

The Family Law Review

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



Dividing Goodwill After *Miller v. Miller*

Editors' Corner

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In the Family Law Section, the beginning of summer is marked by our most important event of the year: The Family Law Institute. Kelly Miles, with the support of the executive committee and Steve Harper, has been working extremely hard in preparing what is sure to be a great program. Apart from the learning experience we all receive from attending the Institute (not to mention an entire year's worth of continuing legal education), it is a great opportunity to become better acquainted with our colleagues, judges

and court personnel. We encourage you to use this opportunity to reach out to those who you may not know well, as the Institute has served in the past as the beginning of long term friendships in the Family Law Section.

See the article on the next page for more information and the agenda on page 30. Go to <http://iclea.org/programs/7889.html> for complete information and to register for the Intitute.

See you at Amelia Island! *FLR*

IF YOU WOULD LIKE TO CONTRIBUTE
 ARTICLES TO THE FAMILY LAW REVIEW,
 OR HAVE ANY IDEAS OR CONTENT
 SUGGESTIONS FOR FUTURE ISSUES, PLEASE
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Chair's Comments

by Randall M. Kessler
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Wow, this year has gone so quickly. It has been such a pleasure to serve as Chair of the Family Law Section of the State Bar of Georgia for the past year. We have had a wonderful year, including great attendance at the Family Law Institute last May and at the Nuts and Bolts

seminars, as well as other exciting programs, including our December program in coordination with the American Academy of Matrimonial Lawyers and our seminar on same sex issues held in March in Atlanta. One change within our section is the new establishment of committees which we hope will enable lawyers to become more active within the section. As our section has grown over the years, many people have contributed in various, ad hoc ways. Our members have been wonderful by submitting articles to the *Family Law Review*, by speaking at seminars, by helping with our community projects, but they have all been on a case-by-case basis. In an effort to try to make it easier for section members to contribute and become involved, I have appointed committees and I encourage and invite each of you to serve on and to contribute to. I imagine this list of committees will increase over the years as each chair renews committees or establishes new ones. The committees which I have established and the liaison from our executive committee for each such committee is/are as follows:

1. Diversity Committee: Marvin Solomiany, Karen Brown Williams, Andy Pachman

2. Sponsorship Committee: Gary Graham
3. Military Committee: John Collar, (John Camp)
4. Technology/Social Media Committee: Sean Ditzel
5. Community Service: Jonathan Tuggle; Rebecca Crumrine
6. Membership for Outside of Atlanta Membership: Kelly O'Neal Boswell.

If you are interested in joining any of these committees, please reach out to the liaison above and indicate your interest. While this is the first year we have had such committees, I hope that it will offer a chance for more member involvement to improve our wonderful section. Additionally, if you have any other ideas for relevant committees, please feel free to contact me or incoming chair, Kelly Miles.

Finally, and importantly, I wish to thank each member of the executive committee as well as Steve Harper, Brian Davis and everyone at ICLE, and Derrick Stanley, Sarah Coole and all of the staff at the State Bar for their help and all they have done this year and most of all, for their comraderie and friendship. I could not practice family law without the friendships, the very sincere and deep and lasting friendships that the practice of family law has afforded me. Thank you and I cannot wait to see you all at Amelia Island this Memorial Day weekend. *FLR*

2012 FAMILY LAW INSTITUTE

It is almost time for the 30th annual Family Law Institute! The "Cutting Edge of Family Law" is this year's theme which will be held May 24 – 26 at the Ritz Carlton, Amelia Island. The speakers will give short presentations on the hottest, most cutting edge tips specific to their topic. There will also be two sessions on the new evidence code which goes into effect Jan. 1, 2013. The written materials will be comprehensive and will be available for attendees to download. The pace will be fast and full of information to help all of us grow as family lawyers.

Don't forget all the other great events we have planned!

The annual golf and tennis tournaments will take place as usual. The cocktail receptions on Thursday and Friday night will be held outdoors and will provide lots

of time for mingling and munching. Thursday morning features a First Timers Breakfast for new attendees. The "Specific Deviations" will provide live entertainment on Friday evening until 9:30 p.m.

We are very pleased that approximately 30 judges who will attend the Institute. Thanks to all of you that helped make this possible through your sponsorship!

Be sure to make your room reservations. Our block of rooms at the Ritz is currently sold out, but keep checking with them for cancellations at 888-856-4337. There are all types of rooms available at the Omni at the Amelia Island Plantation, 800-874-6878. Ask for the "ICLE Family Law Institute" rate.

The beach...the sand...the sun...the Institute! It doesn't get much better than that! See you at the Institute! *FLR*

Dividing Goodwill After *Miller v. Miller*

by Will Geer and Allen F. Harris

It has been a year since the Supreme Court of Georgia addressed the division of goodwill in a professional practice. In *Miller v. Miller*, 288 Ga. 274 (2010), the Supreme Court provided some clarification regarding dividing goodwill, but also, created some confusion regarding the effect that using the market approach has upon the valuation of the personal goodwill. The court appeared to accept that a key person discount or personal goodwill has already been recognized and adjusted for in the purchase price when a market approach is used.¹ The court first recognized that “[V]aluation 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.”² After explaining the three principal approaches³ for valuing a business, the court pointed out that there is not a single best approach to valuing a professional association or practice.⁴

In *Miller*, the trial court had accepted the valuation of Wife’s expert of Husband’s internal medical practice at \$331,214 using a combination of the three approaches. Husband argued that the use of the market approach was improper because there was no market for a solo medical practice. The Wife’s expert, however, testified that she used two national databases, and that the use of such databases was a generally accepted method for valuing a professional practice and its goodwill.⁵

The Husband further argued that the trial court erroneously divided “professional goodwill” because it is not a marital asset. The court provided an informative explanation of enterprise or commercial goodwill versus individual or personal goodwill. The court explained that enterprise or commercial goodwill is transferred when an enterprise is bought and sold as an ongoing concern.⁶ Individual or personal goodwill, however, is not transferable when the enterprise is bought and sold, but instead remains with the individual owner.⁷

The court recognized that the majority of states hold that personal goodwill cannot constitute marital property, but that enterprise goodwill can constitute marital property.⁸ The Supreme Court of Georgia followed the majority rule and held that enterprise goodwill is included in the valuation of a professional practice as part of marital property. The Court considered the Husband’s use of the term “professional goodwill” to be ambiguous, but concluded Husband probably intended the term to mean individual goodwill.⁹ For purposes of the *Miller* case only, the Supreme Court of Georgia assumed that individual goodwill does not constitute marital property in Georgia.¹⁰ The Court observed that the trial court had excluded individual goodwill from its valuation of the practice by accepting the valuation of Wife’s expert.¹¹

Wife’s expert testified that a “key man discount” was not applicable to the medical practice because Husband could be replaced by another internal medicine doctor.¹² Wife’s expert further asserted that the fact that some patients may not return was taken into account by use of the market approach and by use of a higher capitalization rate resulting in a lower value.¹³ The Court noted that a “key person discount” is one method of quantifying personal goodwill.¹⁴ It is at this point, that the court makes a sweeping statement that most business valuation analysts would probably concede should be qualified or limited. The court, without



limitation, states that “[w]hen a market approach is used, ‘the ‘key man’ discount or personal goodwill has already been recognized and adjusted for in the purchase price’ of the comparable practices”¹⁵ This statement, without qualification, could be improperly applied to valuations using a market approach. A “key man discount” could be represented in the market approach and a higher capitalization rate, but the use of the market approach has no indication of the value assigned to covenants created during the sale and transition of the business. In other words, it is very doubtful that the two national databases made any delineation between the values assigned to covenants not to compete and enterprise goodwill. One would certainly expect that the databases would have included sales that were made in conjunction with the exercise of a non-compete. Such covenants not to compete would be reflective of personal or individual goodwill and thus, would have included personal or individual goodwill in the valuation under the market approach.¹⁶

A paper authored by Bernard I. Agin was cited by the court in support of the statements that “[a] key person discount is one method of quantifying goodwill” and that when the market approach is used the key person discount or personal goodwill has already been recognized and adjusted for in the price of the comparables.¹⁷ In speaking with Agin while preparing this article, he was asked if he felt that the use of the market approach excludes the value that could be assigned to a covenant not to compete, thus, bifurcating personal or individual goodwill from that value. He responded, “no.” He indicated that if questioned, he could clarify the reference cited from his paper, but that he would not stand behind his referenced statement without qualification. It is important to understand that when a purchaser of a business also purchases a covenant not to compete, the purchaser is effectively purchasing some of the personal goodwill from the individual.¹⁸ If all the practices included in the two national databases were sold without covenants not to compete the rationale of Wife’s expert would not be flawed. If, however, covenants not to compete were included with the sales, the market approach would not recognize and adjust for personal goodwill in the purchase price of the comparable practices.

In conclusion, we note that the Supreme Court of Georgia recognized that a determination of goodwill is a question of fact and not law.¹⁹ There is no precise formula for the determination.²⁰ The Court concluded that the valuation of Husband’s medical practice, including goodwill, was sufficiently supported by probative expert testimony. Since the court concluded that the trial court reasonably approximated the net value of the practice and its goodwill, based on competent evidence and sound methods of valuation, the valuation would not be disturbed. In the future, an opposing party or opposing expert, when presented with the arguments submitted by the Wife and her expert in Miller, should investigate the comparables used in the market approach to determine whether covenants

not to compete were included in the purchase price. If covenants not to compete were included and not purchased separately, personal goodwill will not have been recognized and adjusted for in the purchase price of the comparable practices. *FLR*



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(Endnotes)

- 1 288 Ga. at 279, 705 S.E.2d at 844 citing Bernard I. Agin, *Failure to Understand Asset Types*, in Nat. Business Institute, Preventing Critical Financial Mistakes During Divorces (2007)
- 2 288 Ga. at 275, 705 S.E.2d 275 quoting *Stenecken v. Stencken*, 873 A2d 501, 505 (II) (N.J. 2005).
- 3 The three approaches or methods are the income or capitalized earnings approach, the market approach and the cost approach. 288 Ga. at 275, 705 S.E.2d at 842.
- 4 288 Ga. at 275, 705 S.E.2d at 842.
- 5 288 Ga. at 276, 705 S.E.2d at 843 citing Christopher A. Tiso, *Present Positions on Professional Goodwill: More Focus or Simply More Hocus Pocus?* 20 J. Am. Acad. Matrim. Law. 51, 65 (III) (D) (2006) and Barth H. Goldberg, *Valuation of Divorce Assets, Revised Edition* § 8.4.
- 6 288 Ga. at 278, 705 S.E.2d at 844.
- 7 Id.
- 8 Id.
- 9 Id.
- 10 Id.
- 11 Id.
- 12 Id. at 279, 705 S.E.2d at 844.
- 13 Id.
- 14 Id.
- 15 Id. at 279, 705 S.E.2d at 844 quoting Agin, supra.
- 16 See *Slater v. Slater*, 240 Or. App. 30, 42, 245 P.3d 676 (2010), in which the Oregon Court of Appeals analyzed the effect of a covenant not to compete and followed the majority rule that to the extent a covenant not to compete corresponds to the business’s future earnings capacity attributable to the individual, the value of the covenant is not marital property.
- 17 Id. at 279, 705 S.E.2d at 844.
- 18 See *Slater v. Slater*, 240 Or. App. at 42.
- 19 Id.
- 20 Id.

Military Divorce: Returning Warriors and “The Home Front”

by Mark E. Sullivan

1. Return of the Warriors

Empty outposts overseas mean full billets and bedrooms back at home. In view of the “new phase of relations” between the U.S. and Iraq, using Vice-President Joe Biden’s language, many servicemembers (SMs) are returning home. The redeployment of military personnel back to their stateside assignments and their homes is the result of significant drawdowns in Iraq and Afghanistan. SMs who are returning from the Middle East are not only from the active-duty forces (Army, Navy, Air Force and Marines); they are also from the Reserve Component, namely, the National Guard and the Reserves. Thus the homecoming impact will be felt nationwide, not just in communities near military bases. While reuniting with one’s family will be a joyous experience for SMs, it may create significant stresses for some. And these stresses may lead to legal consequences.

2. Stresses and Relationships

Stresses may arise due to one party’s having been solely in charge of the home for the entire deployment, without any help and with heavy responsibilities for running the home, managing the budget, taking care of children and – quite often – holding down a job as well. Having been away for a year in most cases, the returning SM has his or her own issues. These SMs need time to decompress and to adjust to new responsibilities, routines and duties – both at home and at work.

Sometimes there is an “interim relationship” which was formed while one spouse was gone. If this is so, it will have to be dissolved so that the marriage may continue. If this doesn’t happen, the marriage could be in trouble and a separation is on the radar screen. The impacts on the parties include separation, interim support, domestic violence, temporary custody and many more issues.

The result for the family law attorney is a confusing welter of rules, laws, cases and problems. When does state law govern? When should the injured party seek redress through the military? How does federal law affect the conflict? Where can one locate co-counsel who is familiar with these matters, a consultant who can give quick and accurate advice, or an expert witness who is available in person or by phone or Skype to assist the court?

3. Rules and Resources

Where to find the resources for a military divorce case will depend on the issue involved. The usual matters involved are custody and visitation for minor children, support for the spouse and children, the role of the

Servicemembers Civil Relief Act in default rulings and motions to stay proceedings and division of the military pension. Domestic violence may also be involved in some family law cases involving military personnel. The well-read attorney is the one best armed to defend or prosecute in these areas. They are complex and often counter-intuitive. A mentor, consultant or expert will often be useful as a guide through the wilderness.

There are several sources of information for the attorney caught up in these problem areas. For the following scenarios, assume that the parties are Army Sergeant Fred Wilson and his wife, Maria Wilson, the mother of their two minor children.

4. Servicemembers Civil Relief Act (SCRA)

Formerly known as the Soldiers’ and Sailors’ Civil Relief Act, the SCRA is found at 50 U.S.C. App. § 501 et seq. The two most important areas in civil litigation are the rules for default judgments (when the SM has not entered an appearance) and the motion for stay of proceedings. The former requires an affidavit as to the Fred’s military status and the appointment of an attorney for Fred by the judge. The duties of the attorney are not specified, and there are no provisions for payment. The default section of the SCRA is at 50 U.S.C. App. § 521.

At 50 U.S.C. App. § 522 are the requirements for Fred’s obtaining a continuance (called a “stay of proceedings” in the Act) for 90 days or more. Here are the requirements: Elements of a Valid 90-Day Stay Request. Does the request contain...

- A statement as to how the SM’s current military duties materially affect his ability to appear...
- and stating a date when the SM will be available to appear?
- A statement from the SM’s commanding officer stating that the SM’s current military duty prevents appearance...
- and stating that military leave is not authorized for the SM at the time of the statement?

An overview of the Act is found at “A Judge’s Guide to the Servicemembers Civil Relief Act,” located at www.nclamp.gov > Resources (the website of the military committee, North Carolina State Bar). You can also get this info-letter at www.abanet.org/family/military (the website of the ABA Family Law Section’s Military Committee). The Guide tells about the requirements and protections of the SCRA and the steps one should take to comply with the Act’s requirements. It contains a sample motion for stay of

proceedings and what the appointed attorney needs to do to protect his or her newest client.

5. Family Support - Military Rules and Regulations

Fred is required to provide adequate support to Maria and the children; each of the military services has a regulation requiring adequate support of family members. The Air Force support policy is found at SECAF INST. 36-2906 and AFI 36-2906. [Note: Numbered rules and regulations can be easily found by typing the number of the regulation into one's favorite search engine]. The Marine Corps policy on support of dependents is found at Chapter 15, LEGALADMINMAN, found at <http://www.marines.mil/unit/mcieast/sja/Pages/legal-assistance/domestic-relations/default.aspx>. The Navy Policy for support issues is at MILPERSMAN, arts. 1754-030 and 5800-10 (paternity). Go to <http://www.public.navy.mil/bupers-npc/reference/milpersman/Pages/default.aspx>. The policy of the U.S. Coast Guard is located at COMDTINST M1000.6A, ch. 8M. This may be found at <http://isddc.dot.gov/OLPFiles/USCG/010564.pdf>. The nonsupport policies and rules of the U.S. Army are found at AR [Army Regulation] 608-99. See also the SILENT PARTNER info-letter on "Child Support Options" at the N.C. State Bar and ABA websites shown above.

Knowing Fred's pay and allowances is a key factor in determining support. All SMs receive a twice-monthly LES (leave-and-earnings statement). To learn how to decipher one of these, just type into any search engine "read an LES"

to find a guide explaining the various entries on the form.

There are numerous garnishment resources at the website for the Defense Finance and Accounting Service (DFAS), located at www.dfas.mil. The statutory basis for garnishment is at 42 U.S.C. §§ 659-662 and the administrative basis is at 5 C.F.R. Part 581. A list of designated agents (and addresses) for military garnishment is found at 5 C.F.R. Part 581, Appendix A. Military finance offices will honor a garnishment order that is "regular on its face." 42 U.S.C. § 659 (f). See also *United States v. Morton*, 467 U.S. 822 (1983) (holding that legal process regular on its face does not require the court have personal jurisdiction, only subject matter jurisdiction). Limits on garnishment are found in the Consumer Credit Protection Act, 15 U.S.C. § 1673.

6. Custody and Visitation

The best source for information on military custody and visitation issues is usually your own state custody statutes. There are 43 states with specific provisions covering visitation and custody issues which arise when one or both parents are in the military. These include delegated visitation rights when a parent is absent due to military orders, visitation during leave, mandatory contact information, rules on not using Fred's military absence against him in a custody determination and the use of expedited hearings and electronic testimony. "Counseling on Custody and Visitation Issues" is a Silent Partner info-letter found at the websites in the second paragraph of Section 2 above.

If Fred is retaining the children beyond the date of return in the custody order or keeping the children, and a custody order requires their return, then Maria can use Department of Defense (DoD) Instruction 5525.09, 32 C.F.R. Part 146 (Feb. 10, 2006), to obtain the return of children from a foreign country. In general, this Instruction requires SMs, employees, and family members outside the United States to comply with court orders requiring the return of minor children who are subject to court orders regarding custody or visitation.

