions without going through the status of their husband in transactions involving contracts and the sale of real property.[9] However, a married woman still could not bring a civil suit against her husband. The wife's legal status was deemed to have merged into that of the husband.[10] Despite their growing commercial freedom, married women were still subject, in most jurisdictions, to their husband's tortuous conduct without legal recourse under the law in early American jurisprudence.

Statutes also reflect the status of inter-marital relations. The Married Women's Acts were promulgated by most jurisdictions in the mid-19th century. The Acts aimed to make the status of women more equal to men in the eyes of the law, primarily in regards to property rights, testamentary rights and the control of their other assets without interference from their husbands.[11] Although some rights began to develop for women, not all areas of the law followed this pattern. Some jurisdictions gave wives the right to bring suit against her husband. South Carolina's Code Ann § 155170 read, "A married woman may sue and be sued as if she were unmarried. When the action is between herself and her husband she may likewise sue or be sued alone." Still, not all state legislatures agreed on the issue. A 1985 Hawaii statute read, "A married woman may sue and be sued in the same manner as if she were sole; but this section shall not be construed to authorize suits between husband and wife."[12]

Even in jurisdictions that did enact Married Women's Acts in the mid-1800's, the judiciary would often invalidate the provisions of the Acts as such legislation often was at odds with prior judge-made common law.[13] This "judicial de-radicalization" was accepted at the time.[14] The field of torts was not firmly rooted in law until the late Nineteenth century, allowing traditional common law theories to trump many emerging theories of equality.[15] Court holdings of the time period reflected this philosophy. A Georgia court expressly ruled in *Heyman v. Heyman*, that the Georgia Married Woman's Act has not changed the common law rule that neither husband nor wife is liable to the other in a civil action for a personal tort.[16] In *Abbe v. Abbe*, the court ruled that a wife was barred from recovering damages after being battered and assaulted by her husband.[17] Similarly, in *Main v. Main* a judge acted properly when he held a husband was immune from liability for the false imprisonment of his wife under the doctrine inter-spousal tort immunity.[18] The Supreme Court of the United States gave their opinion on the doctrine in *Thompson v. Thompson*.[19] In that case, a wife brought suit against her husband for assault and battery. The Court considered the burden that coverture placed upon women and the Acts passed to emancipate women from a husband's control. The justices held the Act authorized a married woman to bring suit for torts committed against her as fully and freely as if she were unmarried, but added the Act was not intended to give a right of action as against the husband. Rationale for this clarification was based on the notion that a different holding would lead to a flood of litigation between spouses. The effect of this holding left women a severely inadequate legal remedy to protect themselves from violence within their homes.

In modern times legislatures and judiciaries have placed significant modifications on the doctrine of inter-spousal tort immunity. In 1914, every jurisdiction in the country recognized the doctrine.[20] The archaic rationales of privileged abuse and neglect without recourse, which contrast with justice and equity are now less prevalent. In the one-hundred years since, nearly every state has either abolished the doctrine or significantly limited its application. However, this relic of ancient times is still applied in some jurisdictions.

B. The Status of Inter-Spousal Tort Immunity in Georgia

The majority of states no longer recognize the common law doctrine of inter-spousal tort immunity. Georgia is in a significant minority of states as it keeps the doctrine in its common law form as adopted in 1863.[21] Georgia courts have followed the code, barring suits and stating marriage extinguishes antenuptial rights of action between the husband and the wife, and after marriage, the wife cannot maintain an action against her husband based on a tortuous injury to her person.[22] Although, the majority of the discussion in this article will deal with intentional torts arising during the dissolution of marriage, it is important to note that the doctrine also applies to negligence and other unintentional torts. However, in two situations, Georgia courts have not applied the doctrine. First, in extreme factual situations, courts will deviate from a strict application of the general rule.[23] Second, the doctrine will not be applied when there exist both a lack of marital harmony between the spouses and no possibility of collusion[24] between the spouses.[25] These exceptions to the general rule where recognized by the Georgia Supreme Court in *Harris v. Harris*.[26] In nearly each instance where a court states a need for inter-spousal tort immunity the primary justification is for public policy reasons. Unfortunately, the doctrine is overbroad. There are also

countless public policy reasons to abolish the application of inter-spousal tort immunity. History appears to be the reason for the retention of the doctrine.

C. The Dissolution of Marriage and Inter-Spousal Tort Immunity

Marriage creates the legal status of the husband and wife. The status of married couples allows interactions between the husband and wife to be viewed differently than interactions between the husband and wife and third parties. A spouse may recover for a third party's acts which deprive the spouse of their partners services, companionship, support and conjugal affections. Within the marriage, the status of husband and wife establishes various duties, privileges and obligations on the two under the law. For instance, in certain circumstances spouses cannot be compelled to testify against one another or may prevent one another from disclosing information communicated in confidence. The doctrine of inter-spousal tort immunity insulates a spouse from tort liability for injuries caused to the other spouse. Some states, including Georgia still recognize this doctrine when it does not violate public policy. An example of a court application of the doctrine can be seen in the holding in *Yates v. Lowe*. Here, the court found that despite the death of the husband a suit commenced by the surviving wife was barred by the doctrine of inter-spousal tort immunity.[27] The basis of this decision was to prevent the appearance of collusion between the wife and her deceased husband's estate, as the wife would have a friendly relationship from an economic perspective with the estate of her deceased husband.[28]

