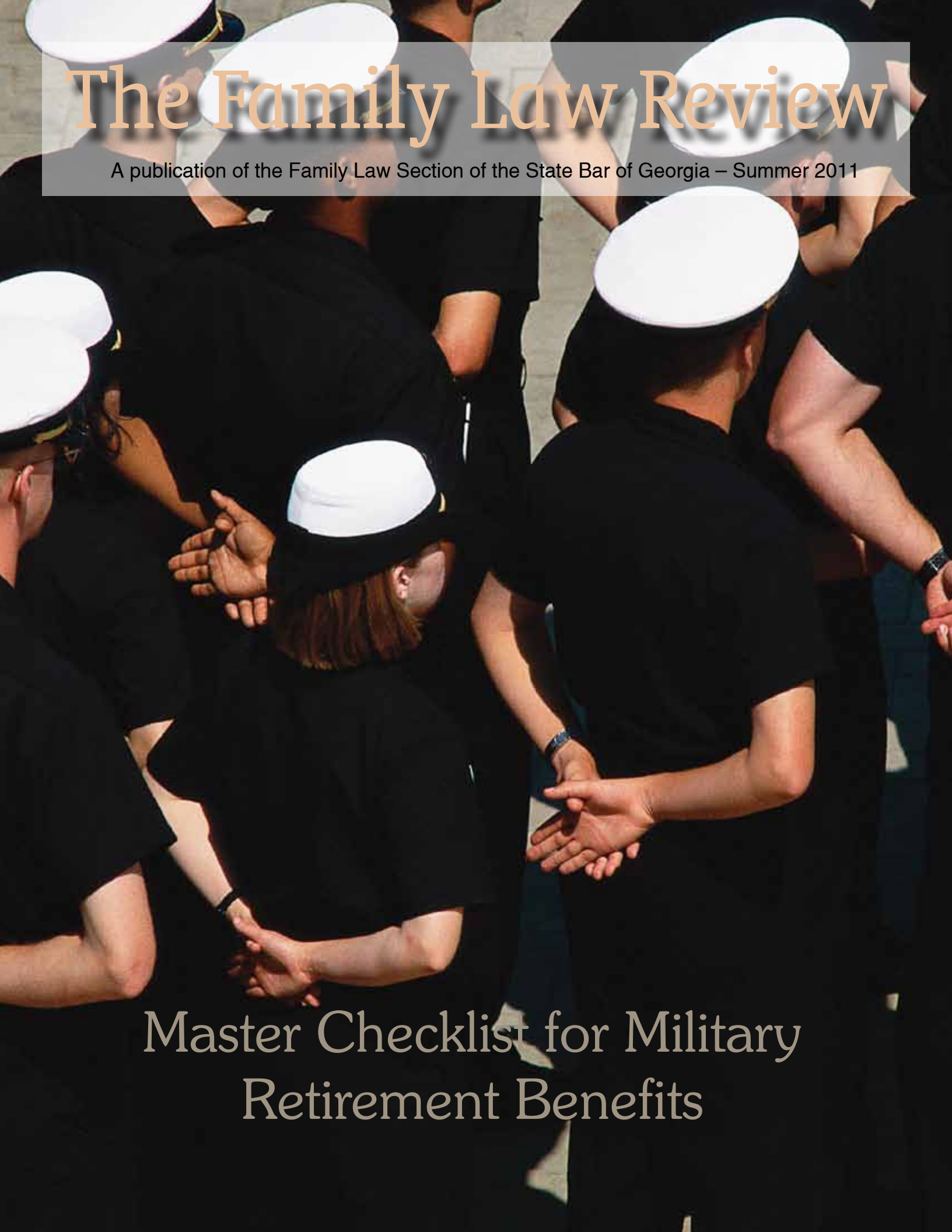
The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia – Summer 2011



Master Checklist for Military Retirement Benefits

Editor's Corner

by Marvin Solomiany and Randall M. Kessler
msolomiany@ksfamilylaw.com
rkessler@ksfamilylaw.com
www.ksfamilylaw.com

One of the improvements we have made to the Family Law Review is the cover art that will now be a part of all future issues. Because of the increased content over the past few years from what originally began as a newsletter, we determined that including cover art will give it more of a "magazine look" which best represents what the Family Law Review has become. While we have included many articles written by some of our fellow family law attorneys from other states, we continue to encourage the submission of articles by Georgia attorneys. Because of the many issues involved in family law cases, there are always opportunities to write an article about an issue which we may have just encountered in a case and with which others may not be as familiar. The underlying purpose of the *Family Law Review* continues to be to serve as an educational tool for our fellow members, and this cannot be achieved without your continued support. Whether your participation comes from attending one of the many seminars the section sponsors or writing an article for the *Family Law Review*, your participation in the section is what allows our section to continue to grow and remain one of the most active sections in the State Bar. We continue to look forward to publishing *Family Law Reviews* which allows our members to gain a better understanding of the many different issues we encounter as family law attorneys and thank you for your continued support in achieving this goal. *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, co-editor at msolomiany@ksfamilylaw.com.

Inside This Issue

Chair's Comments

by Randall M. Kessler
rkessler@ksfamilylaw.com

I am so honored to be able to submit my first column as chair of this section. While I always understood and respected the amount of work that went into leadership of the Family Law Section, I now appreciate the efforts of my predecessors even more. Paul Johnson's efforts over the past year were extraordinary and guided us from a wonderful Family Law Institute in Destin with more than 500 attendees (for the first time) through significant legislative events to amicus brief considerations throughout the year. He managed the section well and guided us into a position of leadership where we are certainly one of the most respected sections of the Bar. His work was performed on the shoulders and efforts of all of our previous chairs who have made the Family Law Section what it is today.

I was so pleased to see so many lawyers and judges at our recent Family Law Institute in Amelia Island. The interaction was once again heartwarming and productive and brought the bench and bar even closer. We are all in this together. We are all part of the system, and we all share that tremendous duty, burden and obligation to help families through some of the most trying times of their lives.

Please let me know what I can do for you and what the section can do for you. I truly enjoy Bar involvement and am devoted to improving the bar, the bench and bar relationship, and the practice of family law. I love practicing family law (although at times it certainly has its moments) and I love the camaraderie, friendship, and mutual respect that exists within the section. Please feel free to write, email, call or text me with concerns, questions, or suggestions you may have for the 2011-12 Bar Year. I look forward to seeing many of you at our seminars, Bar meetings and ultimately at the Family Law Institute next year at Amelia Island, for which plans are already underway by next year's Institute chair, Kelly Miles.

Have a great Fall, and please be in touch if there is anything I can do for you. *FLR*

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Master Checklist for Military Retirement Benefits

by Mark E. Sullivan

This article is an outline of what you need to know about division of military retirement benefits. It will help you learn how military retired pay works, understand the Survivor Benefit Plan, and learn how to accomplish the allocation and division of military benefits. It will also teach you where to find resources which explain these issues so that you can guide your clients in decision-making and can submit pension division orders which will be honored by the retired pay centers.

1. **Got "DOCs"?** Documents you need to understand military pay and retired pay, Reserve Component retirement points, accrued leave, elections for the Survivor Benefit Plan (SBP), and notification of eligibility for retirement for a Guard/Reserve member.
   a. Leave and Earnings Statement for active-duty personnel (this is DFAS Form 702)
   b. "How to Read Your LES" [do a SEARCH for this on Google – several websites available]
   c. Retirement Points Accounting System Statement for Guard/Reserve personnel
   d. Retiree Account Statement for retired personnel (DFAS-CL Form 7220)
   e. "20-year letter" for Guard/Reserve personnel as to SBP election
   f. DD Form 2656-1 for SBP elections, coverage for retirees
   g. Letter from branch of service that servicemembers (SMs) receive upon retirement (pay status), showing expected amount of retired pay and calculations
   h. If a document cannot be obtained voluntarily or through discovery from the member, then obtain from DFAS, other retired pay center (Coast Guard, Public Health Service, NOAA), the reserve headquarters or state adjutant general's office, or other military agency, as applicable, by submitting a court order or a subpoena which has been signed by a judge.
2. **"Who's in charge here?"** Rules for division of military retired pay and the SBP.
   a. Division of military pensions is authorized by USFSPA (Uniformed Services Former Spouses' Protection Act), 10 U.S.C. 1408. It is an enabling act which allows states to divide pensions but does not require it; it does not specify a method of division and contains some restrictions.
   b. The Survivor Benefit Plan is the survivor annuity program for pension division, to allow a former spouse (FS) to continue to receive payments after the member/retiree dies. 10 U.S.C. 1447 *et seq.*
   c. Volume 7B of the Department of Defense Financial Management Regulation, DoD 7000.14-R (DoDFMR) explains how each of these work – www.defenselink.mil/comptroller/fmr
   d. State laws and rules exist for pension division, whether survivor annuity is available for the former spouse, what the marital fraction is, whether military leave is divisible, etc.
3. **To play the game, know the rules!** How military retired pay works, how compensation for a retiree is calculated, and what is needed for state court jurisdiction to divide military retired pay.
   a. Active duty retirement under one of 3 systems: a) Final retired pay b) High-3 c) CSB/Redux. Details at Army Retirement Services; go to www.armyg1.army.mil – good for all branches of armed services. The important date is DIEMS (Date of Initial Entry into Military Service), which is found on the Active Duty LES.
   b. Reserve/National Guard retirement rules (pension based on retirement points)
      i. In general retired pay starts when retiree attains age 60
      ii. 20 "good years" needed to be retirement-eligible (50 points needed for a "good year")
      iii. Calculate marital share upon retirements points per year, not months of pension service
      iv. Four points for a "drill weekend," one point per day of active duty (e.g., 14 points for two weeks' annual training or "summer camp")
   c. Jurisdiction rules (10 U.S.C. 1408 (c)(4)) – obtain pension division jurisdiction over SM by:
      i. Domicile – his or her legal residence
      ii. Consent – entry of general appearance in the lawsuit
      iii. Residence – but not because of assignment
   d. SCRA – When SM has not yet retired, pension order must state that court has honored SM's rights under the Servicemembers Civil Relief Act, 50 U.S.C. Appx. 501 *et seq.*
   e. DFAS is the retired pay center for Army, Navy, Air Force, Marine Corps (and reserve components,

also Air and Army National Guard); separate pay centers for retirees of Coast Guard, Public Health Service, NOAA.

f. Four methods for division of retired pay (from active duty retirement) – full explanation in Attorney Guide at www.dfas.mil > Military Pay > Garnishment Military. Examples:

   i. Fixed dollar amount - $500 a month

   ii. Percentage – "Mary gets 10 percent of Tim's pension monthly" (use when retirement has occurred and all numbers are known)

   iii. Formula clause – "Mary is to receive 50 percent of Tim's final retired pay times 214 months of marriage during service divided by Tim's total service when he retires" (use when SM not yet retired)

   iv. Hypothetical - "Mary is to receive 50 percent of Tim's retired pay times 214 months of marriage during service divided by Tim's total service when he retires, with his retired pay calculated as if he had retired as a staff sergeant with 16 years of creditable service. His HIGH-3 pay amount is $3,400 monthly."

g. Reserve/Guard methods of division – same as above except that formula clause must be expressed in points, not months.

h. Disposable Retired Pay (DRP) = gross retired pay less any VA disability waiver and premium for SBP (for FS in this divorce). DRP is what retired pay center divides, regardless of what the order says. See also "Break a leg!" below.

i. COLAs – usually occur in January. Automatically included in all methods except set dollar amount, which does not allow COLAs to be included or added on.

j. The pension is not a "fund," so you cannot refer to the account balance or the part of the fund acquired during the marriage or at the date of divorce. It is a defined benefit, governmental program (not a "qualified plan") with monthly payments to the retiree. TSP is a fund (Thrift Savings Plan), similar to 401K plan. "What you see is what you get." Check the account balance to see what's there.
SBP – choose it or lose it. How the Survivor Benefit Plan (SBP) works, its cost and benefits

k. SBP – an annuity that continues stream of income to designated beneficiary when SM/retiree dies first; without it, the pensions stops upon death of the SM/retiree

l. Pays 55 percent of selected base amount if SM/retiree dies first

m. Former spouse coverage generally costs 6.5 percent of base amount, paid upon retirement by deduction from pension check

n. If FS dies first, then entire pension is restored to the retiree

o. Effectuate through court order sent to retired pay center; court can require SBP

p. Base amount may be any amount from full monthly retired pay (which is the default if order or clause is silent) down to $300/mo.
Snooze… and you lose. Learning the limitations and deadlines which apply

q. 10/10 Rule – direct pay from retired pay center requires 10 years of service concurrent with 10 years of marriage. This is an enforcement rule, not a rule as to pension division eligibility. FS is still eligible to claim pension division if less than 10/10.

r. Never take default judgment against SM/retiree; obtain proper service, state basis for jurisdiction (see jurisdiction rules above) to get valid direct-pay order honored by retired pay center.

s. SBP is suspended for former spouse if she/he remarries before age 55

t. SBP deadlines – when SM/retiree makes election, must be done within one year of divorce; when FS makes "deemed election," must be done within one year of order granting SBP coverage (use DD Form 2656-10)

u. SBP cannot be divided between present and former spouses

v. SGLI and Ridgway decision – when representing FS, do not rely solely on Servicemembers Group Life Insurance to secure benefits; 1981 Supreme Court decision says courts cannot enforce orders or agreements that require SGLI. *Ridgway v. Ridgway*, 454 U.S. 46 (1981).

w. 20/20/20 health care coverage for full medical benefits – 20 years' marriage, 20 years' service, overlap of 20 years. This means TRICARE and space-available care at military medical facilities. If 20/20/20 not met, use CHCBP (Continued Health Care Benefit Program).

