



The Family Law Review

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THE ART OF DIVORCE SETTLEMENT NEGOTIATIONS

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Any fool can take a divorce case to trial. Only a skilled lawyer can negotiate a settlement which maximizes the client's position without making the opponent feel taken advantage of. Those negotiating skills are becoming more critical as we enter an era where matrimonial disputes are increasingly being resolved in non-courtroom forums. This article is intended to present a conceptual system which allows practitioners to focus their existing skills to produce more positive settlements.

The Importance of Understanding the Psychology of Divorce.

The first step towards achieving a positive settlement is to recognize that a divorce negotiation is unlike any other legal negotiation. Car accident negotiations, for example, are one dimensional because the accident client wants only one thing . . . money. By contrast, divorce cases often involve a multitude of interrelated issues, all of which are colored by the intensity of the emotions of the parties, their families and sometimes even the lawyers. As a result, divorce negotiations are complex, multi-leveled and require a high degree of understanding the psychological nuances which are in play. Emotion-wrought disputes may arise over seemingly trivial matters, such as the division of furniture and wedding gifts, or even the custody of pets. It is not uncommon for the lawyer to accomplish the client's objective in one area only to destroy his bargaining position in another. Negotiations can also break down because there is no middle ground for settling some emotion-driven assets that the clients perceive as indivisible, such as how does a lawyer divide a beloved pet or a piece of sentimental property?

The lawyer who can understand each case's emotional aspects, its unique issues, the parties, and how they all interrelate can significantly improve settlement results. The successful divorce lawyer must know each of the following before starting to negotiate a case:

1. The law and the facts of her case,
2. The client's goals,
3. The opposing lawyer, and
4. The judge.

Know the Law, Your Client and Your Client's Case

A significant step towards a successful settlement is to develop a working knowledge of the law which applies to your situation. There is no quicker way to be taken advantage of or to create a malpractice opportunity than to violate this cardinal rule. Any good divorce lawyer must have a working knowledge of a multitude of areas of law such as tax, corporate, partnership, real estate, options, security devices, negotiable instruments, landlord/tenant, and wills and trusts. It is equally critical to have a working knowledge of non-legal areas of study such as finance, insurance, counseling, abuse, addiction and psychology.

While the divorce lawyer needs a working understanding of many interdisciplinary areas of study in order to frame issues, build client confidence and formulate imaginative solutions, the lawyer also needs to know when to seek the aid of an expert in one of these fields. Being unprepared on critical matters of law will never benefit your client.

The next step is for the divorce lawyer to familiarize herself with the client and the facts of the client's case. This is accomplished by truly listening to your client. Your wealth of legal knowledge will be wasted unless it can be overlaid and applied to the client's facts. The lawyer can only get those facts by listening. It is amazing how often practitioners neglect the simple yet important task of listening to what their clients have to say.

It is important to accept that we practice in a people-oriented area of law that requires good listening skills to

Editor's Corner

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Greetings:

Another summer has passed and we are well into another great Bar year. Our wonderful Nuts & Bolts of family law programs followed a tremendous Family Law Institute, chaired by Paul Johnson in Destin, Fla. It is hard to believe another Family Law Institute is just around the corner, but so it goes. Next Memorial Day weekend, we look forward to another great program in Amelia Island from May 26-30, 2011. The program will be unique in many ways. While there will always be basic

information, this year we will also explore the new trends in family law across the nation and in Georgia. We also hope to increase the lawyer/judge ratio in the hopes that we have a 1:10 or 1:15 ratio of lawyers to judges. It is important for lawyers and judges to meet outside the courtroom and to exchange ideas both in the seminar programs and elsewhere (at the beach, the pool, the golf course and around the dinner table).

Enjoy this issue of the FLR, have a great end of the year and as always, feel free to contribute articles, photographs (of work, vacation or both) and give us your feedback on this and any other issue of *The Family Law Review*.

Randy and Marvin

The opinions expressed within
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Chair's Comments

by K. Paul Johnson

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It is my privilege to serve as Chair of the Family Law Section this year. I want to congratulate Tina Shadix Roddenbery for her superb leadership during the 2009-10 year. Under her leadership, the Section flourished. For example, the section was instrumental in the passage of new legislation that expanded the domestic relations long arm statute so that Georgia residents can now enforce custody orders against non-residents. In addition, during Tina's tenure, the section held its first-ever past chairs dinner, which brought together the section's past leaders. Tina also worked with members of the section to offer CLE at the Bar's Midyear Meeting and to publish a special edition of the Family Law Review to alert section members to recent changes in the family law landscape. Given all of this, Tina is truly a hard act to follow.

I would be remiss if I failed to mention the role of my mentor, friend and former law partner, Carl Pedigo, in my election to this post. Carl hired me straight out of law school and took me under his wing. I cannot imagine having a better mentor. It was Carl who taught me to practice family law with honesty, compassion, and diligence. It was also Carl who first got me involved in the Family Law Section by asking me to speak with him on the

PKPA and the UCCJA back in 1997. In short, I owe a large part of my success in the practice of law to Carl and I hope that I will make him proud during my tenure as chair.

I am excited to be working with so many friends on the Executive Committee again this year. Many of the members of the Executive Committee have served the section for years. We also have one new member on the Executive Committee, my friend and colleague, Scot Kraeuter from Savannah. Those of you who are familiar with Scot know that he will be a fine addition to an already great Executive Committee.

As chair-elect, I enjoyed hosting the Family Law Institute at Destin in May. As many of you know, this year's seminar was the largest Institute in history. I appreciated all of the positive feedback from the attendees and was thankful for the opportunity to meet and chat with many members of the Section. I hope to see all of you at next year's Institute, which this year's chair-elect, Randy Kessler, is already hard at work planning.

Finally, I want to thank all of you, the members of this section, for your continued support and for making the Family Law Section one of the largest and most successful sections in the Bar. I hope that you all will feel free to contact me or any member of the Executive Committee with questions about or suggestions for the section. *FLR*

Advisory: Error Caused by Altering Tabs on Child Support Worksheet

The official version of Georgia's Excel™ Child Support Guidelines Worksheet is hosted by the Administrative Office of the Courts and is found on the Child Support Commission website at <http://www.georgiacourts.gov/csc/>.

It has come to the attention of commission staff that users are altering the tabs that appear at the bottom of the workbook. (The Excel Child Support Calculator is a workbook comprised of individual worksheets accessed by tabs, such as "Schedule A or Schedule E"). While it may be tempting for users to want to alter the Excel workbook by renaming the tabs or adding colors to the tabs or by hiding the tabs (appearing at the bottom of the workbook), doing so can corrupt the worksheet. The most common error seen as a result of making such edits is a run-time error caused because the structure of the workbook has been altered. The user *must not* change the structure of the workbook.

An example of this situation: As data is entered into the Excel workbook (including the data entry form), the underlining computer code uses the information to perform the calculations. If the code cannot find "Schedule E" because it has been renamed for example as "Deviations," calculations will not occur. The user will encounter a message of run-time error appearing in a dialog box.

The only solution for resolving the run-time error is for the user to download a new worksheet and use that worksheet without altering the tabs in any way.

Thanks for your assistance in helping resolve this issue. *FLR*

A Talk With Hon. Ken Wynne

by Paul Oeland

On July 1, 2010, Ken Wynne became the newest addition to the bench of the Alcovy Judicial Circuit. Announced as a judicial appointee by Gov. Purdue in December of 2009, Judge Wynne's swearing-in was delayed because of the issues with state revenues and budgets, but now formally installed, he has taken to the work eagerly and with purpose. I sat down with Wynne just a few weeks into the job for this interview.

Q: What was your first job after graduating from the University of Georgia School of Law?

A: I worked for Harmon, Smith & Bridges in Atlanta, which had a general civil practice. I did mainly domestic work for the firm, although I also did some commercial litigation as well. I worked there for about 14 months.

Q: What did you think of the domestic work?

A: Well, I was young and wasn't married, so I probably had less of an appreciation for the work than I do now. Frankly, at that time, I found watching marriages dissolve and parents fighting over children to be draining.

Q: Where did you go after that job?

A: I came to the District Attorney's Office in the Alcovy Judicial Circuit in August of 1988. Initially I handled child support enforcement and the delinquency cases in the juvenile courts of Newton and Walton counties.

Q: Why did you become a prosecutor?

A: I enjoyed criminal law in law school, and I found being a prosecutor gave me the opportunity to do the right thing in the cases that I handled. I had the choice, based on the facts and law presented in each case, to dismiss a case or to aggressively prosecute the case, depending on what was needed. I liked very much that ability to do what I believed was right.

Q: Before taking the bench you were the elected district attorney for the circuit. How did you climb from the humble beginnings in the office to that position?

A: In 1990 John Ott was the district attorney, and he was appointed to the bench. His

assistant Alan Cook ran against another lawyer in the office and two other attorneys and won in a special election. We had been an office of four attorneys—one became the judge, one became the district attorney, and one left after losing the race. So, I was the only one left when Alan looked around and needed a chief assistant. I was his chief assistant for 10 years, and when Alan decided not to run for re-election in 2000 I ran and was fortunate enough to be elected.

Q: Given that you came directly from the District Attorney's Office, you have to sit out for a while on criminal cases. How do you feel about doing nothing but civil work for a while?

A: That's right, we estimate I will not have a criminal calendar for about 60 days, so I have been absorbed in the civil case load. It has really been a blessing in a way, because it has given me time to re-familiarize myself with civil practice and procedure. It has afforded me the time to really focus on the cases before me, time to read each file and research the issues presented in each case. It has been the best way for me to get up to speed on the law so that I can handle these matters competently. I have really enjoyed it. It's been fascinating because it's a new challenge.



Q: What positive do you think you bring to the bench that utilizes your experience as a prosecutor?

A: A judge has to know the rules of evidence well, and I tried many, many cases in the District Attorney's Office. I know the rules of evidence well, and I think this will benefit all lawyers, but especially family lawyers because of the sheer number of hearings and trials you typically have.

Q: What about your experience as a prosecutor will help form your judicial philosophy in the area of family law?

A: I think there is some real commonality between criminal and domestic work, and sometimes some overlap as well. In both, you are typically dealing with people who have a problem and who are unable to resolve it themselves. As a prosecutor, I had the ethical duty to seek justice, and inherent in that is the notion of fairness. I think this experience will help in the domestic arena with two entrenched parties who can not find common ground. It will be my goal to find what's fair, and to help people part as amicably as possible, especially when they have children.

Q: What will you expect from family law practitioners that appear in front of you that maybe you will not expect from other lawyers?

A: Well, I expect all lawyers to be prepared, of course, but I think family lawyers have a special obligation to remember that, many times, there are collateral parties involved – children. While you certainly have the obligation to represent your client's interests, I expect you to do this in a way that minimizes the damage to the children. I recognize what you do is different and more difficult at times, but on a personal note, my parents divorced when I was seven years old, and I clearly remember the impact that had on me and my brothers and sister. I think it is incumbent on all of us to think about that.

Q: You are a blank slate to us. Tell us what we can expect from you.

A: It's been a long time since I was in private practice, with the stress of being in different courts and multiple clients. But, I do understand the pressures of private practice, and while I certainly expect conflict letters to be filed, I understand the business of private practice added to human frailty means mistakes will be made. I will be patient unless and until I think that patience is being taken advantage of.

Also, I will issue my rulings as soon as possible, and it will be my goal to rule from the bench when possible. While sometimes I will need to take some time to consider cases, I think waiting for court rulings causes anxiety for litigants. Sometimes they just want a decision to bring closure.

Finally, you can expect me to be prepared and informed in court so that I can handle cases competently.

Q: Because of the delay in your swearing in and that you have no law clerk, you have a unique perspective on the budget problems facing the judiciary in the state. How has this impacted you so far?

