The Family Law Review

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Dumping the Billable Hour

by Mark A. Chinn
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Tired of the Billable Hour?

Is every month a fight to meet your billable hour quota so you can meet the overhead? Is every month a continual battle to encourage your staff and associates to meet their quotas? Does the production in the firm come to a complete standstill at the end of every month in an attempt to generate bills? Do you hate reviewing bills? Are you sick and tired of feeling like you can't enjoy a cup of coffee with a fellow lawyer or staffer because you are "wasting billable hours"? How about Saturdays? Do you sit at home on Saturdays feeling guilty that you are losing billable hours? Or worse, are you up at the office on Saturdays billing?

From the client's perspective, are you tired of hearing complaints from clients about getting charged $60 for a two minute call? Have you grown tired of looking at a huge bill that you know is going to be a shock to the client, but that you know you must send anyway?

From a practice perspective, are you tired of accounts receivable? Are you tired of dealing with clients who don't pay the final charges at the conclusion of the work?

For most of us, the billable hour is the only thing we know, even though we are sick of it, we don't know what else to do. There is an alternative and it is called "Value Pricing."

ABA and Other Leaders in the Change

Work on this topic began with the ABA Law Practice Management Section Task Force on Alternative Billing Methods in 1989. This Task Force published *Beyond the Billable Hour: An Anthology of Alternative Billing Methods.* In 2002, the ABA Commission on Billable Hours published its report.

The report contained a preface by ABA President Robert E. Hirshon that discussed the many reasons for abandoning the billable hour. In the first sentence of his preface, he opines that "many of the legal professions contemporary woes intersect at the billable hour." He writes that the billable hour is responsible for a lack of balance in lawyers' lives, negative impacts on lawyers' families, loss of professional mentoring, decrease in lawyer service, less collegiality and a loss of focus on efficiency.

No less an authority than The Honorable Stephen G. Breyer, associate austice, Supreme Court of the United States, weighed in on the side of dumping the billable hour, writing in the foreword of the report, in part:

The villain of the piece is what some call the "Treadmill"–continuous push to increase billable hours... How can a practitioner undertake pro bono work, engage in law reform efforts, even attend bar association meetings, if that lawyer also must produce 2100 or more billable hours each year, say 65 or 70 hours in the office each week?

The Committee's technical task, then, concerns not just a better or more efficient way to run a law firm. It concerns how to create a life within the firm that permits lawyer, particularly younger lawyers, to lead lives in which there is time for family, for career and for the community. Doing so is difficult. Yet I believe it is a challenge that cannot be declined, lest we abandon the very values that led many of us to choose this honorable profession.

There have been three important ABA publications on alternative billing: *Beyond the Billable Hour: An Anthology of Alternative Billing Methods; Winning Alternatives to the Billable Hour;* and *Billing Innovations New Win-Win Ways to End Hourly Billing.*

In *Winning Alternatives to the Billable Hour*, Hirshon writes, "The billable hour, such as it is, encourages too many of the wrong principles and suppresses too many of the right ones." Foreword, viii.

In *Billing Innovations,* author Richard Reed minces no words about the demise of the billable hour: "[I]t is probable that straight hourly billing (billing by hours spent without limit and without regard for the benefit conferred) will virtually disappear in the years ahead....The time

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Editor's Corner

by Randall M. Kessler
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I hope those of you who attended the 2008 Annual Institute in Destin enjoyed yourselves. It was a great program and the weather, while threatening showers the whole time, ended up being perfect. Congratulations to Ed Coleman for a fine program. And I would like to thank John Lyndon and Steve Harper for the photographs from Destin seen throughout this issue of the FLR. Next year, back at Amelia Island, will be another good time, so put it on your calendars now. Tina is already putting a great program together.

Thanks again to all of our contributors, but we still need more input from family law attorneys across the state. How are the new guidelines working in your jurisdiction? What about parenting plans? Please write about family law issues that concern you. I want to be sure we include all of Georgia, so please send in an article, or interview a judge or a respected local family law attorney (and take a photo).

Have a good autumn and keep the contributions (articles, not cash) coming. FLR

If you would like to contribute to The Family Law Review, or have any ideas or suggestions for future issues, please contact Editor Randall M. Kessler at 404-688-8810 or rkessler@kssfamilylaw.com.

Inside This Issue

A Note from the Chair

by Edward J. Coleman III, chair
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It is with great pleasure that I send this first message as chair to my fellow members of the Family Law Section of the State Bar of Georgia. I realize that I am not well known to most members of the section, so I will begin with a brief introduction. I grew up in Atlanta (Dekalb County), in a family of six children (I have five wonderful sisters who now reside all over the country). I attended parochial and public schools before graduating from Emory University in 1979 with a B.B.A. (Accounting). I then graduated from the University of Georgia School of Law in 1982. I have practiced law in Augusta since 1982 with my law partner, Carl J. Surrett. My practice is split largely between domestic relations and my work as a Chapter 7 Bankruptcy Trustee. My wife, Cathy, and I have a daughter, Emma, who will be heading off to Valdosta State University this Fall.

I have had the pleasure of working with the executive committee since 2003, and during that time I have met many outstanding lawyers and judges whose devotion to improving the practice of law in the area of domestic relations has been inspiring. The Supreme Court's Pilot Project and recent legislative developments in family law have made for exciting times. I hope to continue the section's tradition of educating our members and serving our community.

In May 2008, our section hosted the 26th Annual Family Law Institute in Destin, Fla. I am grateful and proud of the contributions from all of our speakers and I continue to be amazed at the logistical support and technical expertise we receive from Steve Harper, Brian Davis and others from the Institute of Continuing Education. We had a successful event; and from all accounts, one of the most popular programs was that chaired by John Lyndon of Athens, Ga., on Small Town Domestic Relations Practice. "Small town" is a relative term of course. If you live in Ty Ty, then Hahira is big. I think of Augusta as small, and I am always amused when attorneys from even smaller areas comment on our big city ways. But this diversity in the size of our legal communities is one area that I want to focus on during my term as Chair. Involvement in the activities of the Family Law Section has sometimes been dominated by attorneys practicing in the metro-Atlanta area. But if there is anything I have learned in 26 years of practice, it is that some of the finest legal minds come from the most remote areas of our state. And, as John Lyndon=s program at the Institute demonstrated, there are issues and challenges unique to smaller jurisdictions. Accordingly, I encourage attorneys from every corner of the state to get involved in our projects, to contribute articles to our newsletter and to contact the members of the executive cmmittee with ideas on how we might improve our section and serve our communities. In Augusta, for example, some energetic lawyers recently formed a family law section of our local bar that now meets about every other month and puts on CLE programs. I have identified three modest public objectives for the section during my term:

(1) Achieving geographic diversity among the section leadership. This is a worthy goal in my mind because of the different perspectives that it will bring to our work. I hope to reach out by enlisting section liaisons in each judicial circuit that can keep the section apprised of activities of local interest

(2) Identifying an ongoing public service project that our section can collectively support with contributions from a large number of our members - ideally this would be some service related to our field of expertise; and

(3) to make available a more substantial body of resources for the section's membership which will be of greater benefit to practitioners.

I look forward to continuing the work of the section with the leadership of our executive committee and the contribution of all our section members. I want to extend my thanks to Thomas F. Allgood Jr. and H. William Sams Jr. of Augusta, both of whom served as chair of our section in recent years, for giving me the opportunity to work on the executive committee as an officer. I also want to express my thanks to my law partner, Carl J. Surrett, for serving as the finest mentor and role model a lawyer could have.

I look forward to working with you in the next twelve months and to continue the tradition of education and service. FLR

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has come to say goodbye to time as the *sole* criterion for measuring the value of legal services."

Lately, a new force has entered the picture, CPA and author, Ron Baker who has authored several books on the subject, including, the following:

Pricing on Purpose: Creating and Capturing Value. New Jersey: John Wiley & Sons, Inc., 2006.
Professional's Guide to Value Pricing. 5th ed. New York: Aspen Publishers, 2004.
The Firm of the Future: A Guide for Accountants, Lawyers and Other Professional Services (with Paul Dunn). Wiley, 2006

In his first work, *Professional's Guide to Value Pricing,* Baker traces the history of hourly billing to the 1940's when large Wall Street firms adopted time sheets. Baker argues emphatically for the demise of the billable hour and presents a lengthy "how-to guide" for practitioners on how to convert from hourly billing to what he calls "Value Pricing." Baker argues that customers do not buy *efforts*; they buy *results. Value Pricing, at 82.*

The Ethics

The ethics of making the conversion away from hourly billing is always a concern. Any lawyer contemplating the change must carefully review the ethics policies in his or her state. Our survey of cases indicates most states approve of alternative billings such as fixed fees or retainers and pricing by the project or month with the ultimate criterion being the "reasonableness" of the fee.

The New York State Bar Association has weighed in favorably on alternative billing, holding that any agreement between a lawyer and a client is reasonable, by definition:

Indeed, subject to the economic realities of the situation and an attorneys's professional obligations, virtually any billing method that attorney and client can both agree upon and abide by will result, almost by definition, in a fair fee. *Cited in Baker, Value Pricing, at 332.*

Florida has permitted value pricing and has gone so far as to recognize the value of reputation:

On the other hand, a lawyer of towering reputation just by agreeing to represent a client may cause a threatened lawsuit to vanish and thereby obtain a substantial benefit for the client and be entitled to keep the entire amount paid to him, particularly if he had lost or declined other employment in order to represent that particular client. *Bain v. Weiffenbach, 590 So. 2d 544, 545 (Fla. App. 2 Dist., 1991).*

Our informal survey of the jurisdictions indicates most, if not all, states will permit value pricing, usually subject to a reasonableness test. Colorado clearly bars non-refundable retainers, so practitioners there should carefully review their ethics provisions. *Colorado Ethics Committee Rule 1.5.*

Taking The Plunge

If you are ready to take the plunge, here is a simple step-by-step recommendation:

1. Read the ABA and Baker publications cited in this article.
2. Interview someone who practices fixed fees or value pricing. Oftentimes, criminal defense lawyers, DUI lawyers, estate lawyers and bond lawyers charged fixed fees.
3. Analyze your case base to see what kind of work you are doing, what it costs and why.
4. Pick a new case that poses little risk and just try setting a fee.

Conclusion

The billable hour is all we know. So, it is hard for us to conceive another way to do things. But if we think about it, the billable hour has been around for only a small portion of the life of law practice. We should also take comfort in the knowledge that a justice of the United States Supreme Court and leadership of the ABA have led the charge for change. If you are willing to do the work and take the risk to make the change, you may just find that you have transformed your life and your law practice for the better. FLR

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Mark is author of How to Build and Manage a Family Law Practice, published by the American Bar Association in 2006. He is also a contributing author in How to Capture and Keep Clients, published by the American Bar Association General Practice Solo Section in 2005 and 101 Practical Solutions for the Family Lawyer, published by the ABA Family Law Section. Mark has authored numerous articles on family law and law practice management for National and Local publications.

