The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia Winter 2011

# Parenting Coordination:

## As seen from the bench, a family law attorney and parenting coordinator.

### From the Bench

**by Hon. Mary E. Staley**

For the sake of their children, divorcing parents must communicate with each other in a healthy manner concerning parenting issues. This poses a serious problem for the approximately 20-30 percent of divorcing parents who exhibit high conflict behaviors. Research indicates that unrelenting parental conflict is the most common cause of poor adjustment in children following a divorce. In the past the legal system has had limited resources available to assist high conflict families. However, the creation of parenting coordinators (PC) in 1997 has resulted in a steadily growing trend throughout the United States, Canada and Europe of using PC's to address problems unique to high conflict divorcing parents.

Parenting Coordination is a non-confidential, child centered process designed to assist conflicted divorced and divorcing parents and help the courts determine the best interest of involved children. It is a form of dispute resolution for cases in which conventional mediation is inappropriate or ineffective due to high levels of conflict. Through education, mediation and case management, the family's progress is monitored to ensure that parents fulfill their obligations to their child(ren) and complying with court orders. With prior approval of the parties or order of the court, the PC may make temporary decisions consistent with the scope of a court order or appointment contract to help high-conflict parents who have demonstrated an inability or unwillingness to make parenting decisions on their own. PC's may be used during the divorce process or post divorce. Parents with serious communication difficulties or with serious allegations about each other may request the monitoring services of a PC. The PC is a mental health professional or family lawyer who is trained to work as a neutral with the parents to ensure parental access and protect children from unnecessary stress. Parenting Coordination goals include:

- Shielding the child from conflict
- Allowing the child to love both parents
- Reducing the child's stress
- Improving the co-parent relationship
- Increasing parental cooperation and respect
- Teaching effective communication skills
- Monitoring any attempts at alienation
- Mediating (pre-divorce) or clarifying an existing parenting plan
- Reducing future litigation
- Monitoring parental behaviors and compliance with court orders
- Reporting non-compliance to attorneys
- Referring those involved for necessary services
- As last resort, provide testimony for the child(ren)

Usually the PC is granted limited authority to make simple and temporary modifications to visitation and custody. This authority is conferred by court order or consent of the parties. Any changes are put in place to reduce stress for the children. For example, it might be wise to change a transfer time or location for a few weeks to alleviate a child's stress at transfer. Ultimately, a parent's visitation rights *can not* be altered in any way by the PC absent parental agreement or court order. Unless both parents agree to a modification after a trial period, the visitation pattern reverts to the original plan as outlined in their order. However, the PC may make recommendations to the parent's and the court about those parenting issues that the parents were unable to resolve to assist the parties in improving their parenting style as well as inform the court about those issues.

Parents that are best suited for a PC are those with high degrees of conflict, with numerous allegations against each other, who engage in frequent litigation and have a chronic inability to communicate regarding child rearing. Parenting coordination is also appropriate for rigid, mistrusting parents, those with emotional instability, substance abuse and/or the need for supervised visitation. Parenting coordination is considered by some to be the only intervention for allegations or findings of parental alienation. For those families with chronic non-compliance and/or ongoing domestic violence, parenting coordination is not appropriate.

Parenting coordination benefits the courts by providing a fresh view of these difficult families. Unlike any other professional working with the courts, the PC has the unique opportunity to see the family in action through

See Parenting Coordination pg. 7

# Editor's Corner

**by Randall M. Kessler and Marvin Solomiany**
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Can you believe this decade has ended? Don't we all remember "Y2K"? We have seen many changes in the world at large as well as in the world of family law. Family law is no longer a "hushed up" subject. It is all over the news and it is, at least in my opinion, a much more respected field of law compared to what it was when I first began practicing. Isn't it amazing that law students and lawyers actually contact us and want to get into family law? It seems years ago it was a default area of practice and now it has become recognized as the important area that it is.

The Family Law Section continues to play a role in improving the practice of family law. Once again, we have put on some excellent seminars, including last year's Family Law Institute, and the Nuts and Bolts seminars. In keeping with that tradition, I am very much looking forward to next year's Family Law Institute at the Amelia Island Plantation over the Memorial Day weekend. We will have some great speakers discussing the newest trends in family law and some of the most relevant topics including international custody and gay marriage. We are also hoping to have more judges than ever so that the ratio of attendees to judges is better and there will be more time for all attendees to meet and interact with all of the judges. In addition, many of the judges will be presenting hot tips on opening statements or closing arguments and in fact may even deliver their own sample opening statements or closing arguments to show exactly how judges would like for us to prepare and handle our openings and closings. It should be very exciting and educational. Please book your rooms now and plan to attend our Family Law Institute May 26-28, 2011. We look forward to seeing you there.

We have printed the *Companion Guide to Child Support Worksheet and Schedules* and enclosed it with *The Family Law Review.* This publication was created by the Georgia Child Support Commission with contributions by several of our Executive Committee members.

Here's to a great new decade. Looking forward to learning and litigating (and mediating and collaborating) with you all. ***FLR***

# Inside This Issue



*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.*

# Chair's Comments

**by K. Paul Johnson**
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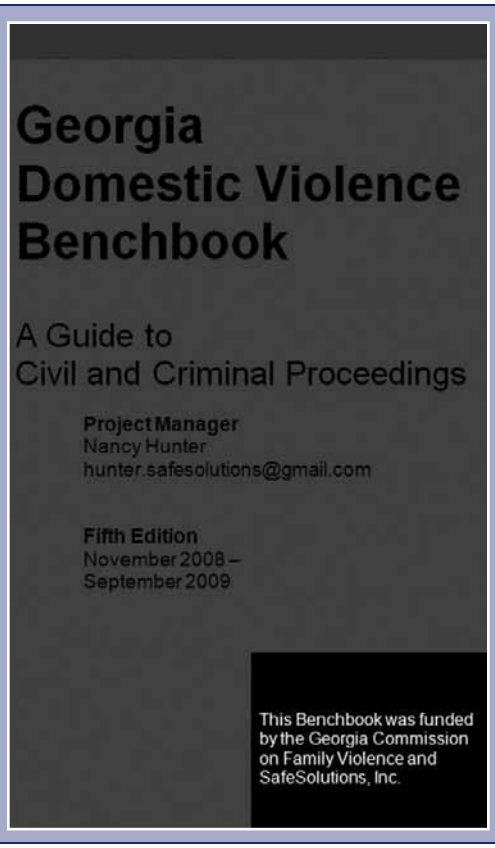
I hope that everyone had a safe and happy holiday season and is now well-rested and ready for the new year. It is hard for me to believe that I am already halfway through my tenure as chair of our fine section. During the years I have been involved with the Family Law Section, the thing about our section that has most amazed me is the diligent work of our Executive Committee. I know that this sounds like shameless self-promotion, but bear with me here. So far in my tenure, Kelly Miles has organized and put on two very well-reviewed and attended Nuts and Bolts seminars. John Collar and Regina Quick, our legislative liaisons, have prepared us for the upcoming legislative session by reviewing bills that will likely be considered this year. Executive Committee members have spoken at the Nuts and Bolts seminars and at December's annual American Academy of Matrimonial Lawyers seminar. Randy Kessler has managed to be a regular fixture on CNN's Nancy Grace show, to co-edit this journal and to organize this year's Family Law Institute (rumor has it he hasn't actually slept since the second Clinton administration). Marvin Solomiany has co-edited this journal. Jonathan Tuggle, Becca Crumrine and former Executive Committee member Leigh Cummings prepared a stellar line-up of judges to speak at the Section's professionalism seminar which was held in conjunction with our annual Section meeting in January and which was attended by over one hundred members of the Bar. In addition, Becca Crumrine has gone above and beyond the call of duty and has been of tremendous assistance to me and the entire Executive Committee. All of our Committee members have attended several meetings–often travelling across the state to do so–to deal with all of the many logistics that keep our section, one of the Bar's largest, functioning. Your board has done all of this in just the last six months or so, without pay and while running their own law practices. I hope you will join me in thanking our incredible Executive Committee for the work that they do.

I hope that my description of the hard work put in by the Executive Committee will not dissuade all of you from becoming as active in the section as your practice allows. We are always looking for folks to speak at the section's seminars, to write articles for the Family Law Review and to help with many of the other functions performed by the section. From experience, I can tell you without hesitation that your participation in the section will enrich your practice immeasurably. Feel free to call or e-mail me or any of the members of the Executive Committee to discuss what opportunities are available.

In closing, I want to wish everyone a happy and prosperous new year. ***FLR***




The Georgia Domestic Violence Benchbook (2009, 5th edition) has 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 lulu.com/content/2196528.

# Matrimonial Assessment:

## An Innovative System for Family Law Attorneys

**by Lonny L. Balbi, Q.C, lonnybalbi@familylaw-balbi.com**

### Introduction and Overview

Family Law poses many challenges to both clients and their legal advisors. Separating spouses are often embroiled in conflict and are in a situation they would rather avoid. Expenses are increasing with two households. The children are stuck in the middle of a bad situation.

The attorneys work hard to reduce conflict and help navigate their clients through many legal options towards settlement. The process is always expensive.

### Free Initial Consultation

Many attorneys offer a free initial consultation to clients in order to encourage people to hire the attorney to conduct the legal work required. In some situations, the first half hour is free, and after that, the attorney charges some hourly rate. In other cases, attorneys charge their usual hourly rate for the time spent with a client at the first meeting.

Not charging or under charging for the first interview with a client is a mistake. Clients receive very high value for that first meeting. If the meeting provides enough detail and information specific to the client, then the client will normally have no problem paying a decent price for that service.

### XONEX™ Matrimonial Assessment System

When a client first meets with his or her family attorney, that meeting is probably one of the most important and valuable meetings the client will ever have with an attorney. Expectations are set, strategies are formulated and important practical advice is given at the earliest stages. Remember that the client is seeing the attorney because of a difficult problem and the client is afraid: afraid of losing the children, losing the home, losing a job or not knowing what to do. The attorney is there to advise the client to help reduce those fears.

The XONEX™ Matrimonial Assessment System is an entire process in managing clients from the point of first contact to the conclusion of the first meeting and beyond. Attorneys and staff will be trained on how clients are explained the difference between an initial consultation a Matrimonial Assessment. The meeting is then arranged. The meeting involves a consultation with an attorney with expertise in the Family Law area of concern. The attorney reviews the historical facts then provides the client with advice on each of the legal issues presented. If there are children, a XONEX™ Child Protector Evaluation will also be conducted. In addition, information is provided on practical strategies and tips, how to improve the client's situation and reduce costs, together with a review of all options for settlement. The client is provided with reading material on the law and books on parenting. The client also receives a recording of the Assessment.

All questions are answered so the client can make an informed decision what to do in that situation.

The Matrimonial Assessment is bought as a package for clients for a flat rate. It has a unique name (to distance this from "free initial consultation" thinking) and provides enhancements and significant value to the client.

The client values the information because it is detailed and very fact specific. The process is not based on time expended by the attorney, but rather a full review of the client's situation and specific advice given to the client. At the conclusion of the Assessment, the client will have all questions answered and have a game plan in place on how to proceed. Most importantly, the client knows the cost of the Assessment up front before entering the office and is happy to pay the cost at its conclusion.

For the attorney, the Matrimonial Assessment System provides a stream-lined process that provides the client with proper care from the point of first contact until the conclusion of the Assessment and beyond. It also offers a flat rate billing based on value (not hourly rates) to the client. Collection problems are eliminated.

