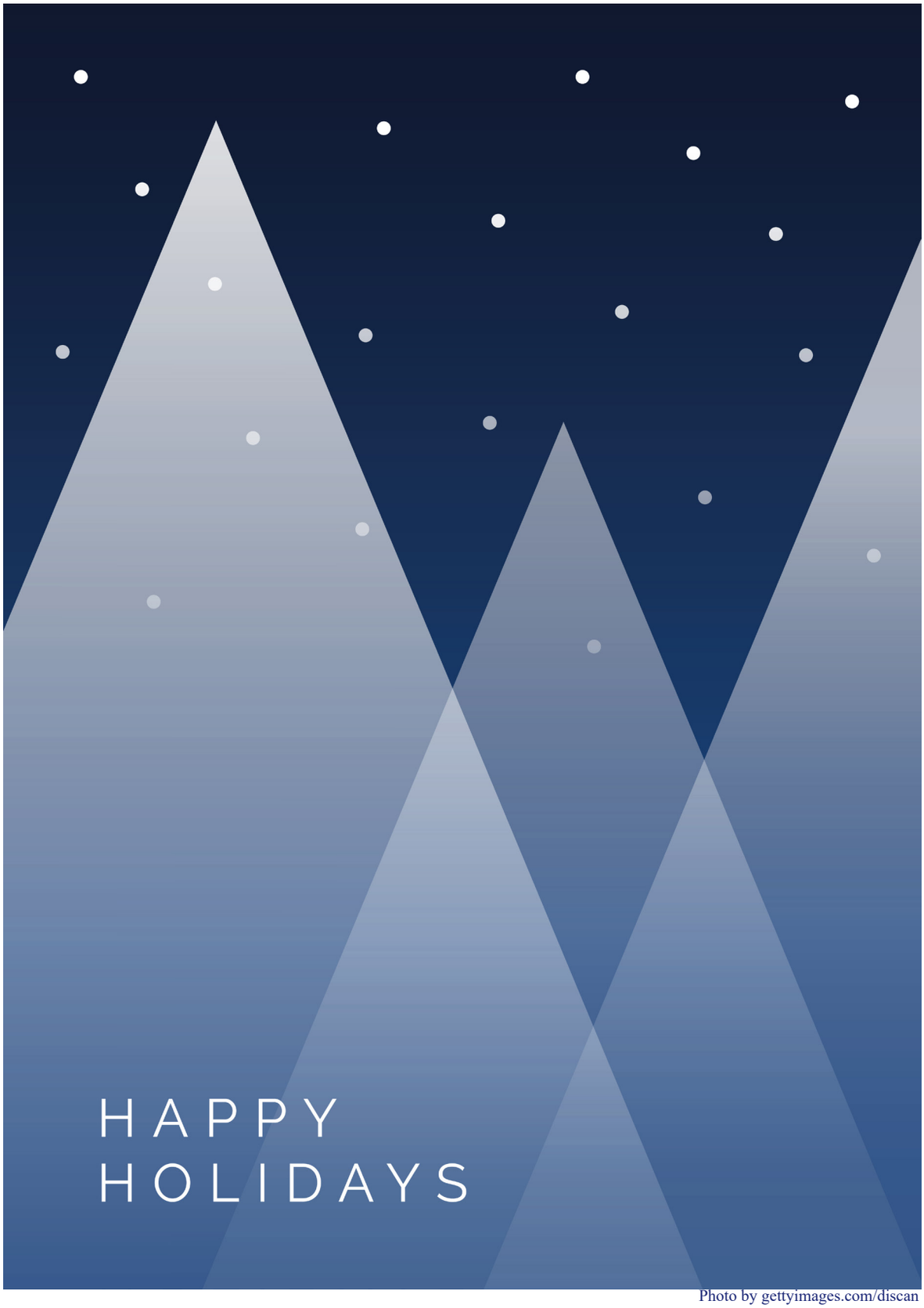
The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia – Holiday Issue 2020



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Editors' Corner

By Jonathan Dunn

Welcome to the Holiday Issue of the Family Law Review!

It is my esteemed privilege to serve as your Family Law Review editor. While most of us are eager to bid farewell to 2020, the year has not been without silver linings. In particular, I commend to you Daniele Johnson's engaging discussion of the judiciary's role in advancing social justice. The year has been especially trying for victims of domestic violence, but as Vicky Kimbrell points out, the increase in domestic violence reports has also afforded members of our section more opportunities to serve. The pandemic has required us to adapt and look at things from a new perspective, as evidenced by Drs. Adams and Volkov's exposition on the effect of Covid-19 on business valuation. With so many changes afoot, it is nice to have some constants--like Vic Valmus' faithfully rendered case law updates. Rounding out this edition are practice pointers and insights, touching on the use of private investigators, the recovery rebate in divorce and when to change your beneficiary designations. From the aspirational to the practical, I am confident you will find some nuggets in this edition's offerings to improve your practice and your outlook.

I am honored to share these articles with you, and I encourage you to let me know how we can improve upon the good work that has gone into this publication. I say "we" because member contributions comprise the lifeblood of the *Family Law Review*. So, if there is a topic that you would like to see addressed, or if you have a submission for publication, please let me know.

Inside This Issue

Editor Emeritus

By Randy Kessler

At the end of every year I always look back and am amazed at all that has transpired. But this one perhaps takes the cake. Yes there was a lot of tragedy and ugliness in 2020. Everyone has been touched by the events of 2020. And I'm sure each of us have heard the profound anger and frustration from our clients. But doesn't that make our work that much more important? Family connections have become vital to enduring the depths of this pandemic. And we are tasked with doing our best to preserve parent-child relationships. It is so gratifying to know so many lawyers who are helping clients and families get through this. And the most amazing thing to me is human innovation. The fact that the Spanish Flu lasted three years and killed 50 million people (in a world with a much lower population) foreshadowed what could've happened with this pandemic. All the numbers are terrible, but thank goodness for the scientists and leaders who have gotten us to a point of hope where there seems to be a light at the end of the tunnel. Politics aside, and yes there is a lot to criticize all around, I like to look at the positive and be thankful. It is my great hope for all of us and for everyone that 2021 returns us somewhat to normalcy and the pandemic begins to be part of our history instead of our present. I cannot wait to see all of you again in person, in court, at mediation, at seminars and socially. And as always, I'm so grateful to share my professional journey with all of you.

A Word from Our Chair

By Kyla Lines

2020 has certainly been an interesting year for everyone, and that includes the Family Law Section. Since assuming the role as Chair in June, I have been doing my best to roll with the changes 2020 has dealt to all of us. In April, we made the necessary and difficult decision to cancel our beloved Family Law Institute, and since that time the Executive Committee has been working diligently to determine a path forward so that we can resume one of our primary missions – providing quality family law continuing legal education to our members.

Since ICLE has been unable to provide seminars without requiring speakers' personal attendance at the State Bar offices, we have spent significant time investigating other means of putting on large scale seminars virtually. We will begin that endeavor with our Section Annual Meeting and CLE which will be held on January 7, 2021 at 4:30 p.m. Executive Committee Members Jeremy Abernathy and Kristen Files will be moderating a one-hour panel on Race in Family Law. We hope you will all tune in and join us.