Local Attorney Awarded Top Professionalism Award

Carol Walker, a Gainesville attorney, was awarded Georgia's top professionalism award from the Family Law Section of the State Bar of Georgia. The "Joseph T. Tuggle, Jr. Award" is given in recognition of the person who the Family Law Section deems to have most exemplified the aspirational qualities of professionalism in their practice as a lawyer and/or judge. Past recipients include some of Georgia's most respected and admired family law attorneys and judges.

Walker was awarded this honor at the section's annual Family Law Institute on May 24. The award was presented by the Hon. Bonnie C. Oliver, Gainesville superior court judge. Oliver said: "This attorney prepares every case as if it were the most important case. No detail is overlooked and no issue goes unrecognized. The level of preparation is unsurpassed by any other domestic attorney with whom I've dealt."

In addition to Walker's law practice in Gainesville, she has volunteered countless hours to the legal profession. She has served on the State Bar Investigative Panel and the executive committee of the Family Law Section of the State Bar of Georgia. She has mentored numerous young lawyers over the years. Family law practitioners around the state are perhaps most familiar with the untold hours Walker devoted towards molding, improving and teaching lawyers and judges on the recently overhauled child support guidelines. Not only did she give of her time, she did it at her own expense at a significant sacrifice to herself and her practice. FLR

Hon. Bonnie C. Oliver presents the Joseph T. Tuggle Jr. Award to Carol Walker

Case Law Update: Recent Georgia Decisions

by Victor P. Valmus
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ALIMONY

***Rivera v. Rivera*, S08A0775 (May 19, 2008)**

The parties were divorced in 2006 and the final divorce decree required the husband to pay the wife the sum of $500 per month as alimony for 60 months for a total payment of $30,000. This amount was based upon the jury's verdict which left blank the portion of the verdict dealing with lump-sum and in-kind alimony. It awarded the wife periodic alimony payments as follows: The word "month" being circled and $500 per month for 60 months. The husband filed a Motion for Modification of Alimony. The trial court dismissed the motion stating that the alimony sought to be modified was lump sum and lump sum alimony is therefore not modifiable. The husband appeals and the Supreme Court of Georgia affirms.

The husband relies on the jury's identification of the award as periodic alimony. However, it is clear that reviewing awards of the divorce judgment, the Court will ascertain the nature of the award as a matter of law and on the basis of substance rather than on labels. To determine if an award of alimony is periodic or lump sum, if the obligation must state the exact number and the amount of payments without other limitations, conditions or statements of intent. The award would then be non- modifiable. Here, the jury's award has no limitation or contingency such as remarriage, death or upon the provisions for the husband to pay the wife. Therefore, the Court was correct in dismissing the Motion for Modification.

ATTORNEY'S LIEN

***Ruth v. Herrmann*, A08A0501 (May 2, 2008)**

The wife (Ruth) filed a divorce action in Clayton County against her husband, Robin Ruth, who was represented by Scott Herrmann. In March of 2006, Herrmann served Notice of Withdrawal from Representation during the divorce action because the husband failed to pay his attorney's fees and to cooperate in the defense of his case. Herrmann then filed an attorney's lien against the marital property owned by both parties and served notice of the filing of this lien on Ruth in March of 2006. In April 2006, the court signed the order granting Herrmann's request to withdraw as counsel for the husband in the divorce. In June 2006, Ruth filed an emergency motion to remove the lien, noting therein, that the marital residence had been awarded to her in the final divorce decree. After the hearing, the trial court entered an order in August 2006, which denied the motion finding the lien was properly filed and that Ruth had received notice of the lien. Ruth did not appeal.

In September 2006, Ruth filed the underlying action in Dekalb County Superior Court seeking an order removing the attorney's lien as well as punitive damages and attorney's fees. Herrmann filed an answer and counterclaim for attorney's fees in November 2006. The case was transferred to Clayton County Superior Court and Herrmann moved for summary judgment arguing that this claim to remove attorney's lien was precluded by the doctrine of res judicata and/or collateral estoppel. Ruth also responded and filed a cross motion for summary judgment arguing that his claim was for money he had received. The case was set for oral arguments, but Ruth did not appear at the hearing. The trial court denied Ruth's Motion and granted Herrmann's motion finding that the August 2006 Order is a final judgment of this Court and cannot be re-

litigated by the plaintiff under the legal principals of res judicata/collateral estoppel. Wife appeals and the Court of Appeals of Georgia affirms.

Ruth argues that the trial court erred in applying the doctrine of res judicata/ collateral estoppel because there was no identity of parties or causes of action between her and Herrmann. However, pursuant to O.C.G.A. §9-12-40, a judgment of the court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put at issue or which under rules of law might have been put at issue.

Collateral estoppel, or issue preclusion, precludes re-litigation of an issue that was decided on the merits in another action between the same parties or their privies. The propriety of Herrmann's attorney's lien was litigated and decided in the divorce action. Ruth filed an emergency motion to remove the lien and a brief in support of her motion in which a hearing was held. Ruth's motion to remove the lien was denied. Ruth did not appeal that order or move the court to reconsider its decision. Instead, she filed the instant action.

It is a well-established principal that an attorney has the same right over an action, judgment or decree as his client has or might have had for the amount due the attorney. Therefore, Herrmann had the same rights as the husband.

Ruth also argued that the trial court erroneously ruled by implication that Herrmann's lien was valid. Pursuant to O.C.G.A. §15-19-14(b), his lien was valid. The statute provides that upon an actions, judgments and decrees for money, attorneys at law shall have a lien superior to all liens except tax liens; and no person shall be at liberty to satisfy such action, judgment or decree until the lien or claim of the attorney for fees is fully satisfied. At the time of the settlement between Ruth and her ex-husband, an attorney's lien on the property co-owned by the Ruths had been filed and Ruth had received notice thereof. Therefore, the trial court's implicit ruling that the lien was valid is correct.

CONTEMPT/VISITATION COSTS

***Carlson v. Carlson,* S08A0704 (July 7, 2008)**

The parties were divorced in 2005 and the husband was awarded primary custody of two minor children. All of the wife's visitation was to be supervised and the parties would equally divide any cost associated with the supervised visits. The husband filed several contempt motions and on the third motion, alleged that the wife failed to commence and continue competent mental health therapy. The trial court found the wife in willful contempt and ordered her to immediately commence mental health therapy and for the wife now to be responsible for 100 percent of the cost associated with the supervised visitation with the parties two minor children. The wife appeals stating the Court impermissibly modified the final judgment and decree. The Supreme Court of Georgia affirms.

The wife asserts on appeal that trial court did not have the power to increase the amount of visitation costs that she was required to pay. It has been a long held rule that the trial court cannot modify the terms of a divorce in a contempt proceeding. However, exceptions have been made regarding visitation rights and the court is expressly authorized to modify visitation rights even on its own motion during a contempt proceeding. Here, the costs were directly associated with the wife's visitation privileges. Therefore, the Court is empowered to increase the amount of visitation costs to be paid by the wife in the contempt proceeding.

PARTITION

***Harvey v. Sessoms,* SO8A0583 (June 30, 2008)**

The parties divorced in 1970. The wife was awarded permanent possession of the marital home and was required to pay the mortgage payments with the title to the property remaining in both the husband and wife's names. The wife lived in the home until 2004 when she left to care for her elderly mother. She rented the home to a third party and retained the rental income. In October 2006, the husband filed a petition for statutory partition claiming the wife had given up the possession of the marital home and was seeking an accounting of the rental income and half of the profits earned from the lease of the property. The wife moves for summary judgment arguing that the court placed the property of the tenants in common in the exclusive possession of one tenant thereby burdening the interest of the non-possessing tenant and therefore, is not subject to partition. The trial court granted wife's motion for summary judgment. The Supreme Court of Georgia reverses.

Pursuant to the divorce decree, the parties are tenants in common giving the husband one-half undivided interest in the property. A tenant in common can surrender his or her statutory right to partition when the requesting party has expressed or impliedly agreed to relinquish the right to partition. If a non-possessing tenant in common has not agreed to give up his right to partition, then that right is not extinguished. Therefore, since the husband did not contractually relinquish his right to partition, the trial court erred in the granting summary judgment. Justice Hunstein dissents.

PROMISSORY ESTOPPEL/CHILD SUPPORT

***Garcia v. Garcia*, S08F0536 (July 7, 2008)**

The parties were divorced and the court ordered the husband to make weekly child support payments for support of the mother's child who was not the biological or the adopted child of the husband. The husband appeals and the Supreme Court of Georgia reverses.

A man who is the biological father of a child has a statutory obligation to pay and provide support for the child. A person, who is not the biological father or the adoptive father of a child, can be obligated to make child support payments if that person executes a written agreement promising to provide support for a child and therefore is bound by the terms of the agreement. Here, the trial court applied the doctrine of promissory estoppel as set forth in O.C.G.A. §13-3-44(a). It was undisputed that the husband is not the biological father or the adoptive father nor has he executed a written contract to support the child. The wife knew the identity of the biological father and that he was living in Carroll County.

The mother argues that the husband applied for an amended birth certificate to add his name as the father because he wanted the three of them to be a family and he promised that he would take care of the child and be her father. The wife makes reference to the holding in *Wright v. Newman* in that the Trial court properly applied promissory estoppel. However, this case differs significantly from *Wright* in that the mother and her child did not rely upon the husband's promise to their detriment. In *Wright*, the trial court found the child's mother relied upon the husband's promise of support and had foregone a source of financial support for the child by refraining from identifying and seeking support from the child's biological father. This court has upheld the application of promissory estoppel in other cases such as in *Mooney v. Mooney*, where the wife relied on the husband's promise to financially support the grandchild when the wife accepted custody of the grandchild. In the instant case, the wife identified the child's biological father and the reason why she never sought support from the biological father was that he did not want anything to do with the child. Therefore, there is no evidence that the husband's promise caused the wife to forego of valuable legal right to her detriment.

PROMISSORY NOTE/DIRECTED VERDICT

Cawley v. Bennett, A08A0154 (July 16, 2008)

Prior to the parties divorce on April 13, 1993, the husband and wife met at the husband's divorce attorney's office and signed a document which stated in pertinent part: "I, Buddy Cawley, do agree to pay Kim Cawley the sum of Thirty Thousand Dollars ($30,000.00). The sum of Thirty Thousand Dollars ($30,000.00) to be paid in full by our daughter's 10th birthday." Shortly afterwards, the parties signed a settlement agreement which was incorporated into the divorce decree the following month. The daughter's 10th birthday came, but the husband did not pay the $30,000 Promissory Note. The mother assigned the Note to her father, but the husband still refused to pay. The husband moved for a summary judgment in that settlement agreement resolved all of the issues arising from the divorce and neither the settlement agreement nor the divorce decree incorporated the Note. Therefore, the mother was barred from enforcing the Note against him. The mother claimed that the Note was a legally enforceable contract separate from the settlement agreement. The trial court agreed and denied the father's summary judgment motion. The father did not file an Interlocutory Appeal, and at the jury trial, did not move for a directed verdict. A jury verdict was entered for the mother and the husband appeals. The Court of Appeals of Georgia reversed with direction.