### Important Concepts

There are several important concepts that enhance the XONEX™ Matrimonial Assessment System. Understanding these concepts will make the system work better for the attorney and provide greater value for the client. The concepts are:

- Systems
- Value

- Pricing
- Client Selection
- Exclusivity
- TLC (Follow-up)

## 1. Systems

**Concept:**

Services can be provided at a lower cost to the attorney and client by establishing strong systems. A system is a series of steps followed consistently by staff in order to ensure quality work and successful completion of a project. Systems are important in Family Law because many of the tasks undertaken by attorneys are repetitive in nature and lend themselves to a systems approach.

All sorts of systems exist in Family Law practices. These include an accounting system, production systems, staffing systems etc. Systems tend to make an office run more efficiently and thus more profitably.

**Practical Application:**

The Matrimonial Assessment System has been developed in detail to take care of a potential new client from the point of initial contact through to the conclusion of the Matrimonial Assessment and even beyond. Following this system is easy to learn and ensures exceptional client care.

## 2. Value

**Concept:**

Attorneys need to understand that clients see value in a very different way than attorneys do. Value is completely subjective to each person. For example, if an attorney gives a client one hour of advice on how to save hundreds of thousands of dollars in potential child support, the attorney may bill the client one hour of their time, but the client may see the value of that advice worth up to the amount he saved in child support. On the other hand, a telephone call trying to arrange a meeting and billed at the attorney's hourly rate may equate absolutely no value to the client.

Clients want results and they are willing to pay for them. The Family Law attorney is in the unique position of knowing all of the client's fears, concerns, hopes and desires in their most personal of circumstances. Knowing this information helps the attorney understand what the client values and what that client might be willing to pay for a resolution.

Understanding the value a client places upon an attorney's services helps determine the appropriate price. However, clients are also willing to pay a premium knowing the price up front. There are no surprises and the client comes to the meeting prepared to pay that price.

**Practical Application:**

The XONEX™ Matrimonial Assessment process determines a set price in advance of any meeting with the client. The price is not determined by the time it takes the attorney to conduct the Assessment. It is a flat rate and provides the client with several valuable components.

The benefits received by the client include the detailed understanding by the attorney of the facts; specific advice to the client about the legal position on each issue; providing the client with practical tips and strategies for resolution; providing the client a list of options for settlement and the cost of each option; advising the client on which option would likely work best under the circumstances; providing the client with written information about each issue; answering all of the client's questions; providing the client with the exclusive XONEX™ Child Protector DVD; and providing the client with a recording of the advice given.

## 3. Pricing

**Concept:**

Closely related to value is pricing. Typically attorneys' charge an hourly rate and that rate is multiplied by the time expended to set a fee. This system tends to ignore the value to the client.

Ideally, since the value (and hence, price) to each client is subjective, then the price for a particular service to the client should vary by each individual client. However, a flat-rate pricing for a service such as a first meeting with a client makes sense in terms of the balance between efficiency and value. The price to be charged needs to provide the client with value at least equal to and hopefully greater than the cost to them. In turn, the price charged should also be profitable to the attorney.

**Practical Application:**

Under the XONEX™ Matrimonial Assessment System, the value to the client is created based on all of the benefits provided to the client. The price is set in advance. It is not based on time, but rather, value. This service and package of information can command a premium in most market places.

## 4. Client Selection

**Concept:**

Client selection is the single most important way for an attorney to increase profits, reduce stress and serve clients better. It is important to identify problem clients as early as possible, and then avoid taking them on. On the other hand, the attorney should also identify the good clients and fill the practice with them. In this way, the attorney will be happier, staff will be happier, and the clients who are served will definitely be happier.

**Practical Application:**

The Matrimonial Assessment System includes a Matrix evaluation form to select good quality clients before they even get in the door.

## 5. Exclusivity

**Concept:**

People want what they cannot have. It is that simple.

Exclusivity is an idea that lets a potential client know that even if the client can afford an attorney, the attorney may not agree to accept the client's case.

This concept turns the traditional school of thought on its head: rather than the attorney asking the potential client to hire the attorney for the provision of services, the client asks the attorney if he or she is willing to take on the case. It is a subtle, yet very important difference.

When attorneys are trying to get new business, they usually take whatever comes in through the door. If the client can afford to pay the money, the attorney will take the case on. There may be all sorts of good reasons why the attorney should take the client's case, but desperation and inexperience on the part of the attorney should not be reasons to accept a file.

**Practical Application:**

The better approach is to advise clients at the beginning of the Matrimonial Assessment interview that the case will be discussed in detail and at the end, the attorney will decide whether or not he or she will accept the client as a new case. The attorney's decision will depend on many of the client selection criteria (see item 4 above). Then, during the interview, the client will be thinking about acting in an appropriate way to ensure the attorney will agree to take on the matter. It is often surprising at the conclusion of a Matrimonial Assessment when the client asks point blank: "So, will you accept me as a client and how much money do you want?" Exclusivity is discussed in more detail in the training manual of the XONEX™ Matrimonial Assessment System.

## 6. TLC (Follow-Up)

**Concept:**

One of the important concepts in providing good value to clients is setting their expectations to provide a certain service, and then exceed those expectations by providing more information or service to them. Whenever a client has expectations that are met or exceeded, the client is more willing to pay the price and will be much happier for the service provided.

**Practical Application:**

When a client meets with the attorney at the Matrimonial Assessment the client should already receive good value for the price. However, following the Matrimonial Assessment further enhanced value to the client would be having the attorney's legal assistant follow up with "TLC" calls on a weekly basis for four weeks to the client to provide the client with further information and receive updates, all for "free". The assistant contacts the client and confirms that the attorney had requested the assistant contact the client to see how they were doing. Further, the assistant provides the client (usually by e-mail) with another article or further information relevant to their case. Training tools for the "TLC" calls are included in the training manual of the XONEX™.

## Matrimonial Assessment System.

Even though the Matrimonial Assessment has been completed and it has been paid for, the client continues to receive follow-up service from the attorney through the legal assistant. The client's expectations are being exceeded.

More information about the XONEX™ Matrimonial Assessment System can be obtained by contacting the author. ***FLR***

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*Lonny Balbi is a family law lawyer in Calgary, Alberta, Canada. The Matrimonial Assessment System was developed after years of working with clients and lawyers to perfect the process. Balbi patented the system to allow other law firms to use it effectively.*

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joint meetings. In some cases the PC is appointed in conjunction with the use of a Guardian ad Litem (GAL) or custody evaluator to provide additional information to assist the GAL or custody evaluator. In an ideal situation the PC may help the parents avoid court resolution of their family matters. When cooperation and resolution are not accomplished, the PC's testimony is a tremendous help to the court in rendering a decision that is in the child's best interest. Courts should consider using a PC when it appears that a high conflict family will benefit from a neutral with proper training to assist them in finding a peaceful resolution to their problems.

## From a Family Law Attorney

### by Blake Halberg, Family Law Attorney

High conflict families usually require an inordinate amount of our time. Understanding and utilizing parenting coordinators can benefit our practices and the families we serve. Having a PC available to manage the behaviors of both parents allows you to focus on matters such as the financial aspects of the case and not hand holding or listening to on-going stories and allegations our clients tell us about the other party with regard to the children. A PC can also help when both parties are seeking physical custody to expose when one of the parties is seeking custody for some reason other than what is in the best interest of the child(ren). In some cases we can help families by having both of the attorneys recommend to their clients that they learn about parenting coordination. This can be part of their settlement agreement, a recommendation by the GAL, a custody evaluator or ordered by the court. When there is no court order then the parties must both agree by signing a stipulation appointing a parenting coordinator.

Parent Coordinators are generally licensed psychotherapists or attorneys who are trained in mediation, child development, high conflict divorce, domestic violence, as well as parenting coordination.

In situations in which parents have been filing motions, calling the police over immaterial matters or exposing their children to their immature or impulsive behaviors, the PC can become a real God-send for the child(ren). As long as a parent is trying to respect the court order and attempting to work with their co-parent the process will benefit the entire family. For those parents who find controlling, micromanaging and hateful behaviors entertaining, the PC process will either alter their behaviors or be reported back to the attorneys and ultimately to the court. Either way the PC assigned to a family finally provides them with a service that can actually make a difference in the lives of the parents and their child(ren). When parenting coordination is successful, the child's symptoms of stress will be greatly reduced or eliminated. When children feel free to love both parents they are given a tremendous gift by their parents. Keeping parents out of court may save children from having their parents squander their college savings in a never ending series of charges and countercharges that the parents make against one another.

Ultimately, when our high conflict clients engage the services of parent coordination there is an enhanced chance that the parties will not be bringing each other back to court on contempt charges, which at the end of the day is in the best interest of the child(ren).

The states that currently recognize parenting coordination in their statutes include the following: Idaho, Oregon, Oklahoma, North Carolina, Louisiana, Colorado, Minnesota, Florida and Texas. Many other states are creating task force groups, local rules or legislation to allow parenting coordination. For a more complete summary of the states with statutes and a sample court order visit: www.parentingcoordinationcentral.com.

## From a Parenting Coordinator

### by Susan Boyan LMFT, director of the Cooperative Parenting Institute

Parenting coordinators function as a neutral to provide services to the higher conflict family. The PC process is a non-confidential one that allows the professional to take a more active role in monitoring parental behaviors. This allows the PC to report back to the attorneys or testify in court if necessary regarding how the parents are co-parenting and how their behaviors impact the children. The primary role of a parenting coordinator is to shield the child and help the parents to avoid further court action. Our responsibilities vary based upon the language of the stipulation or court order. Generally parenting coordinator responsibilities include:

- Educating co-parents in effective communication skills & anger management
- Mediating parenting issues
- Mediating age appropriate parenting plans or

making modifications to reduce conflict in the post divorce families
- Monitoring parental behaviors & parental access and reporting to the attorneys only as necessary
- Shielding the children from parental conflict, loyalty binds, & unnecessary stress
- Ensuring the execution of the court order or settlement agreement
- Collaborating with all professionals involved with the family
- Determining additional services such as counseling, random drug screens, parenting classes
- Determining the need for reconciliation services for the alienated child and parent

Some PCs will have a time limit on their role while others are open ended as a way to be available to families when they resort back to conflict at future stages in their relationship. When parents have gone as far as they can in the process they are placed on an "as needed" basis so they may return as new issues arise.

Many professionals in mental health and family law become confused by the overlap of other court involved services. Therefore, it is essential to understand the difference between the role of parenting coordinator and other roles that also work with conflicted families. First and foremost, parenting coordination is non confidential which makes the role very different than psychotherapist, mediator or attorney. Furthermore, the PC is more directive and structured than a therapist which helps to ensure the sessions are productive. The PC may provide solutions on a temporary basis when the parents are unable to resolve an issue that must be resolved such as when their order does not define a holiday period and the holiday is only weeks away. Unlike a custody evaluator, the parenting coordinator is not to provide a custody recommendation. However, they may provide information about the child's functioning and parental behaviors that may assist the court in making a custody change. One of the differences between a PC and a Guardian ad Litem is that the PC works primarily with the parents together as a team to address the goals stated above. However, both the GAL and PC are appointed as neutrals who are intended to focus on the child's best interest. They both may report to the court/attorneys and they may have some limited authority. A PC may not recommend custody while a GAL may do so. Unlike a GAL the PC remains available to the family on an "as needed basis" after a case is closed.