A: My colleagues on the bench here have been very gracious in allowing their law clerks to rotate and help me out, so that has been a big help. I do find myself spending a lot of time just making sure all the forms are in the file that are supposed to be there, and I'm not sure that's the most efficient use of my time. I would rather be studying points of law or closely reviewing settlement agreements.

Q: Are there things family lawyers can do in our cases to help with this?

A: So far the only thing I have really seen is in cases where the agreement proposes a shared physical custody arrangement, and one party's income is significantly higher than the other party's income. In spite of this disparity, the request is that neither party pay support to the other. I believe children should have the same advantages in both households, so I would ask that you consider this in these cases. Also, sending proposed orders, even in lieu of letter briefs and the like, would be helpful.

Q: What will be your goal or goals in the family law cases that come before you?

A: Some of this I have already mentioned, fairness, an amicable resolution when possible, and swift decisions when an amicable resolution is not possible. But, also I recognize divorce is just a bad situation, and I think the greatest help I can give is to make sure the proceedings are held correctly, so I plan to be prepared when I walk into the courtroom and take the bench.

Q: I guess every lawyer has what I call "If I were a judge" moments when we think we would or would not do things a certain way if we were on the bench. What promises did you make to yourself that you want to make good on now that you're a judge?

A: I believe in the economy of words from the bench. As the judge, I am not the show. I have to control my courtroom, but I am not the show. I believe lawyers should be able to try their cases. Clearly we have the rules of evidence, and the judge has to exercise some degree of control simply to keep the case progressing, but lawyers should try the case. The less visible I am the better.

Wynne has been married to his wife Pam for 22 years. They have a 17 and a 15-year-old. He remains active in his church and in the local Kiwanis Club in Covington. *FLR*



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

Beneficial Tax Treatment for Alimony Payments Requires Planning

by Martin S. Varon and Sue K. Varon

Most divorce scenarios involve spousal support payments for at least a minimal period of time. Although the length of time for payment of alimony has decreased, particularly in these economic times appropriate planning will allow the payor to take advantage of beneficial tax savings.

Assume you represent a client who has been married for many years, earns a significant salary and will likely pay alimony in the final settlement. Also, assume that the settlement will not be finalized before year-end (we are almost in the fourth quarter of 2010); your client is already living separately from his/her spouse; and is paying her/him temporary support. **Is there any way to characterize the 2010 support payments as "alimony" in order for the payments to be tax deductible and thus financed, in part, by the Internal Revenue Service (IRS)?**

"Alimony is a payment to or for A SPOUSE or former spouse under a divorce or SEPARATION INSTRUMENT." Internal Revenue Code section 71 and Regulations thereunder; Internal Revenue Publication #504. Specific criteria must be fulfilled before the IRS will allow the support payments to be considered deductible alimony:

- the spouses do not file a joint return with each other;

- the payment is in cash;

- the instrument does not designate the payment as not alimony;

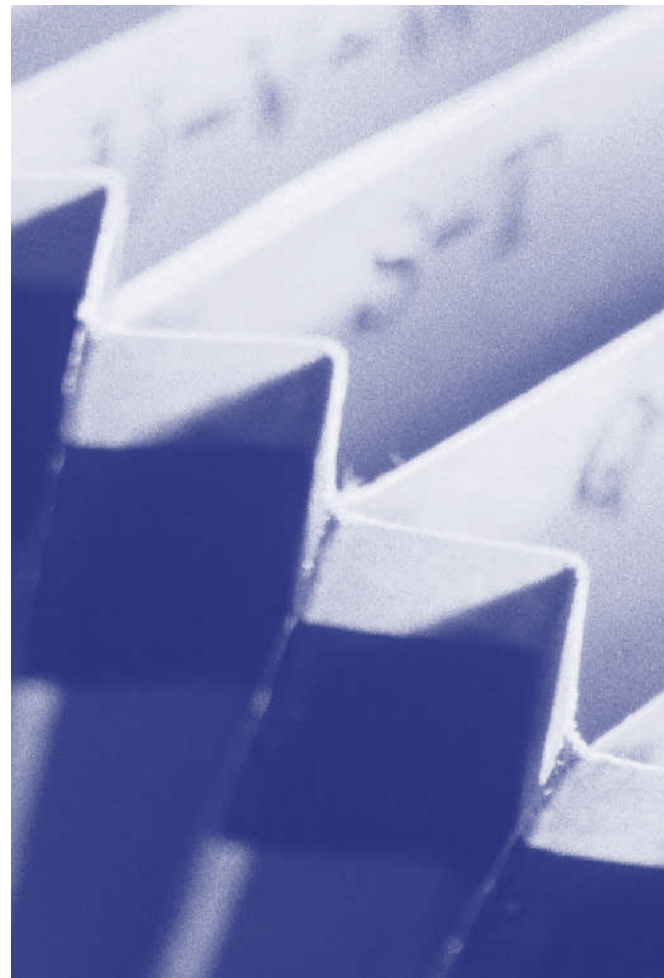
THE SPOUSES ARE NOT MEMBERS OF THE SAME HOUSEHOLD AT THE TIME THE PAYMENTS ARE MADE (This requirement applies only if the spouses are legally separated under a decree of divorce or separate maintenance);

There is no liability to make any payment (in cash or property) after the death of the recipient spouse; and

The payment is not treated as child support (IRS Publication 504, Code Section 71 and Treasury Regulations thereunder).

Let's look at some unusual fact patterns that may arise in your specific client's situation.

If the divorce is not finalized on or before Dec. 31, 2010, is there any way the support payments can be tax deductible? Yes.



Alimony includes payments to/for a SPOUSE under a separation instrument. A separation instrument is defined as:

- a written separation agreement, or

- a decree or any type of court order requiring a spouse to make payments for the support or maintenance of the other spouse. This includes a temporary decree, an interlocutory decree, and a decree of alimony pendent lite.

What if the parties' finances and the current depressed housing market dictate that the parties live in the same household, with the husband living in another part of the house. Are the payments deductible alimony? Maybe.

If the spouses are legally separated under a decree of divorce or separate maintenance any support payment will not be deductible as alimony. However, if the parties are **NOT** legally separated under a decree of divorce or separate maintenance, a support payment made pursuant to a written separation agreement, support decree, or other court order may qualify as alimony even if the parties are members of the same household when the payment is made.

meaning it is not limited. If the parties continue to jointly own the former marital residence and your client is paying 100 percent of the mortgage obligation, your client may deduct one half of each payment as alimony. The other 50 percent is deemed to be a mortgage payment. Only the interest portion of the mortgage payment is tax deductible as an itemized deduction; not the portion that represents the reduction of principal.

What constitutes a written agreement to satisfy the requirements set forth by the IRS for beneficial tax treatment of support payments? The following cases may provide some guidance.

"An exchange of letters between the ex-spouses was held to be a 'written separation agreement' because it is in writing and is a meeting of the minds." *Campbell v. Commissioner*, 15 T.C. 355 (1950)

A letter from a husband's attorney to the wife may constitute a written agreement and payments made pursuant to the letter may be deemed alimony. Treasury Regulations Sec. 1.71-1(b)(2)(i) and *Azenaro v. Commissioner*, T.C. Memo 1989-224

"A letter signed by the wife's attorney for the wife and accepted by the husband's attorney on behalf of the husband as 'understood, accepted and agreed,' agreeing the husband will pay 'all normal and usual expenses of maintenance and operation' of residence" *Leventhal v. Commissioner*, T.C. Memo 2000-92

The tax ramifications related to the payment of temporary and permanent spousal support can be significant. It is important to structure all settlements (both temporary and final) to enable your clients to take advantage of beneficial tax treatment. Most practitioners include a statement in their clients' settlement agreements specifying that they are not providing tax advice. If there is any uncertainty regarding the manner of structuring the financial aspects of the settlement (both on a temporary and final basis), it is prudent to seek counsel from a certified public accountant prior to drafting the agreement. *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 (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.

If one party makes mortgage payments on behalf of their former spouse for the former spouse's home, will the payments be considered alimony? Maybe.

Cash payments to a third party under the terms of the parties' divorce or separation can qualify as cash payments to the former spouse and be deductible as alimony. This beneficial tax treatment for your client should be considered at time of settlement. Payments that are considered alimony are 100 percent tax deductible. This deduction is taken above the adjusted gross income line,

be able to understand the emotional content of the matters in dispute. You should find another area of law to practice if you do not care about people or you lack the ability to listen to their problems.

Listening must begin with the first interview. Your goal is to ascertain the client's concerns, help the client set reasonable goals, and then work to resolve those concerns by accomplishing those goals. Have the client put aside that list of questions he brought with him and start the interview by asking the client what went wrong in the marriage. Remember, at one point your client stood before every friend he had and promised "to death do us part," yet here he is sitting in front of you admitting his failure. Even the most stoic client needs the opportunity to get it off his chest, with no interruption, comment or criticism. Some clients will be eager to talk your ear off, while others will quiz you as to why this information is necessary. Tell the client the truth . . . you want to know what is on his mind, what is bothering him, what his issues are. You want to know these things to enable you to help him set reasonable goals and resolve problems.

It is amazing how a client's eyes will light up when given this explanation. "Here is an attorney who cares for something more than the dollar. This is the attorney I want to hire." This approach is successful, however, only if you mean what you are saying. Bluffing interest will not engage the client's trust and that trust is necessary to your ability engage the client's confidence.

Every good lawyer will tell you that it is critical to the lawyer/client relationship that the lawyer take charge during the initial consultation. This is true, but too many lawyers believe that "taking charge" means pontificating about her own skills or the great things she plans to do for the client. The successful lawyer takes charge by listening, analyzing and not over promising. Listening to your client at the inception of your relationship builds the foundation from which you will later guide and direct your client through the negotiation process. Reference what you have learned from the client as you begin to guide and direct also gives the client the opportunity to develop a sense that his lawyer heard and cares about his concerns. One of the great mysteries is why clients hire lawyers with poor legal skills. Perhaps it is because those lawyers are good listeners, and work with what they've learned. If you follow these principles it is unlikely you will ever see a client who presented himself with a list of questions at the beginning of the interview leave without having most of his questions answered without ever having had to refer back to the list.

Study after study makes clear that clients look for the lawyer who cares about their case rather than one who is the smartest, the cheapest, etc. So listen and learn. Lawyers are not therapists, but that does not mean that it is not useful to spend part of an hour listening to what is on the client's mind. Listening clues you to what is needed as you begin to offer guidance, direction or redirection.

Remember, too, that you may have heard the same story a hundred times, but this is a first for the client. Avoid the temptation to pigeonhole the client's problem into the ready-made scenario that you already have the answers for. Each case is unique and the later negotiations will involve complex, intertwining goals and concerns with a healthy spicing of emotion thrown in.

"Listening" does not mean that the lawyer should sit quietly through the entire first interview. Depending on the client, you may want to listen for the first 10 to 15 minutes without anything more than an occasional affirmative response to let the client know that you are attentive. A typical statement in the first fifteen minutes would be: "He said what?" "Was that the first or the second time that happened?" "How did you respond?" It is the affirmation that you are listening which is important, not the answer. Gradually insert yourself into the discussion by guiding the discussions to the areas that will make an actual difference in your case. You should be doing all of the talking by the end of the hour. By then you are using what you have heard to "take charge" with guidance and direction. If you are Perry Mason, he is to be Paul Drake, the investigator. After all, who knows more about the case than the client?

Make sure to give the client a few specific instructions (homework assignments) during the first interview so that he leaves your office with a task and direction. The best way to assure the client that you understand the law, that you care about him and have the skills to do the job is to make the client part of the team which is being formed to handle his divorce. Have the client get a credit report on himself (even though you can easily get one yourself) because it is something the client will feel good about having accomplished. Distribute the boilerplate checklist of records that we each have and tell the client why it is important to start gathering the documents for you and the other side. Suggest a specific book that he might read to educate himself about the process he will soon be embroiled in.¹ Work is a constructive therapy so use it to your client's advantage.

