The Family Law Review

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Maintaining Clients' Safety and Security in a Digital Age

by Melissa F. Brown
www.melissa-brown.com

New technology is now available for purchase by anyone with access to the internet that provides valuable information about individuals, their habits and whereabouts. Most of this technology was created for legitimate purposes, but unfortunately some users, such as abusive spouses, jealous boyfriends/girlfriends, dishonest employees and others, misuse the technology to the detriment of another.

Family law litigants are often targets of this misuse. Thus, lawyers, litigants and judges must learn how others misuse technology to protect victims from abusive tactics. It is also important for all to understand how to properly use this technology so one does not inadvertently violate federal and/or state laws.

Pre-paid phone cards that spoof callers' originating phone numbers, GPS tracking devices installed in cars or cell phones and various types of computer spyware are just a few of the many products available for purchase, and most are easily found online. Blog sites such as www.chatcheaters.com highlight many of these products that one might use to gain an unfair advantage against another person. Familiarizing ourselves with these technologies and products is critical in family court cases because one cannot properly prepare a case nor can a judge intelligently rule without keeping up with the many advances in this digital age.

Misuse of Caller ID by Pre-Paid Spoofing Phone Cards

SpoofCards are prepaid phone cards that offer "the ability to change what someone sees on their caller ID display when they receive a phone call." This technology is even accessible as iPhone and Facebook applications.

The application promotes caller ID spoofing, voice-changing and call recordings. SpoofCard also allows users to change the gender of their voice to further disguise their identity from the recipient of their call. While the use of this technology is legal, some states have passed laws making spoof caller ID illegal when it is used "to mislead, defraud or deceive the recipient of a telephone call." However, in July 2009, a Florida District Court held that the state's recently enacted Caller ID Anti-Spoofing Act was unconstitutional because the Act's effect regulated commerce outside the state and therefore the Act violated the Commerce Clause of the United States Constitution. On the federal level, the House of Representatives reintroduced a bill to amend the Federal Communications Act of 1934 to prohibit the manipulation of caller identification information and a House committee is currently reviewing the proposed bill.

Fraudulent uses of SpoofCards include taking advantage of a credit card companies' use of caller ID to authenticate a customer's newly-issued credit card. In situations where credit card holders are asked to validate their new credit card by calling a 1-800 number from their home or cell phone, spoof card technology can intercept the validation method. This interception, or spoof, allows the spoofer to pretend he is the card's true owner and, in essence, steal the card. The credit card thief can then fraudulently use that credit card without the owner's knowledge until the first bill arrives in the mail.

Other fraudulent uses include prank calls. In 2005, SWAT teams surrounded a building in New Jersey after police received a call from a woman claiming she was being held hostage in an apartment. Her caller ID had been spoofed, so the 911 call appeared to come from her apartment. The woman living there was not actually in any danger. Instead, two other young women called 911 and pretended to be a hostage so that the 911 operator was tricked into believing the call came from the victim's apartment. The teenagers were later found and charged with conspiracy, initiating a false public alarm, and making a fictitious report to police.

See Safety on page 9

Editor's Corner

by Randall M. Kessler
rkessler@kssfamilylaw.com
www.kssfamilylaw.com

Greetings! I would first like to wish each and every section member a happy, healthy and safe 2010.

This year our chair, Tina Roddenbery, has appointed my partner, Marvin Solomiany, as co-editor of the *Family Law Review*. For this, I'm grateful as I look forward to becoming vice-chair and eventually chair of our section. Marvin and I will work together to provide the best product we can to the members of the Family Law Section of the State Bar of Georgia. We hope to continue to have articles from lawyers and experts across the nation as well as from lawyers across our state. If any of you have an idea or a suggestion, please continue to feel free to e-mail or contact me or Marvin to discuss your ideas or thoughts.

We also hope that you enjoyed the special edition of the Family Law Review, which was distributed at the end of 2009 regarding the specific new issues relating to the child support guidelines. If you have ideas for special editions in the future, please submit those to us as well for consideration.

This is really 2010. Do you remember when the millennium turned? Well, here we are in the year of the sequel to Stanley Kubrick's, *2001*, and time just keeps marching along. We hope that this year is a good one for you, your family, your friends and your clients. We look forward to seeing you at the Family Law Institute in Destin over the Memorial Day weekend this summer. Take care, and once again, best wishes for a happy, safe and successful 2010. ***FLR***

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Chair's Comments

by Tina Shadix Roddenbery
troddenbery@hsrblaw.com
www.hsrblaw.com

We are over halfway through my year as chair and I am very proud of the Executive Committee's hard work and accomplishments. Each member has made significant contributions to the section. This edition of the Newsletter provides a little biographical information about our Executive Committee members so you can learn about the lawyers who currently lead the section. I want to mention their efforts in furthering the purposes of the section so far this year. One core purpose of the section is to provide family law CLE. This year, in addition to sponsoring our traditional family law seminars, we offered a new seminar. For the first time, we held a CLE at the Midyear Meeting in conjunction with our annual meeting of the section. Rebecca Crumrine chaired, with assistance by executive committee member Karen Brown Williams and Leigh Cummings, a professionalism seminar which had over 100 attendees. All involved felt it was an outstanding program. Many section members attended our Annual Meeting for the first time as a result of attending the seminar. At that meeting the slate of officers for the next Bar year are nominated and approved. They are: chair, Paul Johnson, vice-chair, Randy Kessler and secretary/treasurer, Kelly Miles. These nominees will take their new offices in June at the State Bar Annual Meeting. Randy Kessler chaired The Nuts and Bolts Seminar in the fall which received very positive comments about the presenters and the quality of the substantive law presented. The section co-sponsored a family law seminar in Augusta with the Augusta Bar and co-sponsored a family law seminar with the American Academy of Matrimonial Lawyers. Paul Johnson is working hard as chair of this year's Family Law Institute. The program looks exceptional. Another purpose of the section is to make appropriate recommendations to the State Bar about family law legislation. Our Legislative Committee, led by John Collar and Regina Quick, drafted family law legislation which amends the long arm statute to permit Georgia custody orders to be enforced in Georgia against non-residents. At the Midyear Meeting, the State Bar Board of Governors voted to support this legislation during this year's Legislative session. Kelly Miles has worked hard, along with Derrick Stanley, section liaison, to significantly improve our section website. It is now a site you should add to your favorites and use in your practice. Check it out. Jonathan Tuggle is organizing an event to bring the past chairs of the section together and shall use some of what is learned at the event to add to the history portion of the website. Newsletter co-chairs Randy Kessler and Marvin Solomiany have done an outstanding job with the special edition and this newsletter. Both editions contain articles which are helpful to our practice. Members Ed Coleman, John Lyndon, Andy Pachman and Kelly Boswell have contributed to all the efforts mentioned above and have each made valued contributions at our Executive Committee meetings. I think all of you for your efforts and support. ***FLR***

Front (l-r) Kelly Miles, Paul Johnson, John Lyndon, Regina Quick, Tina Shadix Roddenbery, Back (l-r) Tyler Jennings Browning, Kelly O'Neill-Boswell, Andrew Pachman, Edward Coleman, Karen Brown Williams, Jonathan Tuggle, Rebecca Crumrine, Randy Kessler, Marvin Solomiany, John Collar Jr. (not pictured)

Randall M. Kessler, Editor
Family Law Newsletter

Dear Mr. Editor:

On behalf of the Child Support Commission, we want to thank the Family Law Section for taking the initiative to alert its members about some recent changes to the Child Support Guidelines and the Uniform Superior Court Rules. Further, in light of the economic downturn, we are glad that attention is being called to an often overlooked provision of the Child Support Guidelines concerning involuntary loss of income. This provision may provide some needed relief for the noncustodial parent who has lost a job and suffers a substantial reduction in income. The authors' thorough analyses are all excellent and point up several areas of particular interest.

One such area is the matter of reconciling discrepancies in the statute, rules and worksheets. In the evolving process of transitioning from one set of guidelines to another, it has been necessary to amend the statute, amend the uniform rules and alter the worksheets several times. On occasion, there have been conflicting provisions. One area of discrepancy at present is with subsection (m) of OCGA sec. 19-6-15 and Uniform Superior Court Rule 24.2. Previously, the statute required a party to file a Worksheet and Schedule E, regardless of the existence of deviations. If there were no deviations, it would mean submitting a blank Schedule E. That wastes paper, and in addition, with the new EZ short form created for emergency situations, there is no Schedule E. The EZ form is only for those cases when no deviations are sought. Effective Sept. 1, 2009, subsection (m) was amended to provide: "The child support worksheet and, if there are any deviations, Schedule E shall be attached to the final court order or judgment; provided, however, that any order entered pursuant to Code Section 19-13-4 shall not be required to have such worksheet and schedule attached thereto." O.C.G.A. §19-6-15(m)(1). This same revision was also made to paragraph (4), subsection (c) of the same code section. However, Rule 24.2 continues to require filing of Schedule E in uncontested cases filed with a complete agreement, whether there are deviations or not. It is possible that the Rule will be amended in the future to conform with the statute.

Please be aware that the revision to §19-6-15 regarding the low income deviation necessitated a change to Schedule E of the Child Support Worksheet. Effective Sept. 1, 2009, the Child Support Commission issued a new release of the Worksheets, with a revised Schedule E. The newest version may be downloaded from this website: www.georgiacourts.org/csc.

The Commission also wants to ensure that no one interprets the changes to the low income deviation to provide for a mandatory minimum order, regardless of other deviations that may apply. The Child Support Commission made a conscious decision not to have a minimum order amount when first reviewing the Child Support Guidelines that became effective Jan. 1, 2007. If the low income deviation is the only deviation, then the minimum order amount is as set forth in the statute. However, if other deviations apply, e.g. a parenting time deviation, it is possible that the amount may be less.

Another point we want to stress regarding the application of the involuntary loss of income subsection concerns the ongoing obligation of the noncustodial parent to pay the full amount originally awarded until such time as the court modifies the award. If the court determines that a modification is appropriate, then the relief will be retroactive to the date of service on the custodial parent.

Again, many thanks to the Family Law Section for all the years of involvement in the process of adopting and implementing the new guidelines and for the many hours of hard work on the part of so many section members. Your commitment and dedication to family law and to the many people in this state affected by domestic turmoil is exemplary. Please feel free to contact the staff of the Child Support Commission at any time by e-mailing us at www.georgiacourts.org/csc and selecting "Contact Us" or to jill.radwin@gaaoc.us.