The role that is confused the most with parenting coordination is that of co-parenting counselor. On the surface they may appear to be the same service because co-parenting counseling also addresses child(ren)'s issues associated with divorce and family separation while assisting divorced parents to work more effectively as co-parents. However, one of the major differences is that co-parent counseling is a confidential process. As a result, information gathered through co-parent counseling cannot be shared with the court without the agreement of both parents. If highly conflicted parents are ordered to counseling or co-parenting counseling the professional will have their hands tied by confidentiality and the lack of authority to report non compliance. A co-parent counselor is not required nor expected to share information regarding parental compliance to the court and most would prefer never to testify. Parenting coordinators are expected to testify when needed. Therefore, monitoring of parental behaviors and compliance with court orders can not be accomplished through co-parent counseling. Co-parent counseling is suitable only for parents who are demonstrating mild conflict and those who do not have emotional problems. Co-parenting counseling is not recommended for parents:

- who are experiencing serious conflict
- who are involved in frequent post divorce litigation
- who have made serious allegations of the other parent such as allegations of neglect, of parental alienation, parental instability, domestic violence, addictions and child abuse.

A parenting coordinator has completed a minimum of 40 hours in family mediation training, generally 20 hours of parenting coordination training and has experience working with divorce and families. The number of PC training requirements are determined by each state as part of their local rules or state statues. They vary from 20-26 hours. Since Georgia does not yet have any legislation anyone may provide this service. Due to the high degree of conflict, the litigious nature of these clients and the fact that approximately 80 percent have personality disorders makes this work extremely important and very difficult. Careful selection should be made in using professionals with at least the minimum training and experience.

Since divorcing parents must continue to communicate for the sake of their children, the ability and willingness to do so is vital to the child's wellbeing. Since the co-parent relationship is so important to the mental health and overall adjustment of the children having a parenting coordinator may be the only way to ensure the children have a healthy childhood. The reason mental health providers and family law attorneys will go out on a limb to provide this difficult service is for the children caught in the middle. When all is said and done, parenting coordination is all about advocating for children in a very active process. ***FLR***

## Resources:


www.parentingcoordinationcentral.com

Boyan & Termini 2004 *The Psychotherapist as Parenting Coordinator in High Conflict: Strategies and Techniques,* Taylor Publishers

Boyan & Termini 1997, *Cooperative Parenting and Divorce: A Parent Guide to Effective Co-Parenting,* Active Parenting Publishers


The Cooperative Parenting Institute parenting coordination training is scheduled this year in Atlanta on June 24-26 and Nov. 11-13 at the Collaborative Law Center. For more information on the training visit www.cooperativeparenting.com.

# Professionalism CLE and Annual Meeting

**by Tina Shadix Roddenbery,**

The Family Law Section held its second Professionalism CLE in conjunction with the Family Law Annual Meeting and Reception at the Capital City Club downtown on Jan. 6, 2011. Over 110 participants attended the event.

The CLE was a unique opportunity to hear a diverse group of Superior Court Judges from around the state discuss how they deal with professionalism issues which occur in their domestic relations cases. The eight judges who responded to questions regarding professionalism in domestic cases were:

*(Left to Right Front Row) Hon. Mark Anthony Scott, Hon. Lawton E. Stephens, Hon. Gail S. Tusan, (Back Row) Hon. Brian J. Amero, Hon. Kathy S. Palmer, Hon. Horace J. Johnson Jr., and Hon. Gail S. Tusan, at the Family Law Professionalism CLE.*

- The Hon. Hon. Brian J. Amero – Flint Judicial Circuit
- The Hon. Horace J. Johnson, Jr. – Alcovy Judicial Circuit
- The Hon. Michael C. Clark – Gwinnett Judicial Circuit
- The Hon. Robert E. Flournoy, III – Cobb Judicial Circuit
- The Hon. Kathy S. Palmer – Middle Judicial Circuit
- The Hon. Mark Anthony Scott – Stone Mountain Judicial Circuit
- The Hon. Lawton E. Stephens – Western Judicial Circuit
- The Hon. Gail S. Tusan – Atlanta Judicial Circuit

The moderator, Jonathan Tuggle, asked judges many questions and they responded.

All the judges also commented on lawyers appropriate use of conflict letters. Judges are seeing more lawyers being untruthful in the letters, serving them only the afternoon before the hearing, or not serving opposing counsel until the morning of the hearing. The judges cautioned the attendees that they have their staff make calls to the other courts to confirm the accuracy of the letters.

At the end of the panel discussion Immediate Past Chair Edward Coleman was introduced by Chair Paul Johnson to read the slate of new officers for the 2011-2012 Bar Year. The slate of Randy Kessler, chair; Kelli Miles, vice-chair,; and Jonathan Tuggle, secretary, was unanimously approved by the Section. ***FLR***

*Tina Shadix Roddenbery is a founding member of Holland Roddenbery LLC., immediate past chair of the Family Law Section and a fellow of the American Academy Matrimonial Lawyers. She can be reached at troddenbery@hollandroddenbery.com.*

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# Enterprise Versus Personal Goodwill, the Next Chapter

**by Martin S. Varon and Sue K. Varon**

The recent *Miller v. Miller* (2010 WL 4704326) case decided by the Supreme Court of Georgia on Nov. 22, 2010, has been the topic of much discussion. A recent article in *The Fulton County Daily Report* focused on this case. At the Dec. 3, 2010, American Academy of Matrimonial Lawyers seminar held at the State Bar of Georgia, Barry McGough provided the participants with an analysis of the case in his talk on *Transmutation of Property: Commingling*. At the Dec. 9, 2010, Cobb County Bar Association Family Law Section CLE seminar, Wayne Morrison pointed out the case's potential impact with respect to separate versus marital property in his talk on *Can of Worms? Reconciling* Lerch v. Lerch *and* Coe v. Coe. The Miller case was the topic of interest at the Dec. 7, 2010, meeting of the Georgia Society of Certified Public Accountants Forensic and Valuation Services Section. Finally, it was cited in the most recent edition of *BVWire* Issue #99-2 (a business valuation resource). The case discusses the implications of commingling marital assets into a joint account. *Miller v. Miller* has significantly impacted case law in Georgia with respect to business valuations and the issue of goodwill.

According to *BVWire* Issue #99-2: "Only two state jurisdictions had yet to address the determination of professional practice goodwill value in divorce—and now only Alabama stands alone…The Supreme Court of Georgia agreed with his recitation of the majority rule and based on leading precedent from other states (including *May v. May*, 589 S.E.2d 536, 541 (III), fn. 7 (W.Va.2003) and *Steneken v. Steneken*, 873 A.2d 501, 505(II)(N.J. 2005), it decided to follow 'the vast majority of jurisdictions and include enterprise goodwill in the valuation of a professional practice as part of marital property'. Further, professional goodwill does not constitute marital property in Georgia.'" The court further states that "It is clear today that a determination of goodwill is a question of fact and not of law."

How will this impact your clients? Let's assume that your client owns a medical practice, a dental practice, a consulting firm, a law firm or an accounting practice. It appears from the Miller case that enterprise goodwill is a marital asset subject to equitable distribution in a divorce proceeding, but personal goodwill is not a marital asset and not subject to equitable distribution in a divorce proceeding. Of further significance is the determination that the allocation is a question of fact. *How do we determine the portion that is enterprise goodwill compared to the portion that is personal goodwill?*

During the 2010 Family Law Institute in Destin, Fla., we introduced the Multi-attribute Utility Model (MUM) that was developed by a business valuation expert and friend from Illinois. The model lists ten attributes that demonstrate evidence of personal goodwill and ten attributes that demonstrate evidence of entity or enterprise goodwill. After considering these ten attributes, the business valuator applies the attributes to your client's specific practice to help the court determine the weight to be allocated to personal goodwill versus enterprise goodwill. Some of the attributes require a subjective analysis, while other attributes are clearly objective. The Model attempts to assist the court in making a factual determination with respect to the proper allocation.

The method was applied by the Appellate Court of Illinois Fifth District in *In re Marriage of James O. Alexander and Valery M. Alexander,* No. 5-05-0109. In *Banchefsky v. Banchefsky,* 2010 WL 3527578 (Ohio App., Sept. 9, 2010) "the trial court expressly acknowledged MUM's utility in determining the fair market value of a professional practice–but said the model was not necessary in this case, due to the arm's length sale of the business and assigned value of the non-compete." In another Ohio case, *Concheck v. Concheck*, decided by the Court of Common Pleas, Franklin County, Ohio Division of Domestic Relations, Case No. 04DR-01-337, the Court also applied the MUM methodology to determine the portion of personal versus entity goodwill. This model was recently utilized in Valdosta, Ga. divorce case.

One of the enterprise attributes that is analyzed is multiple locations. Let's assume your client, an ophthalmologist, locates his practice right off a major highway (near Spaghetti junction or off of West Paces Ferry at the I-75 exit). Business has increased

significantly because of the convenience of location. Many new patients are coming to this location because of its ease of accessibility, convenient hours and competitive pricing. Is this not indicative of enterprise goodwill rather than personal goodwill? On the other hand, let's assume your client is a neurologist specializing in complex brain surgery. This physician has years of experience, specialized abilities, skills and unique medical credentials. The experience, skills, and unique specialty of this practice are indicative of personal goodwill attributes.

I was recently speaking to several AMA family lawyers at both seminars previously mentioned. I provided a comparison of two or three top family lawyers and their practices. One family attorney has a staff of outstanding attorneys in his practice; however all of these attorneys are of counsel. This attorney's practice has a tremendous degree of personal goodwill attributable to his charisma, skills, experience and reputation. He IS the practice. I compared this attorney to another well-known family law practitioner who is also very skillful, experienced and has an outstanding reputation. This second attorney practices in a much larger firm that has trained other very skilled attorneys who are all employees of the firm. A significant amount of this second attorney's knowledge, experience and skills has been transferred to the other employees. While this second attorney has significant personal goodwill, there is also significant enterprise goodwill. Many clients come to the firm not only because of this second attorney, but also based upon the law firm's reputation.