Remember that you are a lawyer and not a puppet. Promise only that you will do your best work for the client, nothing more and nothing less. The distinction is critical because it highlights your role as an advisor. Your job is to meld the facts and the law together in the most advantageous way for the client but you cannot remake your client's facts. The best lawyer is the one who can give the client the bad news in such a way that it is accepted, albeit reluctantly, and then moves on to the next step in the process. Most practitioners never promise the client any specific result other than that you will do your best for the client.

You will never get all of the information you need to understand and settle the case during the first interview, so do not try. This interview merely sets the tone for the relationship as you want (and expect) it to be. It will take several interviews and other information gathering techniques to fully grasp all the details and nuances of the case, and to develop your relationship with the client.

Following the theme that this is “your divorce and that I expect and need your help with it,” you should send the client the next homework assignment soon after being hired. You want a written history of the client’s marriage. This means you need to hear about the good, the bad and the ugly parts. This also a cathartic exercise for the client that can provide insights not drawn from your meetings. A critical part of his “history” is a requirement that the client write out his objectives in order of priority. This will give you a record of the client’s own view of the importance of each issue, and will provide a checklist in developing a plan to achieve the important goals. This list can also be used by you and the client to determine what is and is not nonnegotiable.

In addition to being information-gathering opportunities, each subsequent interview is an opportunity for you to build the confidence and rapport with your client which will become so important when the actual settlement process begins. Focus on getting the client’s information, including an understanding of what motivates the client’s spouse. As you begin to understand what your client’s spouse wants you can speculate as to what concessions she would make to attain her own goals. You will gain a greater understanding of the psychological and emotional pressures affecting all members of the family unit each time you talk to your client. In doing so, you will gain the insight that will become invaluable once everyone is sitting at the conference table.

As you progress through this article you will note that it describes settlement techniques that work only with a

client with whom you have built a rapport, somebody you like. It will not work with a client who cannot be dissuaded from unrealistic expectations. Unrealistic expectations, anger, a need to punish, not understanding the terms of the settlement, perceptions of coercion or a tendency toward buyer’s remorse all characterize the unhappy client which will increase the probability of a malpractice claim or community bad-mouthing of you and your practice.

Being the client’s advisor is a reference to the law, not to the client’s personal life. Do not become emotionally ensnared in the client’s troubles because it is your detached objectivity that allows you to give good legal advise. This control is lost once the client becomes a friend, personal confidant, a buddy. In addition, there are those clients who have an unreasonable or irrational perspective on their case and your role in it. Discharge such clients immediately or the set the case for trial without any further attempt to negotiate a settlement. Such clients will never be happy with the result you obtain, regardless of how favorable that result actually is. Either let some other lawyer disappoint him, or let the judge be the one who shines the stark light of reality into his darkened room.

Providing guidance and direction while maintaining control means that you must always tell your client what he needs to hear rather than what he wants to hear. Help the client develop realistic objectives by being direct, matter of fact and honest. The more knowledgeable the client is made about the law and the process, the easier it will be to



settle. The bottom line is always this: terminate the lawyer/client relationship if you cringe at the thought of picking up the client's file. You will not settle the case, or if you do, the client will not like the result regardless of how favorable it actually was. No lawyer needs the money that badly.

Know the Other Lawyer

Negotiating a divorce case is like no other negotiation for a number of reasons, not the least of which is that there are few hard laws or legal rules that apply. The vagueness of asset values, flexible criteria for division of property and the lack of objective spousal support standards always gives the advantage to the legally and factually informed and prepared lawyer. The next question to answer is whether your opponent is that lawyer.

Who is the other lawyer? Does she know the law? Does she have solid negotiating skills, or does she take unreasonable positions only to back down on the night before the trial? Is she honest and forthcoming with information, or does she "hide the ball?" Is her style so offensive that the best course of action is to have the case set immediately for trial? Does she get emotionally caught up in her clients' cases? ² The list is endless. One way to find the answers is to make a few calls and ask questions about your opponent if you have not handled cases with her before. It is critical to know your opposing lawyer's strengths and weaknesses, level of knowledge and working style.

What is your opponent's negotiating style. Is the lawyer a "competitive" or "cooperative" negotiator? Although it is easy to be a jerk it is even easier to be

perceived as a jerk. As a result, posturing is rarely helpful and usually counterproductive. Posturing may make the client feel good for a moment if the client's goal is to punish or to gratify his own ego, but it is not conducive to settlement.

"Competitive" negotiators occasionally obtain more extreme results than "cooperative" negotiators but the price for those results is that they settle far fewer cases. It is not worth subjecting your client to this kind of negotiation. "Competitive" negotiators frequently win a battle during a particular confrontation, but they seldom win the war. They forget that the parties are often going to have to deal with each other for a long time and the pleasure of the moment may cause damage that lasts a lifetime.

Divorce is a specialized business and as a result, cases tend to be handled by the same group of lawyers. This means you will negotiate case after case with the same opponent. Resist the temptation to make disparaging comments about the other lawyer to your client even if you have worked together and know well her shortcomings. Your grandmother was correct when she advised that you never build yourself up by tearing another person down. Instead, focus on doing your job as well as you can. Let the results speak for you. Just as you must know your opponent, understand, too, the importance



of your own credibility in the negotiation process. What is being said about you? Ask yourself the same questions that you ask about the opposing lawyer. You cannot expect the opposing lawyer to encourage the settlement process if your own credibility suffers in the legal community.

Recognize that a lawyer's reputation, sincerity and credibility are tremendously important to settlement. Always covet your reputation. It, like credit, takes a lifetime to establish but only one day to destroy. For example, until and unless a lawyer acquires a reputation for being well-prepared and willing to try her cases, there will always be opponents who will discount her position.

Know the Judge Who Will Try Your Case

Settlement is largely determined by what the lawyers believe is attainable through trial. In jurisdictions where cases are pre-assigned, knowing the judge will allow the lawyer to gauge the credibility of the opposing party's settlement proposals. This is one of the reasons divorce cases are usually handled by local counsel.

The goal is to have a clear understanding of what your client can reasonably expect as an outcome if a settlement is not reached and a third party (a judge) has to resolve the dispute. "Knowing" the judge does not mean that she will cut you any special favors. Rather, it is a recognition that every person, regardless of position, has personal biases and prejudices. A judge with a husband who stays home to care for their children will look at a case differently than a judge who has placed her children in daycare so that her husband can work. An alcoholic judge who has been sober for five years is going to be sympathetic to an addictive spouse who has recognized her problem and is seeking treatment. Call more knowledgeable local lawyers and ask for advice if you are not confident in your understanding of your judge.

Gauge your settlement advice to the client on what you expect the judge to do if she ultimately will resolve the unresolved conflicts. Keep in mind that the lawyers can fashion a result which the court would not have the authority to impose upon the parties. This is particularly true in areas involving highly emotional issues. As we all know, judges cut things in half with a rusty knife whereas we have the opportunity in the settlement process to use a surgeon's scalpel.

Knowing the judge can also help you resolve that one stubborn impediment to a resolution of the entire case. Most judges are more than willing to meet with the lawyers (directly or by a telephone conference) for a quick advisory meeting. Each side makes a quick statement to the judge of her "best case" scenario. The judge then explains her read on what the outcome could be. Telling the client how the judge will likely rule on disputed issues often resolves stubborn impediments to settlement because it carries more weight than your own opinion and allows everyone to save face.

Preparing for the negotiation process

Serious negotiations should not begin until the lawyer has all the facts and a clear understanding of the client's

goals. Does the client understand and feel comfortable (procedurally . . . almost never emotionally) with the process he is about to go through? Tom Tyler, a psychologist at Northwestern University, reported in an article in the July 1988 *ABA Journal* that people often care less about how much money they get in a settlement than how they got it. He noted that "clients care most about the process by which their problem or dispute is resolved. In particular, people place great weight on having their problem or dispute settled in a way they feel is fair." Clients who participate in the settlement process are much more accepting of the outcome. Remember the Perry Mason analogy. It is your job to educate the client before the settlement process begins if your client's goals conflict with the law, your ethics or judicial practice. You have an ethical obligation to not allow falsehoods or assert positions to merely harass. You do your client a service by discouraging and preventing emotionally charged and questionable tactics.

Develop a plan for approaching the specific negotiation by examining the big picture pieced together from your knowledge of the law, the parties, your opponent, and the judge. A negotiating plan is your map to settlement and is critical because most people get lost without maps. Objectively analyze the case by questioning everything, including your client's version of the facts and his demands. Clients actually do lie to their lawyers. Investigate and carefully evaluate the facts, the law, and the reasonableness of disputed claims. Make sure you know what your client wants and is willing to relinquish. This is where that written list of priorities will help you guide the client.

Next anticipate what the opponent wants and why. It bolsters your own confidence and undermines the opponent's confidence if you understand where the hot buttons are. Define your parameters by identifying both parties' goals. For example, does the husband need a quick divorce so he can marry his girlfriend? Does a mother need joint custody to save face although she does not desire to be the primary parent? Does a cheating spouse feel generous to assuage her guilt? Learn both parties' weak spots. Learn if either client (or lawyer) is adamant about not going to trial. Watch for any health problems or age considerations that may affect a client's goals. Discover if there is an asset that has sentimental or emotional value that will be a stumbling block to settlement. Look for "secrets" that no one wants revealed at trial.

Be a problem solver instead of a problem creator. There is no better way to win the trust of the opposing party than by finding solutions to her issues. Consider innovative formulations. For example, if mom wants the house to raise the children and dad merely wants his portion of the equity, consider deferring payment until the youngest child graduates from high school. This gives mom a chance to find an alternative source of money to pay dad while making dad feel good about not disrupting the children's lives. If the parties cannot agree on an asset's value that no one wants, sell it and let the market establish the value. If

a party does not want to pay support “on principle,” offer extra tax-free property of equivalent after-tax value. The settlement possibilities of each case are limited only by your imagination. This is where your knowledge of the law and the facts of the case make you the better negotiator because you understand the parties’ priorities and how to help each get there.

A good negotiator must separate the people from the problem. For example, your opponent will not appreciate a lecture on the law, but would appreciate receiving a citation to a controlling case which could then be passed on to her client, especially if it is not given in the client’s presence. After all, nobody wants to look bad, either by being, or appearing to be, uninformed about the law in front of the client. Harassing letters or comments reciting in detail the immoralities or other bad personal conduct of a spouse is seldom effective, so why do it? Do not let your client’s complaint become yours. Nasty threatening tactics destroy the kind of atmosphere that is conducive to settlement. A charge of misconduct should be related as just that—unless or even if its truth has been verified (i.e., “My client reports that . . .”).

Be thorough, remembering that it is all in the details. Try to negotiate agreements which leave nothing dangling. Peripheral matters that usually are relatively easy to dispose of as a part of an overall settlement can be the source of bothersome problems if left unresolved. Pesky details such as who will assume responsibility for paying any tax deficiency due on a previously filed joint tax return, division of tax refunds, who is going to pay which credit card, division of dependency exemptions, division of the family photos, who will provide visitation transportation, where the support check will be sent, etc., can and should be anticipated and resolved before they arise after entry of the judgment.

In learning how your client thinks, you should also determine if your client is strong enough to be an active partner in the negotiation process. Clients capable of holding their own can often resolve minor disputes directly with the other party. Spouses know each other far better than the lawyers do. However, it is critical to monitor such direct negotiations to circumvent intimidation, subsequent misquotation of statements made or an unintended revelation of tactics and strategy.

Understand Your Role in the Settlement Process

Shakespeare said “to thine own self be true.” You cannot enter the settlement arena without knowing your own limitations. Understand when to call in a specialist. Other professions and occupations call in specialists for the difficult problems. Do not let your client suffer because of your own ego.