4. "Break a leg!" Understanding how disability pay can reduce the divisible pension

a. Primary types of disability payments: military disability retired pay, VA disability compensation, Combat-Related Special Compensation (CRSC)

b. Court cannot divide VA disability compensation, and only small part of military disability retired pay is subject to pension division (although disability benefits ARE subject to consideration in support cases, in general).

c. When retiree has VA disability rating of less than 50 percent, election of VA payments means dollar-for-dollar reduction of pension; thus share for FS is reduced due to unilateral action of retiree.

d. Courts and agreements often employ indemnification language to guard against this, or else include clause providing for $1 a year modifiable alimony for the FS.

e. For details, read *Scouting the Terrain*, *The Servicemember's Strategy*, *The Spouse's Strategy* and *CRDP and CRSC – The Evil Twins* (SILENT PARTNERs) at www.nclamp.gov. ***FLR***

Mark Sullivan, a retired Army Reserve JAG colonel, practices family law in Raleigh, N.C. and is the author of The Military Divorce Handbook *(ABA May 2006), from which portions of this article are adapted. In a March 2011 Maryland court order, he was cited as a national expert in the area of military pension division. He works with attorneys nationwide as a consultant on military divorce issues, as an expert witness, and as an advisor in drafting military pension division orders. He can be reached at: at Law Offices of Mark E. Sullivan, P.A., 2626 Glenwood Ave., Ste. 195, Raleigh , N.C. 27608, (919) 832-8507; Email – mark.sullivan@ncfamilylaw.com.*

Family Law Attorneys Needed to Help Military Service Members and Veterans

By Norman E. Zoller

Early last year, the State Bar of Georgia launched a program, known as the Military Legal Assistance Program, designed to connect volunteer lawyers with military service members and veterans needing legal assistance. The legal services are being provided by lawyers either on a pro bono or on a reduced-fee basis as the client and the attorney agree.

Services are furnished on any civil matter according to the following eligibility criteria:

- Active duty service members having pre- or post deployment related legal matters.
- Veterans separated from the service with a service-connected disability who seek legal assistance directly related to their disability.
- Representation for the spouse of an active duty service member where the legal issue affects the well-being of the family as a whole and the interests of the spouse and service member are aligned.
- Eligible clients who physically reside in Georgia and require legal assistance where jurisdiction lies in the state or federal courts of Georgia.
- Legal assistance to National Guard members, Reservists, and military retirees, as attorney resources allow.
- Although the program does not provide direct assistance to individuals accused of criminal violations, it does help direct such individuals to public defenders, legal assistance offices, or local bar associations.

The results have been gratifying so far. Through July 2011, more than 400 service members and veterans have been connected with lawyers. Approximately half have been family law matters.

For those who know a service member or veteran who needs legal assistance, or **if you would like to be connected** with a service member or veteran with a family law matter through this program, please contact me at either (404) 527-8765 or normanz@gabar.org. And many thanks to all those attorneys who have helped thus far. *FLR*

Norman E. Zoller was appointed in October 1981, as the first clerk of court for the U.S. Court of Appeals for the 11th Circuit. He was later appointed in August 1983 as circuit executive for the 11th Judicial Circuit and so served until his retirement in February 2008. He also served 22 years in the Army including nearly seven years' active duty as a field artillery officer with two tours of duty in Vietnam and then 15 years as a judge advocate officer in the National Guard and Reserves. He currently serves as coordinating attorney for the Military Legal Assistance Program.

The State Bar has three offices to serve you.

HEADQUARTERS
104 Marietta St. NW
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800-334-6865
Fax 404-527-8717

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Tifton, GA 31794
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800-330-0446
Fax 229-382-7435

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Savannah, GA 31401-1225
912-239-9910
877-239-9910,
Fax 912-239-9970

Newly Required Income Withholding Order Form to be Used in All Child Support Cases

by Jill O. Radwin

In any child support case in which an income withholding order is applicable, the form of the notice accompanying the order must follow as mandated by Sections 466 of the Social Security Act and state law. See §19-6-31 et al.

The mandate applies regardless if it is a private case or a Division of Child Support Services (DCSS) action in this state. Specifically, sections 466(a)(1), (a)(8) and 466 (b)(6)(A)(ii) of the Social Security Act requires states to use the federally approved Income Withholding for Support form with Income Deduction Orders initially issued on or after Jan. 1, 1994.

During the past several years, the Federal Office of Child Support Enforcement has periodically convened a group of employers, members of the judiciary, and state and federal child support representatives to discuss items that could be addressed to improve the withholding process and the form, itself. As a result, the Office of Management and Budget released a revised "federal income withholding for support (IWO)" form on May 31, 2011. Within the instructions, there is the requirement that this specific OMB approved form must be the one used. If not, the revised Social Security Acts sets forth repercussions.

The new form helps to enforce Georgia and federal law, both of which require that IDO payments be paid through a central agency—in Georgia, it is called the Family Support Registry. OCGA §19-6-33.1. Again, this applies to both DCSS and private cases. The new form provides that if an IDO, issued on or after May 31, 2011, does not direct payment to the state's Family Support Registry (O.C.G.A §19-6-33.1) then the employer should reject the order and return to the sender immediately. However, there seems to be a grace period for the form itself. The federal transmittal (AT-11-05) from the Federal Office of Child Support Enforcement does allow that if the employer receives a document to withhold income that is not issued on the OMB-approved form as required by federal law, then the employer must reject the document and return to the sender effective May 31, 2012, a year after the issuance of the revised form. Further, if an order was issued and processed prior to May 31, 2011, and is a modification or presents a problem for the employer because it is not on the revised form, then the employer should contact the sender to request a revised OMB-approved form. In the meantime, the employer should continue using the former form until a revised one is received.

The revised form and instructions are as follows:

- IDO Form: http://www.acf.hhs.gov/programs/cse/pol/AT/2011/at-11-05a.pdf
- Instructions: http://www.acf.hhs.gov/programs/cse/pol/AT/2011/at-11-05b.pdf
- Q & A: http://www.acf.hhs.gov/programs/cse/pol/AT/2011/at-11-05c.pdf

Also, thank you to the State's Division of Child Support Services, Deborah Johnson of Atlanta Legal Aid, and my AOC Child Support Collaborative staff for their contributions to this article. *FLR*

Jill O. Radwin is the child support commission staff attorney and the manager of the Child Support Collaborative Project, an ongoing project between her agency, the Administrative Office of the Courts and Division of Child Support Services, jill.radwin@gaaoc.us.

INCOME WITHHOLDING FOR SUPPORT

☐ **ORIGINAL INCOME WITHHOLDING ORDER/NOTICE FOR SUPPORT (IWO)**
☐ **AMENDED IWO**
☐ **ONE-TIME ORDER/NOTICE FOR LUMP SUM PAYMENT**
☐ **TERMINATION of IWO** **Date:** _____

☐ Child Support Enforcement (CSE) Agency ☐ Court ☐ Attorney ☐ Private Individual/Entity (Check One)

NOTE: This IWO must be regular on its face. Under certain circumstances you must reject this IWO and return it to the sender (see IWO instructions http://www.acf.hhs.gov/programs/cse/newhire/employer/publication/publication.htm - forms). If you receive this document from someone other than a State or Tribal CSE agency or a Court, a copy of the underlying order must be attached.

State/Tribe/Territory _____
City/County/Dist./Tribe _____
Private Individual/Entity _____

Remittance Identifier (include w/payment) _____
Order Identifier _____
CSE Agency Case Identifier _____

RE: _____

Employer/Income Withholder's Name _____

Employer/Income Withholder's Address _____

Employer/Income Withholder's FEIN _____

Employee/Obligor's Name (Last, First, Middle) _____

Employee/Obligor's Social Security Number _____

Custodial Party/Obligee's Name (Last, First, Middle) _____

Child(ren)'s Name(s) (Last, First, Middle) _____

Child(ren)'s Birth Date(s) _____

As an addendum to this article, new information was obtained or clarified Aug. 3 and 4, 2011 at an "Employers' Symposium" held in Atlanta by the Federal Office of Child Support Enforcement. The form which is called "Income Withholding for Support" has a possible subtitle as, "Original Income Withholding Order/Notice for Support (IWO)." For our purposes here in Georgia, practitioners should use the form as a **notice** rather than consider it as an order which would require a judge's signature and would be filed in the court clerk's office despite containing a Social Security number. In other words, this new federal form should be used to fulfill the requirements of O.C.G.A .§19-6-33. The notice should not be filed with the court; to do so violates Georgia law (O.C.G.A. §10-1-393.8). Instead, the new form should be sent to the obligor's employer, together with an Income Deduction Order properly issued under O.C.G.A. §19-6-32.

Making Every Mediation Count

by Andy Flink

With every domestic case I mediate I believe that there is always room for progress regardless of where in the process the mediation occurs. Many times cases are ready to settle but sometimes they are not. If this is an initial mediation in the case then it can be a great first step just getting the parties together in the same place.

Since I don't know all of the dynamics and facts pertaining to the case before I begin (typically in court ordered mediations) I don't place expectations on an outcome. My first job is to make sure the parties become comfortable with me. I need to know what they want to accomplish and I have to establish trust as they tell me their story. I'm not there to discuss who has a greater advantage or more leverage. I am there to help the parties move through the very difficult process known as divorce.

While I never thought I would say this at the time, fortunately I have been through my own divorce with children. Clients seem to identify with that. I have never encountered anyone in a domestic mediation that was happy to be there. Since the climate of the room is always somewhat "difficult" creating a less threatening environment is important. Your mediator needs to stay focused 100 percent of the time to maintain this. We want to get people talking and communicating. Sometimes we try to reach accord on smaller items because it doesn't always make sense to solve the big issues first. I'll try to outline where parties agree so that each side can see some progress. It doesn't matter if it happens through caucus or joint session. Good mediators know when people need to be where.

The process of mediation and the session itself should always be viewed as an opportunity for progress. Even if you go into mediation knowing nothing is going to happen, a great mediator will surprise you and be creative enough to achieve movement. Making the session count and utilizing your hours constructively should always be their goal. Perhaps we reach settlement, perhaps not. Yet maybe this session is what got your case moving in the right direction creating that initial catalyst for settlement.

I never know if and when a case will settle. Sometimes I don't believe there is a chance it ever could and it does… that day. In one particular case I began to believe that there was no chance of settlement since the parties insisted on meeting together but argued every time they did. Realizing this is how they preferred to communicate I stayed with them knowing that this was how they would settle. Eventually they argued their way to settlement.

Everyone's time is valuable. No mediation session should ever be a waste of it. ***FLR***

Andy Flink is a contributing author on post divorce and trained mediator and arbitrator. He is familiar with the aspects of divorce from both a personal and professional perspective. He is experienced in both business and divorce cases, and has an understanding of cases with and without attorneys. Flink is founder of Flink Consulting, LLC, a full service organization specializing in business and domestic mediation, arbitration and consulting. At One Mediation, Andy serves as a mediator and arbitrator who specializes in divorce and separation matters and has a specific expertise in family-owned businesses. He is a registered mediator with the state of Georgia in both civil and domestic matters and a registered arbitrator.

Same-Sex Marriage: Important Issues to Consider For Your Clients

by Marty and Sue Varon

New York's passage of the law allowing same sex marriages (joining Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, and Washington DC) prompted significant discussion and reporting of many concerns:

- John Mayoue provided us with an excellent update at the Family Law Institute in late May
- Randy Kessler July 26, 2011 posting on Linked-In: "Gay Marriage Issues are everywhere, not just NY"
- *Wall Street Journal* article – July 9, 2011: "Headaches for Same-Sex Couples"
- *New York Times* article-June 11, 2011: "From I.R.S. to Gay Couples, Headaches and Expenses"
- *USA Today* article-July 21, 2011: "Legal gay marriage doesn't end money headaches"
- MSN Money Market Watch-July article: "Giant tax headaches for gay couples"

What is all the commotion about? Even in a state that gives recognition to same-sex marriages, the Federal government, under the Defense of Marriage Act of 1996 (DOMA) does not. Some important tax issues to be cognizant of include:

Income Taxes

Same-sex couples will not be permitted to file joint income tax returns for federal tax purposes (favorable tax rates). Many state's individual tax returns begin with the federal adjusted gross income or taxable income. Thus, if the state recognizes the same-sex marriage and the couple wants to file a joint state income tax return, they will have file single federal income tax returns, and then prepare a "dummy" joint federal tax return to help them prepare a joint state income tax return.

Estate Taxes

There is an unlimited marital deduction for estate tax purposes. Husband may leave wife millions or even billions of dollars at death without generating an estate tax. However, the federal government does not recognize the marital deduction for same-sex couples. The estate tax asset exemption is due to revert back to $1,000,000 in 2013, but this may be revisited prior to then.

Social Security Benefits

Social security benefits are governed by federal law; therefore a same-sex spouse is not entitled to a deceased's spouse's benefits. A same-sex spouse who divorces his partner in a state that recognizes same-sex marriages will not be entitled to 50 percent of his partner's social security benefits even if they were married for over ten years.

State-Based Rights

With respect to states that recognize same-sex marriages, many rights that are prevalent under state law will be recognized in those states. However, what if the couple is traveling or moves to a state that does not recognize same-sex marriages? What impact will this have on rights regarding hospital visitation, medical treatment in cases of emergencies, inheritance rights in case of dying intestate, worker's compensation benefits, health insurance, and pension benefits. What about alimony awards from states that recognize same-sex marriages?

