



The Family Law Review

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Fall 2009

The Secret to Success: Using Witness Consultants to Prepare Your Client

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Preparation of the client/witness is critical to the success of a deposition or trial. Obvious, yes; ignored, too often. One of the best and most efficient and effective ways to prepare a witness for deposition or trial is by hiring a witness consultant.

Why Use A Witness Consultant?

The witness consultant's focus is singular in purpose. While you are busy worrying about the law, the judge, your relationship with the other side, potential witnesses and a bevy of other issues that naturally arise in any single litigation (let alone the multiple other litigations you may have going on at any one time), the job of the witness consultant is both simple and straightforward—help get the witness ready for his or her testimony.

Practical Approach

Good witness consultants work to familiarize the client with what is actually going to happen when their testimony is taken. What can/should the client expect? How should the client deal with a variety of different situations? For example, what if the witness needs to go to the rest room? That is not something that I had ever mentioned in my preparation of witnesses. But what I learned from Elaine Lewis of Courtroom Communications, with whom I work in preparing witnesses, is that often it is the relatively mundane, peripheral issues that can cause the client the greatest anxiety and are the easiest to resolve if addressed. Certainly, as the attorney, the last thing you want when your client is being deposed or on the witness stand is for him or her to be preoccupied with “what if I need to go to the rest room” or “how do I ask.” Beyond this, the witness consultant works with the client so that he or she gains an understanding of, and becomes comfortable with, inter alia, the physical surroundings of the room in which he or she is going to testify and is prepared for interruptions by

the reporter who may ask the client to repeat the answer, by the adversary who may interpose an objection, or, in court or in arbitration, by the person or persons presiding.

Understanding the “Rules” of Testimony

Having provided the client with a basic understanding of the manner in which their testimony will be taken, the practical approach employed by a skilled witness consultant then extends to a thorough, detailed review of what I refer to as the “rules” of testimony. By “rules,” I mean the specific framework within which the client gains an understanding of his/her role and what you as the attorney expect. Some examples of “rules” include: tell the truth, listen to the question, do not guess, do not answer a question you do not understand, do not volunteer, do not speak in absolutes.

Why then is it not better for the attorney to conduct the preparation? The reason is simple. We as lawyers have a tendency to talk to our clients about the rules that are then at the top of our head. So we hit on some, not others. This is not a proper way to effectively prepare our client for his or her testimony. A good witness consultant goes through every rule, every time, in every preparation because that's what they do!

Moreover, even with the rules we do cover (and even assuming all of the relevant rules are covered), it is simply not enough to tell the witness the “rules” for deposition or trial. Clients need to be told in detail what each rule means, to be given examples and practice implementation. Witness consultants have a luxury we do not. They do not have to split their time between preparing a case and preparing a witness (and handling all of the other demands of a matrimonial practice). They are free to focus exclusively on the problems and needs of the particular witness. Practice sessions in which the witness answers

See Secret on page 15

Editor's Corner

by Randall M. Kessler
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Happy Fall! We had a great institute. It is hard to believe that it has already been a few months. Congratulations to Tina Roddenbery on putting on a great show. The pictures throughout this issue demonstrate how much fun it was and we look forward to next year

in Destin. For those of you who attended, it was great to have you there. For those who missed, be sure to come next year. Paul Johnson is already hard at work on an excellent program.

Thank you so much to John Lyndon, who, in addition to providing consistent leadership on the executive committee, educational information through his CLE presentations and warm advice as a friend, also took several of the wonderful photos featured throughout this issue of the *Family Law Review*.

Once again we are privileged to have contributions from so many qualified writers. Please enjoy this issue of the FLR and think about what you could write about, or what issues you would like to see covered in future issues and let me know. *FLR*

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

The opinions expressed within The Family Law Review are those of the authors and do not necessarily reflect the opinions of the State Bar of Georgia, the Family Law Section, the Section's executive committee or the editor of The Family Law Review.

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Chair's Comments



by Tina Shadix Roddenbery
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I thank you for the opportunity to serve as chair this Bar year. The section is one of the most respected sections in the State Bar. Our section has won the distinguished State Bar of Georgia Section of the Year award several times, including for the past bar year. Congratulations to Edward Coleman, immediate past chair, for his leadership to the section for the 2008-09 bar year. Our section membership remains strong and our finances are sound. We are so financially sound we were able to answer the State Bar's call to help a deserving non-profit in these difficult financial times. We continue to provide our members with top-rated CLE seminars. Our seminars are well-attended and receive high praise for the program content. Routinely, judges who attend our seminars comment positively about the quality of the program and the quality of the people who attend the seminar. This year's Family Law Institute had 429 attendees who managed to have fun even in the midst of very inclement weather. We have a lot to be proud of. And there are many individuals to thank for the success of the section. The individuals include past chairs of the section. This year, for the first time, the section will sponsor a black tie Past Chairs' Dinner to celebrate the contributions of the past chairs. The dinner will also be an opportunity to gather the twenty-nine living past chairs together in order to share stories, to take an oral history of the Section and to discuss how the practice of family law has changed over the 33 years since the section was founded. The individuals to thank for the success of the section also include the past and present members of the Executive Committee. The members of the 2009-10 Family Law Section Executive Committee are listed on the last page of this newsletter. I want to announce the three new additions to that committee this year. They are Regina Quick from Athens, member-at-large, Kelly Boswell from Albany, member-at-large and Marvin Solomiany from Atlanta, newsletter editor. They are great additions to an already strong committee. Finally, the most important individuals to thank for the success of the section are you, its members. It is our members who raise the level of family law practice in this state every day. We do it by the way we learn the law, the way we advocate for our clients and the way in which we treat each other, the courts and our clients. I am proud of how Family Law Section members strive to incorporate what we learn at our seminars and in our Newsletter to make this a great area of the law in which to practice. *FLR*

*The State Bar of
Georgia Immigration
Law Section wants to
meet you!!*

*All Family Law Section members
are invited to be the guests of the
Immigration Law Section for
a meet and greet cocktail party
Tuesday, Sept. 22, 2009 to be
held at Shout.*

*Shout is located in Colony Square
1197 Peachtree Street
Atlanta, GA 30361.*

*For directions go to
www.heretoseverestaurants.com.*

*The reception is from 6- 8 p.m.
The Immigration Law Section
has also invited members of the
State Bar Criminal Law Section
to mix and mingle with us.*

*So come out and meet some
lawyers from these sections!*

*please RSVP to
derricks@gabar.org*

Family Law Section Answers Call for Donations

by Rebecca L. Crumrine
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At the May 2009 State Bar of Georgia Sections meeting, the Georgia Bar Foundation (the Foundation), due to the dramatic reduction in IOLTA funds, made a one time request of the individual Bar Sections to contribute to five organizations, all of which are supported predominately through the Foundation. In the May 6, 2009, follow up letter to that meeting to all the Section Leaders, Len Horton, executive director of the Foundation, explained anticipated IOLTA revenues for 2009 were down approximately one third from fiscal year 2008, due to falling interest rates and falling economic activity. Horton explained, "During this period when our economy is struggling to regain vigor, a number of important organizations that have expanded with the support of the Georgia Bar Foundation are facing possible loss, or at least the significant reduction, of that support."

Due to the dire financial situation, the Foundation sought the leaders of the State Bar Sections help—seeking "one-time, emergency funding" of which the total amount provided will be applied directly to the funding shortage. Five organizations were identified by the Foundation as in need of funding due to the reduction of the Foundation's support: (1) Atlanta Volunteer Lawyers Foundation, who recruits lawyers to assist families suffering abuse, custody and disability issues and provides statewide assistance for Guardian ad Litem programs; (2) BASICS Program and Children At-Risk Program, who prepares children at risk and prison inmates for productive work lives in society without getting into trouble with the law; (3) Georgia Appellate Practice and Educational Resource Center, who provide post-conviction counsel for inmates sentenced to death; (4) Georgia Law Center for the Homeless, who provide legal assistance to Georgia's homeless and solve problems for the homeless; and (5) Truancy Intervention Project Georgia, who trains volunteer lawyers to represent children with school attendance problems and helps create programs throughout Georgia to keep children in school.

Horton's May assessment of the reality of the losses of IOLTA funds over the past fiscal year came to fruition in July, the end of the Foundation's fiscal year. At the July 17, 2009, annual meeting of the Georgia Bar Foundation, only \$2.47 million was available to distribute, in sharp contrast to the \$6.74 million distributed last year. As provided in the July 22, 2009, Fulton County Daily Report, only 12 nonprofits were funded this year, as opposed to 32 last year.

Upon receipt of Horton's May 6, 2009, letter, the Executive Committee of the Family Law Section began discussions regarding the Foundation's request and continued discussions over the course of two Executive Committee meetings. Over the years, the Family Law Section built a reserve due to the conservative efforts of the Section leadership and continued reduction in expenses without reduction in the services the Section provides to its members. The Executive Committee protected the Section funds so that the Section's contribution would not affect the quality services provided by the Section, including seminars, the newsletter and support to its members.

After thorough investigation and much dialogue, the Executive Committee voted to provide one-time emergency funding to Atlanta Volunteer Lawyers Foundation (AVLF) in the amount of \$30,000. The Executive Committee remained in line with the giving of other Sections and chose AVLF due to the family law oriented services AVLF provides state-wide. AVLF coordinates with private lawyers to provide free legal services to low-income people above the income cut-off for legal aid services, which is 150 percent or less of the federal poverty level of \$22,500 for a family of four.

In addition to servicing Fulton County victims of domestic violence and children impacted from domestic abuse, as well as providing Guardian ad Litem in family law cases, AVLF maintains numerous state-wide programs, including:

- Providing special advocacy training via the web;
- Working with the Supreme Court of Georgia Committee on Justice for Children to author "Family Preservations in Georgia: A Legal Guide to Preventing Unnecessary Removal to State Custody;"
- Serving as a model and providing education and training to replicate the AVLFGuardian ad Litem program model to recruit attorneys to serve as Guardian ad Litem in family law cases on a pro bono basis;
- Serving as a model and providing education and training to replicate the AVLFGuardian ad Litem program model to assist and represent pro se litigants; and
- In the first two months of operation of the Safe Families office, serving victims from Fulton, Cobb, DeKalb, Henry, Clayton, Fayette, Paulding and Dougherty counties.

Every year, AVLFGuardian ad Litem provides training and expertise on issues affecting children at risk and coordinating pro bono legal assistance. With 30 years of experience, AVLFGuardian ad Litem has provided millions of dollars of free legal services to children at risk and their families every year with only skeletal staff and budget. And, AVLFGuardian ad Litem is already planning for the future and investigating other avenues for funding now that the security of the Foundation funding and IOLTA funds have been shaken. AVLFGuardian ad Litem is proactive in ensuring it plans for future funding gaps from IOLTA by pursuing new grants with national organization and government sources to continue the volunteer services provided for the past 30 years.

These financial times are difficult for all of us, and it is a time when we all need to work together to keep in place the programs necessary to help ensure the safety of our families. AVLFGuardian ad Litem is one of those programs, and it is too important to Georgia families to fall victim to this economic crisis. Last year, AVLFGuardian ad Litem received funds from the Foundation to expand the Guardian ad Litem program on a statewide basis, yet the funds were cut in half this year, receiving \$117,000 as opposed to \$250,000 last year. AVLFGuardian ad Litem, thrilled to receive anything, still is struggling to operate with a 10 percent reduction in the overall budget. The Sections one-time contribution allows AVLFGuardian ad Litem to continue to provide valuable representation to families in need and/or victims of domestic violence throughout Georgia. *FLR*



Rebecca Crumrine is a senior associate practicing in the Domestic Relations and Family Law section at Davis, Matthews & Quigley, P.C. Currently an adjunct Professor at John Marshall School of Law, she serves on the Executive Committee of the Family Law Section. She can be reached by sending an e-mail to rcrumrine@dmqlaw.com.

Attorney coaches are needed for high school teams throughout Georgia

Serve as a mentor to a team in your area and make a positive impact in your community!

CLE credit is available for coaching a mock trial team!

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Volunteer forms and a list of teams needing coaches may be found under the Attorney Volunteer section of the mock trial website.



Case Law Update

by Vic Valmus
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ALIMONY

Sprouse v. Sprouse, S09F0709 (June 1, 2009)

The parties entered a common law marriage in Alabama in 1996. That marriage was terminated in 2001 by decree of divorce in an Alabama court. Shortly thereafter, the parties resumed cohabitation and at a wedding ceremony, they married on March 5, 2005. The husband brought a divorce action on Jan. 2, 2007. After a bench trial, the trial court entered a final decree which in relevant part, awarded alimony to the wife in the amount of \$1,000 per month for six months or until she began receiving social security benefits, whichever first occurs, at which time alimony would decrease to \$500 per month for twelve and one-half years. The husband appeals and the Supreme Court affirms.

The husband argued that the trial court did not thoroughly examine all of the relevant statutory factors in determining alimony pursuant to O.C.G.A. § 19-6-5(a). With respect to alimony, there is no statutory requirement that findings be included in the decree. However, after review, the transcript shows that there were many questions and comments by the trial court which tends to indicate that the court considered many of the statutory factors such as the wife's need, the husband's ability to pay and so forth.

The husband also contends that the trial court abused its discretion by considering the length of the time the parties lived together in a meretricious relationship prior to their marriage in 2005. O.C.G.A. § 19-6-5(a) also states that the court can consider such other relevant factors that the court deems equitable and proper. Therefore, the Supreme Court saw no reason why that discretion necessarily excludes considering the length of the parties premarital cohabitation. Therefore, the court held that the "catch-all phrase" as set out in O.C.G.A. § 19-6-5(a)(8) provides the trial court with the discretion to consider the parties' entire relationship. This includes periods of premarital cohabitation and no one factor is dispositive.

ALIMONY

Crosby v. Lebert, S09A0061 (April 28, 2009)

The parties were divorced in Dec. of 2005, and their final decree incorporated terms and conditions of a settlement agreement. Pursuant to the agreement, the wife was to receive, among other things, a Cadillac Escalade. The husband was required to make monthly installment payments on the automobile and transfer title of the car to the wife once the car was paid off. The settlement agreement specifically stated that the husband shall make these payments in the form of permanent periodic alimony. The husband was also required by the agreement to pay for 18 months of health insurance for the wife. These insurance payments would also be made in the form of periodic alimony. The wife remarried in April of 2006 and in July 2006, the husband notified the wife that she would be responsible for the remaining payments on the automobile and his payments on the health insurance would cease.

The husband filed declaratory action and moved for summary judgment, arguing his obligation to make periodic alimony payments under the settlement agreement ceased upon the wife's remarriage. The trial court granted summary judgment to the husband. The wife appeals and the Supreme Court affirms.

Under O.C.G.A. § 19-6-5(b), all obligations for periodic alimony, however created, for which a time for performance has not arrived,



shall terminate upon remarriage of a party to whom the obligations are owed unless otherwise provided. The wife contends that the automobile is included in the settlement agreement as equitable division of property and not periodic alimony. However, the automobile payments here are clearly defined in the settlement agreement as permanent periodic alimony. To interpret the agreement here as providing for only a property settlement instead of permanent periodic alimony failed to give full effect to all of the language included by the parties in the settlement agreement. Therefore, the trial court was correct in granting summary judgment to the husband. In addition, the wife makes no argument to appeal or contest the husband's refusal to make payments for her health insurance.

ALIMONY

Patel v. Patel, S09F0505 (May 4, 2009)

The parties filed for divorce after 22 years of marriage. Following a bench trial, the trial court awarded to the wife alimony in the amount of \$5,000 for the first year, \$4,000 for the following two years and \$3,000 for one final year. The wife appeals and the Supreme Court affirms.

The wife contends that the trial court failed to properly consider the factors set forth in O.C.G.A. § 19-6-5(a). Here,

there was evidence to support the trial court's finding based upon wife's ability to work, the wife's need for alimony and the husband's ability to pay. Furthermore, this court will uphold the trial court's finding unless clearly erroneous, which is the same as the "any evidence" rule.

The wife also argues that the reduction of alimony after the first and third years constituted an improper future modification which would not be based on a change of circumstance as required by O.C.G.A. § 19-6-19. However, because the alimony provisions set forth in the trial court's order state the exact amount of each payment and the exact number of payments to be made without other limitations, conditions, or statements of intent, the obligations is one for lump sum alimony payable in installments. Therefore, O.C.G.A. § 19-6-19 does not apply and it is in the trial court's discretion to establish an installment payment schedule for such a lump sum award. In addition, the factors established in O.C.G.A. § 19-6-5(a) are relevant for a determination of permanent alimony, whether periodic or lump sum.