Protect yourself by writing the client in advance to advise what you think will be the outcome at trial. Understand the nuances of genuine communication with your client. There must be “real communication” between the client and lawyer throughout the entire case for the negotiation process to succeed. Your goal is a client who is happy with the result not only on the day of settlement,

but two years later as well. Explaining the process, the dynamics, how you will work and what you “plan” to concede will build confidence.

Your client should respect your advice before, during and after settlement if you have cultivated the proper working relationship. Once this has been achieved the client will heed your instructions as to what should or should not be done during the case. Effective communication is the key to developing this level of trust and rapport. As stated above, this relationship begins at the initial interview and builds with each contact the client has with your office.

Create an environment where you can educate your client. The lawyer must be realistic with the client and be able to define what is a good settlement. Explain what probably will happen if the case goes to court. As the case progresses, keep the client fully advised of developments, including a reassessment of goals as needed. An educated client will be a true partner in the settlement process

The Mechanics of Settlement Negotiations

Many lawyers bargain by telephone because they prefer to avoid a face-to-face situation. Statements can be made over the telephone which would make many lawyers uncomfortable to say directly. The telephone is primarily useful for short interactions where procedures are established for the exchange of information, to exchange tidbits of information, or to resolve isolated issues. Using the telephone gives you the opportunity to not take the settlement call if you are not yet prepared for it. Be straightforward and tell the opposing lawyer if you are not yet ready to talk settlement. Such a call makes clear that you have enough self-confidence and knowledge of the settlement process to avoid a situation where you could have been taken advantage of. It also saves your client money. Keep in mind that this is a short time solution. Using the telephone also gives you the opportunity to gauge your opponents responses and correct misunderstandings before they grow out of proportion. It also provides the opportunity to defer any settlement call if you are not ready. Calls do not involve a great expenditure of time or the client’s money.

Some lawyers prefer to bargain by mail, fax or e-mail. These mechanisms are also frequently used to establish procedure and to exchange larger bits of information. As with telephone contacts, these mechanisms are very popular with lawyers who do not like face-to-face meetings. Some disadvantages are that they do not provide the instantaneous ability to read a response or correct a misunderstanding. And too often, the lack of immediate response allows the recipient time to read too much into what was said. On the other hand they can provide a measure of protection against misunderstanding as to specifics since there are written memorializations. Letters help summarize what has been resolved and identify what remains in dispute. Copies of letters will also keep the client advised and can be used as a checklist in preparing the final agreement. Some disadvantages of letters are that they are time-consuming and can be expensive for the client.

Fax transmissions create their own issues. Faxes provide the instant gratification of the telephone without a face-to-face meeting. Faxes seem to get immediate attention —unlike regular mail. On the other hand, faxes are often abused: beware the “scud mail” fax or the after 5 p.m. fax man. The use of e-mail is rapidly becoming a popular method of client-lawyer and lawyer-lawyer communication. It is a wonderful tool but, like all tools, it can be dangerous if mishandled. E-mail transmissions between lawyers are often quick, short notes that are mistyped and are as casual in style as telephone conversations. This is especially true in divorce work since, as noted above, the same lawyers often work together. Do you know that your opponent is forwarding your e-mail message directly to her client? Did you intend it to be forwarded? What if it goes to the wrong person? Protocols need to be developed as to how e-mail will be used. Develop a clear understanding with those with whom you correspond that e-mail is to be forwarded to the client only if it says “cc: client” at the bottom, or prepare your e-mail with the same level of care that you would a letter. This mutual professionalism may save you some embarrassment when your casual note to your “good buddy” opponent is forwarded to her client, who in turn forwards it to your client. It is just as important that you be circumspect when communicating with your own client by E-mail. While clients can copy your letters and send them to others, they seldom do. On the other hand, your e-mail message to the client is easily forwarded to parents, friends, members of the client’s support group and even the spouse with only a keystroke.

There is no better way to communicate directly with the other party than by face-to-face negotiation. You have the power to present yourself, and your position, in any manner you wish (i.e., confrontive, supportive, a conciliator, a problem resolver, etc.) and since the negotiation process begins with the first contact with the opponent, everything that you do or say will make a difference.

With this in mind, initially consider whether your client should even attend the settlement conference. Some clients should not for a variety of reasons, most of which have to do with temperament, demeanor or a history of abuse. If your client does attend, decide whether it is appropriate for the client to actively participate, be present but non-participatory, or to be in another room available for immediate consultation.

There are many advantages to having the clients present. You have the opportunity to impress the other party with your reasonableness without opposing counsel being able to filter what you say. You have the opportunity to gauge the parties’ reactions to proposals and gain insight into their driving emotions. There is an opportunity for the negotiations to evolve in a natural give-and-take atmosphere with all parties present.

There are also disadvantages to having the clients present. Your client may misinterpret posturing by your opponent which is designed primarily to impress her client or intimidate yours. There is also a danger that your client will compare you unfavorably with the opposing lawyer.

A client may seek to control or interfere with lawyer-to-lawyer discussions. Your client may be intimidated either by opposing counsel or their spouse. Or more likely, your client will not be able to keep his mouth shut, thereby destroying even the most carefully crafted negotiating plan.

A face-to-face negotiation is the forum where a lawyer’s negotiation skills are at their highest premium. Like trial, there is no margin for error. You cannot take back verbal statements or nonverbal cues once they are given without losing considerable “face” and negotiating strength. This unforgiving atmosphere is why many lawyers dislike face-to-face meetings. If you do your homework, however, this is the arena where you can utilize all of the above concepts to obtain the most satisfactory result.

Strategies for a Face-to-Face Negotiation Session

Now that you understand the actors, the law and the facts and you have planned your objectives and your methods, it is time to establish the strategies by which you will accomplish your client’s goals. For example, there is a split of opinion as to whether it is useful to make the first offer. Your initial offer may have been substantially better than expected and may spur settlement while creating a sense of fairness. However, it is likely that the party who makes the first offer is also likely to make the first concession. That will not be a problem if the concession is preplanned.

Put your negotiating plan into effect by setting the stage and selecting the venue. Outline all areas to be addressed before the session begins. One method is to work from a proposed stipulated judgment which is written exactly as you would want the judge to rule on your behalf. Send it to the opposing lawyer well in advance of the meeting so that she and her client have a chance to review and discuss it. This document takes advantage of the old adage that it is easier to edit than it is to create. In addition, using the judgment assures that you will not forget an issue nor argue about language after the settlement. Usually the lawyer who starts the document gets to draft it in final. This also allows you to fine-tune the language the way you think it should be.

Start the meeting by going through the document page by page to identify where there are disagreements. Never make concessions at this stage because the one concession you really need to make may be on the last page. You will no longer have anything to “bargain” with if you made all of your concessions as you went through the document for the first time. Negotiations will really begin as everyone goes through the form of judgment for the second time during this face-to-face meeting.

One of the fringe benefits of this approach is that, while a full settlement may not have been reached, you have reached an agreement on all of the language of the proposed judgment which is not in dispute. This may sound sophomoric, but how many times have you and your opponent argued for weeks over how the judge’s two-page opinion letter should be set out in the 10-page final judgment? One of the chief benefits of holding the settlement conference in your own office is that your

secretarial staff can bring in revised versions as the negotiations progress. For example, pass along the first four pages with handwritten corrections to be retyped while negotiations continue on through the remainder of the judgment. This can also be done with a laptop in the conference room, but lawyers usually cannot type as fast as their secretaries. More importantly, it distracts from your ability to focus on the settlement process because you are so busy typing. The goal of using a proposed judgment in such a meeting is to have the participants leave the negotiations that day with a signed agreement. This prevents litigants from taking a few days to develop "buyer's remorse" and renege on the deal.

A disadvantage to using a proposed judgment is that it may send a message of inflexibility or create a perception that you are controlling. Some lawyers feel intimidated by this approach and may actually be more combative because of it. These fears can sometimes be allayed by calling the meeting with the purpose of resolving final "tough" issues after counsel have been "jointly" working on the form.

Throughout the process be aware of what is happening around you. Always keep in mind the opposing counsel's personal skill, negotiating experience, personal beliefs and attitudes, the negotiator's perception of the current situation, and the resources available to her client. Do not make an offer that causes the opponent to lose all interest in settling. Instead you should present your offer in a confident manner so that your beliefs set the stage and your assumptions form the basis from which the negotiations will proceed. At the same time try to be aware of false issues which they are prepared to "give up on".

Prepare your client ahead of time by explaining the process and the need to make concessions. Explain that your goal in presenting issues to be conceded and making more valuable concessions is to create a concession-oriented attitude in your opponent. Even false issues which are obvious to the opposing lawyer help elevate the opposing party's confidence in his own lawyer. He feels good about the result when the opposing lawyer is convinced to give up on other issues. Making a concession (even a red herring) builds an atmosphere which is conducive to the opponent "giving up" on items about which you care.

Working the psychological nuances of the process is where it all comes together. Focus on areas of interest, not on a position—(i.e., refer to the children's needs, not to the custodial label). Choice of language is just as critical. President Clinton in his 2000 state of the union address was skillful in describing each new spending proposal as an "investment" in the future rather than an expenditure. After all, everyone thinks investing is good whether or not they believe spending is bad.

There are many nuances that often affect the tone and pace of a negotiation. Consider injecting an emotional element into the negotiating strategy. The welfare of the children and their need to enjoy the same standard of living. A reluctance to involve the children in a fight

over support or custody. Loss of the children's respect. Past practices of the spouse. The wife's initial financial investment in the marriage and her role as a homemaker. How a wife assisted in her husband's career. The wife's inexperience in the business world. The husband's business reverses. The poor health of one of the spouses. An affair and the attendant negative reaction of family and friends.

Another effective technique in lowering settlement barriers is to personalize the negotiation by calling the opponent (and sometimes the parties) by first name. Other common techniques are argument (legal or nonlegal), flattery (genuine or not), silence (people often talk to fill a silent void, thus inadvertently disclosing information) and patience (good things do come to those who wait).

Humor can be an effective negotiation technique, but it is very difficult to use because the situation is not a humorous one for the clients. Stay away from humor unless you are a very good negotiator with a good feel for people. Clients seldom think you are as humorous as you think you are.

The most important thing is to demonstrate that you are willing to work at being a problem solver. You can do that by talking directly to the clients and not just to the lawyer. Focus on issues without attacking or defending. Recognize that mild threats can sometimes be effective if carefully communicated and completely understood by the opponent. Major direct threats, however, will break down the communication. "If you do this, I'll do _____." Try to create opportunities for the parties to "save face". Even ask for criticism of your own position. "This is my solution, do you have a better one?" Client preparation will ensure that your client does not lose confidence in you as you solve the other side's problems.

Listen to the opposing lawyer, the other party, and the clients. Try to discern what is really being said. Listen to verbal signals where the meaning is apparent on its face (i.e., "I cannot offer more.") or where the meaning is equivocal (i.e., "My client is not inclined to offer any more.").

Observe nonverbal signals. Some obvious examples are the loss of temper or open expressions of pleasure or relief, etc. Careful observation may disclose more subtle varieties such as furtive expression, telltale mannerisms, gross body movements, etc. Try to make good eye contact throughout the negotiation. This helps you focus on the opponent's verbal and nonverbal signals. In your own actions try to use questions rather than statements to avoid resistance to your words. Learn to restate in your own words the opponent's position as a means of verification and clarification. Also, questions will get answers and information from the other side which can be used to effectuate settlement.

Closing the Deal

Now that the process is near its end you should aim for a total package, not a piecemeal disposition of some issues, though support or custody can easily be bifurcated. Creating a win-win atmosphere encourages cooperative behavior and increases the likelihood of a successful negotiation. Demonstrate your willingness to "tell" your

client to “give” on an issue. Doing this in a negotiation is often a critical component of making the other side feel that you truly are interested in resolving disputes. It also helps you project an image of honesty and candor.

Save larger concessions to be the deal clincher made at the end of the negotiation meeting rather than at the beginning. By the end of the session the opponent has, hopefully, forgotten her carefully planned out concession pattern and thought out tactics. At that stage, the posturing is over and everybody sees what really is going on. Excessive demands have fallen away and the party is going to lose face if he backtracks.