While the general rule is to apply inter-spousal tort immunity in suits under tort law between spouses, the doctrine will not be applied where public policy reasons are not present. For example, in *Trust Co. Bank v. Thornton*, a claim was brought against the deceased husband's estate by the deceased wife's parents. The distinguishing facts the facts from *Yates v. Lowe* is the deceased wife's parents had no interest in the estate of the deceased husband. Like *Yates v. Lowe*, there was no marital harmony to protect, but because the parent's of the deceased wife had no interest, this case does not create a reasonable apprehension of collusion between the plaintiffs and the defendant estate. For these reasons, there was no public policy concern supporting the application of inter-spousal tort immunity and the doctrine was not applied by the court.[29]

To obtain a divorce in Georgia, married couples may either file for a fault or no-fault based divorces. A fault based divorce may be granted to parties on the grounds of adultery, desertion, extreme cruelty, drug addition, habitual drunkenness, willful desertion for a period of over a year, insanity, conviction of crime of moral turpitude, incest, impotency at the time of marriage, force, duress, menace or fraud.[30] A party seeking a divorce may seek a no-fault divorce, in which the petitioner must show that the marriage is irretrievably broken and there is no possibility of reconciliation.[31]

Generally, a party may recover from a tortfeasor for any injuries inflicted. A spouse of a tortfeasor may be barred from recovering compensation from his/her wrongdoer under the inter-spousal immunity statute currently in place. There are approximately 2,096,000 marriages in the United States, and statistics show that around 53 percent of those marriages will end in divorce.[32] Of those divorces it is estimated that between 10-15 percent involve conflicts with severe abuse and physical violence.[33] Where still in effect, many of the victims of such abuse are barred from recovering from their injuries. The lack of a legal remedy for these victims is an egregious and blatant injustice and such deprivation is a vestigial concept left over from a sexist society.

Whether a divorce is being sought for fault or no-fault reasons under Georgia law, there is a persuasive argument that there is no longer marital harmony or possibility of a collusive or "friendly" lawsuit between the parties. Policy arguments in support of marital harmony just do not exist in a divorce setting. Further, a party seeking to receive the benefits of inter-spousal immunity, based on their status as husband and wife, should not be allowed to use those benefits when they abused their marital status. When they abuse the status they should lose the ability to assert any privileges that were fruits of such status.

In *Wallach v. Wallach*, where the parties were married at the time of the automobile collision but divorced before the subsequent lawsuit was filed, this court followed the general rule that after divorce one of the former spouses cannot maintain an action against the other for a personal tort committed during coverture.[34] Coverture is the status and relationship of a wife arising out of a marital relationship.[35] As discussed in the previous paragraph, if a divorce is being sought the marital relationship has equitably ended. Furthermore, the Middle Aged term of coverture used by the *Wallach v. Wallach* court is presently of little significance. Women no longer require the protection and status of a man to exercise their rights as an adult in the United States, making the theory of coverture inapplicable.

II. Torts and Marriage

A tort is a breach of a private duty owed to an individual which results in the injury of either the individual's person or property.[36] An act may be both a tort and a crime, however torts are distinguished from crimes because torts are private in nature as opposed to a crime's public nature. A central tenet of tort law is the ability of the wronged party to recover compensation from the tortfeasor for damages caused to person or property. Without the possibility of the tortfeasor having to pay damages, there is little if any reason for tort law to exist.

A. Torts During the Dissolution

When a failing marriage is reaching its final days, emotions often escalade causing more than a mere exchange of unhappy words. Actions and words by one spouse may create a reasonable apprehension of immediate harmful or offensive contact with another, and

may eventually result in such contact. Conduct between spouses may be outrageous and have an intention to harm the other which transcends all bounds of decency found in society. A spouse may, out of malice or spite, deprive the other of their possessions, or substantially interfere with the other's possessions to render the object valueless. If the two parties did not have the status of being married, these instances would be causes of action for assault, battery, intentional infliction of emotional distress, trespass to chattels and conversion. However, common law would likely prevent a recovery in these instances in light of their status as a married couple and the application of inter-spousal tort immunity. Instead, in these situations a court should consider the tort as the end of the marriage relationship if it was material to the dissolution of the marriage. Therefore, at the time of the commission of the tort, courts should view marital harmony as non-existent, especially if a divorce is filed in light of the tortuous conduct.

B. Statutory Indications of a Lack of Marital Harmony

As previously outlined, cruel treatment is ground for a fault based divorce in Georgia. A tort such as an assault or battery by the wife upon the husband or vice-versa, constitutes cruel treatment for the purposes of a fault-based divorce.[37] An inter-spousal tort leads to an end of marital harmony. The occurrence of the statutory permitted grounds for divorce in the form of a tort also ends marital harmony as the injured party has a right to end the marriage.

