

# The Family Lawyer



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Newsletter Editor

Rachel Miller, [rachel@prfamilylaw.com](mailto:rachel@prfamilylaw.com)

## A MESSAGE FROM THE CHAIR

by Daniel A. Bloom, *Pachman Richardson LLC*



Allow me to take a quick moment and notify you about some upcoming plans for the Section. Please mark your calendars for the annual (minus last year) Judicial Appreciation Luncheon at the Georgia Railroad Freight Depot on Thursday, November 10<sup>th</sup>. We will hear from a great keynote speaker and we will honor a deserving recipient with the Families First Award. Our annual Valentine's Day Seminar will be held on either February 10<sup>th</sup> or 17<sup>th</sup>, chaired once again by Louis Tesser and David Marple. Throw in two seminars on arbitration and mental health/addiction issues (our clients' issues – not our own), and it looks like we are coming up on a pretty full year.

The section has agreed, once again, to be Santa Claus for the Children's Village at Christian City. Gary Graham will continue as the coordinator extraordinaire. The project is truly wonderful to be a part of. I hope you all will plan to participate this year. I have received a lot of positive feedback about starting an Association of Family and Conciliation Courts chapter. I have a list of names of those who are interested; if you have interest but have not contacted me, please e-mail me or David Marple ([dmarple@dmqlaw.com](mailto:dmarple@dmqlaw.com)).

I hope to see you all at this month's breakfast. Many of you expressed interest in hearing from Judge Poole and David Marple was able to make it work. Have a great month!

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## CASE LAW UPDATES

by Sarah McCormack, *Kessler & Solomiany LLC*



### Gottschalk v. Gottschalk

2011 WL 2697054 (Ga. App.)

July 13, 2011

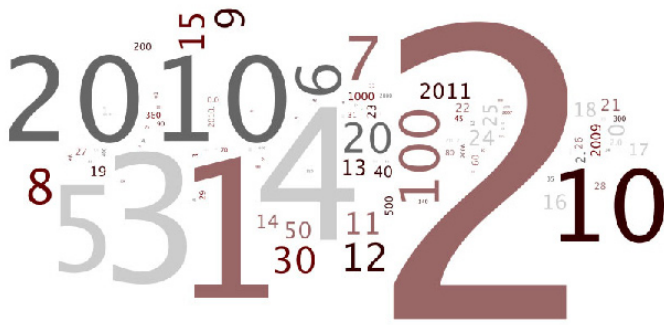
**Custodial Evaluation Can Be Ordered in Context of Petition Seeking Modification of Visitation Alone; Due Process Not Violated Where Expert Not Permitted to Evaluate Contents of Custodial Evaluation to Which He Did Not Have Court-Authorized Access**

In this fiercely litigated modification of visitation case, the father appealed multiple issues, including 1) the availability of a court-ordered custodial evaluation where only a change of visitation was sought; and 2) the propriety of precluding his expert's testimony as to the flaws in a custodial evaluation to which his expert had not been granted access by the court.

The Georgia Court of Appeals upheld the trial court on all points, including those two. The appellate court noted that visitation is a part of custody, and that a custodial evaluation is therefore a tool that a court can use in a visitation modification context. The appellate court also found no due process flaw in the trial court precluding the father's expert from testifying as to his or her opinion on certain aspects of the custodial evaluation. Despite a consent order being in place that required court pre-approval of third parties accessing the contents of the custodial evaluation, the father ignored its constraints and provided a copy to his expert. The father's evidentiary predicament at trial was therefore a product of his own making, and could have been avoided had he resorted to a procedure clearly available to him (i.e., seeking court approval of his own expert's access to the custodial evaluation).

## PLACING A VALUE ON THE MILLER CASE<sup>1</sup>

by Peter A. Rivner, *Pachman Richardson, LLC*



Many of us went to law school because math was not our strong point. However, as family law attorneys, a great number of our cases boil down to number crunching. That is especially true when a divorce involves a business asset, specifically a professional practice. Luckily, we are able to turn to forensic accountants and business valuation analysts to assist us with the complex procedure of valuing a professional practice.

To make valuation even more difficult, Georgia case law has been practically silent on the issue of business valuation in a divorce. Leaning on established precedents from other jurisdictions, the Georgia Supreme Court finally discussed the methodology behind business valuations as a matter of first impression in *Miller v. Miller*, 288 Ga. 274 (2010). However, *Miller* only provided a starting point for the development of this area of the law and has not been subsequently cited, leaving many issues unanswered and the state of Georgia well behind the rest of the country in establishing acceptable methods for valuation.