Sincerely yours,

Jill Radwin and

Judge Louisa Abbot

Family Law Section Executive Committee Biographies

- **Tina Shadix Roddenbery** has been a Member of the Board of Governors of the State Bar of Georgia since 1995 and is the current Chair of the Family Law Section. She is a fellow in the American Academy of Matrimonial Lawyers, a Master in the Charles Longstreet Weltner Family Law Inn of Court, and is current Chair of the Atlanta Volunteer Lawyers Foundation Board of Directors. Roddenbery is a partner in the Atlanta law firm of Holland Schaeffer Roddenbery Blitch, LLP.
- **Randall M. Kessler** is the founding partner of KSS Family Law in Atlanta, a 14 lawyer, family law firm. He is a master in the Charles Longstreet Weltner Family Law Inn of Court. In addition to his roles in the State Bar of Georgia Family Law Section, he serves as the Vice Chair of the Family Law Section of the American Bar Association. Kessler also serves as co-editor of *The Family Law Review*. He received his J.D. from Emory Law School and his B.A. from Brandeis University.
- **K. Paul Johnson** is a partner in the firm of McCorkle & Johnson, LLP. His practice focuses primarily on family law, representing individuals in divorces, child custody matters and child support cases. Johnson earned his B.A. in English Literature cum laude from Georgia State University in 1991. He then received his J.D, cum laude, from the University of Georgia School of Law in 1996.
- **Marvin Solomiany** is a partner at Kessler Schwarz & Solomiany, P.C. Apart from serving in the Executive Committee of the State Bar Family Law Section, Solomiany is the current President of the Family Law Section of the Atlanta Bar Association. He has been recognized in the Georgia Trend Legal Elite (2008 & 2009) and as 1 of 15 attorneys selected "On the Rise" by the Fulton Daily Report in 2007. Marvin is married to Kerry and is a parent of Aaron (9) and Amanda (7).
- **John L. Collar Jr.** is a graduate of the Cumberland School of Law at Samford University. After law school, Collar served as a law clerk to the Hon. Thomas E. Cauthorn III, in the Cobb County Superior Court. He then joined as a partner at Cauthorn & Phillips, P.C. in Atlanta. Prior to founding Boyd Collar Nolen & Tuggle, he was a partner at Warner, Mayoue, Bates, Nolen & Collar, P.C.
- **Edward J. Coleman III**, is a partner in the Augusta, Ga., firm of Surrett & Coleman, P.A. Coleman graduated from Emory University (B.B.A. 1979) and the University of Georgia School of Law (J.D.1982) where he was on the Moot Court Executive Board. He has served on the Executive Committee of the Family Law Section of the State Bar of Georgia since 2003. He has served as a Chapter 7 Bankruptcy Trustee since 1994, and is a member of the National Association of Bankruptcy Trustees.
- **Kelley O'Neill-Boswell**, a partner of Watson Spence LLP in Albany, Ga., focuses her practice in family law litigation, adoption and catastrophic injury litigation with over 17 years of experience. After graduating from the University of Georgia with her bachelor's degree, she earned her law degree from Mercer University and was admitted to the State Bar of Georgia in 1991. She has served as past president of the Dougherty Circuit Bar Association and is currently an active member of the Family Law Section of the Georgia Bar Association and the Association of Trial Lawyers of America.
- **Rebecca L. Crumrine** practices Domestic Relations in the Atlanta Firm of Davis, Matthews & Quigley, P.C. and is a member-at-large of the executive committee of the State Bar Family Law Section. She is a barrister in the Charles Longstreet Weltner Family Law Inn of Court, an Adjunct Professor of Domestic Relations Law at John Marshall School of Law in Atlanta and currently is the chair-elect of the Family Law Section of the DeKalb County Bar Association. Crumrine sits on the board of the Historic Oakland Cemetery and is on the Woman's Advisory Board of Breakthru House.
- **John Lyndon** graduated magna cum laude from the University of Georgia, Athens in l973, and attended the University of Georgia School of Law, graduating in 1976. He then began the private practice of law in Athens, which is now devoted exclusively to the area of divorce and family law. He has been designated a "Georgia Super Lawyer" since 2006. In 2008 he was one of less than 50 Super Lawyers in Georgia with a family law designation, and the only lawyer so designated from the Northeast Georgia area.
- **Kelly Anne Miles** practices in Northeast Georgia and is a partner in the Gainesville law firm of Smith, Gilliam, Williams & Miles. Miles has served as president, chair of the Bench/Bar Liaison Committee and on the Domestic Relations Local Rules Committee for the Gainesville-Northeastern Bar Association. She has been a member of the Family Law Section since 2006.
- **Andy Pachman** is a member of the Charles Longstreet Weltner Family Law Inn of Court, the Lawyers Club of Atlanta and former president of the Family Law Section of the Atlanta Bar Association. He has been selected by his peers as a *Georgia Super Lawyer* every year since 2004 and also recognized as an *Outstanding Lawyer of America* and one of the *Legal Elite: Georgia's Most Effective Lawyers*. Pachman is a founding partner of Pachman Richardson, LLC.
- **Regina M. Quick** is a graduate of the University of Georgia School of Law and practices family law in Athens. She is a founding member and former chair of the Family Law Section of the Western Circuit Bar Association. 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.
- **Jonathan J. Tuggle** is a shareholder with Boyd Collar Nolen & Tuggle, LLC where he practices exclusively in the area of matrimonial and family law. He currently serves as a member-at-large on the executive committee of the State Bar of Georgia Family Law Section, and was the founding member of the Family Law Committee of the Younger Lawyers Division of the State Bar. He may be reached at jtuggle@bcntlaw.com.
- **Karen Brown Williams** is a graduate of Howard University, Boston College and Emory Law School. She began her law career in 1990 as clerk to Justice Carol Hunstein where she served for more than two years before becoming a Public Defender for Dekalb County. She founded her law practice in 1994.
- **Tyler Jennings Browning** is the current chair of the Young Lawyer's Division Family Law Committee for the State Bar of Georgia, as well as a Northern district representative for the YLD. He has co-chaired the *Successful Trial Practice* seminar for ICLE since 2005 and has been a lecturer at the Cobb County Family Law Workshop since 2008. Browning practices in the metro Atlanta area with Browning & Smith, LLC, in Marietta.

E-mail Effectiveness

by Robin Hensley
Executive Coach, Raising the Bar
www.raisingthebar.com

E-mail is like money — an excellent servant but a terrible master.

E-mail is not the same as hard copy, according to Dawn-Michelle Baude Ph.D. and author of *The Executive Guide To E-Mail Correspondence*. In her book, Baude explains the differences this way.

1. E-mail is designed to move or transact information as rapidly as possible from the writer to the reader. It usually produces immediate action, often in the form of another e-mail. Hard copy, on the other hand, is designed for contemplation over time and does not necessarily move the reader to act. E-mail is a transaction; hard copy is a reflection.
2. Unlike hard copy, e-mail is more than rectangular. It appears in a window, with clearly defined edges. These edges focus reading in a way that is very different from the way we read hard copy. The edge of a piece of paper is not so insistent. It's easier for the eye to lift, to wander, to reflect.
3. E-mail is boxed-in with multiple frames that relentlessly focus the eye on the text. Rigid borders confine the gaze and keep it on the words. The trapped-in quality of the text affects our expectation about the purpose and intent of reading. When we look at an e-mail message, we expect to receive information—right away. We get frustrated when we don't get it.

Why is it important to see the e-mail page differently from hard copy? If you understand how e-mail information is seen and processed at a conscious and subconscious level, you can use that knowledge to create messages that are more likely to be read and acted upon. We'll talk more about this later in the article. Right now, let's shift attention to some of the basic rules of e-mail courtesy.

First off, we've got to be sure that people take us seriously when messages with our name in the header arrive in their inbox. The quickest way to brand yourself as silly and someone who will fall for anything is to succumb to e-mail chain letters and cutesy information that urges you to pass it along. Asking others to join your online link-ups can also be annoying. In Europe and California, Linked-in and other such services are wildly popular and considered imperative to one's professional career.

Here in Atlanta, most people haven't figured out where the benefit is yet. If these kinds of online services have proven to be a beneficial part of your business building strategy, then be sure to smooth the way with a brief e-mail message in advance of your invitation. Be selective in your invitations and make sure that you live up to your online profile. Keep in mind that your links are often public information. Do you want everyone to know who your customers are?

You can also direct e-mail that isn't urgent, like newsletters and other subscriptions, to one or more separate e-mail accounts you can check at your leisure. That way you can respond to your most important messages without being slowed down by those that aren't time-sensitive. Yahoo and gmail offer free e-mail services you can use for this purpose. Signing up with them is quick and easy.

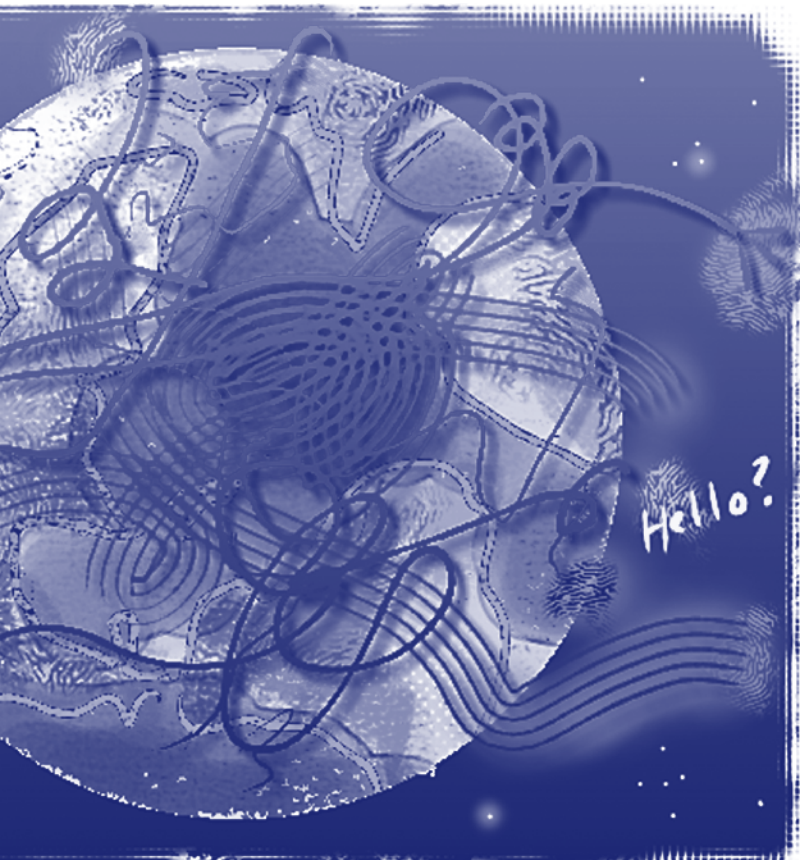
You wouldn't write a letter or a check and send it off without your signature, would you? An e-mail without a signature isn't finished either. It's also discourteous to the reader. Of course, by signature I mean the information you include at the bottom of your message that shows how to contact

you. Signatures are easy to set up so they will attach to every message. If you're not sure about how your e-mail program handles signatures, your service provider should be able to help.

One more thought before getting back to our main topic, and that is about text messaging. You may already know this, but I was surprised to learn that recent studies show that text messaging is rapidly replacing e-mail. Like hard copy, e-mail may never disappear entirely, but text messaging is the future and if you haven't used it, you may want to look at how you could incorporate it into your communication strategy to advance your goals.

Now that you've thinned out your e-mail inbox, stopped adding to what others may consider junk and made it easy for people to contact you, let's jump back to how to maximize your e-mail impact. Here are 10 ways to make every message you send more effective.

1. Make your message fast and easy for the reader. At the beginning of the article, we learned that e-mail implies action; that it creates an expectation. That means the first thing you must do is to make your message fast and easy for the reader—mapping your message so the reader intuitively knows where to look for specific information. For example, the subject line is the first place the reader looks. Make the subject short and compelling, capturing the information like a newspaper headline would. Include a signature line, as the reader will intuitively look for contact information there. Make the message itself stand out with bulleted points that move the reader's eye where you want it to go.



2. Write for skimming and scanning. Readers skim e-mails, giving different levels of attention to its different parts. They scan, looking for specific information while ignoring the rest. Set your e-mails up to help your reader do both.
3. Use white space to speed up skimming and scanning. To skim and scan, the eyes need to move around the text, focusing in some places, resting in others. A dense block of print discourages rapid eye movement. According to Baude, our expert on e-mail effectiveness, contrast speeds things up. Alternating print with empty white space "gives the reader wings."
4. Use white space to add meaning. White space is not empty, it's full of meaning. White space tells the reader that there's a change in idea, a shift in the argument, an example on the way, a contrast coming or an objection being raised. Readers use white space to navigate information in an e-mail as much as they use printed words on the screen.
5. Make the first sentence count. In business e-mail, the first sentence of the text is the most important. Readers decide to read an e-mail immediately or save it for later based on the first sentence.
6. Begin with your conclusion, and then explain.
   - For replies, give your answer in the first sentence and explain your reasons below.
   - To save time when making a request, tell the reader straight out what you want.
   - For updates, summarize the situation in the first sentence and then detail it in the rest of the e-mail.
   - If you have a question, ask it right away.
   - If the reader has asked you to reply, remind him or her of that at the start.
7. Keep it simple to keep things moving.
   - Use headers and sub-titles to enhance skimming.
   - Use short sentences and common vocabulary as much as possible.
   - Keep your message length to screen size to eliminate scrolling.
   - Use simple, straightforward language to get your message across right away.
   - Use simple present and past tense.
   - Use simple salutations. A first name followed

by a comma is less formal; and a name followed by a colon is more formal and signals something important is about to be said.

- Cut the e-mail thread and start a new e-mail when the length becomes cumbersome.
- Use the subject line to gain the reader's attention.

8. Build connection through your tone.
   - Avoid using CAPITALS. The reader interprets them as SHOUTING.
   - Avoid using punctuation such as exclamation marks when your message is intended to be formal.
9. Proof then send. To get a fresh perspective and to pick up typos and errors,
   - Change the typeface to see your message with fresh eyes
   - Enlarge the type size
   - Print a hard copy and/or
   - Read your message aloud to listen for errors
10. Know when to call instead of e-mailing. Use the telephone to build or enhance your connection with the reader.
    - When you need to communicate how you feel
    - When you need to break bad news before you send the e-mail or
    - When you have been e-mailing back and forth for several weeks without achieving resolution

In closing, e-mail is an excellent servant, but it is you who must change in order to master it. Set specific times of the day when you check your e-mail, use e-mail with people who tend to be long-winded on the phone, copy only those who need to know and make friends with your "Delete" key. Be selective about to whom you give your e-mail address, and treat your e-mail just as you would hard copy—act on it, forward it, file it or trash it. ***FLR***

For more on e-mail dos and don'ts, sample texts for a variety of situations and visual cues to give your messages more impact, pick up a copy of *The Executive Guide To E-Mail Correspondence* by Dawn-Michelle Baude, Ph.D.

Robin Hensley is president of Raising the Bar. Robin, who is an author and business development coach, specializes in coaching attorneys on how to maximize their rainmaking skills. Robin's book, Raising the Bar: Legendary Rainmakers Share Their Business Development Secrets, *captures what 10 of Atlanta's legal superstars have to say about business development, practicing law and building a lifetime of client goodwill. A majority of the profits will be donated to The Atlanta Legal Aid Society. rhensley@raisingthebar.com, www.raisingthebar.com.*

CHECK IT OUT!!!!

The Family Law Section website has been updated and enhanced! It is packed with helpful information you don't want to miss. Take a look at www.gabar.org/sections/section_web_pages/family_law/.

For instance, a copy of every Family Law Newsletter from November/December 2001 through the 2009 Special Edition can be found on our website now. Each copy can even be downloaded as a pdf.