7. Military Pension Division

Rules on retired pay garnishment are at www.dfas.mil > "Find Garnishment Information" > "Former Spouses' Protection Act." In addition to a legal overview, there is a section on what the maximum allowable payments are and an attorney instruction guide on how to prepare pension division orders. Information on the Survivor Benefit Plan (SBP) is at the "Retired Military



and Annuitants" tab (under "Survivors and Beneficiaries") and at the "Provide for Loved Ones" link at this tab. Military pension division is set out at 10 U.S.C. § 1408, and the Survivor Benefit Plan is located at 10 U.S.C. § 1447 et seq. The Defense Department rules for both are in the DODFMR (Department of Defense Financial Management Regulation), <http://comptroller.defense.gov/fmr/>.

There are seven Silent Partner info-letters on dividing military retired pay and SBP coverage. All of these are found at the websites shown above at Section 2, second paragraph.

8. DOMESTIC VIOLENCE

The DoD Instruction on domestic violence is DoDI 6400.6 "Domestic Abuse Involving DoD Military and Certain Affiliated Personnel (Aug. 21, 2007). Other websites containing useful information about the rules and procedures in this area are:

- www.vawnet.org (National Online Resource Center on Violence Against Women),

- www.ncdsv.org/ncd_militaryresponse.html (National Center on Domestic and Sexual Violence)
- www.bwjp.org (Battered Women's Justice Project).

An excellent summary of the remedies and responses is found in "Domestic Violence Report," April/May 2001 by Christine Hansen, executive director of The Miles Foundation, which is at www.civcresearchinstitute.com/dvr-military.pdf. *FLR*



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since 1989. He works with attorneys nationwide as a consultant on military divorce issues and to draft military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com.

Uniform Interstate Depositions Act

by Regina M. Quick

Family law practitioners will have a new method of obtaining discovery in cases pending outside of Georgia beginning July 1, 2013. HB 46 repeals the Uniform Foreign Depositions Act and incorporates the provisions of the Uniform Interstate Depositions Act (UIDA) to be codified in O.C.G.A. § 24-13-110. The legislation was passed by the Georgia General Assembly on Jan. 23, 2012, and awaits the signature of the Governor. The provisions will be integrated with the modernization of the Evidence Code, creating a procedure that requires minimal judicial oversight and intervention.

The new act is patterned after Rule 45 of the Federal Rules of Evidence. The provisions are cost-effective for litigants and fair to deponents. The UIDA specifically authorizes a subpoena to be directed to a person to attend a deposition for all of the following purposes: to give testimony, to produce designated items for inspection and copying and/or to permit inspection of premises under his control. The new provisions will be available to litigants in 19 states¹ which have adopted a version of the Uniform Interstate Depositions and will ensure that Georgia litigants will receive reciprocity in those states.

Georgia's existing statutory framework is based on a model act developed in 1920. The Uniform Interstate Depositions and Discovery Act was promulgated by the National Conference of Commissioners on Uniform State Laws in 2007.² Uniform codes strengthen the federal system by providing consistent rules from state to state and likewise foster economic development by creating a

stable environment for conducting business in the United States. The legislation was authored by Rep. Mike Jacobs (R-Atlanta). The legislation was introduced in the 2009-10 biennium, but was not voted on in the Senate. Sen. Bill Cowser (R-Athens) successfully carried the bill this session in the Senate. Both legislators are strong voices for issues which improve the judiciary generally and are equally attentive to issues which affect family lawyers specifically.

See the full text of the bill here: www.legis.ga.gov/Legislation/20112012/118607.pdf. *FLR*

Regina M. Quick is a graduate of the University of Georgia School of Law and practices family law in Athens. In 2008, she served as a member of both the Georgia Child Support Commission Low Income Deviation Study Committee and the Electronic Worksheet Task Force and is the former county administrator and ex officio guardian for Athens-Clarke County.

(Endnotes)

- 1 Georgia joins S.C., N.C., Va., Miss., Tenn., Ky. N.Y., Ore., Idaho, Mont., Calif., Nev., Utah, Colo., N.M., Kan., Ind., Del. and Md. In addition, bills were pending in legislatures of 10 other states in 2012.
- 2 Also known as the Uniform Law Commission or ULC. Since 1892, the Uniform Law Commission has served the profession by determining the need for uniformity among state statutes, drafting nonpartisan and practical legislation to meet existing needs and then advocating for the passage of these laws in every state. The ULC has developed more than 300 uniform or model acts.

Confessions of a Guardian Ad Litem

Managing High Conflict Custody Cases

by M. Debra Gold
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I don't think we need to see a show of hands on this one. But just in case.... How many of you have found yourselves in such high conflict divorce and custody actions that you reach your wit's end? Without even looking, I know the answer. All of you.

Last year, I struggled with one of my more difficult cases. The admired "mother of the year" became enraged and vindictive when she learned that her husband wanted a divorce. This, of course, affected her otherwise impeccable intuition and judgment regarding her children's needs. I even witnessed some of her extreme behaviors. The emails were stinging. Some of them were directed at me. I was very concerned about the children.

I began to wonder if it was my imagination that these difficult to manage personalities were becoming more prevalent in custody disputes. My colleagues opined that it wasn't my imagination. Their custody disputes were also getting uglier and uglier. It seems like almost everybody wants their day in court, nobody takes responsibility, everybody is a blamer and nobody has the capacity to empathize and recognize the effects of their high conflict disputes on their children.

Then a friend of mine who is a trusted mental health professional gave me a copy of "High Conflict People in Legal Disputes," by Bill Eddy. Shortly thereafter, I attended the American Academy of Matrimonial Lawyers seminar at the State Bar Center where Eddy was one of the speakers. After reading the book and listening to his lecture, I saw the secret. The book is a must have for every family law practitioner's bookshelf.

I was wowed from the first page. It seemed as if Eddy dug into my filing cabinet and wrote about some of my cases. I related to so much of each and every chapter. You will recognize your clients and opposing parties in many of the examples. Every chapter starts with a funny cartoon. This keeps the reader smiling even when the subject matter may otherwise make the reader want to cry.

Using many of his own experiences as an attorney, mediator and therapist involved in difficult custody disputes, he

cites case examples to explain the dynamics of high conflict cases. He provides the reader with a basic understanding of personality disorders. And then he provides the reader with practical tools and techniques to deal with those personalities. He also provides the reader with the skills to adapt the lessons learned to the facts and circumstances of the difficult cases we have to manage. As Eddy states in his book, "The more people who have this knowledge, the easier it will be for all of us who deal with problem personalities."

Eddy wrote this book for you. Judges, attorneys, mediators, guardian ad litems, come one, come all. At the AAML seminar, he provided statistics that confirmed the prevailing sense that high conflict personality disorders seem to be increasing in our society. Many of the worst of those personalities walk into our law offices and courtrooms making our jobs as family law practitioners much more of a challenge. His book will be a great tool to help get you past those challenges so that you can retain your wits and your sanity in those most difficult cases. *FLR*



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



Your Cell Phone Is Subject to Search As is Any Other Container

Like a Toothbrush and Clothing In a Paper Bag? But, the Cell Phone Records Are Not?

by Margaret Gettle Washburn, senior editor
Gwinnett County Bar Association Newsletter

In the recent case of *Hawkins v. State*, S11G0644, March 23, 2012, Justice Hines presiding, the Supreme Court affirmed the judgment in *Hawkins v. State*, 307 Ga. App. 253 (2011), holding that a cell phone is roughly analogous to a container that can be properly opened and searched for electronic data. The majority opinion of the Court of Appeals appropriately noted that searches of a cell phone incident to arrest must be limited as much as is reasonably practicable by the object of the search. Such as an officer may not conduct a “fishing expedition” and search through photos or audio files when the object is to discover certain text messages.

In so holding, the Court noted that the arresting officer’s observations clearly showed that evidence of Haley Hawkins’ text messages to the officer were in her cell phone and the cell phone would be found in her vehicle.

The Supreme Court granted certiorari to the Court of Appeals to consider whether that Court properly determined that a police officer’s search of a cell phone incident to arrest was lawful. Their decision was affirmed.

This case arises from the Lowndes County Superior Court. The defendant, Haley Hawkins, had been arrested for various crimes, including an attempted violation of the Georgia Controlled Substances Act following an exchange of telephone text messages between Hawkins and a law enforcement officer who posed as another individual. After agreeing by text to meet the officer, allegedly to purchase drugs, Hawkins arrived in her car at the appointed place. The officer observed her entering data into her cell phone, and he contemporaneously received a text message stating that she had arrived.

The officer approached Hawkins’s vehicle and placed her under arrest; her vehicle was searched and her cell phone was found inside her purse. The arresting officer searched the cell phone for the text messages he had exchanged with Hawkins, and then downloaded and printed them. Hawkins moved the trial court to suppress evidence of these text messages as the product of an unreasonable search and seizure because it was accomplished without the authority of a warrant; the

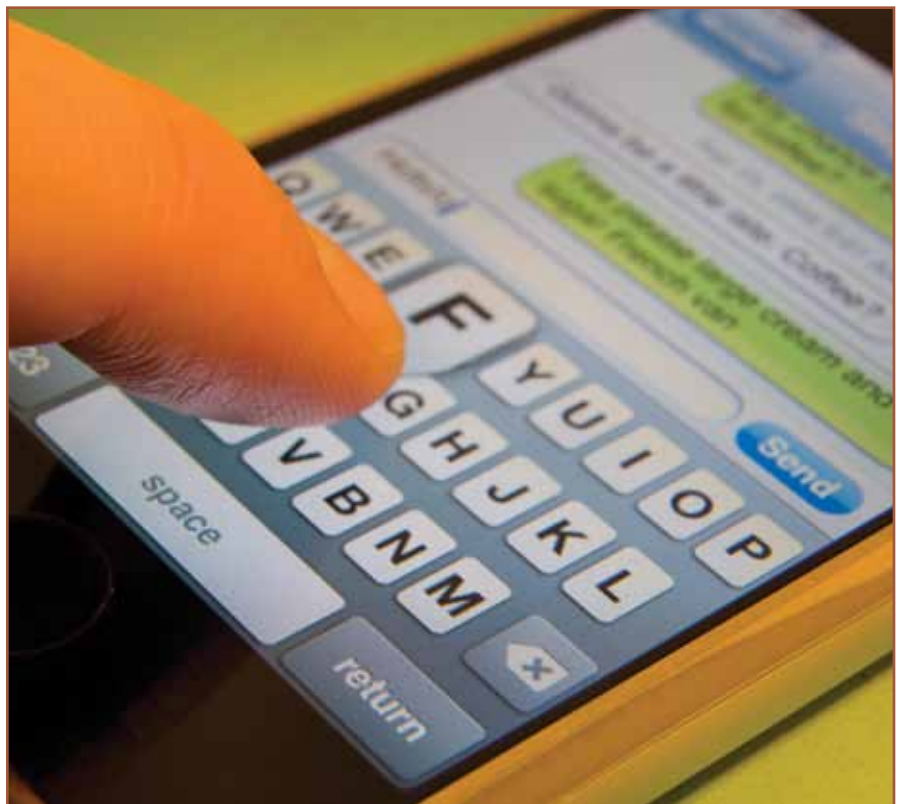
motion was denied, and the Court of Appeals permitted an interlocutory appeal, and affirmed the trial court.

As the majority opinion of the Court of Appeals noted,

[a]s a general rule, “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment[,] subject only to a few specifically established and well-defined exceptions.” *Katz v. United States*, 389 U. S. 347, 357 (88 SC 507, 19 LE2d 576) (1967). “Among the exceptions to the warrant requirement is a search incident to lawful arrest.” *Arizona v. Gant*, 556 U. S. 332, (129 SC 1710, 1716 (II), 173 LE2d 485) (2009).

There was no dispute that Hawkins’ arrest was lawful.

As noted in *Gant*, in many instances, “the offense of arrest will supply a basis for searching the passenger compartment of an arrestee’s vehicle and any containers therein,” *supra* at 344 (III) (emphasis supplied), when “it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’ [Cit.]” *Id.* at 343.



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In this instance, it was clear from the officer's observations that evidence of the text messages Hawkins exchanged with the officer were in Hawkins's cell phone, and that the cell phone would be found in her vehicle. Accordingly, the Court of Appeals addressed the question of whether, for purposes of a search incident to arrest, the cell phone could be treated in the same manner as a traditional physical container, and found that it could. *Hawkins*, supra at 257.

The Defendant argued that the cell phone at issue cannot be treated as a container because it does not ordinarily contain another physical object. See *New York v. Belton*, 453 U. S. 454, 461 (n. 4) (101 SC 2860, 69 LE2d 768) (1981) (" 'Container' here denotes any object capable of holding another object.") However, the Supreme Court agreed with the majority opinion of the Court of Appeals that, although an electronic device, a cell phone is "roughly analogous" to a container that properly can be opened and searched for electronic data, similar to a traditional container that can be opened to search for tangible objects of evidence. *Hawkins*, supra at 257.

"The wisdom of this conclusion can be seen in the fact that a major focus of an examination into the propriety of a container search incident to arrest is the nature of the object of the search. See *Ross*, supra, at 824 (Scope of the search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found.") See also *Gant*, supra at 343-344 (III). And, in circumstances such as these, the similarity of a cell phone to a traditional container in which there might be found physical entities of evidence is clear; it is reasonable to believe that the object of the search will be found inside the cell phone."

The dissent in the Court of Appeals notes that a cell phone may contain large amounts of private information, including "recent-call lists, emails, text messages and photographs." [Cit.] Id. at 265 (Phipps, J., dissenting). However, the Supreme Court did not find that the potential volume of information contained in a cell phone changes its character; "it is an object that can store considerable evidence of the crime for which the suspect has been arrested, and that evidence may be transitory in nature."

Further, the Court found that other courts have recognized the potential for information stored in a cell phone or similar device to be lost if not captured quickly. See, e.g., *United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996).

"And, the mere fact that there is a potentially high volume of information stored in the cell phone should not control the question of whether that electronic container may be searched. See *People v. Diaz*, 51 Cal. 4th 84. **FLR**



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Interview with Hon. Gail S. Tusan

by Kevin J. Rubin
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In October 2011, I had the pleasure of interviewing Hon. Gail S. Tusan. Judge Tusan has served on the Superior Court of Fulton County since May 1995. She is one of three superior court judges who preside in the Family Division of Fulton County.

Rubin: Please tell me about your background.

Tusan: I was born in Los Angeles, Calif., and graduated college at UCLA. I began law school there, finishing three semesters, and then transferred to George Washington University Law School in 1979 upon marriage.

Rubin: What brought you to Atlanta?

Tusan: The decision to be near family.

Rubin: What influenced your decision to become a lawyer?

Tusan: There were a few reasons.

First, my father was a career police detective with the Los Angeles Police Department and my mother was a schoolteacher, so I grew up in a household of public service. Even though I interacted with lawyers while growing up, I was the first lawyer in my family.

Second, there was a married couple who were lawyers and the youth advisors at my church. They made an impression on me, specifically how they as lawyers helped the community and our church.

Finally, I was a psychology major in college and planned to become a child psychologist. However, I took a Philosophy of Law class in my junior year and took an interest in that. I found the class very interesting, and thought I could easily use my psychology background in the legal profession, and my ultimate desire to help people.

Rubin: How long have you been practicing law?

Tusan: I've been a member of the Bar since 1982 and practiced about 10 years before going on the bench full-time.

Rubin: Prior to becoming a judge, in what area of law did you practice?

Tusan: My first five years of practice I worked in trademark litigation, and then branched out into intellectual property related franchise law. Toward the end of my practice, I became more of a general practitioner, which helped to round out my experience and provided exposure to such areas as family law.

Rubin: What made you decide to become a judge?

Tusan: In the early 1990s, the judicial landscape was

changing and there was a concerted effort by the Governor and Mayor to diversify the bench. In 1995, the Superior Court bench in Fulton County was expanded to add three new seats. This piqued my interest in serving on the bench, and a few of my mentors identified me as someone who was oriented toward public service and who would have broad community support. Also, the opportunity to help litigants resolve their disputes very much appealed to me.

Rubin: What aspect of serving as a judge do you like the best?

Tusan: Interacting with people and trying to help them reach a point of reason, which can be challenging, depending on how reasonable the people are to begin with. I think that I bring a valuable perspective to the divorce and custody cases I hear based on my own life experiences. As a wife, mother and a member of a blended family, I know well the challenges and blessings of life's transitions.

After my initial tenure on the Family Division was complete, I rotated back into the general division where I presided over criminal and civil matters. It did not take me long to realize that I actually appreciated the ability afforded to judges presiding over Family Division cases to engage in hands on involvement with the parties and counsel to engineer the best result for the children and families involved.

In 2006, I returned to the Family Division and have enjoyed my tenure tremendously.

Rubin: What are the advantages or disadvantages of the family division system in Fulton County compared to other county systems?

Tusan: The biggest advantage is that domestic relations cases are the only focus of the court. It is not a matter of the judge having to determine the order of priority between a construction case, contract case, murder/rape case, or a family law case. Obviously, you have to prioritize within the family division, based on the age of the case or emergency status involving children, but you always have our attention and know what we are going to hear each day. Also, when you focus on family law you become more knowledgeable in terms of the issues and the law, as well as becoming more skilled in cutting through all of the evidence in determining what is the need in the case and how can the court address it.

The disadvantage of having a designated family division only hearing family law cases would be

the emotional toll on the judges and our staff. Typically the parties present in a highly charged, anxious, emotional state and often are very angry or hurt which affects how they interact with court personnel and testify, as well as process and respond to our decisions.

Rubin: What improvements do you think could be made to the family division?

Tusan: It would be helpful if we had another judge since three of us are handling the domestic workload for all 20 elected superior court judges. However, the Family Division is committed to doing as much as possible for the families we serve with the resources at our disposal.

[The Family Division recently released its 2011-12 Family Division Survey Report. This report is based on a survey conducted this past fall and confirms much of what Fulton County is doing well on behalf of its families.] We recognize that over the lifetime of the Family Division, the economy has changed dramatically which has adversely affected many families and increased the Family Division docket. It is our goal to ensure that the economic reality of today's times do not compromise the service provided to you by the Family Division.

The three judges who handle the family law docket for the entire bench are committed to making the necessary improvements in process to achieve more uniformity for the Family Law bar and even greater access for the citizens of Fulton County.