The father argues that denial of summary judgment motion was in error, but the appellate court does not review a denial of summary judgment once the case has been tried. Instead, the appellate court reviews the case under the sufficiency of the evidence in the light most favorable to the jury's verdict. Mother argues that the promissory note was concerning a child support obligation, but the settlement agreement had no mention of the promissory note, but obligated the father to pay monthly child support payments of $250 and half of the child's reasonable daycare expenses. The wife stated that $250 a month was inadequate and she only signed the settlement agreement accepting $250 a month because of the $30,000 promissory note. The settlement agreement had language which, in pertinent part, stated that this settlement agreement constitutes the entire agreement between the parties and supersedes any and all other agreements previously made by the parties.

Even though the mother assigned the Note to her father, it is well established that an assignee takes the assignment subject to any defenses against the assignor, but in light of the settlement agreement, there is no evidence that the Note thereafter was enforceable by the wife. In addition, the only remedy supplementing a divorce decree requiring a non-custodial parent to pay is by modification pursuant to O.C.G.A. §19-6-19. Therefore, the settlement agreement is an enforceable agreement until it is modified by separate proceeding instituted by petitioner for modification. As stated above, the father did not move for a directed verdict, and the Supreme Court has instructed that failure

to move for a directed verdict bars the party from contending on appeal that he is entitled to a judgment as a matter of law because of the insufficiency of the evidence, but it does not bar him from contending that he is entitled to a new trial on that ground. Therefore, the trial court is reversed and the father is entitled to a new trial.

RETIREMENT BENEFITS

***Shell v. Teachers Retirement System of Georgia, et al.*, A08A0661 (May 19, 2008)**

The husband, Mr. Shell, was a former teacher employed by the Atlanta Board of Education and had a retirement account with the Teachers Retirement System (TRS) and died in August of 2000. His current wife, Shell, requested that TRS pay her the funds remaining in her late husband's retirement account. TRS refused on the basis that her husband's former wife was listed as his beneficiary. The current wife filed a declaratory action against TRS and Mr. Shell's former wife alleging that Shell should be the beneficiary of her late husband's retirement account. Shell argued that the first wife ceased being the beneficiary pursuant to the divorce decree which provided that Mr. Shell would retain all funds in his TRS retirement account. TRS responded with a motion to dismiss arguing that TRS was legally required to pay Mr. Shell's retirement benefits to the last filed beneficiary designation. Thetrial court granted the motion dismissing Shell's complaint. The Court of Appeals affirmed.

Georgia law requires that upon the death of a TRS member, TRS is required to pay the applicable retirement benefits to the beneficiary nominated by the member by means of a written designation duly executed and filed with the Board of Trustees. Retirement benefits from TRS are generally exempt from attachment and are not assignable. Therefore, the trial court was correct in dismissing Shell's complaint. FLR

Past Family Law Section Chairs

Kurt Kegel	2007-08
Shiel Edlin	2006-07
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Paul V. Kilpatrick Jr.	1980-81
Hon. G. Conley Ingram	1979-80
Bob Reinhardt	1978-79
Jack P. Turner	1977-78

2008 Family Law Institute Pictures

Distinguished panel addresses attendees at the Institute

John F. Lyndon & Judge Steve Jones

Hansell Roddenberry & Paul Johnson

Jed Silver & Laura Austin

David Givelber & Judge Steve Jones

Judges Daniel Craig & Ronnie Joe Lane

Hansell Roddenberry, Claudia & John Noell

Judge Hulane George

Rick Newton of Thomson West

Ed Coleman and Randy Kessler

Chandelle Summer

Ed Coleman & Leigh Cummings

Justice Harris Hines & Judge Stephen Schuster with his daughter Laura

Kelly Miles & Judge Cynthia Wright

Domestic Torts:
Going Beyond the Divorce Complaint

by Jessica D. Kirk,
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"If she may sue him for a broken promise, why may she not sue him for a broken arm?"
Brown v. Brown, 89 A. 889 (Conn. 1914).

tort (tort) n. Law.
A wrongful act, damage or injury done willfully, negligently or in circumstances involving strict liability for which a civil suit can be brought.[1]

Tort (from Lat. Torquere, to twist, tortus, twisted, wrested aside) . . . A violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction. . . generally such duty must arise by operation of law and not by mere agreement of the parties.[2]

It's one of the first legal constructs internalized in law school, a word often politically charged and a concept rarely considered by the domestic relations attorney. But duty, breach, cause and damages should not be far from the minds of responsible family lawyers. Why? Not only because good lawyers will consider these remedies in order to provide the best representation of wronged clients, but also because all lawyers have an ethical obligation to provide competent representation for those clients.[3]

A domestic tort is the breach of a duty arising out of a family relationship which is the proximate cause of an injury resulting in liability, substantial damages and a source of recovery.[4] This type of claim can be very important in those difficult domestic cases where remedy is otherwise barred, whether by contract, via antenuptial agreement or by law -- as where non-marital property such as a spendthrift trust or inheritance is involved or where ERISA restrictions or marriage durational requirements prevent access to retirement accounts. They might also be appropriate in those cases where the marriage is brief but the misconduct is grave. Further compensatory and punitive damages may be awarded in a tort claim and the defendant "may not assert ...that he is financially incapable of paying such damages..." as grounds to reduce the award.[5]

DEFENSES

When analyzing possible tort actions for a client, it is necessary to consider the legal defenses applicable to the tortious claim. The statute of limitations is of primary concern, although it is a concept of less concern in domestic relations practice than in others. In some jurisdictions, interspousal immunity may still prevent certain types of claims. More often, claim or issue preclusion can present problems in pursuing separate actions.

Statute of Limitations

The first consideration when analyzing the viability of a domestic tort claim is the applicable statute of limitations; some causes of action may be barred by the time a client seeks representation while others are not.[6] Intentional torts, the most common among domestic tort claims, generally have a short limitations period which begins to run from the date the tort was committed and this statute of limitations is not tolled during the marriage.[7] In a marital context, the client often remains in the relationship attempting to improve the marriage beyond the time period provided in the statute of limitations. In such a situation, an attorney might consider characterizing the entire continuum of the defendant's conduct as a single tort, such as in Battered Woman's Syndrome cases, in order to lengthen the limitations period.[8]

Examples of circumstances that toll the statute of limitations in some states are the disabilities of insanity and minority.[9]

Interspousal Immunity

A necessary predicate to the domestic tort claim is the abolition of interspousal immunity. At common law, the husband and wife were considered as "one person", with the husband representing the interests of his wife. Permitting tort suits between two spouses was thus both morally and conceptually objectionable.[10] A watershed Connecticut holding in Brown v. Brown[11] led to the recognition of the legal concept of spouses as individuals with the ability to seek redress from one another through the legal system. However, the doctrine of interspousal tort immunity still exists in a few jurisdictions,[12] having withstood a variety of constitutional challenges,[13] and having been justified as necessary to preserve marital harmony and to prevent fraud and collusion.[14]

This defense may be waived,[15] however and a majority of states have abolished interspousal immunity altogether -- often after first eroding the concept by creating exceptions for intentional torts and then permitting actions for premarital torts or those committed before divorce.[16] Moreover, the abrogation of the doctrine has garnered support from leading legal scholars and practitioners alike.[17]

Claim Preclusion and Res Judicata

In order to guard against possible claim or issue preclusion, particularly in jurisdictions that still recognize fault-based divorce, a determination of whether a tort claim should be plead in the divorce action must be made at the outset of the case. Approaches vary widely by jurisdiction: Some courts require the severance of claims to avoid undue complication of divorce proceedings while others call for either mandatory or permissive joinder where the claim arises from the same subject matter, in order to avoid piecemeal litigation and res judicata issues.[18] Perhaps more frustrating is that some jurisdictions take no particular position at all.[19]

Courts that have adopted the approach of mandatory severance emphasize the dissimilarities between the two actions in terms of both practicality and procedure. Stuart v. Stuart,[20] an often-cited Wisconsin case, is illustrative:

Although joinder is permissible, the administration of justice is better served by keeping tort and divorce actions separate. . . . Divorce actions will become unduly complicated if tort claims must be litigated in the same action. A divorce action is equitable in nature and involves a trial to the court. On the other hand, a trial of a tort claim is one at law and may involve, as in this case, a request for a jury trial. Resolution of tort claims may necessarily involve numerous witnesses and other parties such as joint tortfeasors and insurance carriers whose interests are at stake. Consequently, requiring joinder of tort claims in a divorce action could unduly lengthen the period of time before a spouse could obtain a divorce and result in such adverse consequences as delayed child custody and support determinations.[21]

These courts often rebut the res judicata argument by pointing out the difference in purpose between the two types of claims: tort aims to redress a wrong by compensating for injuries and divorce aims to untangle a marital relationship by equitably dividing marital property.[22] Thus, the fractionalized litigation claim preclusion is designed to prevent does not exist.

Additionally, courts have cited notions of justice. *Nash v. Overholser*,[23] for example, found that it was "fundamentally unfair" to apply the res judicata doctrine to bar the tort action in question: "A former spouse should not be required to forego his or her right to jury trial simply to satisfy the doctrine of res judicata where . . . the objectives of that doctrine do not compel such a result."[24] That case additionally cited Stuart:

If an abused spouse cannot commence a tort action subsequent to a divorce, the spouse will be forced to elect between three equally unacceptable alternatives: Commence a tort action during the marriage and possibly endure additional abuse; join a tort claim in a divorce action and waive the right to a jury trial on the tort claim; or commence an action to terminate the marriage, forego the tort claim and surrender the right to recover damages arising from spousal abuse. To enforce such an election would require an abused spouse to surrender both the constitutional right to a jury trial and valuable property rights to preserve his or her well being. This the law will not do.[25]

Those that see the overlap of claims as problematic, for example, as tort claims can affect parties' financial status, require or strongly encourage joinder. In these jurisdictions, the interplay of fault and the facts of the case are often determinative.[26]

Issue Preclusion/Collateral Estoppel

Where the claim itself is not precluded, issue preclusion may still work to the disadvantage of the tort plaintiff, as those issues of fact actually litigated and decided in the divorce proceeding become binding in a subsequent case.[27] Much of an estoppel determination, however, is either case- or jurisdiction-specific:

If, under the law of a particular jurisdiction, fault is not relevant to the divorce, maintenance or property division, then those facts important to finding fault in the tort suit cannot be raised. In addition, the trial court in a divorce

case often makes no specific findings of fact. If all the trial judge finds is that the parties are entitled to a divorce and thus awards custody, support, maintenance and divides the property, no useful findings for the tort suit are likely.[28]

In fault cases, then, it is necessary in the divorce action that attorneys carefully separate tort issues from fault for the breakdown of the marriage in order to preserve the claim.[29]

SETTLEMENT CONSIDERATIONS

Careful use of language is crucial, particularly in final divorce agreements and settlements. Clauses which purport to establish "complete," "final," and/or "full" settlement or reference "all matters" between the parties[30] or release and discharge parties from "all obligations" or "all other claims, rights and duties arising or growing out of the marital relationship,"[31] particularly those that employ the full range of "end of the line" verbiage, give courts good excuse to shut down subsequent claims.[32] Depending on which side of a potential future claim the party is, an attorney will need to work to draft or delete such phrasing in order to protect the client's interests. Express reservation of a tort claim in the settlement agreement also increases the likelihood of a subsequent suit's survival.