Does your memory need some help? Do you vaguely remember a presentation at a Family Law Institute on a topic that would help you with a particular case but you just can't remember which year it was? Our website now has all program agendas listed for each Family Law Institute from the first Institute in 1983 through the 27th Institute in 2009. This enables the viewer to see the topics discussed at each and the presenter's name.

News updates are posted on the website providing current information on the constantly changing practice of family law and the Resources page gives links to other websites that are helpful on many topics.

Safety continued from page 1

Another example of spoofing abuse includes breaking into another person's cell phone voice mailbox. Many cell phone systems are automatically set up to accept calls from the account owner's cell phone number to activate a replaying of all voice mail messages left on the cell phone. SpoofCard technology has the ability to create the fiction that it is a cell phone, and the spoofer can then listen in on someone else's voice mail messages. This is a danger divorce litigants need to know so their spouse does not use this technology to listen in on their voice mail messages. Attorneys need to warn their clients about this potential danger and advise them to password protect their cell phone voice mail.

Deborah Alexander, a New Jersey divorce attorney, had a client who was a victim of domestic violence. Alexander obtained a restraining order against the ex-husband and he wanted this order overturned. To prove his case, he used spoofing technology to make it appear his ex-wife was calling him incessantly and that she did not really fear him. By spoofing, he would call himself using her number so his caller ID displayed her phone number. The only way Alexander proved her client was not calling the ex-husband was to prove that she did not make certain calls at certain times. She proved her case with the use of computer forensic specialists as well as the cell phone providers' cell phone records. Thus, proving someone has spoofed another requires proving the absence of calls or texts from the cell phone number that was spoofed.

TrapCall Cards

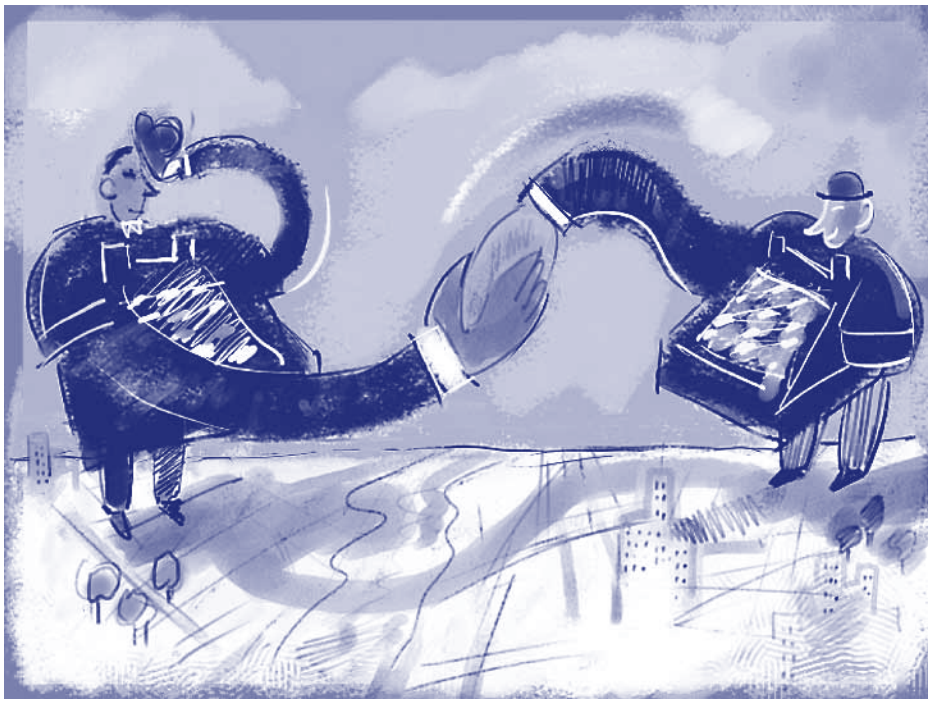
TrapCall is another type of prepaid phone card that is manufactured by the makers of SpoofCard. TrapCall cards work differently from SpoofCards. Instead of spoofing others' numbers, it is designed to unblock and reveal callers' identities and phone numbers even if the caller paid to block his or her number or have it unlisted.

Some TrapCall features also provide the caller's full name and billing address. TrapCall is also capable of sending transcriptions of a caller's voice mail as an e-mail message to the TrapCall user's phone without the knowledge of the person who left the message. This technology can also record incoming calls, retrieve online conversations and block unwanted calls with a disconnected message.

Similar Caller ID technology was utilized in the 1995 murder of 21-year-old Kerisha Harps. Harps phoned a friend's house not knowing that her ex-boyfriend was at the friend's home looking for her. When the ex-boyfriend saw Harps' phone number and location on the friend's caller ID, he used the information to locate and murder her.

Despite stories like this, TrapCall's manufacturer insists the technology was created to help protect domestic abuse victims by enabling them to identify the harassers calling them in addition to providing these victims with the ability to record the abuser's message and/or conversation. The company further defends its product by pointing out that abuse victims can counteract TrapCall's features if they purchase a SpoofCard. SpoofCards are made by the same manufacturer as TrapCall cards, and SpoofCards can display a false number if the abuse victim wants to hide their real number so the abuser cannot identify the victim's location or actual phone number. In situations involving child custody and constant contact between estranged parents, SpoofCards can be used as safe cards to hide a spouse's phone number from the other spouse.

Clearly the development of new technology moves so rapidly that only those in the technology world are able to keep up with all the new products. While it is difficult for the average person, including attorneys, clients and judges to stay abreast of all new products, it is important to recognize the existence of intelligence-gathering technology even when the gatherer is miles away from the victim. Thus, before one assumes a client is overly paranoid about a spouse spying on him or her, recognize this paranoia may be real. In addition, warn your clients to take steps to uncover whether or not their privacy was breached, illegally invaded or their information stolen by the opposing party.



Text Messages

Technology also exists to falsify or spoof text messages. Such services are found at www.thesmszone.com or www.fakemytext.com. While spoofing was originally created to allow users to work outside their offices and make business calls or send texts that displayed their work numbers rather than the number of the actual phone they were using, abusers have quickly learned how to use this technology for illegitimate purposes. Abuses include impersonating another person and negatively harming the reputation of another person or even a product. Angry parents in a custody battle might even use this technology to pretend to be the other spouse and leave damaging messages on a voice mail that puts the other parent in a bad light.

An angry spouse could use this technology to send inappropriate text messages using the other spouse's cell phone number to malign the other spouse's reputation or credibility. If such abuse occurs, the victim spouse should hire computer forensic specialists or contact their cell service provider to show that the victim did not send the inappropriate text from his or her phone. Again, the proof is often the omission of such texts from the actual phone at the time the spoofed text was sent rather than proving the sent text came from another phone.

Cell Phone Surveillance

There are many valid reasons to use cell phone surveillance. Employers often need to track employees during work hours. As long as the employees know the GPS is on the vehicle, it is legal to use the devices. Some parents also use GPS devices to monitor their young children, particularly those who may stray or are not old enough to care for themselves. Parents commonly use GPS devices to track their teenage drivers. For a small fee, one can easily contact their cell phone service provider and transform the cell phone into a surveillance and GPS tracking device. Although the federal wiretap law prohibits many forms of electronic communication monitoring, 18 U.S.C. § 2510(12)(C) specifically excludes signals by mobile tracking devices like GPS.

Predictably, GPS technology is sometimes illegally abused by individuals wanting to stalk their spouse or significant other.

New technology also exists to illegally register a phone via the internet for GPS surveillance, with the thief paying for this surveillance on his own credit card. Advise clients not to loan their cell phone to anyone whom they do not trust, even for a minute, because it only takes a few moments to add this tracking device to another cell phone. This is particularly frightening because the stalker can hide his or her activities by having the bills sent directly to him or her so the charges do not show up on the actual cell phone owner's bill. Clients should also know that soon-to-be-ex-spouses sometimes put GPS software on their children's cell phones for improper purposes, such as monitoring their spouse's movements when the child is with the other spouse.

GPS devices are also easily placed in PDAs, Pocket PCs, running watches and vehicle navigation systems (OnStar), and they are frequently hidden in automobiles. The most

popular locations to hide a GPS in a vehicle are inside the plastic bumper, in the gap between the windshield and the hood, inside stereo speakers, in the front dash, under rear dash fabric or in the rear dash/third brake light. It is easy to hide these devices and many are capable of tracking the cars in real time as well recording the car's speed. The features are particularly useful to confirm a spouse is cheating or more importantly, if a spouse is driving dangerously or driving at high speeds when the child(ren) are in the car.

Sherri Peak, of Seattle, Wash., was stalked by her ex-husband through a cell phone equipped with a GPS that her ex-husband had attached to the battery of her car. Peak filed for divorce when her husband became overly possessive and questioned her whereabouts throughout the day. After they separated, her husband began showing up everywhere she went. After six months of this behavior, she asked police detectives to search her car to find out how her husband knew her every move. The detectives found a tracking device made from an ordinary cell phone under her dashboard. The charger was wired into her car's electrical system. Every time Peak started her car, the phone would charge so he did not have to charge its batteries. Her ex-husband also set the ringer to silent so whenever he called, the phone automatically answered and he was able to listebn to her in-car conversations. Her ex-husband also equipped the cell phone with a GPS system linked to a companion computer program so he could track her every move. (See the link in Footnote 15 for a video account of Peak's ordeal.)

Peak's ex-husband was ultimately arrested. He pleaded guilty to felony stalking and served eight months in jail. When the police arrested him, they also found keys to her house, night vision goggles, computer spyware, print-outs of e-mails she sent to other people and bank account numbers and passwords. This story is not highly unusual; according to one source, three out of every four stalking victims are terrorized by threats of violence or death at the same time they are being monitored and followed.

To avoid having an estranged spouse, stalker or ex-spouse from using GPS technology to track a client, advise the client to contact their cell phone service provider and ask if location services were added to his or her service plan. In addition, advise clients to set up their own cell phone account and make it password protected so no one else can access account records or change account settings. Clients should also be wary of cell phone gifts. The reason for this warning is that the cell phone may have GPS and other monitoring technology downloaded on it, and the recipient may not want the giver to have the ability to track down his or her whereabouts. Finally, tell clients to set Bluetooth to hidden and GPS to 911 only, especially when in public areas. As to GPS devices attached to vehicles, find a knowledgeable detective or car mechanic familiar with the hiding places to locate any hidden devices.

Applicable Case Law

Case law and legislation struggle to keep up with technological advancements to draft language that encompasses the many ways technology is misused. However, courts have addressed GPS systems as they relate to invasion of privacy. Following are important cases that address this issue, beginning with opinions that focus on surveillance by police officers.

The 7th Circuit held in *U.S. v. Garcia* that GPS tracking devices did not violate the Fourth Amendment. To determine if a warrant is required for installation of a GPS device by law enforcement, the court held that the determining factor is whether the installation of the device constituted a "search" or a "seizure." If the GPS device does not borrow power from the car battery, take up any room that could be occupied by passengers or alter the driving capabilities of the car, the court held there is no seizure. The court also held that installing a GPS device on a vehicle when it is located on a public street does not constitute a search. Their reasoning noted little distinction between physical surveillance and electronic surveillance.

The U.S. Supreme Court has consistently indicated that there is no reasonable expectation of privacy in activities that were publicly observable. In *U.S. v. Knotts*, the Court held that "an individual traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements." In holding with the Supreme Court's ruling that using a GPS does not violate the Fourth Amendment, the Court in *State v. Sveum* held that police were free to attach GPS devices to vehicles that traveled into and out of public and private areas, even for an extended period of time.

However, the Wisconsin Court of Appeals urged states to enact legislation to prevent warrantless, baseless searches by police. The New York Supreme Court, in *People v. Weaver*, also held that the placement of a GPS tracking device and subsequent monitoring of a car's location constituted a search requiring a warrant under the New York Constitution and was, therefore, unconstitutional. The Weaver Court differentiated Knotts by claiming that improved technology required more restrictions. Therefore, even with a warrant, police are not allowed to track a person's movements for months on end. As technology progresses, it is difficult to predict how courts will rule. It is also difficult to fit new technology into older court opinions while courts apply the old law to modern products. Thus, lawyers and judges must meet this challenge by interpreting the law's intent and applying the law's intent to the use of modern technology.

The Violence Against Women Act of 2005 clarified criminal stalking via GPS. The revised Act "reauthorized existing programs to combat domestic violence, sexual assault, dating violence and stalking, and created new ones to meet emerging needs of communities working

to prevent the violence." Section 114 improved the existing federal stalking law by "borrowing state stalking law language to criminalize stalking by surveillance (this could include surveillance by . . . GPS) or through an interactive computer service and to expand the accountable harm to include substantial emotional harm to the victim." The provision also enhanced minimum penalties if the stalking occurred in violation of an existing protection order.

Georgia and Adultery

Georgia clients who are likely to pay alimony have a strong interest in catching their spouse committing adultery because proving the adultery caused the parties' separation bars the recipient's receipt of alimony by the payor. Such marital misconduct is also a factor in determining alimony in many other states. Therefore, GPS devices are frequently used by parties to catch an adulterous spouse and to save the potential payor from paying a detective thousands of dollars to follow the other party using 24/7 surveillance.