With the advent of this new case law, it will become more crucial than ever to have business valuations performed by an experienced valuation expert who is knowledgeable and understands the ramifications of the law. Keeping abreast of the ever-changing legal environment in this area can have significant impact on the outcome of your cases. ***FLR***

*Martin S. Varon (CVA, CPA, JD) and Sue K. Varon are co-owners of Alternative Resolution Methods, Inc. (www.armvaluations.com). Marty focuses on business valuations, valuations of marital estates, pension valuations and estate valuations. 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 active practice of divorce and business law) continues to serve as a mediator in the family law and civil law arena, and is a resource for local counsel on discovery projects and trial preparation. Please feel free to call Marty or Sue with any questions at (770) 801-7292.*

# Past Family Law Section Chairs

| | |
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| Bob Reinhardt | 1978-79 |
| Jack P. Turner | 1977-78 |

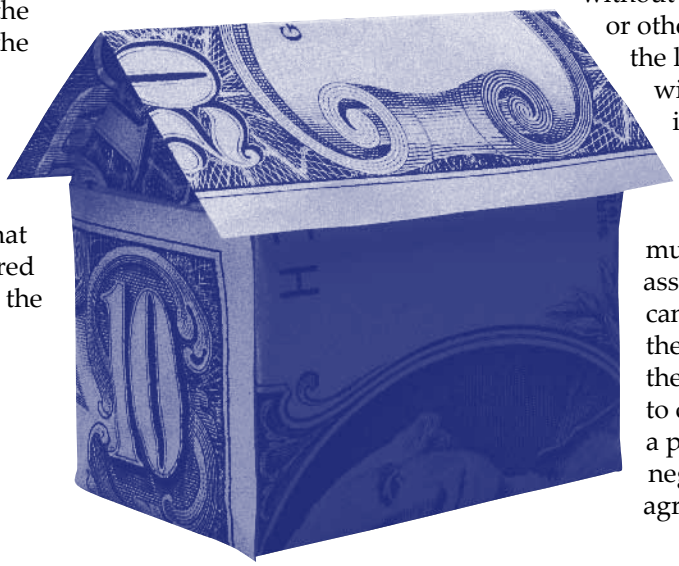
# Impact of Deducting Future Tax Ramifications from the Value of a Marital Asset

**by Martin S. Varon and Sue K. Varon**

Many family law seminars often include a session on case law updates from jurisdictions throughout the country. Although other state opinions are not binding in Georgia, they may be indicative of future developments in our jurisdiction. It is valuable to learn about these cases, not only with an eye toward possible future developments in the State of Georgia, but also as a means of predicating a legal argument based on persuasive authority. An interesting valuation case was decided earlier this year in the Superior Court of Pennsylvania.

*Balicki v. Balicki* (2010 PA. Super 134), involved a couple who married in 1979 and had two children, the youngest of whom reached age 18 in the summer of 2006. The divorce case focused on typical issues including temporary and permanent alimony, equitable distribution and attorney's fees. The financial issue of particular interest involves the equitable distribution of the husband's closely held business.

The wife is a stay-at-home mother who raised the children. The husband is a shareholder-attorney in a Pittsburgh law firm. In addition, the husband is the part owner of an insurance agency. The judge assigned the case to a Special Master to determine the economic claims. The Master held that the marital value of the insurance agency was slightly in excess of $610,000. The husband requested that the Master reduce the value to almost $470,000 to account for the tax consequences and expenses that would be incurred if husband sold the agency.



It should be noted that the Pennsylvania Divorce Code states the following should be considered with respect to the equitable distribution of marital property:

> "1. The Federal, State and local tax ramifications associated with each asset to be divided, distributed or assigned, which ramifications need not be immediate or certain. The expense of sale, transfer or liquidation associated with a particular asset, which expense need not be immediate or certain."

The Special Master agreed with the wife on this issue and did not consider the tax consequences or the expense of sale. "Wife and Master… believe the tax ramifications and expense of sale can only be considered if Husband is likely to sell the marital interest in the insurance agency. Master….explains: 'Given that this has been a family business for two generations and that the parties now have adult children who might someday inherit the business as Husband did, the Master declines to reduce the value by those hypothetical expenses and finds the marital value to be $610,000 (rounded).

The lower court reversed the Master's decision with respect to this issue and the Superior Court held that the lower court did not abuse its discretion. The Superior Court went on to state: "Pursuant to our Equitable Distribution Award, Wife will receive $X cash, without any tax consequences or other expenses. This will be the largest asset that Wife will receive. The marital interest in the insurance agency is the largest asset Husband will receive, but it is a much different type of asset than cash. Husband cannot properly convert the marital interest in the insurance agency to cash without finding a potential purchaser, negotiating a written agreement containing the

terms and conditions of the sale, consummating the sale and then paying income tax due as a result of the sale. Husband may incur expenses of sale other than income tax, such as a broker's commission, finder's fee, attorney fees and accountant fees. Hence, Wife will have access at no cost to her largest asset, cash, while Husband's access to the cash value of his largest asset involves a potentially difficult and clearly costly process. Therefore, deducting the tax ramifications and expenses of sale from the marital value of the insurance agency is certainly a fair way to divide this asset, and we made no error in doing so."

Is this decision the result of the court following specific legislated statues? Or is this indicative of a future trend? I am aware of numerous excellent family law attorneys who, when representing the spouse who is receiving the marital residence, insist that the appraised value be reduced for expenses associated with the sale of the residence even when there is no current sale contemplated. What impact will this ruling have upon the distribution of retirement accounts if no qualified domestic relations order is prepared to split the account? As you are aware, retirement funds typically are fully taxable upon distribution. Will an aggressive attorney representing the titled owner of the retirement funds insist upon applying the 10 percent penalty in addition to the tax consequences because of the potential for an early distribution? What if the owner of the property is in a very high income tax bracket as of the date of the divorce? Should the attorneys consider a lower probable tax bracket as of the date of sale?

If I was assisting the Wife's attorney in this case, I would argue if the court finds that the reduction for taxes is upheld, then the calculation should be reduced by the present value of the tax hit. As a valuation expert, we are asked to determine a conclusion of value as of today. I would argue that since a potential sale will not occur until some future date, we need to reduce the anticipated tax by a present value calculation. Although we do not know with certainty when and if a sale may occur, I would argue that it may occur at a normal retirement age (age 65-66). By calculating a present value of a future tax expense and cost of sale, this would reduce the amount of the reduction subject to the time until retirement, and the interest rate assumption utilized. ***FLR***

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

# 2011 Family Law Institute May 26-28, 2011

We hope you will be able to attend the 2011 family Law Institute at the Amelia Island Plantation, Amelia Island, Fla. This year, thanks to the efforts of our chair, Randy Kessler, the event will be another great learning and social experience for everyone.

The program will be cutting edge and practical, focusing on current Family Law Issues facing judges and lawyers. We will address issues such as International Custody as well as same sex marriage. The section has also invited over 50 judges (including justices of the Supreme Court of Georgia, Judges of the Court of Appeals of Georgia and superior court judges). We expect a great turnout. With so many jurists attending, there will be a great opportunity for you to discuss policies and procedures impacting on this important practice area. The ICLE brochure will be sent out around the end of February 2011.

The Institute will begin on May 26, 2011, and end on May 28. We have set aside a block of reduced-price rooms at Amelia Island Plantation. The per-night base room rates range from $159 for a resortview room to $375 for a three-bedroom oceanview villa. As is our Family Law Institute tradition, we will have receptions on Thursday and Friday evenings - likely with our now-famous Family Law Institute Band at Friday's reception, a tennis tournament on Thursday and a golf tournament on Friday. Randy has some other surprise events in store as well!

You are getting this early notification in the FLR because you are a section member. You may make your room reservations NOW, before the event is announced to the entire bar membership, by calling the resort at 1-800-281-1100. Refer to our group as the ICLE Family Law Institute when making your reservations. The cut-off date for making reservations in our room block is April 26, 2011. You can find a wealth of information about the Resort and the hotel by visiting their web site at www.aipfl.com.

The robust nature of this truly special event has been due in large measure to the sponsorship of many law firms and other related organizations. This year, in addition to our historical sponsorship levels, we have added a Five-Star Sponsor Level at the $10,000 mark and a Double-Diamond Sponsor Level at the $5,000 mark. To discuss the special incentives and recognition attending sponsorship at these levels, you should contact Eileen Thomas at 770-818-0301 or eileen@ethomaslaw.com.

# Obama Care & Family Law

**by James Holmes**

## Introduction

The cost of medical insurance coverage (and the uncovered expenses) is an integral part of any families budget; when a marriage is dissolving how family members are going to be insured for medical expenses and the costs of that insurance becomes even more critical to the discussion and to the "amount of income left" to meet all other expenses.

The Patient Protection and Afordable Care Act (PPACA) was signed by President Obama on March 23, 2010. More commonly known as Obama Care, this legislation will directly impact these medical insurance deliberations and decisions.

However, let me start with this caveat: *I am not a health care expert and do not offer this as a guru of Obama Care*. I am just a guy that became fascinated with the enormity of the scope of reach of the proposed legislation; I read the initial House version, read most of the Senate version and have read multiple summaries of this act. This document is provided simply as an introductory summary of the law and as a heads-up for the practitioner.

Under the Law, multiple new programs and agencies are established; while the law if over 1,500 pages itself, much – if not most- of the actual impact will be determined by the many new rules and regulations that are yet to be written and be promulgated, the large majority of those coming from Department of Health & Human Services (HHS), but also several other cabinet departments being involved. Also, there are multiple words of art throughout the law, some defined in the Act and others yet to be defined by those rules and regulations. Many provisions call for funding in the next few years which may or may not happen. [PRACTICE NOTE: Realize that what health insurance will be available at what cost and subject to what regulations is yet to be determined. Also, realize that each time your client goes through an enrollment period, there needs to be discussion regarding health insurance cost and coverage.]

Generally, this new law will impact access to health insurance coverage and the cost of that coverage. However, for one in Family Law practice, there are some provisions that might impact your practice and the advice you provide to your clients, or at least should be considered in giving that advice.

## Phase-in:

If you have watched the news at all you know that some provisions of the Law went into effect on Sept. 24, 2010. This was in fact the second of several phased-in effective dates between now and 2014. A review of the Phased-In provisions that I believe might impact the practice of Family Law are detailed below. [NOTE: Many specific changes in the coverage and costs of Medicare – Parts A, B, and D – are not included here]:

### July 1, 2010:

- Tanning Bed Tax – 10 percent tax on amounts paid for tanning Services [NOTE: If your client is in this business, they will notice a decrease in after-tax income.]

### July 10, 2010:

- Secretary of HHS was required to establish a web site to assist people to identify affordable health insurance options. That web site is www.healthcare.gov. [NOTE: A summary visit to this site finds it to be a work-in-progress and not the most user-friendly. However, it does appear to consolidate a lot of information into one site.] [NOTE: Effective upon enactment states were eligible for grants to establish health insurance consumer assistance programs. Whether the Georgia has received such a grant is not known.]

### July 21, 2010:

- HIGH-RISK POOL: Access to insurance for uninsured individuals with a pre-existing condition is available by entering into a temporary high-risk pool (which will be superseded by the health care exchange in 2014). [NOTE: If your client is facing those high COBRA costs, I would suggest that the client investigate this option.]

### IV. Sept. 23, 2010:

- CHILDREN'S PRE-EXISTING CONDITION *: Elimination of pre-existing condition exclusion for children – i.e., individuals under the age of 19.
- LIFE TIME LIMITS *: Elimination of lifetime limits on benefits.