ATTORNEY CLIENT PRIVILEGE

Brown v. State of Georgia, A09A0295 (June 25, 2009)

The parties were in the middle of a contested divorce case when the husband (Brown) took his son and fled to Mexico. He was apprehended and returned to Georgia a month later. While being held in jail prior to his arraignment, the husband asked to speak to his former attorney. He asked his attorney if everything he said was confidential and she replied "yes". The husband then told the attorney that when this is over, he is going to kill his wife, he is going to kill her mother and then he was going to kill himself. The husband's mother had also given to his attorney a letter that he had sent to her, which, among other things, had wrote across the bottom "kill, kill, I kill, I kill," and other obscenities. The husband also sent his attorney a letter complaining about her defense of him, including the statement: "never is a man more free than one with nothing to lose. I will be back and crime: loving my son."

The husband's attorney became concerned after the husband was released from his short stay in jail about the husband's possible future conduct and contacted the State Bar for advice. After being instructed by the State Bar, the husband's attorney reported Brown's statements to the



authorities and he was indicted and convicted on two counts of terroristic threats. Brown appeals and the Court of Appeals affirms.

Brown appeals, among other things, that under the facts of this case, he did not communicate the threat to his wife and mother-in-law directly or indirectly and did not intend for the threat to be communicated to them. The fact that Brown did not communicate the threats directly to the victims does not alone preclude a conviction if the threat is stated in manner in which will support an inference that the speaker intended or expected the threat to be conveyed to the victim, which is often proven through the use of circumstantial evidence. Here, evidence showed that Brown frequently used law books while in jail and wrote to his attorney about what he thought the law was and how he should proceed with the case. Most importantly, in a letter to his attorney a month before he made the threats to murder his wife and mother-in-law, he asked his attorney, "how far does the attorney-client privilege go," and "are there any exceptions?"

The facts showed two things: Brown was familiar with attorney-client privilege and he was aware the privilege had exceptions. Therefore, it was difficult to believe that Brown did not know that certain communications to his attorney were not privileged and that she must report these threats to keep him from carrying them out. Therefore, the attorney's actions were proper, were not privileged and the evidence was sufficient to sustain Brown's conviction.

CHILD SUPPORT

Grenevitch v. Grenevitch, S09A0320 (June 8, 2009)

The parties were divorced in Dec. of 2007. A final judgment and decree of divorce incorporated the terms expressly agreed to by the parties that the wife was awarded primary custody of the four minor children and the husband was obligated to pay \$1,614.70 in monthly child support. The child support payments would be due and payable in like fashion until such time as the youngest minor child dies, marries, enters the military, attains the age of 18, or is otherwise emancipated, whichever first occurs; provided, however, that in the event that any of the minor children turn 18 years of age while still in high school, the husband's child support obligation shall continue for that child until such time as the child graduates from high school, but in no event to extend past the child's 20th birthday. The husband filed a petition captioned as "Complaint for Modification of Child Support" and at that the time parties' eldest child had turned 18 years old and the husband's child support obligation for said child has ceased. The trial court did not give the husband an opportunity to present evidence of whether the child had turned 18 and graduated high school. Thus, the question presented in the case is whether under any set of facts involving the parties' eldest child turning 18, the husband's child support obligation for that child could cease. The trial

court dismissed the husband's petition and awarded the wife attorney's fees. The husband appeals and the Supreme Court reverses.

The decree is clear that the parties contemplated a change in the husband's child support obligation in the event that the eldest child turned 18 and was no longer in high school and nothing in the final decree shows a contrary intention by the parties. Therefore, in light of the possibility that the state of facts could have been proven to show that the husband's obligation to pay child support for the parties' eldest child had ended, the trial court erred in dismissing the husband's complaint for modification of child support. In addition, because the wife is not the prevailing party here, the trial court also was not authorized to award attorney's fees pursuant to O.C.G.A. §19-6-15(k)(5). Justice Hunstein dissents.

COMMON LAW MARRIAGE

In re the Estate of Robert L. Smith, A09A0278 (June 3, 2009)

Robert Lewis Smith died intestate. Ann Olds filed a petition for letters of administration with the probate court claiming she was Robert's wife. The probate court entered a final order appointing Ann as the administrator of the estate and issuing letters of administration. One of Robert's sons filed a motion to set aside the order, contending that Ann was not Robert's surviving spouse. Following an evidentiary hearing, the probate court entered an order finding that there was no common law marriage between Robert and Ann and set aside the order appointing Ann as administrator of the estate and revoked the letters of administration. Ann appeals and the Court of Appeals affirms.

In order for a common law marriage to come into existence, the parties must be able to contract, must agree to live together as man and wife and must consummate the agreement, with all three of these elements being met simultaneously. Further, the legal marital relationship cannot be partial or periodic. Georgia does not recognize common law marriages entered into after Jan. 1, 1997. For a party to assert the existence of a common law marriage prior to Jan. 1, 1997, the party must establish its existence by a preponderance of the evidence.

There was conflicting evidence in the case as to whether or not there was a common law marriage. Ann testified that her and Robert began dating and moved in together in 1993, but they couldn't be married, because, at the time, there was an outstanding warrant for his arrest. She also stated they shared finances, a bed and also raised their daughter together. Ann also stated that they ceased living together for a few months in 1996 and they separated a few times, but otherwise lived together on and off from 1993 until his death in 2006.

On cross examination, Ann admitted that she had another boyfriend during the period of 2000 when she was

separated from Robert. The trial court concluded that Ann did not produce a copy of the divorce decree dissolving Robert's prior marriage and that a majority of the evidence regarding the relationship between the two was dated after Jan. 1, 1997. In addition, the parties separated numerous time and Ann had a boyfriend during one separation. The parties filed income taxes as single persons and she did not list Robert as the father of her child on the birth certificate or give her daughter Robert's last name. In addition, Ann was the only witness who testified in support of her common law marriage. Therefore, if there is any evidence to support the finding, even though the evidence is in conflict, the trial court must be upheld.

CONTEMPT

Farris v. Farris, S09A0302 (April 28, 2009)

The parties filed for divorce on Nov. 13, 2007. After a bench trial, the trial court made an oral ruling as to the equitable division of the parties' marital assets and debts, but did not enter a final judgment and decree of divorce until Dec. 19, 2007. The divorce decree provided for the sale of the marital residence as follows: the marital residence shall be placed upon the market for sale by the wife on Jan. 1, 2008. Neither party shall reside in the residence after Jan. 1, 2008. The wife shall be entitled to choose the broker or such agent with whom said residence shall be listed for a period of time not to exceed six months. Unless the parties

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agree to the contrary in writing, the house shall be listed and sold at a price of not less than \$650,000. The wife shall be solely responsible for all aspects of the listing and sale. However, should the residence not sell within this initial six month period, then the husband shall be entitled to manage the listing and sale of the marital residence under the same provisions and obligations as set forth above for the wife. This process shall repeat itself every 6 months until the residence is sold. Upon the sale of the marital residence, each party shall be entitled to receive one-half of the net proceeds derived from said sale.

On Dec. 10, 2007, prior to the entry of the final decree, the husband made an offer to purchase the wife's interest in the house for \$325,000. The wife rejected the husband's offer. On Jan. 1, 2008, she listed the house for sale for \$1.1 million. On Feb. 4, 2008, the wife accepted an offer from the parties' daughter in the amount of \$650,150 and the husband rejected the proposed sale. Under the terms of the agreement, the parties would be required to pay \$5,000 in closing costs and to finance \$325,000 of the purchase price.

On April 14, 2008, the wife filed a motion to hold the husband in contempt for rejecting the proposed contract to sell the house to their daughter. The husband then filed his own motion to hold the wife in contempt for rejecting his Dec. 2007, offer. In June 2008, the trial court held a hearing on the parties' motions, and in June of 2008, the trial court found the wife to be in willful contempt by rejecting the husband's offer and awarded the husband attorney's fees in the amount of \$2,341. The wife appeals and the Supreme Court reverses.

Before a person can be held in contempt for violating a court order, the order must inform him or her in definite terms of the duties thereby imposed upon him or her and the command must therefore be expressed rather than implied. In fact, the express written terms of the divorce decree did not even exist at the time, because the final order was not entered until Dec. 19. The record also reveals that there was neither an oral or a written ruling from the trial court that would have required the wife to sell the marital residence to the husband prior to the entry of the final decree. The trial court's finding of contempt was based on the wife's alleged violation of the terms of the Dec. 19, 2007, final decree and not any other ruling. Therefore, the trial court had no basis for holding the wife in contempt.

The trial court also erred in awarding attorney's fees to the husband based upon a finding of contempt which was also erroneous. However, in connection with the award of attorney's fees to the husband, the trial court also found that the award was justified in light of the entire matter of contempt being initiated by the wife's motion for contempt and the wife causing the proceedings in question. Therefore, the Supreme Court remanded the case for reconsideration of the attorney's fees award in light of the absence of any finding of contempt against the wife.

JUVENILE COURT JURISDICTION/HABEAS CORPUS

Douglas v. Douglas, S09A0363 (June 15, 2009)

The parties were divorced in 1999 and the final divorce decree awarded custody of the couple's one-year-old son to the father. Two years later, Department of Family and Children Services (DFCS) filed a petition in Juvenile Court alleging the child was deprived and sought temporary custody. Prior to the final hearing on the petition, the mother and father entered into an agreement transferring custody of the child to the mother. After the hearing, the juvenile court incorporated the agreement into an order that transferred custody to the mother, provided visitation to the father and relieved DFCS of any further custodial obligations. Six years later, the father filed a petition of writ of habeas corpus in the superior court, arguing that the child should be returned to him because the juvenile court awarded only temporary custody to the mother and that order had expired. Therefore, he is still the child's legal custodian pursuant to the divorce decree. The habeas court denied the petition saying that the mother was legal custodian by virtue of the juvenile court order incorporating the agreement to change custody. The father appeals and the Court of Appeals reverses.

Juvenile courts have exclusive original jurisdiction over cases in which a child is alleged to be deprived. In such a deprivation proceeding, the juvenile court may award temporary custody to another parent but it does not have the authority to grant permanent custody absent a transfer order from the superior court. Because the issue of permanent custody or modification of a divorce decree was not transferred to the juvenile court from superior court, the juvenile court can only grant temporary custody to the mother at the deprivation hearing and the juvenile court's order, by operation of law, expires two years after it was entered.

Although habeas corpus can no longer be used to seek a change in child custody, it still can be used by the legal custodian seeking to enforce a child custody order. However, even where a legal custodian brings such a habeas action, no complaint seeking to change custody may be made as a counterclaim or in any other manner or response to a petition for a writ of habeas corpus seeking to enforce a child custody order. Here, the father is the legal custodian pursuant to the divorce decree and he properly brought the habeas action to enforce that decree. In response, the mother may not maintain an action to change custody based merely on a change of circumstances. Rather, the habeas action must be resolved under the standards set forth in *Dein v. Mossman*, which states, in pertinent part, that the trial court's discretion should be governed by the rules of law and be exercised in favor of the party having prima facie legal right to custody of the child unless evidence shows that such person has lost the right to custody through one of the ways recognized in O.C.G.A. § 19-7-1 and 19-7-4

or through unfitness. Therefore, the habeas court should have exercised its discretion in favor of the father unless he had lost that right to custody through unfitness or one of the other legal realms as set forth in O.C.G.A. § 19-7-1 and 19-7-4 such as voluntary contract releasing parental rights, consent to adoption, failure to provide necessities, abandonment or cruel treatment.

PATERNITY /ARTIFICIAL INSEMINATION/ ATTORNEY'S FEES

Brown v. Gadson, A07A1345, A09A0413 (Nov. 8, 2007) (July 1, 2009)

Delores Brown entered into a written agreement in Florida with Gregory Gadson, whereby he agreed to provide semen for her use in attempting to become pregnant by artificial insemination. After having a second child by such procedure in North Carolina and moving to Georgia, Brown filed a petition for a determination of paternity and to obtain an order for child support against Gadson. Gadson filed a verified answer and counterclaim requesting that the petition be dismissed because the agreement of the parties relieved of him the duties of parenthood. The trial court granted Gadson's motions to dismiss and awarded attorney's fees to Brown. Brown appeals and the Court of Appeals affirms in part and reverses in part.

Brown contends the trial court erred by refusing to set aside its judgment of dismissal arguing mistake, lack of consideration, upon a non-amendable defect appearing on the face of the record and stated that the trial court considered matters beyond the pleadings which converted Gadson's motion to dismiss to a motion for summary judgment without giving her notice thereof. Here, Brown directs her claims of mistake to a decisional or judgmental error underlying the trial court's judgment of dismissal, however such claims are not cognizable under O.C.G.A. § 9-11-60(d)(2). Brown also claims that the judgment of dismissal should be set aside based upon a nonamendable defect appearing on the face of the record and that these defects resulted because the trial court converted Gadson's motion to dismiss to a motion for summary judgment upon considering matter beyond the pleadings without giving her notice thereof. The trial court's order granting Gadson's motion to dismiss was based upon the agreement of the parties, which was attached to and incorporated into the pleadings. Therefore, the trial court's consideration of the same did not convert the motion to dismiss to a motion for summary judgment.

The court must also address the fundamental question of whether the Florida agreement of the parties is enforceable in Georgia and not contrary to public policy. The Supreme Court of Georgia opined that biological paternity does not correspond with a responsibility to provide support in cases of artificial insemination. Georgia statutes neither provide nor contemplate the circumstances of this case. Under Florida statutes, the donor of any

egg, sperm or pre-embryo, other than the commissioning couple or a father who has executed a pre-planned adoption agreement under Florida Code, shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children. Therefore, this court is constrained to find that the agreement of the parties is unenforceable on public policy grounds.

With regards to the second appeal of the initial hearing, Gadson moved for attorney's fees pursuant to O.C.G.A. § 9-15-14, asserting that Brown's action to establish paternity and seeking child support had failed to present any justiciable issue of law or fact. After this court affirmed the denial of Brown's motion to set aside the dismissal, the trial court then granted Gadson's motion for attorney's fees on the grounds that the actions against him for paternity determination and child support lacked substantial justification. Brown appeals and this court reverses.

The trial court based an award of attorney's fees to Gadson upon Brown's act of filing an action that was determined to be precluded by an enforceable agreement between the parties. In support of this award, the court cited its earlier determination affirmed on appeal, that the parties' agreement was enforceable. Under these circumstances, Brown's act of bringing claims against Gadson, contrary to the terms of their agreement, was not substantially frivolous, substantially groundless, or substantially vexatious and could not, by itself, support a fee award under O.C.G.A. § 19-15-14.

PRENUPTIAL AGREEMENT

Dove v. Dove; and vice versa, S09A0197, S09X0198 (June 15, 2009)

The parties executed a prenuptial agreement and the trial court ruled that the agreement was unenforceable because it was required to be attested by two witnesses under O.C.G.A. § 19-3-63 and was not. The trial court went on to rule that even though it did not meet the requirements of O.C.G.A. § 19-3-63, it did meet the requirements established in Sherer. The husband filed an interlocutory appeal and the wife cross-appealed and the Supreme Court reverses and dismisses the wife's cross appeal.

O.C.G.A. § 19-3-63 provides, in relevant part, that every marriage contract in writing, made in contemplation of marriage, must be attested by at least two witnesses. This court has repeatedly stated that prenuptial agreements settling alimony issues are made in contemplation of divorce and not marriage. This court has always stated the criteria to use is Sherer, which is a three part test to set the standards governing the enforcement of any nuptial agreements. In addition, to hold such agreements void now unless attested by two witnesses would do a disservice to the bench, the bar and to the litigants involved.

In the wife's cross appeal, she states that the trial court erred in ruling that the husband's failure to disclose his income when the parties executed the prenuptial agreement

rendered the agreement unenforceable. Even though the husband did not provide to the wife a list of his income, he did list the value of all his investments and other properties. In addition, the wife also lived with the husband for four years prior to the prenuptial agreement being entered into, and therefore, the trial court was correct in determining that the absence of the husband's income on the financial statement did not constitute a non-disclosure of material fact which would render the prenuptial agreement unenforceable. Justice Carly writes a lengthy dissent.