COMMON TORT CLAIMS

It is generally accepted that not every act that is considered tortious between strangers should be considered tortious between spouses.[33] Where domestic torts are concerned, the defenses and procedural complications create an environment in which, often, only the most extreme cases survive. Spouses can fail to behave as the famed "reasonably prudent person" too; thus, negligence actions are always a consideration where they are not barred by one of the aforementioned defenses. However, the most often litigated domestic torts are intentional.

Domestic Violence

The most common suits by far are assault and battery cases. These cases often involve large compensatory damages as well as big punitive awards.[34] False imprisonment is a related claim to consider where, however, briefly, one party has unlawfully interfered with the personal liberty or freedom of movement of another.[35]

Third Party Liability

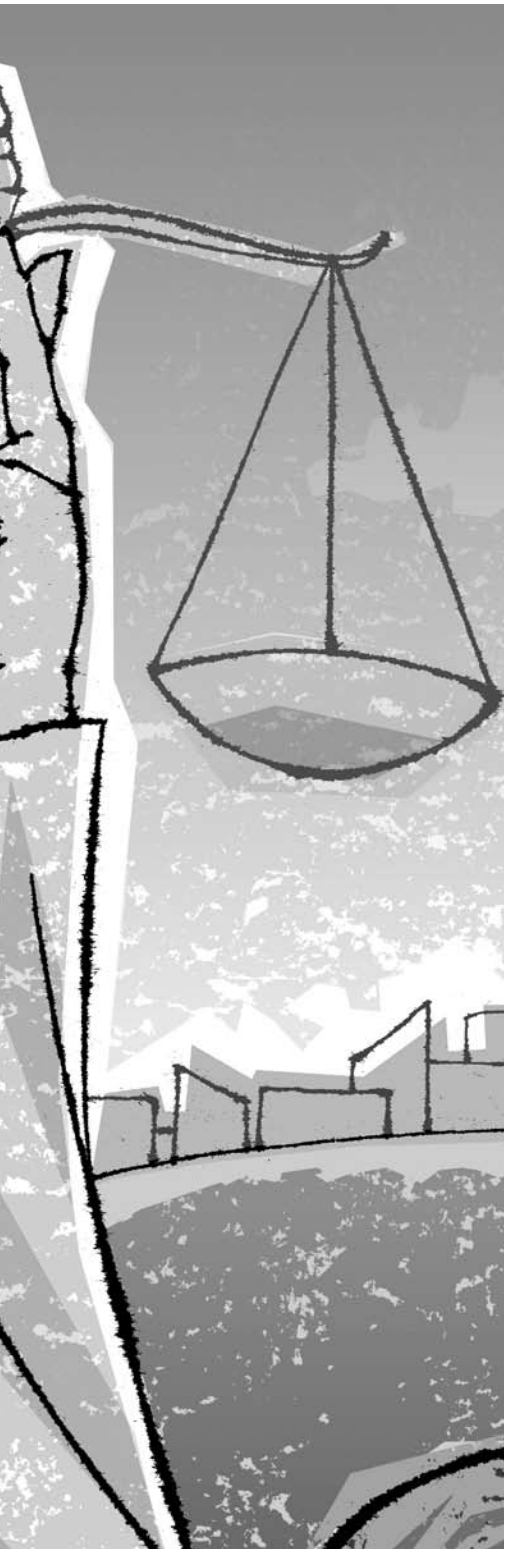
Third party liability for law enforcement's failure to protect a battered spouse under a restraining order is limited, as a result of the recent U.S. Supreme Court decision in Castle Rock v. Gonzales.[36] Although a due process claim might not succeed, an equal protection claim might survive under the theory that domestic violence cases are treated differently than other assaults or that police policy of failing to protect victims of domestic violence has a disproportionate impact and is discriminatory toward women, the most frequent victims of domestic violence.[37] In a case where the abusive husband was himself a police officer,[38] the court adopted a legal standard for sustaining such an argument, requiring the plaintiff to show 1) that a policy or custom was adopted by the defendants to provide less protection to victims of domestic assault than to other assault victims; 2) that discrimination against women was the motivating factor for the defendants; and 3) that the injury was caused by the operation of the policy or custom.[39] This type of argument, however, has also encountered significant judicial resistance. Another option is a justifiable reliance theory, in which the holder of a protection order and the municipality share a "special relationship"[40] recognized by some courts.

Torts Against Children

Child victims of family violence may also file tort actions for their abuse, neglect and the long-term effects thereof. Such an action may be filed through a next friend during minority or in their own name post-majority. Usually the statute of limitations will be tolled during the child's minority.

Generally, the same rules and defenses that apply to adult family violence torts will apply to torts in which a child is the plaintiff. Among these defenses, depending on jurisdiction may be parental immunity,

which has been expanded to include foster parents as well.[41] Exceptions may exist, however, in cases where acts are especially heinous or intentional such as sexual abuse, willful and intentional injury and particularly in wrongful death cases.[42]



Intentional Infliction of Emotional Distress:

Tort of outrage claims require that the defendant: intentionally or recklessly; by outrageous conduct; cause severe mental distress to the plaintiff.[43] This is a difficult claim to make such that it withstands summary judgment under any circumstances, as each of the components requires such extremes.[44] With regard to domestic torts, the severity of the conduct and resulting harm is especially important: it must, in order to survive a motion to dismiss, go beyond the run-of-the-mill failed-relationship fallout to tortiously inflicted distress sufficient for an independent claim.[45] Thus, courts tend to agree that adulterous conduct, however outrageous to clients on a personal level, does not generally rise to the level required to sustain an intentional infliction of emotional distress case.[46]

Jurisdictions vary on whether such a claim requires a physical manifestation of emotional or psychological injury.[47] An "emotional battery" theory, relying on the concept of the absence of consent, could also be effective for some clients for whom the particular abuse is abnormal and thus especially harmful.[48] Additionally, conduct that occurred after the breakdown of the marital relationship may make a better case in some jurisdictions than that intertwined with the breakdown itself.[49]

Heart Balm Torts

Suing a third party for his or her contribution to the breakdown of the marriage or the family unit is sometimes possible through heart balm torts, which were historically property-rights claims.[50] Although most states no longer recognize them, [51] residents of those jurisdictions that do and even nonresidents who commit heart balm offenses in those jurisdictions should know about this type of claim. [52] This is increasingly important as Internet romances blur the lines regarding where exactly a particular act may have occurred and the resulting liability.[53]

Alienation of affections

This tort claim is usually brought against a paramour, but any third party can be subject to liability[54] and requires: he existence of a valid marriage at the time the alienation occurred, wrongful conduct on the part of the defendant, an injury to the innocent spouse demonstrated by the loss of affection or consortium and a causal connection between the defendant's conduct and the innocent spouse's loss,[55] and, enerally, malice.[56]

Criminal conversation

Criminal conversation (essentially an adultery action) requires both the existence of a valid marriage at the time the criminal conversation occurred and sexual intercourse between the defendant and spouse;[57] available whether the spouses were separated, whether the defendant had a good-faith belief that the adulterous spouse was not married or whether the adulterous spouse initiated the conduct.[58]

Seduction

Seduction is the fraudulent enticement of a chaste woman into sexual intercourse.[59]

Breach of contract to marry

The elements of this claim (also know as "breach of marriage promise") are: a valid agreement to marry, consideration, damages and breach.[60]

Economic Claims:
Fraud/Concealment of assets

Whereas misrepresentation regarding the value of an asset is generally considered intrinsic fraud (perjury/false testimony), which is inactionable in many states,[61] misrepresentation or concealment of an entire asset can qualify as an extrinsic fraud (one that deprives the victim of the chance to submit his or her case to the court) and thus the basis for an independent action.[62] Since the decree represents a presumptively fair final judgment, however, "most states reject the concept of a tort remedy

for economic fraud in obtaining a divorce settlement."[63] Thus, dependent upon when it is discovered that a party provided false information about marital assets, the best approach may be to either file a motion to reconsider or one to reopen the case.[64]

RICO claims are also a possibility for cases involving income and asset conspiracy such as might arise with overly helpful partners in, for example, a family business.[65] Although federal courts generally use the abstention doctrine (allowing states to handle their own affairs), the Younger doctrine (calling for abstinence where a federal claim is present if such claim could be presented in a state court and the state proceedings continue) or the Rooker-Feldman doctrine (dictating that federal courts abstain when a federal case is "brought primarily to attack actions inextricably intertwined with state court judgments") to avoid divorce cases, a practitioner can increase the odds of getting around the abstention doctrine by waiting until the state action is complete to file the federal claim, thus exhausting state court remedies and avoiding a collateral attack on the state court judgment.[66] Those cases that survive motions to dismiss must allege: an enterprise, a damaged property interest, at least two predicate acts as defined by the statute to establish and a pattern of racketeering.[67]

Although procedurally complicated in terms of jurisdiction, claims against third party conspirators who assist in discovery fraud have also been successful.[68]

Breach of fiduciary duty

The Uniform Marriage and Divorce Act adopts a partnership theory for domestic relations law, which in turn imposes on marital partners the dual duties of loyalty (requiring accounting and disallowing self-dealing) and care (avoidance of negligent or reckless conduct or intentional misconduct or violation of law).[69] States which have adopted similar statutes can thus provide relief to spouses whose partners mismanage funds and assets during the course of the marriage or otherwise jeopardize marital interests. Although with a few exceptions,[70] equitable distribution states tend to reject such a theory, the concept has been applied to situations involving the disclosure of assets for antenuptial or property settlement agreements.[71] Among the remedies for breach are an accounting, the setting aside of judgments, unequal distribution of property and imposition of a constructive or resulting trust. Depending on the circumstances, fact situations such as those that would give rise to this type of claim may also lead to a successful conversion or trover action.[72]

Invasion of privacy: Wiretapping/electronic surveillance:

The tort of invasion of privacy is the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities. In analyzing the viability of this claim it is crucial to evaluate the individuals expectation of privacy.[73]This claim can be established by four distinct wrongs: intruding into the plaintiff's physical solitude; giving publicity to private information that violates ordinary decency; putting the plaintiff in a false light, but not necessarily defamatory position in the public eye; and appropriating some element of the plaintiff's personality for a commercial use.[74] Invasion of one's privacy may be accomplished by an investigation into private concerns, a physical looking into an area where there is an expectation of privacy or by accessing stored information such as emails and voicemails.[75]

The Electronic Communications and Privacy Act of 1986 prohibits the willful interception of oral, wire and electronic communications as well as the willful disclosure of the contents of such communication where the discloser has knowledge that it was illegally intercepted.[76] There is generally no longer a marital exception to such laws.[77] Interception "comes only with transmission;" however, a loophole exists that sets the access of stored information outside the realm of both civil and criminal punishment under the older acts.[78] That loophole does not apply to a "protected computer" (one - which translates to virtually every one - used in interstate or foreign commerce or communication) is intentionally accessed without authorization or exceeding authorization either where the information obtained relates to interstate or foreign communication,[79] or where an attempt to defraud where a thing of value is obtained,[80] but damages must generally be intentional and exceed $5,000.00 or involve physical injury or threat to public safety or threat to medical care, examination or diagnoses.[81]

The Stored Communications Act is also a concern to anyone who "intentionally accesses without authorization a facility through which an electronic communication service is provided...and thereby obtains, alters or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system."[82]

Increasingly, clients obtain information from computer hard drives or keystroke-recording programs (e.g., Spector software) in anticipation of or during divorce litigation. This creates concerns as to both civil and criminal liability, as well as evidentiary ones.[83] It is important to remember in advising clients that courts often take a sort of marital-property approach to what is fair game, especially where both parties regularly use the equipment.[84] "Work computers," however, are viewed differently depending on the circumstances: access has been allowed where a laptop supplied by the husband's employer was left in the marital residence[85] whereas a business computer's hard drive, with only suspicion that the employee was not reporting income, has been denied.[86] Use of password-protected files of a joint computer has also been denied in certain circumstances.[87]

Sexually Transmitted Diseases

All states recognize the potential liability of a sexual partner for negligent or intentional transmission of a venereal disease to another.[88] Although most claims involve herpes, experts expect AIDS to become an often-litigated tort as well.[89] The basis of liability for such claims can include tortious fraud and battery.[90]

The burdens in such cases can be difficult but are manageable.