Occasionally, jury demands are made. Certainly, everyone is entitled to a jury trial, but accommodating these requests lengthens the trial and takes more days to resolve a particular case. In many cases, we encourage people to agree to a six-person jury, which shortens the amount of time needed for the entire trial. We still rely heavily on mediation and late case evaluations. We also now have Judicially Hosted Settlement Conferences with some of our senior judges, which have been very successful in resolving many difficult cases.

Rubin: How has the economy affected the family division?

Tusan: We have more cases and fewer resources. Therefore, we've been forced to reevaluate the manner of our scheduling the judicial officers who help us with our case management status conferences. The Family Division once had a staff psychologist, but we lost funding for that position. That loss has reduced our access to

affordable psychological evaluations for many families who need them. Additionally, our source of Guardians ad litem has been curtailed to low income families, leaving a wider gap of cases in need of a GAL but unable to qualify for or afford one. However, we have been fortunate in that the Family Division has not had to furlough or let go of any of our immediate staff for budgetary reasons. Rather, our very dedicated staff works tirelessly to fill in the gaps and provide quality customer service to all of the citizens who avail themselves of the Family Division.

Rubin: What is your opinion on having an uncontested hearing calendar, similar to some other counties?

Tusan: We have contemplated allowing magistrate judges at the North and South Annexes to take uncontested final hearings for us, or trying to travel there ourselves to provide this satellite service. To the best of my knowledge, all three of us have scheduled times for uncontested cases. I'm available to finalize those most mornings and at other times as scheduled by my case manager. Both our judicial officers and judges have made a concerted effort to be available on a daily basis to take uncontested final hearings.



Zachary D. Porter/Daily Report.

Rubin: What is your position on co-parenting arrangements?

Tusan: Co-parenting agreements should be encouraged. I am certainly open to consider co-parenting, joint custody, equal parenting, etc. I always caution parents that even if their arrangement is termed as joint, that does not necessarily mean that the calendar is going to be divided in half each and every day. Factors such as distance between parents' homes, particularly if the child is of school age, weigh on my decision. Sometimes parents often underestimate the effect of the schedule on the children. If the travel time between the two homes is significant, that may not work best for the children. Also, differences in each party's parenting style/method will factor into the decision, but hopefully there will be a lot of similarities between the households and the children's daily routines. Parents should be open to alternative schedules, such as using the summer months to make up for having a reduced schedule during the school year.

Rubin: How does a co-parenting arrangement impact your decision on child support, specifically the parenting time deviation?

Tusan: I am interested in seeing what the agreement provides for the extra expenses of the children. If the incomes are comparable or at least are such that each parent without assistance can provide a comfortable home, then the issue is how are those extra expenses going to be paid. It is not reasonable for each party to pay just his or her own extra expenses.

If there is a significant disparity between incomes, the higher earning parent may still end up paying the other parent some amount of child support for the benefit of the children in order to equalize the financial disparity.

Rubin: What advantages are there to specially setting all of your trials, as you do in your court?

Tusan: I've decided that having everyone come in and report their time is a waste of my time and their time. Also, it raises expectations for litigants that they are coming that day to have their day in court, but in turn they may be told to come back the following week or are put on standby. I find it helps manage expectations. It also helps in resolving conflicts in the scheduling of attorneys and litigants. My staff attorney works very hard to keep our trial calendar moving and to provide sufficient time for all disputes to be resolved.

Rubin: What advice do you have for attorneys who practice in your courtroom?

Tusan: Let me know what you want at the beginning of the hearing. Help me, help you – proposed orders are helpful, especially those sent electronically, which can be revised.

Take advantage of any delays in a trial or hearing starting to talk to the other side in an effort to resolve the need for the proceeding, or at least to disclose exhibits, witnesses or other way to streamline the proceeding when it begins.

Be clear on your desire for me to speak with a child and what I should be speaking about to the child. Obtain leave for such an interview in advance of bringing the child to court. I do not typically have attorneys sit in on the *in camera* interview, and I want to focus in on the issues that I need to address with the child. Also, any proposed questions for the child should be ones that you expect a judge to ask, not questions that an attorney would ask on cross-examination.

Rubin: Do you have any special advice for young attorneys?

Tusan: To the best of your ability, take control of your client's case. Know the judge; know the judge's procedures. Prepare the case on what you, as the young lawyers, should know is the issue, not what your client may instruct you to put before the court. Focus on the best interests of the children and what a realistic, practical solution would be. Sometimes, I am really disappointed when I hear all of the evidence and the closing argument, and the attorney says something to the effect of "well you heard the evidence and we trust you to make the right decision." Tell me what you want as your proposed resolution, I don't want to be forced to figure it out on my own.

Rubin: Finally, in addition to your day job, you are also an accomplished author. Are you working on another book?

Tusan: I am trying to carve out time to move forward with my next book, which will be a sequel to the original story. Fiction writing is a creative release for me which I very much enjoy. Even though we are involved in helping families reach a livable solution, you cannot really create happy or alternative endings. They are what they are. Through fiction writing, I get the opportunity to really take charge and ask the questions that I cannot ask from the bench. It is a different kind of writing and thinking, but we all need something to use as an escape, which is why I do it. **FLR**



Kevin J. Rubin graduated from the George Washington University with a Bachelor of Business Administration, cum laude, in 2000, and a Masters of Science in Information Systems Technology in 2001. In 2008, Kevin graduated from Emory University School of Law and has practiced family law exclusively since graduation.

Is the Psychotherapist in your Case Forensically Informed?

by Howard Drutman, Ph.D. & Marsha Schechtman, LCSW
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You are trying a case. The opposing counsel has Dr. Freud, psychotherapist, on the stand. In the examination of Dr. Freud, your colleague asks, "How often have you seen the teenage child of this divorcing couple for individual psychotherapy?" He responds, "One time a week for a year." The attorney follows up, "How often have you met with the father and with the mother." Dr. Freud testifies that he has seen the father for five or 10 minutes at each session that he has with the teenager. He reports that he has not met with the patient's mother. Dr. Freud is asked why and he replies, "I contacted her after I had seen the patient for a couple of months. She was angry that I was seeing the child and refused to come in to meet with me." There is one final question directed to Dr. Freud, "What is your opinion about why this child refuses contact with his mother?" Dr. Freud smiles and smugly replies: "In my 30 years of practice, I have seen many situations just like this. This child has severed his relationship with his mother due to the child abuse he receives from her. This mother hit the child and emotionally abused the child. In fact, much of the abuse took place while the mother was drunk." The opposing counsel thanks Dr. Freud for his professional opinion, based on an impressive 30-year career as a psychotherapist and part-time university professor. Your colleague is confident that the judge will be impressed by the testimony of this esteemed psychotherapist who has verified to the court, what his client has been saying throughout the case. The witness is passed to you for cross-examination. Just as you get ready to start, the judge calls for a lunch break, giving you time to review your notes about some of the potential dangers of having a psychotherapist involved in a contested child custody case.

You take another look at the article, "Is the Child's Therapist Part of the Problem?" from Family Law Quarterly, written by Greenberg, et.al. Right there on page one, it clearly states, "Clinicians who undertake court-related treatment without adequate expertise run the risk of exacerbating, rather than improving, the life situations of these children." You believe that Dr. Freud may have exacerbated the situation and actually made the estrangement of the child from the mother worse, not better. Further in the article, you read, "While the treating expert's role is distinct from that of the forensic expert, (e.g. psychological examiner or child custody evaluator), effective treatment with children of separating and divorcing families can occur only when the therapist is knowledgeable about the myriad of forensic mental health and legal issues that often are imposed upon the therapist, the children, their parents, and the treatment itself during contested custodial disputes." Further into the article you read a paragraph from the authors:

"Biased therapists may escalate conflict by providing treatment information to the court at the request of one parent without obtaining a balanced understanding of both sides of an issue. In the extreme, a biased therapist may present unbalanced information to the court by minimizing or ignoring bias in the information available. Some therapists even express opinions about parent-child relationships that they have not observed (p. 50)."

Greenberg, et al (2003) went as far as to state: "We believe that offering opinions to the court based upon an inadequate foundation of information, especially when the testimony crosses the line from treatment opinions into forensic judgments (e.g. opinions about custodial placement and conclusive opinions about allegations of abuse), is a violation of the professional standards governing most therapists (p. 50).

You flip to an article written by Grossman (2002) and see there are a number of problems that can occur when treating therapists offer information to the courts. Grossman felt that therapists, in an attempt to assist their patients, might make errors by offering opinions and recommendations to the court about family members they have never seen. Additionally, when only one parent brings the child to appointments, the therapist may become biased in favor of the parent who regularly attends and with whom they speak on a regular basis.

In a Greenberg and Gould (2001) article, "The Treating Expert: A Hybrid Role with Firm Boundaries" you discover that most non-forensic psychotherapists function under an assumption that psychotherapy is a process initiated by the client and base treatment on the client's own perceptions of their life and experiences. The therapist develops a therapeutic relationship with the client and provides a confidential zone for the client to explore their thoughts and feelings about themselves and those around them. Greenberg and Gould stated, "Implicit in this process is the assumption that the client will be motivated to provide as much accurate information to the therapist as possible, to enhance the therapist's ability to assist the client" (p. 471). This assumption of accuracy in the patient's reporting is often an incorrect assumption in patients who are going through litigation.

Greenberg and Gould (2001) went on to discuss how treating therapists might become biased by:

"...uncritically accepting the statements of the parent or child whom the therapist is treating, without recognizing that the client's statements may be heavily influenced by outside factors (e.g. the parent's position in the custody conflict, the child's exposure to the

custodial parent's concerns, or the status of the legal case). In such a case, the therapist unintentionally biases treatment by supporting the client's expressed views and by advocating for that view as the most appropriate outcome for the case. In the process, the therapist may unintentionally stray beyond the boundaries of his or her role and into ethical and legal trouble." (p. 470).

Greenberg, et al (2003), and Greenberg and Gould (2001) described how therapists working in contested custody cases need to "think forensically." Grossman & Okun (2007) wrote that treating psychotherapists had limited usefulness to the court because their conclusions are not based on an independent investigation. They went on to describe the forensic approach as being, "...broader, more objective and neutral inquiry, attempting to verify the information supplied by the client with other sources." Greenberg, et. al. (2003) described the challenges for the "forensically-informed therapist":

"...to be aware that the information being brought into the treatment session could be intentionally or unintentionally distorted. Statements made by a parent or child may include inaccurate observations, selective attention to events that support one parent's view, perceptions distorted by the parent's emotional investment in the outcome, and/or deliberate distortion of information. A child's perceptions and statements may be altered by external influences such as suggestive questioning, exposure to the parental conflict, or exposure to a parent's emotional needs." (p. 45).

Greenberg, et al (2003) also wrote that the forensically-informed therapist should have knowledge "... of relevant research regarding children's adjustment to divorce, domestic violence, alienation dynamics, child abuse, children's suggestibility, the impact of parental conflict on children, child development and the coping skills children need to adjust successfully as they mature."

Forensically-informed therapists need to keep in mind strategies to minimize bias and make sure that their

conclusions and recommendations are based on a full assessment of the situation in which a child finds him/herself. According to Greenberg, et al (2003), the therapist must "...understand the family situation in which the child lives, including the impact of the family's involvement with the legal system; and (2) the therapist's ability to identify, formulate and actively explore rival, different and plausible interpretations of the child's behavior, statements, problems, and needs." (p. 48)

The last document you review while waiting for court to re-start is a copy of the "Guidelines for Court-Involved Therapy" developed by the Association of Family and Conciliation Courts (AFCC). In that document you read their standards for the level of court involvement, professional responsibilities, competence, multiple relationships, fee arrangements, informed consent, privacy, confidentiality and privilege, methods and procedures, documentation and professional communication. You decide to see how well the good Dr. Freud adhered to these aspirational standards of practice.

You check your watch and realize that the hearing is about to start again. You quickly translate what you have just reviewed into a series of questions you will pose to Dr. Freud in your cross-examination. You decide to see if Dr. Freud has an understanding of the current literature related to children, divorce, high-conflict coparenting and children who refuse visitation. You also decide to query Dr. Freud on his consideration (or lack thereof) of alternative theories on why this teenager and mother are estranged. You want to know if Dr. Freud is familiar with some of the research on bias and contamination of interviews with children. Lastly, you want to cover the practice standards and see if Dr. Freud practices from a forensically-informed perspective.

The hearing begins and you step to the podium. You ask Dr. Freud, "Are you familiar with the Guidelines for Court-Involved Therapy which was developed by the Association of Family and Conciliation Courts (AFCC)?" Dr. Freud responds that he is not familiar with those guidelines and has never heard of the AFCC. You proceed to ask the good



doctor how he verified the allegations that the child made about his mother. Dr. Freud ponders the questions and responds, *"In my 30 years of clinical practice I have developed my interviewing skills to be able to assess the credibility of what a patient tells me. The father confirmed that the child was telling me the truth."* He assures the court that if the child were lying, he would have been able to detect it. You ask Dr. Freud if he is aware of the literature that therapists are no better than untrained professionals are at detecting the credibility of other people. He, arrogantly, responds that the researchers never spoke with him.

You switch topics and start to question Dr. Freud about his understanding of the literature on divorce and the best interests of the child. You ask him for a list of which peer reviewed journals he regularly reads, which books on child custody he references and what professional courses and continuing education seminars he has attended. Dr. Freud looks annoyed at your questions and stumbles to try to name a journal. When queried further, he admits he does not subscribe to any divorce related journals nor was he able to remember any books he has read about child custody, divorce, and the best interest of the child. When asked about continuing education, he testifies that he completes the required classes for licensure and takes classes in ethics, psychopharmacology and general seminars on various mental disorders.

Next, you ask Dr. Freud to describe the various alternative theories he has about why the teenager is refusing to see his mother. Dr. Freud, in his typical arrogant manner testifies that he is sure he is correct and did not need to waste his valuable time, *"playing the games of graduate students pondering alternative explanations to something that was obvious."*

You move into your final area of inquiry. Does Dr. Freud engage in appropriate professional practices and does he follow the Guidelines for Court-Involved Therapy? After numerous questions, Dr. Freud admits that he never received informed consent from the mother before he saw the child. He did not get the mother's side of the story. He did not consider an alternative hypothesis for the estrangement. He admits he was giving parent-child relationship opinions without ever having met with the mother. He admits that he was not up to date with the literature in the area and that he had not attended specific educational courses to be competent in this area. Although he would never admit he was biased, it became obvious that he was. You thanked him for his testimony and conclude your cross-examination.

As you sit down, you feel a sense of satisfaction that you have exposed this so-called expert. You have transformed his testimony. The witness was exposed, seen as a psychotherapist who had inadvertently sided with a child and one parent against the other parent without investigation or balance. You are happy that you have successfully impeached this witness.

As professionals working with family attorneys and psychotherapists, we often see similar opinions (from

therapists like Dr. Freud) in court testimony, depositions, affidavits or in collateral contact interviews. Family attorneys need to become better at making sure that their clients and the children of their clients receive evaluations and treatment by therapists who have the appropriate training, experience, and ongoing continuing education. In the hypothetical case above, the therapist was colluding with the teenager and the father (without even realizing it, yet it came across in court). If the information about the parties or their children is not derived in a forensically sound manner, the court has no way to know if the findings and recommendations are valid and appropriate. Experts are required to base their opinions on systematic, valid, and reliable methods of acquiring information. The experts then develop recommendations based on the data and scientific research — not from their hunch or the number of years they have been in practice.

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



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Mediation: Is there a Downside?

by Andy Flink

Recently, I asked several family law attorneys and judges in the Atlanta area their thoughts on both the positive and negative aspects of mediation. The answers I received were interesting and decidedly positive. Mediation was considered to be the *best* alternative in divorce cases, especially when there are minor children involved.

Mediation was, however, deemed to be a negative in those rare cases where either one side conducted themselves in an unreasonable and unnecessary manner or when one side appeared at a session completely unprepared. In these instances, the majority of attorneys I spoke with still believed there was some small measure of progress, even if it was acquiring the knowledge that settling was going to be more problematic. Judges that I spoke with also promoted mediation. They would prefer the family make the life-altering decisions amongst themselves rather than be put in the position to make them for people they knew very little about.

significant if the case settled sooner – as one attorney told his client in a case where I was the mediator: “If you settle now you’ll be able to send your kids to college, if you want to drag this on, we certainly can, but you’ll end up sending my kids to college.”

In mediation I have one goal in mind: to settle, perhaps with a full settlement, or sometimes with a partial or temporary one. Regardless of what the parties or counsel say to me about how difficult or impossible the case is, or how meeting will be a “significant waste of time,” I’ll consistently look for and hopefully find the “wrinkle” that gets the parties moving forward. This is especially satisfying when at the end of a session we’ve reached agreement and counsel explains that they “never thought this case would settle.” I am always glad if it did – but even if it didn’t, I believe it’s always worth an attempt. I may feel that the session wasn’t productive but, like most of you who I work with, my consensus is the same: there is very little downside to what can result in a potentially worthwhile outcome for everyone involved. *FLR*



These illustrations do not include cases where abuse, violence or significant power imbalances are present, which are considered to be cases that are inappropriate for mediation. As well, there will certainly be cases that present themselves as those that will never settle in mediation and will require litigation.

Many of you also believed that a positive and productive reason to mediate was to simply create the scenario where everyone *had* to be in the same place at the same time. Trying to schedule five or more people to meet together was daunting in itself; being forced to meet was actually a good thing: This initial mediation session might be the first time attorneys meet each other in person. Everyone also agreed that by settling the case sooner through mediation the parties, especially those with children, could move past the conflict and concentrate on parenting. The financial benefits to the parties were also



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

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Towards a Holistic Approach to the Law*

by Hon. Stephen Dillard, Court of Appeals of Georgia

One of the first things law students are taught is that, as lawyers, they will be expected to “zealously represent” their clients. But what exactly does this mean? Unfortunately, the imagery conjured up by this turn of phrase only serves to perpetuate the pernicious notion—held by many non-lawyers—that lawyers will do anything it takes to win a case. Thus, while the sentiment behind the charge to zealously represent one’s clients is no doubt well intentioned, I think it is long past time for lawyers to recast the manner in which they describe the nature of the attorney-client relationship. And any discussion along these lines should begin with the understanding that a lawyer has duties beyond those to his or her clients—i.e., to the bench, bar, community-at-large and to the rule of law. Indeed, the rules of professional conduct make this abundantly clear. But there is a compelling reason beyond mere ethical compliance for taking a more holistic (rather than mercenary) approach to one’s law practice: it makes for far better lawyering.