TORTUOUS INTERFERENCE/IMMUNITY

Farrar v. Macie et al., A09A0103 (March 30, 2009)

Attorney James J. Macie often encountered psychologist John Edward Farrar as a testifying expert in child custody cases. On Dec. 15, 2000, Macie filed a complaint with the State Board alleging that Farrar had engaged in conduct which violated several ethical standards and guidelines of the American Psychological Association. Macie averred in his affidavit that he filed the report because he became concerned that Dr. Farrar often made custody recommendations without a proper evaluation of both parents, the children and relevant witnesses. Macie further averred that he spoke with psychologists and he read the American Psychological Association Guidelines for child custody evaluations in divorce proceedings and became worried that Dr. Farrar's custody recommendations violated the APA guidelines and were improper to the detriment of children involved in the cases in which he testified. The State Board found that Dr. Farrar had violated its rules and ordered that he suspend all testimony in custody and certain other cases for a minimum of one year, beginning Nov. 1, 2003. Dr. Farrar filed this action on Nov. 16, 2006, seeking damages arising out of Macie's filing of the complaint with the State Board and the alleged dissemination of a publication by Defendants in Feb. of 2003. Farrar sued Macie, Macie's wife and Macie's paralegal. The trial court granted summary judgment to the Defendants and Dr. Farrar appealed. The Court of Appeals affirms.

Farrar's claimed that the Trial Court erred in granting summary judgment to the Defendants on the claim that Defendants improperly disseminated anonymous flyers in the community alleging that Farrar was the subject to prosecution by the Attorney General in the state of Georgia by not considering the Affidavit of Marcus L. Pittman. Pittman, a forensic document examiner, averred based on certain documents provided to him, Macie's paralegal and Macie's wife authored certain other documents or flyers provided to him. However, these various documents, Exhibits B through E, were not attached to the Affidavit filed with the Trial Court and the Trial Court found the Affidavit to be insufficient. Pursuant to O.C.G.A. §9-11-53(e), Affidavits supporting or opposing a summary judgment shall include, "sworn and certified copies of all papers or parts thereof referred to in an affidavit and shall be attached

thereto and served therewith." Therefore, the Trial Court correctly refused to consider Pittman's Affidavit.

Farrar also contends that the Trial Court erred by granting summary judgment in that Macie's actions were privileged. O.C.G.A. §43-1-19(i) provides that a person is immune from civil or criminal liability for supporting or investigating the acts or omissions of a licensee or applicant which violates the provisions of subsection (a) of this Code section if such report is made or action is taken in good faith, without fraud or malice. Here, Macie averred that he filed a complaint because he became concerned that Dr. Farrar often made custody recommendations without proper evaluation of the parties involved. Macie's sworn testimony evidences his good faith in filing the complaint with the State Board. In such a posture, Farrar cannot rest upon his allegations or denials but is cast with the burden of showing that there was a genuine issue at trial. Here, Farrar did not argue that anything in the record either shows or reasonably infers that Macie did not act in good faith in communicating to the State Board. Therefore, Macie was immune in civil liability for reporting Farrar's alleged unethical and unprofessional conduct to the State Board. Other issues that were raised such as the statute of limitations and no justiciable issues of law or fact are not addressed in view of the findings above.

UCCJEA

Croft v. Croft, A09A0781 (June 11, 2009)

The parties were married on March 11, 2007, in South Carolina and their child was born in September 2006. In October 2007, the family moved to Augusta and in March of 2008, the father moved out of the marital residence and returned to South Carolina and the mother remained in Augusta. The child lived with the mother and visited the father's home in South Carolina on weekends. Beginning in May of 2008, pursuant to an agreement between the parties, the child stayed with the father Monday-Thursday and with the mother Friday-Sunday. In September 2008, the mother told the father that the child was going to remain with her in Augusta and would be attending day-care. The next day, the father filed a complaint seeking custody of the child in the family court of South Carolina. That afternoon, the father went to the mother's house to see the child and picked him up and drove back to South Carolina. On Sept. 15, 2008, the mother filed a divorce action seeking temporary custody in the divorce action attaching a copy of the South Carolina complaint to her petition alleging that she was not served and that she was not subject to jurisdiction of the South Carolina court. The father was served a copy of the Georgia complaint in South Carolina on Sept. 18, 2008, and filed an answer and counterclaim for the lack of jurisdiction and improper service of process.

Both the mother and father testified at the September 29, 2009, emergency custody hearing and the trial court awarded temporary custody to the mother and ordered that the father be held at the court house until the child was

produced. In its Oct. 15, 2008, written order, the trial court concluded that the child resided in Georgia from October 2007, until at least May 1, 2008, thus Georgia was the home state of the child within 6 months of the commencement of this action pursuant to the UCCJEA. The father appeals and the Court of Appeals affirms.

Georgia adopted the UCCJEA in 2001 and pursuant to O.C.G.A. § 19-6-61(a), a court of this state has jurisdiction to make an initial trial custody determination only if: (1) the state is the home state of the child from the date of the commencement of the proceeding or was the home state of the child within 6 months before the commencement of the proceedings and the child is absent from the state but a parent or person acting as parent continues to live in the state. Here, the child moved to Georgia with the parties in October 2007. Assuming for the sake of argument that the child moved to South Carolina and began staying there with the father for 4 days a week, that did not occur until May 1, 2008. The mother filed for divorce and custody petition on Sept. 15, 2008, thus, the child did not live in either South Carolina or Georgia for six consecutive months immediately before the date the mother filed her petition. However, Georgia was the child's home state within six months before the commencement of the proceeding and at the time the mother filed her petition, the child was absent from Georgia while the mother continued to live in Georgia. Therefore, to UCCJEA conferred jurisdiction on the trial court.

The father also argues that the trial court erred in failing to confer with the Trial Court in South Carolina before it exercised jurisdiction pursuant to O.C.G.A. § 19-9-66. However, the South Carolina court did not have jurisdiction substantially in accordance with this article and therefore, there was no requirement that the trial court here confer with the trial court in South Carolina.

The father also argued that the trial court improperly ordered him to be held in the custody of the Sheriff until the child was brought to the court house. The father does not cite a case to support this argument and simply argues that absent a finding of contempt, the trial court had no such arrest powers. However, premitting the trial court exceeded its authority in requiring that the father be held in the court house until the child was produced, he did no object to the ruling at the hearing. No matter how erroneous a ruling of the trial court might be, litigants cannot submit to a ruling or acquiesce in the holding and then complain of the same on appeal. Therefore, the incident claim of error was waived.

UCCJEA/EMERGENCY JURISDICTION

Taylor v. Curl, A09A0749 (May 19, 2009)

The parties were divorced in 2007 in the Superior Court of Jackson County. The court granted custody of the children to Taylor (mother). After the divorce, the mother moved with the children to Florida and the father moved

to Walker County. On Jan. 28, 2008, the father filed a petition in the Superior Court of Walker County requesting temporary and emergency custody of his two children. The trial court found the children had been subject to and/or threatened with mistreatment or abuse and granted temporary custody to the father. The mother appeals, claiming Walker County lacked both personal and subject matter jurisdiction to issue a temporary order. The Court of Appeals affirms.

The father asserts that the mother may not appeal a temporary order of the court without complying with both interlocutory appeal procedures pursuant to O.C.G.A. § 5-6-34(b) and the discretionary appeal procedures of O.C.G.A. § 5-6-35. In 2007, the Legislature amended O.C.G.A. § 5-6-34 to provide that all modifications of child custody orders filed on or after Jan. 1, 2008, are directly appealable and are no longer subject to the interlocutory appeal procedures. In addition, this court recently held that the general assembly's amendment to O.C.G.A. § 5-6-34 also makes it unnecessary for the applicants in child custody cases to comply with the discretionary appeal procedures set out in O.C.G.A. § 5-6-35(a)(2). Therefore, the mother was not required to comply with either the interlocutory or the discretionary appeal procedures.

The UCCJEA's basic purpose is to prevent a noncustodial parent from seeking to modify custody determinations in his or her home jurisdiction without regard to where the child of the custodial parent has the closest connections. However, there is one exception to this general rule which is found in O.C.G.A. § 19-9-64. Pursuant to this section, the state has temporary emergency jurisdiction to make a child custody determination if the child is present in the state and it is necessary in an emergency to protect the child. However, the order must specify the period that the court considers adequate to allow the person seeking the temporary order to obtain an order from the court maintaining continuous jurisdiction over the custody of the child. Here, the order provided that the father shall have 90 days to obtain an order from the other forum that may have jurisdiction in this case, which would have been the Superior Court of Jackson County. Therefore, the trial court was correct in finding that Walker County Court properly asserted temporary emergency jurisdiction, as the court found that the children had been subject to and threatened with mistreatment and that the children were in Walker County visiting the father, which are the only requirements to assert temporary emergency jurisdiction.

VALID MARRIAGE

Beard v. Beard, S09A0501 (June 15, 2009)

The parties were married in 1992 and the husband filed for divorce on Jan. 17, 1996. The court signed a final judgment and decree of divorce, however, the order was not filed in the clerk's office until March 19, 2003. On Feb. 26, 1996, after the divorce decree was signed but before it

was filed, the couples engaged in a wedding ceremony. The wife filed a verified complaint for divorce on Feb. 13, 2008, stating that the parties were married on July 3, 1992. The husband answered the complaint that the 1992 marriage had been dissolved and the complaint should be dismissed. The wife amended her complaint to allege that the couple was married on Feb. 26, 1996. The trial court entered an order denying the husband's motion to dismiss and awarded the wife temporary alimony. The husband appeals and the Supreme Court reverses.

The 1992 marriage was dissolved by the 2003 order of divorce and no valid marriage could be entered into in 1996. Under O.C.G.A. § 9-11-58(b), the civil judgment must not only be signed by a judge, but must also be filed with the clerk and, unless the court otherwise directs, no judgment shall be effective for any purposes until the entry of the same. Here, the trial court did not otherwise direct and there is no statement that the order granting divorce was to be entered nunc pro tunc. Therefore, it was not until March 19, 2003, when the decree was filed in the clerk's office that the divorce decree became a final and effective judgment. Therefore, the motion to dismiss should have been granted because there was no existing marriage that could be subject to the divorce action.

VISITATION AND DIVORCE/INTEREST RATE

Mongerson v. Mongerson, S09F0132 (June 15, 2009)

The parties were married in 1986 and were divorced by a Final Judgment and Decree of Divorce filed on Oct. 1, 2007. The Final Judgment, among other things, ordered custody of the couple's three minor children to the wife, gave limited visitation to the husband and prohibited him from exposing the children to his sexual partners and friends. The decree further required the father to maintain a life insurance policy on his life with the children to be named as beneficiaries, monthly alimony to the wife for as long as she was enrolled in the educational system and earning passing grades in a program to obtain a college degree and to pay the wife's attorney's fees of \$8,800 with the option of paying \$200 per month with the award accruing interest at a rate of 11.25 percent per annum. The husband appeals and the Supreme Court affirms in part and reverses in part.

The trial court required the husband to maintain a life insurance policy on his own life with the children of the marriage named as equal beneficiaries. However, at the time the Final Decree was entered, one child had reached majority and there was no evidence of specific and unambiguous language that reflected a voluntary obligation on the part of the husband, and therefore, this obligation exceeded his legal duty.

The husband also claims that the trial court erred in prohibiting the husband from exposing the children to his homosexual partners and friends. There is no evidence in the record before the court that any member of the

excluded community has engaged in inappropriate conduct in the presence of the children or that the children would be adversely affected by exposure to any member of that community. Prohibition against contact with any gay or lesbian person acquainted with the husband assumes, without evidentiary support, that the children will suffer harm from such contact. Such an arbitrary classification based on sexual orientation flies in the face of our public policy that encourages divorced parents to participate in the raising of their children. Therefore, the trial court abused its discretion when it imposed such a restriction on the husband's visitation rights and that part of the Final Judgment is vacated.

The husband also makes issue of the Final Judgment giving the wife a right of first refusal that requires the husband to notify the wife when he plans to leave the children in the care of a third party and ordered that the wife can decide whether she shall provide care for the children in that instance. The husband complains that the parties did not agree on such a provision, however, the judgment issued by the trial court and the divorce action is not limited only to the matters upon which the parties have agreed, therefore, the trial court was in its discretion to include that provision in the Final Judgment.

In regards to the attorney's fees, the Final Judgment and Decree of divorce did not cite the statutory basis for the attorney's fees award, but that omission does not mean that the statutory basis of the award is in question. It is clear from the transcript of the final hearing that the trial court properly considered the relative financial positions of the parties whereas the wife's income was approximately 1/10th that of the husband. Therefore, the court properly considered the financial circumstances of the parties. However, the husband also challenges the interest rate imposed on the award of attorney's fees in that it is not consistent with O.C.G.A. § 7-4-12 (a), which states that "all judgments in this state shall bear annual interest upon the principle amount recovered at the rate equal to the prime rate on the date the judgment is entered plus three percent." Therefore, the part of the judgment setting the rate of interest is vacated and the case is remanded to the trial court to determine the rate of interest on the judgment pursuant to O.C.G.A. § 7-4-12(a).

The trial court also awarded child custody and awarded visitation according to terms of the parties' stipulated agreement. The trial court order advised the parties that it would entertain a request to review and modify the current visitation schedule at any time, at the request of either party and would consider specified facts established at the hearing when faced with a request to review and modify the visitation. Here, the language at issue is an attempt by the trial court to retain jurisdiction of the case and as such, is wholly ineffective. *FLR*

Secret continued from page 1

questions on all possible topics can serve the valuable purpose of educating a witness on what issues are important and get them to focus on these areas.

Theme Development

Nothing is more important than your theme of the case. Your theme is what the case is all about. It is the framework within which you make strategic decisions about the manner in which the case should proceed, the positions you take and how your client should be prepared for both deposition and trial.

The theme helps the client to understand and digest what his or her case is about at the most basic level. It provides the client with a foundation from which he or she will be able to respond to any question posed, regardless of whether the particular question was addressed during preparation. Therefore, it is not enough for you as the lawyer to know and understand the theme, but it is your client who must know and understand it.

It is the witness consultant who can devote the time and energy required to have the client gain that understanding. Good witness consultants help elicit from the client his/her story and assist (when, but only when, they are asked) in the development of the theme of the case. A witness consultant will work with the witness on how to focus answers on the case theme, instead of wandering

around giving less important details. Since it is impossible to predict each and every area of inquiry that opposing counsel may pursue, having a theme for your case is crucial to success. The more in command your client is of the theme or themes of the case, the more prepared he or she will be for his or her testimony, regardless of the ultimate questions posed.



Witness Consultant As Ombudsman

Divorce cases are especially delicate and private matters. We are often faced with very demanding clients going through the absolute worst times in their lives. Even for the most even-tempered of counsel, there is the possibility that the relationship between counsel and client could fray. One of the valuable roles a good witness consultant serves is as ombudsman between the lawyer and the client. For example, you become frustrated with the client because he/she answers the same question differently each time it is asked and the client becomes frustrated with your frustration. It has been my experience that a witness consultant can often be a lawyer's best friend, by helping to bridge those kinds of divides and maintain and preserve a strong relationship between counselor and client.

Cost Savings

Finally, in most cases, the rate charged by a witness consultant is substantially lower than the hourly rate charged by the attorney, particularly the partner in charge. Therefore, practitioners may find that the cost/benefit analysis favors the retention of a witness consultant, allowing for proper and effective preliminary preparation of the witness while you focus on preparing other aspects of the case. Once the preliminary preparation is completed, the consultant and lawyer often work in tandem to complete the preparation.

Considerations In Conjunction With Retaining A Witness Consultant

However, retention of a witness consultant is not a decision to be made lightly. If you elect to employ a witness consultant, you must give consideration to the legal and practical implications of that decision.

Legal Considerations

Turning first to the legal implications of a decision to employ a witness consultant, you must be prepared to address the propriety of the communication itself and the protection it is to be afforded under either (or both) attorney-client privilege or work product protection. It is critical that you research how courts in your particular jurisdiction have handled the use of witness consultants and the issue of privilege before engaging the consultant to ensure that the consultant's work conforms with the law in your jurisdiction.

Be aware that while the use of trial consultants is growing the case law is relatively sparse. Judges often have a particular bent on whether and under what circumstances the communications between a client and a witness consultant is protected. Accordingly, while it is necessary for you to be familiar with the law in your particular jurisdiction, it is equally important to determine the practice of the particular judge before whom you are to appear.

Protection under the attorney work product doctrine has been afforded to litigants at the federal level. Of particular relevance to this issue is the decision of the Third Circuit Court of Appeals in *In re: Cendant Corporation Securities Litigation*, 343 F.3d 658 (3d Cir. 2003). In *Cendant*, Dr. Phil McGraw was retained as a trial consultant by Ernst & Young. Opposing counsel sought to inquire of a former Ernst & Young employee, Simon Wood, as to his conversations with Dr. Phil. The Court determined (at p.660):

Compelled disclosure of the substance of conversations between Wood, his counsel and Dr. McGraw would require disclosure of communications protected by the work product doctrine. The communications took place during a consultation that focused on those issues that counsel and Dr. McGraw perceived to be central to the case. Moreover, the communications were intended to be confidential and made in anticipation of litigation. As such, the communications are at the core of the work product doctrine and are only discoverable upon a showing of rare and exceptional circumstances.