In addition, stay tuned for our Inclusion Committee Meetings, which will resume in January under the leadership of our extraordinary Immediate Past Chair, ivory brown. We also have Nuts and Bolts of Family Law coming up on February 25, 2021. Secretary Ted Eittreim put together the agenda for our "normal" in-person Nuts and Bolts dates in August and September, which had to be postponed along with everything else. He has made the adjustments needed for the program to be presented virtually - just in time for everyone to get some much-needed CLE credit.

We also continue to partner with local organizations to help children and families in need. For the holidays this year we made a contribution to the Solomon's Temple Foundation, and provided gifts to children from the Warren Boys and Girls Club. The Amazon wish list for the kids at the Boys and Girls Club was fulfilled by Family Law Section members within 48 hours! Thank you to everyone who participated in making the holiday a great end to an otherwise not so great year for these kids.

Wishing everyone a Happy Holiday and a wonderful New Year. Cheers to 2021, vaccines, and hopefully, some much needed normalcy!

The Effective Use of Private Investigators in Family Law Cases

By Eric Echols,[1] Patty Shewmaker,[2] and Jim Holmes[3]

I'm meeting with a potential client on a Friday afternoon, and almost like clockwork, the potential client tells me that she thinks her husband is having an affair on her, it's so common, it's almost cliché. After discussing the relevancy of such conduct for her soon to be pending divorce, it becomes apparent that having proof of such extracurricular activities will be an important element to the strategy of the case. So, I give the potential client a few names of some private investigators and send her on her way and tell her to call me back when she has the proof we need. Right? Wrong!

This article discusses how you can effectively use and leverage Private Investigators (PI) in your family law cases. It is old school to only think of a private investigator when you hope to catch someone *in flagrante delicto*, which, let's be real, happens almost never. So, when could you utilize the services of a PI? This article discusses the different reasons and ways to leverage a good private investigator in your family law cases.

For a reference point in this article, consider the case where a parent is preparing to file for a divorce and the other parent – the primary wage-earner in the family and also a recipient of a large inheritance - absconds with the child; the left-behind parent wants to file a custody action but cannot find the other parent in order to file and serve them.

What can a Private Investigator do for you? A PI can be involved in many aspects of a case from the start to the end. The list of things that you might consider having done by the PI are:

1. Locate the other party or other persons or entities
2. Service of initial process or of later documents (if the other party does not retain counsel) and serve subpoenas on Non-Parties
3. Surveillance of person(s)
4. Asset searches
5. Records search – real property records, UCC records, Secretary of State filings have the person's name as an Officer and/or Agent for service of process
6. Specifically, perform a "background check" on the person

Each of these will be addressed in more detail below.

Directly related to what the PI can do for you is the cost. Generally, nobody puts funds away because they think one day, I need a Family Law Attorney or a Private Investigator; so, the funds available for the case will be a factor in what can reasonably be done on the case. Sometimes, clients are like kids in the candy store, and the cost of PI services can temper unrealistic requests. Like the client who wants a PI to follow his wife around just because he wants to know what she is up to because…well, just because. So, make sure you understand what the cost for each separate thing you ask the PI to do.

Which PI do I hire? So, you start considering hiring a PI for the case, but you have lots of questions. Which one do I use, how do I determine is if a particular PI is the right one for the case, and specifically, how can the PI help?

Initially, you should find out or know the following about the PI:

1. Is the PI currently licensed? If so, in which State(s)?
2. Has the PI worked similar cases as yours?
3. Can and will the PI provide references, preferably both attorneys and parties, for which the PI has worked?
4. Determine if the PI can provide the services you are considering have done.
5. Determine if the PI is appointed as a process server, and if so, what counties (make sure they are appointed in the county of your case)? This is a very important factor and will be discussed further in the article.

6. Ask what investigative "tools" the PI has and can use to provide the information you want.

7. Then, you might consider doing some checking of the PI on Google, with the Better Business Bureau, and other social media sites.

What the PI can help with.

1. Locate persons or entities: In many cases, the PI will have to locate ("track-down") the person(s) to be served in the lawsuit. This is most often the opposing party, but could also include important witnesses. This "tracking-down" process is usually more than just running a name through a database to get an address. And in the case facts detailed above, the other party does not want to be located and served and tries to avoid the service. Now comes the "tracking-down" process, which might include:

- Running the name through various databases

- Search to get vehicle information

- Do a vehicle locate search to see where they park their vehicle

- Determine where the person works (if not known)

- Do a social media search to learn probable places where the person goes and might be found, and who the person's family members and friends are, and maybe who is the "significant other" is. Further searching could provide addresses that may be needed if it becomes necessary to "stake-out" a location or locations and hope the person appears, conducting surveillance until the person being served is spotted

There can be a lot in locating or tracking down a person, especially if that person is avoiding service. Generally, there is not a Statute of Limitation in Family Law cases, but there can be exceptions, and one must always exercise reasonable and due diligence to have the opposing party served after a case is filed. If there are Hearing Notices and related subpoenas and discovery documents to be served at the same time, then time becomes more applicable. And time could be critical if the person who has the child is moving out of town or the person you want to divorce is in and out of town a lot or just in town for a short time.

2. Service of Process and/or subpoenas. Once the person has been located, you want to maximize your efforts. Remember - a critical step is to make sure the private investigator is appointed to serve papers in the Court the case is filed. If the PI is not an approved process server in the Court where the case is filed, it generally means that a PI – after tracking-down a person – must then get a process server who is appointed in the County of the filing to serve the papers or the extra step of getting an order signed by the assigned judge allowing the PI to serve the Respondent. This extra step can be a hindrance and can delay service. After locating the person there may only be one opportunity to get the papers served – that is when the PI initially locates the person to be served.

3. Information Source. Private investigators can also be a treasure trove of information for a Family Law Attorney. This information can be on a party, "significant other," and/or potential witnesses.

A PI can do a background check on an individual. I once had a disputed custody case where the mother's new boyfriend had gotten arrested for possession of heroin. A background check revealed that this was not his first go-around, and mother lost custody of her young child to the father.

Criminal Background Checks conducted by a private investigator will find felonies (all arrest to include sex offender), misdemeanors, and some traffic accidents and moving violations. The background check will also identify business information, professional licenses, permits (hunting, weapons), and court records (liens, judgments, bankruptcy, foreclosures and some civil court suits). After all, you want to know everything you can about the person you are filing against. This information can help in getting a favorable decision, as in my case when the mother lost custody due to the criminal history of the new boyfriend.

A PI can also conduct surveillance on an individual. This might be done to prove that a spouse is having an affair, or it may be to prove that a former spouse who is receiving alimony is in a meretricious relationship. This is where things can start to get very interesting, and this is also where family law attorneys need to have a trusted private investigator who knows the ins and outs of the law. Surveillance can come in many different forms.