The Georgia Board of Private Detectives and Security Agencies regulates private detective and security businesses in the state. The Board reviews applications, oversees examinations, licenses qualified applicants and controls the professional practices of licensees throughout Georgia. Private detective businesses must have a company license issued by the Board, and any private detective employees must register with the private detective company so they, too, are licensed.

When installing the GPS device, private investigators are likely held to less stringent standards than police because no current laws address a private investigator's use of a GPS device. In South Carolina marital situations for example, either party is authorized to install a GPS tracking device on a vehicle if: the device is a slap and go type tracker; the installer does not trespass upon property when installing the device; the device does not alter the vehicle in any way; and the device does not use the vehicle's power supply. Investigators may not track government employees on government property unless the investigator has a pass to enter the property. In the event that a tracked vehicle enters government property and the investigator does not have permission to track the vehicle, any information gathered by a GPS device while the government employee is on government property must be destroyed.

Currently, most states allow private investigators and individuals to use GPS tracking devices for legitimate purposes. Georgia, is the first state to try to pass a law prohibiting anyone other than law enforcement, parents/guardians and business owners monitoring employees, from attaching GPS tracking devices to cars to track others without their consent. Georgia House and Senate Conference Committees were appointed to attempt to reach an agreement for proposed H.B. Bill 16. As drafted, H.B. 16 prohibits private investigators from using GPS devices unless the investigators first obtain consent from the person they are tracking (which is highly unlikely) or obtain "an order authorizing the use of a tracking device from the Superior Court of the county in which the person who is subject of the tracking device resides." Those convicted of Code violations are guilty of a misdemeanor. Private investigators from other states are closely watching this legislation because they fear it will not only negatively affect their livelihood, but also their personal safety and their clients' wallets.

Potential Liability of Attorneys Hiring Private Investigators

Hiring a private investigator or detective can create potential liability against the attorney and client. In the course of an investigation, if one's private detective goes too far and commits a tort such as defamation, invasion of privacy, trespassing or intentional or negligent infliction of emotional distress, the attorney and/or client are potentially liable for the investigator's tortious activity. This situation could arise if the attorney exercises independent control over an investigator or the attorney instructs their investigator to find incriminating evidence by saying something to the effect of "I don't care how you do it." Thus, it is imperative for divorce attorneys to hire trusted, professional, licensed private investigators and to refrain from ever instructing or even insinuating that the detective violate any laws.

Spyware

Spyware is software that monitors a computer user's browsing habits. Versions of this software are also capable of collecting personal information and recording keystrokes. Some spyware contains other features such as taking snapshots of the computer screen; restarting, shutting down and logging off the computer; controlling the desktop and mouse; and even making the computer talk. Spyware works by sending the information it gathers to the installer's computer via e-mail in the form of detailed "activity sheets." The software is often inexpensive and easy to install, but it is very difficult to detect without the use of special anti-spyware detection software.

Some spyware is also acquired when one downloads innocent looking software, music or online videos, or by opening certain e-mails, IMs or text messages. In a 2004 study conducted by America Online and the National Cyber Security Alliance, 77 percent of those surveyed did not think they had spyware on their computers, but 80 percent of the computers tested were infected with some sort of spyware program.

Spyware is used legitimately by parents on their children's computers. Employers can install spyware on their employees' work computers as long as the employee knows he/she is being monitored. However, when this information is obtained without the user's knowledge, 18 U.S.C. § 2701, the "Unlawful Access to Stored Communications Act" is violated. The Act states

one may not "intentionally access without authorization a facility through which an electronic communication service is provided . . . and thereby obtain[], alter[], or prevent[] authorized access to a wire or electronic communication while it is in electronic storage in such system . . . ."

There are simple ways to protect yourself or your client from spyware. Advise clients to only install software from web pages they trust, and tell clients to carefully read the fine print in licensing agreements, looking for any reference to agreeing to a company's collection of a person's computer's information. Also, advise clients to be especially wary of popular free music and video file-sharing programs. Web links found in e-mail spam or other unsolicited messages frequently contain spyware. Installing quality anti-spyware programs that find and delete spyware as well as running the anti-spyware programs once a week will better protect one's computer.

KeyKatcher

KeyKatcher is a spyware program that some divorce litigants have used to illegally monitor and spy on their spouses. KeyKatcher software is easier to use when the couple lives together and the spy has constant physical access to the computer. A KeyKatcher is a small device resembling a flash-drive that is connected to a computer's keyboard or tower and records up to 262,000 keystrokes, or over 160 pages. After the keystrokes are recorded, the spy can remove the device and download the information onto another computer. To prevent the use of KeyKatcher on a computer, clients should check the keyboard port on the back of their computer tower. If they find a foreign device, they should physically remove the device and have a qualified forensic computer expert analyze it.

Spousal Abuse and the Legal Implications of Using Spyware

Mental and emotional abuse from a controlling spouse is exacerbated by the use of spyware. Currently, few laws address one spouse's intrusion upon another spouse's right to privacy through abusive spy methods. Clearly, spyware that tracks a partner's moves by observing and monitoring all computer activity such as websites visited, e-mails sent and received, instant messages sent and received, as well as all passwords and PINs entered by the spouse without their knowledge is illegal in most states.

The use of such illegally obtained information as evidence in court proceedings is also prohibited by law. The Federal Wiretap Act prohibits use of communications obtained through wiretapping in violation of the Act admitted into evidence at trials or hearings. A law firm in Chattanooga, Tenn., was recently sued for two million dollars for allegedly using illegally obtained e-mail evidence in a divorce action. Allegedly, the estranged wife used e-mail spyware to intercept communications from her husband's computer, and her attorney "used or tried to use" the communications in the divorce action.

Attorneys, for both ethical and legal reasons, must clearly advise clients not to use any illegal spyware devices even if they suspect their spouse is cheating. Further, the Model Rules of Professional Conduct address the serious ethical violations that could arise if an attorney encourages or condones a client's use of such spyware. Therefore, it is imperative for clients to understand the differences between legal and illegal surveillance so both the attorney and their clients avoid costly mistakes.

The use of spyware in intimate relationships to control a partner is not a form of domestic abuse currently recognized by law. Few criminal statutes effectively address the issue of marital spying. Some civil causes of action exist that might encompass spyware, but these laws are not well developed or targeted to put an end to this form of abuse. Even the Federal Wiretap Act, 18 U.S.C. § 2510, falls short of completely protecting a spouse who is unknowingly tracked, monitored and controlled by the other spouse. In fact, hardly any legal remedy exists until the controlling spouse becomes physically abusive.

The criminal definitions of domestic assault, stalking, invasion of privacy, computer tampering and violating state wiretap acts each fall short of including marital spying as a criminal offense. The likely reason is that these were passed well before the rise in use of computers and the Internet. Possible causes of action against a spouse who uses spyware against another spouse are negligent infliction of emotional distress, intentional infliction of emotional distress, invasion of privacy, trespass to property and possibly violation of a state's wiretap act. Again, proving each of the elements required for each cause of action is difficult. Therefore, it is imperative that state legislatures and the federal government update civil and criminal laws to include spyware and other digital and technological advances to prevent harassment by one person against another.

Conclusion

Judges, lawyers, clients and the average Joe need to educate themselves about the various types of technology that can infringe upon their privacy and potentially cause much harm. Currently, our laws are unable to keep pace with the development of new technology and hardware. It is imperative to understand the potential for abuse and to warn clients, friends and family from ever using any illegal means to obtain evidence about another individual without that individual's knowledge, unless permitted by law, so they do not inadvertently violate any privacy or wiretapping laws. ***FLR***

Melissa F. Brown
Melissa F. Brown, LLC
145 King Street, Suite 405
Charleston, SC 29401
843.722.8900 (office)
843.722.8922 (fax)
www.melissa-brown.com, www.scdivorcelaw.com
www.twitter.com/ComplexDivorce

Case Law Update

by Vic Valmus
vpvalmus@mijs.com

ALIMONY

Coker v. Coker, S09F1159 (Oct. 19, 2009)

The parties were married in 1981, separated in 2005 and had no children. The husband's family owned a 154 acre track of land in Bartow County and the parties paid no rent for use of land and lived in a mobile home on the property. In 2001, the entire track was conveyed to Coker Investments, LLC, which was owned by the husband and other members of his family. The husband owns 8.34 percent of the interest. The 154-acre parcel was appraised at $1.2 million with the husband's share of the LLC being $100,800. The wife conceded that the LLC was a non-marital asset. The wife presently lives with her parents and earns $45,000 per year. The court found the husband to have an annual income of approximately $30,000 per year. The court awarded the wife equitable division of property of one-half of the mobile home value of $1,500 and lump-sum alimony in the amount of $36,500 to be paid from the husband's separate estate within 3.5 months. The husband appeals and the Supreme Court reverses and remands.

Ordinarily, the fact-finder is awarded wide latitude in fixing the amount of alimony. O.C.G.A. § 19-6-1 provides that alimony be awarded in accordance with the needs of the parties to whom it is awarded and the ability of the other party to pay. The testimony at trial was that the husband's interest in the LLC could not be transferred. There was no evidence presented to support the conclusion that he had the financial resources to allow such an amount to be paid as ordered. The trial court's award of lump-sum alimony was erroneous and cannot stand. The case is remanded for further proceedings consistent with this opinion.

ATTORNEY'S FEES

O'Keefe v. O'Keefe, S09F1368 (Sept. 28, 2009)

The final hearing was scheduled to begin at 9 a.m. on Sept. 25, 2009. The husband did not appear until 1:30 p.m. that day, and because of his late arrival, the court could not finish the hearing in one day. Because of conflict issues, the second day of trial did not occur until Nov. 10, 2009. The court issued a final order and reserved the issues of attorney's fees. Both parties were able to present letter briefs and neither party requested a hearing on the issue. The court awarded $6,367.50 of attorney's fees to the wife for the necessity of returning for a second day of trial, thus causing her to prepare a second time. The husband appeals and the Supreme Court reverses and remands.

Generally, an award of attorney's fees is not available unless authorized by statute or contract. Pursuant to O.C.G.A. § 19-6-2, authorizing a grant of attorney's fees in a divorce action is in the sound discretion of the court except that the court shall consider the financial circumstances of both parties as a part of its determination of the amount of attorney's fees, if any, to be allowed against either party. On the other hand, O.C.G.A. § 9-15-14(b), authorizes an award of reasonable necessary attorney's fees upon the finding that an action or any part thereof lacks substantial justification, was imposed for delay or harassment or an attorney or party unnecessarily expanded the proceedings by other improper conduct. In this case, the trial court's order failed to state the statutory provision that it relied on and failed to set forth the required facts necessary to support the imposition of attorney's fees under either code section. Therefore, the case is remanded.

CHILD SUPPORT

Henry v. Beacham, A09A1129 (Nov. 19, 2009)

In 2004, the mother (Beacham) filed an action for paternity against the father (Henry) requesting genetic testing of the child. In August of 2005, the trial court entered an order of temporary child support directing the father to pay $2,200 per month. In August of 2007, the trial court entered a final judgment of paternity and legitimation finding, among other things, that the father's monthly gross income was $49,583 which supported a deviation from the most top-tier of the child support obligation tables to $3,000 per month of support. Even though the father had made substantial sums of money, he had

been behind on the temporary child support payments on three occasions and had encountered financial problems over the course of his professional athletic career. The final judgment ordered and directed the entry of an income deduction order providing that $9,000 be deducted from his monthly paychecks during the football season from September through December in order to fulfill a total annual child support amount of $36,000.

In light of the father's previous financial problems and previous child support arrearages, the court directed that he fund a $250,000 trust which would be utilized only in the event that the father failed to pay his obligations. To fund the trust, the father was required to pay $100,000 on Oct. 15, 2007, $100,000 on Nov. 1, 2007, and $50,000 on March 15, 2008, each coinciding with the three large bonus payments which he was to receive. The trial court explained that any money remaining in the trust would revert back to the father at the time that his child support obligation to the mother had ended. In March of 2008, a contempt order was entered against the father for failing to fund the trust, but he had paid the $250,000 into his attorney's escrow account. Father appeals and the Court of Appeals affirms.

The father contends that the trial court erred by creating a trust as a security device for future child support payments and argues that the child support guidelines under O.C.G.A. § 19-6-15 does not authorized use of a trust as a device to secure unpaid child support obligations. Pursuant to O.C.G.A. § 19-6-15, this section states that the trial court in its final judgment can state the manner, how often, to whom, and until when the support shall be paid, giving primary consideration to the best interest of the child for whom the support is being determined. Under the previous child support code section, lump sum child support payments and the creation of a trust fund for future payments were approved by the Supreme Court of Georgia even though the guidelines to enforce at the time did not expressly provide for such payment structures. Therefore, the creation of the trust was supported by the language in the Child Support Guidelines as well as prior appellate case law.