Planning

For everyone with same-sex partner clients, it is imperative to have detailed, thought out agreements in place. These include (but are not limited to) post-separation agreements, wills, trusts, and health care powers of attorney. Even if the agreement does not survive state law in a new domiciled state, an agreement that clearly outlines the parties' intent and wishes is preferable to no agreement.

Up until recently some of the liberal northeastern states (Vermont, New Hampshire, Massachusetts) were the only states recognizing same-sex marriages. However, with New York in the fold, how long will it be before other states follow and recognize same-sex marriages? When will it become law in Georgia, and when will it be recognized by the federal government? Until then, attorneys should consider how to draft agreements for clients who may move from a state that recognizes same-sex marriage to a state that does not, or vice-versa, It is more critical than ever to reflect upon issues concerning tax, wills, trust and estates, health care directives, and pre- and postnuptial agreements when working with same-sex couples. *FLR*

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

The Specific Deviations played on July 27 at a reception for the summer conference of the Georgia superior court judges in Athens. The band was fresh from an appearance at the Family Law Institute at Amelia Island in May, and the Athens performance marks the third time that the band has performed for the judges' events. Band members include Roy Finch on guitar and lead vocals, Vic Valmus on lead guitar and vocals, Hannibal Heredia on bass and backing vocals, Steve Steele on keyboards, and Jeremy Abernathy on drums. John Lyndon, the band's manager, receives 10 percent of the proceeds (so far, there haven't been any) and has the extra perk of buying beer for the band.

Photo by Randy Kessler

Holiday Parenting Time Planning

by Eric A. Ballinger

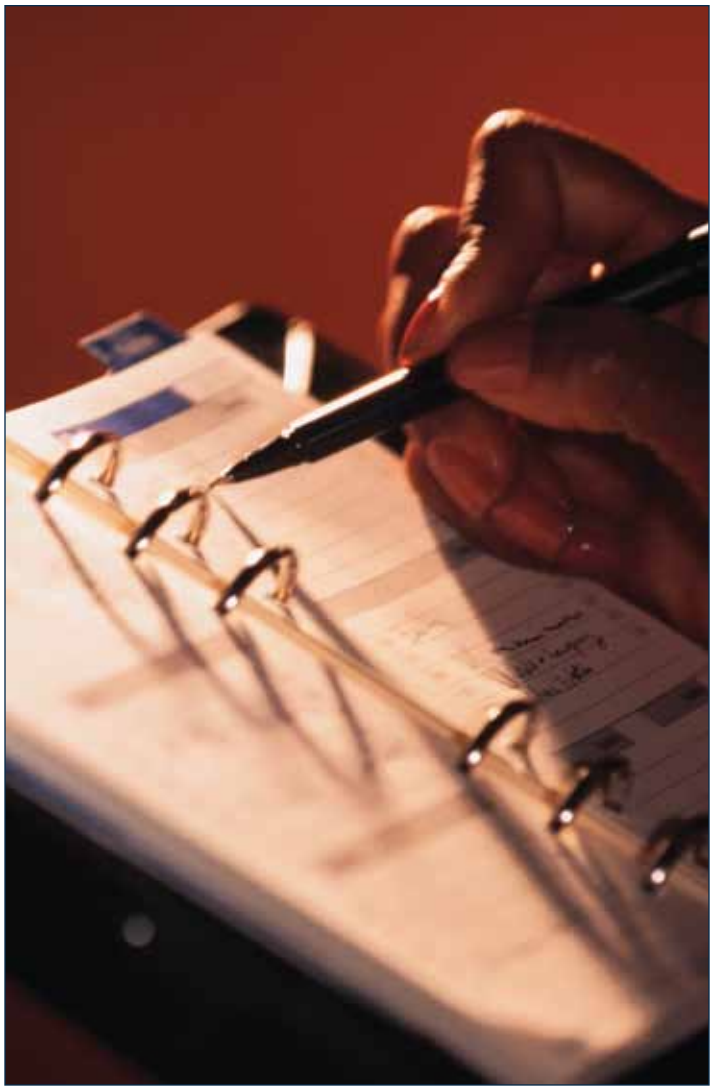
One of the most significant parts of any parenting plan for divorcing or divorced parents is creating a parenting plan for the holidays. While often attorneys and judges use the term, "standard visitation" there should be nothing standard about setting up a holiday parenting plan. The term, "standard visitation" is really an attempt to impose a cookie cutter solution to very individualized situation. Each family brings to the table its own mix of traditions and circumstances and each family should have a well thought out plan as to how they and their children are going to spend the holidays.

During any every settlement conference and mediation a great portion of the time is devoted to putting together the parenting plan for the holidays. While the school breaks and summer get a great deal of attention, the two main holidays that fall into contention are Thanksgiving and Christmas. The children's time at these two holidays is more precious than any real property and more contested. This subject can be a great deal of stress for the parties and their attorneys while trying to hammer out a resolution.

Preparation is essential for reaching plan for the holidays that best suits the children's and family's needs. Having clear objectives and being able to articulate why those objectives are in the best interest of the children can allow for taking an strong positions in negotiations and mediations. Further, the party able to articulate those objectives and rationales to the judge is most likely to see their holiday plans as an outcome at trial and avoid the trap of, "standard visitation".

Below are some considerations to think about in putting a holiday parenting plan.

- Think of the Children First: While it seems a restatement of the obvious, the first place to plan a holiday parenting plan is to think of what the children enjoy. While the objective of the holiday parenting plan is to allow each of the parents to spend time with the children during the holiday, put thought into what the children enjoy doing. While children cherish the time they spend with their families, children really enjoy being with other children. This especially holds true as children get older and as children begin to pull away from their parents and want to spend time with their own friends They enjoy getting to see all of their relatives, but they do not enjoy being pulled from one event to the next for the sake of dividing their time. On the other hand the children may be looking forward to that special trip with the other parent. Remember that this is their holiday time.
- Think of the Other Parent: While this seems counterintuitive a little consideration of the other parent's thoughts about the holidays can go a long way. Remember that children have connections with extended family from both sides and the holidays are the time of year those connections are renewed. Think about their family traditions and how they can fit into your plan for the holidays. It is also important to minimize the number of stressful interactions with the other parent. Reducing contacts can reduce friction and can prevent brining up hurtful memories.
- Think of Your Own Limitations: While the holidays are filled with time off from school for children, the same is not always true for their parents. For many, the holidays and year end are the busiest time of year at work and are unable to spend that additional; time with the children. Understand your own stress at the holidays. For some, the holidays are already a quagmire of stress without adding the strains of a dividing family at home. By understanding your own limits you can plan your time with the children over the holidays that will deliver to them the best holiday experience.



- Think Logistically: With the traveling back and forth between the parents, there are a lot more considerations than go into holiday planning. Understand that children do not like being separated from their new gifts at Christmas time, meaning more time packing, more time hauling luggage and more space for things. Also, the holidays are the busiest travel times of the year. Traffic on the roads may be heavier at time, meaning allowing more time driving between the exchanges. Many of the businesses that parents rely as exchange locations are closed on the holidays. In planning travel by air, the heavy holiday traffic added to possibility of winter weather need to be a part of any travel calculations.
- Think Creatively: With the change in the structure that takes place in a dividing family, this is the time to get creative. Old traditions will not remain intact as the family and the family's resources are pulled apart. While most people are focused on the actual holiday and the old family traditions surrounding the holiday, however the reality is that these times are going to be shared between two households. Generally, children enjoy a celebration, no matter when or where it is. These holidays come with significant time from school and alternative celebrations can be planned. Further, do not be limited to the actual breaks from school. In addition, plan family gatherings for the weekends leading up to the holidays, or at other times of year. With some planning new traditions can be created that will enrich the entire holiday experience.
- Think Flexibly: No matter how tight the plan for the holidays is, things can fall apart unexpectedly. Remember the plan that fits for this year may not work out the same for next year or the years to come. School calendars change, weather turns and any multitude of things can come up that can and will alter plans around the holidays. Building these contingencies into a parenting plan can best help to deal the myriad of contingencies that can come up. This is especially important when dealing with a parent who will insist on rigidly following the letter of the parenting plan. The best way to be flexible is to plan for change and contingencies.

While these considerations are by no means exhaustive, they should be incorporated into making a comprehensive plan for both parents to spend time with the children at the holidays. With an effective parenting plan for the holidays, parents can reduce the level of tension and stress while insuring that the children enjoy the special time and can share happy memories in the future. *FLR*

Eric Ballinger can be reached at P.O. Box 450, Canton, GA 30169, (770) 479-2020 or eric@ballingerlaw.com.

Immigration Law Issues in Family Cases for Domestic Violence Survivors

What Family Law Attorneys Need to Know

by Vicky O. Kimbrell and Monica Khant

In most instances, the best help a family law attorney can provide to an immigrant survivor with status concerns is a referral to an immigration attorney. Immigration or status can be the most important issue for a client in a divorce, custody, or protective order case, and the most complex. As family law attorneys, we expect that we can help protect the victim's safety, security, child custody, and financial situation. In the immigration law area we should refer the client and remember to do no harm.[1]

What Georgia's Immigrant Community Looks Like

Georgia's immigrant population has exploded in the past decade. We have seen a 59.4 percent rise in our immigrant population from 2000-09. Today, 9.4 percent of Georgia's population is foreign born. Of that group, 34.5 percent are naturalized citizens and 25 percent are lawful permanent residents, leaving 40.5 percent with temporary legal status or undocumented. A large proportion of these immigrants are new to Georgia. Over 37 percent entered in the 1990s, 41.4 percent entered in 2000 or after. Almost 19 percent of Georgia children have one or more immigrant parents. Importantly, 83 percent of children with immigrant parents in Georgia are U.S. citizens.[2]

The Dangers of Domestic Violence and Potential Immigration Remedies

The 2010 Georgia Domestic Violence Fatality Review and the daily news remind us of the life threatening dangers of intimate partner violence. Five hundred and ninety eight victims have been killed in Georgia in the past five years as a result of domestic violence.[3] One in four women will be a victim of domestic violence during her life.[4] Immigrant victims are, if anything, more vulnerable than the general population. Because of cultural and language barriers they are less likely to reach out or receive protection. Helping an immigrant victim improve her status keeps her safe in several ways: It severs her dependence on the abuser, protects her from detention and deportation, and allows her essential economic security because she can secure legal employment. Improving the survivor's status can also improve her standing in a custody case. It can put her on a path to lawful permanent residency or citizenship. It can increase her access to public benefits and housing and can give her the ability to travel to and from the United States.

To secure these protections, the Violence Against Women Act[5] provides protection and relief from batterers who use status as another tool to control and terrorize victims.[6] Under VAWA, a survivor can file for:

- VAWA self petitions
- U visas
- T visas, and
- Battered spouse waivers

A VAWA Self-Petition is an application filed by the victim if she has been subject to battering or extreme cruelty during her marriage to a United States citizen or legal permanent resident. The immigrant spouse is often dependent on the abuser to apply for her status adjustment. A spouse who is the victim of abuse can file on her own without the sponsorship of the abuser. The victim must show that abuse occurred during the marriage, she entered into a good faith marriage to the abuser, she is a person of good moral character, and she would face extreme hardship if removed from the United States. It is important to note that an abused child can also qualify for VAWA relief if the abusive parent is a United States citizen or legal permanent resident. A VAWA self-petitioner must file within two yeas of the final divorce to qualify for relief.

A U visa allows a victim to apply for immigration relief if she has been a victim of a qualifying crime such as domestic violence, rape, incest, kidnapping, involuntary servitude, trafficking, and other crimes. The individual must have suffered substantial physical or mental abuse because of having been a victim of that crime and the victim must have information concerning that criminal activity. She must show that she has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the crime. Furthermore, the criminal activity must have violated the laws of the United States or occurred here.

To qualify for a T visa the petitioner must be victim of a severe form of trafficking in persons. The victim must be physically present in the United States because of the trafficking, assist in the investigation and prosecution of the traffickers, and show that she would suffer extreme hardship if forced to return to her home country. A severe form of trafficking in persons is the transportation of persons via force, fraud, or coercion for the purpose of sex trafficking and/or involuntary servitude, peonage, debt bondage, or slavery. If the victim is deemed eligible for the T visa, she can remain in the United States for up to four years, sponsor her spouse and children, and possibly apply for legal permanent residence in the future.

An additional form of relief from removal, which can be granted by an immigration Judge is VAWA cancellation of removal. This form of relief can be appropriate when a an abused spouse or child of a United States citizen or legal permanent resident is already in a respondent in an immigration court proceeding. As with any case in Immigration Court, this form of relief is complicated and the client should consult with an immigration attorney.

How VAWA Confidentiality Protects Victims

To keep the immigrant victim under the batterer's control and to keep her from seeking help, batterers often threaten to report the victim to the immigration authorities. The Department of Homeland Security has recognized this dynamic and has dealt with it under its confidentiality policies. DHS cannot disclose information except in a few limited circumstances and is barred from making deportation decisions based solely upon information provided by abusers or family members of abusers.[7] In addition, enforcement actions may not take place at shelters, rape crisis centers, supervised visitation centers, family justice centers, victim services programs, community based organizations, schools, places of worship funerals, or at religious activities. No enforcement action should occur at any courthouse in connection with a protective order, child custody, civil or criminal case related to domestic violence, sexual assault, trafficking, or stalking. A victim should not be afraid to litigate in court or seek help from social services because, at least under the law, she is better protected when seeking help at the shelter or the courthouse than at any other time.