When it comes to doing surveillance to get the information needed to show the spouse is having an affair, living with someone or just violating a court order (someone sleeping over when the children are present). A good, trusted PI is the only way to go. And the PI knowing the law protects your case as the PI is (should be) working for you, the attorney; the PI, therefore, is an extension of you, which ultimately always means professionalism and ethics as well as some protection by the 'work-product rule.'

There are different types of surveillances (Covert, Overt, Mobile, Stationary), and there are different ways to get the surveillance accomplished; generally, a PI can use a GPS, Covert Cameras, Spyware, and just the good old fashion covert stationary surveillance. Yes, sitting in a vehicle with a camera, a bottle of water, crackers will always be the best way to do surveillance, but also the most costly.

So, let's talk Global Positioning System (GPS). Using a GPS, of course, is more economical, it's safer than following behind someone, and if you lose your target, the GPS will get you back where you need to be. However, using a GPS comes with its own limitations, restrictions, and complications. GPS by Georgia law can be used by a private citizen, why? Because there is no law in Georgia that states a person cannot put a GPS on another person's vehicle. The caveat is that the GPS must be put on the vehicle in a public area, i.e. parking lot (store, office, apartment) as long as the parking lot has public access. The GPS must be placed on the outside of the vehicle, not hidden inside the vehicle. GPS works best in these types of cases when the GPS unit is affixed under the vehicle in the wheel well or some flat metal that will secure to magnet. The GPS becomes restricted because most vehicles today are made mostly of aluminum, plastic, rubber and special fibers, yes there is steel on a vehicle but on the new vehicles today, the steel is so far under the vehicle there will be interference with the satellite and the location will not transmit. The complication with using a GPS is the Summons and Complaint the private investigator will get if the unit is located. Because Georgia as no law prohibiting the use of a GPS, the person finding the GPS can sue for:

1. Invasion of their Privacy
2. That there was trespass to their personal property
3. There was intentional infliction of emotional distress
4. And they will want punitive damages and their attorney fees paid

If you think I'm speaking from experience on this, then you would be correct. Even though we won the suit (12 person jury verdict – search in Marietta Georgia, Cobb County Superior Court with TFP Company as the Defendant in an invasion of privacy lawsuit by a Party's girlfriend) and even with the Plaintiff's Motion for a New Trial being withdrawn, there still were complications for example, In my professional opinion and experience using GPS as the only surveillance method is not prudent. It's that old cliché, "Never put all your eggs in one basket."

And what about the client who thinks that her husband is having her followed? We all have had a Client call and states, "I'm going through a divorce or separation, but we are staying in the same house but in different rooms." This call normally comes with "I think my soon to be ex has put something on my computer (laptop) or my car (GPS) or my cell phone and is monitoring my every move and conversations." Is this possible? Absolutely! especially if the spouse had access or still have to your devices, knows your login and passwords, had or still have access to your cloud, and continues to have access to your vehicle. This is when you use your PI as a "Counter Measure" to conduct the following:

1. Debugging – looking for spyware that has been downloaded on your computer or cell phone
2. Sweeps – looking for hidden cameras in the home, and GPS on the vehicle
3. Counter Bugging – Download spyware on your devices that will record when someone else is accessing the device
4. Counter Surveillance – Provide you with a counter-surveillance plan, i.e. what to look for, what to do, etc.

When do you get the Private Investigator involved? The earlier you can get the PI involved, the better. Include the PI in your discussions with your client early on. If the PI understands what you are trying to accomplish and why, e.g., i.e. what do you hope to prove and what type of evidence do you need and why? The private investigator can guide you and your client in the best approach and the best way to prove what it is that you are trying to prove.

Every case has its pros and cons, and sometimes the private investigator will get burnt (spotted) when conducting surveillance. An inexperienced private investigator may panic or think the case is over. This is far from the case. When surveillance is compromised, the best course of action is to let some time go by and go back, but this time in a different vehicle, or use another private investigator to do the surveillance for you. The key to doing surveillance is to know what the client wants before you do the surveillance. What is the task, what does the case need to be successful? This is where a good surveillance plan comes in handy before the private investigator starts the case. The plan will determine what you need before the surveillance begins to prevent the private investigator from getting burnt. For instance, using a GPS in conjunction with mobile surveillance and have another private investigator at the possible meeting location. A good surveillance plan accounts for time of day, traffic, construction, area being surveilled, and who is being surveilled. Being prepared will mitigate the compromise.

The testifying Private Investigator – Directing and Crossing. Now that you have all this evidence, you need the private investigator to testify and present that evidence.

At times the PI will be required to go to court; in most cases the PI will be testifying on any submitted report, eye-witnessed accounts, and what was otherwise discovered when working the case; although a licensed professional, the PI should review all reports and materials related to the case and should be prepared by the attorney just like the client and any other witnesses. On a side note if there were countermeasures (debugging, sweeps, counter bugging) done on the case, then the specific person needing to testify will be the person who performed the task – this may be the PI, and it may be another person tasked or hired to do the task; that person will show and testify about the process in recovering the data, how the data was kept secure, and how the data was analyzed and used. This person should also be prepared to state their training, education, and experience.

As you can see, the use of a PI in Family Law Cases is a can be a very effective resource. From the start your Client will feel secure and trust you have their best interest in mind. The information found or presented by the PI can help with your case strategy and legal theories and also help to identify case strengths and weaknesses. And, if an argument is to be made for attorney's fees because of the opposing party's conduct such as avoiding service, the PI can testify as to what was required to perfects service and can also testify as to your due diligence in getting the other party properly served. A good trusted professional PI and a Family Law attorney are partners in the case who share a common goal – that being to advocate for your client.

Endnotes

1. Eric D. Echols, CFI, is a Partner of TFP Company LLC, a full-service private investigation agency with focus in civil cases (PI, wrongful death, premises liability, and security negligence); criminal cases; domestic cases (child cruelty / custody, divorce, and infidelity); training (firearms, investigations, security, loss prevention); and process serving. Eric is also an expert witness in matters of loss prevention cases such as shoplifting and false arrest by retail loss prevention agents, security negligence and security. Eric is a licensed Private Investigator and a Classroom Instructor and Firearms Instructor for the State of Georgia and a licensed private investigator in the State of Tennessee with over 30 years of experience in the field of investigations, security and loss prevention. Eric can be reached at 770.579.0188 or via email at eric@tfpcompany.net. Please visit the TFP Company, LLC website at www.tfpcompany.net.
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Family Violence Prevention - A Year Like No Other

By Vicky O. Kimbrell

The Twin Pandemics

Most of us seek protection in the security of our homes, but what happens when those homes are not safe? For family violence survivors, their homes can be the most dangerous place on earth. Now they must also face the Covid-19 pandemic.

Since the coronavirus pandemic outbreak, Georgia's 24-hour Domestic Violence Hotline has seen a 15% increase in calls. The coronavirus pandemic has forced some family violence victims to remain in their homes with abusers because they can't afford to leave, they lost their job or housing, or because of the fear of venturing out and getting sick and becoming one of more than 195,000 fatalities. These fears are magnified exponentially when these victims are also protecting their children. For the first time during in 2020, victims can face two plagues – the coronavirus crisis and violence while they are trapped in their homes.