### Methods of Business Valuation

Having never previously addressed the issue of business valuation, the Supreme Court in *Miller* recognized that “the valuation of a professional business practice presents unique issues not encountered in conventional business” because “the professional practice’s most valuable asset is its goodwill,” the value of which “is more difficult to quantify.”<sup>2</sup> The Court emphasized that there is no bright line rule or formula when valuing a closely held business. Instead, “valuation is an art rather than a science that requires consideration of proof of value by any techniques or methods which are generally acceptable in the financial community and otherwise admissible in court.”<sup>3</sup> Indeed, “there is no single best approach to valuing a professional association or practice, and various approaches or valuation methods can and have been used.”<sup>4</sup>

Prior to *Miller*, the question of whether a professional practice could be valued was largely unknown. Generally, there are three acceptable and legitimate methods of business valuation: the income approach (also known as the capitalized earnings approach); the market approach; and the cost approach (also known as the asset approach).

Essentially, the income approach (capitalized earnings) values a professional practice by dividing the expected economic benefit by the capitalization rate. The market approach is based on comparable sales to determine the price a willing buyer will pay and willing seller will accept. Differences between the subject business and the comparable sales, such as geographical locations and dates of

the sale, go to the weight of the valuation method rather than its admissibility.<sup>5</sup> The cost approach determines the market value of the professional practice by examining the net operating costs and the value of the business’ assets.

### The Hybrid Approach – Capitalization of Excess Earnings

The *Miller* decision changed the approach to business valuation by endorsing a hybrid approach, combining the income and cost approaches, known as the capitalization of excess earnings approach.

Under that approach, the excess earnings are calculated by deducting the owner’s reasonable salary, or an average salary for similar persons in the same field, from the average net income of the practice.<sup>6</sup> The key is that by using a reasonable or average salary rather than the practitioner’s actual salary, the excess earnings are adjusted for those practices which increase or decrease their retained earnings by means of a lower or higher salary for the practitioner than is normal.<sup>7</sup> The excess earnings are then reduced by the capitalization rate. Finally, the value of the capitalized excess earnings is added to the total fair market value of the professional practice’s assets, resulting in the total value of the professional practice.

### Advantages of the Capitalization of Excess Earnings Approach

The capitalization of excess earnings approach addresses many of the common issues concerning business valuations of professional practices in divorce proceedings.

First, the capitalization of excess earnings approach avoids the common problem of valuing a professional business on the basis of post-divorce earnings and profits.<sup>8</sup> By capitalizing only the excess earnings of the practitioner, the approach actually excludes most future earnings from consideration.<sup>9</sup>

Second, the capitalization of excess earnings approach excludes from its valuation of the professional practice the practitioner’s personal goodwill. There are two types of goodwill, enterprise goodwill and personal goodwill. “Enterprise goodwill is transferred whenever the enterprise to which it attaches is bought and sold as an ongoing concern.”<sup>10</sup> Generally, enterprise goodwill is the value of the tangible assets of the company. The *Miller* Court held that enterprise goodwill in the valuation of a professional practice is included in the definition of marital property.<sup>11</sup> Personal goodwill, on the other hand, “is not transferable when the enterprise is bought and sold, and instead resides primarily in the personal reputation of the owner.”<sup>12</sup> The *Miller* Court held, for the purposes of this appeal only, that individual goodwill does not constitute marital property in Georgia.<sup>13</sup> Thus, to be proper, the method of valuation of the professional practice must exclude personal goodwill from its value. Capitalization of excess earnings does just that by allowing for an adjustment to be made to the capitalization rate to reflect the risk that some clients would not return if the practice was sold.<sup>14</sup>

Third, and most important to our everyday practice, the *Miller* Court held that the capitalization of excess earnings approach allows the trial court to award an equitable division of the professional practice and award alimony based on the practitioner’s income without improperly double dipping. The Court reasoned that the capitalization method deducts a reasonable salary expense for the

SEE *MILLER*, Page 3

**MILLER, continued from Page 2**

practitioner, and, as such, there is a “separate basis for both the alimony award and the property division.”<sup>15</sup>

**Conclusion**

While the *Miller* Court specifically approved of the capitalization of excess earnings approach, the Court also held that it is ultimately a factual determination to be made by the trial court as to which valuation method to use and as to how much weight should be given to each expert, opening the door to the use of other legitimate valuation methods.<sup>16</sup>

Georgia appellate courts must still address the unanswered question of whether Georgia is a fair market value state or a fair value state. Essentially, the difference is whether to take into account various discounts to the value of the professional practice, i.e., a discount for lack of marketability. Additionally, Georgia appellate courts must determine whether tax consequences from the projected sale of a professional practice should be taken into consideration in a valuation.