Immigration and Status Issues in Family Law Cases

In Georgia, a victim's immigration status is not relevant to establish jurisdiction in family law cases. The Supreme Court of Georgia has held unanimously that citizenship is not required to file for divorce in Georgia. Padron v. Padron, 281 Ga. 646 (2007) (A person's immigration status does not, as a matter of law, preclude that person from establishing residency for purposes of obtaining a dissolution of marriage.) The Court reached the same result in an adoption case in In Re D.J.F.M., 284 Ga. 420, 423 (2007) (Georgia has the innate ability to protect children, despite their immigration status.)

In custody cases, jurisdiction is determined by the Uniform Child Custody Jurisdiction and Enforcement Act[8] or the Federal Parental Kidnapping Prevent Act[9], neither of which include status or citizenship as an element to determine jurisdiction. The central factor to determine jurisdiction for custody is the home state of the child.

Nor is status or citizenship a factor to determine the best interest of the child. The standard that the court must use to decide custody where the court has made a finding of family violence, is that the judge "shall consider

as primary, the safety of the child and victim of family violence."[10] Typically, batterers argue that the immigrant parent may be whisked off by immigration authorities at any moment and, therefore it is not in the best interest of the child to be in the custody of the immigrant parent.[11] In reality, filing for protection under VAWA gives the victim protection from removal and the batterer's violence is a much greater threat to the safety and well-being of children than the manipulative threat of deportation.[12]

The Impact of Divorce and Family Law Actions on Immigrant Survivors

Because divorce can adversely impact the legal rights of survivors, they need to understand the effect of divorce on their immigration rights. To qualify for a VAWA self-petition action, the survivor must file within two years of the final divorce order. Divorce will end the legal immigration status of spouses and children of visa holders, including students or persons with legal work visas. Divorce also cuts off access to lawful permanent residency for spouses and children of people seeking lawful permanent residence status for employment and family relationship based status requests, for asylees, and for cancellation of removal applicants.

Batterers sometimes seek an annulment from the immigrant spouse, rather than a divorce using religious arguments. An annulment is hardly ever appropriate for immigrant victims because it can lead to a claim of marriage fraud, which will permanently bar an approval of any visa petition and is grounds for deportation.

While the issuance of a family violence act protective order will have no effect on the immigration status of the abuser, the violation of a protective order is a deportable offense. Violations of "the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable."[13] The threat of deportation is another reason that mutual restraining orders against the victim are dangerous. Georgia law protects victims against mutual restraining orders by erecting several procedural protections that must insisted upon by counsel.[14] Most importantly, a mutual protective order cannot be entered unless the respondent files within three business days prior to the hearing and alleges specific findings of violence committed by the Petitioner.[15]

In family law actions filed for immigrants, the attorney can help the victim protect her status by obtaining the documents that she may need for her immigration case in discovery or by simply making a point to advise her to safeguard her documents before the abuser takes or destroys them. Important documents can include passports, identification documents, copies of any immigration case documents previously filed on her or the children's behalf, birth certificates, love letters, family photos, tax documents, bank documents, and all the usual documents needed in discovery in a family law case.

Because family law attorneys can help or harm immigrant survivors in their immigration cases these vulnerable clients require additional layer of counsel and care. Ensuring that survivors have knowledge about their options and their rights in both their family law and immigration cases will ultimately insure that all victims and their communities, which include all of us, are safer. ***FLR***

Vicky Ogawa Kimbrell, Georgia Legal Services Program

Monica Khant, Georgia Asylum Immigrant Network

(Endnotes)

1 The first referral for a domestic violence victim should be to the Georgia DV Hotline for safety planning assistance at (800) 334-2836. See, ABA Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking In Civil Protection Order cases at http://www.americanbar.org/content/dam/aba/ migrated/domviol/docs/StandardsofPracticeCommentary 82407.authcheckdam.pdf.

2 Immigrants in Georgia are from: Mexico - 29 percent; Central America - 9.2 percent; Africa - 8.2 percent; Asia - (Not separately listed 8.2); South America – 6.6 percent; India - 5.9 percent; Europe – 5.4 percent; Caribbean 5.2 percent; Eastern Europe – 4.6 percent; Korean 4.1 percent; Jamaica 3.9 percent; Vietnam 3.5 percent; China/Taiwan – 3.3 percent.

3 Fatalityreview.org

4 Tjaden, Patricia & Thoennes, Nancy. National Institute of Justice and the Centers of Disease Control and Prevention, "Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey," (2000); See also, http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf

5 Title IV, sec. 40001-40703 of the Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355 , and signed as Pub.L. 103-322, and was reauthorized in 2000 and 2005.

6 Much of the immigration law information included here is based on information provided by Legal Momentum at www.legalmomentum.org by Lesley E. Orloff.

7 Interim Guidance Related to Officer Procedures Following Enactment of VAWA 2005, U.S. Immigration Customs and Enforcement Memorandum, January 27, 2007.

8 O.C.G.A. § 19-9-41, and following.

9 28 U.S.C. § 1738A

10 O .C.G.A. § 19-9-3(a)(4)(A)-(D).

11 Angie Junck, Sally Kinoshita, and Katherine Brady, Immigration Benchbook: For Juvenile and Family Court Judges (Immigrant Legal Resource Center), July 2010, at 67-68. "Just because a person is undocumented does not mean that he or she faces imminent deportation from the United States or even is very likely ever to be deported. Millions of undocumented persons have lived for decades in the United States, often acquiring lawful immigration status later in life."

12 Bancroft, Lundy, and Silverman, Jay, The Batterer as Parent, Sage Publications, 2002.

13 8 U.S.C. § 1227(a)(2)(E).

14 O.C.G.A. 19-13-4(a).

15 Zorza, Joan, What is Wrong with Mutual Orders of Protection, Domestic Violence Report,1999 Civic Research Institute, Inc., at http://www.scvan.org/mutual_orders.html.

Mulling Over Miller:

The Impact of a Finding of Personal Goodwill on the Scope of the Marital Estate and on a Potential Alimony Award When One Spouse Owns a Professional Practice in a Georgia Divorce

by Sarah McCormack

Until the recent Georgia Supreme Court decision of *Miller v. Miller*, 288 Ga. 274 (2010), Georgia remained one of a handful of states that had not yet addressed, in any form or fashion, whether the value of personal goodwill in a professional practice was properly includible in the scope of a marital estate to be divided upon divorce. With the benefit of that recent decision, however, it appears that Georgia intends to join the majority of states that hold that personal, or individual, goodwill, is a non-marital asset that is not subject to equitable division. See *Miller*, 288 Ga. at 278 ("[W]e resolve this contention by assuming for purposes of this appeal only that individual goodwill does not constitute marital property in Georgia.").

As most attorneys who have dealt with the issue of valuation of a closely held corporation or professional practice know, personal goodwill consists of customer loyalty and patronage that derives from a particular individual's personality and unique skill set. For example, a doctor may trace a certain level of his patient volume to his warm bedside manner, or an attorney may accumulate a particular client base because of his reputation as a bulldog in the courtroom. Because the concept of personal goodwill is so inseparable from the person himself or herself, it is considered non-marketable (stated differently, illiquid / incapable of being sold for a certain dollar value) and therefore, under the majority rule, is excluded from the marital estate – presumably because the professional practice owner could not simply sell his or her personal goodwill so as to give a soon-to-be-ex-spouse his or her share.

If this type of goodwill is not considered an asset, but rather a kind of personality-driven future income stream, it can still be factored into a determination of spousal support. What was not dealt with in *Miller*, however, and what will be interesting to see on a going-forward basis, is whether spouses married to a professional practice owner in Georgia will be considered to possess an enhanced alimony claim. For example, if a doctor pays himself $300,000 every year, but also has the benefit of additional business income attributable to personal goodwill, should his wife have a superior alimony claim in comparison to a similarly situated wife married to a W-2 employee making $300,000? The proper answer appears to be, "yes," especially where the alimony-seeking spouse had his or her marital lifestyle elevated, all or in part, based upon the personal goodwill value (and resulting income stream) related to that professional practice. At least two of the cases cited by the *Miller* decision support this concept. See *Steneken v. Steneken*, 843 A.2d 344, 352 (2004) (noting that "excess earnings" can be considered a source of income for the purposes of alimony); *May v. May*, 589 S.E.2d 536, 547 (2003) ("It is not a divisible asset. It is more properly considered as the individual's earning capacity that may affect property division and alimony.").

Whether or not the Supreme Court of Georgia extends its *Miller* personal goodwill holding beyond the scope of "this appeal only," and whether or not they find such goodwill to augment a divorcing spouse's alimony claim beyond what would otherwise be the case, *Miller* does stand for certain clear propositions. Under *Miller*, a trial court's valuation of a professional practice is a fact-finding exercise, and any value that results from that exercise will be upheld so long as it is based upon competent evidence and one or more sound valuation methods that are generally acceptable in the financial community. The Supreme Court of Georgia emphasized that valuation of these types of businesses is more of an art than a science, and that even the price found in a buy-sell agreement will not necessarily be binding upon the trial court. Finally, the opinion indicates that, while it would be impermissible double-dipping to include personal goodwill in a business value (that is then divided as part of equitable division) and in the determination of the level of alimony, this "double-dip" does not exist with respect to child support. A professional practitioner's salary as well as his or her additional business income may therefore be included when determining the proper amount of child support under the Georgia child support guidelines.

Suffice it to say that, more than anything else, *Miller* excites Georgia family law practitioners because of its promise of additional development of appellate law with respect to professional practices. Where we go from here remains to be seen . . . . ***FLR***

Sarah McCormack grew up in Atlanta, before receiving her undergraduate degree at the University of Virginia in 1997 and her law degree at the University of North Carolina, Chapel Hill in 2001. After an initial two years of family law / general civil practice work at McKenna, Long & Aldridge, LLP, she has spent the subsequent eight years practicing family law exclusively with Kessler & Solomiany LLC.

Divorcing Baby Boomers: Problem Children in the Playpen

by Paula G. Kirby

Divorce clients in the over-50 age bracket are increasing in substantial numbers. The economy undoubtedly has been a significant factor. High-earning baby boomer employees have been downsized or terminated in record numbers, residential, commercial and retirement values have declined and created incredible stress, and couples in this age bracket face an empty nest, which in turn forces the re-evaluation of a marital relationship. As family law attorneys are discovering, the increased use of social networking websites, including Facebook, OurTime.com, SeniorFriendFinder.com, SilverSeniors.com, AgeMatch.com, PrimeSeniors.com, Classmates.com, Twitter and a multitude of other international dating sites, plays a participating role as well. Instantaneous access to friends-gone-by, as well as introductions to new acquaintances worldwide, increase the reach of spouses who feel neglected or yearn for a different way of life.

Increasingly, family law attorneys have to assume the role of counselor when presented with an over-50 age client. While this *always* has been true in divorce cases, aging spouses today are particularly restless, angry and fearful. What should you say to this spouse? If it is a long-term marriage, caution, and perhaps good legal practice, suggest you inquire whether the couple sought marital counseling or talked with friends and family. Reconciliations are not uncommon when an older couple separates and begins the process of unwinding a long-term marriage, but discovers it may be best to maintain the status quo. As a divorce proceeds, the family law attorney may have to refocus a mid-life client's perspective on life after the divorce. For many older spouses, both men and women, this life will not be the same, financially or socially. Others, however, will thrive.

The standard intake sheet or client questionnaire may need to be revised or expanded to address needs specific for the initial consultation with an over-50-year-old client. Consider these inquiries in addition to usual questions regarding income, assets and debts: Is it a second or third marriage for one or both spouses? Are there children of this marriage or previous marriages? If so, are they all adult children or minors? The failure rate increases with each successive marriage, and blended family discord does not end when children reach the age of majority. If your client is in a blended family arrangement, what is the health of each spouse? Generally speaking, children remain loyal to their natural parents. A recently surfacing health issue may have invoked the loyalty of one spouse's adult children, who may view this event as a time in which to insert themselves into the marriage. This kind of unexpected intrusion, even though well-meaning, can challenge even the most tested blended family relationships.

Family law attorneys know that they must evaluate all income, assets and debts in each divorce case, but with clients who are in a second or third marriage, they also should inquire about disposition of assets from a first, second or third marriage, so called "lingering assets," including: defined benefit or contribution plans, IRAs, SEPs, insurance life insurance trusts (ILITs), annuities or life insurance policies, stock options, military benefits or survivor benefits, income tax liabilities or loss carry-forwards, estate planning documents, business ownership interests and retirement plans. Are there any unresolved issues arising out of a previous marriage? Is there a premarital agreement for your client's marriage, or did the couple sign documents that may be considered a valid postnuptial agreement? Were the agreements signed in a different state? If so, which state's law applies? Are there any indemnifications from a prior divorce that are or may become an issue? Was there any joint, common or community property from a previous marriage that is currently owned as tenants-in-common with an ex-spouse?

Many family law attorneys have been startled within the past couple of years when an older spouse appears for a divorce consultation and seems to have a good job or substantial assets, only to later acknowledge that the assets are encumbered or pledged to a prior spouse. Bankruptcies have added to the difficulties encountered with clients of all ages, but with increasing frequency, such divorces create incredibly sad circumstances for older clients. Downsizing

and layoffs that lead to financial difficulty are cited frequently as playing a part in the increasing percentage of divorcing spouses in the over-50 age group.