Insanity as a legal term is most often associated as a defense to unreasonable actions. However, insanity is also grounds for divorce in Georgia. Insanity is defined in two ways in Georgia; the first is the inability to distinguish between right and wrong,[38] and the other is a delusional compulsion.[39] The second situation occurs when at the time of an act a delusional compulsion to do such an act overmastered his will to resist doing it. Such an event, if it leads to a petition to divorce, is an end to marital harmony. For this reason, any tortuous conduct between spouses after this delusional compulsion, should not be barred by the doctrine of inter-spousal tort immunity.

C. Immunity Removed

The commission of a tort or existence of a fault-based grounds for divorce which leads to a petition for divorce being filed or separation of the parties is an end to marital harmony. This is one of the two public policy reasons in favor of the application of the doctrine. The other policy consideration, discussed in *Robeson v. International Indem. Co*, holds that without the existence of such harmony, it is highly unlikely that collusion will occur between the parties unless there is some evidence of potential fraud on an associated insurance claim or to the court. In lawsuits in which the judgment would be paid by an insurance company courts hold that a collusive or friendly relationship exists.[40] Without insurance, the public policy arguments in favor of inter-spousal immunity evaporate and there is no support for application of the interspousal tort immunity provisions of O.C.G.A. ' 1938.[41] All injuries in tort which are the cause for separation and/or filing a divorce petition and those subsequent should not be barred by this doctrine, so long as they are within the appropriate statute of limitations, and are not covered by insurance. Removing this defense will allow injured spouses the ability to seek appropriate legal redress from tortfeasor spouses, for loss of income, medical damages and even punitive damages, where appropriate. In cases involving a specific intent to harm, the $250,000 cap can be removed.

III. Fraud

In Georgia, for a prima facie case of fraud, one must show that there was a misrepresentation of a material fact, made willfully to deceive or recklessly without knowledge and acted upon by the opposite party causing damages thereto.[42] If proven, a party who relied on fraudulent statements may recover punitive damages to deter and punish the wrongdoer. Georgia courts have recognized fraud in several situations involving marital relations.

A. Child Support

A party to divorce may be able to recover tort damages for fraud in regards to their child's father's misrepresentation of their income for child support determination. In *Butler v. Turner*, the Court found that a father's misrepresentation of income to determine child support payments to be a valid basis for a suit based on fraud. The court noted the suit was proper because the plaintiff brought her claim for damages she personally sustained from the fraud. The loss of the difference in the amount of child support awarded from the amount that should have been awarded but for the misrepresentation, would constitute the actual damages required. Punitive damages may be appropriate, pursuant to O.C.G.A. '51125.1.

B. Antenuptial Agreements

Antenuptial agreements must not be the result of fraud, duress, mistake, misrepresentation, or non-disclosure of material facts. A party seeking to enforce an antenuptial agreement must show there was a full and fair disclosure of the assets of the parties prior to the execution of the agreement.[43] This standard creates a lesser burden as now a party seeking to void the agreement must show only there was either no full disclosure of all material facts or any material misrepresentation. A showing of either of these prevents the enforcement of an antenuptial agreement on public policy grounds.

C. Fraudulent Inducement into Marriage

Fraudulent actions before the marriage may lead to a recovery. One who is induced to enter into a marital relationship under false pretenses has a common law tort action for fraud and may recover damages incurred.[44] Furthermore, a claim that such an action is barred by the doctrine of inter-spousal immunity is without merit because the fraud creates an invalid marriage and there is nothing to protect.[45]

D. Fraud Damages

Georgia courts have awarded damages for fraudulent transfers of property incident to divorce proceedings. If such a fraudulent transfer occurs, the injured party may seek to set aside the transfer and seek damages from grantor.[46] Damages may also be sought in an action separate from the divorce action from the grantee if the grantee acted in bad faith, with fraud, or in a conspiracy as against the creditor-party.[47] A petition seeking a decree of alimony or child support between former spouses creates a creditor-debtor relationship creating the potential for fraud. Georgia courts have enjoined fraudulent conveyances done to defeat a claim of alimony since 1880.[48] Additionally, the victim of a fraudulent conveyance may be awarded general and punitive damages.[49] Since general damages are those which the law presumes to flow from any tortuous act, they may be recovered without proof of any specificity.[50]

Fraud is considered a tort, but it also has contract law principles intertwined within its elements. For this reason, damages for fraud are based on restitution in the measure of the benefit of the bargain to the non-wrongdoer. However, in a fraud claim, restitution alone is not a sufficient deterrent to prevent fraud. For this reason oftentimes a court will award punitive damages and/or attorney's fees to an injured party. A successful fraud claim in other areas of domestic relations law may allow a plaintiff to be awarded these damages which would normally not be available without a claim of fraud or an intentional tort.[51]

Further, a divorce case with fraud and /or intentional torts intertwined within may produce the opportunity to ask for attorney fees pursuant to O.C.G.A. '13611 as opposed to O.C.G.A. '19-6-2. Under the later, when determining the amount to award, if any, the judge must consider the financial circumstances of both parties.[52] An award of attorney's fees is not predicated on a finding of misconduct or wrongdoing of the parties.[53] Under O.C.G.A. '13611, the standard is not ability to pay, but is the amount the fact finder determines was cause as a result of the bad faith.