- DEPENDENTS UNTIL 26 *: Any policy providing dependent coverage must now make that coverage available until the child turns age 26 [NOTE: Could this lead to many policies not covering dependents? Make sure your client knows the answer.] The adult child does not have to live with you to have coverage, but the child cannot be covered if eligible for health benefits at the child's employment.
- LOSS OF COVERAGE DUE TO ILLNESS *: Prohibition of dropping insureds when they get sick or because an unintentional mistake was made on the insurance application.
- NEW PLANS: All new group and individual plans must provide coverage for certain preventive services with restrictions on charges for co-pays and deductibles. [NOTE: Whether a plan is a new plan or is a grandfathered current plan is a significant determination but not one easy to make. Some summaries expect that only about a 1/3 of the current plans )a/k/a/ keeping one's current insurance) will be in effect by 2014; the new plans are subject to the provisions of the PPACA and its mandated health care contract provisions – e.g. the annual out-of-pocket expenses are limited to $5,950 for an individual and $11,900 for a family (reduced for those below 400 percent of the Federal Poverty Level). Generally, a current plan will lose it grandfathered status if significant changes are made that reduce benefits or increase costs – i.e. cannot significantly (i) cut or reduce benefits, (ii) raise co-payments, (iii) raise deductibles, (iv) lower employer contributions or (v) add or tighten annual limit on what the insurer pays, and, cannot change insurance companies.]
- "*": Those provisions marked with the asterisk apply to ALL health insurance Planes, whether current, grandfathered or new.
- SMALL BUSINESS CREDITS: If the Employer is a Eligible Small Employer – i.e. an employer with less than 25 Full-Time Equivalents (FTEs) – a tax credit is available to cover some of the cost of the medical insurance offered to those employees. [NOTE: 1. This credit is optimized at the level of 13 FTEs and tops-out at about $36,000. 2. Also, this credit is somewhat of a moving-target in that the amount of the credit or the percentage of the medical insurance cost which can be a credit changes after 2014.] [PRACTICE NOTE: If your client runs a "small business", there may be some funds available to reduce the costs of medical insurance and thereby increase the "disposable income" of the business.]

## Jan. 1, 2011:

- LONG-TERM CARE: Provides new, voluntary options for Long-Term care insurance
- TAX-EXEMPT SAVINGS ACCOUNTS: Standardizes the definition of Qualified Medical Expenses for HSAs, FSAs, and HRAs (and similar such accounts), to conform with the definition used for the itemized deduction.
- MEDICAL EXPENSE WITHDRAWALS: Increases the tax for withdrawals from a HSA (and other similar type accounts) for non-qualified medical expenses –i.e. generally any medical expense not prescribed by a physician, thereby denying reimbursement for all over-the-counter purchases - from 10 percent to 20 percent. [PRACTICE NOTE: If your client uses a HSA to get pre-tax money to pay medical expenses, the definition of qualified expenses is changed and narrowed, imposing an increased tax on non-qualified withdrawals.]
- 1099s: 1009s must be issued to any vendor (including corporations) of services or rental property to which more than $600 is paid during the year; there are several exceptions including merchandise, telephone and payment of rent to real estate agents. [PRACTICE NOTE: Getting the 1099s may be a nice to have in discovery to verify expenses of a business.] [NOTE: In your practice, this means that you must issue these 1099s; check with your accountant as to which vendors this provision applies.]

### Jan. 1, 2012:

- Various provisions primarily aimed at improving primary health care.

### Jan. 1, 2013:

- CONTRIBUTIONS INTO FSAs: Limits annual contributions to FSAs to $2,500 per year; this is currently unlimited. [PRACTICE NOTE: Remember earlier that the withdrawals for medical expenses are to be generally restricted to prescribed medications. And again, if your client was contributing more than this dollar amount on a pre-tax basis to reduce income tax, that tax liability may increase.]
- MEDICAL EXPENSES ITEMIZED DEDUCTION: Itemized deduction threshold for medical expenses is increased to 10 percent of Adjusted Gross Income from 7.5 percent
- NEW SURTAXES: HIGH INCOME EARNERS: Increases the Medicare tax rate by 0.9 percent on wages over $200,000 for individuals ($250,000 for couples filing jointly, but only $125,000 for couples filing separately). Also, this tax is expanded to impose a 3.8 percent tax on 'net investment income (or unearned income) – i.e. interest, dividends, capital gains, annuities, royalties and rent (excluding tax-exempt interest and retirement account distributions). And finally, formerly self-employed people had been able to deduct 1/2 of the Medicare Tax paid; this deduction is not allowed against the net investment income. [PRACTICE NOTE: If your client's income exceeds this limit - or the $125,000 if the couple files separately - be sure that you include these new surtaxes when determining After-Tax Income.]

### Jan. 1, 2014:

- ADULT PRE-EXISITING CONDITION: Pre-Existing condition exclusion becomes effective. [Contemporaneously I believe that the high-risk insurance available from the state will be curtailed if not eliminated.]
- ANNUAL LIMITS OUT: Eliminates imposition of annual limits on the amount of coverage an individual may receive
- EXCHANGES: Health Insurance Exchanges are required to be established in every state; individuals who pay more than 9.5 percent of income on insurance.
- INSURANCE CREDITS: Provides Health Care Credits for persons with incomes between 100 percent and 400 percent of the Federal Poverty Level but below 400 percent of poverty (appox. $11,000 to $44,000 for individual and $22,000 to $88,000 for family). [PRACTICE NOTE: How this provision impacts or compliments Medicaid and PeachCare / WellCare is not known at this time.]
- INSURANCE REQUIRED: Requires MOST individuals to obtain acceptable insurance coverage; failure to obtain coverage will results in a penalty – i.e. greater of $95 up to 1 percent of income for 2014 increasing to the greater of $695 or 2.5 percent of income in 2016. Families have a cap of $2,250 per family. [PRACTICE NOTE: The actual cost of insurance for the children may become difficult to determine; remember, the Child Support Law provides that if the actual incremental cost for insuring the child / children cannot be determined, then divide the total insurance cost by the number of individuals being insured.] Employers with 50 or more employees must offer coverage or pay a penalty of $2,000 per full-time employee (not counting the first 30). [PRACTICE NOTE: If your client is such an employer, this can directly impact the bottom-line.]
- EMPLOYER TAX CREDIT: Employer with less than 25 employees that offers insurance receives a tax credit.
- MEDICAID ACCESSS: Access to Medicaid will be increased to 133 percent of Federal Poverty Level.

### Jan. 1, 2018:

- All existing insurance plans must cover approved preventive care and checkups without co-payments.

### Conclusions:

My review of this Law raises more questions than answers provided. As a practitioner of Family Law, I end this review with these observations and comments:

- The cost of whatever health insurance that will be available will be a moving target for some time.
- Make sure your client in well-informed on the specifics of the costs and the coverage.
- If the case goes through one or more "enrollment periods", BE SURE to return to the specifics of health insurance.
- If your client has pre-existing conditions and if COBRA is simply too costly, check into the state's High-Risk coverage.
- Use the HHS web site as a research tool.
- If your client's income exceeds the stated limits, make sure that the After-Tax income is after the surtaxes are deducted.
- Filing separate returns is sometimes considered to avoid the joint liability; however, if this action leaves a client with income over $125,000, then the surtaxes come into play. ***FLR***

Continued from page 9



















# Case Law Update

**by Vic Valmus**
**vpvalmus@mijs.com**

## APPEAL/SUPERSEDEAS

*Robinson v. Robinson*, **S10A0929** *(Oct. 4, 2010)*

The parties filed for divorce on July 31, 2007, and the court entered a temporary order requiring the husband to pay $3,431 per month in child support for the three minor children and $3,000 per month in temporary alimony, beginning Aug. 1, 2007. On Nov 5, 2008, after a bench trial, the trial judge entered a final judgment and decree which required, among other things, the husband to pay $5,440.65 per month in child support. The final judgment and decree required lump-sum permanent alimony to be paid to the wife, but not periodic permanent alimony. On April 30, 2009, the trial court entered an order on the wife' request for attorney's fees. On May 15, 2009, the husband filed an application for discretionary appeal which was denied as frivolous. Thereafter, the trial court entered the remittitur on July 28, 2009.

On July 13, 2009, the wife filed a motion for contempt arguing, among other things, that the husband had failed to pay alimony, child support and medical expenses as set forth in the temporary order. On Aug. 21, 2009, the wife filed an amended motion for contempt which sought child support for the months of June, July, and August of 2009, calculated using the $5,440.65 per month set forth in the final judgment and decree of divorce. She also sough temporary alimony for the same months, based upon the July 31, 2007, temporary order. On Aug. 26, 2009, a hearing was conducted on the amended complaint. On Sept. 20, 2009, the court found that the husband was not in contempt. The trial court stated that the child support obligations were controlled by the temporary order until the entry of the remittitur in the trial court on July 28, 2009; the higher amount set forth in the final decree did not take effect until the remittitur was entered; and such higher amount would be due beginning with the payment required for August 2009. The trial court also denied the wife's claim for temporary alimony for the months of June, July and August 2009, while the husband pursued the appeal. The wife appealed. The Supreme Court affirmed in part and reversed in part.

It is unquestioned that the application for discretionary appeal and resulting notice of appeal operates as a supersedeas of the trial court's final order during the pendency of the appeal. Therefore, the operative question is, upon the return of remittitur, do permanent awards in the final judgment and decree take effect as of the date of entry of the remittitur, or do such orders relate back to the date of the final judgment and decree, with adjustments then made to reflect any payments made under the temporary orders during the pendency of the appellate actions? Some decisions support the proposition that an award in the final judgment and decree of divorce are to be enforced as of the date the judgment was entered, with the proper adjustments for any payments made pursuant to the temporary order during the pendency of the appeal. There are also cases reaching the opposite result. Temporary alimony is different in character and purpose from an award of permanent alimony because it is intended to meet the exigencies that arise out of the domestic crisis of a pending proceeding for divorce. It also takes into account the particular necessities of the spouse at that time and provides the means by which the spouse may contest the issues in the divorce action, including any appeal. Therefore, the Supreme Court held that the proper rule, if not otherwise altered by the trial court, is that a temporary award continues in effect until the entry of the remittitur in the trial court and it is from that date forward that any permanent and final award in a final judgment and decree of divorce has effect. Accordingly, the trial court erred in ruling that the husband was not obligated for temporary alimony amounts that had come due before the entry of the remittitur in the trial court. The trial court correctly ruled, as to child support, that the temporary award remained in effect until the date the remittitur was entered.

## CHILD SUPPORT/LUMP SUM

*Mullin v. Roy*, S10F1120 *(Sept. 20, 2010)*

The parties were married in 2004 and the wife filed for divorce in October of 2007. Shortly thereafter, the husband was arrested for possession of child pornography, lost his $80,000 per year job and begin living off of a $422,000 inheritance that he received in May of 2007. In March of 2009, the husband pled guilty in federal court to receipt and possession of child pornography and on May 13, 2009, was sentenced to serve five years in

prison. Prior to the sentencing hearing, the husband and wife signed a partial settlement agreement resolving all issues except for child support. Regarding child support, the court settled on an amount half-way between the husband's and wife's projection for his future earnings and set the child support obligation as $1,122. The court ordered the husband to pay, within 60 days, his entire amount of child support obligation for the next 13 years in one single payment of $175,163. The mother then filed a motion for reconsideration, arguing that the youngest child will not be emancipated for 15 years and the court modified the final order to require the Father to pay the entire sum of child support for two children for the next 15 years; i.e. $201,960. At the time of the final order, the husband had spent all but approximately $200,000 of the inherited funds. The husband appealed and the Supreme Court affirmed.

The husband conceded that the trial court had discretion prior to 2007 to order a lump sum payment of a child support obligation but argued that this authority was eliminated in the 2007 revision of O.C.G.A. § 19-6-15. However, the Supreme Court found that nothing in this code section expressly precludes lump sum support awards. The statute expressly authorizes the trial court to exercise discretion in setting the manner and timing of the payment and this language is certainly broad enough to encompass an order to pay a child support obligation all at once.

The husband also claimed that the trial court's award of lump sum child support was improper because it precluded any future modification of the obligation. However, the court held that this concern was based entirely on speculation about what might or might not occur at some point in the future, and, therefore, was not ripe for adjudication. The husband also argued that the trial court erred in granting the wife's motion for reconsideration and in amending is earlier order to include 2 additional years of the daughter's minority in the Husband's child support obligation, which increased the lump sum payment by $26,797. This ruling was made after the judgment under review and it cannot be considered. The amended order was entered after the husband filed the discretionary application that was granted and he never filed a discretionary application seeking review of the later order.