Having a lawyer can help victims escape the violence. Studies show that 75% of the time a victim obtains a Protective Order the violence is stopped or substantially reduced. Protective Orders also save tax dollars. (*TK Logan, NIJ*) For every dollar spent to obtain a protective order, the state saves $31.75 in community costs, like emergency room, law enforcement, courts, and incarceration costs.

Yet, rural Georgia has been referred to as a legal desert. Two-thirds of the state's lawyers are in the five metro Atlanta counties. The remaining one-third of lawyers are spread across 154 counties. Fifty-nine counties have less than 20 lawyers; fifteen counties have two or less; and four counties have no lawyers. Rarely are any of those lawyers able to represent victims without costs.

Georgia Legal Service's Family Violence Project assures holistic legal representation by providing attorneys in protective order cases, access to financial help with food stamps and Medicaid, help with housing representation if the landlord is threatening eviction, or advice and resources on divorces. GLSP has been a part of the solution to family violence for the past 50 years.

But we have over 5,000 Family Law Section lawyers who could help. If everyone volunteered for one case, we'd make a substantial dent in the need for legal representation. Pro bono lawyers help victims in all types of cases, including divorce, consumer, bankruptcy, healthcare, protective orders, and support cases that are a key part of helping survivors out of violence. And if you don't have the time, you can donate.

If a survivor needs help or more information, they can call GLSP's Family Violence Project at 833 - GLSPLAW (833 457-7529) or go to www.glsp.org. If you want to volunteer to help a survivor, complete the information at: https://duejusticedo50.org/volunteer-form/

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Correction

The Winter 2020 edition of the *Family Law Review* contained an error. R. Mark Rogers's article "Child Dependency Exemptions: Did the Supreme Court of Georgia Get Blanchard Wrong?" attached an incorrect image of the author. Mr. Rogers's actual likeness is reprinted here. We at the Editorial Board sincerely regret the error, and we extend our apologies to Mr. Rogers.

Military Legal Assistance Program

The Military Legal Assistance Program (MLAP) is a State Bar of Georgia program that assists service-members and veterans by connecting them to Georgia attorneys who are willing to provide free or reduced-fee legal services.

How can you help?

Take at least one pro-bono case per year. Offer free initial consultations with service-members and veterans, pro-bono or reduced fees if extended legal services are provided.

To sign up for the MLAP, contact Christopher Pitts at 404-527-8765 or at MLAP@gabar.org

The Effect of COVID-19 on Business Valuation

by A. Frank Adams III, Ph.D. and Nik Volkov, Ph.D.

The COVID-19 pandemic and the mitigation efforts enacted by governments around the globe wreaked havoc on virtually every nation's economy and, likely, resulted in permanent shifts in many aspects of the lives of all citizens (ex: consumer behavior, social life, businesses operations etc.). The implications of such shifts are being felt across our economy, and around the world, and are already affecting the field of business valuation. In this article, we present our approach to valuing privately held firms and go through the most commonly accepted methodologies used in business valuation and discuss the ways in which, in our opinion, the pandemic affected each approach. We also suggest possible remedies that business valuation analysts may employ when working on a business valuation assignment in this new environment.

First introduced in the 1930's, the Structure-Conduct-Performance (SCP) model has been widely utilized in economics and finance departments' industrial organization and investment analysis courses at both the undergraduate and graduate level. This analytical framework posits that market structure, and the conduct of firms within that structure, are key determinants of market performance. Michael Porter's Five Forces Framework, first published in the Harvard Business Review in 1979, draws heavily from the SCP Model and has remained a mainstay in undergraduate and graduate business programs throughout the US and the world for the past 40 years. Porter's model, considered a macro tool in business analytics, identifies five forces that determine the profitability of a particular industry and, by extension, the profitability of individual firms within an industry based on firm specific attributes and competencies. These five forces are competitive rivalry, bargaining power of suppliers, bargaining power of customers, threat of new entrants and threat of substitute products.

In our academic and consulting careers we have too often seen both students and business valuation professionals focus on the performance of an individual firm in determining value, i.e. a silo approach of concentrating primarily on past financial performance to 'predict' future financial performance. While this approach can work well under certain circumstances, it assumes a static industry structure, static conduct of firms within an industry as well as a static structure of financial and human capital within a particular firm.[1] Technological changes, government regulations and trade policies, and most recently Covid-19, *inter alia*, can have a dramatic impact on an industry, the conduct of firms within an industry and the resulting financial performance of firms in an industry. Therefore, it is of upmost importance, particularly in today's environment, to utilize the aforementioned frameworks and models to analyze and assess the impact of exogenous factors on a particular industry and the resulting conduct of firms within that industry as well as assess a particular firm's ability, from a financial and human capital perspective, to meet the challenges it faces in the marketplace.[2]

Once armed with an understanding of the 'macro' environment in which a firm operates, valuation professionals, when estimating the fair market value of a firm, typically utilize one (or more) of three valuation approaches: the Asset Based Approach, the Income Approach and the Market Approach. The decision as to which approach or approaches is most appropriate is based on the nature of the business and its unique characteristics.

Asset Based Approach – arguably the least utilized approach in the pre-COVID era. This approach simply suggests that the value of a business is closely related to the value of the assets underlying the company.[3] A valuation engagement involves subtracting the liabilities of a business from an appraised value (fair market value/replacement cost) of the business' assets. Historically, this approach was mostly utilized for real estate holding companies and businesses that continuously generated losses or were to be liquidated in the future.[4] While not widely used in the pre-COVID environment, we anticipate that this approach may, at least temporarily, gain more popularity in the valuation community. Given the high uncertainty regarding future cash flows of businesses that were most affected by the pandemic, i.e. travel and entertainment, commercial real estate,

restaurants, etc., and the increased probability of a future liquidation of such businesses, an asset-based approach may become the preferred methodology in certain valuation engagements.

Income Approach – arguably the most "real world approach" used in business valuation engagements. There are two primary methods to the Income Approach, however both of them focus on converting the future anticipated economic benefits from a business into a single present value. Because this approach incorporates future expectations regarding the performance of a business and the risks associated with future anticipated cash flows, the income approach allows for the most flexibility when dealing with uncertainty and the possibility of future shocks to a business. This approach was widely used in valuation pre-COVID and, since we believe it will likely play an even greater role post-COVID, discussion of the Income Approach's two methods is warranted.

1. *Capitalization of Earnings/Cash Flows Method* – this method values a business based on the future estimated earnings or cash flows that are expected to be generated by the company. The estimated future benefit is then capitalized using an appropriate capitalization rate. It is not uncommon for the valuator to assume that past earnings or cash flows of the business are an appropriate measure of the future benefit from the business and that they grow at a constant rate. The capitalization rate used in this approach is also assumed to be constant. Thus, the approach does not allow for any fluctuations in either the ability of the business to produce earnings or in the riskiness of the business, and is only appropriate for businesses that exhibit year-over-year consistent cash flows and earnings which are not subject to significant fluctuations as a result of external shocks. An example of a business for which this approach may be appropriate is an auto repair business that has low growth potential but exhibits an ability to consistently produce positive and predictable earnings. The use of this approach, however, becomes rather questionable in today's environment when the current earnings of virtually all businesses are being affected by the pandemic. It is more likely than not that an abnormally high recovery rate from the pandemic will be followed by a lower growth rate when the recovery turns to more stable moderate-growth conditions. The capitalization of earnings method is nothing more than a significant simplification of the discounted cash flows method that is discussed below.