IV. Realignment

If you have ever been in a personal injury case with a coverage issue claimed by the insurance company, you find your injured client a defendant, along with the tortfeasor. To keep from sharing jury strikes with your adversary, you normally would ask the court to realign the parties so that parties with the same interest are on the same side of the vee. But you can go one step further in a divorce case, if your client has the burden the greater burden of proof and you lost the race to the courthouse. At any stage of the action and on such terms as are just, a trial court has the discretion to realign parties, as by changing the status of a party from defendant to plaintiff.[54] This could occur as a result of a directed verdict or the abandonment of a claim during the trial itself. Make the motion to realign immediately, before, during or after the evidence is presented or during the pendency of the case when such permitted reason becomes apparent.

In *Moore v. Moore, et al*, the Supreme Court pointed out that the wife had a significantly heavier burden of proof regarding alimony, adultery and attorney fee's, along with the added tort of fraud. It is pointed out in *Moore v. Moore*, the procedural rights which a plaintiff typically exercises at trial, including the important right to opening and concluding arguments, actually belong to whichever party bears the burden of proof. These rights are neither allocated on the basis of the denomination of the parties, nor logically deferred upon a defendant only when the defendant bears the entire burden of proof.[55] The Supreme Court concluded in *Moore v. Moore* that the trial court has the discretion to realign a plaintiff as a defendant when the defendant has a more extensive burden of proof.

In light of the previously discussed tort implications during a divorce, a party claiming tort injuries will have a significantly greater burden of proof than one defending such claims. Where these claims are being brought and your client is not the plaintiff, you should make this motion and the court should use its discretion to realign the parties in a manner which allows the more heavily burdened party to have the procedural rights of a plaintiff.

V. Jury Verdict Form

Empower the jury to right the wrong that has incurred during the marriage. Argue that it does that not matter if their judgment is ever paid; only that their finding is just and represents a fair appraisal or assessment of the damages inflicted. Actually, intentional torts and judgments for fraudulent activity, just like child support, alimony and most property awards are non-dischargable in bankruptcy.[56] Your verdict form will expand with the following favorable "blanks" added for the jury to show and use their power of justice.

Personal Injury

We the jury find for Plaintiff as follows:

A. For the medical bills:
B. For lost wages:
C. For pain and suffering of Plaintiff:

OR

We the jury find for Defendant.

D. Punitive damages

We the jury find, by clear and convincing evidence, that an award of punitive damages:

Should be made against Defendant.

OR

Should not be made against Defendant.

This _____ day of Month, Year.

_____ (signature)Foreperson

Your divorce trial has now expanded to a tort case. The divorce case which includes an intentional tort claim, particularly fraud, are concepts which jurors understand and are willing to issue awards to compensate the injured party.

VI. Conclusion

As a lawyer that has chosen to litigate domestic matters, we must have the courage and stamina to take the case all the way to its natural conclusion, including a complete recovery for all issues. If that case involves abusive elements of intentional torts and fraud, include those claims and their damage elements as part of the divorce petition. Juries hate fraud and those who perpetrate such. It is easier to prove than adultery and the additional damages are real and non-dischargeable.

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2 In an action for personal injuries, the statute of limitations is two years from the date of the injury; fraud allows for four years after its discovery. The position this article takes in regards to tort actions within a marriage will advocate for the adding of tort claims with the divorce. A failure to do so may bar a plaintiff spouse due to the relatively short limitations period associated with intentional personal injury actions.

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41 *See Smith v. Rowell*, 176 Ga. App. 100 (1985); *Shoemake v. Shoemake*, 200 Ga. App. 182 (1991).
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The Team Approach to Protecting the Best Interest of Children

by Daniele C. Johnson

The role of the Guardian ad Litem was only recently defined by the Georgia Uniformed Superior Court Rules in May of 2005. U.S.C.R. 24.9. Until then, guardians were left virtually to their own devices to conduct their investigations and make their recommendations however they deemed appropriate.

Even with the guidance of U.S.C.R. 24.9, guardians and judges are allowed a wide range of discretion to decide how they will work together in contested custody cases. With that discretion, comes varying opinions on several aspects on how such trials are conducted. For example, judges differ on their opinions of whether or not a guardian should provide a written report.

Unless otherwise directed by the appointing Judge, the guardian ad litem shall submit to the parties or counsel and to the court a written report detailing the guardian's findings and recommendations at such time as may be directed by the assigned Judge. U.S.C.R. 24.9(6). In other words, a judge may excuse a guardian from providing a written report.

Some judges consider the contents of a report to be purely hearsay, thus inadmissible. Others share the concern that the report may fall into the hands of the child or children at issue, further perpetuating familial strife and turmoil. Perhaps this reasoning is behind the requirement that report shall be released to counsel and parties only, and shall not be further disseminated unless otherwise ordered by the Court. U.S.C.R. 24.9(6)(a). Many Judges, however, insist that without a written report, he or she can't make an informed final decision of what is in the child's best interest.

Guardians also fail to reach a consensus on whether they should provide a written report. Some are of the opinion that a report will only be used to impeach their recommendation and ask themselves "why should I give the parties ammunition to use against me"? Others use the process of writing the report to organize their thoughts, not really forming a final recommendation until the last sentence of the report is written.

As the saying goes, "it takes a village to raise a child". Similarly, in contested custody cases, it takes a team of professionals to determine what is in the best interest of a child. A guardian is only one member of that team, which consists of several other members, including, but not limited to, Judges, attorneys, and psychologists. The written report opens the dialog with the other members so that they can then work together to develop the best possible parenting plan.