The Third Circuit concluded by finding no exceptional circumstances present, the "communications merit work product protection" and that while it believed "Wood may be asked whether his anticipated testimony was practiced or rehearsed" the "inquiry should be circumscribed."

Notably, in concurrence, Justice Garth found that the attorney client privilege would also be applicable, citing to an article by Stanley D. Davis and Thomas Beisecker, *Discovering Trial Consultant Work Product: A New Way to Borrow an Adversary's Wits?*, 17 Am. J. Trial Advoc. 581, 626-27 (1994), which explains that:

'communications between a client practicing testimony and a consultant are not discoverable because 'interwined with the client's responses to mock questions and the consultant's reactions thereto, will inevitably be client communications ... which are ... intended by the client to be a confidential part of the communication. Extirpating the comments of the consultant from this context may well be impossible without bringing along these communications and thus frustrating the purpose of the attorney-client privilege.'

In New York, for example, under appropriate circumstances, the protection has been extended under the cloak of the attorney-client privilege by the Second Circuit and the Southern District of New York. See, e.g., *In Re Grand Jury Subpoena Dated March 24, 2003*, 265 F.Supp.2d 321, 332-34 (S.D.N.Y. June 2, 2003) ("it is common ground that the privilege extends to communications involving consultants used by lawyers in performing tasks that go beyond advising a client as to the law"); *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (privilege applies to communications of a third-party made at the request of an attorney or the client

where the purpose of the communication was to put in usable form information obtained from the client).

In February 2008, the Northern District of California, in *Hynix v. Semiconductor Inc., v. Rambus Inc.*, 2008 WL 397350 (N.D. Cal. Feb. 10, 2008), concurred with the holding of the Third Circuit in *Cendant*, and specifically identified the limited questions that may be asked of the client with regards to a witness preparer. The Hynix court determined that:

the parties may ask a witness whether he or she met with a jury consultant, the purpose of any such meeting, who was present, the duration of the meeting and whether the witness practiced or rehearsed his testimony. The court will not permit questioning beyond those limited points because inquiring into work-product protected material creates unfair prejudice and doing so will lead to both confusion and delay. Either of these reasons justify precluding some of the proposed questioning under Rule 403.

In an effort to buttress any attempt to pierce attorney work product protection or attorney client privilege, consider implementing two measures:

- If you elect to employ a witness consultant it should be pursuant to a written retainer agreement clearly defining the consultant's role as an agent of the firm. It formalizes the retention and makes the propriety of the relationship less susceptible to challenge.
- In accordance with the *Cendant* decision, consideration should be given to whether counsel should be present for any meetings between the witness consultant and the client. In many cases the lawyer's presence, particularly in the first session or two may inhibit the development of a rapport between the witness and the consultant.

Practical Considerations

Beyond the legal implications attendant to your retention of a witness consultant, you must also consider the practical implications. While lawyers are governed by various model rules and ethical codes, there are no external controls whatsoever on the conduct of trial consultants. Accordingly, you need to do your homework and know who you are hiring.

It is critical in choosing a witness consultant, as in choosing any professional, that the person be interviewed thoroughly and references verified to determine whether the consultant can actually deliver on representations made. The vast majority of consultants are members of an organization known as the American Society of Trial Consultants (ASTC). The website for the organization is www.astcweb.org. As an initial screening matter, it is good to know your consultant is a member of the

ASTC. A review of the ASTC website will reveal that there is a Professional Code, which provides for Ethical Principles, Professional Standards, Practice Guidelines and Commentary.

The problem is that the ethical principles are aspirational and members of the ASTC are not subjected to enforceable internal standards. In addition, there are no standards for admission, no core skill requirements or training and no continuing education requirements. As a result, even if the witness consultant you retain is a member of the ASTC, that retention may be susceptible to attack at trial. Accordingly, it is something that you need to be prepared to address.

The witness consultant must also be someone with whom you are able to work closely. You and the witness consultant should be compatible in style and temperament. For example, not all witness consultants work alone with a client. They do not want to. Some witness consultants, instead of training a witness on how to properly handle questions (not substantively, but technically), come in, listen to testimony and start fixing and tweaking. If you require a consultant who can work alone with the client or one who is available to work with you from the inception of the preparation, witness consultants like the ones in the above examples may not be right for the engagement.

Finally, notwithstanding the potential upside to involving a witness consultant, a witness consultant is not an attorney. Attorney oversight is critical to the success of the representation and under no circumstances can you abdicate your role. It is your case and you must remain in charge. You must be available to familiarize the witness consultant with the case to maximize the effectiveness of the preparation and remain integrally involved in that preparation to maximize the effectiveness at deposition or trial. *FLR*



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Property Settlements Impact Home Ownership in a New Credit Market

by Ellie Shannon
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Divorce often results in one or both parties buying or selling real estate and/or obtaining a new mortgage. How well protected parties to a property settlement may be when attempting to transact real estate and the associated debt has been impacted greatly by both technology and the financial crisis.

Technology has made it possible for mortgage lending to be based on credit scores. If one party to a property settlement does not pay previously joint debt now stipulated as that party's sole obligation, it can still lower the credit scores of the party who is no longer obligated. Litigation will not resolve this issue. Although the injured party may pursue damages, litigation will not change the damage to credit scores. In the past, mortgage options were readily available even to borrowers with low credit scores. Today, mortgages for borrowers with low credit scores are largely unavailable. Property settlements that do not protect the client from non-payment of previously joint debt may leave the injured party with very few mortgage options.

The financial crisis has reduced many credit options available to consumers. For example, current mortgage guidelines require an applicant prove receipt of alimony and/or child support for at least three months and show continuance for at least three years before considering it as income to qualify for a mortgage. Thus, some applicants may not qualify for a mortgage if the lender will not consider child support or alimony as income. Prior to tightening credit guidelines, mortgages were available that did not require proof of income. Those "no income verification mortgages" are no longer



available. And, if the property settlement allows for a prorated reduction in alimony until the marital residence sells, the mortgage applicant may only qualify for a mortgage based on alimony actually received.

The current financial crisis has also had a significant impact on property values and marketing time. An example of a “no win” property settlement scenario can be the requirement that one party sell or refinance the marital residence within one year after the final divorce. The settlement assumes the property can be sold within one year. In a slow market, not only may one year not be long enough, it may require reductions in the selling price that could require the seller to owe money at closing. Refinancing the property may no longer be an option because now the property is not likely to appraise for an amount sufficient to qualify for a refinance. The responsible party is now out of options. At this point, it is not uncommon for the responsible party to “give up” and stop making the mortgage payments. Litigation will not resolve the issue because now the credit scores of both parties originally obligated on the mortgage have been lowered due to non-payment of the mortgage. In summary, what originally appeared to be a reasonable property settlement has not protected either party.

Realtors and mortgage lenders have always been a free source of current information. Now more than ever, current information is essential to protect the parties to a property settlement. A realtor can provide information about current property values and marketing times. Mortgage lenders are now required by law to provide a copy of the credit report to an applicant. Not only

does a credit report provide an instant snapshot of one’s current financial obligations, but being pre-qualified for a mortgage can provide the client with valuable information for decisions about a prospective property settlement. For instance, the average consumer is often unaware that ownership of the property and obligation of the debt are actually separate issues—that signing

a quit claim deed does not also release the owner from mortgage obligations on the property. But, this issue would become clear in reviewing a credit report with a reputable lender.

There have been numerous changes in both real estate and mortgage lending over the past year. Drafters of settlements may best serve their clients by

evaluating the potential implications any agreement may have on either party’s ability to dispose of or acquire real property or mortgage debt in light of these changes. Property settlements that do not consider these changes may fail to protect the settling parties. *FLR*



Ellie Shannon is a Senior Account Executive at Pine State Mortgage Corp. She is the recipient of multiple production awards including awards from the GA Mortgage Bankers Association and has almost 30 years experience in the mortgage industry. She can be contacted at ellie.

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“Realtors and mortgage lenders have always been a free source of current information.”

Attention State Bar Members! Please Note!

check your information

www.gabar.org/member_essentials/address_change/

The State Bar is in the process of implementing its new database. This implementation will affect how a few things work on Bar’s website. To be ready for this change, we ask that you please make sure we have up-to-date information in your membership record. Please go to www.gabar.org/member_essentials/address_change/ and check your information. Also note what e-mail address the Bar lists as your official e-mail address, as you will need this to log in for the first time once the database change takes place. We will keep you updated as we move forward with this project.

Resources for Unemployed Attorneys



The State Bar of Georgia provides resources to attorneys who are unemployed as a member benefit. Some of the resources include:

- * Lunch and Learns for Lawyers Seeking Employment
- * Law Practice Management Program
- * Lawyers Assistance Program
- * Georgia Law Schools’ Careers Centers
- * Court Appointed Work by County
- * Links to Many Other Online Resources

For more information, visit www.gabar.org/news/resources_for_unemployed_attorneys/

Lesson Learned: Preparation Prevented Disaster

by Paul Oeland
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When the rest of the world heard on June 19, 2009, that the Georgia Theater in Athens was on fire, many thought of the great bands they had heard there and the beer they had spilled inside. I thought of John and Tricia Lyndon. Their office was in the building adjacent to the Georgia Theater, sharing an interior wall. When my father called me at 7 a.m. to give me the news, I assumed that their office would soon be in flames as well. Throughout that morning I got updates from my sister who works for the Lyndons, that somehow the flames had not spread and that it seemed the damage to the office would be much less than they feared. The end of this story is much happier than it could have been. While John and Tricia have moved the office permanently out of that space due to fears of structural damage to the building, the office suffered no fire or water damage. Tricia described a very fine layer of soot that covered the entire office and while this created serious problems for them, they both recognize it could have been much worse.

Once it was clear that they had avoided a major catastrophe, I started to wonder what the Lyndons were thinking as they watched the theater burn. Specifically, I wondered what they knew they had done right to prepare for a potential disaster and what they wish they had thought of. So, I sat down with both of them to ask that and other questions.

Question: What was that morning like?

John: I got the call from your sister, Terri, that the Georgia Theater was on fire at about 7 a.m., so I raced to the office, driving the wrong way down the one-way street that runs next to the parking lot to get there. You could see smoke billowing into the air from three miles away, so I was not encouraged. I parked and ran towards the office and was met by a few firemen who discouraged me from getting much closer to the building. From the vantage point I had when I first got out of my car, it looked like the flames had already spread to the roof of our building, so I thought it was

already burning, and I uttered a few choice words. As I came around to the front of the building, I could see that the flames had not spread so I was relieved.

Question: What were your first thoughts about what you wanted out of the office?

John: Obviously, I was not thinking very clearly. My first thought was to run into the office to get the files for the cases I had been in court for the day prior, simply because they were the most recent concerns.



Question: What was it like to stand there on the street and watch the building burn?

Tricia: The streets had been blocked off to traffic, so people from the downtown businesses and other law offices walked down to be with us. Everyone was very kind, coming to stand and watch and pray with us while this was happening.

Question: So as you're standing there watching this unfold, what did you know you had done right?

John: Well, honestly, those thoughts just don't come into your head when you're watching the building burn. In retrospect, here's what we did right: 1) we back up the server everyday and we take these back up tapes out of the building and store them off-site every night. So, I knew that we would be able to recover everything that we had produced in cases for our clients. 2) we synchronize our Blackberrys to our server everyday and we store all of our clients' contact information and opposing counsels' on our Blackberrys, so I knew that we would be able to get in touch with our clients immediately.

Tricia: I think the third thing that we did right was we had renter's insurance. We had carried a policy for years without ever really thinking about it. The premium was minimal and we had thought about cancelling it before, but just kept paying it. It has paid and will pay for everything – the move, the furnishings, the professional cleaning of all of the items in the office – and with a very small deductible.

Question: In retrospect, then, what did you do wrong?

John: I don't think there's a whole lot more that we would have done differently, or that we will do differently in the future. Probably the only thing is that we should scan more original documents in and store them on the server. Had everything gone up in flames, we would have been able to save only what we produce, not pleadings or motions from opposing lawyers, or orders, or anything like that. So, we will probably scan more of these in, but you have to decide how much is too much. We can't scan in every document that we get for discovery, for example, because it's too much. They make fire-proof file cabinets, but no one is going to go out and buy those, because they're prohibitively expensive. We'd been in practice for 30 years and hadn't had a fire. There are some things that just aren't practical to plan for.

Tricia: I suppose now I question whether it's a good idea to be right next to a bar, with all that it brings with it.

John: Well, the flip side to that is that it was wonderful to be next to the Georgia Theater when bands would come in, set up and do sound checks. I would get to listen to great music in my office for nothing. It was part of the charm and character.

Question: So after you see that your building is not going to burn down, what do you do?

Tricia: By about noon that day, we knew our first priority was to reassure everyone that works for and with us that we would be okay and that we would continue on. So, we got some note pads and pens and all of us sat at The National for lunch and planned how we would move forward.

John: And around 3 p.m. I managed to convince someone to let me in the office for a few seconds. I grabbed the server and got the chance to look around. I saw there was no fire or water damage, so I felt like we'd be okay. The first people we called after I got in were Terri and Amber, who work for us, to tell them we were going to be okay.

Tricia: We had so many generous offers of space and eventually settled on space in the building where Regina Quick and Roy Finch are. One good thing we learned is that AT&T is able to forward your telephone number to any phone you choose, without you actually having to physically forward the calls from the phone itself. So, within very little time, we had the telephone ringing to our cell phones.

Question: What has the process been like since?

John: I describe it this way, it's like going camping because you have no routine and you can't find all of the things you need and you have at home, it's just so hard to get anything done. Luckily, we were pretty well caught up before the fire, so it's enabled us to only have to play catch up since the fire.

The perspective is this – early that morning while I was standing outside watching the fire, I remembered that I had a mediation scheduled at my office that day. I called my client, told her what was going on and told her she needed to call her husband and have her husband call his lawyer to tell him about the fire and that we couldn't do the mediation. She was very concerned about us during the call and understood. A little while later she called back and asked if we could do the mediation somewhere else that day. So, while the owner of the Georgia Theater was worried about his building and business and I was worried about my law practice, my client was worried about her divorce.

I wanted to interview John and Tricia for the lessons learned from this disaster, believing we all need to be reminded about things like off-site server back-ups, appropriate insurance coverage and the benefit of keeping client contact information on Blackberrys and the to scan more original documents. The central lesson, though, is that while it doesn't seem fair that things like this happen to wonderful people like John and Tricia, it may also be that they are the only two that could manage it with the humor, grace and courage necessary to survive it. **FLR**



Paul Oeland graduated from the University of Georgia School of Law in 1998 and the primary focus of his practice is family law. His main office is in Conyers and there is a satellite office in Midtown Atlanta.

After the Representation:

How to Maximize Income and Earn More Clients

by Robert S. Meyring
Meyring Law Firm

The actions you take during and especially after the first representation of the family law client may be more important than the original representation of that client. Meaning, strive to be the lawyer the client likes the best by communicating with them in a post-representation continuing relationship. The relationship with the client should be very good or great. By making a few adjustments, your law firm can generate more fees per file and earn more referrals from existing clients. Here are my thoughts on how to make that happen.

When it comes to practicing family law there are two areas seldom examined: 1) the impact of a divorce, remarriage, adoption or prenuptial agreement on the client's estate plan and estate beneficiaries and 2) the continuing attorney-client relationship after the divorce representation. With more focus on these two areas you will earn more money.

Here's an example where some estate planning intersecting with family law can head off a lot of trouble. It's very likely that a divorce client with children and sizable assets will seek an antenuptial or prenuptial agreement before the next marriage. I strongly suggest implementing an estate plan at that time for the comprehensive protection of the client's long term interests. More specifically, this scenario without estate planning often gives rise to a decedent's unintentional transfer of the decedent's sizable assets away from decedent's natural children and toward the step family as inherited or devised through the surviving spouse and stepparent. Here, a testamentary qualified terminable interest property trust crafted by an estates attorney will often preserve the asset-laden divorced client's estate legacy for his or her children and still provide lifetime support for the surviving spouse.

In the interests of full disclosure, as a trusts and estates attorney that often litigates over estates, I do not practice family law, but I do often help resolve issues and conflicts between the beneficiaries of decedent's first family and

step-families. Conflicts between first family and step-family originate from the divorce and are almost always avoidable with some informed estate planning. From this probate and estates lawyer's viewpoint, the family law attorney would do well financially by adding a review of the impact of the divorce on the estate plan. An estates review could be incorporated into the divorce representation to allow the client to know the long term impact of the divorce on the divorce client's child's inheritance. More likely, the attorney could check back with the client after a proper time to offer a reasonable or free review of their family law or estates issues. There is a chance that upon checking up with the client, the family law attorney will be retained by that client on another matter. Even if the chance of being rehired is small, isn't it statistically



“worth it” to implement the effort automate a timely post-representation status check with the client?