At the heart of a holistic approach to law practice is a recognition that the disputes we handle as lawyers are not about us. Ideally, lawyers are servants. Our clients come to us when they are vulnerable and in dire need of guidance. And the last thing a client needs is a lawyer who merely fans the flames of discord. What a client does need is for someone to dispassionately analyze the situation and come up with a game plan for quickly resolving the dispute—i.e., a problem solver. Unfortunately, this approach is much more difficult to market to a person in the midst of emotional turmoil. Indeed, prospective clients will often express a desire for a “pit bull attorney” who will inflict pain and misery on their adversaries. But that is not what a client needs, and a lawyer has an obligation to channel the client’s emotions in a constructive manner. This does not

just promote the cause of professionalism, but also inures to the benefit of the client.

The reality is that many cases are won or lost due to the reputations of the attorneys involved, and a fanatical, win-at-any-cost lawyer is not doing the client’s cause any favors. It may warm a client’s heart to hear her attorney bluster on about how she has suffered a grave injustice, but if that rhetoric has no basis in the law or serves to undermine a valid legal position, then it ultimately serves no purpose. A good attorney knows this. A good attorney recognizes that effectively representing a client begins and ends with zealously guarding her reputation and going above and beyond the baseline of ethical standards imposed by our profession.

So, my challenge to the young lawyers of Georgia is this: spend a little time each week thinking about what it means to be a lawyer. Consider what an honor it is to serve our fellow citizens during their most challenging times. And remember that every time you file a pleading or brief or make an appearance in court, you are either harming or building up your reputation. It may sound trite, but the old adage really is true: your most precious asset as a lawyer is your reputation. Treat it as such. **FLR**



Judge Stephen Louis A. Dillard was appointed to the Court of Appeals of Georgia on Nov. 1, 2010 by Gov. Sonny Perdue. Prior to his appointment, Dillard was in private practice with James, Bates, Pope & Spivey in Macon, serving as Chairman of the firm’s appellate practice group

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The First Metacarpal Is Not The Best Pointer¹

by Jim Holmes

Anatomically, the thumb is the first metacarpal bone; it is the first digit of the hand, is shorter and thicker than the other fingers and is nearer to the wrist than the other fingers.

Colloquially, the word “thumb” gets applied in many ways. To mention just a few: one scans when he “thumbs;” one is under another’s control when “under one’s thumb;” one is not liked when you “thumb your nose;” and one approves or disapproves with the up or down of the thumb. And, oh yeah, there is the “rule of thumb”.² Several sites on the Internet are found when one types in this phrase,³ and there is even a “Rules of Thumb” website.⁴

Generally, the phrase “RULE of THUMB” is defined as a principle with broad application that is easily learned and easily applied; however, the “RULE of THUMB” is only a means of estimation not intended to be strictly accurate or reliable. (Emphasis added).⁵

Now, more and more often several “Rules of Thumb” are being “argued” by attorneys. Specifically:

- The ‘term of alimony’ (if any) should be no longer than 1/4 1/3, or, or 1/2 of the term of the marriage;
- The ‘amount of alimony’ (if any) should be no more than the level of child supporting for one child applying the old child support guidelines; and/or,
- Child support and alimony should not be more than 50 percent of the payer’s net pay; and as to property division,
- Equitable Division of the ‘Marital Estate’ pursuant to *Stokes v. Stokes*⁶ estate is always 50-50.

While these “Rules” are easy to quote and easy to apply, this author knows of no analysis that compares the application of these “Rules” with actual outcome. At best, these “Rules” provide some marginal degree of reference when discussing possible terms of settlement; however, the application of these “Rules” without more calls to mind another “thumb” term – i.e., – the thumb screw – a form of a vice (clamp) used to pinch the thumb and inflict pain. In the divorce, this pain gets inflicted on your client by (i) paying either too much or too little alimony for either too long or too short a period of time, or (ii) always dividing the marital estate 50-50.

More specifically, the pain is inflicted on the non-working spouse and also (though to a lesser degree) to the lower income earning spouse, when this “exposed spouse” leave the marriage with little (if any) alimony for a short (if any) term, with a lower income producing ability, and with an “equal” division of the marital estate (both assets and debts) that is not “equitable.” Or, another example,

the pain is inflicted on the higher-income spouse when the combined “piling-on” of child support, alimony, and debt allocation leaves very little on which to live.⁷

THE REQUIEM

John P. Wilson III, of Levine & Smith, P.C., wrote an article entitled “Requiem for the Divorced Homemaker.”⁸ If you have not read this, it is an absolute must. In fact, if you are representing a client that is seeking alimony or an “equitable division of marital property,” I respectfully suggest that you insist that your client read it. While the term “homemaker” has definitely become more and more gender neutral, the “Requiem” asserted by Wilson very negatively impacts both genders.

In his article, Wilson cited four legal occurrences that have led to the reduction in amount and term of alimony awards and to a reduced chance of an “equitable division” of anything than 50-50; those were:

1. The U.S. Supreme Court’s ruling in *Orr v. Orr*, 440 U.S. 268 (1979) which held that laws which do not apply to both genders are unconstitutional;
2. The tentative passage of the Equal Rights Amendment, which Wilson described as not being “...a friend of the homemaker...” It helped give rise to the expectation that a woman should be able to support herself; this is further reinforced by more women entering the workforce.⁹
3. The former Child Support Guidelines which were enacted in July of 1989 [The non-custodial parent paid a percentage of Gross Income depending on the number of children – i.e., 17 – 23 percent for one, 24 – 27 percent for two, 28 – 32 percent for three, etc. The income of the custodial parent (more often the Mother) was generally not considered (or, at least only indirectly to decide where in the percentage range the amount of support would fall, but far more often it was in the middle of the range – i.e., 20 percent, 25 percent, etc.)]. The application of these old guideline multiples increased the amount of child support being paid and this in turn resulted in the payment of less alimony, if for no other reason than there was less disposable money with which to pay it;¹⁰ and,
4. The new Child Support Guidelines which permits the finder-of-fact to impute income to a spouse [O.C.G.A. §19-6-15(f)(4)(D)]. These new Guidelines provide a “Basic Child Support Obligation” and “Presumptive Level of Support”¹¹ generally lower than the support provided under the former

guidelines. This inevitably leads to the “self-fulfilling prophecy” recognized by Wilson – i.e., as he states it: “...[A]s the homemaker is awarded even less in child support, this in turn forces the parent to abandon the role of homemaker to make ends meet...”¹²

The custodian parent’s receiving less support imposes the requirement of an immediate return to work (or entry into the workplace) (sometimes too early and perhaps at a lower level of income and benefits than would have been possible if alimony supported a transition back into and education for the return to the employment sector); this lower level of support also very often imposes a reduction in the standard of living.¹³

ALIMONY – THE ‘A’ WORD:

Laura W. Morgan is the owner and operator of ‘Family Law Consulting’ in Charlottesville, Va.;¹⁴ she recently published an article in the Winter, 2012 *Family Advocate*. In the article entitled “Current Trends in Alimony Law – Where Are We Now,” she writes:

“Alimony is, and may always be, a concept in flux, ever-changing to meet the concerns of public policy ... Even the name mirrors its changeable nature: alimony, spousal support, maintenance ... Alimony continues to stumble along, based on habit and precedent as much as logic ... We have difficulty explaining its precise purpose yet, at some level, we are reluctant to get rid of it entirely. In short, the law of alimony is in the midst of an identity crisis...”¹⁵

In Georgia, the general definition found in the Superior Court Jury Charges is “Alimony is an award from one party’s estate – separate property or future earnings – for the support of the other. The amount of the alimony (if any) and the term of that alimony (if less than until death of either party or remarriage of recipient) is generally based on one party’s needs and the other party’s ability to pay”. [See also O.C.G.A. §19-6-1]

A. AMOUNT: As to the amount of alimony, O.C.G.A. §19-6-5 details eight factors to be considered, those are:

1. Standard of living established during the marriage;
2. Duration of the marriage;
3. Age and physical and emotional condition of both parties;
4. Financial resources of each party;
5. If applicable, the time necessary for either party to acquire sufficient education or training to enable him/her to find appropriate employment;
6. Contribution of each party to the marriage, including but not limited to, services rendered in homemaking, child care, education, and

career building of the other party;

7. Condition of the parties, including the separate estate, earning capacity and fixed liabilities; and
8. Such other relevant factors as deemed equitable and proper.¹⁶

Disregarding these factors, this Author has often heard the “Rule of Thumb” that the amount of alimony should be equal to a “child’s portion” rule; that “rule” is “derived” using the old child support guidelines. Under those old guidelines one child would receive 17 percent - 23 percent of the Payer’s Gross Income as child support. This “rule” puts the spouse-recipient into the child’s position, and the amount of alimony for this “one child” would be calculated in the same fashion – i.e., 20 percent of the Payer’s Gross Income. Is that the right amount? Too much? Too little? Is this supported by the facts of the case and the application of the above factors?

And another approach preferred for establishing the amount of alimony to be paid independent of the factors listed is to establish the Payer’s Net Income; the “rule of thumb” that a Payer SHALL not pay an amount of child support and alimony that is more than 50 percent of that net income is then applied, with the amount of alimony being no more than the remainder when the child support amount is subtracted from the net income figure. Again, is that the right amount? Too much? Too little? Is this supported by the facts of the case and the application of the above factors?



B. TERM: As to the term of alimony (length of time of payment), Georgia law generally provides that the alimony payment will continue until the remarriage of the recipient or the death of the payer or the recipient unless otherwise provided. While there is no legal guideline for the term, this Author asserts that many of the factors for consideration in determining the amount of the alimony also provide guidance in establishing a term that fits the facts of the case. In his article Mr. Wilson observed that about 15 years ago, a “general rule of thumb” came into being – that rule being that the term of alimony would be one-third ($\frac{1}{3}$) to one-half ($\frac{1}{2}$) the term of the marriage;¹⁷ as a mediator, I hear this very often. However, more is more – and as also observed by Mr. Wilson – I as a mediator am hearing one-fourth to one-fifth of the term of the marriage or, i.e., one year of alimony for every four or five years of marriage. Such a “rule of thumb” has no foundation in the law and may or may not have any basis in the particular facts of each case.

In preparing this article, this author reviewed an article entitled “The Divorce Spousal Calculator – An Alimony Formula Rescue” by Scott R. Stevenson and Justin L. Kelsey. This article was revised in February of 2010; it was written to introduce the “Divorce Spousal Support Calculator”; this is described as “... a tool ... to enable the family law practitioner to better advise their client ... where a primary issue is alimony ...”(See, www.alimonyformula.com).



This article reviewed 12 alimony awards – amount and term – under the laws of various states and under standards proffered by various professional organizations and judicial scholars. The basic facts were:

- A marriage of 19 years;
- No children;
- Husband’s annual gross income is \$125,000;
- Wife’s annual gross income is \$25,000; and
- There are not other assets to fund an “alimony buyout”.

Does Husband pay alimony? If so, what is the amount and the term?

A summary of the awards are as follows:

	ALIMONY AWARD	ALIMONY TERM ¹⁸
HIGH	\$41,667	PERMANENT ¹⁹
Low	\$23,000	3 YEARS ²⁰
AVG.	\$30,398	13 YEARS, 2 MONTHS ²¹

This author found this article and the many mathematical approaches to alimony to be very informative. Additionally, this author found some extremely important “words of wisdom” in this article. Those were: “... these formulas, guidelines and recommendations (detailed and applied in this article) do not take into account the many other factors required for consideration in each individual case...” (p. 24) [Emphasis added]. This comment certainly would apply to the referenced “Rules of Thumb” mentioned in this article and now being asserted by attorneys as to amount and terms of alimony (and for that matter, the Rule of Thumb discussed below as to Equitable Division).

Furthermore, this author would note that the average amount of alimony determined using most of the formulas reviewed exceeds the “child’s portion” “Rule of Thumb” for alimony – that is 20 percent of Payer’s income which is \$25,000 – and the average term exceeds even the one-half of the marriage “Rule of Thumb” of 9 ½ years.

This author believes that all of this leads to an inescapable conclusion: The facts of the case and the application of the factors detailed in the law must control. Despite the disdain with which the concept of “alimony” is viewed, the payment of alimony may in fact be called for and supported by the facts and the law.²² This being said, this author must acknowledge that the specific facts of each case can control only to the extent developed by a party in conjunction with counsel. Two examples. A party seeking alimony out of a desire to go to school to enable the obtaining of job – not return to school to get a third degree – needs to have the specifics – i.e., course of instruction desired; school alternatives; time required; probable cost. The simple desire to return to school or the sense of entitlement to alimony usually does not carry the day – and frankly should not carry the day. Alternatively,

if a party is against the payment of alimony and is arguing that the spouse “can get a job,” provide some evidence that there is in fact a job market for the spouse and of the estimated earnings.²³

Equitable Division

Turning to division of marital property, prior to 1982, Georgia was known as a ‘title state;’ if a piece of property were titled in just one spouse’s name, attorneys used such “legal tools” as trust – actual, constructive/implied – gifts, and contract (promises between spouses) to have that property awarded to the non-titled spouse.

Then in 1982, a divided Supreme Court of Georgia (two dissenters) rendered the opinion in *Stokes v. Stokes*, 246 Ga. 765, 273 S.E.2d (1980). This case involved competing claims to a house – property had been deeded to Husband by Wife’s Father, a house had been built, and then Husband deeded the property to Wife. While the first line of the opinion is: “[T]he facts of this alimony and property division case are relatively unexceptional”, the Court announced the concept of ‘EQUITABLE DIVISION of MARITAL PROPERTY,’ an exceptional holding.

The court very specifically defined the parameters of its deliberations and holding. The Court stated: “...[W]e deal here solely with the authority of the trier hearing an alimony case to award to one spouse real property titled in the name of the other spouse where the basis of such award is neither alimony, partitioning, trust nor fraud, but is “equitable division of property.” [*Stokes* @ p. 171].

The court then reviewed a variety of earlier Georgia cases showing that this State had for some time begun a “transition” from the title concept of property and had been making awards/divisions of property on the basis of the equities. Finding that a “... court has the ancillary jurisdiction to determine the equitable interest of either spouse in the real or personal property owned, either in whole or in part, by the other spouse...” (quoting from *McConaughy and Hinchey, Georgia Divorce, Alimony and Child Support*, 1975 Edition, §12-2, p. 179); the Court then affirmed the jury’s award of an interest in the house titled solely in Wife’s name.

However, at least to this author, as important as the majority decision recognizing the concept of ‘Equitable Division’ was the concurring opinion of Justice Harold Hill; in his concurrence, Hill delineated a three (3) step approach (*Stokes* @ p. 174) to ‘Equitable Division’ and identified several factors that should be considered by the fact finder in deciding what division of the marital estate would be “equitable;” those factors (not that different from those detailed above as to alimony) are:

1. The duration of the marriage, and any prior marriage of either party;
2. The age, health and employability of each party;
3. The contribution or service of each spouse to the family unit;
4. The amount and sources of income, (separate)

estate, debts, liabilities as well as debts and liabilities against this separate property;

5. The financial and income needs of each of the parties;
6. The marital estate and sources of income as well as related debts and liabilities; and,
7. The opportunity of each for future acquisition of assets and income by employment or otherwise.

Note: These factors identified by Justice Hill are now a part of the Suggested Pattern Jury Charges published by the Council of Superior Court Judges of Georgia (although stated in a different sequence and not verbatim).

This author has found no article, case, or other source that proffers a “Rule of Thumb” as to Equitable Division like that referenced as to alimony. However, as a mediator I am often told that (i) Georgia Law is “50-50,” or (ii) Georgia Law requires “50-50.”²⁴ Yet, nowhere in the *Stokes* opinion, nowhere in the more than 50 cases citing *Stokes*, nowhere in the Court’s Pattern Jury Charges, and nowhere in any other applicable Law is a 50-50 division dictated or even a presumption suggested/recommended. Again – as with the amount of and the term of alimony – it is fact dependent, with the determination of “equitability” being a moving target.

Equitable Division v. Alimony

I purposely presented these two concepts – Equitable Division “v.” Alimony – in the adversarial “v;” can these “live together” and can they be considered and awarded based on the same facts? The elementary answer is “yes;” but how is the best done?

Hill answered this twice in his concurring opinion; first, in detailing the factors to be considered in making an “equitable division”, he asks (*Stokes* @ p. 174) “... whether the appointment (of the marital estate) is in lieu of or in addition to permanent alimony (referring readers to his Paragraph 3 immediately below which specifically addressed an award of alimony (*Stokes* @ p. 174).

Then in that Paragraph 3 – after determining each party’s separate estate and after determining and equitably dividing the marital estate – the fact finder is to “... [P]rovide permanent alimony, if it sees fit to do so...”

The Suggested Pattern Jury Charges (22.200 “Introduction to Alimony”) provides that the fact finder “... may decide equitable division before deciding alimony, or ... may decide alimony before deciding equitable division...”

Regardless of the sequencing of consideration, the award of “alimony” and the determination of an “equitable division” are independent determinations that should also be viewed as “co-dependent²⁵”. The same Pattern Jury Charge states that the fact finder has four options: “... You (fact finder) may: (1) grant alimony and no equitable division; (2) may grant equitable division and not alimony, (3) grant both, or (4) grant neither, according to the facts ...

and the law..." Each divorce must address this adversarial "v", and one of the four very deliberate determinations MUST be made in every case according to the specific facts.

Conclusion

Wilson's article began with the word "Requiem." A Requiem is sometimes referred to as a "Mass for the Dead;" even if not a part of a religious ceremony, the "Requiem" is most associated with death (or musical compositions associated with death). A possible reading of Wilson's article is that alimony of any significant amount and term and that any "Equitable Division" other than 50-50 is "dead."

While I completely agree with Wilson's analysis, I would submit that the writing of the actual Requiem has yet to be completed; however, the concern of this author is that the 'Rules of Thumb' have resulted in a "composition" of the Requiem that is much further along in practice than in the Law. And, the resolution of cases based on "Rules of Thumb" void of factual application of statutory and case law furthers and even promotes and facilitates the completion of that Requiem.