This team approach has an inherent circular system of checks and balances designed to protect the best interest of children. The parties, attorneys, guardians, trial courts, and appellate courts check each other until the final resolution of the case. This system simply does not work without a written report. The report summarizes the Guardian's investigation, including identifying all sources the guardian contacted or relied upon in preparing the report. U.S.C.R. 24.9(6)(a). Providing this trail of reasoning for the Judge gives the final decision more credibility for the parties, attorneys, and appellate courts.

It is expected for the guardian to be called as the Court's witness at trial and be subject to examination U.S.C.R.24.9(7). A guardian should welcome the challenge of defending his or her recommendation. By listening to the opinions of other team members, the guardian is forced to consider alternative views that he or she may have previously missed. If the recommendation is sound, clear, and reasonable, it should withstand challenges made against it. If the recommendation is in fact impeached by the contents of the written report, then it probably should not be accepted anyway.

The guardian is an officer of the court and shall *assist* the court and the parties in reaching a decision regarding child custody, visitation and child-related issues. U.S.C.R. 24.9(3). However, the recommendation is only one of several factors the court will consider in making its final decision, as outlined in O.C.G.A. §19-9-3(3).

The written report provides the Court with a clear explanation of how the recommendation is reached. Ironically, the report will contain hearsay statements, one of a handful of exceptions to the hearsay rule. Of course, hearsay is inherently unreliable. As such guardians must be careful to only include statements in the report that are either undisputed or heavily substantiated by other credible evidence. Further, there is no reason to include statements that do not influence the recommendation. Including such insignificant statements may either embarrass one or more of the parties and inflame an already contentious situation.

In short, while there may be several arguments against providing a written report, those arguments are easily overcome by its benefits. The written report is an important tool used by all parties involved to achieve the common goal of protecting the best interest of children, lending transparency and credibility to the process. ***FLR***

Daniele Johnson has been practicing family law in the metro-Atlanta area for the past 15 years. She has been a Guardian ad Litem since 2005 and a certified parent coordinator since 2011. To learn more about her and her firm, you may visit her website at www.djfamilylaw.com.

Advice from Hon. Kathy S. Palmer

Judge of Superior Court, Western Judicial District

by R. Scot Kraeuter

Judge Palmer grew up on a cotton farm in Johnson County, Georgia. She earned her undergraduate degree from the University of Georgia and then became a "double dawg" when she graduated from the University of Georgia law school. Palmer first practiced law under the third year practice act with the Clarke County District Attorney's office and upon graduation from law school joined the Prosecuting Attorneys Council as a staff attorney. She later served as an Assistant Solicitor in Dekalb County. After her time in Dekalb County, Palmer went into private practice in Swainsboro and in 2000 she was elected to the office of Superior Court Judge for the Middle Circuit of Georgia. She currently presides over the Superior Courts of Emanuel, Toombs, Candler, Jefferson and Washington Counties.,

Percentage of Case Load as Domestic:

Judge Palmer's docket consists of approximately 45 percent domestic matters and 50 percent criminal matters. The remaining 5 percent of her docket includes various civil matters.

The Most Difficult and Important Aspect of Family Law:

The most important and difficult issue that a Superior Court Judge decides in a domestic case is custody, especially if both parents are fit, proper and equally good parents. Palmer, like King Solomon, favors the party most willing to share custody and promote the child's relationship with the other parent.

Dealing With the Emotional Fallout of Custody Decisions Your Courtroom:

Palmer's approach when announcing her decision in contentious and difficult custody cases is to avoid over-lecturing but rather to give guidance on each parent's good points. She will admonish some parents where appropriate, but not too much. She also advises parents to be unafraid to ask for help with parenting, if necessary, and to give in a bit to the other parent on parenting issues. While Palmer is not afraid to deal with the emotion surrounding custody decisions, these custody cases are personally hard and draining.

Other Than Lack of Preparation , What is the Biggest Mistake Attorneys Make in Your Courtroom:

Lawyers need to prepare their clients for what could happen in a Temporary Hearing or Final Hearing advises Palmer. Attorneys need to tell their clients "like it is" and prepare them for the worst case scenario, as well as the best case scenario. Also, attorneys who dwell too much on the minute details in financial affidavits do not gain much ground in Judge Palmer's courtroom. In Judge Palmer's experience financial affidavits are typically not 100 percent accurate, especially those prepared for Temporary Hearings. Her advice is for attorneys to hit the high points in the financial affidavit and move on.

What Area of Family Law Needs to be Changed

Unwed fathers being listed on the child's birth certificate is a cause of great confusion where the father does not then pursue a legitimation action. This is also confusing to many in law enforcement who are called to respond to domestic disputes. Because being listed on a child's birth certificate is not the same as a true legal legitimation, this area of the law needs to be addressed to end the confusion surrounding parental rights.

Number of Domestic Jury Trials in Judge Palmer's Circuit:

Domestic jury trials are extremely rare in Palmer's courtroom with the last jury trial she can recall having occurred about two and a half years ago.