2. *Discounted Earnings/Cash Flows Method* – this method is most commonly used in the valuation of businesses for investment purposes (including mergers and acquisitions, spinoffs, purchases of stock of publicly and privately held companies etc.). This approach allows for non-constant future cash flows and for incorporation of a change in the future risk profile of a business. Furthermore, it provides the valuator greater flexibility to stress test assumptions made in a valuation as well as to demonstrate a range of values of a business under different assumptions and conditions. This method represents the most "real world" approach to valuation. A valuator projects future cash flows of a business for a defined period of time, typically for five to ten years depending on the level of maturity of the business, market conditions, and the industry the business is engaged in. The valuator then computes a terminal value of the business, an approach that is almost identical to that used in the capitalization of earnings approach, at the time of the last projected cash flow. The future projected cash flows and the terminal value are then discounted to the present at an appropriate discount rate(s). What is most notable about this approach is that it allows for both fluctuations in the expected cash flows as well as fluctuations in the discount rates used in the valuation. This approach is more involved than the asset based or the capitalization of earnings approach, but it can provide a more realistic valuation for a business operating in an industry with growth opportunities combined with, for example, considerable uncertainty. The reasons for choosing this approach, over other more simplified approaches commonly used in valuation engagements, are amplified by the COVID pandemic. For instance:

a. The use of past or present earnings (cash flows) as a measure of the economic benefit used in the capitalization approach may not be appropriate in current conditions. For most businesses, 2019 was a good year and the use of 2019 earnings in a valuation may result in a significant overstatement of the value of a business. Just as importantly, the use of the 2020 expected earnings (cash flows) may result in a significant understatement of the value of a business as the 2020 earnings of most businesses will likely not represent their true earning potential.

b. The use of a non-constant discount rate in a discounted cash flow valuation allows the valuator to appropriately incorporate the risks associated with a business and the general dynamics of the market's appetite for risk into the valuation. As such, it is reasonable to assume that, while the required returns on an investment are very high presently, they will likely come down in the next few years. A discounted cash flow approach allows a valuator to incorporate such an expectation in his/her valuation.

Market Approach – the approach that has been widely used in litigation in the pre- COVID era but will likely face some significant challenges post-COVID. This approach is a comparable transactions approach where the valuator finds a set of comparable companies that have been sold and estimates the value of the subject business based on the value of the comparable transactions using market value multiples for earnings, sales, and/or other income statement or balance sheet items. The strength of this approach is that the comparable transactions do represent the "real world" valuation of comparable businesses. As noted above, the "real world" does incorporate the expectations about the future earnings and the risks associated with such future earnings in the calculation of value, therefore making the comparable transactions representative of the value arrived at by using the discounted cash flow valuation discussed previously. However, due to small sample sizes of the comparable transactions and the limited data on the underlying financials of private companies included in the comparable transactions sample, this approach poses issues even in a normal economic environment. It is often difficult, if not impossible, to find true comparables to the subject business because the operational aspects of the comparable business(es) are often unobservable. Other issues, in a normal economic environment, include finding a sufficient number of comparable transactions that are recent, i.e. within the past year or two, to draw meaningful conclusions about the value of the subject business. These issues are amplified by the COVID pandemic. As such, it may not be reasonable to use any pre-COVID comparable transactions as measures of the value of the subject business in the current environment. Any business transactions that took place between the start of the COVID pandemic in the U.S., and today, may also not be representative of the value of the subject business as many of them either transacted based on terms that were negotiated prior to the pandemic or took place on a fire-sale basis. Thus, we believe that, while very legitimate from a methodological standpoint (if executed correctly), the market based approach to valuation will be less useful in the upcoming year, or potentially longer, as the sample size of the post-COVID transactions has to be sufficiently large for valuators to be able to draw meaningful inferences.

All three approaches discussed above in one way or another (directly or indirectly) incorporate the idea of a rate of return that investors require when purchasing a business. As such, in an asset-based valuation, the value of a given asset is driven by either the economic (or, in some cases, non-economic) benefit that such assets can generate to the purchaser. This future benefit from owning the asset return that the purchaser receives from the purchase. In the income approach, the rate of return (the discount/capitalization rate) is the driving force of

valuation, while the market approach allows one to solve for the prevailing required rate of return in a given transaction and, therefore, provides the valuator with the actual market required rate of return. Thus, a discussion of the effect of COVID on rates of return and the appropriate discount and capitalization rates is warranted.

The build-up method of computing the cost of capital (the discount rate used in the valuation) is the most commonly used methodology to derive the appropriate discount rate to value a business. It states that:

$K_e = R_f + ERP + IRP + SCR,$ where

K_e is the cost of equity (or the discount rate used in the valuation of equity shares of the company)

R_f is the risk-free rate of return

ERP is the expected equity risk premium

IRP_t is the expected industry risk premium

SP is the size premium

SCR is the specific company risk

The risk-free rate has changed since the beginning of this year with the 20-year Constant Maturity Treasury Yield falling from 2.19% on January 2, 2020 to .98% on July 30, 2020, just over a 1 percentage point drop. On the other hand, the equity risk premium, utilized by leading valuation firms in the US, has increased over the same time period by approximately 1 percentage point, almost completely offsetting the drop in the risk-free rate.[5] According to Jerome Powell, the Chair of the Federal Reserve, the risk free rate is expected to stay near all-time lows for at least several years to come resulting in virtually no change to the combined values of two of the five components of the discount rate; the risk-free rate and the equity risk premium. The COVID pandemic has had a significant impact on the expected industry risk premium, size premium and, arguably even more so, specific company risk. As such, one may argue that the industry risk premium has dropped significantly for technology-related industries as the pandemic has demonstrated that economy-wide shutdowns result in greater digitalization and that technology companies, that historically have been viewed as bearing a higher industry-specific risk than most other industries, may weather systemic shocks better. On the other hand, the industry risks for retail, commercial real estate, travel and entertainment, among other industries has increased substantially. Similarly, we expect that the size premium/discount has been affected by the pandemic as larger companies typically have better access to capital and more flexibility in cutting internal inefficiencies, which would allow more longevity during times of uncertainty. Most importantly, however, the specific company risk must be very carefully examined and assessed in a post-COVID valuation. Some companies have strengthened as a result of COVID and are now looking at a marketplace that offers significant new growth opportunities due to lower competition and a shift in consumer demand. However, for many companies, the specific company risk has increased markedly as the ability of many of them to even survive has come into question.