In more than just self interest, I suggest review of the effect of the divorce, remarriage or adoption on the client's potential estate beneficiaries. A lot of issues resolved in the probate courts are the same issues the divorce client did not address during his or her lifetime. If your firm does not practice estate planning, you could still ask a trusts and estates attorney to review the client's potential estate. The same is true for other issues that crop up unrelated to your practice areas. The benefits of asking another lawyer to review issues include more attorney time to focus on family law and more client referrals coming from the same attorneys to whom you've given work. The maxim that you cannot get something without giving something first is true. “You get what you give” and “What comes around goes around” are anonymous variations of the same idea.

Since attorneys may contact previously represented clients, it's important to realize that these past clients can potentially be a great source of new business and new clients. Statistically, the market potential works very well for both estates law and family law firms. More than half of the eligible population does not have any estate planning documents like a will, trust, power of attorney or advance directive for healthcare. Statistically, if roughly half of all first marriages end in divorce, if thereafter the likelihood of remarriage is 95 percent and if the likelihood of second marriage failure is at least 60 percent and third marriage failure rate is about 75 percent, then I ask: What is your firm doing to be in the position to be the attorneys for that second, third or fourth divorce and the intermittent prenuptial agreements?

Ask yourself if you have given your client any reasons to come back to your firm in the near or distant future. Was your interaction with the client pleasant enough that they would be comfortable returning to you? Would clients return only for family law issues or would they also bring issues outside the scope of the previous representation?

What would keep clients coming back? Something that you give to keep them interested in you and your services. A few suggestions include sending birthday cards, holiday cards, newsletters and firm gift certificates for clients to give to friends; and giving free educational workshops and creating events like an invitation only dinner for your best clients. Don't forget the easiest and most overlooked of all gestures is a handwritten thank you note sent to the client. **FLR**



Robert S. Meyring of the Meyring Law Firm provides comprehensive estate planning, probate and estates litigation services. The Firm's website www.willsquill.com has past articles, detail, & planning forms. Phone: 678-217-4369; meyring@willsquill.com.

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Casual Contemplations

by Heidi Geiger
heidi@geigerlaw.com

Why do I practice Family Law? Why? Why? Why? Admit it. We have all had days when we question our career choice. Sometimes we have several days in a row when we may be losing our religion. The client who took several years to create the mess they are in expecting you to straighten it out and fix it in 30 days and then not pay you 100 percent of your fees. The secretary who forgot to calendar a court date. The spouse who doesn't understand why you stayed in mediation until 8 p.m. Your grandma who thinks you should help families stay together rather than break them up. The step-kid who wants to see "the little card that let's you take whatever you want" that his mom told him about. (Your bar card a.k.a. license to steal.) The guy at the neighborhood pool with a "quick divorce question." The brother-in-law with a speeding ticket.

Acquaintances come and go. Children grow up. Clients move on. Statutes change. Case law updates. Technology accelerates. Security tightens. Stock markets crash. Taxes increase. Benefits decrease. Some medication helps. But what remains the same, consistent and dependable? The fellowship of our Bar.

Not only do we work together. We go to each other's weddings. We go to each other's funerals. We handle each other's divorces. We send birthday cards and sympathy cards to each other. We help each other run for office. We go to the beach together. Even if we change law firms, we are still engaging with, working with, battling with each other. We deal with the same group of folks for the most part.

I have read a statistic that people will change jobs or careers an average of eight to ten times in their life. I've been practicing Family Law for 14 years now. I anticipate doing it for another 30. One of the things that I really look forward to is working with and litigating with my fellow members of the Georgia Family Law Section. I feel lucky to not be a part of that statistic.

I found two quotes to share with you.

Robert McAfee Brown:

"How does one keep from "growing old inside"? Surely only in community. The only way to make friends with time is to stay friends with people.... Taking community seriously not only gives us the companionship we need, it also relieves us of the notion that we are indispensable."

Virginia Woolf:

"One of the signs of passing youth is the birth of a sense of fellowship with other human beings as we take our place among them."

A quick summary of my last 14 years would be something like this. Being the green lawyer, first jury trial, owning a cell phone, getting married, buying a house, changing firms, starting my own firm, enduring back surgery, speaking at CLE seminars, watching the World Trade Center collapse, going through secretary after paralegal after secretary, getting in shape, disbelieving that a judge was actually shot and killed on the bench, trying to have a baby, having a baby, using a Blackberry, finding a nanny, juggling work and family, gaining weight, marketing, father dying, trudging along through a recession. Every step of the way there has been a Family Law lawyer advising me, encouraging me, supporting me and making me laugh.

Thanks! I'll see you in court... or at mediation... or at the beach... or at your birthday party... or for lunch... **FLR**



Geiger & Associates, LLC, was established as a Family Law practice in 2000. Located in the historic Vinings Village, Heidi Geiger is the principal of the company which provides personal attention to each and every client, helping them through difficult times.

Chief Justice Sears Honored

by Rebecca L. Crumrine, Esq.
Davis, Matthews & Quigley, P.C.

Upon the retirement of Chief Justice Leah Ward Sears from the Georgia Supreme Court, the Family Law Section of the State Bar of Georgia honored her at the 2009 Family Law Institute in Amelia Island, Fla. Tina Roddenberry presented Justice Sears with a Frabel Dogwood, "a reflection of Chief Justice Sears's beauty inside and out," inscribed:

From the State Bar of Georgia Family Law Section in honor of your commitment to families in your judicial leadership in the area of Family Law.

Roddenberry thanked Chief Justice Sears for her 17 years of service on the Supreme Court and her leadership and service to the families of Georgia.

The honor took Chief Justice Sears by surprise. She graciously thanked the Family Law Section. She stated her real deep abiding passion is for all things family. As many may know by now, Chief Justice Sears will be studying the evolving issues involving family law this coming year with a think tank out of New York. She lauded family lawyers and the profession, and expressed her special affection for the Family Law Section, stating: "Really this award goes to you. The most important aspect of this democracy is families."

We thank Chief Justice Sears for her commitment to families and legal equity, and look forward to her future work. *FLR*



Chief Justice Sears receives a recognition gift from Tina Shadix Roddenberry

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Judge Robert W. Chasteen Jr., Superior Court for Cordele Judicial Circuit

by Lucy M. Martin
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www.hsrblaw.com

On July 29, 2009, I had the pleasure of interviewing Judge Robert W. Chasteen Jr., who has been a Superior Court Judge for the Cordele Judicial Circuit since 2005. Prior to becoming a Superior Court Judge he was in private practice for approximately 35 years in Fitzgerald, Ga., the town where he was born and bred. Judge Chasteen received his J.D., cum laude, from the University of Georgia School of Law in 1969.

Q: What influenced your decision to become a lawyer?



The Hon. Robert W. Chasteen Jr.

A: My father-in-law was a lawyer and I would listen to him talk when I was in college. He would talk about his interesting cases. I also went to court with him a few times or I'd drive him to court, so I guess that's when I become interested in becoming a lawyer.

Q: What type of cases did you handle in private practice?

A: It was a general practice. About 25 percent of our cases were domestic relations cases. We did some criminal work. I also represented the County as County Attorney for about 35 years. Our firm also represented a bank and a bank holding company.

Q: Do you miss anything about private practice?

A: I miss the aspect of helping clients, of being able to take their particular situation or problem and resolve it for them, so that you both feel good about the end result. I used to enjoy sitting and talking to my clients. When you're a Judge you can't sit around and do that.

Q: What counties are in your Circuit?

A: Ben Hill, Wilcox, Crisp and Dooly Counties.

Q: What is your schedule like in terms of having to travel to each Courthouse?

A: If we're not having jury trials which might require me to be in one place for several days, I spend about one day a week in each county. Also, I do a mix of civil and criminal cases – some days I'll do all civil cases and other days I'll do all criminal.

Q: Is there any additional travel you have to do in your judicial role?

A: I also go to habeas proceedings at the Wilcox State Prison in Abbeville once a month. The hearings are at the prison in a little courtroom set up there. I may have six or seven hearings in one day and it is much easier and less demanding of resources to hold the proceedings at the prison. You avoid the necessity of having to transport the prisoners here to the courthouse with all the guards and security concerns that involves.

Q: What is that experience like for you?

A: Well, at the habeas hearings most of the prisoners are pro se and it is difficult sometimes to explain to them what they can and can't do. Quite often, if you tell them that legal procedure doesn't allow them to do certain things, for example, you are not allowed to file successive habeas proceedings, they think that you are criticizing them. It can be interesting work though and sometimes you hear interesting reasons why you should set them free. I think there may be a barter system where a prisoner can get someone to help them prepare for the hearing for money. I had one case where the prisoner said that I should overturn his conviction because venue was not proper in the county where he entered his plea. However, I don't know who filled out the paperwork, but I was looking at the plea transcript and saw that venue was proper in that county. He commented "I guess I paid money for nothing." I don't know whether he was misled and the person who prepared the paperwork didn't know what he was doing, but they raised some assertions that were not reflected in the record.

Q: What was your first priority on becoming a Judge?

A: One of my goals was to make the experience of coming to court as uncomplicated and efficient as I could for the lawyers, the parties and the jurors who appeared before me. For instance, I'm cognizant of the fact that jurors' time is very valuable and someone is paying for them to be there, so I try to make sure that I'm using their time as efficiently as I can. I don't like to have unnecessary hearings. At a calendar call I'll hear the uncontested cases first, so those people don't have to wait two hours to be heard. If a lawyer is from out of town, I try to take his case first unless it's going to take all day. But if they have something very short, I want to get these people out and back on the road so they can go home. Also, my goal was and still is to treat everyone that comes before me with dignity, and to be fair and impartial while also taking care that everyone's time is being used as efficiently as possible. Also, I always keep in mind that I'm not only a Judge but a lawyer and people are observing me as a representative of all lawyers and that when people are in my courtroom, they are getting an impression from how I conduct myself of how the judicial process works.

Q: As a Judge, what are your favorite types of cases?

A: Adoption cases are the most fun. I enjoy those

because you see children going into a home where someone is really interested in caring for them.

Q: Do you have many pro se litigants coming before the Court?

A: I do see a fair number, but mostly in situations where there are no children. For people with children, I see fewer pro se litigants now that they've changed all the filing requirements, so that people now have to submit Child Support Worksheets and a Parenting Plan and so on. People now find they need attorneys because it's difficult to jump through all the hoops necessary to get the paperwork done and get everything into a form that will be accepted by the Court.

Q: Do you all require the filing of the Child Support Worksheets and the Domestic Relations Financial Affidavit with the initial filing?

A: There is a Uniform Rule that is being considered which will change the procedure such that you don't have to file those documents with the initial filing, but our current Internal Operating Procedures do require that the Worksheets and Domestic Relations Financial Affidavit be filed at the time of the initial filing. When you file a domestic relations case, we have a Standing Order that incorporates those requirements.

Q: Do you make much use of the deviations on the Child Support Worksheets?

A: Yes, I do use the deviations from time to time. One that is particularly useful is the deviation for travel expenses related to visitation, especially when one parent has moved far away from the other and the travel expenses are significant. I don't see the use of the parenting time deviation so much, because you really need to go beyond standard visitation to warrant the use of that. But I've had some cases where a parent has more than just regular weekend visitation, for example the parent is taking the children for the whole summer and in that case the parenting time deviation is appropriate.

Q: Is there anything that frustrates you in particular about cases where there are children involved?

A: Something I don't like to see is people not taking children into consideration in these cases, particularly when people don't see that it is important for both parents to be involved in the children's lives as much as possible. It's hard for two parents in a traditional household to raise children nowadays, particularly when it comes to supervising the children, so you can imagine how hard it is when there is only one parent. I think sometimes lawyers need to do a better job educating their clients about the need for both parents to be involved in raising the children and spending as much time as they can with them. I don't mind telling parents, and I did this when I was practicing, that if they tell me they don't want the other parent visiting the kids, that is just not going to

happen. Sometimes parents don't want to hear that – but you need to tell them.

It is very rare for me to take away all contact with either parent. But you do have situations where somebody is on drugs and they can't be trusted to take the children off by themselves. In those situations I'll order supervised visitation. I don't order supervised visitation when one party asks for it just to aggravate the other, just because the other parent has a beer or something.

Also, sometimes I will be asked to come up with a visitation schedule. I can do that, but I'm the least qualified person to do it. How do I know if the visitation schedule I come up with will comport with your schedule? The parties are in the better position to know when they are taking family vacations or when the children might be visiting other relations. So I encourage the parties to sit down and see what works best for them.

My primary concern in these cases is the welfare of the children. I want their lives to be as normal as they can be and it is always my goal to structure things to make that possible. The adults can handle themselves.

Q: Do you think split parenting is a good idea?

A: I think split parenting works well when the parties get along well together. I've seen cases where the parties just work real hard at trying to make everything work for the children. But again, I can't make that structure work if the parties are not going to work together and commit to putting the children ahead of themselves.

Q: You were President of the State Bar of Georgia from 1995 to 1996 and were active in many other capacities with the State Bar over the years as well. In what ways did your term as President and involvement in other Bar activities affect or influence you as an attorney in private practice and as a Judge?

A: Actually, before I got to be President, I was co-chair of the Bench & Bar Committee which was a committee formed for lawyers and judges at the trial court level, to try and resolve issues that come up. I was lawyer co-chair with Hilton Fuller who was the judge co-chair at that time. We had some very significant meetings where we were able to talk about issues that affect both the Bar and the Bench. The Bench & Bar Committee provided a significant opportunity to communicate from my standpoint as a lawyer to Superior Court judges about things that concerned us and we had a lot of really good discussions. One of the issues we focused on was how to make the operation of the courts more efficient.

Mostly I would say my experience with the State Bar allows me as a Judge to understand the concerns of lawyers from all different types of practices. When I was President of the Bar, I enjoyed going all around the state listening to lawyers talk about all sorts of things that were of concern to them. That was very enlightening and I got a really good

insight into how everybody's practice is different and that your large firm will have different needs from your sole practitioner or rural practitioner – if we implement rules and/or laws it effects people in different ways so you've got to think about that sometimes. So some rules of the Bar might work well in a metropolitan area law firm but may not work so well in Fitzgerald. For example when the Bar initiated the Trust Account Overdraft Notification rule – the way that worked was if your trust account got overdrawn, they were going to file a complaint based on that. But you could have an inadvertent overdraft in a small community where the lawyer wrote somebody a check at a closing and that person carried it across the street to the bank and got a cashier's check, but the lawyer may not make a deposit that day. So while that rule was fine for say larger firms with more staff, it might not work so well in smaller firms with little staff. So my time as President of the Bar gave me an appreciation for the kinds of things lawyers in all different locations have to deal with.

Q: What kinds of things did you find lawyers looked to the Bar for?

A: Lawyers want information about things that can benefit their practice. A person in a large practice has different needs than the sole practitioner but all want Continuing Legal Education that addresses hot button issues so they can get the knowledge they need to help them better serve their clients. Something that worked well on a local level was a one day seminar held in our vocational technical college for lawyers and judges on how to prepare child support worksheets. These are the type of events that lawyers want to have available to them. The Bar is a service to help them provide that information. We have an excellent CLE program. Also, the State Bar has been able to offer low cost programs at the Bar Center in Atlanta. We've also opened offices in Tifton and Savannah with teleconferencing facilities. During the year I was President, we started a program called Law Practice Management, which helped a lot of lawyers with the business side of their practice. There was a reduced fee schedule for firms depending on their size. So these are the types of things lawyers really appreciate.

Q: Your Presidency of the State Bar coincided with your position on the Code of Professional Responsibility Committee and the State Disciplinary Board Review Panel. What was your experience in those roles?

A: When I was President, one of the things I didn't anticipate was having to deal with the disciplinary side of things. That was the committee that Chief Justice Hunt started, as he was leaving as Chief Justice of the Supreme Court to go on the federal bench. It was a committee to look at how the Bar handles discipline cases. We sat down and conducted a self-examination and looked at our procedures and processes. One of the things that we did at the time was to conduct a detailed screening process of how complaints were being handled. It was found

for example, that in some cases people were calling up complaining that their lawyer wouldn't call them back, but the lawyer being complained about wasn't even representing the person calling to complain. The process then was that the lawyer had to fill out a form that took a considerable amount of time to complete, when a simple phone call would have resolved that problem. So there was a program instituted at that time to weed out these types of claims. We did a pretty good analysis of the overall process and came to the conclusion that we had a good system, but we did some things to improve that system and make it run more efficiently.