Use of Attorney Fee Sanctions Under O.C.G.A. § 9-15-14:

Palmer rarely grants attorney's fees as a sanction under O.C.G.A. § 9-15-14. An attorney really has to abuse the court process for her to do so. However, under such

circumstances she will award attorney's fees. In the last five years, Palmer can only recall two such attorney fee motions having been filed; she granted one of those.

14 Year old Custody Elections, Judge Palmer's Views on This:

Palmer gives strong consideration to an age appropriate child's custody election, in both her private practice of family law and as a judge. However, typically she can see through the election when appropriate especially if the election was emotionally gained. Palmer does not volunteer to talk to children in chambers in an election case but will do so if the attorneys ask her to. In a large percentage of cases the children will "come clean" about a false or improperly obtained election while in her chambers. Judge Palmer is very careful not to change custody to the "good time" parent or if she is convinced that the election was obtained in an effort to reduce child support.

Advice on Oral Argument for Attorneys:

Palmer's advice to attorneys on oral argument is simple: be prepared, bring copies of supporting case law (highlighting key points of the opinion is even better) and be brief.

Views on Awarding True Joint Physical Custody:

Judge Palmer has sought out and reviewed the University of Georgia research on joint physical custody which shows that it only works with the right parents. If either parent has control issues or if there is not true co-parenting between the parents, she will not award joint physical custody because it will likely fail. However, with the right parents, it is absolutely the right way to go.

Palmer's Views on Alimony:

While alimony cases are very fact based, she does not award a lot of alimony anymore. Certainly in the right case with the right facts she will award an appropriate amount of alimony. However, she is much more likely to award short term rehabilitative alimony on a temporary basis or for a year or two or so. Palmer, when still in private practice tried the first jury trial in her circuit in which the husband (her client) was awarded alimony. However, she notes that the jury did not award him much as part of the property division.

Recent Trends in Family Law Cases:

Palmer has seen an explosion in social media and technology introduced as evidence in her courtroom in the form of Facebook pages, tweets and texts. In the face of this avalanche of information she is often surprised at both the content of these social media accounts and how short-sighted these litigants are.

Does Conduct Matter and if so how Much does it Matter:

Conduct does matter to a degree in her court. Its impact is very fact sensitive, depending upon what each of the parties did or did not do. Conduct can affect the ultimate division of property by 10, 15 or even 20 percent but not in an overly punitive manner. Whether the children were present during the bad conduct is significant regarding custody and visitation issues. Typically, however, Palmer is more concerned about how children will be provided for in the custody cases appearing in her courtroom.

How can Attorneys Best Serve Their Clients in Palmer's Courtroom:

She advises attorneys to show civility and set the tone for the case.. Incivility is not appreciated nor is it tolerated in her court. She recommends: no sniping at opposing counsel; keep it professional; and, do not make it personal.

Requests for Custody as Leverage in a Divorce Case:

In short, using custody as leverage in a divorce case is irritating to Palmer. When she picks up on this happening, (and you know that she will), Palmer will also take a very long and hard look at the parties' financials with respect to the final property division.

Her view is that is a party that is willing to use their children as pawns in a divorce case cannot be trusted on any issue in that case. Such behavior absolutely becomes a credibility issue that affects the entire case. Palmer keeps a lookout for evidence of a pre-divorce absent parent suddenly becoming a "super" parent. Such sudden, new behavior is always suspicious. She wants to hear evidence about the past involvement of both parents with the children. She prefers that evidence go back for a year or two or more rather than a mere six months.

Use of Parenting Affidavits in a Temporary Hearing:

Palmer likes to see parenting affidavits submitted for Temporary Hearings and particularly likes to use them to see which parent has been caring for the children over the long term.

Judge Palmer views family law attorneys as vital to the Superior Courts' ability to properly decide domestic cases. She believes that the members of the Family Law Section of the State Bar of Georgia are very well trained and regularly rise to the occasion to properly and fully present their domestic cases. ***FLR***

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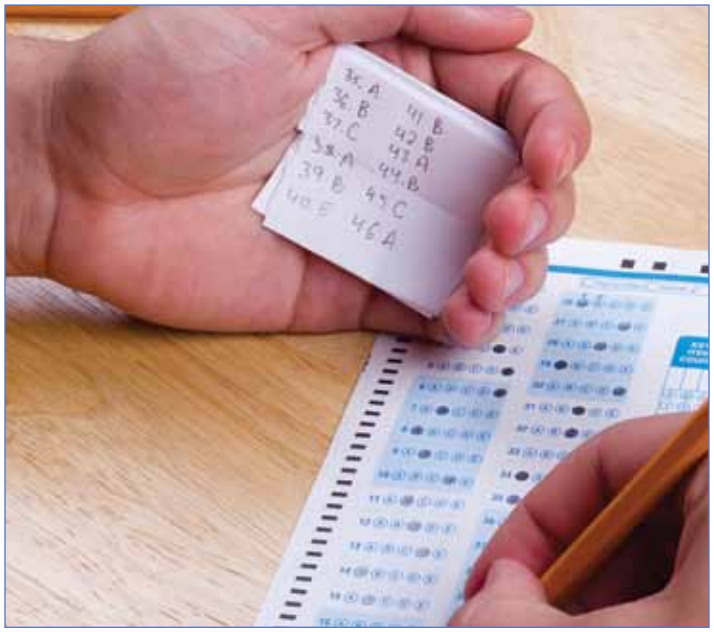
What is Your Worksheet IQ?

by Sabrina Byrne

I wrote this Article with a particular goal in mind: to provide the reader with an informative piece that would be fun to read. I hope I succeeded.