For a negligence case, a duty of persons with dangerous contagious diseases to warn others of the risk of infection must be established, after which a plaintiff must generally prove actual or constructive knowledge of the ailment on the defendant's part.[91] A tortious fraud case involves the assertion that by definition, a marriage relationship imposes a duty to inform a spouse that one has contracted an infectious disease.[92] A battery claim closely examines consent, asserting that the plaintiff spouse based his or her consent to sexual relations on a mistaken belief and would not have consented with knowledge of the venereal disease; the sexual act thus becomes the equivalent of nonconsensual touching.[93] Causation can be difficult, but obtaining medical records for both sides can clarify issues fairly quickly.[94]

Family Claims: Custodial Interference/Abduction

In addition to filing contempt and injunctive procedures against those who abscond with children in violation of court orders, claims against financially solvent former spouses, grandparents or others who know (or with reasonable diligence should know)[95] that your client is the primary residential parent can be highly effective, particularly where the presentation of damages is carefully handled.[96] These claims are most appropriate where the interference occurs for an extended period of time.[97] In addition, the children may have a claim against those who "take off" with them.[98]

Other Parenting Issues

Some jurisdictions will recognize parental alienation as a claim for parents who, through the actions of the others, are deprived of their relationships with their children. Courts have also recognized a cause of action for fraudulent misrepresentation on the part of a former husband who learned the child born of his marriage was not his biological child where the evidence indicated an intentional deception on the part of his former wife.[99] However in some states child support paid during the period of deception is not recoverable. [100]

ATTORNEY CONCERNS

In addition to possible malpractice liability for failure to provide competent representation of clients via the pursuit of all available claims, divorce attorneys must protect themselves from liability where the aforementioned torts themselves are concerned. [101] Ensuring clients' careful and honest responses to discovery not only makes for good ethical practice but also provides protection against discovery fraud claims.[102] Attorneys need also be cautious in considering the presentation of evidence where privacy issues are concerned. There are no immunities or privileges for attorneys, so the same criminal liability for intentional disclosure of private communications applies.[103]

Malicious prosecution and abuse of process are additional worries when advising a client to pursue criminal charges, such as domestic violence and contempt charges for violation of domestic or restraining orders; however, due to the nature of family law, most courts have resisted malicious prosecution claims against both attorneys and clients.[104] As always, frivolous litigation is also to be avoided, although statutes often limit recovery to litigation costs and reasonable attorney's fees.[105] Advising witnesses becomes tricky as well, as witness immunity from slander claims only applies where the testimony is relevant.[106]

Guardians ad litem should also exercise caution. Although GALs generally enjoy judicial, quasi-judicial or qualified immunity, policy concerns generally prevent full immunity.[107] Thus, acting in good faith when performing the duties of a GAL is of utmost importance.[108] Attorneys with particularly volatile clients will also want to be careful to avoid negligence claims for failure to warn of an immediate, likely assault or of impending child abuse.[109]

CONCLUSION

Though we cannot prevent the infliction of harm to our clients by their spouses and while legal remedies are clearly insufficient to erase the hurt they suffer, we as lawyers do have many potential civil remedies which we can pursue on their behalf. An exhaustive list may be an impossibility, but domestic relations lawyers do well to protect both themselves and their clients by thinking outside the four corners of the divorce complaint to get the best result for clients through the aforementioned and any other available remedies. FLR

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(Endnotes)

1 Webster's II: New Riverside Dictionary (1984).

2 Black's Law Dictionary, 6th ed. (1990).

3 ABA Model Rules of Professional Conduct 1.1 states that lawyers shall provide "competent representation," which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

4 Robert Spector, All in the Family B Tort Litigation Comes of Age, 28 Family L.Q. 363, 363 (1994).

5 5 Murray v. Murray, 598 So. 2d 921 (Ala. Civ. App. 1992) (affirming an award of $5,000.00 in compensatory and $50,000.00 in punitive damages to wife who counterclaimed in divorce action seeking damages for assault).

6 See, e.g., Dowling v. Bullen, 94 P.3d 320 (Ariz. 2003) (alienation of affections statute of limitations held to be four years).

7 Robert G. Spector, Domestic Torts: New Ways to Find Fault, 27 Family Advocate 6, 12 (2005). But see Feltmeier v. Feltmeir, 798 N.E.2d 75 (Ill. 2003) (cause of action not barred by statute of limitations on claim for intentional infliction of emotional distress since it was only the last act of abuse that commenced the running of the limitations period).

8 See, e.g., Cusseaux v. Pickett, 652 A.2d 789 (N.J. Super. 1994). But see Davis v. Bostick, 580 P.2d 544 (Or. 1978) (unsuccessful attempt at establishing a continuing tort).

9 9 Ala. Code '6-2-8.

10 See Wayne F. Foster, Modern Status of Interspousal Tort Immunity in Personal Injury and Wrongful Death Actions, 92 A.L.R. 3d 901, 906 (1979).

11 89 A. 889 (1914).

12 See, e.g., Larkin v. Larkin, 601 S.E.2d 487 (Ga. Ct. App. 2004); Burns v. Burns, 526 P.2d 717 (Ariz. 1974); Raisen v. Raisen, 379 So. 2d 352 (Fla. 1979), cert. den. 101 S. Ct. 240; Varholla v. Varholla, 383 N.E.2d 888 (Ohio 1978); Smith v. Smith, 287 P.2d 572 (Or. 1955); Rubalcava v. Gisseman, 384 P.2d 389 (Utah 1963) (addressing collusion and insurance specifically).

13 Id.

14 41 Am. Jur. 2d Husband and Wife ' 251 (2006). But see Waite v. Waite, 618 So. 2d 1360, 1361 (Fla. 1993) (finding "no reason to believe that married couples are any more likely to engage in fraudulent conduct against insurers than anyone else," and noting that spouses are subject to investigation, impeachment, the court's contempt power, criminal perjury and fraud charges, civil lawsuits and racketeering and forfeiture statutes, which are Aequally as adequate for those with a marriage license" as for those who are unmarried).

15 41 Am. Jur. 2d Husband and Wife ' 251 (2006).

16 92 A.L.R.3d 901 (2006).

17 W. Page Keeton et al., Prosser and Keeton on the Law of Torts ' 122, at 902-04 (5th ed. 1984). See also Carl Tobias, The Imminent Demise of Interspousal Tort Immunity, 60 Montana L. R. 101 (1999).

18 See Spector, supra note 6, at 8-9; Barbara G. Fines, Joinder of Tort Claims in Divorce Actions, 12 J. Am. Acad. Matrim. L. 285 (1994).

19 Spector, supra note 6, at 9.

20 421 N.W.2d 505 (Wis. 1988) (affirming 410 N.W. 2d 632 (1987)).

21 Id. at 508.

22 Spector, supra note 6, at 8.

23 757 P.2d 1180 (Idaho 1988).

24 Id. at 1181.

25 410 N.W.2d at 638.

26 But see Sotirescu v. Sotirescu, 52 S.W.3d 1 (Mo. Ct. App. 2001) (no preclusive effect on wife's tort suit where there was a finding of no misconduct in divorce).

27 Spector, supra note 6, at 12. See, e.g., Smith v. Smith, 530 So. 2d 1389 (Ala. 1988) (wife who was beaten, suffering a ruptured disc and requiring several operations including a surgical fusion of the vertebrae and removal of a rib, estopped from bringing an assault and battery action before the final judgment of divorce because the parties' extensive settlement negotiations had involved discussion of her need to be compensated for injuries she sustained during the marriage).

28 Spector, supra note 6, at 12.

29 See, e.g., Chen v. Fisher, 2005 N.Y. Slip Op. 09572 (N.Y. Ct. App. December 15, 2005) (no res judicata despite personal injury facts arising from the same transaction or series of events as divorce where all fault allegations but one were withdrawn by stipulation in order to expedite the divorce).

30 See, e.g., Jackson v. Hall, 460 So. 2d 1290 (Ala. 1984) (language of such an agreement demonstrated an intent to settle all claims despite argument that the clause was "boilerplate").

31 See, e.g., Overberg v. Lusby, 727 F. Supp. 1091 (E.D. Ky. 1990), aff'd 921 F.2d 90 (6th Cir. 1990) (requiring dismissal of a claim for the infliction of a sexually transmitted disease where such language appeared in the divorce decree).

32 But see Feltmeier v. Feltmeier, 798 N.E.2d 75 (Ill. 2003) (general release language of a marital settlement agreements that a spouse forever release all present and future claims against the other did not release former husband for intentional infliction of emotional distress insofar as the agreement was signed before the cause of action accrued and failed to release any specific claim).

33 Spector, supra note 6, at 6 (citing S.A.V. v. K.G.V., 708 S.W.2d 651 (Mo. 1986) (abolition of interspousal immunity does not lead to liability in every "unwanted kiss and rolling pin" case)).

34 See, e.g., Cater v. Cater, 846 S.W.2d 173 (Ark. 1993) ($20,000 compensatory and $350,000 punitive).

35 See, e.g., Cutlet v. Cutlet, 388 S.E.2d 14 (Ga. Ct. App. 1989) (punitive award in case involving false imprisonment in addition to assault and battery).

36 545 U.S. ____ (2005) (Docket No. 04-278).

37 28 Am. Jur. 2d Proof of Facts 1, ' 16 (2004).