Thus, while the *Miller* case holding takes us one step closer in the area of valuation of professional practices, we still have more work to do to clarify this important issue.

## (Endnotes)

1 The author would like to thank Linda J. Schaeffer, CPA CFE CVA of Fraizer & Deeter, LLC, for her assistance with this article.

2 *Miller v. Miller*, 228 Ga. 274, 275 (2010), quoting *May v. May*, 214 W.Va. 394, fn. 7 (2003).

3 *Id.* at 275, quoting *Steneken v. Steneken*, 183 N.J. 290 (2005).

4 *Id.*, quoting *Poore v. Poore*, 75 N.C.App. 414 (1985).

5 *Id.* at 276.

6 *Id.* at 276.

7 *Id.* at 277.

8 *Id.*, quoting *In re Marriage of Nevarez*, 170 P.3d 808 (Colo. App. 2007).

9 *Id.*, quoting Christopher A. Tiso, *Present Positions on Professional Goodwill: More Focus of Simply More Hocus Pocus?*, 20 J. Am. Acad. Matrim. Law 51, 62(III)(A) (2006).

10 *Id.* at 278, quoting Brett R. Turner, *Equit. Distrib. Of Property*, 3d § 6:73.

11 *Id.* at 278.

12 *Id.*, quoting Turner at § 6:37.

13 *Id.*

14 *Id.*

15 *Id.* at 277, quoting *Adlakha v. Adlakha*, 65 Mass.App.Ct. 860 (2006). Additionally, as it concerns child support, the *Miller* Court held that it was appropriate for the trial court to include both the practitioner’s salary and his business income in the calculation. The Court “rejected outright a double-dipping claim with respect to child support, reasoning that as between parent and child, the asset subject to property division is not being counted twice.” *Id.* at 278, quoting *Steneken v. Steneken*, 367 N.J.Super. 427 (2004), aff’d as modified, *Steneken v. Steneken*, 183 N.J. 290 (2005).

16 *Id.* at 274, quoting Barth H. Goldberg, *Valuation of Divorce Assets, Revised Edition* § 8:4.

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## CAN I GET MY MARRIAGE ANNULLED?

by Benjamin Porter, *The Porter Law Firm, L.L.C.*



Several years ago, pop-star and music icon Britney Spears was able to successfully annul her marriage, which prompted some increased discussion on the topic, especially among those who have religious opposition to divorce. Are annulments

only granted to celebrities? Have I been married too long to have my marriage annulled? What if my partner and I have never had sexual intercourse? Those questions and more are routinely asked to family law attorneys during the initial consultation. To better understand when an annulment is warranted, two points must be clarified initially. First, unlike a divorce, an annulment effectively deems the marriage invalid *from its inception*. As such, it is as if a marriage never occurred. Second, annulments are statutorily constructed, and, thus, can only be analyzed through a state-specific lens.

Marriage is a civil contract between two individuals which the state has a vested interest in preserving. That is why it is often perceived to be far easier to get married than divorced. As difficult as it is to get divorced, an annulment is even more challenging. In Georgia, as in most states, annulments are extremely rare and only granted in unusual circumstances. For that reason, it is likely that most seasoned family law practitioners have not handled many annulment cases.

To be validly married in the state of Georgia one must satisfy three criteria, otherwise known as the “three C’s”: capacity, consanguinity, and consummation. To qualify for an annulment, a party must show that one of those “three C’s” was not fulfilled, thereby making the marriage void. Often, parties who are able to successfully annul their marriage find themselves in one of the following situations:

- 1) The parties are related beyond the limits of consanguinity (i.e., (step)parent/(step)child, grandparent/grandchild, aunt/nephew, or uncle/niece;
- 2) One of the parties did not have the mental capacity to enter into a contract;
- 3) One of the parties was under the age of 16 when he/she entered into the marriage;
- 4) One party forced the other party into the marriage;
- 5) One of the parties was fraudulently induced to enter the marriage; or
- 6) One of the parties was married to another living spouse at the time of the marriage.

Many clients are convinced that they have been “duped” into marrying their partner. However, courts are hesitant to permit a spouse from contending that his/her partner tricked he/she into marriage. Finding out that your partner is a “shopaholic”, “neat-freak”, “couch potato”, or even an alcoholic does not justify an annulment. Georgia courts have isolated annulment claims based on fraud to those primarily regarding sexual relations and child rearing. For example, although incurable impotence is not one of the statutory grounds for divorce in Georgia, a husband whose wife assured him that she could bear children, when she knew that was not true, may be a candidate for an annulment. However, even where an individual has been fraudulently coerced into marriage, he cannot assert a claim for annulment if a child has been born to the relationship prior to or after the marriage (or has been therein conceived).