A person cannot point straight with the thumb; at an early age we learn that the "turn" in the thumb is better for hitch-hiking and for being oppositional to the other fingers. Similarly, "Rules of Thumb" do not point straight. If you as a practitioner choose to use them – whether seeking or opposing alimony, or whether seeking or opposing a more than 50-50 equitable division – then use the "Rules of Thumb" cautiously and always tempered and modified by the applicable Law and the specific facts.²⁶ *FLR*



Admitted in 1978, Jim Holmes has been practicing all aspects of family law since 1979. He is a certified mediator, arbitrator and case evaluator as well as a certified collaborative lawyer. Holmes specializes in complex financial issues and custody issues.

(Endnotes)

- 1 I thank John Wilson of Levine & Smith, Patty Shewmaker of Lynch & Shewmaker, and Shannon Hicks, Law Clerk to Hon. Clarence Seeliger for their review of earlier drafts of this article and for their individual and collective valuable critiques and suggestions.
- 2 Earliest citation of phrase was in Sue William Hopes' *The Complex Fencing Master*, 2nd Ed., 1692.
- 3 Wikipedia, Answers.com, Phrase-Finder, world wide words
- 4 Rulesofthumb.org
- 5 Wikipedia.com & Answers.com
- 6 *STOKES V. STOKES*, 246 Ga. 765, 273 S.E.2d 169 (1980), as "flushed out" and defined in its progeny. (This author found over 50 cases that have cited the Stokes opinion).
- 7 The author's initial title for this article were was HAS 'DOUBLE JEOPARDY' COME TO THE FAMILY LAW PRACTICE?. 'Double Jeopardy', simply stated, is the procedural defense in criminal law that prevents an individual from being tried twice for the same (or similar) crime.
- 8 *The Family Law Review*, April, 2008, pps 4-8. *The Family Law Review* is a publication of the Family Law Section of the State Bar of Georgia.
- 9 The reference to "woman" is not meant to assert or imply a gender bias. This expectation is applied equally to the non-earning spouse regardless of gender.
- 10 The reduction in the amount of child support produced under the new Child Support Guidelines – and thereby leaving more disposable income with which to pay alimony – has not produced rush to pay more alimony.
- 11 "Basic Child Support" is based solely on the combined income of the parents, with the amount of child support for that level of combined income being found in the Support Table. "Presumptive Amount of Child Support" adds to the calculation the cost of medical insurance for the children and the cost of child care incurred so that a parent may work outside the home.
- 12 Wilson at P. 4. See FN 7.
- 13 An interesting phenomena of the new Child Support guidelines is that imputing income to the non-working or under-employed spouse may in fact increase the level of support to be paid, that is the 'Presumptive Level of Support'. Remember, a "policy goal" of these new Child Support Guidelines is to obtain for the minor child/children a level of support which would continue as much as possible the same standard of living had the family stayed intact. While the imputing of income to a spouse (or adding the new and lower income of the spouse that has returned to the work force) will reduce the percentage share of the total marital income of the higher-earning spouse, that lower percentage share could still be a higher dollar amount of monthly support than the amount would have been if no income were imputed. Also, if the imputing of income and the spouse's return to work raises the requirement of child care/after-school care, the 'Presumptive Level of Child Support' number will very often be considerably higher. So, watch out what you ask for.]
- 14 Ms. Morgan's Family Law Consulting provides research and writing services to family law attorneys nationwide. A review of her vitae on the organization's web site (www.famlawconsult.com) reveals her multiple (if not prolific) writings in the family law arena. She and Brett R. Turner are co-authoring the forthcoming "Alimony Handbook" to be published by the American Bar Association.
- 15 *Family Advocate*, Winter 2012; Vol. 34, No. 3, ABA Section of Family Law, pps 8-11.
- 16 This Author reviewed the alimony provisions of most states east of Mississippi. These factors were rather universal; most also had the general factor of, "any other facts and circumstances the trier of fact wishes to consider". Three other

factors found that were quite interesting were (1) Cost of Health Insurance, (2) Need to fund retirement benefits beyond Social Security, and (3) Economic misconduct of a party.

- 17 Wilson at page 4. See FN 8.
- 18 Four of the twelve alimony calculations presented did not suggest a term.
- 19 This permanent award is subject to termination upon remarriage or death.
- 20 Generally, the State of Texas allows no more than three (3) years of alimony (unless there is disabling mental or physical conditions).
- 21 Texas not included
- 22 Also, the payment of alimony in some instances could make available more money for the two households. The Payer is often losing some or all of the itemized deductions and exemptions and at the same time becoming a single taxpayer with higher tax rates applying at lower levels of income. The W-4 must be changed or a significant amount of income tax will not be withheld. And often, the Payee (recipient of the alimony) has the exemptions and would be filing as 'Head of Household' with a lower income. Shifting income to the lower income (and lower tax rate) party while replacing the lost deductions and exemptions with the alimony deduction may result in more money being available. This scenario gets even more dramatic if substantial child care is to be paid. NOTE: This 'After-Tax' Cash-Flow determination can only be estimated with any accuracy by preparing several 'Pro-Forma' (trial run) tax returns.
- 23 Evidence such as want ads for the position, or information from salary.com or other sites on what such positions are paying. But see FN 13.
- 24 Mr. Wilson noted: "...The disposition of marital property has changed. Overwhelmingly it is divided equally between the spouses regardless of their respective income ... Inevitably, such a division is less favorable to the spouse with less income earning ability...". Wilson at p. 5. See FN 8.
- 25 The topics of property division and of alimony are addressed in Sections 307 and 308 respectively of the "The Uniform Marriage and Divorce Act". The "Comment" to Section 308 states in part: "...The dual intention of this Section and Section 307 is to encourage the court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance...". If this approach is taken, then the Rule of Thumb of 50-50 is even more called into question and much more inequitable (though equal) to the non-working or significantly lower income producing spouse.
- 26 Using another criminal law term (in keeping with FN 7), I respectfully suggest that each attorney "MIRANDIZE" your client; by that I mean give your client a copy of O.C.G.A. §19-6-5 and/or the Pattern Jury Charges on Alimony and the Pattern Instructions and/or a copy of Mr. Justice Hill's concurring opinion in *Stokes* on Equitable Division. I believe that an attorney can only be as good as the information and input received from the client, and it MUST be the client that at least takes the "first shot" at establishing the case for or against alimony and at establishing what is "equitable" in his/her case. This author believes that this active involvement of the client invokes perhaps the greatest protection for the client against a results based on the rote application of 'Rules of Thumb'. This active, informed involvement of the client is the 'Miranda Warning' in a divorce case.

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Enforcement of Islamic Dowry

by Eric A. Ballinger

In a traditional Islamic marriage, it is customary for a written contract containing provisions for a dowry. This is not similar to the Western concept of dowry where the family of the bride pays the groom to take the hand of their daughter. In the custom of the Islamic world, the groom pays the dowry to his bride as her own property in the event of the death of the groom or divorce. There is no doubt that these written marriage contracts are enforceable under the Shari'a or Islamic law, but are there are questions as to their enforceability in civil courts in the United States.

The enforcement of these contracts is met with some controversy. Some groups contend that enforcement of nominal amounts in dowry agreements deprive women of remedies available to them under state law theories of recovery regarding equitable division of property or community property as well as alimony.¹ On the other side, there are contentions that many dowry agreements amount to a windfall to a wife on the entry of a divorce.

The appellate courts in Georgia have yet to deal with the issue, however, courts in other jurisdictions have ruled in such cases with some surprising results. These agreements that are grounded in centuries old religious tradition and written in vague terms compared to formally drafted ante-nuptial agreements may seem unenforceable. However in the application of neutral principles of law, these agreements may be enforceable under Georgia law. The Islamic marriage contract contemplates the payment of a dowry both at the time of marriage as well as upon the death of the husband or divorce. While these agreements may be construed as contracts in contemplation of marriage, the implication of divorce may very well render the agreement as a contract in contemplation of divorce and subject it to the rules of contract construction. Furthermore, if these agreements are deemed to be valid ante-nuptial agreements, then the courts will have to determine their enforceability in accordance with the case law on subject.

Just as in Western culture, marriage is an important part of the Islamic world, however it comes with its own traditions and taboos. Prior to marriage, a man and woman are not allowed to be alone together. While the Koran espouses that marriage is a joinder of equal partners with separate roles, it is generally recognized that the husband plays a dominant role in the marriage.² A Muslim man may marry a woman of equal or lower status than him and is free to marry a non-Muslim. Women are prohibited from marrying a non-Muslim and must marry equal or above their station in life.³ While an Islamic marriage ceremony involves a cleric or Imam, marriage in Islam is contractual in nature and not sacramental.⁴

Under the Shari'a, to constitute a valid marriage contract, there must be an offer and an acceptance.⁵

Generally, the groom makes the offer to the wife through her representative, her father, grandfather or uncle. While the Islamic law requires that wife is free to accept or reject the contract, culturally young women are under a great deal of pressure to accept marriage contracts from men who the family deems to be acceptable.⁶ An essential element of the Islamic marriage contract is the dowry, also known as mahr, sadaq, ujr or fareeda.⁷ In some cases the dowry is pledged to the wife upon the formal engagement of the couple.

The dowry is money or goods that the husband pays to the wife and becomes her property upon the marriage of the parties. There is no law specifying the amount required and value is based on the, "age, beauty and virginity of the bride."⁸ According to Islamic law, the dowry is irrevocable by the husband and cannot be claimed by the wife's family.⁹ The intent of the dowry is to provide for the wife in the event of the divorce as Islamic law allows for the husband a great deal of latitude to divorce his wife. There are two parts to the dowry. The first is the prompt and it is payable at the time of the marriage ceremony. The second is the deferred and it is payable to the wife at the time of the death of the husband or divorce.¹⁰ It is usual for the family to negotiate a nominal prompt and a large deferred to make divorce more difficult for the husband.

Islam does not promote divorce and considers a marriage to be a life-long bond. Because the husband is deemed to carry the financial burden in the marriage, Shari'a gives the husband broad discretion to divorce his wife.¹¹ A husband need only pronounce the talaq, "I divorce thee..." three times in order to end the marriage.¹² On the other hand, in order for the husband to be free to marry again, Islamic law requires that he pay the deferred portion of the dowry in full.¹³ A wife may divorce her husband, however if she so chooses, she will forfeit her dowry and may have to repay the prompt portion back to the husband.¹⁴ In a divorce sought by a wife, called a khul'a, it is understood that the wife is to reimburse the husband for what he has put out for her.¹⁵

While the marriage contract in an Islamic ceremony is certainly enforceable in Islamic countries and amongst clerics who minister to the faithful, there is some question as to the enforcement of these contracts in civil courts in the United States. While some contend there is bias against Moslems in this country, the issues raised in enforcement concern whether or not the courts can enforce religious based contracts, First Amendment issues, whether or not the agreements meet the criteria for valid contracts and whether or not the agreements meet the requirement for a valid pre-nuptial agreement. Courts around the country have addressed the issue of the Islamic dowry and in some cases enforced the provisions.

In 1985 the Appellate Division of the Supreme Court of

New York in *Aziz v. Aziz*¹⁶ enforced the dowry provisions of and Islamic marriage contract, holding that they could enforce the non-religious portions of a religious agreement. The New York court looked to similar rulings where Jewish marriage agreements were determined to be enforceable.¹⁷ Likewise, the appellate court in Florida upheld the award of \$50,000 judgment to the wife under a sadaq in *Alrilich v. Elchahal*,¹⁸ finding that the contract was a valid ante-nuptial agreement.

On the other hand, the Court of Appeals in California declined to enforce the provisions where wife had filed for divorce in *Dajani v. Dajani*.¹⁹ The Court applied principles of Islamic law and tradition that hold that the wife forfeits her dowry if she chooses to divorce her husband. The court also applied state law principles involving ante-nuptial agreements, holding that the enforcement of the agreement would promote profiteering through divorce.

The application of the First Amendment to the enforcement of the Islamic marriage contract in the civil courts was raised in the New Jersey Superior Court in *Odatalla v. Odatalla*.²⁰ In this case, a bride and groom entered into arms length negotiations along with witnesses, all of which was captured on video and after the documents were signed and witnessed, the ceremony took place. The trial court enforced the dowry, giving a judgment in favor of the wife. The husband appealed, contending that the enforcing the contract violated the Establishment clause of the First Amendment and the dowry portions did not meet the requirements of a contract under New Jersey law.

The New Jersey appellate court looked to the U.S. Supreme Court decision in *Jones v. Wolf*²¹ for guidance in applying “neutral-principles” of law. Jones arises out of property dispute between two factions of a Georgia church congregation. While one faction sued in civil court for a determination of ownership of the church property, the other group objected, contending that civil courts have no authority to decide church ownership based on doctrinal issues. Justice Blackmun, writing for the majority held;

We cannot agree, however, that the First Amendment requires that States to adopt a rule of compulsory deference to religious authority resolving church property disputes, even when no doctrinal controversy is involved²².

The Supreme Court applied a “neutral-principles” approach, claiming its advantages are completely secular and flexible enough to accommodate all forms of religious organizations. “The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges.”²³ “Furthermore, the neutral-principles analysis shares the peculiar genius in ordering private rights and obligations to reflect the intentions of the parties.”²⁴

The New Jersey court in *Odatalla* held that the application of the neutral principles analysis in the issue of Islamic dowry was a logical extension of the *Jones v. Wolf* analysis²⁵. In applying neutral principles of contract law, the Court was able determine that the marriage contract did meet the state law requirements of a contract and was enforceable.

There has been some issue as to the enforceability of the dowry provisions as a valid ante-nuptial agreement. In Texas, the appellate court reversed and remanded the trial court’s decision to enforce the provisions of the mahr in *Ahmed v. Ahmed*²⁶. While the parties did participate in an Islamic marriage ceremony complete with a mahr agreement, the uncontroverted evidence was that the parties did participate in a civil ceremony six months prior to the Islamic ceremony and as such the agreement was not made prior to the marriage. The appellate court found that there was no sufficient evidence to enforce the agreement as a post-nuptial agreement in that there was no provision as to whether the mahr was to be paid out of the separate property of the husband or the marital property.²⁷

In *Zawahiri v. Alwattar*²⁸ the Ohio appellate courts refused to enforce the Islamic marriage contract both on the grounds that it violated the Establishment Clause of the First Amendment and it did not meet the requirements under Ohio law for a valid pre-nuptial agreement. The court can only enforce a pre-nuptial agreement if 1) the parties entered into it without fraud, duress, coercion or overreaching; 2) there was a full disclosure of the nature, value and extent of the prospective spouse’s property; and 3) the terms do no promote or encourage divorce or profiteering by divorce.²⁹ The Court also pointed out that prenuptial agreements also must meet all of the requirements of a contract, to include an offer, acceptance, contractual capacity, consideration and manifestation of mutual assent.³⁰

The court found that the marriage contract was not discussed until the day of the marriage after the guests had arrived. After a hurried negotiation the husband agreed to a postponed mahr because he was embarrassed and



stressed. As such, the court found that the agreement was entered due to overreaching or coercion.³¹

In 2010 the Washington Court of Appeals reversed the trial courts enforcement of the mahr in *Obaidi v. Qayoum*.³² The Court held that the trial court erred in applying Islamic law and principles of fault to the application of the mahr agreement.³³ The Court applied neutral principles as set out in *Jones v. Wolf* and found that the contract was not enforceable as it was negotiated 15 minutes before the ceremony, prior to that the husband had never heard of a mahr and the agreement was written in Farsi, which the husband neither spoke or wrote. The appellate court even took into consideration that the trial court made findings that the husband may have been under duress.³⁴

However, in *Rahman v. Hassain*³⁵, the appellate court in New Jersey once again enforced the provisions of the mahr, requiring the wife to refund the dowry she was paid. The court found that the wife's pre-existing mental health conditions was an impediment to marriage under Islamic law and the interpretation of Shari 'a that she would have to return the money.

While the appellate courts in Georgia have yet to deal with the issue of the Islamic dowry, the application of neutral principles of Georgia law will give the court some level of direction and guidance to determine the enforceability of such an agreement. The Georgia Code provides that contracts in contemplation of marriage are to be liberally construed to carry out the intent of the parties and there is no requirement of any specific language, only that the contract must be signed by the parties to be married and in the presence of two witnesses.³⁶ Shari 'a requires that the contract for marriage must bear two witnesses in order to attest to the existence of the marriage, to make sure that the relationship is not illicit. However the Supreme Court of Georgia has held in *Lawrence v. Lawrence*³⁷ that a contract that references provisions for alimony and property division is a contract in contemplation of divorce and not subject to the same rules of construction.

The Supreme Court of Georgia ruled in *Cousins v. Cousins*³⁸ that where parties enter into a marital settlement agreement, the its meaning and effect should be determined according to the usual rules of contract construction. The Georgia Code provides that construction of the contract is a question of law for the courts to determine.³⁹ The cardinal rule of contract construction is to take the document as a whole to determine the intentions of the parties.⁴⁰ This can be difficult as most Islamic marriage contracts are hastily written at the close to the time of the ceremony and are short on details. That would open the contract to the statutory rules of contract construction to include the inadmissibility of parole evidence to explain the terms of the written agreement.⁴¹ Further, some may argue that the terms of the written agreement lack and consideration. In order to form a contract under Georgia law, there is required valuable consideration.⁴² While there may be some question as to consideration in the Islamic marriage documents, the

Georgia code provides that marriage in and of itself can be valuable consideration for a contract.⁴³

If the courts determine the requirements are met for the existence of a contract, the three-pronged test for enforceability set out in the *Scherer v. Scherer*⁴⁴ must be applied. (1) was the agreement obtained through fraud, duress or mistake, or through misrepresentation or nondisclosure of material facts? (2) Is the agreement unconscionable? (3) Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?⁴⁵ Only of the answer to all three questions is "no" can the agreement be considered enforceable. However, given the appropriate facts and circumstances, the Islamic marriage contract can be considered enforceable under Georgia law, applying neutral principles as outlined in *Jones v. Wolf*.⁴⁶

However, in protection of the economically disadvantaged party, the Georgia Supreme Court has found ante-nuptial agreements unenforceable where the economically advantaged party has failed to disclose their income and assets prior to the marriage.⁴⁷ In fact there is an affirmative duty of each party to disclose the material facts and there is no requirement that the other spouse exercise due diligence to determine the assets of the other.⁴⁸ On the other hand, persons planning marriage are not in a confidential relationship and each must exercise ordinary diligence in verifying contract terms.⁴⁹ If the parties enter into the agreement with full knowledge of each other's economic status the agreement may be enforceable, despite the financial disparity.⁵⁰

While the courts thought the United States have made desperate rulings on the issue of the enforcement of the Islamic dowry, they have generally followed the same logic through the determination whether or not to enforce the contract. They have cleared the issue of the First Amendment by applying neutral principles to and looked to the non-religious portions of the agreement. In doing so, the courts look to the agreement to determine if the agreement meets the requirement of the contract under state law and then determines if the agreement is enforceable as an ante-nuptial agreement. The courts have on few circumstances relied on the Muslim traditions and Shari 'a to determine the intent of the parties, neutral principles of contract and family law decide these cases.