The father also argues that using a trust as an anticipatory remedy violates O.C.G.A. § 9-5-6, and that the trial court did not make findings of fraud or insolvency and the trust cannot be used as a means to pay a hypothetical future child support arrearage. Even if O.C.G.A. § 9-5-6 applies in the context of an award of child support, there are still equitable remedies available to a creditor without a lien if the creditor has shown evidence of waste or mismanagement of assets. Here, the court was presented with numerous facts of the large debts the father had, spent exorbitant amounts of money on cars and money, has amassed no savings over the course of a lucrative seven-year football career and was in arrears to the mother several times during the temporary child support order.

The father also argues that the trial court abused its discretion by directing the creation of the trust in that it compromises the support interest of the needs of father's seven other children and ceases assets otherwise to be available to pay for their support. It is true that the trust only serves for support payments for one child, however, the court was aware of the other children and the support orders entered at the time the court entered the support order. The creation of the trust was fully funded by bonus money paid during 2007 and 2008, and it did not affect the

amount of future income that father would have had to provide for his other children.

The father finally argues that the court abused its authority by the creation of the trust saying that it first should use its' garnishments or contempt powers to enforce future child support arrearages before constructing the trust. The trial courts decision to create the trust was supported by the facts in the record and this court finds the father's arguments unpersuasive and the father did not argue the amount was too large nor he has not pointed out any specific calculations that were improperly made by the trial court.

CHILD SUPPORT

Turner v. Turner, S09F1313 (Oct. 5, 2009)

The parties were married in 1999, had two children, and the husband filed for divorce in 2008. The parties reached a partial settlement agreement where the parties would share joint custody of the two minor children, with the husband having custody from Tuesday morning through Friday morning, with the exception of holidays and other special occasions. The parties further agreed that the husband would pay $11,000 to the wife for her interests in the marital residence. The parties left unresolved and submitted to the court for determination the issues of child support and division of extra-curricular activities. The parties waived the hearing and after an in-chambers conference, the judge entered a final judgment and decree of divorce which incorporated the partial settlement agreement. The court ordered the husband to pay $552.09 in child support and a portion of the expenses for the children's extra-curricular activities with 2/3 being paid by the husband and 1/3 by the wife. Husband appeals and the Supreme Court reverses.

Trial court entered an order finding the gross income of the father to be $5,483.56 which is approximately 65 percent of the parties' combined income. After determining the basic child support obligation of $1,582 for the two minor children, the court calculated that the husband's pro rata share of such child support obligation was $986.75. As included in Schedule E of the attached court order, the court applied a parenting time deviation of $434.66, reducing the husband's monthly child support obligation to $552.09. The husband did not appeal the court's decision to deviate from the presumptive amount of child support, but he contends that the trial court erred by failing to explain how the court calculated deviation and failing to include express findings that the deviation was in the best interest of the child and would not seriously impair his ability to provide for the children. The revised Guidelines permit the fact finder to deviate from the presumptive amount of child support when special circumstances make the presumptive amount of child support excessive or inadequate due to extended parenting time as set for in the order of visitation or when the child resides with both parents equally.

Where a deviation is determined to apply and the fact finder deviates from the presumptive amount of child support, the order must explain the reasons for the deviations, provide the amount of child support that would have been required if no deviation would have been applied, and how the application of presumptive amount of child support would be unjust or inappropriate and how the best interests of the children for whom the support is being determined will be served by the deviation. Here, the court applied a discretionary parenting time deviation to the presumptive amount of child support but failed to make all of the required findings pursuant to O.C.G.A. § 19-6-15(c).

In addition, the husband challenges the trial court's apportionment of expenses of the children's extra curricular activities. O.C.G.A. § 19-6-15(i)(2)(j)(ii) makes clear that a portion of the basic child support obligation intend to cover the average amount of special expenses for raising children to include the costs of extracurricular activities. The fact finder determines the full amount of special expenses, describing the amount that exceeds 7 percent of the basic child support obligation. The additional amount of special expenses shall be considered a deviation to cover the full amount of the special expenses. Such amounts must be included in Schedule E and the fact finder must make the required findings of fact. The trial court here made no provision in Schedule E for the deviation for the special expenses. Instead, the court included a provision in the final judgment apportioning between the parties the entire costs of the children's extracurricular expenses using essentially the same ratios applied in the basic child support obligation. The court is no longer entitled to do this.

CONTEMPT

Bauman v. Humphries, A09A1096 (Sept. 29, 2009)

On Oct. 15, 2008, following a hearing that was held on Sept. 22, 2008, Bauman (mother) was found in willful contempt of a court order by failing to enroll the parties' children in a private school and failing to pay tuition and registration fees as required by the terms of the consent order that was dated March 14, 2008. The court explained to Bauman that she could purge herself of contempt by enrolling the children at the specified private school no later than Oct. 21, 2008. Failure to do so and to pay the tuition fees would result in her incarceration until she complied with the order. Application for discretionary review of this decision was denied on Nov. 13, 2008. The attorney for the former husband sent a letter following the denial of the application for appeal to the judge in which he asserted that Bauman had not complied with the terms of the Oct. 15, 2008 order. The letter also included a proposed order for Bauman's incarceration. The court signed the proposed order on Nov. 25, 2008. Bauman filed for discretionary appeal and the Court of Appeals reverses.

In Georgia, the trial court cannot order incarceration pursuant to a self-executing order regarding future acts without the benefit of a hearing. Even when a hearing has been held, a party can be adjudged in contempt for failure to make payments adjudicated as being owed and the when the court has ordered that that person can purge himself of the contempt by paying the arrearage. The court may only act, at a minimum, on the affidavit of a neutral and disinterested court official or other officer based upon objective information. The fact that Bauman did not request a hearing is beside the point. The incarceration of a contemptuous party may not depend upon merely the averments of an interested party like the former spouse or the former spouse's attorney, but rather upon the review of objective information provided by one not tied to litigation or standing to benefit from it.

EQUITABLE DIVISION/SEVERABILITY/ ATTORNEY'S FEES

Kautter v. Kautter, S09F0958 (Oct. 19, 2009)

The wife filed for divorce in December of 2003, after 22 years of marriage. In April of 2005, the husband filed a demand for jury trial but when the case was called in June of 2006, the husband deliberately chose not to appear and counsel for the husband declined to participate in the jury trial pursuant to the husband's instructions. The wife motioned to strike the jury demand which the court granted and a bench trial was conducted and the trial was not reported. The court equitably divided the marital property and awarded attorney's fees. The husband's motion for new trial was denied. The husband appeals and the Supreme Court reverses in part and affirms in part.

The husband argues that the trial court erred by striking his demand for a jury trial because the record contains no written withdrawal of his demand and that his action did not amount to an implied waiver of his jury demand as a matter of law. When a party makes a timely demand for a jury trial, the trial court cannot proceed without a jury unless the parties consent to a bench trial by written stipulation filed with the court or an oral stipulation made in open court and entered on the record. Of course, a party in a divorce case can by his voluntary actions impliedly waive a demand for jury trial. In the husband's affidavit in support of his motion for new trial, the husband stated that he deliberately chose not to attend the trial because he was afraid he would be incarcerated as a result of his own contemptuous failures to obey previous orders of the court. The husband argued that he did not intend to waive his right to a jury trial and that he did not understand that he could be deemed to have waived the right by not showing up and participating in the trial. The trial court was authorized to strike from the pleadings the husband's demand for a jury trial as a proper sanction for his willfully refusal to participate in the proceedings.

Paragraph 15 of the final decree states that if any provisions of the decree are considered to be invalid or unenforceable, all other provisions are, nevertheless, continued in full force and effect. This in essence is a severability clause. Such clauses are seen in statutory enactments and contracts, but a severability clause is totally inappropriate in a judicial decree resolving a case before the court. Therefore, the court is directed to strike this language from the judgment.

The husband also challenges the property division award. The wife's petition for divorce only sought equitably division of marital property. The court awarded her, among other things, the sum of $200,000 as lump-sum property division upon the sale or transfer of a certain business in which the husband had an interest and in the event of bankruptcy of the husband prior to the payment in full of this debt for which he is responsible, the $200,000 would be treated as alimony. The treatment as alimony instead of property division in the event of the bankruptcy of the husband prior to the payment in full did not change the nature of the award. Even though the husband also challenges the evidence to support his award, in absence of a transcript of the bench trial, we presume the evidence was sufficient.

The husband also challenges the award of attorney's fees to the wife. The trial court expressly awarded attorney's fees to the wife pursuant to O.C.G.A. § 19-6-2, and not pursuant to O.C.G.A. § 9-15-14. The husband contends that the trial court erred by including in its calculation attorney's fees for the appellate work provided by the wife's counsel during the husband's earlier appeal of this case. Attorney's fees incurred in connection with the appellate proceedings are not recoverable under O.C.G.A. § 9-15-14 because implicate in the language of that statute is that a court of record of this state may impose reasonable necessary attorney's fees and expenses of litigation of proceedings before that court which were brought for the purpose of harassment, delay or those which lack substantial justification. However, O.C.G.A. § 19-6-2 contains no comparable limiting language either explicitly or implicitly, but instead authorizes an award of attorney's fees at any time during the pendency of litigation based upon the financial circumstances of the party. Therefore, there was no error for the court's inclusion in its award of attorney's fees incurred by the wife for the appellate proceedings that occurred during the pendency of this litigation.

MARRIAGE CONTRACT

Sullivan v. Sullivan, S09A1295 (Sept. 28, 2009)

The parties executed an antinuptial agreement and were married in 2001. On the face of the agreement, it showed a single individual witness signed it twice. The husband brought the divorce action in 2008, and the wife filed a motion for partial summary judgment asserting that the

antinuptial agreement is unenforceable. After an evidentiary hearing, the court entered an order denying the motion and declaring the antinuptial agreement to be enforceable. The wife appeals and the Supreme Court reverses.

The wife contends that the antinuptial agreement fails to satisfy the requirement of O.C.G.A. § 19-3-63, that every marriage contract in writing made, in the contemplation of marriage, must be attested by at least two witnesses. This court recently held that O.C.G.A. § 19-3-63 does not apply to antninuptial agreements settling alimony because such agreements are made in contemplation of divorce and thus are not considered in contemplation of marriage. However, the antinuptial agreement in this case does not mention either divorce or alimony. The agreement expressly stated that it was entered into in consideration of marriage and its' stated purposes were to make a fair and adequate provision for the wife taking into consideration the age of the parties, the fact that they have separate families, the fact that they have separate estates, to define their respective rights to the property of the other and to avoid such interests which, except for the operation of this agreement, they might acquire in the property of the other as instance of their marriage relationship. This court has already held that when each spouse waives a right to the other's property either before or after death, it is a marriage contract and therefore this antinuptial agreement must have been attested by at least two witnesses.

PRENUPTIAL AGREEMENTS

Lawrence v. Lawrence, S09A1370 (Nov. 9, 2009)

The parties began dating in July of 2001. Ms. Lawrence (wife) was an office worker where Mr. Lawrence (husband) owned the building where she worked. After a year and a half of dating, the couple moved in together and they were married two years later. Both parties had been married and divorced before. The parties were married on Feb. 27, 2005, and a month before the wedding, the couples executed an antinuptial agreement. The agreement was drafted by the husband's attorney and both parties stated to the attorney that they were each aware of the other's financial position and income. The terms of the agreement were reviewed and explained to each and the consequences of signing. The attorney also advised the wife that she had the right to have her own attorney to look over the agreement, but she elected to sign without having another attorney review it. Three years later, the wife filed for divorce and the trial court upholds the agreement. The wife appeals and the Supreme Court affirms.

The particular paragraph in the Agreement states: "While the parties hereto contemplate a lasting marriage, termination only by death of one of the parties hereto, they also recognize the unfortunate possibility that their marriage might be terminated by way of divorce or other dissolution during the lifetime of both parties as both parties hereto have had previously divorces from other spouses, and both parties hereto recognize and readily except the potential frailty of the relationship. In the event of such dissolution or termination of their marriage during the lifetime of both parties by way of divorce or other dissolution…the parties hereby specifically agree as follows…"

The wife's position was that the antinuptial agreement was void under O.C.G.A. § 19-3-63 because it was not attested by at least two witnesses as required by every marriage contract made in contemplation of marriage. The Supreme Court has repeatedly recognized that antinuptial agreements that report to settle alimony issues as classified under Georgia law is a contract made in contemplation of divorce and not a contract made in contemplation of marriage. The antinuptial agreement in this case addresses alimony. Moreover, it refers explicitly to the possibility of divorce, explaining that the parties want the Agreement to govern in the event of divorce. Here, the antinuptial agreement at issue is clearly a contract made in contemplation of divorce, not a contract made in contemplation of marriage.

The wife also argues that the antinuptial agreement is void by a violation of *Sherer* because the husband failed to carry his burden of proof with respect to the first prong of the Sherer test because there was insufficient pre-execution disclosure of the husband's financial status.

To satisfy the first prong of the Sherer test, the party seeking enforcement should show that there was a full and fair disclosure of the assets of the parties prior to the execution of the antinuptial agreement and that the party opposing the enforcement entered into the agreement freely, voluntarily and with full understanding of terms after being offered an opportunity to consult with independent counsel. Therefore, mutual disclosure of material facts is preconditioned for entering into an antinuptial agreement that accords with Georgia's public policy. This court has stated that attaching to an antinuptial agreement a financial statement showing both parties' assets, liabilities and income, while not necessary, is the most effective method of satisfying the statutory disclosure obligation in most circumstances. Even through the wife never saw a financial statement or other form of documentation of the husband's financial condition before signing the agreement, the record in this case supports the trial courts determination that there was adequate pre-execution disclosure of the husband's financial status.