When discussing the methodology of arriving at an appropriate discount rate, it is important to note that we believe it is more likely than not that there will be a gradual improvement in overall market conditions and, at least, a partial convergence of the current industry and size premiums back to pre-COVID levels within the next year or two. Expectation of such a change further suggests that the use of a discounted cash flow methodology where both the expected cash flows and the expected discount rates are assumed to be dynamic (non-constant) allows for more precision in a valuation engagement.

It is our belief that, now more than ever, the "real world" approach of using the discounted earnings/cash flows valuation method of the Income Approach should be front-and-center as the preferred method for valuing private firms in the current environment. This approach allows us to incorporate Porter's Five Forces Framework in the analysis of the industry in which the firm operates which then informs the valuator

as to the appropriate cash flow and discount rate adjustments to make to reflect the specific company risks of the firm. This view is very much supported by the recent Barron's interview of Aswath Damodaran, an NYU professor who is arguably the world's number one expert in business valuation. While discussing valuation from an investment perspective, Damodaran suggests that discounted cash flow and not the other valuation methodologies should be at the center of valuation in the current environment.[6]

Endnotes

1. At a minimum, utilizing past financial performance to predict future financial performance, and therefore the 'value' of the firm, assumes that the past period reflects the variability in the economy, industry structure, conduct of firms, etc. that a particular firm will experience in the future. We typically see valuation reports that utilize the previous five years of financial information to project earnings going forward.
2. Porter's Five Forces Framework is well known and widely utilized by economics, strategic management, and finance faculty at colleges and universities world-wide, but it is not the only 'framework' available to executives formulating corporate strategy.
3. See Revenue Ruling 59-60
4. We have utilized this approach when valuing a firm where all of the goodwill of the enterprise was personal goodwill attributable to the principal in the firm.
5. "Impact of Covid-19 on Business Valuations," International Institute of Business Valuers, June 2020 Update – COVID Webinar. Carla Nunes, Managing Director, Duff & Phelps, United States, stated that 'Duff & Phelps has increased the Equity Risk Premium for the United States from 5% to 6% because of COVID-19.
6. Root, Al. Buying Tesla at $180 and Other Investing Nuggets From NYU Professor Aswath Damodaran, Barrons, June 25, 2020. https://www.barrons.com/articles/how-to-value-stocks-according-to-nyu-professor-aswath-damodaran-51593082800

The Judiciary's Role in the Advancement Social Evolution of the Nation

by Daniele Johnson

In this this last presidential term, three new justices have been appointed to the United States Supreme Court. Much attention has been given to the fact that the makeup of this nation's highest court may define our country's social policies for decades to come. A mere glimpse into our history, however, demonstrates that this is nothing new. Throughout history, decisions rendered by the Supreme Court, for better or worse, have ratified this nation's social conscience. Many seem to forget that these decisions actually begin in our lower courts.

The United States was founded on the creation of three separate branches of government: the legislature, the executive, and the judiciary. Each branch is meant to operate separately and distinctly from the other two branches of government so as to limit one branch from exercising core functions of another. However, how can that be accomplished when our courts are also given the task of shaping social rules of conduct? Do judges sitting on the lower courts have an obligation to inform the public of socially significant cases, giving constituents the opportunity to influence the projection of social issues by using their power to vote for members of the legislature?

There are at least two sides to this debate. One could argue that impartiality is the most important attribute of a judge. A judge has the responsibility of avoiding even the mere appearance of bias. It would be impossible for a judge to bring public attention to these cases without implicitly suggesting his or her desired outcomes. On the other hand, one could argue that every single socially significant advancement in our country started with cases heard by the lower courts.

For example, in *Obergefell v. Hodges*, 576 U.S. 644 (2015), the petitioner sued the state when it refused to recognize him as the surviving spouse of his terminally ill husband due to the state's ban on same-sex marriages. The Supreme Court's decision held that the fundamental right to marry is guaranteed to same-sex couples. In *Stanton v. Stanton*, 421 U.S. 7 (1975), a mother of two children challenged the state's law that allowed her ex-spouse to discontinue child support payments for her daughter at a younger age than for her son based on the stereo-type that women marry at a younger age and require less education than men. The Supreme Court rejected the outdated notion that women are destined only to remain in the home rearing a family instead of earning an education and entering the workforce. Perhaps the most notable example of how seemingly inconsequential lower court decisions have shaped the fabric of our society can be found in this country's civil rights movement.

Jim Crow was a systematic attempt by state and local governments to suppress the advancement of African-Americans. The dismantling of these laws was instigated by the calculated efforts of such legal minds and activists as Martin Luther King, Thurgood Marshall, and John Lewis. The end of Jim Crow and its ideologies did not begin with the passing of the Civil Rights Acts of 1964 and 1965. Its demise began with the attack of these laws at the lower-court level. For example, *Brown v. Board of Education*, 347 U.S. 483 (1954), involved an African-American father whose attempts to enroll his daughter in a "white" school were denied by the local school board. The Supreme Court declared that the policy of "separate but equal" was unconstitutional. In *Hearts of Atlanta Motel v. the United States*, 379 U.S. 241 (1964), the owner of the establishment argued that the Civil Rights Act of 1964 was unconstitutional and that he had a right to refuse to rent rooms to African-Americans. This argument, of course, was rejected by the United State Supreme Court. *Loving v. Loving*, 388 U.S. 1 (1967), involved a biracial couple who was sentenced by the lower court to a year of incarceration for violating the ban on interracial marriages instituted by the states Racial Integrity Act of 1924. The Supreme Court overturned the convictions and declared that any raced-based restriction on the fundamental right to marry is unconstitutional. These are but a few examples of how civil liberties created

by iconic Supreme Court cases actually stemmed from decisions rendered at the lower-court level.

The role of the judiciary is to apply the laws of the land to facts determined at trial before issuing a fair and *legally* sound decision. However, judges are bound by the laws set by the legislature. Our history is riddled with examples of how judges are unable to render fair, *socially* sound decisions because of the limitations set by state and local law makers. These cases typically go unnoticed by the public until they gain notoriety resulting from the United States Supreme Court's scrutiny. However, the road to the Supreme Court is long. It takes years to get there. For example, Mr. Obergefell's journey began in July of 2013 when the state refused to recognize his same-sex marriage. The decision deeming the state's refusal as a violation of the fundamental constitutional right to marry was issued nearly two years later in June of 2015. By then, his husband had already passed away. Similarly, Mr. and Ms. Loving were convicted of their crimes in January of 1959. The *Loving* decision did not come down until June of 1967. Meanwhile, one can only imagine how many other couples were denied their right to marry outside of their race due to outdated laws set by the legislature nearly four decades earlier. Not to mention, the Lovings had to wait eight long years while the fate of their family lay in the hands of the courts.

Our government is designed in such a way as to allow the vote of the people to determine the social trends of our country. Ideally, the laws passed by the legislature reflect the wishes of the constituents. However, average voters are not privy to cases pending before the lower courts. Most likely, they are unaware that civil liberties are being encroached upon by the application of outdated laws that are no longer consistent with current social values. They may also be unaware that the protections of those civil liberties begin with the laws created and/or changed by their publicly elected officials, not with the judiciary.