38 Watson v. Kansas City, 857 F.2d 690 (10th Cir. 1988).
39 Id. at 694.
40 The elements of such a relationship are 1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; 2) knowledge on the part of the municipality's agents that inaction could lead to harm; 3) some form of direct contact between the municipality's agents and the injured party; and 4) that party's justifiable reliance on the municipality's affirmative undertaking. Mastroianni v. City of Suffolk, 91 N.Y. 2d 198, 204 (N.Y. 1997).
41 See, e.g., Mitchell v. Davis, 598 So. 2d 801 (Ala. 1992).
42 42 See, e.g. Courtney v. Courtney, 186 W. Va. 597, 413 S.E.2d 418, 428 (1991) (Since the law imposes on the parent a duty to rear and discipline his [or her child] ...the parent has a wide discretion in the performance of his [or her] parental function... but this does not include the right to willfully inflict personal injuries beyond reasonable discipline...A child, like every other individual, has a right to freedom from such injury).
43 Restatement (Second) of Torts ' 46. Be careful not to mischaracterize a breach-of-promise claim as one for intentional infliction of emotional distress. See, e.g., Yang v. Lee, 163 F. Supp. 2d 554 (E.D. Md. 2001).
44 See, e.g., McCulloh v. Drake, 24 P.3d 1162 (Wyo. 2001) (claims must be for conduct that is "extreme and dangerous" and "exceed[ing] all bounds of decency").
45 See Spector, supra note 6, at 6.
46 Id (citing Ruprecht v. Ruprecht, 599 A.2d 604 (N.J. Super. 1991)). But see, e.g., Osborne v. Payne, 31 S.W.3d 911 (Ky. 2000) (priest could be liable for damages to a man for priest's affair with his wife because the couple had originally consulted the priest for marriage counseling).
47 Judicial Education Center (JEC), Interspousal Torts, Domestic Violence Benchbook (2006), available at http://jec.unm.edu/resources/benchbooks/dv/ch_7.htm.
48 Spector, supra note 6, at 7.
49 See, e.g., Christians v. Christians, 637 N.W.2d 377 (S.D. 2001) (conduct occurring after the dissolution petition was filed actionable whereas that leading up to the dissolution was not).
50 The recovery amounts in such cases could be surprising to some. See, e.g., Oddo v. Presser, 581 S.E.2d 123 (N.C. Ct. App. 2003) (defendant in criminal conversation and alienation of affections actions found liable in the amount of $910,000 in compensatory and $500,000 in punitive damages).
51 Southern states such as Georgia, Mississippi and North Carolina are examples of states in which at least some heart balm claims remain viable actions, in addition to Hawaii and Illinois, which are among the states which have not passed anti-heart balm statutes. See David M. Cotter, Heart Balm Torts: Why Your Client May Not Be Safe from Liability, 27 Family Advocate 14, at 17-19 (2005), for an excellent and recent chart on the dispositions of all 50 states with regard to these claims. The timing of the conduct may be important. See, e.g., Pharr v. Beck, 554 S.E.2d 851 (N.C. Ct. App. 2001) (cause of action must be based on pre-separation conduct).
52 Cotter, supra note, at 14.
53 See, e.g., id. at 16, 19 for cautions regarding the creation of liability "without [even] leaving home"; Cooper v. Shealy, 537 S.E.2d 854 (N.C. Ct. App. 2000) (court had jurisdiction over criminal conversation case in which a South Carolina woman made phone calls and sent e-mails to North Carolina resident's husband, as those communications constituted solicitations within the state's long-arm statute).
54 Cotter, supra note 49, at 14. But see Thornburg v. Federal Express Corp., 62 S.W.3d 421 (Mo. Ct. App. 2001) (no legal duty on employer to employee's spouse such that employer who assisted employee in relocating plaintiff's children without his knowledge could be held liable for alienation of affections or for intentional infliction of emotional distress); Odenthal v. Minnesota Conference of Seventh-Day Adventists, 632 N.W.2d 783 (Minn. Ct. App. 2001) (allowing suit against minister for negligent marital counseling which led to plaintiff's divorce would result in excessive entanglement in religion in violation of the First Amendment).
55 W. Page Keeton et al., Prosser and Keeton on the Law of Torts ' 124 at 918-19.
56 John C. Mayoue & Dennis G. Collard, Third Party Blame: Novel and Expanding Claims, 27 Family Advocate 44, at 46 (2005).
57 Id. at 917.
58 Cotter, supra note 49, at 15 (citing, respectively, Nunn v. Allen, 574 S.E.2d 35 (2002); Kline v. Ansell, 414 A.2d 929 (1980); and Scott v. Kiker, 297 S.E.2d 142 (1982)).
59 Cotter, supra note 49, at 15.
60 60 Phillips v. Blankenship, 251 Ga. App. 235, 554 S.E.2d 231 (2001) (jury verdict of $24,100 affirmed). See Homer H. Clark, The Law of Domestic Relations in the United States '1.2 at 6 (2d ed. 1987).
61 See Brett R. Turner, Marital Malfeasance: Pursuing Tort Remedies for Economic Fraud, 27 Family Advocate 35 (2005). The current trend, however, allows a separate action where the intrinsic fraud is significant and there is no unreasonable delay on the part of the victim after acquiring notice of the misrepresentation. Id. at 38.
62 Id. at 38. See also Kuehn v. Kuehn, 102 Cal. Rptr. 2d 430 (Ct. App. 2001).
63 Community property states are the most flexible in allowing a separate action. Id. at 39.
64 Id.
65 H. Joseph Gitlin, The Divorce Client and RICO, available at http://www.abanet.org/family/advocate/Spring05_RICO.pdf, at 1 (citing Perlberger v. Perberger, 1999 WL 79503 (E.D. Pa. 1999) (affirmation of trial court's finding that a prominent divorce attorney and his firm were distinct, despite a

complete overlap between the individual attorney and the owner and could constitute an association-in-fact); DeMauro v. DeMauro, 115 F.3d 94 (Mass. 1997) (trial court should have considered staying RICO claim alleging sham trusts and shell companies pending the outcome of the state divorce case); and Calcasieu Marin Nat'l Bank v. Grant, 943 F.2d 1453 (5th Cir. 1991) (separate frauds involving spouse and various organizations found as opposed to required continuous association or enterprise required under RICO)).

66 Id. at 1, 3-4.

67 18 U.S.C. ' 1962. Predicate acts include a fraud that the plaintiff must plead with specificity and prove. See, e.g., Capasso v. Cigna Ins. Co., 765 F. Supp. 839 (S.D.N.Y. 1991) (failure to disclose insufficient to prove necessary underlying fraud charge).

68 See Patrick L. McDaniel, Minding the Money: Claims and Remedies for Breach of Fiduciary Duty, 27 Family Advocate 40 (2005). But see Henderson v. Chambers, No. 03-04-00599-CV (Texas Ct. App., March 31, 2006) (action for fraudulent re-characterization of community interest in marital property an impermissible collateral attack on divorce judgment despite attorneys not being a party to divorce judgment).

69 See McDaniel, supra note, at 40 (citing Sanford N. Katz, Propter Honoris Respectum: Marriage as Partnership, 73 Notre Dame L. Rev. 1251 (1998). Cf. In re Marriage of Duffy, 111 Cal. Rptr. 2d 160 (Ct. App. 2001) (spouse not bound by "prudent investor" rule).

70 See, e.g., Dunkin v. Dunkin, 986 P.2d 706 (1999); Despain v. Despain, 682 P.2d 849 (Utah 1984). Factors to consider in whether such a relationship exists include age, mental condition, education, business experience, state of health and the degree of dependence on the spouse whose behavior is in question. 41 C.J.S. Husbands and Wives 304.

71 McDaniel, supra note 67, at 41-42 (citing, e.g., Manes v. Manes, 277 A.D.2d 359 (2000)).

72 See, e.g., Fleming v. Fleming, 539 S.E.2d 563 (Ga. Ct. App. 2000) (forged stock certificates held solely in wife's name).

73 73 Henry S. Gornbein & Jorin G. Rubin, Listening In, 81 Mich. B.J. 18 20 (2002).

74 74 Casey v. McConnell, 2007 WL 1575569 (Ala. Civ. App. 2007)

75 75 Id.

76 See Edward S. Snyder, Cyber-Snooping: No License to Spy, 27 Family Advocate 20 (2005) (citing Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. '' 2510-2522; The Electronic Communications Privacy Act of 1986, 100 Stat. 1848; the USA Patriot Act ' 209, Pub. L. No. 107-56 ' 209(1)(A), 115 Stat. 272, 283 (2001); and the Computer Fraud and Abuse Act, 18 U.S.C. ' 1030). But see, e.g., D'Onofrio v. D'Onofrio, 780 A.2d 593 (N.J. Super. Ct. App. 2001) (taping children's conversations with their mother by custodial father permissible under wiretap statute where clear evidence that conversations were harmful to children existed).

77 See, e.g., Glazner v. Glazner, 347 F.3d 1212 (11th Cir. 2003); Dommer v. Dommer, 829 N.E.2d 125 (Ind. Ct. App. 2005) (no marital immunity under state wiretap statute, person tape recorded in violation of wiretap act automatically entitled to damages).

78 "Because >wire communication' explicitly included electronic storage but >electronic communication' did not, there can be no >intercept' of an e-mail in storage, as an e-mail in storage is by definition not an >electronic communication.'" Id (citing among others, the cases of Fraser v. Nationwide Mutual Insurance Co., 352 F.3d 107 (3d Cir. 2003) and United States v. Steiger, 318 F.3d 107 (11th Cir. 2003)).

79 76 18 U.S.C.A. '1030(a)(2)(c) (2000)

80 77 18 U.S.C.A. '1030(a)(4) (2000)

81 18 U.S.C.A. '1030(a)(5) 2000; See Snyder, supra note 41, at 21 (citing the Computer Fraud & Abuse Act).

82 77 18 U.S.C.A. '2701(a)(1) 2000.

83 For a case addressing authentication of e-mail, see Fenje v. Feld, 301 F. Supp. 2d 781 (N.D. Ill. 2003) ("satisfied by evidence sufficient to support a finding that the matter in question is what it proponent claims").

84 See id. at 22-23 (citing, among others, White v. White, 781 A.2d 85 (N.J., Union County Super. Ct. 2001) (once e-mails are downloaded from the server, they are no longer stored for transmission purposes and are thus outside the wiretap act protections); Zepeda v. Zepeda, 632 N.W.2d 48 (S.D. 2001) (information obtained from keystroke program allowed to show use of internet in proving adultery); and U.S. v. Scarfo, 180 F. Supp. 2d 572 (D.N.J. 2001) (installing a keystroke program on computer to which one has authorized access not a violation of any law). See also Colon v. Colon, No. A-5986-02T5 (N.J. Appellate Division, August 11, 2006) (video surveillance not invasion of privacy by wife as husband had no reasonable expectation of privacy in office next to master bedroom which was used freely by both wife and children); White v. White, 781 A.2d 85 (N.J. Super. Ct. 2001) (storage of emails on family computer implies authorization of access).