Other clients attempt to argue that since they never engaged in sexual intercourse their marriage was never consummated, and, thus, should be annulled. In Georgia, that argument is unsuccessful. “Consummation” is defined as the exchanging of vows or the marital ceremony, not the participation in sexual intercourse, as is commonly believed.

Assuming that a client is able to meet at least one of the threshold requirements for seeking an annulment, the matter should proceed in a manner similar to that of a divorce action. *See O.C.G.A. § 19-4-4*. The suit is commenced by filing a petition with the superior court in the appropriate county. Then, once the defendant is served with the Petition for Annulment, he/she has 30 days to respond. Unlike in divorce proceedings, however, a litigant who neglects to answer a Petition for Annulment risks having the decree of annulment entered at any time thereafter in open court or in the judge’s chambers. And, lawyers should be aware that temporary alimony may be requested by either party, so a party may have the financial means to resolve the dispute.

If the annulment is granted, the consequences are numerous. First, and most significantly, an annulment shall void the purported marriage, thereby reinstating the parties to their pre-marital status, as if no marriage ever occurred. Second, and consequentially, property owned by the parties will be awarded to the original owner, and is, therefore, not subject to equitable division. There is authority, however, which allows the defrauded or unknowing party to receive a distribution of property and/or other similar equitable relief from the party who knew of the incapacity or other impediment to marriage. Third, an annulment does not relieve a party of the criminal sanctions for bigamous or incestual behavior, nor does it provide a shield against a common law tort action for fraud. Since divorce and annulment yield different implications, it is critical that family law practitioners consider both options when advising clients.

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Please contact Newsletter Editor, Rachel Miller, with your ideas and suggestions at [rachel@prfamilylaw.com](mailto:rachel@prfamilylaw.com).

## UNITED STATES SUPREME COURT RULES THAT STATES ARE NOT REQUIRED TO PROVIDE COUNSEL TO INDIGENTS FOR CIVIL CONTEMPT HEARING ON CHILD SUPPORT

by Melody Z. Richardson, *Pachman Richardson, LLC*



On June 20, 2011, the United States Supreme Court ruled that the Fourteenth Amendment's Due Process Clause does not *automatically* require the State to provide counsel to an indigent person faced with potential incarceration for failure to pay child support in a civil contempt action. The opinion is limited to the situation where the parent entitled to child support is not represented by counsel. The Supreme Court added an important caveat, however, that the State must "have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order." *Turner v. Rogers*, 564 U.S. \_\_\_ (June 20, 2011). Pursuant to the decision, it is now incumbent upon the court hearing the contempt action to inquire into the obligor's ability to pay.

The case arose from an action in South Carolina when Mr. Turner continually ailed to pay his child support due. After being held in contempt on four occasions, each time being incarcerated for 90 days and paying before serving the full term, Mr. Turner was sentenced to six months, which he completed. In January 2008, Mr. Turner was again cited for civil contempt for failure to pay his child support obligation and was sentenced to 12 months. However, at the sixth hearing, no inquiry was made concerning Mr. Turner's ability to pay his arrearage and the trial court made no express finding concerning Mr. Turner's ability to pay his child support arrearage. Although Mr. Turner had served his 12 month sentence, the Supreme Court granted the writ because Mr. Turner was likely to suffer future imprisonment.

The Supreme Court recognized that because a civil contemnor "carries the keys of his prison in his own pockets" since he may pay the arrearage and be immediately released, that such ability is the dividing line between civil and criminal contempt. In determining that an indigent child support obligor was not

entitled to appointed counsel, the Court first noted that when the right procedures are in place, *i.e.*, an inquiry is made into the defendant's ability to pay, it is closely linked to the question of whether the defendant is indigent in the first place. Second, the Court reasoned that often the opposing party is the custodial parent who is also not represented by counsel. The Court did not wish to create "an asymmetry of representation that would alter significantly the nature of the proceeding" by requiring that the obligor be appointed counsel. Finally, the Court opined, that if there are procedural safeguards in place, to wit, (1) notice to the defendant that his ability to pay is a critical issue in the contempt proceeding; (2) the use of a form to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status; and (4) an express finding by the court that the defendant has the ability to pay, the obligor's liberty will be sufficiently protected to meet the requirements of due process.