Judges are given the responsibility of issuing fair decisions based on the totality of the circumstances. Often times, however, they are unable to facilitate a fair outcome of a case due to their obligation to apply a law that may be socially outdated or questionably unconstitutional. Arguably, judges should also give the courtesy to the parties before them of explaining the ultimate decision of their case. If the outcome is seemingly unfair or defies the social conscience of society, the recourse of the parties would be to bring public attention to the case and echo the reasonings provided by the court at the conclusion of trial. In doing so, the public is afforded the opportunity to use their vote to sway the legislature to pass laws that are more in line with the social ideology of the nation. Public awareness of such cases would also allow the judiciary to contribute to the social evolution of this country as it has done throughout history.

In conclusion, it stands to reason that judges of the lower courts do, in fact, have an obligation to inform the public of socially significant cases. However, the sharing of information must be done in such as way that would not encroach upon the duties assigned to the other two branches of government. Instead, the sharing of information should be designed to give the citizens the opportunity to shape the social conscience of this nation through the power of their vote.

Recovery Rebate in Divorce

By Richard Livingston[1], Partner | DHG Forensics and Cindy MacAulay[2], Director | DHG Forensics

What is it?

The Recovery Rebate is a refundable credit against an Eligible Individual's income taxes for the 2020 taxable year. The IRS is referring to this credit as an Economic Impact Payment.

Who is an Eligible Individual?

An Eligible Individual is any individual other than:

1. Any nonresident alien individual;
2. Any individual that can be claimed as a dependent of another taxpayer;
3. An estate or trust. Financial eligibility for the Recovery Rebate is based on Adjusted Gross Income.

Eligibility begins to phase out when Adjusted Gross Income exceeds $150,000 in the case of a joint return, $112,500 in the case of a head of household filer, and $75,000 for any other filer.

How much is it?

If eligible, the amount of the Recovery Rebate will be, before phase-out, $1,200 for individual filers (or $2,400 for joint filers), plus $500 per qualifying child (having the same definition as a qualifying child for the Child Tax Credit). The total Recovery Rebate is subject to phase out limits based upon Adjusted Gross Income.

As an example, for a head of household taxpayer with two qualifying children, the total of the $1,200 Recovery Rebate plus $1,000 for both children would be reduced by $50 for every $1,000 in excess of $112,500 of Adjusted Gross Income and would be completely phased out at Adjusted Gross Income of $156,500.

How will Adjusted Gross Income be measured?

Eligibility for the Recovery Rebate will first be estimated based upon the 2019 tax return, and if no 2019 tax filing has been made, the 2018 return will be used.

Given that this is an advanced credit for the 2020 taxable year, which is being estimated based on past 2018 or 2019 filings, it is possible the advanced credit issued will be more or less than what the Eligible Individual is subsequently determined to be entitled to. If the advanced Recovery Rebate is more, the Eligible Individual will not be required to repay the excess credit. If the advanced Recovery Rebate is less, the Eligible Individual will be able to claim the difference on their 2020 tax return.

How will it be paid?

The majority of payments are expected to be made electronically, and if so, will be made to an account previously authorized by the recipient to receive an income tax refund after January 1, 2018. If no electronic deposit information is available, paper checks will likely be issued and mailed to the taxpayer's last known address.

On Sunday, March 29th, the Treasury Secretary was reported as saying there will be a web-based application for those who do not receive direct deposits to give the IRS the necessary information. Currently, the web-based application has not yet been made available.

When will it be paid?

The CARES Act directs the Treasury Secretary to make the refunds or credits "as rapidly as possible." On Sunday, March 29, the Treasury Secretary was reported as saying that Americans could expect checks to be direct deposited in their accounts within three weeks, however, no expected time period was given for the issuance of paper checks.

What are the potential issues for divorced or divorcing parties?

It is important to remember the Recovery Rebate is an advanced credit for the 2020 taxable year, which is being estimated based on past 2018 or 2019 filings. Once the 2020 tax return is filed, the amount due could change.

For recently divorced parties that filed a joint return in 2018 or 2019, several potential issues could be encountered, such as:

1. The Recovery Rebate could be directly deposited into an account now controlled solely by an ex-spouse;

2. The direct deposit account previously used could have been closed after the divorce, which may require the issuance of a paper check and could slow the process of receiving the funds;

3. If a paper check is issued, it is likely the check will be issued to both parties and will require some coordination to negotiate;

4. The portion of the Recovery Rebate attributable to a qualifying child may require some negotiation as to how it is ultimately divided between the parties.

For parties that are recently divorced, the portion of the Recovery Rebate attributable to a qualifying child may ultimately need to be divided based upon the language in their agreement, as some agreements provide for who is to receive the benefit of tax credits attributable to a child.

For an example, if your client's divorce was finalized during 2019 or early 2020 and neither party has filed their 2019 tax return, the Recovery Rebate will be based upon the parties' 2018 tax return. If the parties' filed their 2018 tax return Married Filing Jointly with two children, and the adjusted gross income was under $150,000, the Recovery Rebate will be $3,400 and deposited to the direct deposit account on the 2018 tax return or a paper check will be issued to the address on the 2018 tax return. This example could have potential issues between the parties' that may need your assistance.

Another issue could arise whereby an Eligible Individual that was recently divorced will have to wait until they file their 2020 tax return to receive their Recovery Rebate because the Adjusted Gross Income reported on a past 2018 or 2019 joint filing was in excess of the phase-out limits. Therefore, that individual will need to file their 2020 tax return and claim their credit at that time, significantly delaying the economic benefit they would potentially receive.

For parties that are currently in divorce proceedings, variations of these same issues could also be encountered.

If the parties decide to file a joint tax return for tax year 2020, the CARES Act states, "…with respect to a joint return, half of such refund or credit shall be treated as having been made or allowed to each individual filing such return." This could potentially be interpreted by some to imply that whatever amount is received, including the portion attributable to a qualifying child, should be divided equally between the parties regardless of their temporary custody arrangement.

While the dollar amount of the Recovery Rebate may not be significant when compared to a parties' overall marital estate or support obligations, the calculations, logistics and timing of the payments will likely give rise to issues that will need to be addressed in the coming weeks and months.

https://www.dhg.com/article/recovery-rebate-in-divorce

Endnotes

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Four Times You Should Review Your Beneficiary Designations

Many of us take a set-it-and-forget-it approach to beneficiary designations on retirement accounts, life insurance policies, wills, and trusts. We create the document, we choose a beneficiary, and we consider the work complete. But the truth is, many life-changing moments are times to thoroughly review those beneficiary designations to make sure they're up to date.

Travis Huber[1], IRA Product Manager for Wells Fargo Advisors, lists four life events that should trigger beneficiary reviews. He also notes common mistakes to avoid.

When to review your beneficiary designations

When you divorce or remarry. At these milestones, many people remember to update their wills, but they may forget about other accounts such as IRAs and life insurance policies. "You've got to rethink everything," Huber says. "If you forget to update a document, the beneficiaries may not be your kids or new spouse as you prefer. Instead, your ex-spouse could wind up as the designee."