Use the computer to get the agreement finalized. If you have worked from a form of stipulated judgment, get it printed and signed while everyone is still together. If you have any doubts that an agreement will be signed call the court and put the settlement on the record by telephone.

If there is a problem bigger than the lawyers can solve try to seek out an independent third party such as a mediator or judge to insert some reality.

Conclusion

Never forget that this is likely not a one-time interaction between the parties. Winning a battle will not always win a war, and a major coup will be later discovered and used to punish the client in other areas in the years to come. If you remain conscious of the emotional dynamics of settlement, you will have a happy client who will pay your bill and tell all their friends for years that “they were happy with the result and you were worth every penny.” *FLR*



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(Endnotes)

- 1 *The Divorce Handbook - Your Basic Guide to Divorce* by James T. Freidman is an excellent resource for this purpose. It presents the information in a question and answer format which allows the client to zero in on the information he wants without having to muddle through extraneous and perhaps confusing details. Random House. 1999.
- 2 This last attribute is often a failing of inexperienced lawyers. They listen to the client, but lose the objective viewpoint which is critical to being an effective advocate.

Save the Date

Family Law Professionalism

CLE

Jan. 6, 2011

The Capital City Club

Georgia Domestic Violence Benchbook

A Guide to
Civil and Criminal Proceedings

Project Manager
Nancy Hunter
hunter.safesolutions@gmail.com

Fifth Edition
November 2008 –
September 2009

This Benchbook was funded
by the Georgia Commission
on Family Violence and
SafeSolutions, Inc.

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

Confessions of a Guardian Ad Litem: Parent Coordination

by M. Debra Gold
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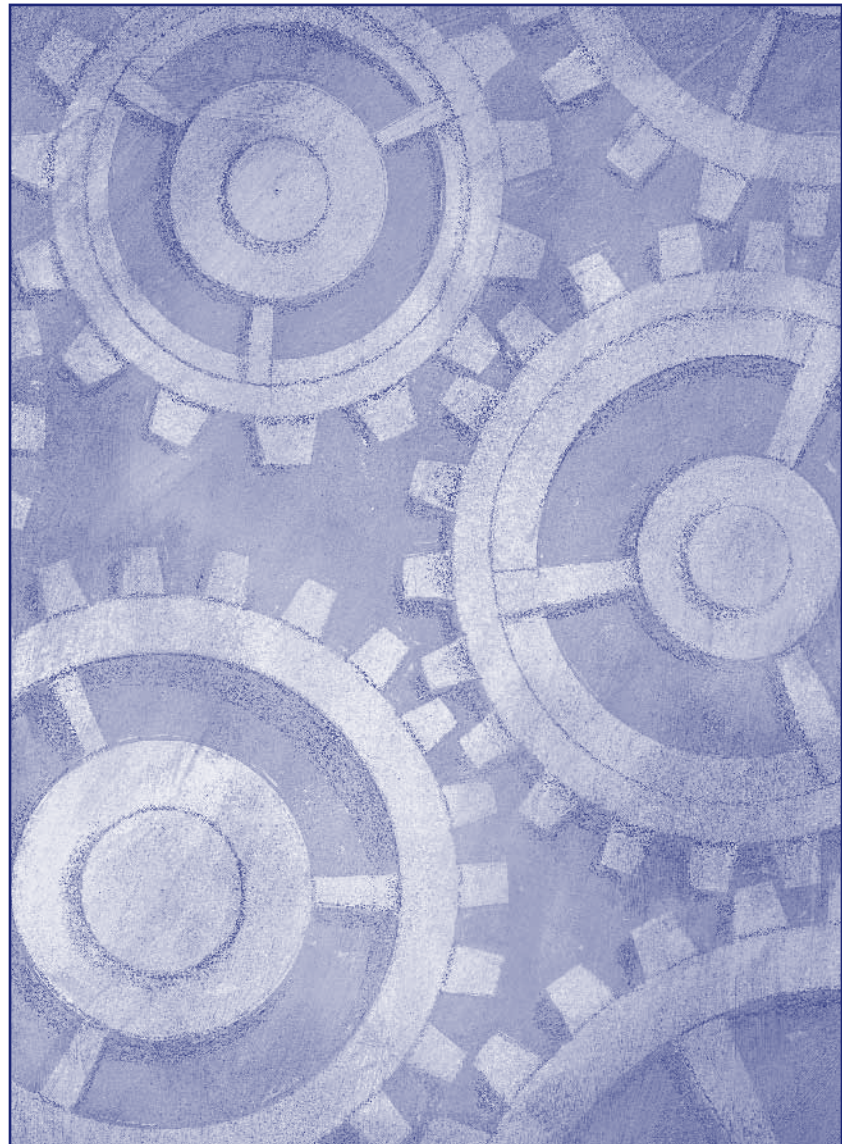
In my 21 years of family law practice, I have seen the advent and success of many programs such as mediation, arbitration, collaborative law, guardians ad litem and seminars for divorcing parents. The growth of these programs is indicative of a recognized need to ease the adversarial nature and high costs of the divorce process, and to prioritize the needs and best interests of the children. One of the latest evolutions in Georgia is the increasing use of Parent Coordinators (PC). I have had some experience with PCs and I recently took a PC training, so I know firsthand how beneficial they can be in high conflict cases. My confession for this issue of *The Family Law Review* is that although it may cut into some of our “repeat business” I am happy to be a part of such a positive, effective and child-centered alternative to litigation.

The Association of Family and Conciliation Courts (AFCC) defines Parent Coordination as “a child focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children’s needs, and with prior approval of the parties and/or the court, making decisions within the scope of the court order or appointment contract.”

Think about those “former” clients who are still calling weekly with complaints about their exes. Often their issues are trivial matters such as the children bringing home dirty clothes and other times the issues are more significant. They complain about arguing in front of the children or the other side inappropriately putting

the children in the middle. They are unable to agree on anything regarding the children. You recognize the same patterns of hurt, anger and bitterness that drove them during the divorce. They are either unable or unwilling to reduce their child-related conflicts without some type of intervention. You throw your hands up in the air because you know there is little you can do. You explain the options to your client but none are good as your client is just as much of the problem as the opposing party. What should you have done to try to minimize these problems?

High conflict cases such as this are the type of cases that benefit from a PC. Had a PC been appointed in this case, the parties would bring their parenting issues that do not require court



intervention to the PC for resolution. The PC would work with the parties in an effort to help them resolve their own conflicts. He or she is trained to facilitate communications and to help the parties work through the difficult emotions that accompany custody cases. The PC process has an educational component so that the parties can learn to better understand concepts such as the developmental needs of their children, family dynamics, how their behaviors impact their children, and how to most effectively co-parent and disengage from the conflicts. The parties learn strategies of how to deal with each other and how to reconcile their differences. The PC may monitor communications and act as an interface to foster better communication and cooperation between the parents. The PC also monitors and works to ensure compliance with the Parenting Plan. In certain cases, the PC may have the authority to require drug and alcohol testing. Finally, if all attempts fail and the parties are not able to work things out themselves, the PC can arbitrate and make limited decisions within the scope of the court's order of referral. If the issue is such that a change in legal or physical custody is in the best interests of the children, the PC can make recommendations that may be used when the issue is litigated.

The ultimate goal of a PC is for the parties to learn the tools to problem solve and move forward productively on their own without the intervention of the PC or the court. In high conflict cases, this is the definition and picture of success.

By delegating post-judgment management and implementation functions to a qualified PC, the court can insure that issues affecting the best interests of the children can be resolved in a more expeditious manner. The courts benefit as the amount of post-judgment litigation is significantly decreased. The benefit to the parents is multifold, the least of which is that they can avoid continuous litigation which is very expensive, both emotionally and financially. The attorneys benefit because they can better manage their time and caseloads without having to constantly respond to their former clients' complaints. And most of all the children benefit, as an effective PC will help their parents learn how to shield them from the trauma of their constant conflicts.

Several states have specific statutory authority for the appointment of a PC. The authority in Georgia is the arbitration code at O.C.G.A. §9-9-1 et seq. I encourage you as attorneys to consider the appointment of a PC in your high conflict cases as a means of facilitating the implementation and enforcement of the parenting plans. If they could, your clients' children would thank you! *FLR*



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“Welcome to Child Support Problem Solving Court”

by Regina M. Quick

When he took the bench in 2003, Judge David R. Sweat had little experience with the intricacies of family law. He quickly identified child support recovery cases as problematic for both his docket and his conscience. Problematic for the docket in that an already full calendar was filled repeatedly with the same litigants who were making no progress. Problematic for his conscience because he could not accept that incarceration was a long-term solution to the problem of nonpayment of support.

So, in May 2008, Sweat began to gather information to create a better alternative and to target problem cases. In Athens-Clarke County, the poverty rate exceeds 30 percent and the graduation rate is less than 50 percent. These dynamics presented a challenging environment in which to address child support arrearages, which for many non-custodial parents seem a mountain to climb. Sweat began to conduct regular child support status conferences, generating a procedure whereby non-custodial parents would be released to report back to court and report on a list of non-traditional tasks which would allow purging of the contempt. By September 2009, he was ready to call a meeting of stakeholders from a wide variety of disciplines to expand the concept.

Now, once a month, Sweat takes the bench welcoming new participants to the Western Judicial Circuit Child Support Problem Solving Court. The people in attendance come with a variety of issues. Sweat takes on a variety of roles: part motivational speaker, part disciplinarian, part philosopher, part hall monitor and part investigator. The continuing connection he develops with these parents and the accountability of the process is making a major difference.

I recently sat down with Judge Sweat to learn more.

Interview with Judge Sweat

Quick: Tell me how the idea came to sort of evolve from this fireside chat, as it were, to the Child Support Problem-Solving Court.

Sweat: This began in May of 2008. Since I

have been a judge, I set aside a Friday afternoon once a month to do child support contempt cases for the Division of Child Support Services. On that day, I think I had heard one too many persons say that “Judge, if you will just give me some time, I will get a job and start paying.” These are not private enforcement cases where an attorney is willing to seek contempt because the person has money and won’t pay. If these individuals had any money, or even had a job, the Division of Child Support Services would agree to a consent contempt and get them to start paying. These are individuals for whom work has not become a meaningful habit in their lives. When we put them in jail, they had no money to get out and would just sit until someone decided that 60-90-120 days was enough and we would let them out, and then we would do it over again.

I think I said, “OK”, we will see. I let some people out of jail, and told them they had to come back to court in two weeks and show me what they had paid. I began seeing these individuals regularly, with some success in getting payments. What I called “Child Support Status Hearings” continued for a long time, but we were still not changing the things which were keeping them from making regular payments: no education, criminal record, substance abuse, and for some, lack of motivation.

I wanted to see if we could get some resources together to improve what could be done for people that were struggling to find work, who needed a GED or who had to have some job training or maybe folks were dealing with the fact of having a criminal record and struggling with how to present that in a way that might make it more likely for an employer to hire you.

So sometime last September, I got some

folks from the community around the table. We got the Division of Child Support Services, Goodwill, the Department of Labor, folks from the Athens Technical College, some of the social service agencies including the homeless shelter, the Athens Justice Project, and Children First.

We met together and I presented the problem. And we decided to see how we can work together on this problem. We all understood that due to nonpayment, many children are living in poverty, and that's just not acceptable.

As we were starting our conversation, I found out that Judge Simpson over in Carrollton had obtained a grant and was doing what they were calling the Child Support Problem-Solving Court. As soon as I had time, I went over to Carrollton visited with Judge Simpson, observed a court session and talked about what they were doing there.

So we decided to develop a Child Support Problem Solving Court here in the Western Circuit. And, of course, all this time I was continuing to do the child support status hearings, seeing people every two weeks or so.

Quick: So the GED candidates, do they go to Athens Technical College?