The Court declined to expand its holding to the situation where the child support is owed to the State for reimbursement of welfare funds paid to the custodial parent or the situation where the custodial parent is represented by counsel or where, as in Georgia, a special attorney general represents the Department of Human Services, Child Support Division. What is clear, however, is that Georgia's Uniform Rule 24.2, which requires a Domestic Relations Financial Affidavit, has taken on the importance of constitutional due process, particularly in situations where the obligor is indigent. Failure to have an indigent obligor complete the affidavit and have it reviewed by the trial court may now be considered a violation of the Fourteenth Amendment.

### Next Section Breakfast Thursday, August 11, 2011 - 7:30 am

at the Buckhead Club

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## THE SPECIAL NEEDS CHILD: DIVORCE CONSIDERATIONS

by Howard Drutman, *Ph.D.* & Marsha Schechtman, *LCSW*, Atlanta Behavioral Consultants



Best interest of the child is a standard most often used to determine post divorce behavior and lifestyle. Two children can be similar and yet what is best for one may not be best for another. Child custody evaluators, guardians ad litem, and, ultimately, judges assess the child's needs from slightly different perspectives. Nevertheless, each strives to understand the best interest of the child in the context of a particular family.

Understanding the best interest of the child is complicated when the child is determined to have special needs. Saposnek, et al (2005) defined a child as having special needs if they have an acute, life-threatening medical condition; chronic developmental disorder; or psychological or behavioral issues. Some of the most common special needs children seen in family law cases are those with speech and language disorders; learning disorders; pervasive developmental disorders (Autism/Asperger's Disorder); sensory impairments, i.e., visual or auditory impairments; psychiatric disorders; intellectual impairment; traumatic brain injury; orthopedic conditions; and many other diseases that alter a child's ability to effectively interact and deal with the world around them.

The special needs child must be assessed with specific reference to the child and their parents' ability to provide the necessary care. A child with a mild to moderate impairment may be too taxing for a marginal parent, yet a child with a severe disability may be appropriately handled by a parent who is equipped with the necessary skills and proper support systems. As we have stated in other articles in this series, when it comes to what is best for children after divorce, there is no one size fits all. The key is in asking the right questions.

### What Experts Can You Retain To Seek Answers About Special Needs?

Family attorneys working with divorcing families who have a child with special needs should make no assumption about the needs of the child based solely on the child having a specific disorder. The wise attorney should seek consultation from professionals who specialize in the care and treatment of the

disabilities that the child possesses. By using those experts, an attorney can learn the specific challenges of the specific child and the need for care. The specialist can also shed light on how well each parent understands the child's needs and can manage the care and treatment. The scope of professionals for consultation may include physicians, mental health professionals, nurses, physical therapists, occupational therapists, speech therapists, educational consultants and financial consultants. Each type of professional can offer their unique perspective on the child, as well as how well their parents understand their condition and treatment requirements.

### Do You Need An Independent Evaluation?

When parents differ in their understanding of their child's condition, treatments, and prognosis, it is time for an independent evaluation. When parents are not unified, you will often see parental conflict over the value of treatment and the long-term outcome predictions for the child. It is essential to determine the reality of the child's condition versus how their parents' view the condition. Some parents take a catastrophic view of their child's disability to help justify the need for intensive care, treatment and support. Other parents are in denial and can minimize the severity of the current condition, as well as long-term implications for treatment. The expert's view of the child and the parents' ability to provide the necessary care will assist the attorneys in moving forward with a parenting plan that accommodates the child's special needs. Optimally, that expert will be a neutral appointed via a stipulated agreement or by the court. Often the special needs issues can be handled in the course of a Child Custody Evaluation or Brief Focused Evaluation with specific concerns centering on recommendations regarding the child's special needs. The brief focused evaluation is perfect if the questions under investigation are limited to the actual assessment, treatment, needs, and prognosis of a child with special needs.

### What Is The Focus Of The Evaluation?

Recommendations from an expert will likely focus on, but are not limited to, issues such as the extent of the disorder; level of disability; prognosis; special equipment (e.g. wheelchairs), medication, treatments; educational needs; costs of the treatments and ongoing monitoring of the child's needs; nursing or other care; lifetime financial maintenance of the child (if the special need is severe); transportation needs, etc. The evaluator can provide a neutral assessment of the issues followed by well reasoned recommendations which are custom fit for the specific child and their parents. The evaluation also helps you determine the future needs of the child, which can then be factored into a financial settlement agreement.

Saposnek, D., Perryman, H., Berkow, J., & Ellsworth, S. (2005). Special needs children in family court cases. *Family Court Review*, 43(4), 566-581.