Q: Has the shrinking economy affected the types of cases you are seeing?

A: Yes. We do have more petty crimes, such as burglaries where cash might be found, and typically the person wants the money to buy drugs. One of the biggest related problems is that we have so few options to be able to help these people with drug problems, because of budget cuts. We're talking about a long waiting list to get these people into facilities and we just don't have enough money or resources to get them the help they need, even when they ask for help. Also, budget cuts have affected our ability to help people with mental health issues. In Ben Hill County, we had a mental health office that has since been closed. The nearest place is now in Tifton, but how can we get those people there? Most of them have no transportation. Most of the people that bring these people into court are family members who want to get help for

the mentally ill relation. The choice is if you don't put them in some sort of program that will make them take their medication, they end up being kept in jail. That is really a poor outcome for people with mental health issues.

Q: Any tips of lawyers in the courtroom?

A: Be prepared before you come to court. For example, if you are reasonably sure that when you come to court you are going to get some sort of relief, go ahead and prepare the Order and bring it with you, and more often than not it will be reviewed and signed right there. Telling me that you are going to send the Order in to me is just one more thing I have to keep up with.

Q: You were an Olympic Torchbearer for the 1996 Olympics. How memorable was that experience for you?

A: It was a very special experience. The passing of the torch occurred early in the morning just as the dawn was breaking. I lit my torch from the last torchbearer and ran maybe less than a mile to the next torchbearer. You could see the light from the torches shining in the early morning light. There were crowds of people lining the sides of the road. It was pretty spine-tingling and I really enjoyed that. *FLR*



Lucy Martin is an associate with the law firm of Holland Schaeffer Roddenbery Blich, LLP. She practices in the areas of family law and trusts and estates litigation.

Past Bar Presidents Include:

1964 Hugh M. Dorsey Jr. *	1980 Kirk M. McAlpin	1996 Robert W. Chasteen Jr.
1965 Will Ed Smith *	1981 Robert Reinhardt	1997 Ben F. Easterlin IV
1966 Henry P. Eve *	1982 J. Douglas Stewart	1998 Linda A. Klein
1967 Omer W. Franklin Jr. *	1983 Frank Love Jr.	1999 William E. Cannon Jr.
1968 David H. Gambrell	1984 Richard Y. Bradley	2000 Rudolph N. Patterson
1969 Frank C. Jones	1985 Duross Fitzpatrick *	2001 George E. Mundy
1970 Howell C. Erwin Jr. *	1986 Jule W. Felton Jr. *	2002 James B. Franklin
1971 Irwin W. Stolz Jr.	1987 Robert M. Brinson	2003 James B. Durham
1972 A. Gus Cleveland *	1988 J. Littleton Glover Jr.	2004 William D. Barwick
1973 Frank W. Seiler	1989 A. James Elliott	2005 Rob Reinhardt
1974 F. Jack Adams *	1990 Gene Mac Winburn	2006 Robert Ingram
1975 Cubbedge Snow Jr.	1991 Evans J. Plowden Jr.	2007 J. Vincent Cook
1976 W. Stell Huie	1992 Charles T. Lester Jr.	2008 Gerald M. Edenfield
1977 Harold G. Clarke	1993 Paul Kilpatrick Jr.	2009 Jeffrey O. Bramlett
1978 Wilton D. Harrington *	1994 John C. Sammon	
1979 Charles H. Hyatt *	1995 Harold T. Daniel Jr.	

* denotes deceased

After the Divorce is Done: Client Financial Failure or Success?

by Suzanne Durbin
suzanne.durbin@gvfinancial.com

After the Divorce is Done: Client Financial Failure or Success? Three easy steps you can take during representation to prepare your client for financial security long after the settlement is finalized.

It's a story every one of us has heard:

Jenny¹ is a 52 year-old who divorced over three years ago. She received a \$5M all-cash settlement. Her attorney was very effective in the representation, garnering over 50 percent of the marital assets, even in the face of extensive family business ownership by the husband. By all rights, Jenny "should" be comfortably off for the rest of her life.

Instead, she finds herself in a costly "dream home" she will have to sell as soon as the construction is finished. The COBRA period on her health insurance is about to expire and the multiple sclerosis she has been diagnosed with in the meantime will make obtaining her own coverage astronomically expensive or unobtainable. She is close to completing training as a pastry chef, though her medical condition will limit both her working hours and years. The alimony she was due to receive for two more years is at risk; her former spouse has become disabled and has not been making his payments. She invested most of her settlement in real estate deals, some of which are now bankrupt, the rest of which will likely take many years to pan out. Jenny is trying hard to keep a stiff upper lip and make the right decisions, but her reality is far from what either she or her attorney imagined the day her settlement agreement was completed.

The reality:

No professional can prevent their client from making bad decisions she is determined to make and nobody can be more responsible for a client's financial future than the client herself. But none of us like to hear these stories, either. As a financial advisor who helps moneyed divorcees manage their share of the settlement, I am often asked about steps the family law practitioner can take to set their

clients up to be successful with their hard-won settlements, instead of becoming the next "Jenny." Following are my favorites.

Step One: Identify and remedy financial illiteracy early.

In most marriages, one party handles the financial decisions, from spending, to investing, to insurance. Within moments of meeting your client, you know if they are the one with the financial experience. If they are not, you can help your client increase their financial understanding and capacity to manage their share of the settlement, long before the final decree is signed. At a minimum, each client should develop comfort around the "big four": income, expenses, assets and liabilities. Great resources include the family's current financial advisor, investment manager, insurance agent and CPA. If they don't have these experts, or feel they are too tied to their spouse, this is a great opportunity to refer to a competent financial professional in your network. If you are going to use a forensic accountant or certified divorce financial analyst for the case, these experts can also provide great education as part of their services. You can also recommend non-profit educational options like Visions Anew www.visionsanew.org, or low-cost continuing education classes at local colleges. A client who understands the basics of finances is better able to manage the settlement you work so hard to get.

Step Two: Plan to cover the "holy three" investment needs in your settlement agreement.

Cash reserves: Each person, divorcing or not, benefits from having cash reserves to draw on in the event of an unplanned emergency or expense. This protects your client from having to liquidate longer-term investments or retirement accounts at an inopportune time. A good rule of thumb is to ensure your client will have 3-6 months of living expenses in a checking, savings, money market, CD or other liquid account. Another option or addition is to provide for access to

credit cards, home equity lines of credit, or personal lines of credit.

Near-term income: This is a traditional strong point in divorce representation. The process is naturally designed to help the parties evaluate their income and expenses in the near term, using the Domestic Relations Financial Affidavit as a key tool. Your client's earnings, alimony and child support can all contribute to establishing a positive cash-flow situation for your client. A common danger spot is with real estate. Often, your client may want to keep a home they cannot afford with their post-divorce income. Showing them the numbers early and often can help them come to grips with this reality and become emotionally ready to move to a more affordable home.

Long-term income: With so much focus on near-term cash flow needs, identifying the sources of longer-term income can be challenging. Yet for most non-breadwinners, if they overspend in the short run, they have no ability to replace those assets with future earnings. It is therefore critical that they understand this concept and receive assets that can be left to grow and provide lifetime income in their later years.

I've found a good rule of thumb that helps many clients grasp this concept easily: For every \$1,000,000 of assets, you can spend about \$3,000/month, after-tax, inflation adjusted, for about 40 years². So in our Jenny example above, if she used \$1M of her settlement to buy a home and invested the remaining \$4M, she could likely spend around \$12,000/month after tax well into her nineties, giving herself a raise with inflation each year. This is in addition to any income she earns, and any alimony, child support, or social security she receives. If the assets available cannot create the desired income, it's better for your client to get that message early. It can be particularly helpful in moving an unrealistic client past a desire to hold onto assets that won't create income (i.e. personal real estate), or helping someone reluctant to re-enter the workforce understand the benefits even modest amounts of earnings can provide in protecting their assets for future growth.

Step Three: Identify and protect against your client's four main foreseeable risks.

Medical problems: Where your client will receive health insurance is a key factor in most divorce cases. One of the safest options can be if your client has access to her own policy through work. If she does not have this option, she likely has access to coverage under COBRA under her spouse's employer. While this is an easy solution in the short term (up to 36 months), your client faces a significant risk by accepting this solution. At the end of her coverage, she will have to obtain an individual policy (unless she gains access through an employer plan or Medicare). Any health condition she develops in the meanwhile, like Jenny's MS, will be fair game for the insurer to consider in determining whether and at what price to offer coverage.

If your client is healthy, recommend that she contact her insurance agent, refer her to a good one in your network, or encourage her to contact primary player's in the Atlanta market directly (such as Blue Cross Blue Shield) to obtain underwritten quotes for her own individual policy. Reflect that premium, which may be higher than the cost of COBRA coverage, on her DRFA, to ensure her needed expenses are reflected accurately.

Disability: If you structure your settlement with alimony, your client is going to rely on that income in planning her financial future. Assuming you prevail in the alimony award, what will protect your client in the event the payor becomes disabled and suffers a loss of income? Does the payor have a group and/or individual disability policy that would continue a least part of his income should he become disabled? If not, you can anticipate a motion for modification that puts your client's alimony in jeopardy. Therefore, particularly if your client will be receiving a large amount of alimony for any length of time, ask about the spouse's disability insurance. Make maintaining coverage part of the settlement agreement. If they don't have coverage, ask for them to get it. Most employers offer disability on a group basis, often without underwriting. There are many good individual disability insurers as well. Also, don't forget your own client. If she is or will be earning income that is not "gravy" to her financial security, urge her to get their own disability insurance to help protect that income stream.



Death: Many settlement agreements require life insurance to replace child support and/or alimony payments that would terminate at the death of the payor. While this is a great idea, there are wide variances in how the life insurance is handled, providing widely variable results for your client.

In all cases, having the right amount of insurance is the first step. Most financial advisors and accountants can easily provide you with a so-called “net present value” calculation to determine a reasonable amount of insurance to replace the income stream that would be lost. Next, you will decide whether to use an existing policy, or if a new policy is needed to meet your client’s needs. If the latter, ask the spouse to apply during the settlement negotiations, not after. Underwriting can take 6-12 weeks and you never know what medical issues can turn up. If the new policy turns out to be unavailable or more expensive than planned, you want that information before your client signs the final decree. Last, the owner and beneficiary of the policy are critical. If the spouse will be the owner of the policy, naming your client as beneficiary, be aware that your client will not receive notification from the insurance company if he changes the beneficiary, reduces the death benefit, or cancels the policy altogether. Your decree may provide her the right to request periodic proof of coverage, but if he has died or become uninsurable in the meantime, redress becomes challenging. An added protection is to have your client named as irrevocable beneficiary of the policy. This way, the insurance company will not process any request to remove your client as beneficiary. It does not, however, prevent the spouse/owner from canceling the policy intentionally, or through failure to pay the premiums. The most secure option is for your client to be the owner AND beneficiary of the policy. As the owner, she retains control. Only she can change the beneficiary or make other changes to the policy. She will be notified if premiums are not being paid and can make payments herself to keep the policy in force.

Long-term Care: When someone begins to need help caring for themselves, the first line of defense is often the spouse³. Your client will soon be single and will therefore not have a spouse available to provide this initial care; she may instead need to pay for in-home assistance. If her needs become too complex to care for at home, she will need to turn to adult day care, assisted living or nursing homes. In fact, nearly three out of four nursing home residents are women⁴. How will she pay for this expense? How will she find and select the caregivers? A good long-term care policy can be the answer. For any client 50 or older, I urge you to make this part of the settlement discussion. Using the family’s current agent, the employer’s HR department if they offer LTC, or someone you refer from your professional network, obtain insurance quotes during the settlement process and reflect the cost on the DRFA. Depending on the age and health

of your client, she could transfer much of her risk for anywhere from \$2-\$6,000/year.

One great “trick of the trade” with long term care insurance is that many insurers provide discounts of 20-40 percent if couples apply together. Some even allow the couples discount to continue after a divorce. Therefore, collaborating to obtain coverage before while the couple is still married can allow each party to obtain reduced pricing on this critical coverage. As with life insurance, underwriting can take 6-12 weeks, so encourage your client (and their spouse) to apply early in the process.

Conclusion:

No matter how well a family law practitioner represents their client, it is ultimately the client’s responsibility to make good decisions and properly manage their share of the settlement. By using the three steps outlined above, however, you can increase the impact you have on your client, giving them a greater chance to avoid becoming the next “Jenny.” You can expand your reputation as an effective practitioner. And you can generate more opportunities to send business to professionals in your referral network (or develop relationships with new ones), thereby increasing the odds of gaining referrals in return. Good for your client, good for your referral partners, good for you. Good practicing! *FLR*

Endnotes

- 1) Jenny is an example, not meant to represent any specific client
- 2) Assumptions include: inflation- 3.5 percent; gross rate of return- 7.5 percent ; average tax rate- 25 percent
- 3) Nearly 23 million Americans are providing unpaid care for a relative or friend. Speech by Josefina Carbonell, U.S. Assistant Secretary for Aging, on April 10, 2003. Retrieved Aug. 9, 2005, from the World Wide Web at www.aoa.gov/press/speeches/2003/04_apr/speeches_archive_04_14_pf.asp.
- 4) Derived from Table 13, the Centers for Disease Control and Prevention, Vital and Health Statistics, June 2002, Retrieved from the World Wide Web Aug. 13, 2005, at www.cdc.gov/nchs/data/series/sr_13/sr13_152.pdf.

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Suzanne Durbin is a partner with GV Financial Advisors. She has been recognized by the Five Star: Best in Client Satisfaction SM Wealth Manager Program in both 2008 and 2009. She and the other Advisors at GV use the proprietary Guided Wealth Transformation™ process to help their clients use their wealth to create the lives they desire, enhance the lives of the people they love, and create a legacy that represents their passions and values. You can contact Suzanne at suzanne.durbin@gvfinancial.com, 770-295-5611, www.gvfinancial.com, or her profile on LinkedIn, www.linkedin.com/in/suzannedurbin.

Young Lawyers Division Family Law Committee Update

by Tyler Browning

The Young Lawyers Division Family Law Committee provides educational and networking opportunities to young lawyers whose practice involves family law. In May, we held a well-attended reception at the Family Law Institute at Amelia Island. We are currently busy planning our annual The Supreme Cork fundraiser, which will take place at a great new venue: 5 Seasons Brewing Company - Westside on Oct. 1. As in past years, this popular wine tasting (and this year, beer tasting!) and silent auction will benefit The Bridge, a treatment center, school and residential program helping troubled adolescents and their families. Last year we raised more than \$20,000 for The Bridge, and with your help we can do even better this year! If you are interested in sponsoring the event or donating silent auction items, please contact Gillian O'Nan at (404) 237-5700 or gonan@levinesmithlaw.com.

We are also always looking for new members to join our committee. If you are a young lawyer or know any in your firm that you can compel into joining us, please contact one of our officers for the 2009-2010 bar year:

Tyler Browning, chair (770) 424-1500
tyler@browningsmith.com

Katie Rohr, secretary (770) 951-2700
krohr@wmbmlaw.com

Traci Weiss, treasurer (770) 951-2700
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Gillian O'Nan, event chair (404) 237-5700
gonan@levinesmithlaw.com

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 NO.

10-01-2009

SUMMONS

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



A Wine Tasting and Silent Auction Event

6:30 pm – 10:00 pm
Thursday, October 1, 2009

5 Seasons Brewing Company - Westside
1000 Marietta Street
Atlanta, Georgia 30318

\$40 per person in advance; \$45 per person at the door
Ticket price includes wine tasting and hors d'oeuvres
Silent Auction closes at 9 pm
Cash, Check and Credit Cards Accepted

Tickets can be purchased at www.thebridge-atlanta.org or
by contacting Beth Pann at 404.446.1536 or bpenn@thebridge-atlanta.org

This event benefits



The Bridge is a 40-year old family treatment center, specialized school and residential program serving troubled and abused adolescents and their families.

The Young Lawyers Division Family Law Committee would like to thank the following sponsors whose generosity made our reception at the 2009 Family Law Institute at Amelia Island a success:

Platinum Sponsors

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Creating an Alimony Trust: A Good Tax Planning Tool?

by Sue K. Varon, Esq. and Martin S. Varon, CPA, CVA, JD
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Establishing a trust prior to divorce may serve to accomplish several desired results. One type of trust, provided for under IRC Section 682, is commonly known as an alimony trust. Pursuant to Section 682(a) this trust must be created prior to divorce or separation, not in contemplation of it. These trusts are primarily used for clients with significant financial resources, who could fund the corpus of the trust.