Sweat: They have a program, part of the adult education program, and individuals, if motivated, can go to Athens Technical College and just about get a four-year degree and never have to pay anything for it because they have resources to help people. We sent people to Athens Tech to get their Work-Ready certificate so that employers would know their job skills were. You could present that to an employer who would know the applicant's level of math, reading, or clerical skills.

Quick: Is that through Athens Technical College, as well, or is that the Department of Labor?

Sweat: It is through the Technical College. The Governor initiated a systematic way to make Georgia work-ready, and so different communities agreed to be work-ready communities and list sufficient number of employees or individual workers to demonstrate these job skills, and employers become aware of what the ratings mean and what this means about an employee's, a potential employee's skills.

And I don't know that Clarke County has made it to the level to achieve the work-ready certification, but they've been working on it.

Quick: And so the Fatherhood Program is another part of your team. That's out of Athens Technical College.

Sweat: Well, actually there are two different Fatherhood Programs. The Division of Child Support Services has a Fatherhood Program that is designed to get people into a GED program or provide short-term

skills training, and other work readiness they can achieve in a fairly short period of time.

The case agents can refer people to the Fatherhood Program, and the Fatherhood coordinator will assist them to get them into those kind of skill-building and then job-seeking activities.

And so that was going on at the Department of Labor.

But Athens Technical College had another program, also called the Fatherhood Program. It came out of Michael Thurmond's Department of Family and Children Services in the '90s when he started trying to move people off welfare rolls and he created what they called the Fatherhood Program, which was a program to try and get people employed. We have actually two Fatherhood Programs in the community.

Quick: And are both those resources available to your participants?

Sweat: We have participants in both of the programs, more in the Child Support Fatherhood Program because they can work so closely with court. The court program coordinator is actually the



local Fatherhood coordinator. And so the Child Support Fatherhood person has just assumed the coordinating position and is responsible for seeing our participants on a weekly basis, ensuring that they are going forward with their skill-building or whatever the job search is, and that they are getting referrals and actively seeking employment.

Some participants are a part of the Athens Tech Fatherhood Program, which is a smaller number. But what is different about the Child Support Problem Solving Court is it takes a more holistic approach. We start looking at, you know, does this person have a substance abuse problem? We're drug testing our participants.

Quick: And so tonight in court I saw substance abuse, lack of education, health issues. I didn't see any overt mental illness tonight, and I saw lack of motivation. Would everybody's problems fall in one of those categories?

Sweat: Well, those are the major problem areas, and I think a lot of times it is lack of motivation. I think there's a lot of undiagnosed depression. But I'm not qualified to say that. A lot of my strategies to get people to work have been to get them out of bed and be someplace at a certain appointed time, rather than sleeping to noon and staying up all night playing Super Mario, or whatever the current X-Box game may be.

The Problem Solving Court takes the holistic view. We've got connections with our local family counseling program, and we have some money and a small contract with them for evaluations and we have a partnership with Advantage Behavioral Health or Community Mental Health Program. We're developing a substance abuse track, and we have an ongoing substance abuse group for participants.

And, of course, drug testing is part of the program. I think the biggest test that many non-custodial parents can't pass is a drug test. If you can get them to where they can pass a drug test, it opens up lots of doors.

But a lot of times they're not at the point in maturity or development that they recognize that as an obstacle to their employment. But my thought is if you can afford to buy drugs, you can afford to be paying your child support.

And we test for alcohol, too. If you can afford to buy alcohol, you ought to be paying child support. And don't tell me your friends give you drugs and alcohol. I don't think that works. We're trying to encourage people with connection to resources and programs and just give them some encouragement. And not just beat them on the head, but give them some encouragement.

If they fail to attend a meeting that they're supposed to attend or are testing positive, we're going to impose a sanction. It may be community service. It may be some jail time.

We see that the most persistent forms of human behavior are those which are intermittently reinforced. And so if occasionally you get caught and you feel the discomfort from that and you don't know when you might get caught again, it will modify your behavior.

Quick: Now, these folks that are your participants, I guess they all come from Child Support Recovery. These are not private litigants?

Sweat: No. These are cases where the Division of Child Support Services has an open case.

Quick: And do you find they don't have contact with their children or does that vary?

Sweat: That varies. And one of the aspects of our program is that we've got a contract with our CASA agency, which is Children's First, Inc. here, to provide a visitation program to connect parents. We know that if there is a connection with a child, a parent is more likely and more willing to pay child support.

So that's another big piece of the Child Support Problem Solving Court, is we're trying to get the non-custodial parent connected to their children, if it is possible.

Now, there are cases where, with family violence, or other reasons then visitation may have to take the form of supervised visitation or structured visitation. There are times when it's just not appropriate, but we want our participants to have a connection to their children, because then they're going to be more willing to provide support for them.

Quick: And so that's what's on the horizon?

Sweat: That's on the horizon. In Carrollton I think that program received funding and they did some planning. Here, since I already had 60 or 70 people that were coming to court every few weeks, I felt like we needed to just jump in. And the Division, Keith Horton and Russell Eastman and Shalonda Smith at the Division of Child Support Services have been great because we've been playing catch-up to where we wanted to be. We're getting things into place now.

And we've got about 30 participants, and we've been gaining several a week. We've only really been taking participants since February.

In the visitation project, we have a number of participants beginning the process. We recently got our contract in place.

Quick: So the funding is there; it's just a matter of getting all the paperwork in order?

Sweat: Getting the paperwork in order and then that will really add a dimension, because I think a lot of our participants have not had a lot of contact with their children.

Quick: Well, I saw tonight a gentleman who actually seemed to have a legitimate legal question about whether Child Support Recovery folks had maybe misapplied some of his payments to old, closed cases, and it begged the question, What can private attorneys do to assist the Child Support Problem Solving Court?


Sweat: Well, that's an excellent question, and one of the things that I see is that is a piece we do not have in place which is assisting non-custodial parents who have been determined to be the biological parent, but have not legitimated the child. And that's a key to building the legal relationship and obtaining a visitation order.

And so we're hoping the private Bar is going to be able to help us. I understand Judge Simpson has had excellent support when he's called upon members of the private Bar to assist with individuals who were in need of that type of assistance, because it makes things a lot clearer when you have that type of structure in place.

So that's one of the big things that I'm hoping we can look to the private Bar to help with.


Judge David R. Sweat serves Athens-Clarke County and Oconee County in the Western Judicial Circuit. He is married to former Athens-Clarke County Municipal Court Judge Kay Giese. They are the proud parents of Andrea, a clinical social worker and a graduate of Yale University and Kevin, a 2010 graduate of the University of Georgia School of Law. Judge Sweat is an avid birdwatcher and a Kansas City Barbeque Society certified barbeque judge. He is also a repository of the closely-guarded secret ingredients which comprise Sweat's Barbeque Sauce, pride of Soperton. *FLR*

Regina M. Quick is a graduate of the University of Georgia School of Law and practices family law in Athens. She is a founding member and former chair of the Family Law Section of the Western Circuit Bar Association. In 2008, she served as a member of both the Georgia Child Support Commission Low Income Deviation Study Committee and the Electronic Worksheet Task Force and is the former county administrator and ex officio guardian for Athens-Clarke County.



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Case Law Update

by Vic Valmus
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ALIMONY

Wier v. Wier, **S10F0553** (June 28, 2010)

The parties were married in 1986 and it was the second marriage for both parties. The parties separated in 2004 and the wife sued the husband for divorce. Following a jury trial, the jury awarded the wife \$200,000 in lump-sum property division and \$600,000 in lump-sum alimony. The property division was to be paid within 15 days. The alimony was to be paid within 90 days. The father appeals and the Supreme Court affirms.

The husband appeals, among other things, that the award to the wife of \$200,000 lump-sum as equitable division of property and \$600,000 lump-sum alimony was erroneous. Here, an equitable division of marital property does not necessarily mean an equal division. The payment of \$200,000 as lump-sum equitable division of property was valid because the jury was authorized to find the value of the parties' marital property was in excess of that amount. The \$600,000 lump-sum alimony award was valid because the jury may consider assets and earning capacity in addition to income in establishing the amount of alimony. The evidence in this case shows that the husband owned property at a value of more than \$1.6 million, and his gross monthly income exceeded \$16,600. In light of this evidence, it cannot be said that the lump-sum alimony or the property division was excessive, nor does the evidence suggest that the jury was motivated by intent to punish the husband for his marital misconduct.

The husband asserts that the trial court committed a reversible error in giving a charge which authorized the jury to consider, among other things, "other relevant factors which it deemed to be equitable and proper in determining the amount of alimony." The husband points out that conduct is relevant in alimony entitlement, but conduct is not relevant in determining the amount of alimony to be awarded, and therefore, the trial court's charge improperly permitted the jury to consider his misconduct in determining the amount of alimony. However, the husband failed to object to the trial court's charge, and therefore, review on appeal is precluded unless it can be said that the charge was substantially erroneous and

wrongful as a matter of law. Here, the charge was not substantially erroneous.

The husband also complains that he is unable to pay the equitable division and alimony awards within such a short time frame. The husband has failed to present evidence of his inability to pay in a timely fashion. Under Georgia Law, a party can be required to sell or encumber property to pay equitable division and alimony awards. Here, the husband can sell or encumber his property, or take any other action he deems necessary to comply with the trial court's order.

BACK CHILD SUPPORT

Smith v. Carter, **A10A1760** (July 30, 2010)

The parties divorced and sometime after, began to live together again, and during such time, conceived a son, who was born Aug. 5, 1994. The couple separated in November of 1997 with the mother retaining custody of the son. Over the next 12 years, the father would have the son over, usually three or four days per month. The father only made one payment of \$100 during this period. The father remarried and adopted 5 children. In 2009, the mother sued the father for past and future child support. The father admitted paternity and sought to legitimate the child. The court granted the legitimation and conducted a hearing on child support. The court found the father's monthly income to be \$2,222.80 and the mother's income to be \$6,384.20. These relative proportions had generally been true through out the last 12 years. Pursuant to the Child Support Guidelines, the court calculated future support from the father to be \$115 per month. Based on the evidence it found credible at the hearing, the court calculated the mother's expenses over the last 12 years of \$83,600 for the child care. The court then subtracted 16 percent of the amount, representing the father's weekend and summer visitations with the mother and ordered the father to pay the entirety of the remaining amount as back child support of \$70,224. The father appeals and the Court of Appeals reverses and remands.

The father contends that in calculating the \$70,224, the trial court erred in failing to consider the mother's income and his much

lower income; the other child support obligations for the five children he adopted; and did not consider financial support for the children from the mother. The father also notes that the current Child Support Guidelines require him to pay \$115 per month multiplied by 139 months over the last 12 years only equals \$16,000. Georgia Law provides that it is the joint and several duty of each parent of a child born out of wedlock to provide for the maintenance, protection, and education of the child until the child reaches the age of 18 or becomes emancipated. It is not the exclusive duty of either the father or the mother. The Child Support Guidelines must be considered by any court setting child support, and shall apply as a rebuttable presumption in all legal proceedings involving the child support responsibility of a parent. Therefore, the trial court erred in refusing to consider these guidelines in its order regarding the back child support responsibility of the father.

The mother cites *Weaver v. Chester*, but in *Weaver*, the mother sought to receive back child support that exceeded her actual expenditures and attempted to justify such an award based on the father's ability to pay. Thus, clarifying *Weaver*, the actual expenditures of the mother are the maximum for a back support award. A custodial parent can never be awarded back support for more than he or she actually spent.

CHILD SUPPORT

Dupree v. Dupree, **S10F0516** (June 7, 2010)

The parties were married in 1998 and they had one minor child. In 2006, the father filed for divorce. After a bench trial, the mother received primary custody. The court found that the husband earned \$3,262.67 per month and the mother earned \$2,484.75 per month. The percentages were split as 57 percent and 43 percent respectively. In addition, the court ordered the parties to equally share the child care costs and ordered the father to maintain health insurance, which was not included in the child support worksheet. Father appeals and the Supreme Court affirms in part and reverses in part.