85 Byrne v. Byrne, 650 N.Y.S.2d 499 (1996).

86 Rosenberg v. Rosenberg, 2002 WL15649 (Minn. Ct. App. 2002).

87 82 See , e.g. Trulock v. Freeh, 275 F.3d 391 (4th Cir. 2001) (holding that, under the Stored Communications Act, authority to generally access a computer hard drive did not include authority to access password protected files of a joint computer user); L. Kathryn Hedrick & Mark Gruber, Cybersex and Divorce: Interception of an Access to E-mail and Other Electronic Communications in the

Marital Home, 17 J. AM. ACAD. MATRIM.LAW. 1, 2 (2001) ("[I]f the e-mail is retrieved through accessing an online account, such as America Online or Hotmail or hacking into a password protected file on the shared computer, the spouse surreptitiously accessing the account or file is most likely subject to criminal and civil penalties."). But see, e.g., State V. Appleby, 2002 WL 1613716 (Del. Super. Ct.2002) (AUnder the circumstances here, where the hard drive was left broken, uninstalled and in the estranged wife's possession and where the hard drive once was installed in the estranged wife's computer, she had complete access to it while it was working and hundreds of her personal documents remained on it, the hard drive was "theirs" in every sense.").

88 JEC, supra note 45, at 7.2.4.

89 Id.

90 Id.

91 Id.

92 Id.

93 Id.

94 See, e.g., John B. v. Superior Court, 18 Cal. Rptr. 3d 48 (Ct. App. 2004) (wife in HIV transmission negligence case entitled to discovery of husband's medical records and prior knowledge of his infection but not identities of previous sex partners).

95 See, e.g., Lozano v. Lozano, 52 S.W.3d 141 (Tex. 2001) (cause of action against paternal relatives).

96 Edward J. Gross, Custodial Interference: Undermining the Court's Decision, 27 Family Advocate 26 (2005) (citing the Restatement (Second) of Torts ' 700). A helpful caselaw update by state appears on pages 26-27. See also Wolf v. Wolf, 690 N.W.2d 887 ($25,000 in punitive damages in case where mother assisted child in running away from father and kept child for nearly three years after he was awarded physical care); Matsumoto v. Matsumoto, 762 A.2d 224 (N.J. Super. Ct. App. Div. 2000) (court had personal jurisdiction over tortious interference with custody claim where Japanese grandmother's out-of-state actions were directed at causing harm within the state); Mayoue & Collard, supra note 36, at 45; Leonard Karp et al., Domestic Torts: Family Violence, Conflict and Sexual Abuse (1989) (listing attorneys for the abducting spouse and mental health professionals as other possible defendants).

97 See, e.g., Lapides v. Trabbic, 758 A.2d 1114 (Md. Ct. Spec. App. 2000) (remedy lies in family court rather than tort claim absent physical removal from a custodial parent for a continuing period of time).

98 See Ann M. Haralambie, Kids' Causes of Action, 27 Family Advocate 30 (2005).

99 Denzik v. Denzik, No. 2004-SC-1131-DG (Kentucky, June 15, 2006); Day v. Heller, 639 N.W.2d 158 (Neb. Ct. App. 2002).

100 89 Ala. Code '12-15-152.

101 Some concerns, although not unique to domestic practice, are perhaps more prevalent or somehow "stickier" where the personal nature of divorce actions is involved. Subcontracting private investigation work is an example: Negligent hiring, supervision or entrustment can pose a particular threat to an attorney where an investigator commits an intentional tort during the course of his employment for an attorney. Mayoue & Collard, supra note 54, at 47. See also United States Shoe Corp. v. Jones, 255 S.E.2d 73 (1979). Trespass and invasion of privacy claims may also arise. See National Legal Research Group, Liability of an Attorney or Spouse for Torts Committed by a Private Detective (1999), available at http://www.divorcesource.com/research/dl/expert/99dec247.shtml (citing, e.g., Sharp v. Sharp, 209 So. 2d 245 (Fla. Dist. Ct. App. 1968) (invasion of privacy) and King v. Loessin, 572 S.W.2d 87 (Tex. Civ. App. 1978) (trespass)).

102 But see Riemers v. O'Halloran, 678 N.W.2d 547 (N.D. 2004) (expert witness accountant and firm in divorce suit immune from fraud suit alleging their errors resulted in a gross inflation of spousal and child support, husband ordered to pay attorney fees for filing frivolous appeal).

103 See Mayoue & Collard, supra note 54. But see Kauzlarich v. Yarbrough, 20 P.3d 946 (Wash. Ct. App. 2001) (qualified privilege for attorney's statements made to a court administrator for the purposes of obtaining courtroom security); Karpowicz v. Hyles, 543 S.E.2d 51 (Ga. Ct. App. 2000) (attorney did not wrongfully intrude on client's private affairs in introducing materials into evidence as he was entitled to assume that records he received and used were either non-privileged or that a psychiatric hospital had obtained a waiver from the client).

104 Mark Gruber, When a Client Files Suit: How to Minimize Your Risk of Being Sued, 27 Family Advocate 48 (2005). But see Leisinger v. Jacobson, 65 N.W.2d 693 (S.D. 2002) (malicious prosecution damages lowered from $120,000 to $25,000 on appeal).

105 Gruber, supra note, at 49.

106 Mayoue & Collard, supra note 54, at 44-45. But see Lawson v. Helmer, 77 P.3d 724 (Alaska 2003) (witness immune to parent's defamation suit as statements to custody investigator and subsequent testimony were absolutely privileged); Hartley v. Williamson, 18 P.3d 355 (Okla. Ct. App. 2000) (psychologist in custody case had additional judicial immunity in performing an adjudicative act).

107 Mayoue & Collard, supra note 54, at 44.

108 Id.

109 Gruber, supra note 95, at 50.

Confessions of a Guardian Ad Litem

by M. Debra Gold
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As attorneys, we all have a duty to represent our clients zealously. This can sometimes be a challenge when our clients take positions or behave in such a manner that we know is not in the best interests of their children. After all, we all have a conscience and should recognize our unwritten responsibilities to the children. We serve our clients best in those situations by working to help them understand how their actions affect their children. My confession for this issue is that I know this can sometimes be a difficult and frustrating task, especially when one parent is bent on destroying the other. I, therefore, came up with the following Bill of Rights for Children of Divorce and I invite you to share them with your clients to help keep them on track.

Every child has the right to love and be loved by both parents.

Children should feel free to express their love and affection for both parents without guilt or fear of disapproval, rejection or other negative consequence. This right extends to step-families and other relatives. There is enough love to go around. This is not a competition to see who your child loves more. Your child loves and needs both of you. If your child wants to have a picture of your ex in his/her bedroom, it does not mean that he/she loves you any less. Allow him/her to keep that picture.

Every child has the right to parents who respect the child's relationship with the other parent.

Parents need to acknowledge and accept that their children have two homes. Neither parent should trivialize or try to control what goes on in the other home. You should never encourage or reward a child for being disobedient or acting negatively toward your ex. Likewise, you should never tell your child to keep a "secret" from your ex. Refrain from communicating moral judgments to your children about your ex's values, lifestyle, friends or successes and failures. Never bribe your children with tempting alternatives so they will want to stay with you instead of your ex.

Every child has the right to continuing care and guidance from both parents.

Your first responsibility is your children. Both you and your ex have so much to offer your children and there is so much they can learn from both of you. You want them to be the best of both of you. Your children have the right to have both of you participate in school, activities and other important events in their lives. Never interfere with that.

Every child has the right to parents who treat one another with integrity and respect.

You don't have to like each other. But for the children's sake, follow the Golden Rule… Remember, children learn from your example. If you and your ex cannot maintain civility, keep it away from the children. Communicate via e-mail and text messages. Have the exchanges of the children occur at school so as to avoid direct contact.

Every child has the right to freely communicate with both parents in privacy.

It is not fair to turn your phone off so that your ex cannot call the children. It is also wrong to "forget" to have the children return phone calls in response to your ex's messages or to wait until five minutes before bedtime to have them call back. Do not distract your children from their phone calls with your ex by starting the movie you just rented. Nor should you violate your children's privacy by reading their e-mails from your ex.

Every child has the right to be free their parents' hostilities and conflicts.

Keep your discussions and arguments away from the children. Don't put your children in

the middle by telling them about everything your ex has done wrong. Recognize that badmouthing your ex hurts your child. Never discuss your legal or business dealings with your ex within earshot of your children and don't take your children with you to your attorney's office. Nor should your child be used as a messenger between you and your ex. Interrogating them about what goes on in their other home puts your children in an unbearable situation and you should refrain from this. Your child is not your spy and he should not be made to feel as if he has to take sides or defend you.

Every child has the right to freedom from guilt or blame.

So many times children think that the divorce is their fault. Talk to your children and encourage them to talk to you about their feelings. Reassure them that not only did they not cause the divorce, but that it is not up to them to prevent it or to get you and your ex back together.

Every child has the right to parents who cooperate with one another when it comes to the children.

Don't interfere with your ex's time with the children just to get back at him/her. This hurts the children more. Accommodate your ex on his/her birthday by letting him/her spend time with the children. You would want the same on your birthday. Remember to notify your ex of important things or events in your child's life. Don't purposefully forget to pack or return clothing or gear your children need when at your ex's home. If necessary, find a qualified parent coordinator to help you learn how ease the conflict and work together for the best interests of your children.

Every child has the right to be heard.

Acknowledge your children's feelings and listen to them when they want to talk. Be honest with your children, giving them age-appropriate answers to their questions about the changing family relationships. Give them the opportunity to have some input into the parenting plan, but don't put them in a position of having to choose between you and your ex.

Every child has the right to live the life of a child throughout minority.

Your 10 year old son is not "the man of the house" now that you are divorced. It is not up to your child to cook dinner and care for younger siblings because you are not emotionally up to doing it yourself. Children often find themselves in the position of "parenting" their own parents. Do not confide in your children or cry on their shoulders. Your divorce is an adult issue. Keep it that way.

Every child has the right to love and be loved by both parents.

Every child has the right to parents who respect the child's relationship with the other parent.

Every child has the right to continuing care and guidance from both parents.

Every child has the right to parents who treat one another with integrity and respect.

Every child has the right to freely communicate with both parents in privacy.

Every child has the right to be free their parents' hostilities and conflicts.

Every child has the right to freedom from guilt or blame.

Every child has the right to parents who cooperate with one another when it comes to the children.

Every child has the right to be heard.

Every child has the right to live the life of a child throughout minority.

Every child has a right to a safe and secure environment in their parents' custody.

Every child has the right to financial support from both parents.

Every child has a right to a safe and secure environment in their parents' custody.

This is a given. Quit smoking around your children. Don't do drugs or drink and drive, especially with your children in your custody. Make sure you have safety plugs in all of the electrical sockets and proper car seats in your car. Be vigilant, but not overprotective.

Every child has the right to financial support from both parents.