Spouses losing jobs encounter significant difficulty finding new jobs, at all economic levels and ages, and even when they do find work, there may be a significant income differential. The reasons are varied. Some employers have found value in hiring downsized or laid-off employees with substantial experience, but for less pay. Anecdotally, employers may be reluctant to hire baby boomer workers, who historically have been higher earners and are approaching retirement age. Despite the risk of age discrimination claims, this trend, which has become more acceptable in the current economic climate, may become defensible in many instances due to decreasing revenues and profits. Similarly, spouses who lack an employment history, because they have not worked recently or stayed home to raise a family, require not only retraining, but retraining in an occupation that welcomes older workers. In our faltering economy, these spouses face a difficult job search because many employers necessarily have reduced training costs.

Parties with significant health issues may present unique challenges to a family law attorney. In a divorce consultation, particularly one involving a older individual, if the client suggests that he or she *needs* a divorce to obtain Medicaid assistance, is the client really having marital difficulties, or has he or she been misinformed regarding qualification for such health care benefits? Do they need an elder law attorney more than a family law attorney?

All of the foregoing issues make the family law attorney's job even more difficult. To combat these problems, find elder law attorneys (special needs and needs-based assistance planning), estate planning attorneys, probate attorneys (for guardianship/conservatorship issues during marriage), business litigators, and tax and transactional attorneys with whom you can either co-counsel, if appropriate, or consult for advice. Not only will these attorneys be able to provide advice to your clients, but naturally may provide referrals to you when you develop a working relationship with them.

Revise or supplement your client intake sheet for older clients or clients in a blended marriage to address the following:

1. Number of prior marriages.
2. Number of children, their ages and their relationship to each spouse.
3. Allocation of income, debts and property from previous marriages (*i.e.*, did the spouse provide a life insurance policy for an ex-spouse or children from a previous marriage).
4. Is there an ownership interest in a business entity or stock options shared or pledged to an ex-spouse?
5. Is real estate co-owned with a former spouse? If so, how is title held?
6. Are there health issues for either spouse, and if so, what is the precise diagnosis and prognosis? Are there mental health issues to be considered? Is health care insurance an issue with respect to coverage or costs? Does the spouse have special needs that may require planning for eligibility purposes?
7. Did the spouse execute a premarital or postnuptial agreement, and if so, what state's law governs interpretation of the document?
8. What do current estate planning documents, financial and health care powers of attorney and beneficiary designations provide?

These issues and others make divorcing baby boomers the problem children in the family law attorney's playpen. Fifty and 60-year-olds are independent-minded, and prior to the recent economic decline, fueled by the plunge in the housing market and unemployment situation, are accustomed to getting their way with hard work and/or good fortune. They also are problem solvers. Point out the problems, provide your best advice and refocus them in the right direction. They will survive. ***FLR***

Paula Kirby practices law in the metropolitan Phoenix, Ariz. area, and her practice focuses on family law, probate and business litigation for small and family-owned businesses. She served as the 2011 co-chair of the ABA Family Law Section's Vulnerable Adults and Special Needs Families Committee and is the section's liaison to the ABA Commission on Law and Aging. Paula is licensed in Arizona and California and can be reached at PAULA G. KIRBY, PLC, 8585 E. Hartford Drive, Ste. 800, Scottsdale, AZ 85255. 480-429-0900. Email: paula@paulakirbylaw.com; inkedin/in/paulakirby; twitter.com/azdivorceatty.

A Few Words from John Lyndon, 2011 Tuggle Award Recipient

by John Lyndon

This year at the Family Law Institute I was honored to receive the Joseph T. Tuggle, Jr. Award for Professionalism. After the award was announced by Judge Lawton Stephens and as I was walking to the podium, those of you in attendance saw a congratulatory video from Chuck Leavell being played. A number of folks have asked me how this came about. As I was in a state of shock about the whole thing, it took me a while to put the pieces together.

Chuck Leavell is one the world's greatest rock and roll piano players and has been a close friend of my family since he joined the Allman Brothers in 1972. He has been a member of the Rolling Stones since 1983 and has toured with both Eric Clapton and George Harrison.

When it was decided that I was to receive the award, Regina Quick contacted my wife Tricia and suggested that Tricia see if Chuck might put something together to commemorate the occasion. Tricia called my brother Skoots, who works with Chuck, and he readily agreed. This was of course all unbeknownst to me.

Chuck, who was in New York recording John Mayer's new album at Electric Lady Studios (the studio Jimi Hendrix built), wanted to know something about the significance of the award. Jonathan Tuggle (son of Joseph Tuggle) contacted his brother Michael to put it in terms a musician might understand. This is what he wrote, which was forwarded to Chuck:

Every year, the Family Law Section of the State Bar of Georgia gives one deserving lawyer the Joseph T. Tuggle Professionalism Award in recognition of their integrity and how they do the job. Musicians have what they call a "player's player." Joe Tuggle was a lawyer's lawyer. Think of the best musicians and you're talking about guys who can play anything and with anybody. The guys who are always on time, respect everyone they ever worked with, work to be the best player on the stage and always give you everything they've got no matter how big the gig is. That's the kind of lawyer Joe Tuggle was. Client or fellow attorney, if you had a question, he was the go to guy for the answer. He treated everyone with the utmost courtesy and was the ultimate gentleman. Day or night, it didn't matter what you needed, if you were a friend, or even a friend of a friend, he'd be there for you. Once drove three hours in the middle of the night to take a client some guitar string they couldn't get where they were. That's the kind of lawyer Joe Tuggle was and that's the kind of person the State Bar chooses to receive the award with his name on it.

(L-R) John Lyndon, Randy Kessler and Hon. Stephen Lawton after the Tuggle Award presentation at the Family Law Institute.

(photo by Steve Harper)

So Chuck put the video together, which included a "little ditty" he wrote for me. But my favorite part was his comment, "A Lyndon getting an award! I thought there might be a reward for getting the Lyndon!"

To view the video, go to youtube.com and search for Tuggle Award. The video should pop up.

I can't end this without thanking a few people. First, the fellow members of the executive committee of the Family Law Section with whom I have had the privilege of serving for the past 11 years and from whom I have learned so much. They have worked tirelessly to improve the section and the fact the Institute now has more than 500 attendees speaks volumes. My paralegals Terri Mobley and Ambrey Mize, who do their best to keep me on track. As we all know, we are no better than our staffs. And last, my wife Tricia, who runs our law office and keeps us all squared away. We recently celebrated not only 42 years of marriage, but 35 years of working together! As a former client of ours so appropriately put it when she was referring a friend to us, "Just remember, Tricia is the brains of the outfit."

Thank you all. I knew Joe Tuggle and am truly humbled to be the recipient of the award named in his honor. *FLR*

Til Death Do Us Part . . .Proceed with Caution

By Laura Kennedy Bonander

Georgia law does not adequately protect spouses in the case of the death of a spouse. In Georgia, it is perfectly legal to disinherit your spouse, even a long-term, stay-at-home spouse and your minor children without any warning to the unsuspecting spouse.[1] Georgia is the only state in the country where it is still legal to disinherit your spouse. The other 49 states agree that one spouse cannot completely disinherit another spouse and, if a deceased spouse has a will that attempts to do so, a surviving spouse may choose to bypass the will and take an "elective share" of the deceased spouse's estate. In Georgia a surviving spouse and minor children have very little protection if the deceased spouse has a valid will that disinherits them. The only protection in Georgia is something called year's support, which, as explained below, is wholly inadequate. As a matter of basic fairness to spouses, Georgia should adopt an elective share system as set out in Article II of the Uniform Probate Code, as amended in 2008.

Here is an example of how disinheritance in Georgia might unfold from the viewpoint of a woman named Sarah. Sarah met her husband Jack when she was in her early twenties. Jack and Sarah were married when Sarah was 25. Although Sarah worked early in their marriage, once she became pregnant, Jack and Sarah decided together that Sarah would stay home with the children. Three children and 20 years later, Jack dies. Sarah has not worked in 20 years and two of her three children are still minors. Unbeknownst to Sarah, Jack wrote a will in which he left his entire estate to his mistress. Sarah now has no income and no resources with which to move forward.

Jack and Sarah had some marital problems, but Sarah chose to stay in the marriage because she believed it was better for her children to be raised in a home with both parents. If Jack's will is valid, Sarah is out of luck. If Sarah had divorced Jack before he died, she would have received an equitable division of their marital property, child support and most likely alimony. If Jack died without a will, Sarah would be entitled to at least one-third of his estate and his children would have received the remainder of his estate. Only if you are the wife who has stuck by your husband through thick and thin, til death do us part, are you provided very little legal protection in the event of his death. Under Georgia law, it is these women and their children who face the most risk financially upon the deaths of their husbands. As a matter of public policy, this makes no sense.

I. Georgia Stands Alone.

A. Spouse Can Disinherit Spouse and Minor Children.

Most non-lawyers do not realize that in Georgia, a man or woman has the right to draft a will that leaves his or her spouse nothing.[2] In addition, a man or woman has the right to draft a will that leaves nothing to his or her minor children.[3] The statute states that a "testator, by will, may make any disposition of property that is not inconsistent with the laws or contrary to the public policy of the state and may give all the property to strangers, to the exclusion of the testator's spouse and descendants."[4] The only requirement for successfully disinheriting your spouse in Georgia is a valid will.

Under Georgia law, a will is valid if it is "in writing and . . . signed by the testator."[5] In addition, it must "be attested and subscribed in the presence of the testator by two or more competent witnesses."[6] Moreover, Georgia courts look for ways to uphold the validity of a will. For example, in O.C.G.A. § 53-4-57, there is a rule of construction that states that if "a will is illegal in part, the part that is legal may be sustained; but if the whole will so constitutes one testamentary scheme that the legal portion alone cannot give effect to the testator's intention, the whole will shall fail."[7] This code section demonstrates that courts may sustain only a portion of a will, if appropriate. There is also a rule of construction that provides that "intestacies are not favored in construing wills." [8] Although a will may also be challenged on the grounds that the testator lacked testamentary capacity, that the will was the product of undue influence or that the will was a product of fraud, anyone challenging the validity of a will has an uphill battle for the reasons discussed above.

B. Wills Can be Revoked At Any Time.

Turning our attention back to the sample case of Sarah and Jack, when Jack dies, Sarah is shocked when she learns of Jack's Will disinheriting her and their children. One reason she is so shocked is because Jack and Sarah had gone to a lawyer after the birth of their third child and had wills drafted. Sarah's will left everything to Jack and Jack's will left everything to Sarah.

This type of will is called a mirror will or a reciprocal will. Unfortunately for Sarah, a few years later when Jack fell in love with his mistress, he revoked his prior will and signed a new one that she knew nothing about. The new will clearly states that it revoked all prior wills. Jack had also found the original will that he had executed when he and Sarah visited the lawyer and he destroyed it. Sarah, however, had no idea that he had done that. Again, this is perfectly legal in Georgia.

Under Georgia law, a testator has the right to revoke his or her will at any time before death "so long as the testator retains testamentary capacity."[9] To expressly revoke a will, there must be an intent to revoke combined with a writing or action annulling the will.[10] Assuming that Jack's revocation is valid, Sarah is left with nothing.

Georgia is the only state in the entire country that allows a spouse to disinherit a spouse.[11] Prior to 1998, this issue was examined by the committee that was redrafting the Probate Code, but the committee decided to retain Georgia's lone status and maintain the inadequate provisions for year's support. [12] One of the reasons advanced for this decision was the notion that it is not really much of a problem, i.e., spouses are not disinheriting spouses with any great regularity.[13] The data cited for this was derived from court records prior to 1996.[14] As I have seen this issue arise in my practice, I wonder whether it is currently happening more frequently than it was in 1996.

Even if disinheritance only happens to one spouse, however, it is one spouse too many. Regardless of how often it happens, as a matter of sound public policy, the law should provide adequate financial protection for spouses when a spouse or parent dies. Every other state in the country that has looked at this issue has decided that such protection is appropriate and Georgia should do the same.

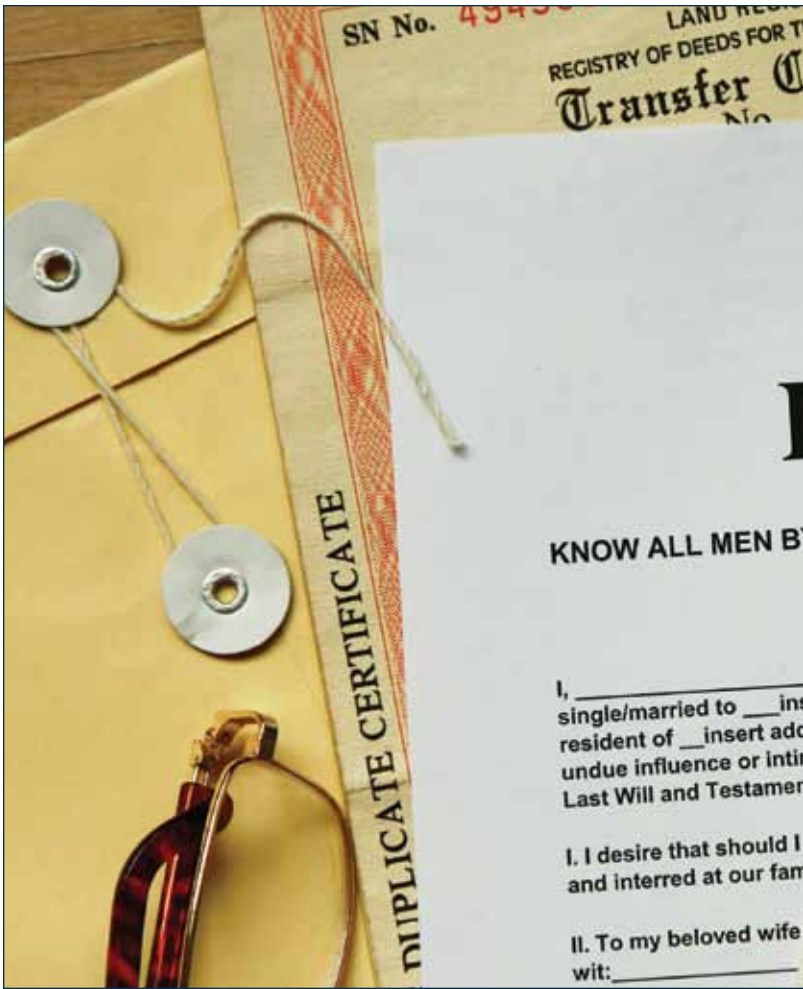
The justification for the right to disinherit your spouse and children that I have always heard is that Georgia believes in the individual's right to dispose of his property as he chooses. The right to dispose of one's property as one chooses, however, is already limited during the course of a marriage by a spouse's obligation of support. In addition, that right is limited during the individual's lifetime if the individual divorces. For the very same reasons, as a matter of sound public policy, an individual's right to dispose of his property at death should be limited in a similar manner.