The Georgia Appellate Courts have yet to decide the issues of the enforceability of Islamic marriage contracts and dowry provisions, the Courts are well equipped with the tools it needs to decide the issues. The clear guidance from other jurisdictions points for the Courts to interpret these religious documents in using the existing laws regarding contracts and ante-nuptial agreements. **FLR**



Eric Ballinger is a sole practitioner in Canton, Ga. He has practiced Family Law for 18 years. He also sits on the Board of Governors for the State Bar of Georgia.

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Equitable Relief From Child Support

by Mark McManus

A Husband and Wife divorce in 2005. They have one child. The Husband and Wife now live in different counties. At the age of 14 the child desires to stay with the Father and attend school in that county for athletic reasons. The Father and Mother agree to allow the child to live with the Father and attend the school in that county. Father agreed in the divorce to pay \$800 per month in child support. The first three months the child is with him, he continues to pay the \$800 per month. Then, he stops paying the child support. He does not think it is fair to pay it to the Mother when the child lives with him, as he is providing for the total support of the child, except for when the child goes to visit his Mother for a weekend maybe once a month. After six months of no child support, the Mother demands the back child support saying it is an agreement and an order of the court. When the father refuses, the Mother files contempt for child support arrears and attorney fees in the county where the divorce was granted. The Father then files a petition for modification of custody, child support, and visitation in the county where the Mother lives. In response to the contempt motion, the Father files an answer and also seeks relief from the child support under a theory of equitable relief.

The Supreme Court of Georgia, in *Meredith v. Meredith*, 234 S.E.2d 510, 238 Ga. 595 established the general rule in regards to parties seeking relief from child support obligations based upon their own voluntary actions without court approval as follows:

This court has repeatedly held that the parties may not, by their private agreement foreclose the court from exercising its judgment as to the question of alimony to be awarded in a divorce decree. See Dodson v. Dodson, 231 Ga. 789 (5), 204 S.E.2d 109 (1974), and cases there cited. It would be anomalous indeed if the parties, by private agreement after the decree, could modify the terms of a judgment which they had no power to dictate to the court in the first place. Code Ann. ' 30-220 provides the exclusive method [238 Ga. 596] by which the alimony provisions of a divorce decree may be revised or modified. If the parties to a divorce decree agree to a modification of alimony, they must present their agreement to the court for its approval. This appears to be the rule in a majority of the states which have addressed this question. La Clare v. La Clare, 265 Cal. App.2d 511, 71 Cal.Rptr. 516 (1968); Cahill v. Cahill, 316 Ill.App. 324, 45 N.E.2d 69 (1942); H. Clark, The Law of Domestic Relations in the United States ' 14.09 at 464-465 (1968).

However, the Supreme Court of Georgia carved out an exception in the following case:

Howard Thomas Daniel v. Glenda Sutton Daniel, 238 S.E.2d 108, 239 Ga. 466, No. 32269. Supreme Court of Georgia. Sept. 7, 1977.

This is an appeal from an order of the Superior Court of Terrell County granting the appellee's motion for summary judgment on the appellant's counterclaim in a child support modification action.

The appellant-husband and appellee-wife were divorced in 1974. Issues of child custody, child support, alimony and property settlement were agreed to by the parties and incorporated into the final divorce judgment. On July 9, 1976, the appellee filed a petition to modify the child support provisions of the divorce judgment. In a separate and distinct proceeding, the appellee obtained a writ of fieri facias against the appellant for unpaid child support payments for the months of September 1975 through February of 1976 pursuant to Code Ann. ' 30-204. In addition to answering the modification petition, the appellant filed a counterclaim contending that the procedures set forth in Code Ann. ' 30-204 are unconstitutional and that the alleged child support arrearages are not required under the divorce judgment or should not be required because the parties' children were in his custody during those months by mutual [239 Ga. 467] agreement. The appellee filed a motion for summary judgment on the appellant's counterclaim which was granted. The appellant appeals.

In Wood v. Atkinson, 231 Ga. 271, 201 S.E.2d 394 (1973) we upheld the constitutionality of Code Ann. ' 30-204. We have recently reviewed and upheld the principles of that decision in West Point Pepperell v. Springfield, 238 Ga. 655, 656-657, 235 S.E.2d 24 (1977). We do not agree with the appellant that decisions of the United



See Relief on pg. 38

Case Law Update

by Vic Valmus

ALIMONY/ATTORNEY'S FEES

Branham vs. Branham, S11A1896 (Jan. 9, 2012)

The parties were divorced in June of 2009 and starting July 1, the husband was required to pay periodic alimony payments of \$120 for 120 months or until the Wife dies, remarries or cohabitates with someone else in a meretricious relationship. In addition, the Wife was to pay the monthly mortgage on the marital residence she was awarded pursuant to the property settlement. The Husband fell behind on his alimony obligations and the Wife failed to keep up with the monthly mortgage payments. In November, 2009, the Husband filed a contempt action against the Wife, and in February 2010 the Husband initiated a separate proceeding to cease or modify the alimony obligations alleging the Wife was cohabitating with someone in a meretricious relationship. In January of 2011, the Wife filed her own separate contempt action against the Husband. A consolidated bench trial was held on all three actions, and the court found that (1) the Wife was in contempt for failing to make mortgage payments on a timely basis, (2) the Husband was in contempt for failing to pay the Wife each installment for periodic alimony as it became due, and (3) the Husband's Petition to Cease or Modify the Alimony Obligations based on the Wife's meretricious relationship was denied. Even though it denied the Husband's Petition to Modify, the court reduced the Husband's obligation for unpaid periodic alimony that accrued from July 1, 2009, through February of 2011 to zero. Since both parties were found in contempt, the Trail Court ruled each party was responsible for their own attorney's fee. The Wife appeals and the Supreme Court affirms in part and reverses in part.

The Wife argues the Trail Court erred by retroactively reducing the Husband's alimony obligation. The retroactive modification of an alimony obligation would vitiate the finality of the Judgment obtained as to each past-due installment. A Judgment modifying an alimony obligation is effective no earlier than the date of the Judgment. The Trail Court's ruling is clearly contrary to rules set forth in *Hendrix v. Stone*, and therefore must be reversed.

The Wife further argues that the Trail Court failed to award her attorney's fees pursuant to O.C.G.A. § 19-6-19(b), which states in pertinent part that if a petitioner files an action to modify alimony based upon cohabitation, and it does not prevail on the petition, the Petitioner shall be liable for reasonable fees incurred by the respondent for the defense of the action. However, the record shows that directly after the ruling, that each party would be responsible for his own attorney's fees and the trial court asked if the parties had any questions regarding the ruling. The Wife did not question the award of attorney's fees. She never requested attorney's fees and she failed to present any evidence supporting an award of attorney's fees.

Accordingly, the Wife acquiesced the trial court's ruling and waived the right to pursue this argument on appeal.

ALIMONY AND ATTORNEY'S FEES

Bowerman v. Bowerman, A11A1895 (March 1, 2012)

The parties were divorced by way of Final Judgment and Decree in September, 2006, which incorporated the parties' Settlement Agreement resolving all issues of the marriage. In May of 2007, certain modifications for visitation with two minor children were made. In 2009, the Father filed a Petition for Contempt and shortly thereafter the Mother filed a Counterclaim for Contempt. The Court found both parties in contempt and ordered a licensed marriage and family counselor to serve as permanent coordinator in the action. In March of 2011, the Father filed an amendment to the Petition for Contempt, attaching a copy of a non-compliance memo of the counselor. The Court entered a final order granting the Husband \$5,800 in attorney's fees and expenses and reimbursement for payments to the counselor in the amount of \$3,400 and authorized the Husband to deduct the sum of \$9,200 from the payment of periodic alimony of \$10,000 per month at the rate of \$1,500 per month. The Wife appeals and the Court of Appeals affirms in part and reverses in part.

The Wife appeals, among other things, that the Court erred by allowing the Husband to offset the attorney's fees and expenses by reducing the alimony payment at the rate of \$1,500 per month. Here, after a decree of permanent alimony has become absolute, there is no authority given under the law by which a Trail Court is empowered to abrogate or modify the obligation imposed by decree unless a right has been reserved by consent of the parties in the Final Decree itself or an action is brought as provided under O.C.G.A. §19-6-18 through 19-6-25.

APPEAL

Edge v. Edge, S11A1532 (Feb. 27, 2012)

The parties were divorced in December of 2007. In March 2008, the Husband filed a Complaint for downward modification of his child support obligations and the Wife filed an Answer and Counterclaim for upward modification of child support. The Wife subsequently filed a Motion for Contempt for non-payment of the required support payments. In January of 2009, the Husband traveled to Afghanistan for his employment. Before leaving, the Husband informed his attorney of his new Atlanta address. In June of 2009, the Husband's attorney filed a Motion to Withdraw, but included an incorrect address for the Husband in her motion. In September of 2009, the Trial Court had a hearing on the case. The Husband was still in Afghanistan and did not appear. However, the Husband's attorney did appear and moved for a continuance and

asked that the Motion to Withdraw be granted. The Trial Court entered an order allowing the Husband's counsel to withdraw. The new hearing was set in October of 2009. The Husband's counsel sent notice of the withdrawal to the Husband's present address, but notice of the October hearing was sent to the incorrect address. The Husband was still in Afghanistan and claims he never received notice of the hearing.

In October of 2009, the Trial Court conducted a hearing and a Final Order awarding the Wife sole legal custody of the children and eliminating Husband's right to visitation was entered. The Husband was held in contempt for failure to pay child support, his child support obligation was increased, and he was ordered to pay the Wife's attorney's fees. The Husband first learned about the hearing when he received the Income Deduction Order in November of 2009. The Husband filed to set aside the Trial Court's order pursuant to O.C.G.A. 9-11-60(d)(2) arguing his lack of notice was his attorney's mistake by putting the incorrect address on the Notice of Hearing. In May of 2010, the Trial Court entered an Order setting aside the Final Judgment based solely on the mistake of the Husband's attorney. The Wife filed an Application for Discretionary Appeal. The Supreme Court reverses.

Generally, an order granting a motion to set aside leaves the case pending below and so must be appealed utilizing the interlocutory appeal procedures under O.C.G.A. §5-6-34(d). However, O.C.G.A. 5-6-34(a)(11) provides the right of direct appeal from all judgments or orders in child custody cases. Thus, the grant of a motion to set aside in a child custody case is directly appealable. In addition, an action seeking to change visitation qualifies for treatment as a child custody case, which is also subject to a direct appeal.

The Wife appeals arguing the Trial Court erred in setting aside the Final Order pursuant to O.C.G.A. 9-11-60(d)(2) which provides in pertinent part, a motion to set aside a judgment based upon fraud, accident, or mistake or act of the adverse party unmixed with negligence or fault of the Movant. Here, the Husband could not rely on the mistake of his own counsel as if his counsel were acting adversely to him. It has previously been held that a trial counselor's inexcusable neglect in filing no answer at all is insufficient grounds to set aside a judgment. Likewise, a trial counselor's failure to include a correct address on her Motion to Withdraw is an insufficient ground to set aside a judgment, which was the only basis the Trial Court considered in its Order.

CUSTODY

Shotwell v. Filip, Filip v. Filip, A11A1728 and A11A1729 (Feb. 13, 2012)

The parents were divorced in July 2002, with the Mother awarded primary custody of the son. A Joint Settlement Agreement stated each parent would be entitled to complete detailed information from any teacher or school giving instructions to the child, a copy of all reports, documents, detailed information from any doctor, and

furnished copies of all reports. In April of 2004, the Mother moved to Oklahoma for work reasons. When she moved, she left the child in the care and custody of the maternal grandmother in Missouri. Her home is about five hours away from the Mother's new residence in Oklahoma. The Mother assured the Father that the child would come and live with her once she got settled in Oklahoma. Father continued to reside in Georgia, but consistently visited his son in Missouri as he was able to. In 2005, the Father filed a Petition of Contempt against the Mother since she had interfered with his visitation rights by moving to a different state. However, the parties' Petition was dismissed after the parties entered into a Consent Order in 2006 modifying the Father's visitation rights.

The Mother was not able to secure a job in Missouri and continued to live in Oklahoma. The child continued to reside with the grandmother. Each year, unknown to the Father, the Mother executed a Power of Attorney in loco parentis in favor of the grandmother, giving the grandmother temporary physical custody and control of one son. The grandmother served as the day-to-day caregiver. The grandmother took responsibility of medical appointments, schooling, and extracurricular sporting activities. The Father continued to pay child support to the Mother, but the Mother did not pay any set amount to the grandmother for the child's expenses. The Father communicated solely with the grandmother regarding the child's visitation issues. All correspondence relating to the child was sent to the grandmother's address in Missouri.

In 2006, neither the Mother nor the grandmother provided the Father any report cards or other student cards, and in August of 2007, the Father called the child's school asking the school to send him copies of his child's report cards. Upon learning the Father made direct contact with the school, the grandmother became upset and indicated to the Father that he should have asked her for the school records. Thereafter, the situation between the Father and grandmother took a turn for the worse. She began limiting some of the Father's visitation with the child. In addition to limiting some of the visitation, the Mother and the grandmother enrolled the child in summer school without the knowledge of the Father, failed to provide him with medical records or timely include the Father's name on the requisite federal forms so he could have direct access to records. Even though the Mother continually reassured the Father that the child would come to live with her, he never did.

In October of 2009, the Father filed a Petition for Change of Custody and Child Support. The grandmother intervened in the case. The Father alleged, among other things, that the mother had voluntarily surrender custody of the child to the grandmother by living in a different state from the child in the past several years, and that his visitation rights had been improperly limited following the 2007 school records incident. An evidentiary hearing was heard, and the Trial Court granted the Father's Petition awarding him physical custody of the child, and gave visitation rights to the Mother and grandmother.

The trial court found there had been a material change of conditions because the Mother voluntarily surrendered her rights of physical custody and control over the son to the grandmother, and the Father's visits with the child had been limited by the grandmother following the 2007 school records incident, and the Father had not been included in or provided information regarding the major decisions affecting the child. The grandmother and Mother appeal and the Court of Appeals affirms.

The Mother argues that there is no material change of condition since the 2006 Consent Order modifying the Father's visitation after she moved to Oklahoma and the child began living with the grandmother in Missouri. A voluntary surrender of physical custody of the child by the custodial parent can constitute a material change of condition. By the time the 2006 Consent Order was entered, less than two years had passed since Mother moved to Oklahoma, and the Mother had recently purchased a home in Missouri and tried to secure employment there. However, by the time the Father filed the Petition to Change Custody, an additional three years had passed and the Mother remained in Oklahoma in the same job. The Mother testified at the hearing, that the son had become established in Missouri and that she worried about removing him from the environment because so much time had passed. An argument can still be construed that since the 2006 Consent Order was entered, it had evolved into a permanent custodial arrangement by the time the Father filed his Petition to Change Custody in 2009. Furthermore, there is evidence that the grandmother limited some of the Father's visitation in retaliation for the 2007 school records incident, and that the Mother and grandmother failed to notify the Father whenever the Mother executed a new Power of Attorney in loco parentis to the grandmother. These combined also support the trial courts' finding that there was a material change of condition.

The Mother also challenged the Court's ruling that it was in the best interest of the child to change physical custody to the Father. There was evidence that the mother had voluntarily surrendered her right of physical custody of the child to the grandmother, and where the custodial parent voluntarily surrenders her custodial rights to a third party, there is a prima facie right of custody vested in a noncustodial parent. At the hearing, the Father presented evidence from a licensed psychologist who opined that the Father is fit and a qualified person to have physical custody of his son, was able to meet the needs of the child and adjust him to a new home and that the counselor did not have any concerns regarding the Father's ability to parent the child. Therefore, the Trial Court was correct in finding that it was in the best interest of the child to live with the Father rather than the grandmother.

DISMISSAL

Bagwell v. Bagwell, S11A1316 (Jan. 23, 2012)

The parents were divorced in 2006. In the Final Judgment and Decree of Divorce, the Wife was awarded primary physical custody of their two minor children, with

her Husband paying child support. In May of 2010, the Husband, an attorney, filed pro se Petition for Downward Modification of Child Support alleging a substantial decrease in income and financial status since the divorce. Later, the Wife moved for sanctions against the Husband for his failure to respond to discovery. On Oct. 22, 2010, the court granted her Motion for Sanctions and Dismissed Husband's Petition for Modification of Child Support. In doing so, the Court stated that the Husband failure and refusal to respond to discovery was willful and intentional. The Husband's refusal to respond to discovery was even more egregious because he was an attorney. Fourteen days after the Superior Court announced its intention to dismiss, on Nov. 5, 2010, Husband filed the instant Second pro se Petition for Downward Modification of Child Support, again alleging a substantial downward change in his income and financial status. The Wife moved to dismiss the Modification Petition because of the two-year bar (citing O.C.G.A. §1906-15(k)(2)). On Jan. 13, 2011, the Superior Court issued an order allowing the subsequent modification to proceed, because the dismissal of the Husband's first modification was not adjudication on the merits, but simply a sanction. In addition, it stated that the action should be permitted to proceed in the interest of fundamental fairness and judicial economy. Wife appeals and Supreme Court reverses.