Record shows that the parties dated for a year and a half and then lived together for over two years before they married. The husband owned Columbia Professional Center, Griffin Pipe, Northrim Office Park and Lawrence Interiors, all of which the wife knew when she signed the antinuptial agreement. In fact, she was working in a building in which the husband owned when they began to date. There are several other factors which would disclose to the wife the husband's financial status, such as the 6,000 square foot house where they lived, the trips they have taken and the money that was spent. In light of the extensive evidence in the record showing the wife's familiarity with the husband's

business dealings and personal financial condition-garnered over the course of a lengthy premarital relationship including two years cohabitation and the absence of evidence of the husband having any income or assets which the wife was unaware, this court cannot say that the trial court abused it discretion finding that there was a full and fair disclosure of the husband's financial condition prior to the execution of the antinuptial agreement.

Justice Hunstein and Chief Judge Williams dissent.

SUMMARY JUDGMENT/JUDICIAL NOTICE

Fitzpatrick v. Harrison, A09A1409 (Oct. 30, 2009)

Fitzpatrick filed a complaint claiming legal malpractice and intentional infliction of emotional distress against Harrison. He filed a motion to dismiss the complaint. Fitzpatrick opposed the motion and requested an oral hearing, but the trial court granted the motion to dismiss without a hearing, ruling that the complaint failed to state a claim for legal malpractice and the claim for intentional emotional distress was time-barred. Fitzpatrick appeals and the Court of Appeals reverses.

Fitzpatrick asserts, among other things, that Harrison converted his motion to dismiss into a motion for summary judgment by attached evidence in support, and therefore, the trial court erred in denying his request for hearing as required under O.C.G.A. § 9-11-56 and Uniform Superior Court Rule 6.3. When the trial court elects to consider matter outside of the pleadings, the motion shall be considered as one for summary judgment and shall be disposed of as provided in O.C.G.A. § 9-11-56 and all parties shall be given reasonable opportunity to send all materials made pertinent to such motion. It is apparent that the trial court considered matters outside of the pleadings in ruling on the motion. There are matters not contained in the pleadings but rather found in affidavits and testimony in a divorce proceeding underlying the claims in the case because Harrison attached motions and supporting documents from the divorce proceedings as exhibits to his motion to dismiss in this case.

The trial court indicated that it was taking judicial notice of the physical pleadings from the divorce action but not of any legal conclusions contained therein, and would consider them in ruling on Harrison's motion. However, the trial court cannot properly make factual findings based upon evidence contained in those pleadings because such issues are a matter of proof and cannot be judicially noticed. The role of judicial notice is to eliminate formal proof as to (1) matters of which the general public has common knowledge; (2) facts which are readily ascertainable by reference to some reliable source and are beyond dispute; and (3) matters which are in the special province of the judge. Therefore, considering evidence from other pleadings, the trial court converted the motion to dismiss into a summary judgment and Fitzpatrick's request for oral motions should have been granted.

SUMMARY JUDGMENT/PRENUPTIAL AGREEMENT

Quarles v. Quarles, S09A0928 (Sept. 28, 2009)

Prior to the parties' marriage in 2000, they entered into an agreement where the parties waived all rights to alimony in the event of a divorce. In 2007, the husband filed a complaint for divorce and the wife counterclaimed for divorce. The husband filed a motion for partial summary judgment seeking to enforce the prenuptial agreement. The court found there was no genuine issue of material fact as to the enforceability of the agreement and the trial court entered an order on the plaintiff's motion for partial summary judgment, finding that the prenuptial agreement satisfies all prerequisites to enforceability set forth in Sherer. The wife appeals and the Supreme Court reverses.

The wife appeals, stating that there was a genuine issue of material fact in that there was not a full disclosure of the husband's income prior to execution of the agreement. At the hearing, when asked whether the husband disclosed his yearly income to her at any time up to the date she executed the agreement, the wife responded: "No, I do not recall that at all." Thus, she began with a definite negative answer and reinforced it by insisting that she did not recall any disclosure at all. For the purpose of summary judgment, we must construed the wife's testimony in the light most favorable to her, and accordingly, there was a genuine issue of material fact as to whether the husband disclosed his income to the wife prior to the execution of the prenuptial agreement.

On summary judgment, the trial court is not authorized to resolve disputed issues of material fact, and is only authorized to determine whether any disputed issues of material fact remain. On the other hand, the husband could have moved to enforce the prenuptial agreement, and as such, the trial court essentially sets in equity and has the discretion to approve the agreement in whole or in part, or refuse to approve it as a whole. On appeal, the trial court's disposition of a motion to enforce a prenuptial agreement is evaluated under abuse of discretion standard of review. Therefore, there is a difference between appellate review for motion to enforce and review of the grant or denial of summary judgment.

UCCJEA

Cohen v. Cohen, A09A0843 (Sept. 2, 2009)

The parties were married in June of 2005 and they gave birth to a son in November of 2005. In December of 2006, the mother left Georgia with their son and lived with her family in West Virginia, but traveled back to Georgia with their son on various occasions. In April of 2008, the mother filed an action for divorce and child custody in West Virginia. In May of 2008, the father filed an action for divorce and child custody in Georgia. In the West Virginia action, the husband moved to dismiss which the trial court granted in July of 2008 on jurisdictional grounds after finding that the mother had not established residency

in West Virginia and was still a resident of Georgia. In Georgia, the mother moved to dismiss for lack of jurisdiction and the court denied the motion in September of 2008 citing the West Virginia court's lack of jurisdiction. The mother appeals and the Court of Appeals affirms.

A court of this state has jurisdiction to make initial custody determinations pursuant to O.C.G.A. § 19-9-61(a). Here, the trial court made specific reference to the West Virginia order that explicitly found that the mother still had a Georgia driver's license, was a registered voter in Georgia, had utility bills, student loans and credit card bills in her name coming to the Georgia address. Based on this, the West Virginia court declined to exercise jurisdiction. The Court also noted that a divorce action was pending in Georgia and the Georgia court had jurisdiction over the divorce action. The West Virginia court would be the only other forum that would have jurisdiction of the case, and therefore the Georgia court properly exercise jurisdiction in that the mother failed to take necessary steps to establish residency in West Virginia or to make West Virginia the home state of the child.

UCCJEA

Murillo v. Murillo, A09A1500 (Sept. 10, 2009)

The father filed a petition in May of 2008 in the Fulton County Superior Court asking to modify the prior child custody order and to grant him physical custody of his 14-year-old son pursuant to the son's election to live with the father. The father served the petition on the mother who was residing in North Carolina with the child since February of 2002. The hearing was held and the court declined to exercise jurisdiction under the UCCJEA based upon inconvenient forum and the North Carolina court is the more appropriate forum. The father appeals and the Court of Appeals reverses and remands.

It is undisputed that the Fulton County Superior Court rendered a prior child custody determination consistent with the UCCJEA and that the father is a Georgia resident with significant connections to the state. Therefore, the Fulton County Superior Court has exclusive continuing jurisdiction. Pursuant to O.C.G.A. § 19-9-67(b), requires that a court shall consider the factors listed (1) through (8) in determining whether it is an inconvenient forum, which is similar to the requirement in Georgia's forum non-convenient statute at O.C.G.A. § 9-10-31.1. In the courts written order, it granted the motion showing that the court considered evidence and undisputed facts in the record relating to the factors listed in O.C.G.A. § 19-9-67(b) numbers 2, 3, 5 and 6, but it found nothing in the record that the court complied with the statutory requirements considering the remaining factors listed. Therefore, the order is vacated and remanded for the court to consider all relevant factors, including all factors listed for the court and to make specific findings on the record either in writing or orally, demonstrating consideration of these factors.

UIFSA

Sussman v. Sussman, A09A2289 (Dec. 2, 2009)

The parties were divorced in Massachusetts. In May of 1995, the court entered a judgment and order which found, among other things, that the husband was in contempt of its original judgment of divorce and determined accumulating arrears, alimony payments, statutory interests and awarded attorneys fees and costs. The total amount of the judgment was $421,465.84 and since that time, the husband never made any payments to reduce that amount. The husband moved to Georgia and in January of 2009, the wife filed a petition in the Superior Court of Gwinnett County to register and enforce the Massachusetts judgment as a support order under UIFSA. Husband argued that the Massachusetts judgment was dormant under Georgia law and that the judgment could not be construed as a support order under UIFSA and the longer statute of limitations available to judgments under the Massachusetts law would not apply in this case. The trial court dismissed the wife's petition to register and enforce. The wife appeals and the Court of Appeals reverses.

UIFSA provides the statutory framework under which support orders issued by a tribunal of another state can be registered and enforced in Georgia pursuant to O.C.G.A. § 19-11-160. Even though the husband argues that the Massachusetts judgment was a contempt order rather than a support order, this argument lacks merit. The Massachusetts court in finding the husband in contempt of the original judgment of divorce, also established the husband's accumulated arrearage for alimony and statutory interests and as such, that judgment was an order and judgment for the benefit of a former spouse providing arrearages and interest. Therefore, it fell within the definition of a support order as set forth in O.C.G.A. § 19-11-101(21), and was governed by UIFSA.

Under the choice of law provisions under UIFSA, the law of the jurisdiction that issues the support order governs the nature, extent, amount, duration of current payments, other obligations for support and the payment of arrears under the order. In a proceeding for arrearages, the longer statute of limitation under the laws of Georgia or the issuing state applies. The Georgia law provides that judgments become dormant after seven years, with the possibility of revival within three years of becoming dormant. In contrast, the Massachusetts statute of limitations for the enforcement of judgment is twenty (20) years, and after 20 years, the judgment becomes a rebuttable presumption that the judgment has been satisfied. Therefore, the statute of limitations is longer in Massachusetts and the trial court should have applied the Massachusetts law to the dormancy issue in this case. Since it has been less than 20 years elapsed since the issuance of the order, the trial court erred by vacating domestication of the final judgment and dismissing the wife's petition. ***FLR***

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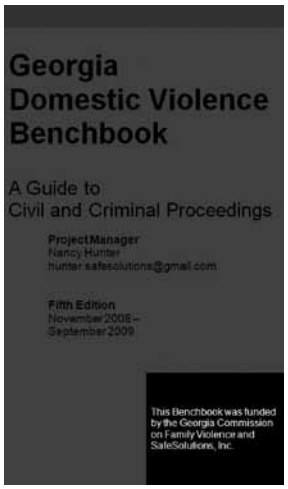


The Georgia Domestic Violence Benchbook (2009, 5th editions) has just been released for download on the Institute of Continuing Judicial Education's website: www.uga.edu/icje/DVBenchbook.html. A print version is also available at www.lulu.com/content/2196528.

TPOs: A Potential Way to Cure that "Alienation" of Affection by Your Citizen Spouse...

by Margaret Gettle Washburn and Austin Buerlein
Margaret Gettle Washburn, P.C.
washburnlaw@bellsouth.net

Pursuant to Title V of the VAWA (Violence Against Women Act) of 1994, amended in 2000, federal legislation provides a mechanism for an otherwise illegal immigrant to secure residency status, as well as various state and federal benefits, through seeking and securing a 12-month Temporary Protective Order against their U.S. citizen spouse. The immigrant battered spouse can not only secure an additional two year extension for her conditional residency status, but she may also even petition for permanent residency status, as well as terminate any currently pending INS investigations or deportation proceedings.

The policy behind the legislation is that Congress determined that domestic abuse problems are likely to be exaggerated in marriages where one spouse is not a citizen and the non-citizens' legal status depends on his or her marriage to the abuser because it places full and complete control of the alien spouse's ability to gain legal status in the hands of the citizen or permanent resident. A battered spouse may be deterred from taking action to protect themselves and their children, including filing for a civil protection order, filing criminal charges or calling the police because of the threat or fear of deportation. As a result, many immigrants were trapped and isolated in violent homes. By enacting the VAWA immigration provisions, Congress intended to alleviate such chilling result. 10 Am. U.J. Gender Soc. Pol'y & L. 95, *109.

However, immigrants that become aware of this provision may attempt to abuse what they see as a loophole for them to stay in the United States and keep living the American dream. Such was demonstrated in a recent case of mine where the non-citizen Wife attempted, on five different occasions, in various venues before different judges, to secure a 12 month protective order against my client, who was a naturalized U.S. citizen from Nigeria. As the marriage lasted approximately two years from the date that the immigrant wife migrated from Nigeria to marry my client until she filed for the first TPO, coupled with the fact that it was believed that she was currently the subject of INS investigation due to criminal charges, the Wife presumably sought to abuse this loophole so that she could remain in the United States, where she was currently benefiting from a full scholarship, various medical benefits, WIK benefits, among other benefits. Interestingly, the parties resided together just long enough to produce an American born child.