Economic protection benefits afforded by the alimony trust would be accomplished in each of the following situations:

- One spouse may not have a good track record when it comes to handling financial responsibilities. The recipient may be a spendthrift or have an expensive addiction, with the potential of dwindling away a lump sum settlement. This could leave the door open for later pleas for additional funds from the more financially stable former spouse.
- In contrast, the funding spouse may be the financially irresponsible party or may be involved in an unstable business venture, leaving the recipient spouse concerned about the likelihood of not receiving future support or installment payments in accordance with a settlement agreement.
- If a significant part of the marital estate is comprised of stock in a closely held business that will ultimately be divided, the spouse who is actively involved in the business will want to prevent the other spouse from interfering with the operation of the business by exercising voting rights that accompany stock ownership. A solution may involve transferring the stock to a trust for the recipient spouse's benefit.

IRC Section 682 specifies rules applicable to alimony trusts. A specified sum is set aside

to be paid to the former spouse. The amount in excess of the specified sum (interest on the principal) reverts back to the person funding the trust. The recipient of the specified sum is taxed on the amount received, just as she would be taxed on alimony payments. Once

The image shows a stack of IRS tax forms. The top form is Form 1040 (U.S. Individual Income Tax Return) for the year 1998. It includes sections for 'Tax Computation', 'Credits', 'Exemptions', 'Income', and 'Adjustments to Income'. The forms are partially overlapping, showing various sections like 'Filing Status', 'Exemptions', 'Income', and 'Adjustments to Income'. The forms are dated 1998.

Husband transfers the principal amount to the trust, he no longer pays tax on the earnings. However, he does not get a deduction for the funds transferred to the trust.

Example 1:

Husband and Wife have decided to divorce. Wife will have primary physical custody of the parties' two minor children. Husband agrees to pay child support in the amount of \$1,200 per month for each child until each child is 18 years old, for a total of \$2,400 monthly. When the first child reaches the age of 18 years, Husband will pay \$1,200 per month in child support. If Husband pays \$2,400 directly to Wife, he does not get a tax deduction nor does Wife include the amount in her income. Instead, Husband can fund an alimony trust with a sufficient amount to produce a minimum of \$28,800 annually (\$2,400 monthly child support multiplied by 12 months), with the trust setting out the requirement that the trustee pay Wife \$2,400 monthly so long as both children are under 18 and the amount to be reduced to \$1,200 monthly when one child reaches the age of 18 years. The trust would also provide that any annual trust income in excess of \$28,800 is to be paid to Husband. Wife will not be taxed on trust income that is specifically classified as child support in the divorce decree or separation agreement.

Example 2:

Husband agrees to pay Wife monthly alimony in the amount of \$1,000 for 5 years. Instead of making monthly payments directly to Wife, he sets up an alimony trust with Wife as the beneficiary, funding it with enough assets to generate \$12,000 a year for a total of \$60,000 over the next 5 years ($\$1,000/\text{mo} \times 12 \text{ months} \times 5 \text{ years}$). Each year Wife will pay tax on \$12,000 that she receives annually; \$12,000 per year is excluded from Husband's gross income (receiving the same benefit as if he had the alimony deduction). However, Husband will have the additional benefit of enjoying the increase in

the trust principal (the amount earned on the principal in excess of the \$12,000 paid to Wife). Further, if Husband is responsible for the total of \$60,000 over 5 years, he could create the trust with a corpus well below \$60,000 of principal at the inception of the trust. Because the trust is paying out \$1,000 the first month, the remaining corpus continues to earn interest income. Thus, the time value of money concept reduces the amount of corpus needed to initially fund the trust to satisfy the alimony obligation.

Alimony trusts are governed by section 682(a) of the Code and, in terms of deduction and inclusion, produce results similar to those under regular alimony arrangements. Trust distributions are excluded from transferring spouse's gross income (giving Husband/transferring spouse the same benefit as if the amount was included in his income and then deducted as alimony), are not subject to alimony recapture, can continue after the recipient spouse/trust beneficiary's death and are taxable to the recipient/trust beneficiary spouse (with the exception noted below).

Section 682 sets out specific requirements for the alimony trust. The trust applies to people who are divorced or legally separated pursuant to a divorce decree, separate maintenance decree or separation agreement. Trust distributions paid to the recipient/beneficiary spouse (Wife) are includable in her gross income and deductible from payor/Husband's gross income. There is one notable exception. When amounts are specifically designated as child support in the divorce decree or separation agreement, those distributions are treated as if they were received by the payor/Husband and then paid directly by him to the recipient/Wife. As a drafting tip, when a trust will make both child support and non-child support distributions, it is imperative that the trust terms specifically designate the character of the distributions (child support or alternative support) to avoid tax consequences to the recipient/Wife.

Clearly, the alimony trust is not appropriate for all clients. However, it is a good planning vehicle for clients who have sufficient assets to fund a settlement, particularly where either of the parties is concerned about the other spouse's financial stability. *FLR*



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Confessions of a Guardian Ad Litem – Guardian ad Litem FAQ's

by M. Debra Gold
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It seems like every case I become involved in as Guardian ad Litem (GAL), the parties have questions about me, my role, their roles and anything else that crosses their minds. I know the attorneys have already explained everything to them, yet the questions keep coming my way. It is therefore not a surprise that my confession for this issue is that sometimes I feel like a broken record, repeating the same answers over and over again. Accordingly, I reduced the answers to the most frequently asked questions to writing. As I have done in past issues, I invite you to share this article with your clients so as to enhance their understanding of who I and my fellow GAL's are and what we do.

- What is a GAL in custody disputes?

A GAL is a duly trained and qualified expert who is appointed by the judge in cases involving custody of children, including divorce, modification of custody or visitation and legitimation. The GAL represents the best interests of the children and is appointed to assist the Court in reaching a decision as

to what is in the children's best interests. Although the GAL is not always an attorney, in Georgia this is the general rule. However, since the GAL does not represent the father or the mother, he or she cannot give legal advice to either party.

- How is the GAL appointed?

The GAL is appointed by way of an order signed by the judge which sets out the GAL's role, responsibilities, rights and compensation. Usually the attorneys will agree on a GAL. However, if the parties are unable to agree upon a GAL, some judges will appoint one from their own lists of qualified GAL's. Other judges will utilize services available in their counties which provide qualified GAL's for appointment.

- What will the GAL do?

The GAL will perform a full investigation into all child-related issues involved in the case and make a recommendation to the judge as to what is in the best interests of the children. Every GAL has his or her own procedures

Frequently Asked Questions

What is a GAL in custody disputes?

How is the GAL appointed?

What will the GAL do?

How can I convince the GAL that I should win the case?

Will the GAL keep the things I say confidential?

What will the GAL say to my children and how should I prepare them?

Will the GAL help to settle the case?

If I do not agree with the GAL's recommendation, am I stuck with it or can I contest it?

Who pays for the GAL?

and means of obtaining information and investigating the facts. You can expect that the GAL will likely visit your home and meet with your children. The GAL will also probably speak with witnesses including teachers, doctors, friends, neighbors, relatives and other people who can shed light on the case. The GAL has the right to request and review records related to the child, including medical, psychological, school and Department of Family and Children Services records. The GAL also has the right to request that the parties and/or the children undergo a medical or mental health examination. In addition it is likely that the GAL will participate in all legal proceedings concerning the children including hearings, depositions, mediation and final trial.

- **How can I convince the GAL that I should win the case?**

Firstly, we must remember that there are no “winners” in custody litigation. The proper question is “What can I do to show the GAL what is in the best interests of my children?” The answer is that you should be yourself, tell the truth, be cooperative and always place your children’s needs ahead of your own. Sometimes that can be easier said than done. It is normal to go to extra lengths to impress the GAL. However, don’t fool yourself. The GAL will get to the bottom of things and will be able to see the truth regardless of how well you sugar coat it. If you act with integrity, you will shine.

- **Will the GAL keep the things I say confidential?**

The GAL has no duty of confidentiality and in fact has a duty to disclose those facts that he or she relies upon when making a recommendation to the judge. The GAL’s right to obtain confidential information regarding a party (i.e., medical and mental health records) is conditioned upon the party signing a release allowing the GAL access to the information. While you do not have to sign the release, unless there is a good reason to keep your records or any other information from the GAL, it is usually wise to do so. Otherwise, the GAL will think you are hiding something and may go to greater lengths to find out information in other ways. Remember, the truth generally prevails. If you go ahead and own up to your shortcomings and issues up front, they may not have as bad an effect on your case as you thought they would. Talk to your attorney about how you should handle this issue.

- **What will the GAL say to my children and how should I prepare them?**

So much depends on the GAL appointed, the ages of the children and other facts and circumstances surrounding the case. Sometimes the GAL will only observe the children or play with them. In other cases, usually those with older children, it may be appropriate for the GAL to talk with the children about some of the issues or the family situation in general. You should discuss this with your attorney and the GAL prior to him or her meeting with your children so you will know how you

should prepare the children and introduce them to the GAL. In no case, however, should you tell the children what they should or should not say to the GAL.

- **Will the GAL help to settle the case?**

Unless the parties otherwise agree, the GAL will likely participate in mediation and settlement negotiations. It is the GAL’s goal to reach a final disposition of your case with as little disruption to the children as possible. Thus the GAL will be supportive of your settling the case. However, although it is not a common thing to do, the GAL has authority to object to a settlement if he or she believes that the settlement will not further the best interests of the children.

- **If I do not agree with the GAL’s recommendation, am I stuck with it or can I contest it?**

You have the right to contest the GAL’s recommendations but it is not always wise to do so. Generally, upon the completion of the GAL’s investigation, if the case does not settle, the GAL will write a report detailing his or her findings and recommendations. The GAL will also likely testify at your trial. The judge will consider the GAL’s report and testimony in making his or her decision, but may or may not adopt the recommendations, as the judge is required to use his or her own independent discretion and judgment in making a decision. You should discuss with your attorney whether it is advisable to contest the GAL’s recommendation and how you should do so.

- **Who pays for the GAL?**

In some cases, usually when the parties are in financial need, the courts will appoint volunteer GALs. However, in most cases the GAL is compensated by the parties. Unless the facts and circumstances indicate otherwise, the parties will generally be required to pay for one-half of the GAL fees and they may be required to pay a retainer. The parties should be aware that the costs for a GAL can run into a great deal of money, particularly if they or their attorneys do not cooperate or insist on monopolizing the GALs time. Most attorneys agree, however, that this is money well spent because a GAL can generally cut to the chase, go straight to the facts and facilitate a final disposition which is truly in the best interests of your children. *FLR*



*M. Debra Gold
Guardian ad Litem
mdgoldlaw@aol.com*

Gold regularly serves as a Guardian ad Litem throughout Georgia and has done so since 1991.

2009 Family Law Institute Pictures



*Melody Richardson, Tara Stoinski and
Andy Pachman*



There is plenty of time for socializing



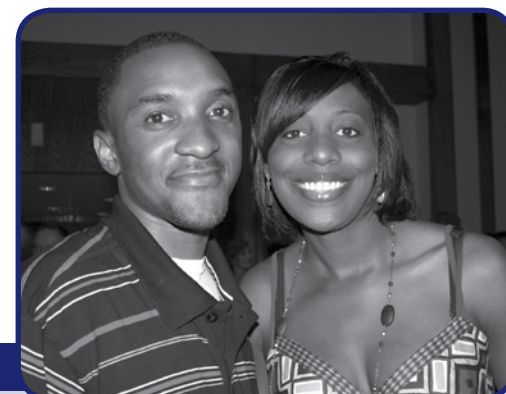
*Dan Bloom and Robert Cowan enjoy
their evening with friends*



*Judge Tain Kell and Paul Johnson
network after a productive day*



*Justice Robert Benham networks
with Nancy Ingram Jordan and
Cassandre M. Galette*



Ready for an exciting evening.



Debbie Ebel and Georgia Lord



Ned Bates Jr.



The afternoon session was at capacity



Children pondered Chief Justice Sears' statements



Tom Browning



Chief Justice Sears, Jennifer and Mattie McKinzie



Chief Justice Leah Ward Sears after her session with the future lawyers at the Institute



Tommy Algood and Trish Lyndon



*Tina Shadix Roddenbery and
Andy Pachman*



Jill Radwin



*FLI attendees at the opening night
reception*



*Tamar Faulhaber, Dana Floyd and
Glenda Sullivan*



Kynna Duncil



Bruce Steinfeld and Glenda Sullivan



*Hala Carey of Carey Associates and Margot from
Visions Anew*



*Wade Padgett, Nancy and Kurt Kegel and
Ed Coleman*



Rick Newton and his new grandson



Judge Steve Jones



*Trinity Hundredmark and
Whitney Mauk*



*Alison Arce, Stephen Clifford and
Judge Gail Tusan*



*Judge Bensonetta
Lane*



Judge Stephen Schuster and Tom Kell.



*Rachel Platt, Joseph Szczeco and Judge Cynthia
Wright*



*Quinton Washington, Cassandre M. Galette and
Celeste Brewer*



Tommy Allgood and Ed Coleman



Judge Cynthia Wright



Judge Adele Grubbs



Judge Bonnie Oliver and friends are ready to start the sessions!



Atlantic Investments



Kathy Portnoy and Charla Strawser



Bob Boyd, Ned Bates and Chris Olmstead



Daniel Moore, Kelly Miles, Russell Smith and Catherine Hicks



Tina Shadix Roddenbery, Dawn Smith, Katie Connel and John Collar Jr.



Brian and Tom Hawkins



Jolie, Randy and Valerie Kessler



Seth Harp, Judges Mary Staley, Bonnie Oliver and Stephen Schuster



Denise Esserman



Lisa Kaplan, Carl Pedigo and Carla Stein



More good times at Amelia Island.



Clay Metts and Paul Johnson

Judge John Simpson, Superior Court, Coweta Judicial Circuit

by Jill Radwin
radwinj@gaaoc.us

At the beginning of court in late May, Superior Court Judge John Simpson called up to the bench three men who had a history of not paying their child support obligations. These three men had just gained employment and had been participating in the other requirements of the newly established Child Support Problem Solving Court in Carroll County. Most importantly, these men had begun paying some of their child support obligation and arrearages. Judge Simpson said, "Normally, I am not a fan of applause in the courtroom, but could those sitting in the courtroom give these men a round of applause?"

Everyone in the courtroom that morning did applaud, especially Judge Simpson. Following that court session, Judge Simpson met with me and my summer law school intern, Siobhan Phillips, to discuss his involvement and motivation in establishing this pilot site of the Child Support Problem Solving Court in Carroll County. Judge Simpson, Superior Court Judge in the Coweta Judicial Circuit, who has sat on the bench in Carroll County since 1996, also answered questions about his career and community involvement.

Radwin: Judge Simpson, what was your inspiration for establishing a Child Support Problem Solving Court here in Carroll County?

Judge Simpson: After being involved last year in drug court, I got the idea of taking this same problem solving court model and applying to the issue of child support. As with most of the judges in the state who hear child support cases involving the Office of Child Support Services, (the state's child support enforcement agency), the docket is always crowded and often, the judges see the same faces over and over again. I asked the Office of Child Support Services (OCSS) if they would be interested in establishing this specialty court with me. The timing could not be better because the state office of OCSS was looking for a court to serve as a pilot with this very same concept. OCSS had already been in discussion with the Administrative Office of

the Courts (AOC) to assist due to the AOC's expertise in establishing drug, DUI and mental health courts. The AOC agreed and became a stakeholder here with the responsibility of facilitating an evaluation of the court.

Radwin: When was the court established and who have become the stakeholders?

Judge Simpson: On Dec. 5, 2008, we had the kick off to announce to the community in Carrollton about the establishment of the pilot project. We actually started the program Jan. 1, 2009, with the first court hearing at the end on Jan. 30, 2009. The stakeholders are OCSS, including the state agency's Fatherhood Program, representatives from state headquarters at "Two Peachtree in Atlanta", the local Assistant District Attorney who prosecutes child support cases for OCSS (Kelly Owens) and representatives from the local Child Support Office. The case manager of this court, Debra Folds, is an employee of OCSS. Also, we have the AOC as a stakeholder and Applied Research Services, the firm AOC contracted with to do much of the evaluation, including a logic model and quantitative and qualitative evaluations. The Georgia Department of Labor is a stakeholder with their assistance in job placement and trainings. We have the treatment/services providers as stakeholders, including Pathways, Tanner Behavioral Services and the local chapter of NAACP. The local Presbyterian Church volunteering to help with visitation is another stakeholder. We are working with our local resources that we already have here. We also have use of the courthouse facilities, including the sheriff deputies, to hold court once a month with the participants of the program.