The husband also contended that the trial court erred by failing to discount future child support payments to present value before calculating the lump sum payment using a discount rate of 7 percent with a rate of interest that accrues pursuant to statute on unpaid child support obligations. The trial court recognized its discretion to make such a reduction but declined to do so, explaining that the husband failed to show that such a reduction would be appropriate in light of the current economic climate in which even the most secure financial investments offer extremely low rates of return.

## CHILD SUPPORT

*Woods v. Bradford,* **S10A0636** *(Nov. 8, 2010)*

The parties were married in 1983 and divorced in 1992. The mother was awarded custody of the couple's two minor children. In 2001, the oldest child went to live with the father, and the younger daughter continued to live with the mother. The parties consented to the entry of a modified custody order reflecting the parties' agreement that the husband's child support obligation for the daughter was $640.87 per month and the mother's child support obligation for the son was $728 per month. The agreement also stated that the parties, in lieu of exchanging support checks in the amounts stated above, the mother shall pay to the father the sum of $75 per month, representing the difference in the support obligation of each party to the other and said payments shall continue until such time as the minor son shall attain the age of 18 years.

The mother continued to pay the father $75 per month until the son reached the age of majority, then ceased. Thereafter, the father did not pay any child support to the mother for the younger daughter. The mother filed a petition for contempt, alleging that the father was obligated to pay $640.87 per month as child support for the daughter after the son reached majority. The arrears were $14,740.01.

After a hearing on Oct. 1, 2009, the court denied the mother's contempt petition ruling that the 2001 order only required the to mother pay $75 child support to the father for each month until the son reached the age of 18. The mother appealed and the Supreme Court reversed.

The Supreme Court held the command in the 2001 order that the mother pay $75 per month until the son reached the age of 18 was clearly a practical accommodation in lieu of exchanging support checks in the mail. The $75 represented a difference in the support obligation of each party to the other. The order embraced separate child support obligations and did not provide for any termination of the father's obligation to the mother prior to the daughter reaching the age of 18.

## CONTEMPT

*Tanner v. Morris*, **S10A1227** *(Nov. 1, 2010)*

The parties were divorced in April of 2004 with three minor children. The final decree awarded primary custody and ultimate decision making authority to the mother. In October of 2005, the eldest child began living with the father and, in July of 2007, the father ceased making child support payments for the eldest child. Then, in May of 2008, the middle child began living with the father and the father stopped paying child support for that child in January of 2009. In July of 2009, the mother formally requested that the father return the middle child to her custody. When the child was not returned, the mother filed a contempt action. At the contempt hearing, the mother testified that she agreed to the custody change and the decrease in child support payments for both children. However, pursuant to the settlement agreement, the child support for the minor children of the parties was $700 per month per child, so long as each child remained in high school and was living at home with the mother or, for as long as each child was in college, the father's child support obligation was to continue until each child reached the age of 23 years old or otherwise emancipated. The trial court found there was an arrearage of $28,700 for both children, but only held the father in contempt for $8,400, (the support for the middle child). The trial court also ordered the middle child to be returned to the custody of the mother instanter and awarded attorney's fees to the mother in the amount of $4,755.98. The father appealed and the Supreme Court affirmed in part and reversed in part.


The Supreme Court has held that self-executing child support modification provisions in divorce decrees are lawful. By including the language "while also living at home with the wife," the child support provision in this case was self-executing. Therefore, the trial court was in error to hold the father in contempt for relying on the self-executing provisions in the parties' settlement agreement to reduce his child support obligation when he had the mother's consent to allow the children to live with him. With regards to the eldest child, the father properly relied on the language of the party's child support agreement and the trial court erred in holding the father was obligated to pay the arrearage for the eldest child.

The father's failure to return the middle child when asked by the mother who had ultimate decision making authority warranted a ruling of contempt. The trial court was correct when it ordered return of the middle child to the mother. However, the arrearage amount should be calculated only from the time the father lost the mother's consent to keep the middle child.

The Supreme Court vacated the contempt order requiring the father to pay $8,400 and remanded to the trial court with direction to determine the amount of arrears from the time the father no longer had the mother's consent to keep the child until the date the child was returned. In addition, the attorney's fees awarded was vacated for reconsideration of the amount in light of the Court's opinion.

## CUSTODY/THIRD PARTY

*Price v. Wingo et. al*, **A10A1972** *(Sept. 30, 2010)*

The parties were divorced in 2008 and final decree awarded custody of the couple's two-year-old son to

the maternal grandparents (Wingo). Ten months later, the father filed an action for change of custody claiming that he was remarried and could now provide a stable home life for the child. After a final hearing, the trial court denied the father's request for modification of child custody and ordered the child to remain with the grandparents. The husband appealed, and the Court of Appeals affirmed.

The Court held the case was controlled by *Durnden v. Barron*. The *Durnden* test provides that once a third party has been awarded permanent custody of a child in a court proceeding to which the parent was a party, the roles of the parent and the third party reverse; that is, the third party has a prima facia right to custody against the parent who has lost the right of custody. The parent can regain custody upon showing, by clear and convincing evidence, his or her present fitness as a parent and that it is in the best interest of the child that custody be changed. Here, the trial court found the father had satisfied the first prong of the *Durnden* test, but failed to show by clear and convincing evidence that the change of custody was in the child's best interests, noting that the primary change in circumstances was the father's short remarriage.

The father argued that the trial court erred by considering evidence relating to matters that transpired prior to the 2008 custody award, including testimony about the father's two prior short marriages and evidence concerning parental fitness and conduct of the parents before the divorce. The father argued this evidence was immaterial and evidence as to unfitness had to be confined to matters that transpired subsequent to the divorce. The court held that, in determining the best interests of a child, the judge may consider any relevant factor, which includes each parent's past performance of parenting responsibilities. Therefore, the trial court was authorized to take into consideration the short duration of Price's two previous marriages. The mere fact of the father's remarriage did not necessarily establish by clear and convincing evidence that the best interests of the child required a change of custody.

## DEVIATION

*Holloway v. Holloway,* **S10F1417** *(Nov. 1, 2010)*

The parties entered into a separation agreement dated Dec. 9, 2009. Pursuant to that agreement, the husband took custody of the parties' younger daughter and the wife took custody of the parties' older daughter. Using the mandatory child support guidelines it was undisputed that the husband owed the wife child support in the amount of $550 per month, and the wife owed the husband $1,568 per month. The parties agreed that the wife would pay the husband $1,000 per month, the result of subtracting the husband's obligation to the wife and rounding the result to an even number. The trial court incorporated the quoted language of the agreement in the final divorce decree that was entered on Jan. 11, 2010. On Feb. 1, 2010, the wife filed a motion for new trial or, in the alternative, to set aside the divorce decree, arguing that the divorce decree contains a deviation from the child support guidelines without including any findings of fact as to why the deviation was appropriate. Based on evidence that the agreement was the product of the wife' voluntary negotiations, the trial court denied the motion for new trial and reconsideration, stating that the $18 differential from the guidelines was not the appropriate basis for negating the divorce decree. The court also assessed attorney's fees against the wife in the amount of $1,000. The wife appealed and the Supreme Court reversed.

The Supreme Court held it was undisputed that there was at least $18 difference in the amount of child support mandated by the child support guidelines and the amount actually being paid by the parties. A deviation means an increase or a decrease in the presumptive amount of child support. O.C.G.A. § 19-6-15 makes certain findings of fact mandatory. For a deviation to apply, the order must explain the reason for the deviation, provide the amount of child support that would have been required if no deviation had been applied, state how the application of the presumptive amount of child support would be unjust or inappropriate and state how the best interests of the child for whom support is being determined will be served by the deviation. The trial court considered none of these findings.

The husband contends the wife voluntarily agreed to the deviation, which inured ultimately to her benefit and cannot change this result. In this case, because the parties' separation agreement did not comply with the provisions contained in the code section and did not contain findings of facts as required to support a deviation, the trial court should have rejected the agreement.

In addition, the trial court must reverse the award of attorney's fees to the husband. If the trial court fails to make the findings of facts sufficient to support an award of attorney's fees under either O.C.G.A. §19-6-2 or §19-15-14, the case must be remanded to the trial court for an explanation of the statutory basis to support it. In this case, the trial court merely ordered the wife to pay the attorney's fees of the husband without making findings of facts and without any cogent evidence of the work performed by the husband's counsel or the nature thereof.

## EQUITABLE DIVISION

*Armour v. Holcombe et. al,* **S10F0946** *(Oct. 18, 2010)*

The parties were married in 1978 and in 1991, the husband's mother (Armour) acquired a home and allowed the couple to live there. Armour deeded property to her son (husband), individually, as a gift. The husband refinanced the property with a commercial lender and made sporadic payments on the debt. Armour also made some payments. In March of 2005, the husband transferred the property back to Armour by warranty deed. The wife filed for divorce on Oct. 13, 2005. The trial court entered an order providing that both the husband and wife were not to dispose of any of their property. On Nov. 17, 2005, the wife amended her divorce complaint and added Armour as an additional defendant and sought to enjoin her from selling the property and to have the deed from the husband to Armour set aside because the deed to Armour deprived

the wife of her marital interest in the property. On Jan. 17, 2006, the trial court ordered the home to be sold and the proceeds to be from held in escrow pending the outcome of the litigation. The home sale resulted in $68,873 being placed in escrow.

On the first day of trial, the wife stated that she was not going to pursue the fraudulent conveyance issue. No request for jury instructions on the issue was made, none was given, and the issue was not placed before the jury. The jury awarded the wife $41,500 from the proceeds. Armour appealed, and the Supreme Court reversed.

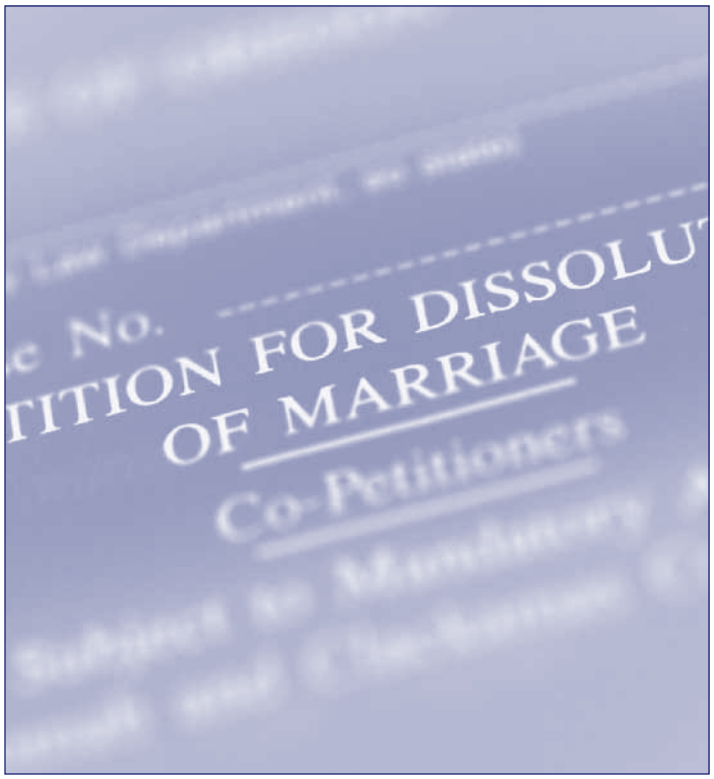
On appeal, Armour contended that there was no evidence that the property was a marital asset and the trial court thus erred in denying her motion for a directed verdict. Only real and personal property and assets acquired by the parties during the marriage are subject to equitable division of property. Property acquired during the marriage by one spouse by inheritance, gift, bequest or devise remains separate property of the recipient spouse and is not subject to equitable division. It was undisputed that the husband transferred the property to Armour in March of 2005 and the deed was recorded on Sept. 27, 2005, before the wife filed for divorce. The Supreme Court has recognized that, when one spouse in a divorce action alleges that a property has been fraudulently conveyed to defeat his or her rights, additional parties involved in the alleged fraud may be joined in the action to facilitate a complete resolution of the issues. Even though the wife amended her complaint to allege a viable fraudulent conveyance claim, she chose not to pursue that claim and it played no part in the trial. The wife did not seek to establish that the husband received proceeds from his transfer of the home, which might have become marital property.