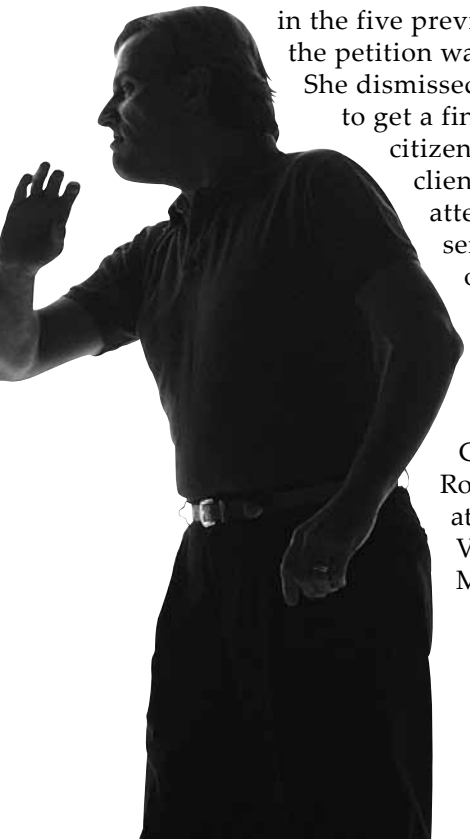
The Wife was involved in at least two petitions; her petition seeking permanent protective order against the citizen husband spouse and a cross petition from the Husband against the Wife and the Wife's brother. There was also a criminal warrant application hearing scheduled against the Wife for the Wife allegedly striking the Husband with a chair leg causing noticeable injury to the Husband's forearm.

On several occasions we engaged in negotia-t-tions with the Wife's former attorney and then immigration/ divorce attorney, to enter into consent order whereby there was no finding of violence against

either party. We simply asked that the Wife agree to go into counseling. The Wife staunchly refused each time to enter into any consent order whereby the doctor citizen husband would not have a finding of abuse against him. She also would not consider any consent order that referenced her own abusive conduct. This backfired to the point that the Fulton Magistrate Court found that the wife had struck the husband and, at the conclusion of the warrant application hearing, the Wife found herself charged with simple battery. That case resulted in the Wife being placed on probation. Thus, in her zeal for a protective order against the citizen husband, the Wife put herself in jeopardy as to her application for residency.

The Wife continued to pursue her efforts to obtain a finding of abuse in the Superior Court of Fulton County, both in status conferences and in a full two day trial. Both the judicial officer and superior court judge carefully discussed the problem with both the parties and counsel at the status and pre-trial conferences. The final judgment and decree also set forth the entire facts and circumstances as to the various allegations of both of the parties and the court's findings as to the allegations of violence made by the Wife against the Husband and the allegations of poor parenting made by the Husband against the Wife. The court awarded joint legal custody. The Wife was awarded primary physical custody with very generous parenting time for the Husband.

Not satisfied, the Wife sought another petition for a temporary protective order in the Fulton County Magistrate Court, again alleging the same conduct as she had set forth in the prior year of petitions. The immigration/divorce attorney accompanied her to the hearing as a friend, but not as an attorney. The presiding magistrate found that the various allegations raised in the new petition were predicated on the same factual transaction that had been dealt with in the five previous hearings, and that the petition was barred by res judicata. She dismissed the Wife's sixth attempt to get a finding of abuse against the citizen Husband. Luckily for my client, the Judge had recently attended two judicial seminars where this issue of allegations of violence made in attempts to gain residency was one of the topics.



According to Gwinnett County Magistrate Judge Robert Mitchum, there are attempts to abuse the V.A.W.A. provision. Judge Mitchum explained:

"If a non-U.S. resident applies for a Domestic Relations Temporary Protective Order, there are issues above and beyond normal property, money and child issues that need to be determined. If the alleged offending spouse is the sponsor for the petitioner's U.S. permanent residency application, the Respondent can simplify their case by withdrawing sponsorship of the residency application and (potentially) have the petitioner deported. It isn't quite that easy, but the respondent routinely makes the threat to control the situation or the petitioner. It is particularly acute if a child is born in the U.S., because that child will be a U.S. Citizen either because the respondent was already a citizen, or, if not, solely because the child was born in the U.S. If the petitioner is deported before a divorce can be had, the child does not get deported. A superior court judge hearing this type of case has the option to order the respondent to take steps to deliver to the petitioner all documents they need to continue their application themselves, i.e. birth certificate, application documents, reference letters, employment records, passport, child's documents, and any other document that the petitioner needs to go on with their residency application by themselves. In addition, the respondent can be ordered to refrain from doing any acts that will hamper the petitioner in their efforts to become permanent residents. I believe that victims of domestic abuse can apply for permanent residency on their own, providing evidence of the abuse, whether there is a pending sponsored application or not. Sometimes we can tell that the whole point behind the TPO petition is to get a leg up on the residency application process." ***FLR***

Our thanks to Judge Robert Mitchum for his assistance with this article. Mitchum graduated Notre Dame in 1972 and is a graduate of the (outstanding) class of 1979 Emory Law School. He was a Commander, U.S. Navy, is on the Faculty at the National Judicial College at the University of Nevada-Reno, and serves as a Magistrate in the Gwinnett County Magistrate Court as of 1987. Mitchum is married to attorney Gloria Mitchum. They have been married 36 years and have three children: Leah, a Lieutenant in the Navy JAG Corps, Phillip, working in Washington, D.C., and Bobby, a graduate student attending UGA.

Margaret Washburn is a graduate of Emory University School of Law, 1979. She practices in Lawrenceville. She is past president of the Gwinnett County Bar Association and past president of the Council of Municipal Court Judges of Georgia. She is a contributing editor of the GCBA Newsletter and serves as co-chair of the Local and Voluntary Bar Activities Committee for the State Bar of Georgia. Austin Buerlein was admitted to the Bar in November 2008, and is an associate with the firm.

Factors to Consider in Determining Who Receives "Credit" for Appreciation in the Value of A Business Owned By Divorcing Parties

by Sue K. Varon, Esq. and Martin S. Varon, CPA, CVA, JD
svaron@armvaluations.com, mvaron@armvaluations

In preparing business valuations in the context of a divorce, it is necessary to value the parties' company as of the date of the marriage as well as of the date of separation. Pursuant to the court's ruling in *Halpern v. Halpern*, 256 Ga. 639, 352 S.E. 2d 753 (1987) if the appreciation in the marital couple's business is due to the efforts of either or both parties, it is subject to equitable distribution upon the divorce. On the other hand, if the appreciation is due to market forces, it remains separate property. This has become common knowledge to family law practitioners in the state of Georgia. This also is critical in a marital asset valuation where the parties own a company run by one of the spouses.

Let's assume that Husband owns stock in a closely held corporation prior to the date of marriage. While the corporation is in its infancy, Husband marries Wife. During the term of the marriage, the value of the corporation appreciates considerably. Husband continues to receive a large (but reasonable) salary during the term of the marriage.

The attorney representing the spouse who does not actively run the company (for this example, Wife) will argue that the appreciation in the value of the business is due to the efforts of Husband. As a result, the appreciation in value of the business should be subject to equitable distribution on divorce. Husband's attorney will argue the increase in value was caused by market forces; therefore both the pre-marital value of the company and the appreciation in the value of the company during the marriage should remain his separate property. Since Husband was reasonably compensated for his efforts during the course of the marriage, Husband's attorney will also argue that the salary Husband received from the company during the marriage was marital property from which Wife already received a benefit. Furthermore, Husband's salary was an

expense to the company which resulted in reducing the value of the company. Husband's attorney will assert that the remaining appreciation in company's value is due to market forces and not subject to an equitable distribution.

An issue to consider is whether it makes any difference if the business to be valued is a service business (such as a law firm, CPA firm or consulting firm) as opposed to a capital intensive firm with a lot of inventory and equipment. In the case under discussion, assume Husband is the CEO of the company and his efforts are instrumental to the appreciation in value of the business. Part of the valuation should include a site visit. Let's also assume that during the site visit, the valuation expert observes that there are significant fixed assets and that the corporation is capital intensive. How would this impact the valuation and the arguments that the attorneys could make?

Case law is always a good source of reference. Although a case from another jurisdiction can only serve as persuasive authority, other jurisdictions often provide a good reference. A Florida Court of Appeals case dealt with the issue under discussion. The Florida court provided that the appropriate approach when determining if any portion of the husband's stock is marital is to determine the value at the date of marriage and at the date of dissolution. The difference in the two values would amount to the appreciation (or decline) in value. The court did not stop there, but added that an analysis of the reasons for the appreciation should be performed to determine if the appreciation was marital or separate. "Simply because a shareholder-spouse devotes work efforts to a corporation during marriage should not transform the entire appreciation of the stock into a marital asset. Analysis is required to determine whether appreciation occurred because of corporate attributes, such as goodwill, underlying investments, customer supplier and employee bases, operating assets and inventory. Allocation of the appreciation should be no more difficult in marital law than is the allocation of fault in a negligence action in tort law." *Anson v. Anson*, 772 So. 2d at 55.

As part of the company's valuation, the valuation expert will analyze the company's financial statements (including income statements and balance sheets) and calculate financial ratios to determine the financial health of the company. Just as a physician focuses on a patient's vital statistics (height, weight, blood pressure) during an annual examination to help determine the person's physical health, the financial analyst calculates various financial ratios to determine the financial well-being of a business entity. Some of the ratios examined include profitability, liquidity, solvency and efficient or inefficient use of assets. Some of these ratios (calculated as part of the business valuation) will determine whether fixed assets, personnel or a combination thereof are the driving force behind the entity's appreciation in value. These ratios are exactly what the Florida Court of Appeals was referring to as a necessary part of the analysis in determining whether appreciation of a company should be classified as marital or separate property.

Clearly, a good business valuation expert can provide valuable financial insight upon which family law practitioners can base their argument for equitable division of the business entity owned by the parties. It is important to provide the financial expert with the opportunity to evaluate this data at the inception of the negotiation process. The information gained from the financial expert's analysis will play a critical role in determining what the marital balance sheet looks like. ***FLR***

Martin S. Varon (CVA, CPA, JD) and Sue K. Varon are co-owners of Alternative Resolution Methods, Inc. (www.armvaluations.com). He focuses on business valuations and valuations of marital estates. He also serves as an expert witness at trial in the areas of family law, business litigation and estate litigation. Sue Varon (retired from the practice of divorce and business law) continues to serve as a mediator in the family law and civil law arena. Please feel free to call Marty Varon with any questions at (770) 801-7292.

Beware Seeking Annulment Based Upon Claims of "Sham Marriage"

by Jeanne M. Hannah
Website: http://jeannehannah.com, Blog: http://jeannehannah.typepad.com
E-mail: jeannemhannah@charter.net

Beware the dangers of seeking an annulment based upon a claim of a sham marriage. If U.S. Citizenship and Immigration Services (formerly Immigration and Naturalization Services or INS) investigates a spouse accused of perpetrating a sham marriage, both spouses are exposed to the danger of prison terms and fines for violation of immigration laws. In January 2008, a Chicago man was sentenced by U.S. District Judge Wayne Anderson to 37 months in prison and three years supervised release for conspiring to commit marriage fraud to circumvent U.S. immigration laws. [Source: U.S. Customs and Immigration Department website. http://www.ice.gov/pi/news/newsreleases/articles/080131chicago.htm]

> *"If U.S. Citizenship and Immigration Services (formerly Immigration and Naturalization Services or INS) investigates a spouse accused of perpetrating a sham marriage, both spouses are exposed to the danger of prison terms and fines for violation of immigration laws."*

In 2005, a bulletin from the U.S. Attorney's Office describing 26 indictments against 30 defendants that were returned by the grand jury in one day. (Some of those charged had already been deported.) The indictments all charged both the U.S. citizen and the alien with a violation of 8 U.S. Code, Section 1325(b) [Marriage Fraud] and 18 U.S. Code, Section 2 [Aiding and Abetting] in Count One. Counts Two and Three charged the alien and the U.S. Citizen, respectively, with violations of Title 18 U.S. Code, Section 1546 [False statement in a document required by immigration laws] based on the false representations made in the immigration forms submitted (I-485 and I-130). Finally, Count Four charged them both with a violation of 18 U.S. Code, Section 1001 [False statements in a matter within the jurisdiction of an agency of the United States] and Title 18 U.S. Code, Section 2 [Aiding and Abetting] based on the statements made at the time of the videotaped interview. Penalties include not only a prison term up to five years but also fines. According to law, those fines can be up to $250,000.

Where a resident alien is found to have entered into a sham marriage, he or she could be prevented from ever obtaining a visa to visit again in the United States and be denied any subsequent application for a green card. If domestic abuse is alleged, this, too could prejudice any future attempt by a resident alien to obtain a visa or a green card sponsored by a family member. ***FLR***

Practicing in the area of family law, Jeanne M. Hannah has maintained her own solo practice in Michigan since 1987, concentrating in the area of family law, particularly interstate parental abductions. She maintains a family law blog "Updates in Michigan Law." Hannah authored the chapter "Divorce Cases" for "Michigan Basic Practice Handbook" (ICLE 6th ed) and "Family Law Issues" for "Advising the Older Client or Client with a Disability " (ICLE 4th ed). A member of the Family Law and Elder Law and Disability Rights sections of the State Bar of Michigan and the Family Law Section and Domestic Violence sections of the American Bar Association, she is often a speaker at Family Law Section conferences and contributes regularly to the sections' internet discussion groups.