II. Protections for a Spouse upon the Death of a Spouse Who Writes a Will are Few and Inadequate.

A. Petition for Year's Support.

One of the few protections under Georgia law for a spouse and minor children of a decedent is the statute that allows for the filing of a petition for a year's support. The statute provides that the "surviving spouse and minor children of a testate or intestate decedent are entitled to year's support in the form of property for their support and maintenance for the period of 12 months from the date of the decedent's death."[15] The courts have been clear that the surviving spouse has the burden of proving the amount necessary for a year's support.[16] The amount "necessary" for a year's support "must be reasonably related to the amount needed by the surviving spouse for a period of 12 months after the decedent's death to maintain the standard of living enjoyed prior to the death."[17] The cases have clearly stated that the award is not designed to "support the spouse for many years to come."[18]

Under current law, it is possible to file a petition seeking the entire estate for year's support and if no one objects, the Court will grant it.[19] If, however, someone objects, perhaps a creditor of the estate or children from a prior marriage, then the petitioner has the burden to prove that the amount sought as year's support is necessary to maintain the standard of living that the spouse had during the prior 12 months, taking into consideration any other means of support, the solvency of the estate and any other factors the court considers appropriate.[20] If you are a stay-at-home spouse and your main source of financial support has just died and left you with nothing, a year's support is going to be wholly inadequate. The year's support remedy is inadequate even if the surviving spouse works, but earns significantly less than the deceased spouse. In addition, a year's support is likely to be inadequate in many typical modern marriages where both spouses work and make financial decisions based on the presumption of two incomes. When one income has suddenly and unexpectedly disappeared and, in the case of disinheritance, is not replaced with any assets, a year's support is not only inadequate, it is unconscionable.



B. Contract to Make a Will.

One other possible protection for a spouse is something called a contract to make a will. A contract to make a will is a contractual promise that you agree to leave your estate to a specific person, for example to your spouse. Wills executed after January 1, 1998 are analyzed under the 1998 Probate Code.[21] Under the 1998 Code, a "joint will is one signed by two or more testators that deals with the distributions of the property of each testator."[22] The 1998 Code further provides that a "joint will may be probated as each testator's will."[23] In contrast to a joint will, mutual wills are "separate wills of two or more testators that make reciprocal dispositions of each testator's property."[24]

Under current law, a contract "that obligates an individual to make a will or a testamentary disposition, not to revoke a will or a testamentary disposition . . . **shall be express and shall be in a writing that is signed by the obligor**."[25] So if you are a spouse looking to protect yourself in the event of your spouse's death, one possibility is for your spouse to execute a will that contains a promise that it will not be revoked. It is not necessary that the contract be contained in the will itself, but the contract document must make clear what will the spouse is promising not to revoke.

III. Protections for Spouses are Greater in Other Contexts.

In almost every other situation, the law provides greater protections for spouses and minor children. As mentioned above, in the context of divorce, Georgia law provides for an equitable division of the marital assets.[26] In addition, a spouse who is not the primary breadwinner is likely to receive alimony.[27] If there are children of the marriage, then both spouses have an obligation of support and one or the other may be required to pay child support.[28] Similarly, when one spouse dies without a will, Georgia law provides that the surviving spouse receives the entire estate if the deceased spouse had no children.[29] If the deceased spouse had children, then those children are entitled to share in the estate.[30] When there are children and a spouse, the spouse receives no less than one-third of the estate and the remaining estate is split between the children.[31]

There is also a federal law that protects a surviving spouse in the context of a deceased spouse's 401(k) account. Federal law requires written spousal consent if a spouse wants to leave his or her 401(k) to someone other than his or her spouse.[32] Other assets that pass outside of probate that may be titled in both spouses names may pass some property to the surviving spouse. For example, these assets could include property held jointly, bank accounts or stocks. If the marital home or other real property passes to the surviving spouse, however, it will come with the burden of paying the mortgage.[33]

IV. Proposal for Change.

It is fundamentally unfair to allow a spouse to completely disinherit another spouse. Disinheritance would be difficult for any spouse; however, it is most egregious for stay-at-home spouses and spouses who earn significantly less than their mate. Public policy should protect spouses and minor children in all contexts, not just in the context of divorce or intestacy. The same policy arguments that provide for equitable distribution in the case of divorce or in cases of intestacy provide support for changing the law to protect spouses from being disinherited.[34]

Georgia should adopt the elective share provisions as set out in Article II of the Uniform Probate Code, as amended in 2008 ("UPC") because those provisions are based on the theory that marriage is a partnership and on the theory that each spouse has an obligation of support.[35]A detailed examination of the UPC provisions is beyond the scope of this article; however, it is my opinion that its elective share provisions are the most comprehensive, thorough and well-reasoned approach to protecting spouses from disinheritance.[36] Of the 49 states that have enacted some type of elective share law, 29 of them have based their statutes on some version of the UPC. Of these 29 states, 19 of them have fully adopted the UPC.[37] An additional ten states have adopted the free standing Article II of the UPC, which contains the provisions governing elective share.[38]

Under the UPC, a court making an elective share determination has to consider the probate and nonprobate assets of both spouses, transfers by both spouses to others during a spouse's lifetime and the decedent's nonprobate transfers to the surviving spouse.[39] The collective of these assets is referred to as the augmented estate.[40] Moreover, the UPC provides that a surviving spouse is to receive 50 percent of the value of the marital property portion of

the augmented estate.[41] The value of the marital property portion of the augmented estate is determined by using a sliding scale based on the length of the marriage that starts at 3 percent for marriages of less than one year and reaches a maximum of 100 percent of the marital property portion for marriages of fifteen years or longer.[42] For example, if a surviving spouse has been married for 15 years or more, the value of the marital property portion of the augmented estate would be 100 percent and the surviving spouse would be entitled to 50 percent of that value as an elective share, minus any amounts already received by the spouse through nonprobate assets or lifetime transfers.[43]

The UPC also provides protection for minor children through a homestead allowance and a family allowance that takes priority over all other claims and that are in addition to the elective share.[44] Because there are situations where both spouses agree that one or both of them are going to leave all of their property to someone else (such as late in life second marriages where each spouse has children from a prior marriage), the UPC provides that a spouse may waive his or her entitlement to an elective share.[45]

Until Georgia comes in line with the rest of the states, all spouses face the risk of being disinherited and not knowing about it until it is too late. Once these spouses find out, they will not be in a position to mitigate the serious financial hardship that they will face. Turning back to Sarah now that we understand the risk of disinheritance, what steps could she have taken to protect herself? There are several options, but no good choices.

When Sarah and Jack started having marital troubles, she could have divorced him rather than trying to work through their problems. Had she done that, she would have received an equitable distribution of marital property, alimony and child support. This option, however, runs counter to the public policy of encouraging families to stay together. Another option that Sarah had was to suggest that the family move to another state that has more favorable laws. For most families, this is not a realistic option. Finally, Sarah could have asked Jack to sign a contract wherein he and she agreed not to revoke the mirror wills that they signed. Couples, however, should not have to pay an attorney to draw up a contract for something that should come as a benefit of marriage. Until Georgia comes in line with the rest of the country, spouses like Sarah should not assume that Georgia law protects them. It does not.

(Endnotes)

1 *See* O.C.G.A. § 53-4-1.
2 *Id*.
3 *Id*.
4 *Id*.
5 *See* O.C.G.A. § 53-4-20(a).
6 *See* O.C.G.A. § 53-4-20(b).
7 *See* O.C.G.A. § 53-4-57.
8 *See Redfearn*, Wills and Administration in Georgia § 7:6, p. 315 (7th Ed. Vol. 1 2008).
9 *See Redfearn*, Wills and Administration in Georgia § 5:12, p. 183 (7th Ed. Vol. 1 2008); O.C.G.A. § 53-4-40.
10 *See* O.C.G.A. § 53-4-41 & § 53-4-42; *see generally*, O.C.G.A. § 53-4-40 *et seq*.
11 *See* Jeffrey N. Pennell, *Minimizing the Surviving Spouse's Elective Share*, 2002 NAELA Inst. 9-1 (2002).
12 *See* Mary F. Radford and F. Skip Sugarman, *Georgia's New Probate Code*, 13 Ga. St. U. L. Rev. 605, 652-668 (June 1997).
13 *Id*.
14 *Id*.
15 *See* O.C.G.A. § 53-3-1 (c).
16 *See* Taylor v. Taylor, 288 Ga. App. 334, 336, 654 S.E.2d 146, 149 (2007).
17 *Id*. at 337.
18 *Id*.
19 *See* O.C.G.A. § 53-3-7(a).
20 *See* O.C.G.A. § 53-3-7(b) & (c); Taylor, 288 Ga. App. at 337.
21 *See* O.C.G.A. § 53-1-1.
22 O.C.G.A. § 53-4-31(a).
23 *Id*.
24 O.C.G.A. § 53-4-31(b).
25 O.C.G.A. § 53-4-30 (emphasis added).
26 *See* Stokes v. Stokes, 246 Ga. 765, 771, 273 S.E.2d 169, 173 (1980).
27 *See* O.C.G.A. § 19-6-1.
28 *See generally* O.C.G.A. § 19-7-2 & § 19-6-15.
29 *See* O.C.G.A. § 53-2-1(c)(1).
30 *Id*.
31 *Id*.
32 *See* 29 U.S.C. § 1055.
33 *See* Manders v. King, 284 Ga. 338, 667 S.E.2d 59 (2008).
34 *See* Uniform Probate Code, article II, pt. 2, general comment (amended 2008).
35 *Id*.
36 *See* Jeffrey N. Pennell, *Minimizing the Surviving Spouse's Elective Share*, 2002 NAELA Inst. 9-1 (2002) (noting that portions of the elective share approach as set out in a prior version of the UPC are inspired and progressive).
37 *See* Uniform Law Commissioners, *Summary, Uniform Probate Code, 2008 Amendments at* http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-upcamend08.asp (last visited February 4, 2011).
38 *See* Uniform Law Commissioners, *A Few Facts About the Uniform Intestacy, Wills and Donative Transfers Act, Uniform Probate Code, Article II* at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uswdta.asp (last visited February 4, 2011).
39 *See* Uniform Probate Code §§ 2-201-2-207.
40 *Id*. at § 2-203.
41 *Id*. at § 2-202(a).
42 *Id*. at § 2-203.
43 *Id*.
44 *Id*. at § 2-402 & § 2-404.
45 *Id*. at § 2-213.

Interview of Judge J. Kevin Chason

South Circuit Judge, Cairo, Ga.

by Kelly Boswell

Boswell: Judge Chason, how long have you been on the bench? And how long did you practice?

Chason: I have been on the bench right at 22 years, and practiced 21 years.

Boswell: What made you decide to become a judge?

Chason: I was looking for a new challenge. I had a general practice and I did everything from, criminal defense early on, a lot of times not by choice but by appointment... I did a lot of real estate, personal injury, estate planning and wills. I enjoy what I do, I enjoyed practicing law

Boswell: How do you like being on the bench?

Chason: Oh, I love it!

Boswell: What do you like most about it?

Chason: Because we get a lot of variety, especially, in a rural circuit with two judges, we overlap quite a bit in what we do. In our general division between Chief Judge Cato and me, he takes criminal and I'm in charge of civil. But having said that, he recently tried a medical malpractice case in Cairo. I try probably more criminal cases than I do civil. I like the challenge. I learn something new every day.

Boswell: Is that because you all just try and help each other out with the calendar?

Chason: That's correct. Just to keep it moving and especially the criminal calendar, a lot of times it takes during a trial week, it takes two judges to move the calendar because if you have one tied up with trials, nothing else is going to happen. A plea is going down and then at the end of the week or at the end of a term, and you have not disposed of much. So when you have two judges in the county on the bench we can move forward with two jury trials at the same time.

Boswell: How many counties are in your circuit?

Chason: We have five.

Boswell: And that covers quite a bit of Southwest Georgia?

Chason: It does. The furthest I go from courthouse to courthouse, is 62 miles from Cairo to Morgan.

Boswell: And your father was chief superior court judge in the Southwest Georgia Circuit, was he not?