O.C.G.A. §1906-15(k)(2) prevents the filing of a petition for modification of child support within two years from the date of the Final Order of a previous petition to modify filed by the same parent, with certain narrow exceptions. The purpose of the prohibition is to prevent parties from excessive litigation over the same issues. Here, with specific exceptions, involuntarily dismissal constitutes adjudication upon the merits unless a trial court in its order of dismissal specifies otherwise. Dismissal, especially of a civil action as a sanction for failure of a party to comply with discovery, is adjudication on the merits. In dismissing Husband's first Petition of Modification, the Superior Court did not specify that the Order was not adjudication on the merits and it was a final Order on the claim for downward modification of child support.

The Superior Court's attempt in the second action to recant its dismissal of the Husband's first modification as simply a sanction and not adjudication on the merits so to render it outside the ambit of O.C.G.A. §1906-15(k)(2) is unavailable. Once an order of dismissal is entered, it may not be modified by the Trial Court outside the term of court in which it was issued in order to specify that it was without prejudice. This is not merely a clerical correction or alteration, but it is a substantial change. There is no question that the Jan. 13, 2011 Order was entered in a different term as the Superior Court Nov. 16, 2010, Nunc Pro Tunc Order was issued. Even assuming that the Superior Court had the authority to modify the Dismissal Order, the ruling determined that Husband's Petition for Modification thus was a Final Order triggering application of the two-year bar.

Husband also argues that there is an exception to the two-year bar based upon the involuntarily loss of

income and sustaining loss of income of 25 percent or more. However, the Husband did not expressly state this exception in his successive pleadings. However, even accepting the income figures set forth in the Husband's petition and that he sustained an involuntary loss of income in excess of the statutory to exception, it does not aid him in the attempt to avoid the two-year bar inasmuch as a relevant time frame for such alleged loss of income is from the date of the prior modification ruling. And, the material allegations of the present petition are essentially that of the prior Petition for Modification. The fact that the substantive assertions in the present Modification are identical with those in the dismissed Modification actions raises the doctrine of *res judicata*.

With regards to the policy argument that the interest of judicial economy shall be served by allowing the present Modification action to proceed, under the circumstances of this case, is quite to the contrary. Permitting excessive modification actions to survive is to reward a litigant for what has been determined to be the litigant's willful and intentional refusal to comply with ordinary Court procedures and processes which the litigant's own suit has set in motion.

EQUITABLE DISTRIBUTION

Shaw v. Shaw, S11F186 (Jan. 9, 2012)

The parties were married in 1968 and a divorce action was filed in March of 2009. All issues were resolved except equitable division of certain property, including unimproved real property in Florida that was received from a trust created by the Husband's mother, two Morgan Stanley accounts established by the Husband with inherited funds, and two deeded interests of 6.67 percent in an apartment complex. In a two-day bench trial, the court issued a Final Judgment and Decree of Divorce and divided the Florida property and two Morgan Stanley accounts equally, and made no disposition in regards to interest in the apartment complex. The Husband appeals and Supreme Court affirms.

The question of whether a particular item of property is actually a marital or non-marital asset may be a question of fact for the trier of fact. The Husband argues that since the accounts were established with funds he inherited from his mother, the accounts are not subject to equitable division. Property acquired during the marriage by one spouse by a gift, inheritance, bequest or devise (made by a non-spouse) remains separate property of the recipient spouse. However, while property inherited by one spouse during the course of marriage begins as separate property, that property can be converted to a marital asset by actions of the recipient spouse, such as the recipient spouse transferring full, partial or joint ownership in the property to his spouse. Here, the Husband opened the two Morgan Stanley accounts for the purpose of receiving assets he just inherited from his mother and he established both accounts from the outset in the name of him and his Wife to be held as joint tenant with a right of survivorship. By doing so, the Husband manifested an intent to transform his own

separate property into marital property. Because both the Husband and the Wife then own an undivided one-half interest in the property, the accounts were correctly treated as marital property. The Husband continues to argue that the principal should not apply in this case since the Wife never contributed to the value of either account and because the accounts were not co-mingled. However, whether or not these allegations are true, they do not vitiate the evidence that the accounts were transferred into marital property when the Husband gave the Wife an ownership interest in the property.

Husband also contends the trial Court erred by finding real property located in Florida was marital property. Again, the Husband argues that he inherited this property from his mother, that Wife has not contributed to the property's value and that the property has not been comingled with other marital assets. However, when the property was inherited, the Husband decided to deed it to him and his Wife as tenants in common, thereby giving each party an undivided one-half interest in the property. Such action by the Husband constitutes some evidence that the said property was transferred into a marital asset.

The Husband claims that he should own the interest in the apartment complex. However, the Husband, Wife, and the Husband's brother bought a 20 percent interest in the property that was divided into three equal shares and amounted to approximately 6.67 percent. Therefore, the purchase of the property was acquired as the direct result of the labor and investments of the parties during the marriage and subject to equitable division, and as such, it was not abuse of discretion to make no disposition with regards to the property.

GRANDPARENT VISITATION

Kunz et al. v. Bailey et al., S11G0867 (Jan. 9, 2012)

The Kunz are the biological paternal grandparents of the child born to Carrie Bailey and the Kunz's son. After Bailey married the child's mother, he adopted the child in 2006 when Kunz's son terminated his paternal rights to the child. Prior to and for a time after the adoption, the Kunz were allowed to visit the child and maintain a familial relationship with the child. At some point, however, the Baileys denied access to the child, and in 2009, the grandparents petitioned for visitation rights. A Motion to Dismiss was filed by the Baileys which the Court denied. The Baileys appeal, the Court of Appeals reverses and the Supreme Court affirms the Court of Appeals' decision.

The two avenues by which a grandparent can receive visitation are: (1) file an original action or (2) intervene in an existing action. Grandparents may intervene in an action where custody of the grandchild is an issue in the divorce of the parents or a parent; in the termination of rights case of either parent; in the termination of visitation rights of either parent; and in the adoption of the grandchild by a blood relative or a stepparent. Also in the last sentence of O.C.G.A. §19-7-3(b), grandparents may only file an original action for visitation when the parents are separated and

the child is not living with both parents. In addition, the last sentence also does not distinguish between any class of parents whether they be natural, adoptive, or some combination thereof. When the child's adoption took place in 2006, the appellee Douglas Bailey became the parent of the child and the child became a stranger to her biological father and his relatives, including the appellants. Since Mr. Bailey was the child's parent at the time the appellants filed their original action for visitation in 2009, the child was living with the Baileys in 2009 and the Baileys were not separated, the Kuntz's had no basis to file an original action for visitation under the statute.

JURISDICTION/SANCTIONS

Lowe vs. Lowe, A11A2129 (March 9, 2012)

The parties were divorced in April 2000, by the Superior Court of Coweta County and the Mother was awarded sole custody of the parties' two minor children. Subsequently, the Mother filed a Petition to Modify Child Support and Visitation and Contempt in Coweta County in August of 2001. The Court entered an Order modifying the Father's support obligation and visitation and was held in contempt. In January of 2004, the Father filed a Petition for Modification of Child Support and Custody in Coweta County. An ex parte hearing was held, and a Temporary Order was entered giving the Father custody of the children. However, after a hearing was held, the Order was vacated and the original custody order was reinstated. A special set hearing was held in April of 2005, but the parties' attorneys could not agree on the terms of the proposed Order and it was never executed. Therefore, there was no action taken on the case until the peremptory calendar in December of 2008, at that time the case was dismissed for lack of prosecution.

In March of 2008, the Father filed another Complaint for Change of Custody in Paulding County where he resided. The Father alleged that the Mother had resided in Fulton County, but had left the State, disregarding the fact that the Coweta modification action was still pending. The Father in his petition stated that the Final Order and Decree was attached as Exhibit E, but it was not attached to the filing until after the appeal was docketed. The Father proceeded to get an ex parte emergency order granting him temporary custody of the children. Once the Mother was noticed and a hearing was held, the Court reversed itself and returned custody of the children to the Mother. In June of 2008, attorney for the Father withdrew from the case. In April of 2010, the Father filed a Motion to Set Aside and Dismiss the Order in Coweta County. At this time, the Father was represented again by previous counsel.

In July 2010, the attorney for the Father filed an Entry of Appearance in Paulding County, and requested a temporary hearing. The Father filed affidavits for the minor children in which they elected to live with their Father, but the Mother claims she never received any certificate of service of the attached Affidavits. Shortly after, the Mother filed a Motion to Dismiss based on jurisdiction of the child custody matters and requested Rule 12 sanctions.

In August of 2010, Paulding County issued a Temporary Order in which it noted the Mother's objection to the Court's jurisdiction based on improper venue, but found the Mother had waived her venue objection because, at the time of the emergency hearing, the Mother was represented by an attorney who did not voice any objection to venue. Also, the case had remained pending for two-and-a-half years and no objection to venue was filed. Based upon the minor child's election, the Court granted temporary custody to the Father. In November of 2010, the Mother filed a Motion for Reconsideration and attached a copy of this court's opinion in *Hatch v. Hatch*, and then filed a demand for abatement of proceedings due to lack of jurisdiction. The Paulding County Court denied the Motion, awarding custody of the children to the Father pursuant to their elections. The Mother moved to set aside the Order and renew her Motion for sanctions against the Father and the attorney for making false statements and untrue allegations. That Motion was denied in April of 2011. Mother appeals and the Court of Appeals reverses and remands.

The Father filed his Complaint in Paulding County. There was a pending custody modification action in Coweta County, thus the Coweta court, not Paulding County, had jurisdiction of the custody case. Even if the Coweta action would not have been pending, Paulding County is without jurisdiction over the matter. Pursuant to *Hatch*, jurisdiction for modification is where the legal custodian resides, or if out of state, the jurisdiction is proper in the county where the custody determination was initially made. Here, the Father files his Complaint to change custody in Paulding County, which is the county of his residence. The Mother had been a resident of Fulton County, but had moved to Tennessee. It is unclear exactly where the Mother resided at the time of the initial filing in Paulding County, but it is clear that she was not a resident of Paulding County at the time. The Complaint should have been filed in either Coweta County, or in the county where the Mother was residing at the time. Coweta County had continuing jurisdiction pursuant to O.C.G.A. §9-9-62(a). Therefore, Paulding County erred by assuming jurisdiction of this matter, and because a judgment entered by a Court lacking jurisdiction is void, all orders of Paulding County in this case are vacated.

The Mother also contends that Paulding County erred by refusing to consider her request for sanctions against the Father's attorney. The Court agrees that the facts here warrant at least a hearing on the matter and upon remand, the Paulding County Court is to consider whether it



is the appropriate venue for such a hearing, and depending on that determination, either conduct a hearing or transfer the sanction issue to the Coweta Court.

LEGITIMATION

Matthews vs. Dukes, et al., A11A2264, A11A2265 (March 14, 2012)

The parties were married in 2003. Shortly afterwards, the Wife began an affair with a married man (Matthews) and in 2005 became pregnant and suspected Matthews was the father. After the child was born, the Wife and Matthews arranged for a DNA test under a false name and discovered that Matthews was the biological father of the child, but the Wife never informed the Husband. The Wife and Matthews continued to make secret rendezvous which included sex in the marital home while the child was there. In 2010, the Husband found out about the Wife's affair with Matthews. When confronted with this, the Wife revealed the year long affair. Husband demanded his Wife stop seeing Matthews. After the Wife stopped seeing Matthews, he filed a legitimation action. Neither party to the marriage expressed an intent to end the marriage.

At the hearing, all parties presented evidence and testimony and the Court denied the petition to legitimate, holding that Matthews lost his opportunity interest in becoming the father of the child and that it was not in the best interests of the child for Matthews to become the legal father. In addition, he ordered Matthews to stay 500 yards away from the child unless he obtain a written permission

from the father and ordered Matthews to pay child support in the amount of \$538 per month until the child reached 18 years of age. Matthews and the Wife appeal. Affirmed in part and reversed in the part.

Matthews contended the Trial Court erred by denying his petition for legitimation. The biological father's opportunity interest begins at conception and may endure through the minority of the child, but it may be abandoned by the unwed father if not timely pursued. Such factors include, without limitation, the biological father's inaction during pregnancy and at birth, a delay in filing a legitimation petition, and a lack of contact with the child. But here, a different standard applies, the Petitioner is not attempting to legitimate a fatherless child against an unrelated third party, but seeks to de-legitimate a presumptively legitimate child of the marriage and thus to destroy an existing legal parent child relationship. The public policy of the State favoring the institution of marriage and the legitimacy of the children born during marriage is the strongest public policy recognized by law. It is undisputed that the Husband and the child have formed a deep familial and psychological bond that stems from the emotional attachments that derive from intimacy of the daily associations.

Here, Matthews took no action during the Wife's pregnancy or birth and never sought to legitimate the child, even after receiving the results from the secret DNA test. It was almost 5 years after the child's conception, and, only after his surreptitious contact with the child was cut off, he filed this action. Even though Matthews argues that he pursued his opportunity interest with the child by meeting with the child during the course of the affair and giving the Wife cash and making purchases for the child, occasional visits with and small gifts to the child do not alter the conclusion that he abandoned his opportunity interest.

Matthews argues that the trial court erred by entering a no contact order. The Trial Court has very broad discretion looking always to the best interests of the child, and if there is any evidence to support the Trial Court's ruling, this Court will not find an abuse of discretion. Here, the Trial Court determined that Matthews had no legal relationship with the child, has repeated over a period of years that he has no respect for the marriage or the family, and has not taken responsibility for his actions or considered the potential harm to the child from his conduct. The Trial Court also found Matthews has been hostile and confrontational with the Husband. The Trial Court is authorized to protect the child and the family from interference resulting in confusion and harm to the child. The Trial Court is also authorized to give certainty to its no contact order by including a requirement for written permission from the Father before any visitation could take place. Otherwise, the Mother could render the order of no effect by taking the child to see Matthews, as she has in the past, thus arguably giving consent to the forbidden contact.

The Mother argues that a no contact order violates her right as a Mother to determine the child's associations



and companions. Her illegal and fraudulent conduct, as well as that of Matthews, contributed to the situation in which she now finds herself. The Mother reasonably gave an affidavit stating that she did not want the child to have any contact with Matthews. At the hearing, she changed her position without being able to articulate any clear reason for having done so.

Matthews also appeals the child support award. The Trial Court reasoned that paternity is separate from legitimation and support may be ordered despite the lack of legitimation, but as noted above, this is not a typical legitimation proceeding, nor is it a paternity suit. The child here is not a fatherless child. Therefore, there is no legal basis that exists for the obligation to support the child. The Trial Court therefore erred in ordering Matthews to pay child support.

SELF-EXECUTING MODIFICATION

Johnson v. Johnson, S11F1856 (Jan. 9, 2012)

The parties were divorced in December 2010. The Mother had primary physical custody of the parties' 12-year-old daughter. Father was awarded visitation that required supervision when the child spent the night in Father's custody. The parenting plan provided that the overnight visitation would be supervised by a reasonable adult approved by a therapist treating the child until such time as the therapist determines that supervision is not necessary. The plan also states that the therapist shall have the authority to determine how supervised visitation should be phased out over time and when supervision may end. Father filed a motion for new trial contending the provisions concerning the termination of the supervised visitation constitute an improper self-executing modification contingent upon the determination of the therapist. The Court denied the petition, the Father appeals, and the Supreme Court reverses.

Visitation rights are part of custody. Self-executing changes of custody/visitation are acceptable as long as they pose no conflict with our law's emphasis on the best interests of the child. However, a self-executing change in custody/visitation that constitutes a material change is one that is allowable only upon a determination that it is in the best interests of the child at the time of the change. Since the provision regarding the termination of supervision of Father's overnight visitation with his child is a material change in visitation that will occur automatically without judicial scrutiny into the child's best interests, it is an invalid self-executing change of visitation and should not have been included in the judgment and decree of divorce. **FLR**



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Relief from pg. 31

States Supreme Court and of this court since the 1973 decision in Wood dictate a different result.

The original divorce decree between the parties provided for joint custody of the three minor children by mutual agreement. The appellee-wife was to have custody for the months of September through May and was to receive \$117 per child per month during those months. The appellant-husband was to have alternate weekend visitation rights during those months and visitation rights over the children's Christmas vacation and between school terms. The appellant was given custody of the children for the months of June, July and August, during which time he was not required to make child support payments. The appellee was given alternate weekend visitation rights during those months. The parties also agreed to confer with each other on all matters pertaining to the health, welfare, education and upbringing of the children with a view toward promoting the children's best interests.

In the fall of 1975 the appellee decided to return to school to complete her education. Not desiring to uproot the children, the parties agreed that the children should continue in the appellant's custody during the appellee's school term. Pursuant to this agreement between the parties, the children remained in the appellant's custody from September 1975 through February 1976. In February 1976 the appellee decided that the arrangement was not working out and thereafter resumed custody according to the terms of the divorce decree. Based on his understanding of the divorce decree and his understanding of the oral agreement, the appellant did not pay the appellee child support payments during September 1975 through February 1976 while he had [239 Ga. 468] custody of all three children and was totally supporting them. In December 1976 the appellee obtained an execution against the appellant for this unpaid child support. The appellant contends that the execution was improperly granted. We agree.

While this court has held that parties to a divorce decree cannot by private agreement modify the terms of that decree (see, e. g., Meredith v. Meredith, 238 Ga. 595(1), 234 S.E.2d 510 (1977) and cases cited therein), we find that the unusual circumstances of this case authorize a different result.

Most courts faced with the issue of a father's right to credit in child support arrearages have taken the position that a father is not entitled as a matter of law to credit for voluntary expenditures. See 47 A.L.R.3d 1039 (1973) and cases cited therein. Several jurisdictions, including many which support the above general rule, have held that a father may be given credit if equity would so dictate under the particular circumstances involved, provided that such an allowance would not do an injustice to the mother. 47 A.L.R.3d, supra at 1041. Included among these equitable exceptions are situations where the mother has consented to the father's

voluntary expenditures as an alternative to his child support obligation, see, e. g., *Frazier v. Rainey*, 227 Ga. 350, 180 S.E.2d 725 (1971), also see 47 A.L.R.3d, *supra* at 1043, or where the father has been in substantial compliance with the spirit and intent of the divorce decree, for example, where he has discontinued child support payments while he had the care and custody of the children and supported them at the mother's request. *Headley v. Headley*, 277 Ala. 464, 172 So.2d 29 (1964). Compare *Roberts v. Roberts*, 231 Ga. 370(1), 202 S.E.2d 57 (1973). These exceptions are to be distinguished from those instances where the father has made voluntary overpayments of the child support due and owing without request or consent by the mother. Under such circumstances, he is not entitled to credit in computing arrearages. See, e. g., *Wills v. Glunts*, 222 Ga. 647, 151 S.E.2d 760 (1966); *Flesch v. Flesch*, 222 Ga. 513, 150 S.E.2d 619 (1966). We also distinguish those cases where an agreement was made between the parties post-judgment to allow a reduction in child support but where the mother retained custody of the children. See, e. g., *Meredith v. Meredith*, 238 Ga. 595, 234 S.E.2d 510 (1977), [239 Ga. 469] *supra*; *Hawkins v. Edge*, 218 Ga. 463, 128 S.E.2d 493 (1962).