The 2010 Family Law Institute

by K. Paul Johnson
kpj@mccorklejohnson.com

It is time to make your plans to attend this year's Family Law Institute, which will be held May 27-29, 2010, at the Hilton Sandestin Beach and Golf Resort in Destin, Fla. We will be discussing the handling of a divorce case from start to finish over the three days. Presenters will cover topics ranging from the initial client interview to steps that practitioners should take to protect their clients after the entry of a Final Judgment and Decree of Divorce. We will be working with one fact pattern throughout the seminar. The fact pattern will be presented to attendees through short film vignettes that will move the story along as the divorce action progresses. The fact pattern will seek to address many of the issues common to a large number of divorce cases, as well as cutting edge issues like discovery of electronic evidence and arguments in custody cases related to sexual preference and religious practice.

This year's speakers include Ed Coleman and Jonathan Tuggle on The Initial Client Interview; a panel discussion on Planning Your Case Strategy; James C. Metts III, and Tyler Browning on Discovery and Evidence; Randy Kessler and Judge Steve Schuster on Temporary Hearings; Carl Pedigo, Leigh Cummings and Wendy Williamson on Making Mediation Successful; Kurt Kegel and Judge David Dickinson on Ethical and Criminal Issues; Rebecca Crumrine, Charlie Bailey, Judge Gail Tusan, Judge Jeffrey Bagley, and Sarah Brogdon on Unusual Custody Issues; Kelly Miles, Scot Kraueter and Martin Varon on Equitable Division; Regina Quick and Katie Connell on Taking the Case to Trial; Kelley O'Neill-Boswell and the Hon. Bill Reinhardt on Drafting the Final Judgment and Decree; Gwenn Holland, Kice Stone and Judge Cynthia Wright on Protecting Your Client After the Entry of Final Judgment; and Jonathan Dunn and Sarah McCormick on Case Law Update and Recent Developments.

As always, the Institute will not be all work and no play. We have receptions for attendees planned for Thursday and Friday nights and golf and tennis tournaments.

ICLE has secured a block of rooms at the Hilton Hotel for $249 per night, plus tax. Refer to our group (FLI) when making your reservations by calling 800-367-1271. We also have a block of rooms at The Grand Sandestin, located in the Sandestin Village. Room rates are $195 for a deluxe hotel room and $209 for a one-bedroom suite, plus taxes. Reservations for the Grand Sandestin can be made by calling 800-320-8115. The cut-off date for making room reservations within our room block for both hotels is April 27, 2010.

Be on the lookout for e-mail blasts and mailings from ICLE to register for the 2010 Family Law Institute. ***FLR***

2010 Legislative Update

by John L. Collar Jr.

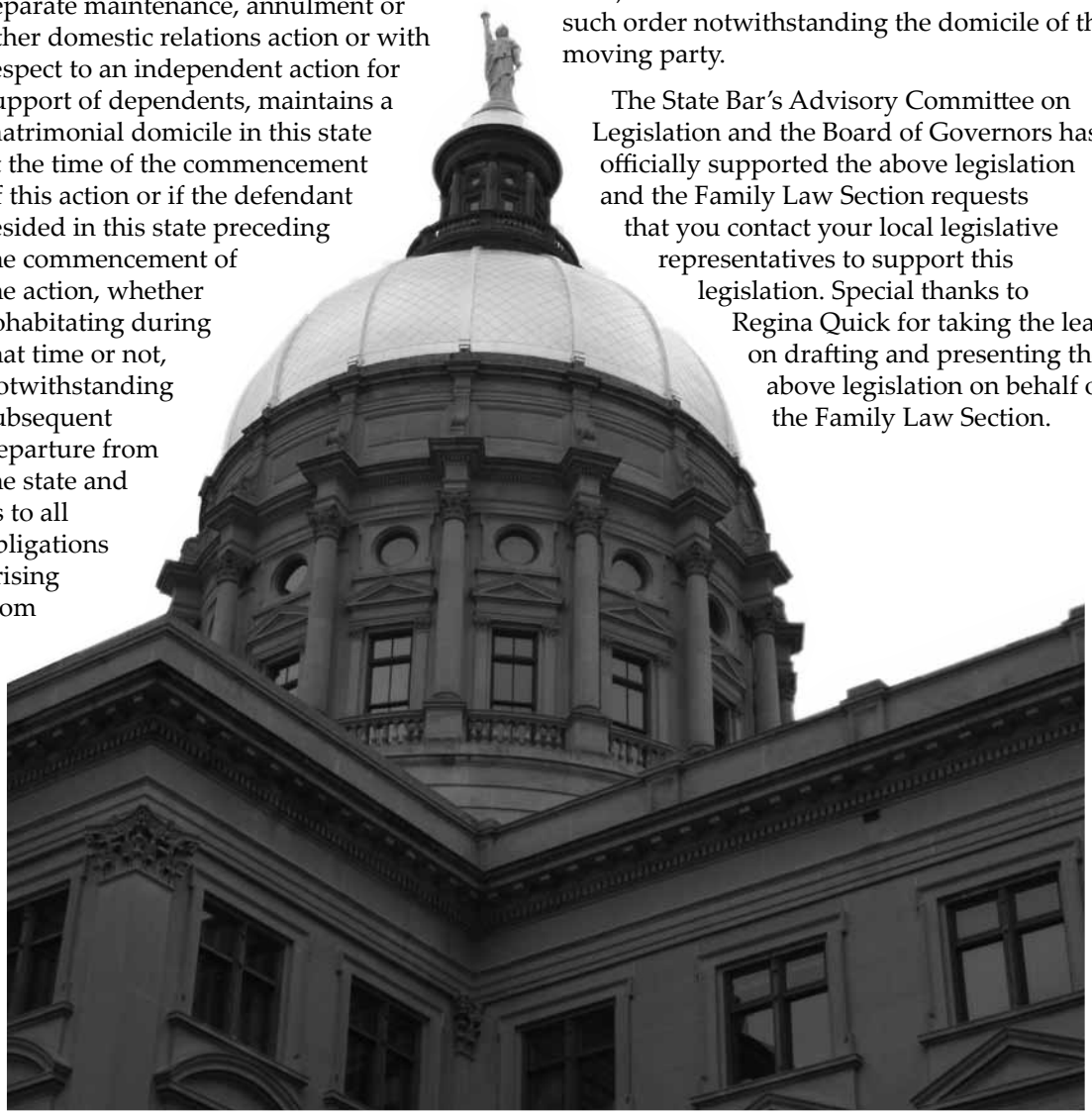
Legislation in the Hopper

The 2010 legislative session is underway and the State Bar Family Law Committee has proposed legislation to address the problem identified in Daniels v. Barnes, 289 Ga.App. 897, 658 S.E.2d 472 (2008) that Georgia courts do not presently have personal jurisdiction over non-residents under the Uniform Child Custody Jurisdiction and Enforcement Act regarding contempt applications. This proposed legislation would repeal existing O.C.G.A. Section 9-10-91(5) and establish the following as new subsections to O.C.G.A. Section 9-10-91.

New Section — O.C.G.A. Section 9-10-91(5) With respect to proceedings for divorce, separate maintenance, annulment or other domestic relations action or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or if the defendant resided in this state preceding the commencement of the action, whether cohabitating during that time or not, notwithstanding subsequent departure from the state and as to all obligations arising from alimony, child support, apportionment of debt or real or personal property orders or agreements if one party to the marital relationship continues to reside in the state. This paragraph shall not change the requirement for filing an action for divorce.

New Section – O.C.G.A. Section 9-10-91(6) Has been the subject to the exercise of jurisdiction of a court of this state which has resulted in an order of alimony, custody, child support, equitable apportionment of debt or equitable division of property, notwithstanding the subsequent departure of one of the original parties from the state, if the action involves modification of such order or orders and the moving party resides in the state, or if the action involves enforcement of such order notwithstanding the domicile of the moving party.

The State Bar's Advisory Committee on Legislation and the Board of Governors has officially supported the above legislation and the Family Law Section requests that you contact your local legislative representatives to support this legislation. Special thanks to Regina Quick for taking the lead on drafting and presenting the above legislation on behalf of the Family Law Section.



Summary of Other Legislation in the Hopper

House Bill 917 – The Uniform Interstate Depositions and Discovery Act

The purpose of HB 917 is to repeal the Uniform Foreign Depositions Act and replace it with the Uniform Interstate Depositions and Discovery Act. This proposed legislation specifically repeals and amends O.C.G.A. Section 24-10 and (a) defines the method for the issuance of a Georgia subpoena which originates from a foreign jurisdiction (another state) seeking discovery; (b) the method utilized by the clerk of court in this state when an out of state subpoena is received; (c) the manner and process in which witnesses in Georgia may be compelled to appear and testify at depositions; and (d) that the subpoena must be served not less than 24 hours prior to the time the appearance is required under the subpoena.

HB 917 also provides that an application for a protective order or to enforce, quash, or modify a subpoena issued by the clerk of court has to comply with the rules or statutes of Georgia and are to be submitted to the court in the county in which the discovery is sought. The proposed effective date of HB 917 is July 1, 2010 and shall apply to requests for discovery in actions pending on July 1, 2010.

House Bill 954 – Amendment To O.C.G.A. Section 19-6-5; Factors Relating To Determining Amount of Alimony

HB 954 proposes amending O.C.G.A. § 19-6-5(8) to the following:

"(8) Such other relevant factors as the court deems equitable and proper; provided, however, that previous marriages or relationships shall not be considered."

House Bill 976 – Amendment To O.C.G.A. § 15-11A relating to the Family Court Division of the Superior Court of Fulton County

HB 976 proposes revision to O.C.G.A. § 15-11A-2 to provide that the Fulton Superior Court Family Division shall continue to exist as a pilot project until July 1, 2018 and shall have the powers, rules of practice and procedure, and selection, qualifications, and terms of judges of the superior court as adopted by the superior court for the family division. The legislation also proposes repealing O.C.G.A. § 15-11A-2 in its entirety on July 1, 2018. The effective date of the proposed legislation is when approved by the Governor or it becoming law without such approval.

There has been some discussion legislation will be proposed to create a Uniform Premarital Agreement Act and legislation addressing custody issues for military persons but as of the writing of this article, no proposed legislation has been dropped. We will make every effort to keep you updated as the 2010 legislative session progresses. In the meantime, if you have any questions, please feel free to contact me at jcollar@bcntlaw.com. ***FLR***

Young Lawyers Divisions Family Law Committee Update

The Young Lawyers Division Family Law Committee would like to thank the following sponsors whose generosity made The Supreme Cork a success:

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On Oct. 1, 2009, the YLD Family Law Committee held their fourth annual Supreme Cork benefit at 5 Seasons Brewing Company-Westside. Guests enjoyed a specially brewed beer, "ALEmony," in the perfect fall weather on the patio overlooking the Atlanta skyline. The wine tasting and silent auction raised almost $19,000 to benefit The Bridge, a treatment center, school and residential facility for abused and troubled adolescents and their families. Thanks to all the committee members, sponsors, donors and guests who made this event a success!

(L - R) Katie Connell (Committee Member), Beth Pann (development director at The Bridge), Katie Rohr (committee secretary), Tyler Browning (committee chair), Gillian O'Nan (event chair).

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

need help?

Lawyer Assistance Program Confidential Hotline

800-327-9631

Lawyers Recovery Meetings: The Lawyer Assistance Program holds meetings every Tuesday night from 7 p.m. to 9 p.m. For further information about the Lawyers Recovery Meeting please call the Confidential Hotline at 800-327-9631.

The Lawyer Assistance Program (LAP) provides free, confidential assistance to Bar members whose personal problems may be interfering with their ability to practice law. Such problems include stress, chemical dependency, family problems, and mental or emotional impairment. Through the LAP's 24-hour, 7-day-a-week confidential hotline number, Bar members are offered up to three clinical assessment and support sessions, per issue, with a counselor during a 12-month period. All professionals are certified and licensed mental health providers and are able to respond to a wide range of issues. Clinical assessment and support sessions include the following:

- Thorough in-person interview with the attorney, family member(s) or other qualified person;
- Complete assessment of problems areas;
- Collection of supporting information from family members, friends and the LAP Committee, when necessary; and
- Verbal and written recommendations regarding counseling/treatment to the person receiving treatment.

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Family Law Section
State Bar of Georgia
Randall M. Kessler, Editor
104 Marietta St., NW
Suite 100
Atlanta, GA 30303

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Tina Shadix Roddenbery, chair
troddenbery@hsrblaw.com

Paul Johnson, chair-elect
pauljohnson@mpjattorneys.com

Randall M. Kessler, secretary/treasurer/co-editor
rkessler@kssfamilylaw.com

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edward.coleman@psinet.com

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

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

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

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

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

Kelly A. Miles, member-at-large
kmiles@sgwmfirm.com

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

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

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

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

Tyler Jennings Browning
YLD Family Law Committee chair
tyler@browningsmith.com