The Georgia child support guidelines contemplate this right. Your children have the right to the same support and opportunities they would have had but for the divorce. Even though you feel like you are paying too much child support, it's probably not enough to provide your children with the kind of lifestyle to which they are entitled. The likelihood is that your ex complains that you are not paying enough child support. Quit worrying about what your ex is giving to the children and how the child support is spent and focus on what you can provide. FLR

Weighted Average Cost of Capital (WACC) - The Need for a Second Opinion

by Marty Varon
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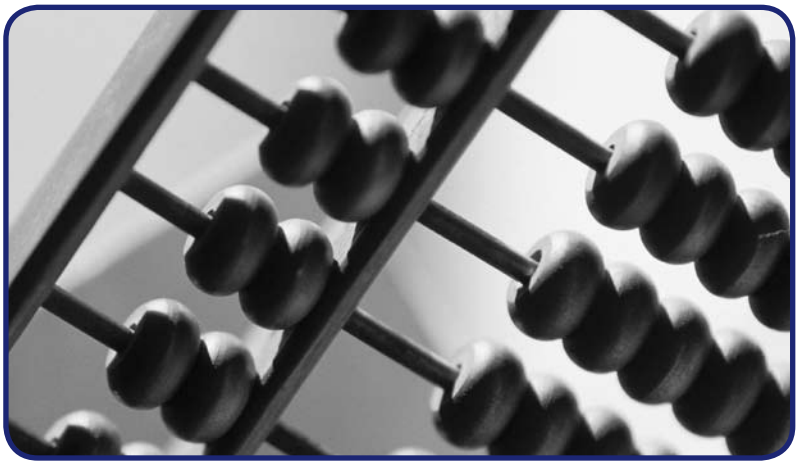
Very often when I am valuing an entity I discover that the company was funded with some long-term debt. This has a significant impact on the value of the entity. This concept is often misunderstood by a valuer, as was the case in a recent valuation report I was retained to review that was performed by another reputable firm.



The effect on value is somewhat comparable to valuing a plot of real estate encumbered by an outstanding mortgage. Let's say the piece of real estate has an appraised value of $750,000 and there is a $500,000 mortgage owed on the property. The value of the real estate is $750,000, but the owner's equity in the property is $250,000 ($750,000 less $500,000).

If the company is valued at $750,000 but there is $500,000 outstanding debt, it would appear that the owner's equity in the entity is $250,000. However, this may not be the case. As described in a recent newsletter article I co-authored with Jennifer Varon, when determining the value of an entity using the income approach, the calculation of the capitalization (interest rate) has a significant impact on value. As stated in that article, the higher the capitalization (interest) rate, the lower the value of the entity. The lower the capitalization (interest) rate, the higher the value of the entity.

The calculation to determine the value of the entity (that is funded to some extent with long term debt) impacts the weighted average cost of capital, which is needed to determine the value of the entity. This calculation is circular in nature and will only be determined with numerous iteration computations.

In the recent case I was reviewing, the valuer concluded that the weights assigned to debt and equity was fifty-fifty. However, the debt was valued at $1.4 million and the equity was valued at $1.0 million. This statement is erroneous on its face. If the value of debt is $1.4 million and the value of equity is $1.0 million, the total value of the entity is $2.4 million. Debt represents 58.33 percent of the total value ($1.4 million divided by $2.4 million) while equity represents 41.67 percent of the total value. This valuation required additional iterations. The ultimate correct determination of value of the equity was over $1.45 million.

If the valuation strikes the practitioner as too good or too bad to be true, there must be a reason and the best solution is to get a second opinion. FLR

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IN THE SUPERIOR COURT OF GRAPE COUNTY
STATE OF GEORGIA

STATE BAR OF GEORGIA YOUNG LAWYERS DIVISION FAMILY LAW COMMITTEE, PETITIONER, VS. INVITEE, RESPONDENT.	CIVIL ACTION FILE NUMBER 10-02-2008

SUMMONS

TO THE ABOVE NAMED RESPONDENT:
You are hereby summoned to appear before:

A Wine Tasting and Silent Auction Event

6:30 - 10 pm
Thursday, October 2, 2008

JCT Kitchen
1198 Howell Mill Road, Suite 18
Atlanta, Georgia 30318

$35 per person in advance; $40 per person at the door
Ticket price includes wine tasting and Tapas

Silent Auction closes at 9 pm
Cash, Check and Credit Cards Accepted

For tickets, please contact: Beth Pann at 404.446.1536 or bpann@thebridge-atlanta.org

This event benefits

THE BRIDGE

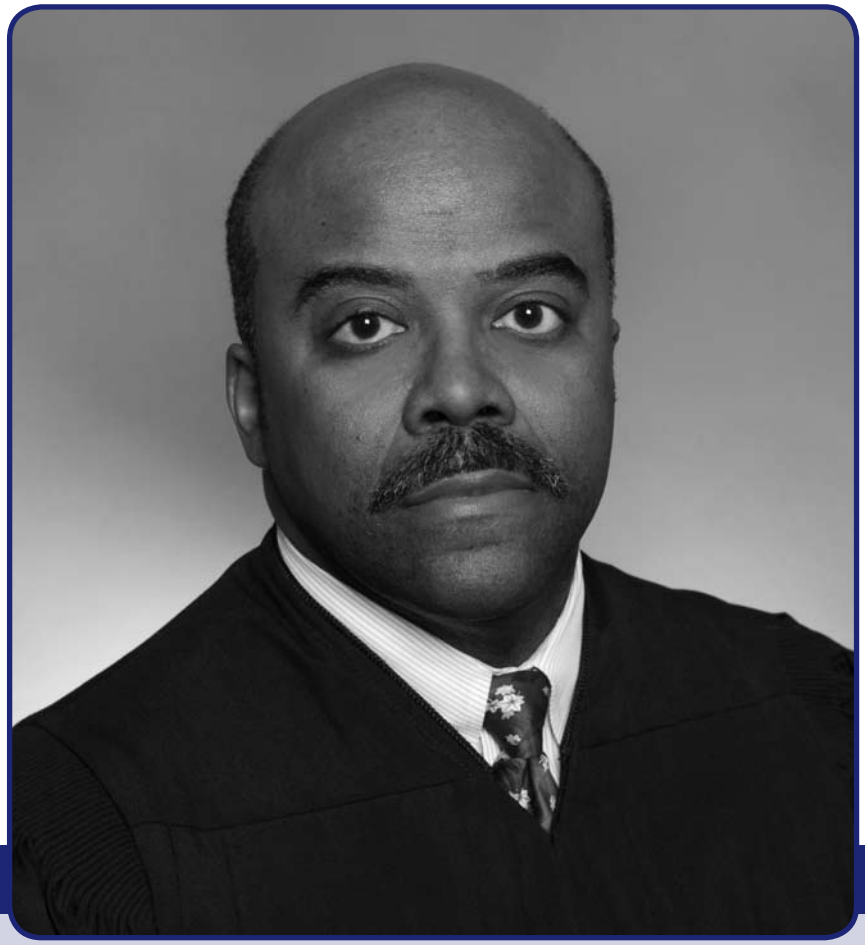
The Bridge is a 38-year old residential treatment facility, school and family center serving severely abused adolescents and families.

Gregory A. Adams: Keeping the Community in Mind

by Karen Brown Williams
thewilliamsfirmpc@yahoo.com

The Hon. Gregory A. Adams has served as a Superior Court Judge in the Stone Mountain Judicial Circuit. He was elected to the bench in July 2004. Adams is a 1981 graduate of Georgia State University where he majored in Criminal Justice. After graduating from the University of Georgia School of Law in 1984, he served as a prosecutor for DeKalb County for more than 10 years. He was appointed to the DeKalb County Juvenile Court in 1994. While serving as the chief judge of the court, Adams supervised a staff of 103 employees and managed an annual budget of four million dollars. Adams was instrumental in generating more than six million dollars in grant money and bringing many innovative programs to the DeKalb County Juvenile Court during his tenure.

Adams led the charge to construct a state of the art courthouse. On April 10, 2007, the DeKalb County Board of Commissioners voted unanimously to name the new facility the **Gregory A. Adams Juvenile Justice Center**; thereby making Adams the first judge in the history of DeKalb County to have a courthouse named in his honor.



The Hon. Gregory A. Adams

He has been active in his community, having served as president of both the DeKalb Lawyers Association and the DeKalb Bar Association. He has received, among other awards, the State Bar of Georgia Justice Robert Benham Community Service Award and the Community Leadership Award, which is given by the Community Leadership Association.

Adams states that his judicial philosophy has been shaped by his life experiences and by such individuals as Supreme Court of Georgia

Justice Robert Benham and Federal District Court Judge Clarence Cooper.

Adams established and personally funds a book scholarship given annually by the DeKalb Lawyers Association. The scholarship honors his law school classmate Carl Anthony Cunningham. Cunningham, who was blind, successfully completed college and law school and went on to become a successful attorney in DeKalb County. In explaining his choice to honor Cunningham though a scholarship to others, Adams expressed that, "Carl Anthony Cunningham demonstrated that all dreams can be fulfilled and all goals realized through hard work and determination."

As a member of the judiciary, Adams strives to assist not just those aspiring to become members of the legal community like the recipients of his book scholarship, but also those who are current members of the State Bar. He has been a longtime friend of the domestic relations bar. He considers the issues facing the domestic relations bar to be among the most challenging due in large part to the very real impact that divorces, child custody disputes, child support cases and the like have on the lives of all involved. Adams remains impressed with the professionalism and level of advocacy of the members of the domestic relations bar who appear before him in what can be difficult cases.

Adams strives to assist not just those aspiring to become members of the legal community like the recipients of his book scholarship, but also those who are current members of the State Bar.

With the rise of domestic relations cases and the changes in the child support statute, Adams consistently encourages *pro se* litigants to attain representation from one of the many qualified and experienced attorneys practicing family law. Those attorneys have worked successfully to make the transition from the old child support guidelines to use of the web-based child support worksheets a much easier one.

Adams depends upon the services of Guardian ad Litems ("GALs") to help resolve issues of custody. He primarily appoints private attorneys as GALs. To ensure that attorneys receive compensation for their time, parties are required to pay a deposit for a GAL's services and must pay any remaining monies owed prior to receiving a copy of the GAL's report and recommendation.

In terms of running his courtroom, Adams does not schedule separate domestic trial calendars; instead, general civil and domestic cases appear together on the same civil non-jury calendars. Adams has approximately six civil non-jury calendars each month but is always willing to increase that number if necessary. He has adoption hearings two mornings per month, but again is willing to hold hearings on additional days if needed.

Adams's goal is to resolve cases as efficiently as possible. He therefore expects attorneys to appear on time and be prepared. Adams believes that lawyers should try to work together and at least make a good faith attempt to settle a case or narrow the issues for consideration. In instances where settlement is not possible, attorneys are given ample time in a trial or hearing to present all relevant evidence in support of their respective client's case.

Adams evaluates attorney's fees requests on a case-by-case basis, but admits that, ideally, the playing field should be level for all litigants in domestic relations cases. He also recognizes the hard work that attorneys put into their cases and the need to be compensated for that time and effort.

At trial, Adams uses pattern jury instructions or requested instructions clearly supported by case law.

Adams usually grants consent orders for continuances or extension of discovery. Attorneys are in the best position to know whether their respective clients will benefit from additional time to negotiate, review documents, retain experts, etc.

Adams believes that his conduct on and off the bench affects the public perceptions of the justice system. Accordingly, he aspires to be fair and respectful of everyone who appears in his courtroom, and to be of service in the legal community and the greater community. FLR

2008-09 Family Law Section Executive Committee

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