QUESTIONS

Here are the ground rules. Each question is completely independent, so you can answer them in any order you wish. Try to answer each question without looking up the law,and, try to cite to the appropriate law if you remember it. When you are finished, check (well, I mean confirm) your answers and the law you cited. Bonne chance!



1. Action to establish an obligation for child Claire with custodian Connie. The father is currently obligated to pay support under two other child support orders. Order A is for $300 per month current support for child Angela owed to custodian April. There are arrears from non-payment of Order A, and an additional $50 per month obligation to cure the arrearage was ordered pursuant to a contempt. For over a year, the father has diligently paid $350 to April. Order B is for $500 per month current support for child Ben owed to custodian Berta. There are arrears from non-payment of Order B, and an additional $100 per month obligation to cure the arrearage was ordered pursuant to a contempt. The father has not made any payment to Berta in over a year. What credit, if any, does the father receive on worksheet B[1]?
   a. The father receives $350 for Order A and $600 for Order B because these are his obligations under current court orders.
   b. The father receives $300 for Order A and $500 for Order B because this is the current obligation under a court order.
   c. The father receives $350 for Order A and $0 for Order B because this is the amount he is actually paying under a current court order.
   d. The father receives $300 for Order A and $0 for Order B because this is the amount he is actually paying for current support under a court order.
   e. None of the above.
2. The custodian mother pays $100 per month for dental insurance for the child. Her pro-rata share of combined income is 40 percent. The deviation goes on Schedule E, section A, line 3. How much is the deviation, and in which parent's column should the deviation be placed?
   a. The deviation is +$100, the cost of the insurance, and it goes in the custodian's column because she is getting the credit.
   b. The deviation is –$100, the cost of the insurance, and it goes in the custodian's column because she is paying it.
   c. The deviation is +40, the custodian's pro-rata share, and it goes in the custodian's column because this amount represents her fair share.
   d. The deviation is –60, the non-custodian father's pro-rata share, and it goes in the custodian's column because this amount is the non-custodian's fair share and the custodian should get credit for it.
   e. None of the above.
3. What, if any, worksheet and/or Schedules must be attached to a final order for child support that has not been entered pursuant to O.C.G.A. § 19-13-4?[2]
   a. CS worksheet; Schedules A, B, D and E; plus all the supplemental Schedules.
   b. CS worksheet and any Schedules you used (for example, you would attach Schedule B if there is a qualified child or pre-existing obligation, but you would not attach that Schedule otherwise).
   c. CS worksheet only, except when there are deviations on Schedule E, then, you must attach CS worksheet and Schedule E.
   d. You should never attach CS worksheet or Schedules to a child support order.
   e. None of the above.

4. The mother makes $10 an hour and works 40 hours per week. What is her income for Schedule A, and how is it calculated?

   a. $2,400 ; 8 hours X $10 X 30 days.

   b. $1,740 ; 174 X $10

   c. $1733.33; (40 hours X $10 X 52 weeks) / 12 months, rounded down to the nearest cent.

   d. $1,733.34; (40 hours X $10 X 52 weeks) / 12 months, rounded up to the nearest cent.

   e. None of the above.

5. Action to establish an obligation for a minor child, Anna. The father has two other minor children, Ben and Barry. Both Ben and Barry are qualified children as defined in O.C.G.A. § 19-6-15(a)(20)[3]. What is the result?

   a. The father gets credit for Ben and Barry on Schedule B because they are qualified children.

   b. The father may ask the court to give him credit for Ben and Barry, but the court may deny this request even though they are qualified children. The only thing the court needs to determine is whether the failure to consider an adjustment will cause a substantial hardship to the father.

   c. The father may ask the court to give him credit for Ben and Barry, but the court may deny this request even though they are qualified children. The only thing the court needs to determine is whether the adjustment is in the best interest of Anna, the child for whom the obligation is being set.

   d. The father may ask the court to give him credit for Ben and Barry, but the court may deny this request even though they are qualified children. The court will need to determine whether the failure to consider an adjustment will cause a substantial hardship to the father and whether the adjustment is in the best interest of Anna, the child for whom the obligation is being set.

   e. None of the above.

ANSWERS AND DISCUSSION

1. Answer: D

   O.C.G.A. § 19-6-15(f)(5)(B) states:

   An adjustment to the parent's monthly gross income shall be made on the Child Support Schedule B--Adjusted Income for current preexisting orders actually being paid under an order of support for a period of not less than 12 months immediately prior to the date of the hearing or such period that an order has been in effect if less than 12 months prior to the date of the hearing before the court to set, modify, or enforce child support.
   Therefore, the obligation must be for current support and the obligor must have been paying the current obligation for at least 12 months (or the life of the order if the order is less than 12 months old). Answers A. and C. are incorrect because they give the father credit for arrearage repayment obligation(s). Answer B is incorrect because it gives the father credit for an obligation that the father is not actually paying (well, at least not for the last 12 months).