In this case we have a joint custody divorce decree which contained no support obligations by the appellant during those months he was to have custody. In addition, we have an agreement by the appellant to assume custody of all three children in order for the appellee to further her education. During the assumed custody the appellant totally provided for the children's support. With the exception of this six month period of time, the appellant-husband has been in compliance with the divorce decree. During this six-month period he was in compliance with the apparent intent and spirit of the divorce decree. Under the circumstances of this case, we find that it would be inequitable to require the appellant to pay again for maintenance he has already supplied at the appellee's request.

We note in passing that the holding in this case is limited to the unusual combination of facts we had to consider.

We are by no means authorizing blanket modification of divorce decrees by private agreement. Under normal circumstances, Code Ann. ' 30-220 provides the proper method by which child support provisions of a divorce decree may be revised or modified.

The writ of fieri facias was improperly issued and the summary judgment on

appellant's counterclaim was improperly granted.

Judgment reversed.

Later, in 1984 the Supreme Court of Georgia went on to explain its ruling in the Daniel case and differentiated it from the facts in *Skinner v. Skinner*, 314 S.E.2d 897, 252 Ga. 512, 4/25/1984 as follows:

We are called upon to consider the application of our decision in *Daniel v. Daniel*, 239 Ga. 466, 238 S.E.2d 108 (1977), to the facts of this case. In *Daniel* we held that in certain rare instances where equity required it, a father may be given credit for child support expenses he paid although the literal terms of the alimony award were not satisfied. Here the trial court allowed the father \$1075 credit for payments he had made to the mother, and modified the decree so as to make her responsible for one-half of the children's medical expenses. We granted the mother's application to appeal. The husband and wife were divorced in August, 1981, and the wife was awarded custody of their two children. Under the terms of their decree, the father was required to pay \$50 per child per week in child support and \$25 per week by a separate check designated "day care" until the younger child entered first grade, as well as all reasonable medical expenses. In July, 1982, the mother removed the younger child from private day care and entered him in public kindergarten, with her mother keeping him after school. The [252 Ga. 513] grandmother refused payment of the \$25 per week, but the mother continued to accept the father's checks and used the funds for family expenses, all with the knowledge of the father.

Meanwhile, the father began to complain that the medical expenses were too high and sought to have the mother share these costs, or to credit the \$25 day care check for these expenses. In March, 1983, she garnished his wages for \$108.27 for unpaid medical expenses. In April, the father filed this action to modify the medical expenses



provision of the divorce decree, citing changed conditions, and seeking credit for his day care payments. (The day care payments are not otherwise an issue because the younger child now is in first grade.) The trial court found a substantial change in the father's income and reduced his responsibility for medical expenses to fifty percent. The trial court also granted the father credit for 43 weeks of day care expenses totaling \$1075 for the time during which the child was being kept by his grandmother at no cost. The trial court also awarded the \$108.27 held in escrow to the father. The mother appeals these rulings. The trial court did not abuse its discretion in modifying the decree to require the mother to share one-half of the medical costs. *Marsh v. Marsh*, 243 Ga. 742, 256 S.E.2d 442 (1979). The second issue raised concerns the credit for the day care checks totaling \$1075 awarded to the father. He contends the award was proper under our holding in *Daniel v. Daniel*, *supra*, 239 Ga. at 466, 238 S.E.2d 108.

The dominant rules are as follows: A decree providing alimony and child support cannot be modified by agreement of the parties. *Meredith v. Meredith*, 238 Ga. 595(1), 234 S.E.2d 510 (1977). After the term at which it was rendered, an alimony and child support award can only be modified by the court in an action instituted for that purpose. *Meredith*, *supra*; *Lindwall v. Lindwall*, 242 Ga. 13(3), 247 S.E.2d 752 (1978); *Herrington v. Herrington*, 231 Ga. 177, 200 S.E.2d 867 (1973). An order modifying an alimony-child support award can operate only prospectively; i.e., it is not to be given retroactive application. *Butterworth v. Butterworth*, 228 Ga. 277(3), 185 S.E.2d 59 (1971). The prohibition on retroactive application precludes the allowance of "credit" for payments previously made.

In *Daniel v. Daniel*, *supra*, we recognized an equitable exception to these rules where the father had in fact provided child support and failure to allow him credit for such support would require double payment. There the husband and wife agreed to joint custody of their three children; the wife to have custody from September to May and [252 Ga. 514] to receive \$117 per month per child during those months and the husband to have custody from June through August, without any child support obligation while he had custody. One year after their divorce, the mother decided to go back to school, and they agreed that the children would remain with the father. This arrangement lasted from September through the following February and the father made no child support payments during these months. After that, they returned to the terms of their original agreement. In December, the mother obtained an execution for unpaid child support payments for the months during which the father had had custody.

While we recognized that a father is not entitled to modify the terms of the decree without the sanction of the court, we also recognized that this rule is inequitable in some situations where the father in fact has provided child support. Thus, credit for the father's voluntary

expenditures consented to by the mother as alternatives to child support, or excusal for nonpayment of support obligations where the mother has requested that the father have custody of the children and he supported them during such period, may be appropriate so that the father is not required to pay child support twice when there is no resulting unfairness to the mother or children. 1 In *Daniel*, however, it was stressed that such an equitable ruling required an "unusual combination of facts", and "[w]e are by no means authorizing blanket modification of divorce decrees by private agreement. Under normal circumstances, Code Ann. ' 30-220 [now OCGA " 19-6-18, 19-6-19] provides the proper method by which child support provisions of a divorce decree may be revised or modified." *Id.* 239 Ga. at p. 469, 238 S.E.2d 108.

We find the case before us falls within "normal" rather than "unusual" circumstances, and is controlled by the requirement that parties may not deviate from the provisions of the divorce decree without the approval of the trial court. *Meredith v. Meredith*, *supra*.

The \$25 weekly day care expense was an obligation which the father agreed to assume for the two year period from the divorce until the younger child entered first grade. Such payments were not used for day care expenses, a fact which the father knew. The wife's mother agreed to keep the child and refused the proffered payment for the benefit of her grandchildren. The mother testified that she used the money for the children and did not appropriate it for her own [252 Ga. 515] purposes. The father is not paying child support twice.

We do not agree that the father rather than the mother should reap the benefit of the grandmother's benevolence. It was intended by the parties that the mother provide child care for the younger child, and that the father pay for it. She provided the child care and he paid the amount agreed upon for this purpose.

This situation does not meet the "unusual" circumstances where the support required under the decree has been provided in another form by the father. Thus, we conclude that the trial court erred in granting \$1075 to the father in this case and in retroactively awarding the father the \$108.27 held in escrow. Judgment affirmed in part; reversed in part. All the Justices concur. **FLR**



Mark McManus entered the legal profession in the metropolitan Atlanta area in 1990. His practice included personal injury, domestic relations, bankruptcy, contracts, transactional, real estate and corporate law. He moved to southwest Georgia in 2007, and has concentrated his practice in the area of domestic relations, including divorce, custody, child support, visitation, legitimation and adoption cases, as well as other complex litigation cases. Rainwater & Gibbs, LLP proudly serves accident victims, individuals, and business clients throughout southwest Georgia.

Conflict in laws between OCGA 19-11-12(c)(3) and OCGA 19-6-15(k)

by Mark McManus

The Modification of a previous child support Order is controlled by OCGA 19-6-15, subsection (k) in pertinent part as follows:

(k) Modification.

(1) Except as provided in paragraph (2) of this subsection, a parent shall not have the right to petition for modification of the child support award regardless of the length of time since the establishment of the child support award unless there is a substantial change in either parent's income and financial status or the needs of the child.

(2) No petition to modify child support may be filed by either parent within a period of two years from the date of the final order on a previous petition to modify by the same parent except where:

(A) A noncustodial parent has failed to exercise the court ordered visitation;

(B) A noncustodial parent has exercised a greater amount of visitation than was provided in the court order; or

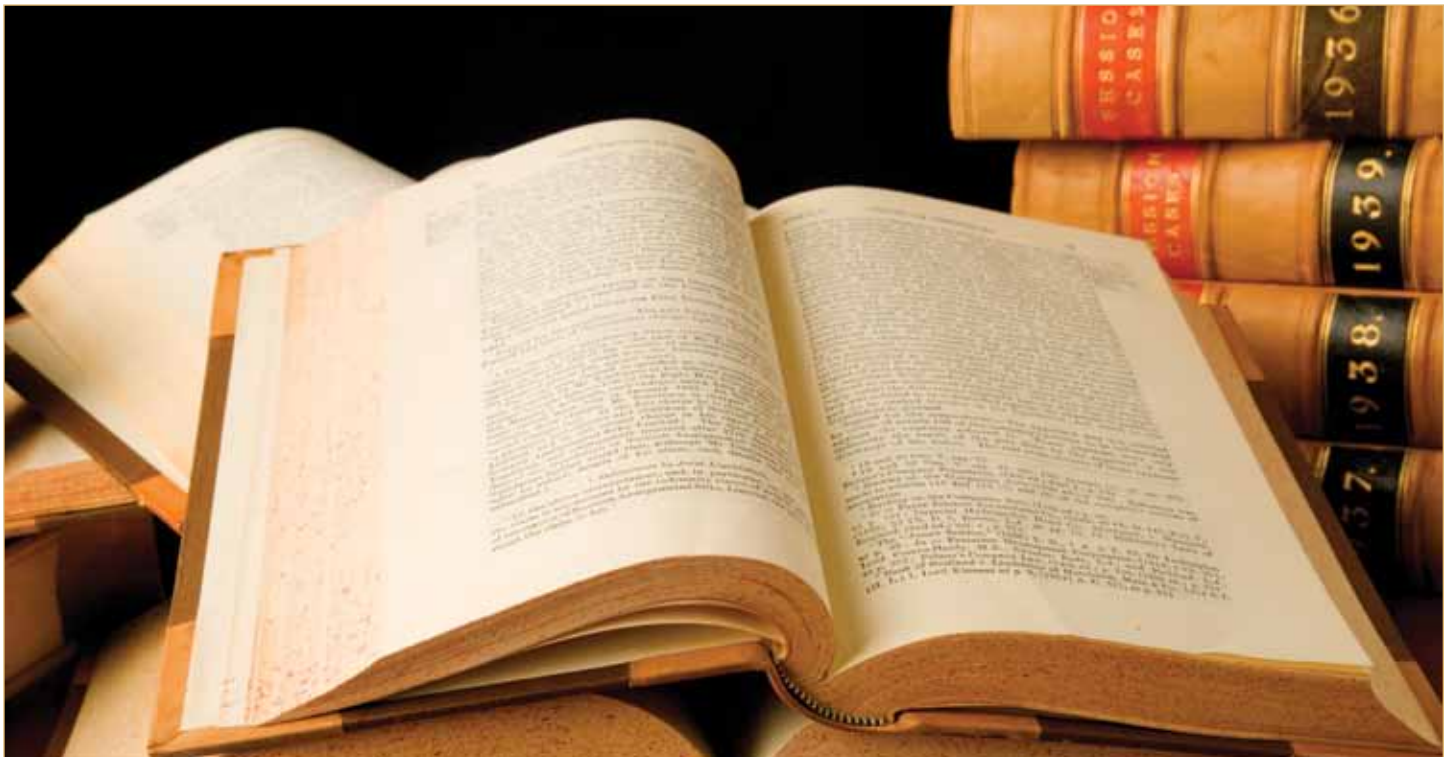
(C) The motion to modify is based upon an involuntary loss of income as set forth in subsection (j) of this Code section.

(3)

(A) If there is a difference of at least 15 percent but less than 30 percent between a new award and a Georgia child support order entered prior to Jan. 1, 2007, the court may, at its discretion, phase in the new child support award over a period of up to one year with the phasing in being largely evenly distributed with at least an initial immediate adjustment of not less than 25 percent of the difference and at least one intermediate adjustment prior to the final adjustment at the end of the phase-in period.

(B) If there is a difference of 30 percent or more between a new award and a Georgia child support order entered prior to Jan. 1, 2007, the court may, at its discretion, phase in the new child support award over a period of up to two years with the phasing in being largely evenly distributed with at least an initial immediate adjustment of not less than 25 percent of the difference and at least one intermediate adjustment prior to the final adjustment at the end of the phase-in period.

(C) All IV-D case reviews and modifications shall proceed and be governed by Code Section 19-11-12. Subsequent changes to the child support obligation table shall be a reason to request a review for modification from the IV-D agency to the extent that such changes are consistent with the requirements of Code Section 19-11-12.



(NOTE: (4) and (5) intentionally omitted here.)

The enactment of OCGA 19-6-15 (which applies to all cases filed after Jan. 1, 2007) in and of itself is not grounds for modification. The petitioner must prove one of the five grounds (A substantial change in either parent's income and financial status under OCGA 19-6-15(k)(1); A substantial change in the needs of the child(ren) under OCGA 19-6-15(k)(1); The noncustodial parent has failed to exercise the court ordered visitation under OCGA 19-6-15(k)(2)(A); The noncustodial parent has exercised a greater amount of visitation than was provided in the court order under OCGA 19-6-15(k)(2)(B); or an involuntary loss of income under OCGA 19-6-15(j) exists for there to be any possibility of a revision.

The Office of Child Support is governed by Title 19-11-et al. OCGA 19-11-12, subsection (c)(3) states as follows:

*(c) (3) If the request for the review occurs at least 36 months after the last issuance or last review, the requesting party shall **not** be required to demonstrate a substantial change in circumstances, the need for additional support, or that the needs of the child have decreased. The **sole basis** for a recommendation for a change in the award of support under this paragraph shall be a significant inconsistency between the existing child support order and the amount of child support which would result from the application of Code Section 19-6-15.*

That is to say that the OCSS may bring an action, if it is after 36 months from the initial or last review, and the party does NOT need to demonstrate a substantial change in condition as required under the foregoing OCGA 19-6-15. The sole basis is a significant inconsistency between the existing child support and the new law under OCGA 19-6-15.

Previously, under *Department Of Human Resources v Allison et al.*, (575 S.E.2d 876, 276 Ga. 175, Supreme Court of Georgia, Jan. 13, 2003, Reconsideration Denied Feb. 10, 2003) DHR did NOT have authority to represent all non-custodial parents in modification cases and OCSS could not bring an action to lower the support. *Ward v. DHR* also allowed a modification where children were not receiving public assistance only with a showing of need for additional support. It appears both of these cases are now overruled by the revised statutes.

Example: At the time of the divorce in 2005 the non-custodial Father was making \$70,000 and the Mother \$50,000. The Mother has primary custody and was receiving \$1,400 (24 percent of his gross income at the time) a month for two children under a settlement agreement incorporated into the Final Order in 2005. No actions have been filed since 2005. The non-custodial Father now makes \$90,000 a year and the Mother makes \$60,000. The new guidelines render, with an insurance adjustment for premiums paid by the Father of \$150 per month, per child, \$1,100, or a \$300 reduction. The \$1,100 is 14.6 percent of his current gross income. Despite a \$20,000 a year increase in income, his child support goes from \$1,400 (24 percent) to \$1,100 (14.6 percent). However, the Father would not

be eligible for a downward modification under the code section of OCGA 19-6-15 as it does not meet any of the five criteria. It would appear, based upon his income change from \$70,000 to \$90,00 or 28.6 percent increase in income that the Mother might be able to get a modification upward in child support based upon a substantial change in either parent's income and financial status under OCGA 19-6-15(k)(1). Not so fast my friend.

Instead, the Father goes to a lawyer and says he ran the worksheet himself on-line and it looks like he should pay less child support, despite his increase in pay. The lawyer runs the numbers, but cannot help him based upon not meeting any of the factors under OCGA 19-6-15. So the Father goes to OCSS and seeks a downward modification. Anyone can use OCSS, and therefore be governed by OCGA 19-11-12, simply by filing a child support order with the department. OCSS takes the case, as required by the present law, and files for a downward modification of \$300 a month under OCGA 19-11-12(c)(3), based solely on the new guidelines.

If this Father had come to me or you, he would be required, under the applicable law (OCGA 19-6-15), to prove one of the 5 grounds exists for modification. But, by going to OCSS, he does not have to prove one of the 5 grounds exists for modification and he can get it lowered solely on the difference between the existing amount and the new guidelines. Parents that choose to go through a lawyer get turned down, as compared to those going to OCSS that get relief. Those going to OCSS get an advantage that persons going to a lawyer do not get.

It does look like a loophole was created by the 2003 changes to OCGA 19-11-3 and OCGA 19-11-12. Was this the intent of the legislature? What are the ethical and/or legal duties of a lawyer to inform the client that they may get the relief they want by availing themselves of OCSS and OCGA 19-11-3 and OCGA 19-11-12?

The bottom line is that pursuant to OCGA 19-11-12, through the OCSS a non-custodial parent can bring an action for downward modification after 36 months with no showing of any changes other than the enactment of the new child support statute resulting in a different amount, while a modification under OCGA 19-6-15 would require a change in circumstances. While this might be reasonable for people receiving public aid, a 2003 revision of OCGA 19-11-3 allows anyone to submit a support order to the department and proceed under that statute. **FLR**



Mark McManus entered the legal profession in the metropolitan Atlanta area in 1990. His practice included personal injury, domestic relations, bankruptcy, contracts, transactional, real estate and corporate law. He moved to southwest Georgia in 2007, and has concentrated his practice in the area of domestic relations, including divorce, custody, child support, visitation, legitimation and adoption cases, as well as other complex litigation cases. Rainwater & Gibbs, LLP proudly serves accident victims, individuals, and business clients throughout southwest Georgia.

See you at the 2012 Family Law Institute at the Ritz Carlton, Amelia Island, from May 24-26, 2012



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