The father appeals, among other things, that the trial court's delay in entering a judgment violated O.C.G.A. § 15-6-21(a), which requires a trial court to rule on motions within 30 days after a hearing in a county of less than 100,000 inhabitants. In the county where the case was tried, there were less than 100,000 inhabitants. However, O.C.G.A. § 15-6-21(a) applies only to motions for new trials, injunctions, demures, and all other motions of any nature and not to a bench trial in a divorce action. The father also argues the trial court erred by ordering him to maintain health insurance, but not including those expenses in the calculation of the child support obligation. The trial court must modify the adjusted child support obligation by factoring in the amount of health and child care expenses actually paid by each parent. Therefore, that part of the court's order is reversed and remanded.

The father also contends that the trial court erred by ordering the parties to equally share in the day care costs

of the minor child, but failing to include those costs in determining his child support obligation. As with the health insurance, the trial court must initially prorate child care expenses of the parties to arrive at the adjusted child support obligation. However, because the trial court ordered child care expenses split equally between the parents, the father actually benefited from the trial court's omission. Otherwise the father would be paying 57 percent versus 50 percent. Since the father was not harmed by the trial court's calculation, he cannot prevail on this enumeration of error, because a party must show both error and harm to prevail.

COMMON LAW MARRIAGE/CHOICE OF LAW

Norman v. Ault, **S10F0874** (June 7, 2010)

In 2008, James A. Norman (husband) filed a complaint for declaratory judgment conversion and damages against Debbie Jean Ault (wife). In her answer, Ms. Ault counterclaimed for divorce, alimony, equitable division of property of the parties' assets. After a bifurcated trial in April of 2009, a jury found, among other things, that the parties were married by common law marriage in Alabama and that Ms. Ault was entitled to \$54,000 in lump-sum alimony to be paid in monthly installments over a period of three years. The husband appeals and the Supreme Court affirms.

The husband contends that the jury's verdict that a common law marriage existed was not supported by any evidence. The wife relied on the law of Alabama to support a claim of common law marriage. Any party that intends to raise an issue of the law of another state or of a foreign country shall give notice in their pleadings or other reasonable written notice. It is a familiar principle of common law that the *lex loci* is adhered to by the courts. Marriage is considered a civil contract and its validity will be judged by the law of the forum in which it was made and in this case, Alabama. Georgia does not generally recognize common law marriages, but will recognize a valid common law marriage established under laws of another state. Unlike Georgia, Alabama has not revoked the right of common law marriage, and the elements of a common law marriage in Alabama are 1) capacity, 2) present mutual agreement to commonly enter into a marriage relationship to the exclusion of all other relationships; and 3) public recognition of the relationship as a marriage and public assumption of marital duties and cohabitation.

Although conflicting, the evidence shows that in 1989, three years after the husband's divorce, the wife began living in Alabama in the same home as the husband, sharing the same bedroom and doing housework. The parties would tell people that the other was his or her spouse, and the husband would tell the wife all the time that in "God's eyes, you are my wife." The husband only had sexual relationships with the wife and in 1998, before the move to Georgia, the husband executed a deed filed in Alabama conveying property to himself, his daughter, and wife, Debbie J. Norman. These claims satisfy enough

of the aforementioned criteria generally indicative of public recognition to determine that the husband has assented to the marriage. Even though the husband raised several challenges to the validity of the common law marriage, the existence of a common law marriage is a question for the trier of fact, and if the evidence supports the finding of a common law marriage, an appellate court should so-construe the evidence to uphold the verdict.

The husband also contends that at the first phase of the bifurcated trial, the trial court erred by admitting evidence regarding the parties' conduct after moving to Georgia, because the only issue at that phase was whether they had entered into a common law marriage when they lived in Alabama. However, the law favors admission of any relevant evidence no matter how ever slight the probative value may be. Even though the wife's cohabitation and public recognition of the marriage in Georgia did not establish a common law marriage, these facts could corroborate other evidence of a prior agreement to marry entered into in Alabama. Once evidence of a marriage contract is present, evidence that the parties acted in a manner consistent with such agreement and that the community believes such agreement existed is relevant to the issue of whether the contract actually existed.

COUNSEL STATEMENTS

Rank v. Rank, **S10F0032** (May 3, 2010)

The parties were married in 2003 and separated in 2008. They had two minor children. A hearing was held on March 18, 2009. Both parties appeared with their counsels of record. The court listened to the attorney's state in their place, without contradiction from the other side, what the evidence would show if formally presented. There was no testimony or documentary evidence entered into the record. The parties' counsel provided the trial court with a detailed overview of the issues, including descriptions of areas where the parties had reached a tentative agreement. After having heard both parties' opening presentations, the trial court explained thoroughly its initial view of the case and the parties were excused to discuss the issues. When the parties returned, the wife's counsel outlined what they understood the circumstances were based on the court's directions, and the attorney for the husband listened, without objection, to the terms to be included in the final decree relating to the property, debt division, child support, child custody, visitation, and various credits that the husband would receive towards the child support arrearage. There were only a few issues that were unresolved. The parties offered no testimony or documentary evidence. The trial court closed the hearing, and, on April 10, entered a final decree. Husband appeals and the Supreme Court affirms.

The husband claims that because there was no testimony or documentary evidence entered at the final hearing, there was no evidence to support the trial court's judgment. The husband correctly notes that the parties reached an agreement on most of the issues and there were no objections to the attorneys' proffers of what the

evidence would show. However, attorneys are officers of the court and their statements, if not objected to, serve the same function as evidence. In the absence of an objection, counsel's evidentiary proffers to the trial court during the hearing will be treated on appeal as the equivalent of evidence. In addition, the husband did not object at the hearing to the trial court's making its legal decisions and entering the final decree based upon information provided during the hearing. A party cannot ignore during the trial what he or she thinks to be error, take a chance on a favorable outcome, and then complain later.

JUDICIAL ESTOPPEL/ATTORNEY'S FEES

Klardie v. Klardie, **S10F0451** (July 5, 2010)

The parties were married in 2000 and they had a son in 2004, then separated in 2008. The final decree was entered in June of 2009. During the course of the marriage, the husband had sporadic employment and the court imputed income of \$2,000 per month. The court found that the wife earned \$7,093 per month. The husband's request for alimony was denied. The court divided the parties' property including the wife's tax deferred accounts, split the accounts equally and ordered the husband to pay a portion of the wife's attorney's fees. Husband appeals and the Supreme Court affirms.

The husband contends that the wife waived any claim to her retirement funds. The trial court should have applied judicial estoppel to such a claim because the wife did not disclose these funds in a bankruptcy case. The federal doctrine of judicial estoppel precludes a party from asserting a position in one judicial proceeding after having successfully asserted a contrary position in a prior proceeding. It is most commonly invoked to prevent bankruptcy debtors from concealing a possible cause of action, asserting a claim following the discharge of bankruptcy and excluding resources from the bankruptcy estate that might have otherwise satisfied creditors. The wife acknowledges that in 2008 she filed for Chapter 13 which was subsequently converted to Chapter 7. Both filings were admitted into evidence at the final hearing, but it appears they were not made part of the record in this case. An uncertified copy of Chapter 13 is the only documentation of any bankruptcy proceeding in the record on appeal and its filing occurred subsequent to the entry of the decree. In addition, a court should be hesitant to apply the federal doctrine of judicial estoppel to defeat the important rights of a spouse to potential support and an equitable share of marital property. Here, the husband has failed to show that the wife's retirement accounts were not exempt from the bankruptcy estate.

In addition, the husband appeals the award of attorney's fees to the wife. Here, the court considered the respective fiscal circumstances of the parties as it is obligated to do under O.C.G.A. § 19-6-2(a)(1). Even though the husband had \$2,000 of imputed income and the wife's income was \$7,093 per month, the court made relevant findings that the husband was underemployed or unemployed by his own doing and in contradiction of the

wishes of the wife. Justices Melton and Nahmias concur in part and dissent in part.

MODIFICATION, CHILD SUPPORT AND ATTORNEY'S FEES

Harris v. Williams, **A10A0294** (June 11, 2010)

The parties were divorced in June of 2005 in Henry County. Primary custody was awarded to the father and the mother paid child support of \$95 per week based on her gross monthly income of \$2,058.33. Since the divorce, the father moved to Alabama with the children but subsequently lost his job and returned back to Henry County and resided at his mother's home. In February of 2006, the mother filed a petition for modification of custody in Henry County. After a hearing, the court denied the mother's petition for modification of custody, increased her child support, and awarded the father attorney's fees. The mother appeals and the Court of Appeals affirms in part and reverses in part.

The Court of Appeals affirms the trial court's dismissal of the mother's petition to modify custody, but reverse the increase of child support and the award of attorney's fees. The mother appeals, arguing among other things, the trial court erred in modifying her child support obligation without finding a substantial change in income since the entry of the final decree of divorce. To modify a child support judgment, a petitioner must show a substantial change in either the parent's income, financial status or the needs of the children. In the mother's petition, she does not allege any change in her income or financial status and the father did not file a counterclaim to modify child support. At the hearing, the trial court found that the mother's income had decreased from \$2,100 to \$0, between the filing of the instant action and the hearing, but imputed income of \$2,100 to her since she voluntarily decided to quit her job at Publix. The mother's income had not substantially changed from the entry of the divorce decree until the hearing. Even though the trial court modified the child support award consistent with existing Child Support Guidelines, it had no valid basis to do so.

The mother also argued that the trial court erred in awarding attorney's fees because the husband did not request attorney's fees under O.C.G.A. § 19-9-3, or 19-6-15, but did so based on frivolous allegations in the mother's complaint. O.C.G.A. § 19-6-15(k) provides that in a proceeding for a modification for child support award pursuant to divisions of this code section, the court may award attorney's fees, costs, and expenses of litigation to the prevailing party as the interest of justice may require. Here, the trial court found that the husband was the prevailing party, but the trial court erred in finding that the father was the prevailing party because the child support increase was not warranted. In O.C.G.A. § 19-9-3(g), only authorizes award of attorney's fees in actions for alimony, divorce, and contempt of court arising out of an alimony or divorce case. In addition, the evidence was insufficient to support an attorney's fees award under any statute. It is well established that an award of attorney's

fees is unauthorized if a party fails to prove the actual cost of the attorney and the reasonableness of these costs. Counsel for the father stated that her hourly rate was \$225 per hour and her total bill was \$5,164.24, but she did not indicate the total number of hours spent on the case, or that the fees incurred were reasonable. Counsel introduced her bill into evidence, however, it was not contained in the appellate record. There was no basis for awarding the husband attorney's fees of \$5,164.24.

ORAL AGREEMENT

Sponsler v. Sponsler, **S10F0299** (June 28, 2010)

After 12 years of marriage, the wife filed a petition for divorce. There were no children born as issue of the marriage. At the start of the bench trial to resolve the divorce, the husband called expert witnesses to testify to the value of his business. After the testimony was completed, the court took a short recess and the parties afterward indicated that they had reached an agreement as to some of the issues in the divorce. The husband and wife testified under oath that they understood that they had had a pretrial conference and settlement negotiations to be set forth on the record for the court. Neither party objected when the judge affirmed that it was the understanding of the court that there was a partial agreement between the parties. Thereafter, the court took evidence on the remaining contested issues. The trial court entered a final judgment and decree of divorce based upon its review of the record, the agreed terms of the settlement and based upon the evidence that had been presented on the remaining contested issues at the bench trial. The trial court also denied both parties' requests for attorney's fees. The husband appeals and the Court of Appeals affirms.