Chason: Well he wasn't the chief. Judge Cato has been on the bench I think since 1978, so he's been on the bench, about 33 years, and my father went

on at the end of 1982. He was appointed by Gov. Busby and he served for 14, then took senior superior court judge status. My father and I are currently the only father and son superior court judges in the state and I am very proud of that.

Boswell: And you have a sister who is a lawyer?

Chason: Right. Claire's a year and few months older than I am. What happened was, when my dad retired, Judge Porter and two other lawyers ran for his seat and Porter was elected. I was law partners with Porter at the time and I left the firm shortly after he was elected. At that time, Claire was in the district attorney's office doing mostly child support recovery work in Albany and I asked her if she wanted to come work with me. She told me no she did not. One Sunday we were at the dinner table at our parents' house and I was telling her I was interviewing lawyers and she said, "I thought you offered that to me. "I said, "I did and you said no" And she said, "I changed my mind." So she came and does a similar practice to what I was doing.

Boswell: Was there anything in particular that made you decide to become a judge?

Chason: I can't say that there was anything in particular. I was fortunate enough after I announced that nobody else ran against me and again that goes back somewhat, I think to timing.

Boswell: Well you spoke at the Family Law Institute, you reminded us that it is important to know your judge, so I wanted to talk to about some things that are discretionary issues. Tell me what your position is on attorney's fees awards?

Chason: Well, on attorney's fees in domestic relations you are supposed to consider the award and the ability of the parties to pay. It is a little different than just the normal stubbornly litigious kind of issue, and what I find a lot of times in hearings is the attorneys are not prepared to address that issue and they want to submit it to me by affidavit later. I have a problem with because the other side is not able to cross examine your affidavit. So, if you are really serious about wanting it, you need to come prepared to present the evidence and I actually find that some attorneys really don't know how to do that.

Boswell: You are saying that if the attorney comes prepared, you are not opposed to awarding attorney's fees in family law cases?

Chason: I am not opposed to it at all. I have no hard and fast rule. A lot of times on temporary attorney fee issues I will reserve a ruling until the case is disposed of but that is not always the case.

Boswell: Tell me what your position is on a joint physical custody award. In my practice I see more men wanting a true joint physical custody shared equal time arrangement.

Chason: Well, on the shared physical, what I want to be careful of is making sure that's not a ruse to get out of paying child support. I think it can work but the parties are getting a divorce, so obviously they don't get along; however, the split time can be difficult for the children. If it works, it is okay with me and I have granted it.

Boswell: So, if someone is wanting joint physical custody, you are going to want to see some evidence that the parents are able to co-parent together well?

Chason: Oh, for sure and that it is not again some sort of ruse to get around child support. What I want to be sure of is that one party is not using the joint physical custody as a sham to get their child support obligation reduced and the other parent is going along just to avoid conflict. You know my obligation is to that child to make sure that child's best interests are being looked after.

Boswell: What is your feeling on whether Schedule E deviations should normally be granted?

Chason: Well, I think the Supreme Court has laid out that you are going to have to lay out a reasoning for the deviation and the deviation is in the best interest of the child. Not simply that the parents have agreed, so I am going to be looking at that and I find that a lot of times that may be the case but the paperwork is not documented and so if you want a deviation from me you are going to have to lay that out and put it in the paperwork.

Boswell: What about a situation where the parents do not agree? Let us say that a custodial parent does not agree to a Schedule E deviation and the non-custodial parent would like a Schedule E deviation because he is paying all the private school tuition. If they tried that case before you do you have any feelings one way or the other?

Chason: Well, if it is a private school thing I am probably going to grant some sort of deviation. Now I say probably, I do not want to prejudge anything but you know I would not be opposed to a deviation based on things that are done, money spent for the best interest of the child.

Boswell: What is the most important thing for family law litigators that appear before you to remember?

Chason: Well, I think that you need to let me know what you are wanting and if you have an agreement, because I can not value half a case. If I know this one is getting the car, this one is getting the house, this one is paying this if that is all settled, that is fine by me. In fact that is great. I think they ought to settle what they can. But I think you need to disclose that simply to help the court in making the award on what you could not agree on.

Boswell: Tell me about your calendar. You only have two judges for such a large circuit. I have noticed that your calendar is very full and I have seen some inquiry recently, from the Supreme Court perhaps, about caseloads in different circuits. What are your feelings on your caseload?

Chason: Well, I think the caseload is manageable because Judge Cato and I work well together. We are typically able to get through with cases. Sometimes we do not get through on a hearing calendar day, and if it becomes a problem, I will set a special day. If we are both in a county in court, we generally have probation officers, public defenders, district attorneys, victim assistance staff, all kind of support people, private lawyers, sheriff's deputies, clerks of court. If we are holding hearing days there is an entourage of security for the courtroom so we try to make days a little bit longer and try to have a fewer days. If we end up with a backlog, I just set a special day and put them down and we will do them. ***FLR***

Case Law Update

by Vic Valmus

Alimony

McDonald v. McDonald, S11F0112 (June 13, 2011)

The parties were married in 2001 and the Wife filed for divorce in 2009. The parties had no children and most of the marital debt was discharged in bankruptcy in 2008. The Wife was disabled and had a pending slip and fall claim and in April, 2009 the Court entered a Temporary Order awarding the Wife exclusive possession of the marital residence and required the Husband to pay the monthly mortgage of $1,953 as temporary alimony. In July of 2009, the Husband was notified that he would be laid off from his job in October. In August of 2009 the Husband broke his ankle while vacationing and filed a personal injury lawsuit. The Husband went on short-term disability and stopped making alimony payments and filed a petition to modify. In addition, the Wife filed a motion for contempt. In March of 2010 after a bench trial, the Court entered a Final Judgment and Decree of Divorce and among other things, the Wife was awarded the marital residence which both parties testified had no equity with the Wife making all future mortgage payments and the her proceeds from the personal injury claim. The Husband was awarded one vehicle and remaining interests in his two 401(k) plans and he assigned the Wife 45 percent and the Husband 55 percent of the remaining $8,000 marital debt. The Court rejected the Wife's request for the Husband to pay $25,000 in alimony payments of $50 over the next 32 years but did order the Husband to pay alimony in the form of keeping the Wife on his health insurance for the next 24 months and making her car payment for the next 12 months. The Court did not hold the Husband in willful contempt of the non-payment pursuant to the Temporary Order but found him in arrears of $11,710. The Husband appeals and the Supreme Court affirms.

The Husband appeals, among other things, that the Trial Court erred in awarding the Wife alimony because she failed to show a need for alimony, he is unable to pay because he is disabled and unemployed, the Wife's alleged misconduct and the short duration of marriage made alimony inappropriate. However, the evidence authorized the Court to agree the Wife was disabled due to her medical problems and that she therefore needed alimony and that the Husband's living expenses and the cost to keep his Wife on his health insurance were lower than he claimed and that his $2,397 per month in long term disability income, future earnings and the personal property that was awarded in the divorce decree would enable him to keep the Wife on his health insurance for two years and make her car payments for one year. The Wife's misconduct as alleged by the Husband was unintentional and did not warrant denial of the limited alimony she was awarded. Because there is some evidence to support the award and it was not made pursuant to an erroneous legal analysis, the Trial Court did not abuse its discretion in awarding Wife alimony.

Child Support

Francis-Rolle v. Harvey, A11A0357 (May 5, 2011)

After the parties were divorced, the Father filed for a modification of child custody. After a bench trial, the Court modified divorce decree granting the Father custody of the parties' minor child then seventeen years old and ordered the Mother to pay child support. The child support order required the Mother to pay child support of $620 per month until the child reached the age of 18 or graduates from secondary school whichever occurs last. Mother appeals and the Court of Appeals affirms in part and reverses in part.

The Mother contends Trial Court erred by ordering her to pay child support to the father after the child reach the age of 18 years. In plain language of the Child Support

Statute, a child support obligations may extend in certain circumstances for a child who has obtained the age of majority, but the obligation will terminate after the child attains twenty years of age. The purpose of the statute is to give the court discretion to recognize continuing parental responsibilities to financially assist the child over the age of eighteen to complete secondary education. The Court's order, however, has the Mother paying child support without limit as to the age and without recognizing that financial assistance will not be required after a child attains twenty years of age. Therefore, that part of the court's order is reversed.

The Mother also contends the court erred in awarding attorney's fees to the Father. The Father did not state the statutory basis upon which he sought attorney's fees, and the court did not set forth any statutory basis or other findings when it awarded the Father attorney's attorney fees in the amount of $15,250. In the order awarding fees, the court found that the Mother was stubbornly litigious. The Father argues that this authorized the court to award attorney's fees under O.C.G.A. §13-6-11 which provides award of expenses of litigation to a Plaintiff where Defendant has been stubbornly litigious. However, O.C.G.A. §13-6-11 applies to a contract action. This is not authorized because the Father's modification petition was not a contract action but an action on the parties divorce decree. Pursuant to O.C.G.A. § 9-15-14(b), a party is entitled to an evidentiary hearing upon due notice that permits an opportunity to confront and challenge the value and need of the claimed legal services. The record shows no proper notice and no opportunity for a hearing was given to the Mother with respect to the award of attorney's fees. The Court's award of attorney's fees is vacated and remanded with directions.

Constructive Trust, Laches and Choice of Law

Davis v. Davis, A10A2195 (July 6, 2011)

The parties were divorced in Louisiana in 1996. Louisiana is a community property state, and the judgment of divorce was silent as to division of any community property. The Wife was served with the pleadings but filed no answer and a judgment was entered on default. In 2008, the Wife filed in Georgia an action seeking equitable relief in the form of a constructive trust to certain real estate and the Husband's military pension. The Husband asserted a defense of laches and moved to dismiss the petition.

At trial, the Wife testified that the parties discussed the pension as part of the divorce and they reached an oral agreement that she would receive $550 per month from the pension for life or until she remarried. When she received a copy of the divorce decree, however, it was not in there but she never took any action in Louisiana to correct the document. She expected the payments to start in February of 2003. In 2003, she only received sporadic payments and eventually they stopped in 2006. The Husband stated that he was giving money to help with the son's education and when he stopped attending college, he quit the payments. The Husband denied having any discussions regarding any pensions and amounts to be paid to her. The Court dismissed Wife's' petition. The Wife appeals and the Supreme Court affirms.

In determining whether a party failed to exercise reasonable diligence in an underlying divorce action and where laches should apply, the Court considers the length of delay, the sufficiency of the excuse, the loss of evidence on disputed matters, opportunity for the claimant to have acted sooner and whether Plaintiff or Defendant possessed property during the delay. In addition, the Defendant must show prejudice from the delay. Pursuant to O.C.G.A. §53-12-93(b), the statute that governs constructive trusts, the person claiming the beneficial interest in the property may be found to have waived the right to a constructive trust by subsequent ratification or long acquiescence. A court of equity will not act unless it is shown that the party seeking relief has exercised reasonable diligence. Here, the Wife was under a positive legal duty to file promptly with the Court and having not done so when ample time was available, she is not entitled to the relief sought in this court. There is ample evidence that the Wife slept on her rights in connection with a divorce action itself and in the 12 years intervening between the divorce decree and this action.

The Wife additionally argues that the Court should have applied Louisiana law. The Trial Court specifically found that the action was brought in equity and under the laws of Georgia. The Trial Court was correct because neither party pleaded or relied on Louisiana law. O.C.G.A. §24-7-24, 9-11-43(c) requires the plaintiff or the defendant to give both the court and the opposing party adequate preparation time for litigation of a foreign law issue. Even if the Court was to apply Louisiana law, the actions were foreclosed because Louisiana provides a specific and exclusive statutory scheme for division of community property and the parties have failed to comply with the provisions of that statute.

During the litigation, the Wife filed an amendment to her Complaint restyling the Complaint to domesticate the Louisiana judgment of divorce and stating that the amendment was to clarify that she sought to domesticate a foreign judgment. However, O.C.G.A. §9-3-20 provides that all actions upon judgment obtained outside the State, except for judgment for child support or spousal support, or both, shall be brought within five years after such judgment has been obtained. Wife delayed almost 12 years.

Contempt

Doane v. LeCornu, S11A0488 (June 13, 2011)

The parties were married in 1996 and in June of 2008 the parties signed a divorce Settlement Agreement which was incorporated into a Final Decree in July, 2008. Among other things, the Husband received the parties' lake house and was required to pay the Wife $73,000 for her interest in the property in three installments. The Husband failed to make the first installment payment but made

the second payment on the date of the contempt hearing leaving a balance of $43,000 due. A Contempt Order was entered against the Husband holding him in willful contempt. The Order extended the timeline for the balance due for her interest in the lake house and to remove her name from the property by June 30, 2010. The Husband did not appeal this Contempt Order or the Final Consent Order. In April of 2010, the Wife filed another Application for Contempt after the Husband missed the June 30th deadline. A hearing was held and the Trial Court entered a second Contempt Order which held that the Husband was in contempt of the Final Consent Order for failing to remove the Wife's name from the lake property or to pay her the $43,000 balance interest that was owed to her and ordered the Husband to immediately place the lake house on the market for sale and to pay the Wife $43,000 from the sale of the proceeds within 5 days of receipt. The Husband appeals and the Supreme Court affirms in part and reverses in part.