The Supreme Court held that no case law has recognized the right to pursue equitable division of property titled to a person other than one of the spouses without title to that property first being brought into the estate of one of the divorcing parties by determination that a fraudulent conveyance has occurred. The consent temporary order in this case provided that the parties agreed to certain matters on a temporary basis and that the home would be sold with the proceeds held in escrow pending adjudication of the interests of the parties. That order in no way adjudicated any issues regarding the fraudulent conveyance to Armour nor did it show an abandonment of her claim that the real estate was non-marital property that should remain titled in her name.

## EVIDENCE

*Pace v. Pace*, **S10F0843** *(Oct. 4, 2010)*

The parties filed for divorce and, after a temporary hearing at which both parties testified, the trial court awarded physical custody of the child to the husband. Approximately one year later, a bench trial was held in which the husband and wife both testified and presented multiple witnesses. The trial court then entered a final judgment and decree of divorce, awarding primary physical




custody and legal custody of the minor child to the husband. The wife moved for a new trial, which was denied. The wife appealed and the Supreme Court reversed.

The Supreme Court reasoned that it was apparent from both the final divorce decree and the order denying the wife's motion for new trial, that the trial court relied substantially on testimony introduced at the temporary hearing, in making a determination of permanent custody. It was likewise clear from the record that the parties were not on notice that such testimony would be considered by the court in making its decision on permanent custody. As of the date of the final hearing, the transcript of the temporary hearing, held more than a year earlier, had not even been filed and the trial court thus relied on its memory and notes in reaching its custody decision.

The Supreme Court reasoned that neither statutory provisions nor the court rules address the extent to which the trial court may rely on evidence from the temporary hearing in reaching its determination on permanent custody. However, an award of temporary custody differs in nature and purpose from an award of permanent custody.

Temporary awards are intended to create an interim arrangement that serves the best interests of the child pending the adjudication of the rights of the mother and the father, whereas the award of permanent custody constitutes a final adjudication of the rights of the parties. As a result, the nature and quality of the evidence presented at a temporary hearing is likely to be different from that which is ultimately presented at a final hearing and the parties should ordinarily expect that only evidence offered at the final, more formal hearing, will be relied on to support the permanent award of custody. Accordingly, the Supreme Court found that, absent express notice to the parties, it is error for the trial court to

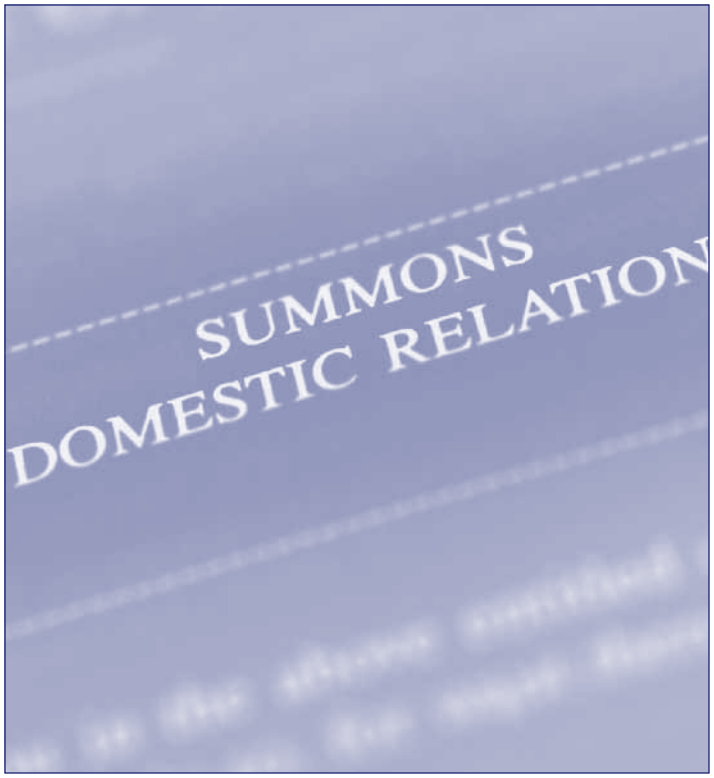
rely on evidence from a temporary hearing in making its final custody determination.

## GUARDIANSHIP

*Boddie v. Daniels,* **S10A1821** *(Nov. 1, 2010)*

In March of 2007, a petition for guardianship of a minor child was filed by the guardian, Daniels. The guardianship was issued in April of 2007. In March of 2009, the mother filed a petition to terminate the temporary guardianship and the guardian filed a timely objection. The juvenile court found by a preponderance of the evidence that the best interests of the child would be served by continuing the temporary guardianship. The juvenile court denied the request to terminate the guardianship without making any findings that such termination would harm the child. The mother appealed and the Supreme Court reversed.

The mother argued that O.C.G.A. §29-2-8(b) does not contain significant safeguards to protect her fundamental constitutional right to raise her child and that the best interest standard should therefore be construed narrowly. The Supreme Court reasoned that the implication of the provisions in the statute is that guardians of a minor have the powers otherwise inherent in parenthood. There are significant similarities between custody and guardianship. Both carry with them privileges and obligations in decision making and daily care of the child. Because these concepts share common attributes, the Supreme Court construed the guardianship provisions and the custody provisions in pari materia in order to determine the appropriate standard to be applied when conflicting claims between parents and non-parents are made in a guardianship hearing. Therefore, the standard found in O.C.G.A. § 29-2-8(b) must be interpreted to mean that a third party must prove by clear and convincing evidence that the child will suffer physical or emotional harm if custody were awarded to the biological parent. Once this showing is made, the third party must then show that the continuation of the temporary guardianship will best promote the child's welfare and happiness. Therefore, the Supreme Court held the juvenile court erred by denying the petition to terminate the temporary guardianship without a finding by clear and convincing evidence that such determination would harm the child, explaining that harm means either physical or emotional harm, not merely social or economic disadvantages.




The Supreme Court further reasoned that guardianships are intended to encourage parents to temporarily turn over custody and care of their children, where necessary, by giving the assurance they can regain custody in the future. This policy would be frustrated if the guardianships were difficult to terminate and constitutional parental rights would not be protected. Parents would then be less likely to voluntarily petition for guardianship.

## LEGAL CUSTODY

*Mark Carol Greene v. Alla Yuriyevena Greene,* **A10A1463, A10A1464** *(Oct. 1, 2010)*

The parties were divorced in September of 2005 and, pursuant to the final judgment and decree of divorce and incorporated settlement agreement, the wife was awarded final decision making authority on matters related to religion. The parties had one daughter that was born in September of 2001. The wife is Jewish and the husband is Christian.

The settlement agreement, in pertinent part, stated, in the event the parties cannot agree on major decisions, then the wife shall be the tie breaker and she shall make the ultimate decision. The mother filed a contempt action against the father, arguing that he was indoctrinating the child in a manner which alienated the child from Judaism. During the contempt hearing, the father acknowledged that he had agreed that the child would be raised in the Jewish faith, would attend Hebrew school, would have a Bat Mitzvah and participate in all other Jewish traditions. However, the father admitted that he had taken the child to numerous Christian churches for various reasons and also testified that he told the child she was Jewish on the outside and Christian on the inside shared Christian prayers with the child, read the Bible to the child and taught many other parts of the Christian faith to the child. The trial court ordered, among other things, that the husband was in contempt and stated that the father should not indoctrinate the child in a manner which alienated the child from Judaism, shall not take the child to church nor engage the child in prayer or Bible study if it promotes rejection, rather than acceptance, of the child's Jewish self identity, shall not share his religious beliefs with the child, if those beliefs cause the child emotional distress or worry about the child's mother or the child herself, cannot participate in prayers with the child, cannot play Christian songs with the child present, cannot read the Bible to the child, or in any way attempt to indoctrinate the child into the Christian faith. The father appealed and the Court of Appeals affirmed.

The Court held the settlement agreement was clear and that the wife had the right to make final decisions about the child's religious upbringing and, therefore, the trial court correctly concluded that the settlement agreement governed.

## LEGITIMATION/NOTICE

*Sherrington v. Holmes,* **A10A1066** *(Sept. 30, 2010)*

The father filed a petition to legitimate on March 9, 2009. The petition asked the trial court to legitimate the child, set child support, award the father broad visitation rights and grant such other and further relief as the court deemed proper. The mother did not answer or oppose the petition. The matter was set for June 29, 2009, and rescheduled for July 20, 2009. On July 16, 2009, the father filed an amended petition requesting that the child's last name be changed and that the trial court determine custody of the child. The mother represented herself pro se at the July 20 hearing and no transcript exists. On July 27, 2009, the trial court entered an order granting the petition to legitimate and changing the child's name to the father's. The court awarded joint custody, naming the father as the primary custodian. After the hearing, the mother retained counsel and moved for a rehearing, citing lack of timely notice that the trial court would be considering the issue of custody at the July 20 hearing. The mother filed a notice to appeal before the trial court ruled on the motion. The Court of Appeals reversed.

The mother argued that she was entitled to at least a 15 day notice to respond to the father's amended petition requesting resolution of custody. The father argued that the right to notice was waived when she failed to answer the petition to legitimate and that his resolution of custody was not raised for the first time in the amended petition because the original petition sought such other and further relief as the court deemed proper. The court held that the general prayer for relief in the father's petition to legitimate was insufficient to put the mother on notice that the father was asking the trial court to determine custody in the legitimation action. Even though the mother's failure to file an answer to the father's original petition to legitimate served to waive any defenses to the original claim for legitimation, it did not waive her right to respond to the father's subsequent request for determination of custody. In fact, the mother was not required to answer the amended petition in the absence of an order directing her to do so and any allegations in the amendment automatically stood denied.

Nevertheless, the mother had a right to file an answer to the amended petition if she chose and O.C.G.A. § 9-11-15(a) contemplates that a party generally is entitled to up to 15 days to respond to such an amendment, even when the trial court orders a response. Therefore, it was premature for the trial court to address the issue of custody at the July 20 legitimation hearing without giving the mother a reasonable opportunity to respond to the new prayer for relief. With such an inadequate notice to the mother, a trial court judge cannot be assured that he is giving proper consideration to the issues impacting the determination of the child's best interests.