Husband contends that the trial court erred in making the alleged oral agreement at trial a part of the court's final order because the terms of the agreement were still in dispute. Here, the husband knew that the agreement reached between the parties during the court's recess would constitute a final resolution of the issues upon which the parties agree. The husband did not object to any of the terms of the agreement when those terms were stated on the record. The trial court was authorized to find that an agreement existed between the parties and was accordingly authorized to make that agreement part of the court's final decree. A trial court is authorized to approve the terms of an oral settlement agreed to by the parties and to incorporate in the final decree.

RECONSIDERATION

Todd v. Todd, **S10A0471** (June 1, 2010)

The trial court entered a final decree of divorce which dissolved a parties' marriage, distributed property and awarded primary physical custody of the parties' minor child to the mother. In the same term of court, the father filed a motion for reconsideration, requesting primary custody of the child. After a hearing, the court vacated the child custody, visitation and child support provisions of the original decree and revised the decree to award

physical custody to the father. The mother appeals and the Supreme Court reverses.

The mother asserts that the trial court erred in granting the motion for reconsideration and then changing physical custody when there was no evidence of any adverse effects on the best interests of the child. The trial judge has inherent power during the same term of court in which the judgment was rendered to revise, correct, revoke, modify, or vacate its judgments, even on its own motion. This inherent power may be extended beyond the term of court in which the judgment was entered when a motion for reconsideration is filed within the same term of court. Since the motion for reconsideration in this case was filed within the term of court that the original custody decree was entered, the trial court was authorized in exercising its power to revise the custody award beyond the term. However, this inherent power is never intended to authorize a judge to set aside judgment duly and regularly entered unless some meretricious reason is given. Here, the sole basis for the motion for reconsideration was the mother was living with a man that she was not married to. There was no evidence concerning the welfare of the child. The trial court did not evaluate or make any determinations as to the best interest of the child, and, instead, simply followed its own policy that a parent living with a non-relative should never be awarded custody. In all child custody cases, the trial court must consider the best interests of the child and cannot apply a bright line rule. Consequently, the trial court's order vacating and revising the original award of physical custody to the mother is not based on a meretricious reason and constitutes an erroneous exercise of the court's inherent power to modify the original decree.

RES JUDICATA

Jacob-Hopkins v. Jacob, **A10A0372** (June 25, 2010)

The parties were divorced in 1998 and pursuant to the settlement agreement; each party owned one half interests in a Mexican property, sharing equally in its burdens and benefits. The wife would refinance or sell the Mexican property within three years of the divorce, but neither the refinance nor the sale ever took place. In 2007, both parties filed actions and counterclaims, and thereafter entered into a mediated settlement agreement in which the husband agreed to convey his interest in the Mexican property to the wife in exchange for a promissory note and security interest. The wife was to make monthly payments to the husband. In October of 2008, the husband filed a contempt stating the wife was not following the terms of the agreement, but he did not seek monetary damages. After the hearing, the trial court found that both parties had, in fact, breached the final order and expressly held them both in contempt and appointed a receiver to take dominion and control over the Mexican property. In the final order, the trial court provided that as a result of the final order previously issued in this matter, all claims between the parties regarding respective misconduct in the handling of the Mexican property are res judicata and neither party shall be vested with any claim against the other regarding the Mexican property. The wife appeals and the Court of Appeals reverses.

The wife argues that the court's order was overly broad to the extent that it forecloses her from filing any action for damages allegedly extending from the husband's breach of the final order. An equity action can be res judicata over a later action for damages or action at law as to all matters put at issue or that might have been put in issue, so long as the case arises upon the



same facts and involves the same parties. However, the matter of damages alleged to have stemmed from the husband's breach of the final order was not put at issue at the contempt hearing. The contempt motion was merely ancillary to the underlying litigation. Thus, the motion for contempt did not serve as an action for damages stemming from the contempt, nor can it be said that the damage issue was before the trial court in the contempt proceeding. Therefore, the doctrine of res judicata cannot preclude the wife from bringing an action for damages separate and apart from the contempt action underlying the challenged order.

SUPPLEMENTAL EVIDENCE

Hardin v. Hardin, A10A0572 (April 6, 2010)

The parties were divorced in February of 2006 and the mother was granted sole custody of the three children. Shortly after, the children allegedly disclosed to the mother that the father had touched them inappropriately during a visit and the mother filed a petition to modify custody. Following the hearing, there was conflicting evidence with regards to the issue of abuse. The trial court found no direct evidence of sexual abuse by the father, concluded that the mother had not established her allegations by a preponderance of the evidence, denied the petition to modify and reinstated the father's visitation. After the hearing, but before entering its order, the court declined to hear additional evidence proffered by the mother. The mother appeals and the Court of Appeals reverses.

After reviewing the record, it cannot be said that the trial court abused its discretion in denying the mother's petition as evidence of sexual abuse was not conclusive. However, the mother challenges the trial court's refusal to consider additional evidence discovered after the hearing, but before the court entered its final ruling. At the hearing, the father was questioned regarding his recent marriage to his 18-year-old wife, who had an 18-month-old daughter. The father testified that he thought she was 27-years-old and he also testified that she was somewhere in Tennessee and that he had no contact information for her. The mother located the wife, interviewed her and wrote the court a letter asserting that Smith had information imperative for the safety of these children and was willing to testify concerning the father's parental fitness. The trial court denied the request noting that the evidence was closed. In the context of an action for change of custody, a trial court must consider all facts and conditions which present themselves up to the time of rendering the judgment and not merely events that occurred prior to the filing of the petition. Where there is a material change of condition effecting the welfare of a child it is error not to review evidence which might have some bearing upon the issue. When the welfare of a child is involved, relevant information must be received up and until the very time that the court rules. Therefore, it was error for the trial court to refuse to consider additional evidence before ruling on the mother's petition.

VENUE

Parris v. Douthit, S10A0165 (April 19, 2010)

The parties were divorced in Cobb County in December of 2008. Among other things, the final decree required the husband to pay the wife alimony in the amount of \$4,200 for 12 years. The wife moved to Cherokee County and subsequently filed a contempt action in Cobb County which was heard in February of 2009. The husband thereafter filed a petition for modification of alimony in Cobb County, and the wife was personally served. She filed a special appearance and moved to dismiss based upon the fact that she is a current resident of Cherokee County. At the final hearing, the trial court entered an order denying the motion to dismiss and temporarily reducing alimony to \$3,000 per month. The trial court certified its order for immediate review, and the mother appeals and the Supreme Court reverses.

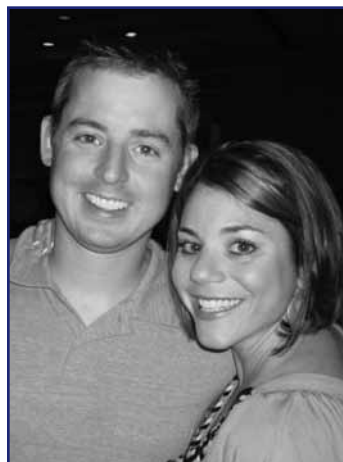
The wife contends that the trial court erred by denying the motion to dismiss. The proper venue in an alimony modification action is the county of residence of the defendant, and not the county where the divorce decree was rendered or the county of the residence of the party defending in the original divorce and alimony suit. In addition, the motion for contempt filed on the wife was not tantamount to filing a complaint wherein the movant submits to venue of the court. Here, the trial court found at the temporary hearing and the husband argues that the parties entered into an agreement on Feb. 12, 2009, to submit to venue in Cobb County. Under certain circumstances, both jurisdiction of the person and venue can be conferred by consent. The defendant could waive the defense of improper venue by conduct, i.e. failing to raise it by motion or through responsive pleadings. Here, the wife clearly did not waive that defense by any such conduct. Another circumstance in which venue can be conferred by consent is where the defendant voluntarily, clearly and specifically, by affidavit, waives any objection to venue. Here, the wife did not execute any written waiver. A general waiver of rights in a written settlement agreement which does not specifically mention venue is not sufficient to waive the defense of improper venue. Oral consent to venue is not comparable to waivers which we have before approved. If there was any oral consent by the wife or the wife's counsel, it was not in written or transcribed. *FLR*

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.

See What Was Going On at the 2010 Fam



Family Law Institute in Destin, Fla.





The Specific Deviations

(The Rock 'n Roll Band, Not The Child Support Guidelines)

by John Lyndon

I have always loved music and come from a family of roadies. I've often accused my brothers of having all the fun, but that all changed this May at the Family Law Institute in Destin, when what started out as a fantasy of mine became reality.

I first met Vic Valmus several years ago at one of the FLIs when his partner, Steve Steele, introduced us. My interest in Vic perked up when Steve told me that he played guitar and in his prior life had been a member of the rock 'n roll band, 38 Special. So, I made it a priority to see Vic play, and at each successive Institute I urged him to bring his guitar down, set up and play, but it never worked out. So this year I decided to take a different approach and emulate Mickey Rooney and Judy Garland in the old films. But instead of a show, it was, "Let's put a band together!"

Paul Johnson was in charge of this year's Institute, so the first call was to him to get his OK for the band to play. Paul was enthusiastic but said he needed to run it by Steve Harper at ICLE. I breathed a sigh of relief when I heard that Steve had OKed the gig, and even though it was contingent on the Sandestin Hilton's approval, I wasn't a bit concerned. The hotel did approve and we were good to go for the Friday evening reception.

I realized the key to the project was getting Roy Finch, of Athens, on board. Roy, before his legal and mediation career, used to play professionally and is a hell of a guitar picker. I knew he would keep the band and project centered and not let us spin out of control.

Roy readily accepted and Vic quickly followed suit. We were off and running!

Of course you can't have a band if you don't have a name, but it didn't take Regina Quick long to suggest "The Specific Deviations," which seemed perfect.

I knew that Steve Steele had played keyboards in a band in the early 70s and recruited him for the band. After that, it was all up to Roy, Vic and Steve. They worked on a set list, discussed other potential band members and scheduled the first and only rehearsal for Thursday afternoon, the first day of the seminar.

The other band members:

Multiple-instrumentalist David George, our lead singer, was one of only two non-lawyers in the band and used to play with Steve Steele in the band Suntower.

Hannibal Heredia, an attorney from Atlanta and guitar player, and a current member of the alt-country band Stovall, agreed to handle bass.

Angela Brown, a Marietta attorney, whom I dubbed the "Queen of Rhythm and Blues," handled backup vocals and lead vocals on *Under the Boardwalk*.

Drummer Kerry Denton, whom Vic recruited and was playing at Harbor Docks in Destin with the Mike Veal Band. Roy had expressed early on that the bass player and the drummer were the keys to the band, because the tendency when playing live is to play too fast, so that the song falls apart. Vic assured us that Hannibal and Kerry were up to the task, and this proved to be true as they stayed absolutely "in the pocket" during the performance.

The afternoon rehearsal went smoothly and everyone left feeling the band showed real promise.

Then Friday morning Vic got a call from Kerry, who said that his show with the Mike Veal Band was set to begin right after our show, so there was no way he could break down his drum kit and get it to Harbor Docks in time to set it up. He could still play with The Specific Deviations, but he could not bring his drums! That is when Vic stepped up and showed his talent. He got on the phone and started making calls, and finally found a place in Fort Walton Beach that would rent him a drum set, so Vic headed to pick them up and we were good to go again.

The band showed up for the reception an hour early for a sound check. They sounded great to me, but I was really elated when David George stepped off the stage and said, "This band sounds better than half the bands in America!"

At 6:30 folks started showing up for the reception and at 6:45 I took the stage and introduced the band, and kicked off the evening.

Here is our set list followed by the words to Divorce Lawyer's Blues, which is sure to be a hit.

- Hold On, I'm Coming
- Gimme Some Lovin'
- Evil Ways
- Dock of the Bay
- Under the Boardwalk
- Jackson
- Maybelline
- Honky Tonk WomanMelissa
- Divorce Lawyer's Blues

The evening performance was a huge hit and many fond memories were created that special evening in Destin, Fla. A special thanks to the performers who were a hit and the audience that kept us pumped up.

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