The Husband contends the Trial Court impermissibly modified the divorce decree by requiring him to put the lake house on the market and to pay the Wife the money he owed her from the proceeds of the sale. The Trial Court's finding is that the Husband failed to meet the extended deadline and the Court therefore did not abuse the discretion in holding the Husband in contempt of the Final Consent Order. However, the Court erred by ordering the Husband to sell the house in order to pay the Wife the $43,000 he owed her. The Court's Order violates the firm rule that the Supreme Court has established regarding modifying property divisions of a Final Divorce Decree. Trial Courts have not been allowed to later compel a party who was awarded a specific asset to sell or otherwise convert that asset in order to comply with some provisions of the Decree. The Trial Court's ordering the Husband to sell the house amounted to a modification not an interpretation of the prior Order.

Contempt/Dismissal

Avren v. Garten, S11A0064 (May 16, 2011)

The parties were divorced in 2003. The parties' Consent Final Modification Order entered in 2006 awarded the Father, a physician, final decision-making authority for the minor child in respect to health and medical issues. After mutual filings, in April, 2010, the Trial Court found the Mother in contempt of previous Court orders and dismissed the Mother's Petition for Contempt against the Father dismissing the Mother's Petition for Modification of Child Support and Visitation. It also denied and dismissed the Mother's Petition for Modification of Child Custody and ordered the Mother to pay the outstanding balance due to the Guardian Ad Litem appointed to represent the parties' minor son and granted the Father's request for attorney's fees. The Mother appeals and the Supreme Court affirms.

The Mother contends that the Trial Court erred without hearing evidence on three of the four subjects of her petition. Three of the four subjects of the petitions were dismissed pursuant to O.C.G.A. §19-9-24(b) which prohibits a legal guardian from bringing an action for modification of child custody or visitation rights or any application for contempt of court so long as visitation rights were held by the legal guardian in violation of a custody order. Counsel for Father submitted at the evidentiary hearing a calendar on which he had circled over 100 dates between March 21 and Nov. 20, 2009, on which scheduled visitation between the Father and the child had not taken place. The Mother admitted there were times when she and the child left her home on scheduled visitation days prior to the closure of the two hour window in which the Father was to pick up the child and there were occasions on which she did not overrule the child's reluctance or refusal to leave the home and meet his waiting Father. The Mother testified the child did not want to visit with the Father and she did not insist that he do so. However, the desire of a child under 14 years of age not wanting to visit their non-custodial parent is not sufficient to deny a non-custodial parent his or her rights of visitation. Having found that the Mother had withheld visitation the Trial Court did not err pursuant to O.C.G.A. §19-9-924(b) in dismissing her contempt of visitation, custody, and portions of the Mother's petition.

The Trial Court also dismissed a portion of the Mother's petition seeking to modify modification of child support. O.C.G.A. §19-6-15(k)(2) requires that no petition to modify child support may be filed by either parent within the period of two years from the date of the Final Order on a previous petition to modify by the same parent except in certain situations which are not applicable here. The Mother filed the current petition for modification of child support in November 2009 which was 11 months after the Trial Court's dismissal in December 2008 of an earlier petition to modify child support and visitation filed by the Mother. The Trial Court's entry of an order dismissing a support modification petition is a final order since it is a judicial action that terminates litigation with prejudice and is imposed involuntarily on a petitioner.

Contempt

Greenwood v. Greenwood, S11A0622 (April 26, 2011)

The parties were divorced by a final decree in 2008 and pursuant to the decree, the Husband was awarded the marital residence which required him to refinance or sell the residence prior to Oct. 1, 2009, and ordered to remove the Wife completely from the mortgage. If not, then the Husband was to pay a penalty of the sum of $10,000 to the Wife due and payable in full on Oct. 2. The Husband did not refinance or sell the home nor did he pay the penalty. The Wife filed for contempt. The Trial Court entered a final order which found the Husband's failure to refinance placed him in willful contempt and triggered the $10,000 penalty provision as set forth in the decree. Rather than immediate payment, the court converted the penalty into a lien against the marital residence. Because of the current market conditions, the

Trial Court would not force the immediate sale of the residence to remove the Wife from the mortgage. The Wife appeals and the Supreme Court reverses.

The Trial Court did not have the power in a contempt proceeding to modify the terms of the decree. The Court improperly modified the divorce decree by converting the Husband's penalty for failure to remove the Wife's name from the mortgage into a lien on the marital residence. The Court does not address the issue of whether once the penalty is imposed it may thereafter be enforced by a lien. The Court also impermissibly modified the decree in ruling the Husband should be allowed a reasonable time to sell the home due to market conditions. The divorce decree clearly states that the marital home would be refinanced or sold no later than Oct. 1, 2009. The decree does not condition the sale or refinance on market conditions. The Court is sympathetic to a Trial Court's concern regarding a hardship a down market may place on the Husband, it does not allow the Trial Court to make concessions for failed market conditions nor did the Court find that the Husband's compliances was impossible.

Equitable Relief

Hudson v Hudson, A11A0504 (April 28, 2011)

Parties were divorced in 2003 and the decree provided that the Wife shall have exclusive use and possession of the marital residence located in Harris County, Georgia, and shall be solely responsible for the taxes due on the dwelling and shall be solely responsible for moving the dwelling from the current location. No timetable of the removal of the residence was stated. In 2010, the Husband filed a complaint for equitable relief alleging that the house occupied by the Wife was occupied on real property owned by his heirs and that she should be enjoined from occupying the house because of her failure to move it over the last seven years. The Mother amended her Answer and pled that the Husband's failure to avail himself of an adequate remedy at law precluded equitable relief pursuant to O.C.G.A. §23-1-4 and sought to have complaint dismissed. The Husband then amended his complaint to add a count seeking declaratory judgment regarding the interpretation of the judgment of divorce. A hearing was held in August of 2010. The Trial Court found that the Husband had failed to exhaust his legal remedies prior to filing a complaint for equitable relief in this matter and dismissed the complaint. The Husband appeals and the Court of Appeals reverses.

The Husband correctly points out that under the Civil Practice Act, a party may state as many separate claims as he has regardless of the consistency and whether based on legal or equitable grounds or both. Further, a party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pre-trial order. In this case, no pre-trial order is contained in the record. O.C.G.A. § 23-1-4 provides that equity will not take cognizance of a plain legal right where an adequate and complete remedy is provided by law; but the mere privilege of a party to bring an action at law or the existence of a common law remedy not as complete or effectual as an equitable relief shall not be deprive equity of jurisdiction. Because the Trial Court order does not address the claim for declaratory relief added by proper amendment and, because the court is unable to discern from the record whether in fact there is an adequate remedy at law available to the Husband, the judgment is reversed and remanded.

Jurisdiction

Wondium v Getachew, S11A0467 (May 16, 2011)

The parties were married in November of 1997 in Ethiopia. There were two minor children born in Georgia. The Husband was served by publication and they were divorced in DeKalb County in February of 2006. In November of 2008, the Husband filed in DeKalb County a petition for modification of custody for an order setting a visitation schedule and for child support. The Wife filed a counterclaim requesting she be awarded sole physical custody of the children and a restriction be placed on the Father's visitation and establish child support. In December of 2009, the Husband filed a motion to vacate the February 2006 default judgment of divorce, which the Wife was awarded legal and physical custody of the children. Husband also asserted the Wife procured the divorce through fraud because she knew his Maryland address but did not use it to effect personal service of the divorce on him. He also alleged that the Wife misled the Court in believing that she had sole custody of the children when, in fact, both children were living in Ethiopia, and that the Wife's failed to provide the required information pursuant to O.C.G.A. §19-9-69 concerning the children's custodians and residences for the five years preceding the divorce petition which would deprive the Trial Court of the subject matter of jurisdiction.

In January of 2010, a hearing was held on the various motions and just prior to the hearing, the Judge orally denied the Husband's motion to vacate the 2006 divorce decree. Husband advised the court in light of the Trial Court's decision not to vacate 2006 divorce judgment, he would abide by the Court's decision and he had no statement to make regarding his petition of modification. Trial Court then proceeded on the hearing on the Wife's counterclaim. Trial Court issued two orders in January 2010. One order denied the motion to vacate the 2006 judgment of divorce, and in the other order, it modified the child custody order giving the Wife sole physical and legal custody of the children and it gave the Husband reasonable supervised visitation and also was required him to pay monthly child support of $650. Husband appeals and the Supreme Court affirms.

Husband challenges the divorce court's jurisdiction based on the residency of the two children whom he alleged resided in Ethiopia at the time the divorce was filed and the time the divorce decree was issued in 2006. The Husband's challenge to the divorce court's jurisdiction were rendered moot by the Trial Court's entry of the 2010 custody modification parenting plan order. During 2010

custody modification proceeding, it was uncontested that the children resided in DeKalb County, as did the Wife. The Husband submitted himself to the personal jurisdiction of the court when he filed his modification pleading and appeared for a hearing on the same.

Husband also complains that the Trial Court erred when it failed to make a jurisdictional findings regarding the children's home state in the body of 2010 custody modification and parenting plan order. It is true such findings are required generally in the Uniform Child Custody Jurisdiction Enforcement Act (UCCJA), but no authority existed here. The Trial Court did not decline jurisdiction on the basis of being an inconvenient form or stayed the matter because of another custody action in a foreign jurisdiction.

Nunc Pro Tunc

Maples v. Maples, S11F0919 (July 11, 2011)

The parties were married in 1983 and were divorced on June 1, 2000. However, the Final Decree was not filed with the Clerk until Aug. 1, 2002. In the interim, the Husband and Wife remarried on June 25, 2000, and lived as Husband and Wife until June 29, 2010, when the Wife filed a Complaint for Divorce. When the Husband learned the Final Decree of Divorce was not filed in the previous action until Aug. 1, 2002, more than two years after they remarried, he filed a Motion to Dismiss the case in 2010. The Wife moved to amend the judgment in the 2000 case. The Motion was heard and the Trial Court amended the Order nunc pro tunc to insure that the Order reflected the true judgment rendered by the Court that the parties were divorced on June 1, 2000. Husband appeals and the Supreme Court affirms.

The Husband asserted that the nunc pro tunc Order cannot be used to back date entry of a divorce decree. However, the Trial Court in this case used a nunc pro tunc Order to cause the written judgment of divorce to relate back to the date of the original hearing and ruling. This was an appropriate use to the nunc pro tunc Order. Every court has inherent power and it is the Court's duty to correct its own records to make them speak the truth. Based solely on the record, and without the necessity for introduction of extensive evidence, the Court may on its own motion without notice, enter such judgment and decree nunc pro tunc at a later date. In addition, the entry of the divorce decree nunc pro tunc to the date of the signing of the decree was advantageous to the Husband as well as the Wife because it accurately reflected his intentions to reenter the bond of marriage on June 25, 2000.

Overnight Guests

Ward v. Ward, S11A0437 (May 31, 2011)

The parties were divorced in March of 2007 and the Husband was awarded primary physical custody of the parties' two minor children. The Wife was awarded substantial visitation and was required to pay child support. In 2008, the Mother filed for contempt and to obtain sole custody of the children. The Husband counterclaimed seeking an increase in child support and attorney's fees. After the hearing, the Court ruled that the Father was not in contempt, declined the modified custody, increased the Mother's child support and amended her visitation provisions of the Final Decree to provide that the Mother shall not have any overnight male guests while the minor children were present and awarded the Father $10,000 in attorney's fees. The Mother appeals and the Supreme Court reversed in part and affirmed in part.

The Mother contends the amended visitation provision on its face prevents any overnight male guests. The Trial Court had the discretion to place restrictions on custodial parents' behavior that will harm their children and this Court has held exposure to a third party that will have an adverse effect on the best interests of the children will allow the Trial Court to prohibit a parent from exercising his or her custodial rights in that person's presence. But the restriction of any overnight male guests would prohibit the Mother from having visitors with whom she has no romantic relationship and for whom the record does not support a finding of any harmful effect on her children. Therefore, the Court abused its discretion in adopting this provision.

The Wife also appeals the award of attorney's fees. The Trial Court did not specify the statutory basis for its award either at the final hearing or in its written order. It is unclear from the record whether the attorney's fees were pursuant to O.C.G.A. §19-6-2 or 9-15-14. If it is under 19-15-14, the order must include findings of conduct that authorized the award. The Trial Court's order contains no such findings. Also, there is no indication that the Trial Court considered the financial circumstances of the parties in making the award of fees. ***FLR***

Vic Valmus graduated from the University of Georgia School of Law in 2001 and is a partner with Moore Ingram Johnson & Steele, LLP. His primary focus area is family law with his office located in Marietta. He can be reached at vpvalmus@mijs.com.

The section would like to thank Vic Valmus for his consistent contribution to *The Family Law Review*. His summation of updates to Case Law benefits all members of the section. His hard work is deeply valued and greatly appreciated.

Images from the Family Law Institute in A

Amelia Island, Fla., May 26-28, 2011

















Family Law Section
State Bar of Georgia
Randall M. Kessler, co-editor
Marvin Solomiany, co-editor
104 Marietta St., NW, Suite 100
Atlanta, GA 30303

Presorted
Standard Mail
U.S. Postage Paid
Atlanta, GA
Permit No. 1447

2011-12 Family Law Section Executive Committee

Randall M. Kessler, chair/co-editor
rkessler@ksfamilylaw.com

Kelly A. Miles, chair-elect
kmiles@sgwmfirm.com

Jonathan J. Tuggle, secretary/treasurer
jtuggle@bcntlaw.com

Paul Johnson, immediate past chair
kpj@mccorklejohnson.com

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

Kevin Rubin
YLD Family Law Committee chair
krubin@bcntlaw.com

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

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

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

Gary Graham, member-at-large
gary@stern-edlin.com

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

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

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

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

Scot Kraeuter, member-at-large
skraeuter@savagelawfirm.net