## LEGITIMATION

*Baker v. Lankford,* **A10A1211** *(Oct. 5, 2010)*

While married to Mark Baker, Kristin Baker gave birth to KB in December of 2006. Mark Baker was listed as the father on the birth certificate. They lived together as a family and he provided financial support and developed a relationship with KB. In June of 2008, when KB was 18 months old, the mother told Baker that KB was Lankford's biological child. In February of 2009, the mother moved out of the home and Baker paid child support and eventually filed for divorce. In November of 2009, while the divorce was pending, Lankford filed a petition for legitimation, custody and visitation and submitted a 99.99 percent DNA test showing that he was the biological father of KB. On Nov. 13, 2009, Baker moved to intervene and to dismiss the legitimation proceeding, arguing that Lankford had abandoned his opportunity and interests to develop a relationship with KB. On Nov. 16, 2009, the court granted the legitimation petition, and dismissed Baker's motion to intervene and ruled that the motion was moot. Baker appealed and the Court of Appeals reversed.

O.C.G.A. § 9-11-11(a)(2) provides in relevant part that, upon a timely application, anyone shall be permitted to intervene in any action when he claims an interest relating to the property or transaction which is the subject matter of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, and his interest is not adequately represented by existing parties. Baker met the first requirement, as he clearly had an interest in the legitimation proceeding as stated in O.C.G.A. § 19-7-20, which provides, in pertinent part, that all children born in wedlock or within the usual period of gestation thereafter are legitimate. A child's legal father is defined as the man who was married to the child's biological mother at the time the child was conceived or born, unless such paternity was disproved by a final order. When Baker filed his motion to intervene, he was the child's legal father and had a parental and custodial right to the child. Lankford argues that Baker had no interest in the action because the presumption of legitimacy was supported by evidence that Baker is not the biological father and a non-biological father has no recognized legal rights to a child. However, the legal father, even one who is not the biological father, has parental and custodial rights to the child and the presumption of legitimacy is not easily rebutted. A man has no absolute right to the grant of a petition to legitimate a child simply because he is the biological father.

Baker also met the second and third criteria for intervening as a matter of right. If the trial court were to declare KB to be the legitimate child of someone other than Baker in an unappealable order, that man would become the child's legal father in place of Baker. Therefore, Baker's interest as KB's legal father would be impaired by the decision of the trial court and his interests were not adequately represented by the parties to the action. The Supreme Court concluded that when intervention appears before final judgment, where the rights of the intervening

party have not been protected, and where denial of the intervention would dispose of the intervening party's cause of action, intervention should be allowed, and failure to allow intervention amounts to an abuse of discretion.

## RETROACTIVE CHILD SUPPORT

*Galvin v. Galvin*, **S10A1104** *(Nov. 1, 2010)*

The parties were divorced in May of 2007 and joint legal custody of their 30 month old child was awarded to the parties, with primary physical custody awarded to the mother. Child support was ordered in the amount of $971.68 per month. In February of 2008, the father sought downward modification of child support on the grounds that he was no longer employed, was receiving unemployment benefits and the mother's income had increased. In November of 2008, the father amended his petition seeking modification of child custody and visitation. After a hearing, the court found a significant change of condition and ordered a downward modification of child support, finding the mother's monthly income had increased to $2,500 per month and imputing monthly income to the father of $2,500. The imputed income was based upon the father's training and experience as a paralegal and the trial court's finding that the father failed to show efforts to obtain employment and was choosing not to work. The court also held there was no material change of condition to warrant a change in custody, but granted a modification of parenting time, ordering that the parenting plan submitted by the mother was in the best interests of the child. Father appealed. The Supreme Court affirmed.

The father argued that the trial court erred by not making the reduction in the father's monthly child support obligation retroactive to February of 2008, the month in which the father filed the petition for modification. The Supreme Court held, the statute provides, in relevant part, that in the event a parent suffers an involuntary termination of employment, then the portion of the child support attributed to loss of income shall not accrue from the date of service of the petition for modification, provided that service is made on the other parent. Contrary to the father's assertion, §19-6-15(j) does not make a valid modification of child support retroactive. The statute provides that child support due before the entry of the modification order (and presumably not paid in full through the obligor's involuntary adversity) does not accrue, to the extent that the child support obligation is based upon the parent's income from employment that has been involuntarily terminated. The case before the trial court sought nothing more than a downward modification of child support. Since §19-6-15(j) does not provide for a retroactivity of a downward modification of child support, the trial court did not err in failing to make the downward modification of child support retroactive to the date the parent filed said modification action.

The father also argued that his presentation of a notice of unemployment benefits and the lack of evidence that he voluntarily terminated his employment precluded the trial court from imputing his income. The Supreme Court held evidence that a parent suffered involuntary loss of employment is insufficient to prevent a trial court from imputing income to an unemployed parent where, as here, there is evidence of prolonged unemployment and a lack of evidence of the parent's efforts to obtain employment.

The father also complained that the trial court erred in modifying the child support obligation but not modifying the amount towards medical and dental insurance premiums and uninsured health care expenses he was required to pay. The Supreme Court held the trial court was authorized to allocate the uninsured health care expenses at a ratio other than the parties' pro rata share of the child support obligation under §19-6-15(b)(10), which requires allocation of uninsured health care expenses based on the pro rata responsibility of the parents or as otherwise ordered by the court.

## TEMPORARY ORDER

*Horton v. Horton*, **S10F0827** *(Nov. 8, 2010)*

The parties' divorce order was entered on June 5, 2009, following a jury trial. During the trial, the trial court refused to allow the wife to introduce evidence of a temporary order that had been entered on Feb. 15, 2007. The wife appealed, asserting the trial court erred by excluding evidence of the temporary order at trial. The Supreme Court affirmed.

The parties had approximately $1.4 million in assets. The temporary order, entered pursuant to an agreement between the parties, allowed them to each draw $2,700.00 per month from designated accounts. The wife contended that evidence of the temporary order should have been admitted at trial to show how much the property was depleted during the time since the temporary order was enforced.

The Supreme Court held the trial court correctly concluded that the issue raised by the wife was controlled by *McEachern*. Evidence of post-separation support payments is not admissible unless the court determines that the evidence should be admitted for impeachment purposes to prevent a party from perpetrating a fraud upon the court.

While evidence of a temporary order is relevant to the economic status of the parties, it is also likely to mislead and confuse a jury for several reasons. For example, court ordered payments may reflect the court's determination, made without a full hearing, or the payments may be made as a result of a consent order or an informal agreement or arrangement between the parties. These amounts may represent an amount necessary to preserve the status quo and may represent some other accommodation and, as such, voluntary temporary payments may not be realistic in the long run. A rule that would allow this evidence would tend to discourage any generous impulse in voluntary payments. The court previously determined that evidence of any temporary payments have the potential to confuse and mislead the jury. Here, there was no allegation that evidence of the temporary order was necessary for impeachment purposes. Even if the evidence was relevant

to the wife's claim at trial, relevant evidence may be excluded if its probative value is outweighed by certain risks. Therefore, the Supreme Court held the trial court properly excluded the evidence.

## VENUE/CHILD SUPPORT

*Autrey v. Autrey*, **S10F1806** *(Nov. 22, 2010)*

The wife filed for divorce in Gwinnett County in October of 2008. Two days later, the husband was served at his residence in Gwinnett County, where the couple had lived for almost 20 years. The husband filed a motion to dismiss for lack of venue, asserting that his domicile and primary residence was in Cobb County and he was entitled to be sued there. The trial court denied the husband's motion and after a lengthy bench trial, the trial court awarded primary physical custody of the children to the wife and found that the husband's monthly gross income was $12,500 for the purposes of determining child support. The husband appealed and the Supreme Court affirmed.

Among other things, the husband contended the complaint for divorce should have been dismissed for improper venue, because he was a resident of Cobb and not Gwinnett County. Even though the husband claimed he was domiciled in Cobb County, the trial court found that the husband continued to reside in and maintain his possession of the marital residence in Gwinnett County until he was served with the complaint for divorce. If there is any evidence to support the trial court's ruling, then the trial court's decision will be upheld.

The husband also appealed the trial court's deviation from the amount of presumptive child support. The trial court may deviate when special circumstances make the presumptive amount of child support excessive or inadequate. Here, the trial court's order incorporated the statutorily required child support addendum and applicable worksheets which showed the husband's child support obligation and the upward deviation of $907.91 were appropriate based upon the undisputed evidence of the extraordinary educational, medical and extracurricular needs of the children. The order also included findings that the application of the guidelines' presumptive amount would be unjust and the best interests of the children would be served by the deviation. Accordingly, the Supreme Court affirmed.

## WAVIER

*DeRyke Administrator v. Teets*, **S10A0710** *(Nov. 8, 2010)*

The parties were married in 2003, during the marriage, the wife designated the husband as the beneficiary of her GE retirement benefits. The parties were divorced on Sept. 25, 2008. Five (5) days after the divorce, the 34 year old ex-wife committed suicide. Prior to the divorce, the parties entered into a settlement agreement, which, in paragraph 3, stated that each party waived all of his or her rights, titles, in and to any profit sharing or employees benefit plan of the other party.

On Jan. 5, 2009, the ex-husband made a claim for the ex-wife's benefits by filing a GE claims benefit form. On Jan. 16, 2009, DeRyke on behalf of the ex-wife's estate made a claim against those benefits. The insurance company's administrator denied DeRyke's claim because the ex-husband was the named beneficiary of record. The ex-husband also filed a complaint for declaratory action against DeRyke as the estate administrator in the US District Court for the Northern District of Georgia, seeking that the husband be permitted to obtain or retain all of the benefits. On May 29, 2009, DeRyke filed the present state court application for citation of contempt against the ex-husband, asserting that he had waived his right to retain any of the ex-wife's benefits by virtue of agreement and that he violated the decree by making a claim for the benefits and by failing to execute instruments necessary to give full force and effect to the agreement as incorporated into the final decree.

On Sept. 15, 2009, the trial court entered an order denying the application for citation of contempt and found that the agreement was complete, clear and unambiguous, that the ex-wife had the opportunity to change her employee benefit designation form, but did not do so; and that there was no evidence to show the ex-wife did not intend to confer the benefits on the ex-husband. Therefore, there was no willful violation of the incorporated agreement for which the husband could be held in contempt of court. DeRyke appealed and the Supreme Court reversed.

The Supreme Court reasoned that the threshold question was the meaning of paragraph 3 of the settlement agreement. The trial court found the language at issue to be complete, clear and unambiguous, in that it unambiguously expressed the intent of the parties that the beneficiary spouse release any and all interest in the benefits at the time of divorce. Therefore, the agreement operated as a complete waiver of the ex-husband's beneficiary designation. Assuming *argunendo*, that a spouse may voluntarily provide benefits to the other spouse at any subsequent date, reinforces the parties' intent that the proceeding language was to operate as an immediate release of any claim to the other's benefits. In the instant case, there was no affirmative act by the former spouse/benefit holder that constituted an attempt to counter or override the relinquishment of rights or claims under the parties' agreement. In addition, the speculation of motivation for the failure to act cannot and should not substitute for concrete action on the part of the ex-wife. The plain purpose of language in a waiver provision like that in this case is to prevent any claims to such benefit plans by one of the divorced spouses in the event the other dies before a change in beneficiary can be affected. In such circumstances, inaction is insufficient to obviate such an unequivocal waiver. ***FLR***

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