2. Answer: E

   A deviation in the custodian's column will only serve to change the amount the custodian is expected to contribute to the child's support, which has absolutely no effect of the amount of child support the non-custodian will be ordered to pay. Since the father-obligor is the noncustodial parent, any deviations on Schedule E should go into his column in order to increase (+) or decrease (–) his obligation. Here, the amount of the deviation, if one is allowed, will be a positive number because the court will want the non-custodian to contribute a monetary amount toward the child's dental insurance; ie, increase the obligation.

   Incidentally, the amount of the deviation is a question for the judge or jury. In this case, the deviation can vary from $0 (no deviation allowed) to the full $100 . However, the Child Support

Commission, which is administered by the Georgia Administrative Office of the Courts (AOC), suggests using the pro-rata share percentage to calculate the amount of the deviation. Companion Guide to Child Support Worksheet and Schedules.[4] While this companion guide is not a legal authority, it was compiled and edited by experts in the area of child support jurisprudence who were instrumental in the development of the current Georgia statutes. Following the AOC's advice, the amount of the deviation would be + $60 . We arrive at this number by multiplying the father's pro-rata share (60 percent) and the cost ($100). The deviation is positive because, as explained above, the court will want the obligation to increase.

As a reminder, the appellate courts have held (year after year) that failure to make the findings in sections B, C, and D of Schedule E is reversible error. *Eg. Black v. Black*, 292 Ga. 691, 697-98 (2013) (Statutory findings must be made for each deviation allowed. *Id.* at n.8); *Brogdon v. Brogdon*, 290 Ga. 618 (2012); *Stowell v. Huguenard*, 288 Ga. 628 (2011); *Holloway v. Holloway*, 288 Ga. 147, 148-49 (2010); *Turner v. Turner*, 285 Ga. 866 (2009). Therefore, in addition to placing the positive deviation in the noncustodial parent's column, the court will need to make the mandatory written finding of facts to support the deviation.

3. Answer: C

According to O.C.G.A. § 19-6-15(c)(4), "[t]he child support worksheet and, if there are any deviations, Schedule E shall be attached to the final court order or judgment." However, a protective order entered pursuant to O.C.G.A. § 19-13-4 that awards child support does not have to have any worksheets attached. O.C.G.A. § 19-6-15(c)(4). Answers A. and B. are incorrect because you should not attach any Schedule other than Schedule E to the final order–and, of course, you only attach Schedule E if there are deviations. Answer D. is incorrect because attaching the CS worksheet (and Schedule E when applicable) is mandatory in all orders not entered pursuant to O.C.G.A. § 19-13-4.

4. Answer: B

The Georgia Uniform Superior Court Rule 24.2A provides, "In calculating monthly income based upon a forty hour work week, hourly salary shall be multiplied by 174 hours." Answer B. is correct because it is the only answer that uses the correct formula.

Additionally, Rule 24.2A also states that the conversion rate from a weekly to a monthly amount is 4.35. Thus, for example, if a parent pays $15 per week for health insurance, to determine the monthly cost for Schedule D, one would multiply $15 and 4.35, which results in $65.25 as the monthly cost. It is interesting to note that 174 equals 40 X 4.35.[5]

Furthermore, failure to use the correct conversion rates is reversible error. *Eldridge v. Eldridge*, 291 Ga. 762, 764-65 (2012) (reversed and remanded when court used 4.3 instead of 4.35 to convert a weekly child care expenses to a monthly expense).

5. Answer: D

O.C.G.A. § 19-6-15(f)(5)(C) states that

[a]djustments to income pursuant to this subparagraph may be considered in such circumstances in which the failure to consider a qualified child would cause substantial hardship to the parent; provided, however, that such consideration of an adjustment shall be based upon the best interest of the child for whom child support is being awarded.

Answer A. is incorrect because the adjustment is discretionary, not mandatory. Answers B. and C. are incorrect because they do not state both factors the court must consider when determining whether to give this credit.

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(Endnotes)

1 You may infer from the facts that these two orders are initial orders that were filed with the clerk of the court at least 12 months ago. This is important because O.C.G.A. § 19-6-15(f)(5)(B)(i) states:
In calculating the adjustment for preexisting orders, the court shall include only those preexisting orders where the date of filing with the clerk of court of the initial support order precedes the date of filing with the clerk of court of the initial order in the case immediately under consideration.
Therefore, the father cannot receive credit for an order unless that order has already been filed with the clerk of the court.

2 O.C.G.A. § 19-13-4 deals with family violence protective orders.

3 O.C.G.A. § 19-6-15(a)(20) states:
"Qualified child" or "qualified children" means any child:
(A) For whom the parent is legally responsible and in whose home the child resides;
(B) That the parent is actually supporting;
(C) Who is not subject to a preexisting order; and
(D) Who is not before the court to set, modify, or enforce support in the case immediately under consideration.
Qualified children shall not include stepchildren or other minors in the home that the parent has no legal obligation to support.

4 A copy of the Companion Guide can be found at www.georgiacourts.gov/csc under the "Resource Materials" tab.

5 The Hon. Judge George F. Nunn Jr., who is the Chief Judge in Houston Superior Court, pointed this out during court one day.

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