Radwin: Will you please summarize for us the concept behind your Child Support Problem Solving Court?

Judge Simpson: In a number of cases the non-custodial parent may be jailed for not paying the child support obligation and then sits in jail from 90 to 100 days. During this period, no child support is being paid. This

scenario frustrates everyone. The individual is in jail not working, not doing any job training, and it comes at a cost of about \$38 per day to the taxpayers for jail cost. So it seems there has to be a better way.

Radwin: How did you come to associate the problem solving court model with the issue of unpaid child support?

Judge Simpson: I worked for a year with the Carroll County drug court so this caused me to think about child support in the same light. Carroll County was one of the first drug court programs in the state and has a very successful drug court with a very knowledgeable director and I learned a lot from the drug court team.

I also had the opportunity to attend a National Judicial College program in Reno, Nev., where I was able to observe a drug court in an urban setting. It is interesting to see the different styles that judges use. I mean, drug courts are very similar across the country; but it is interesting to see the different styles that judges use in drug court.

Radwin: Have you had the opportunity to observe this specific type of problem solving court elsewhere, and if so, describe what you observed?

Judge Simpson: Yes. I had the opportunity to go to North Carolina and observe Judge Kristin Ruth's court. (Judge Ruth is a circuit court judge in Wake County, North Carolina.) We have used her court as a model and we have tried to institute much of what she has done. However, she is in Wake County, which is Raleigh, North Carolina, and

she seems to have more resources than we have in Carroll County. This is in part due to her having the resources of a court in an urban area that is doing relatively well in spite of the current recession. But, we have pressed ahead even though we didn't have all those resources.

Radwin: How many participants do you plan to have in the program during this first year of its operation?

Judge Simpson: We want to have 30 participants. Currently we have 19 so we will be expanding to have 30 within the year.

Radwin: Please describe for us the process one goes through once enrolled in the program?

Judge Simpson: Our problem solving court participants meet with the Child Support Case Manager, Debra Folds. Information she receives at that initial meeting will guide her in assigning each participant to various programs that match their individual needs. We have programs to assist with finding jobs which utilize the Child Support Fatherhood Program and the Department of Labor. The focus is the number of applications the participants submit to potential employers. The Fatherhood Program assists with literacy training, too. We feel like the more jobs each of these participants are able to apply for, the better their chances of getting a job increases. Our substance abuse and mental health program is provided by Pathways, our Community Service Board (CSB). The lack of jobs and addiction issues may be the underlying problem of why these non-custodial parents are not paying child support.

Other underlying problems involve the lack of visitation and no quality interaction between the non-custodial parent and the child. So, another possible referral is to a supervised visitation program we have set up with a local church. A possible referral could be to a volunteer lawyer from the Carroll County Bar Association to assist with legitimation petitions and mediation for visitation issues. The Carroll County Mediation Center is practically next door to the courthouse, which makes it convenient if mandatory mediation is involved. Also, the local child support office is going to do a modification on orders that are clearly out of line with the father's ability to pay.

Radwin: Any perceived successes at this early date?

Judge Simpson: Yes; I think that today (May 30), out of 19 individuals that are currently in the program, we have 12 of them working and paying child support. This was such a chronic group of non-payers when we started. This is the type of group who would sit in a jail for the 100-day period and pay nothing, so I think this is good initial success.

Radwin: Tell us a bit about your background, legal education?

Judge Simpson: I graduated from Mercer Law School in 1985. I was the law clerk for one year to the Coweta judicial circuit upon graduation from law school. In 1986, I ran



The Hon. John Simpson

Bates Honored with Award

by Jonathan Tuggle

Edward E. “Ned” Bates, Jr., longtime Atlanta family law attorney, was recently 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.



Ned Bates Jr. receives the Joseph T. Tuggle Jr. Award from Wilbur Warner

Bates was awarded this honor at the Section’s annual Family Law Institute on May 22, 2009, during the morning session. The award was presented by Bates’ partner, Wilbur Warner, who entertained the crowd with humorous stories of Bates’ childhood, and spoke proudly of his association and friendship with Bates. Bates humbly received the award and graciously thanked the section for this prestigious honor.

Throughout his career, Bates has carried a reputation as a true “gentleman lawyer”. “He is the sort of lawyer that even after you lose to him you still feel good about going over and shaking his hand” says Family Law Executive Committee member John Lyndon. “Ned handles cases the way they should be handled. If everyone would follow his example, the practice of law would be much more enjoyable.”

Bates has been a dedicated member of the Family Law Section, serving as past section chair in 1987-88. He is also the past president of the Georgia Chapter of the American Academy of Matrimonial Lawyers, as well as past chairperson of the Atlanta Bar Association’s Family Law Section, among other honors. He is also the author of *Georgia Domestic Relations—Forms and Practice*, which is recognized by lawyers throughout the state as the definitive domestic relations form book in Georgia. *FLR*

Past Recipients of the Joseph T. Tuggle Jr. Award Include:

1995 - Hon. Hilton M. Fuller Jr.

1996 - Hon. Elizabeth R. Glazebrook

1997 - Ms. Debra A. Segal

1998 - M.T. Simmons Jr.

1999 - Joseph T. Tuggle Jr.

2000 - Hon. Cynthia D. Wright

2001 - Hon. Mary E. Staley

2002 - Hon. Louisa Abbot

2003 - H. Martin Huddleston

2004 - John C. Mayo

2005 - Hon. Carol W. Hunstein

2006 - Deborah A. Johnson

2007 - Jill O. Radwin

2008 - Carol Ann Walker

Fraud's Effect on Settlements in a Deteriorating Economy

by Michael Levitt
mlevitt@mhlevitt.com
www.mhlevitt.com

It is well known that deteriorating economic conditions exacerbate stress and tensions in marriages and often result in separations and divorces. While the old adage advises that both spouses, for their own protection, should understand and be familiar with family finances, it is problematic and generally not the case, when there is a family business or a closely held company, run solely by one spouse (the Owner/Operator).

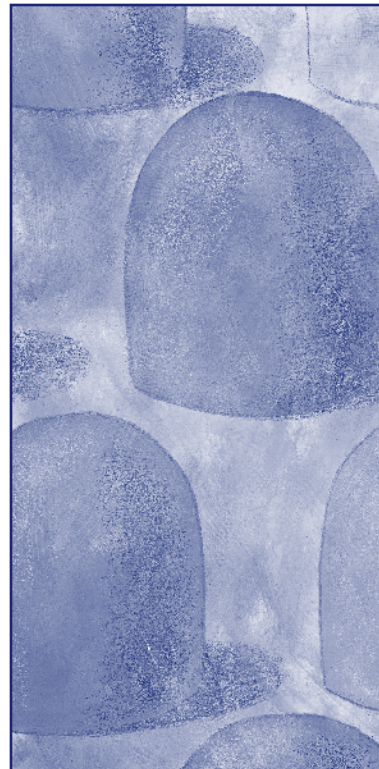
Historically when business is booming and asset values are high, a divorcing spouse might commit a fraud in order to reduce the business value either for example, by accounting fraud or diversion of assets, thus having to share less with the other spouse, or using the funds for a "lifestyle" change. In the current economic environment where asset values are already reduced, a spouse may still be inclined to fraudulently minimize values even further so as to retain more going forward particularly given the current recession.

In periods like these, the engagement of a Certified Fraud Examiner is a cost effective way to determine if any "monkey business" has occurred. Generally, the cost of a fraud examination produces a significant return on investment, especially if one spouse has some inkling of wrong doing.

I had been engaged in a case of corporate fraud at a privately held commodity distributor (ComCo)¹ where it was suspected that funds had been fraudulently siphoned out of a subsidiary, which was a debtor to its bank (BankCo). Metaphorically, ComCo was married to BankCo, which had loaned many millions to the company under a Loan Agreement. ComCo and BankCo each assumed a significant level of trust, just as in a marriage. ComCo relied on BankCo to provide funds when needed and BankCo relied on ComCo's integrity to adhere to the terms of the Loan Agreement and repay the loans as prescribed therein. Unfortunately in this case as in some marriages, ComCo was up to no good.

The initial evidence of a problem, a prerequisite to having access to the company's books and records, was a violation of bank covenants related to the level of an intercompany receivable from ComCo's parent, which was not a debtor under the Loan Agreement. Often in a marital situation, there is some feeling of doubt that the non-operating spouse has about the legitimacy of the business operations, which supports the engagement of a fraud examiner or forensic accountant.

As a fraud investigator and forensic accountant, the scope of my assignment was to identify and quantify any fraud in the operation of the business. I began with interviews of key management personnel as well as other key employees. This phase was undertaken to learn the business flows and processes, as well as to "put the word out" about concerns of fraud. As a result of discussing concerns of fraudulent activity, several confidential tips of possible fraudulent activity were received and investigated. The next phase was to conduct an investigation of past transactions involving cash, checks and letters of credit above a certain dollar level, looking for inconsistencies or any suspicious activity. Transactions were traced from initial orders through the payment cycle and included reconciliations to product received into inventory. The purpose of this activity was to confirm the legitimacy of the cash movements.



The determination was that payments for product from ComCo to the parent were made many months in advance of product delivery, in clear violation of the Loan Agreement and prior business practices and overpaid for the purchase of product. It was discovered that this fraud was initiated to fund a debt obligation of the parent incurred for a failed business venture.

Following submission of my forensic investigation report, a civil action was filed by BankCo and ComCo filed for bankruptcy protection under Chapter 11. I assisted counsel in litigation activity during both the civil action and the bankruptcy, including development of motions, preparing to take depositions for State and Federal Court, and providing deposition testimony, all based on knowledge gained from the fraud investigation. Following my preparation of a valuation of ComCo, BankCo agreed to settle their claim and the company was refinanced out of bankruptcy. The fees for this case were recognized by BankCo to be worth the cost considering the amount of their funds at risk.

Correlating the ComCo case to a divorce matter, it would be possible for an Owner/Operator of a (marital asset) family business or closely held company to embezzle funds from the company by committing a fraud. The embezzled funds could then be hidden in anticipation of divorce or used to fund a different lifestyle, like infidelity, substance abuse or other addictions. There are many paths a fraudster might take to accomplish this, however, the fraud examiner has been trained to investigate and identify them. Some of the more well-known and often used frauds

to siphon money from a company are the use of fictitious employees, vendors and consultants. Checks written from company funds to these fictitious entities are then hidden by the Owner/Operator in any number of ways, e.g., loans to relatives or friends, purchase of assets in other parties' names, etc.

The fraud investigator is knowledgeable in the techniques and methods used to discover the siphoning of funds from a company and how they are then hidden. If the ComCo fraud investigation had not been conducted and the fraud had been allowed to continue and undoubtedly expand as frauds generally do, BankCo would have suffered a larger loss. Similarly, a divorcing spouse may receive less in a settlement due to the perpetration of a fraud.

The importance of engaging a fraud examiner in a divorce proceeding cannot be overstated, particularly when there is a business involved, even if the non-operating spouse has no doubt about the legitimacy of the business operations. A preliminary assessment of the business to identify any red flags of fraud could be accomplished at a reasonable cost. If there were findings of fraud, a more extensive investigation would be undertaken.

In addition to the issues of embezzlement and hidden assets, an appraisal or business valuation must be performed using reliable accounting numbers. The company's financial statements may have been compromised by a fraud and need to be restated for valuation purposes. If there is any suspicion or evidence of possible wrongdoing at a family business or a closely held company, a fraud examiner or forensic accountant should be engaged immediately to evaluate the situation and to insure a fair distribution of assets. *FLR*



MHLevitt Consulting, LLC, was founded to provide the highest level of professional service in the areas of forensic accounting, fraud investigations, litigation support, solvency and related valuation analyses, as well as troubled company and bankruptcy advisory services. These areas of expertise are applied in advisory and support work as well

as in providing expert testimony. Levitt has an MBA in Finance from Columbia University, a BA in Theoretical Mathematics from Lehigh University, and is a Certified Fraud Examiner, a Certified Insolvency and Reorganization Advisor and a Certified Turnaround Professional.

Levitt can be contacted at mlevitt@MHLevitt.com or (404) 234-4949.

Endnotes

- 1) The commodity supplier, renamed herein to maintain confidentiality, was based in the Caribbean and had international business dealings in Europe, South America and the Middle East.

Mediation Preparation: Top 5 Ways Your Paralegal or Legal Assistant Can Help

by Sue K. Varon

Alternative Resolution Methods, Inc.

Once you determine it is time to set your case down for mediation, your paralegal or legal assistant can prove invaluable by following these simple steps:

Step 1: Assess What is Necessary to Get the Case Ready for Mediation.

As the person in charge of scheduling the mediation, paralegals/legal assistants should have basic information. Regarding the timing of the mediation, make sure that the attorney possesses sufficient information and, if not, what additional information is needed. Has discovery been completed or can the attorneys and the parties have a meaningful mediation without completed discovery? If the case is not ready, find out what needs to be done to get the case ready for mediation.

Step 2: Mediator Selection Inquiries

Ask the attorney what style of mediator would be most helpful for the client and for the case. Which type of mediator does the attorney prefer for the case: facilitative (the messenger), analytical (discussing the legal issues), or evaluative (emphasizing the weaknesses of each party's case and the likelihood of the outcome in court). Some mediators are known for their abilities in dealing with emotional, intractable or unshakable clients. Also important is finding out what the attorney believes the other side needs in terms of mediator skills.

Step 3: Research Mediators

Gather information about mediators and develop a resource list. Find out what people are saying about different mediators. You can find out a lot simply by picking up the phone and talking to the mediator. For those you

are unfamiliar with, you can ask how long they have been mediating and find out about the types of cases they mediate. You can inquire how they conduct the mediation, whether attorneys make opening statements, how they avoid having opening sessions waste time or escalate the case, and whether they will agree to go straight to caucus without an opening session.

Criteria that should be made available to your attorney in helping mediator selection include the following:

- Does your attorney need a person who is able to deal with difficult personalities?
- Are you looking for someone with a proactive approach to negotiation?
- Does the mediator need to have quick analytical skills?
- If this case involves significant assets, does this person have a financial background or can they bring in someone to the mediation with financial expertise?
- Consider which mediator will have credibility with both parties.

Mediation and arbitration are different. In arbitration, the parties hire and pay a private judge or pane of judges to decide the case. In mediation, the mediator facilitates the parties' negotiation in an effort to assist them in reaching a mutually acceptable agreement.

- Does the mediator's style involve helping the parties find new ways to explore settlement?

Step 4: Help The Attorney Prepare for Mediation

Organize the file so that pertinent documents are easily accessible. All files, documents, letters, pleadings and evidence should be indexed for the attorney and the client. This will avoid having the attorney shuffle through documents.

Prepare a mediation notebook divided into sections that include the following:

- Summary of the Case
- Domestic Relations Financial Affidavit
- Child Support Worksheet
- Net Worth Statement
- Discovery Responses
- Appraisal(s)
- Settlement Proposal(s) (any settlement offers that have gone back and forth; different settlement outlines)
- List of Relevant Documents (which should be in a separate file box)

Frequently, one party arrives at mediation organized, and the other party notices whether his/her attorney is more or less prepared.

Step 5: Prepare Your Client

An attorney-client meeting should be scheduled prior to the mediation to explain the mediation process to the client. You can inform the client that the attorney will be discussing the following:

- The logistics: that initially they may be sitting in a conference room with the other party and their attorney or, in the alternative, the parties may go straight to caucus.
- The procedure: who will summarize the case (attorney or client) and whether the client will need to speak or just listen. The client should be informed that there will be long periods of down time. During the caucus, the parties will have the opportunity to vent, discuss and inform the mediator of their wants and needs. The client should be made aware that caucus discussions remain confidential unless the mediator is given permission to disclose things to the other side. Clients should be forewarned that the mediator will discuss the weaknesses of the case, as well as the possible outcomes at trial.
- The negotiation process: The client should be warned about creating bottom lines. Mediation should be viewed as an opportunity to think outside the box, coming up with creative solutions

in order to resolve the case. It is important for the client to think about things that are important to the other party. Framing proposed resolutions that take into consideration some of those factors may generate positive movement toward a settlement.

- The compromise: Clients need to be reminded that cases settle because both parties compromise. The point should be driven home to the client that when a case settles, both parties have given up some things in order to have the case concluded and the litigation over. The client needs to consider the costs of a trial as part of the cost benefit analysis.

Preparation is often the key to a successful mediation. Pass along this 5 Step list to your paralegal or legal assistant. With the help of your paralegal/legal assistant the process can be much more productive for all participants. *FLR*



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Mediation Preparation: Top 5 Ways Your Paralegal or Legal Assistant Can Help

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*Step 4: Help The Attorney
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Step 5: Prepare Your Client

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