When you have a child or a grandchild. The time that your family grows might be the time to consider making a child a beneficiary. You can do this individually within a policy or account, or you may want to consider using a trust. You should also revisit primary/secondary IRA beneficiary designations when a child becomes a legal adult, Huber says. If you want several children to split funds from your IRAs, make it clear in your designations. Legally, a sole beneficiary is not obligated to share funds with a family member you haven't named as a beneficiary. Even if the beneficiary decides to do so, it could trigger a gift tax for the recipient.

When a beneficiary dies. Some individuals may outlive their beneficiary, whether it's a spouse or a child. If, for example, a deceased person is named in your life insurance policy as a beneficiary, it could pose complications. "Even if you had named contingent beneficiaries, it's still better to have the paperwork updated," Huber says. "That will mean less time and effort to get those benefits to the right recipient."

When beneficiaries' financial needs change. As time passes, your beneficiaries' financial circumstances may evolve. Maybe you named your dependent children and your spouse equal beneficiaries on an IRA. Now those children are adults with successful careers; they no longer need the money as much as your spouse would. Make sure your beneficiary designations reflect those changing needs.

Two common mistakes to avoid

Conflicting designations. Huber sees this often, and it can make your intentions unclear. For example, perhaps you established an IRA when you were younger and named a sibling as a beneficiary. But years later, you created a will dividing your assets between your spouse and your children. However, beneficiary designations on IRAs and retirement plans supersede what's stated in a will or trust, Huber says. "Your spouse and children can try to use their interest in the will or trust to gain IRA assets; however, the actual IRA designated beneficiary will likely remain in control of the inherited IRA assets."

Incomplete designations. "Sometimes you put your wishes on paper, but maybe you didn't sign the paper, or you forgot to submit it," Huber says. "This would likely create confusion, perhaps cause challenges and delay or prevent passing the assets to the person you want to receive these funds."

Finally, whenever you review, take a holistic approach to beneficiary designations—reviewing all of your accounts together, instead of one at a time—because there can be a ripple effect. "If you change one, it might change what you want to do with the others," Huber says.

Wells Fargo Advisors is not a tax or legal advisor.

Endnotes

1. This article was written by Wells Fargo Advisors and provided courtesy of Trent Doty, Certified Divorce Financial Analyst®, CFP®, Financial Advisor in Statesboro, GA at 912-764-5080. The use of the CDFA® designation does not permit Wells Fargo Advisors or its Financial Advisors to provide legal advice, nor is it meant to imply that the firm or its associates are acting as experts in this field.
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GEORGIA LEGAL SERVICES PROGRAM®

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NEWS RELEASE

FOR IMMEDIATE RELEASE

May 22, 2020

For additional information from Georgia Legal Services Program, please contact: Bill Broker, 912.963.1863, bbroker@glsp.org.

For additional information from the National Center for Victims of Crime, please contact: Katy Maskolunas, 202.467.8768, klmaskolunas@victimsofcrime.org.

GEORGIA LEGAL SERVICES SELECTED BY NATIONAL CENTER FOR VICTIMS OF CRIME

Georgia Legal Services Program (GLSP) is honored to be selected by the National Center for Victims of Crime (NCVC) to lead a training workshop at its annual National Training Institute (NTI) to be held on November 11-13, 2020 in Atlanta. Only a select number of applicants were chosen to present at the 2020 NTI, an event that spotlights projects across the nation that achieve safety and justice for crime victims though innovation. Kyle Gallenstein, a Family Law Section member and Victims of Crime Staff Attorney with the Savannah Office of GLSP, will be among the presenters of the workshop, which showcases GLSP's Victim Legal Assistance Network (VLAN).

VLAN is a referral-based project between GLSP and several partners to holistically meet the needs of crime survivors, including those harmed by domestic violence, stalking, sexual assault, and elder abuse. GLSP's partners in the project are the Georgia Asylum and Immigration Network (GAIN), Atlanta Legal Aid Society (ALAS), Atlanta Volunteer Lawyers Foundation (AVLF), and, its research partner, Georgia State University (GSU).

"This has been a vital ingredient in our delivery of legal services to our clients", according to Bill Broker, Managing Attorney. "The additional tools it puts at the advocate's disposal are vital."

The upcoming workshop, titled "Busting Silos to Serve Survivors: Georgia's VLAN Collaboration", will highlight the importance of building a partnership system like VLAN to connect underserved crime victims to comprehensive legal assistance, as well as other supports for housing, public benefits, immigration, and health. The workshop will demonstrate how these systems can lead to safer communities, which is more crucial now than ever in the wake of the COVID-19 crisis.

In 2019, GLSP represented over 650 victims of crime through the VLAN project, providing much needed legal assistance to promote physical safety and economic security. GLSP's attorneys and support staff involved in the project also helped secure over $700,000 in financial outcomes for crime victims last year.

GLSP is a nonprofit public interest law firm whose mission is to provide free, high quality, civil legal services to low-income or senior-aged persons in Georgia outside of the Atlanta metropolitan area. Its mission is to create equal access to justice and opportunities out of poverty. For more information about GLSP and its services, visit glsp.org.

For information and updates on the 2020 NTI, visit victimsofcrime.org.

Case Law Update

By Vic Valmus

ARBITRATION

King v. King, **A20A0034** (February 27, 2020)

The parties were married in 1991 and had 3 children. In 2016, the Wife filed for divorce in Fulton County. The parties agreed to mediate, and if mediation failed, they would go to binding arbitration. The arbitration agreement specified the procedures that would be followed in arbitration and the agreement was incorporated in the Consent Order entered by the Superior Court. Among other things, the Consent Order required, as part of the award, the arbitrator shall prepare finding of facts and conclusions of law to be submitted to the Court to be confirmed. Mediation was unsuccessful and arbitration extended over several days which was not transcribed. Following arbitration, the arbitrator issued a written award and purported to resolve all claims between the parties including all issues regarding the division of marital property raised at the arbitration hearing. The Wife filed a Motion to Confirm and the Husband opposed the Motion and filed a motion to vacate contending that the arbitrator's authority was imperfectly executed because the award was conclusory in nature and did not contain any finding of facts and conclusions of law as required by the Consent Order.

In December 2018, the Superior Court denies the Wife's Motion to Confirm Arbitration Award based upon the lack of finding of facts and conclusions of law in the award. The Superior Court remanded the case to the arbitrator to resolve all matters. Following the remand, the dispute arose over an alleged *ex parte* communication between arbitrator and the Wife's counsel. In January 2019, the arbitrator voluntarily recused himself. The Wife filed a renewed Motion to Confirm the Arbitration Award. Superior Court reiterated that the arbitration award did not contain finding of facts and conclusions of law as required by the Consent Order and held that the deficiencies in the award could not be remedied in light of the arbitrator's recusal and therefore, vacated the award and remanded for arbitration before a replacement arbitrator. The Wife appeals and the Court of Appeals affirms.

As a threshold matter, the Husband argues that the Wife's appeal of the May 2019 Order should be dismissed for lack of jurisdiction as it was an interlocutory ruling and not a Final Order and therefore, the Wife should have obtained a certificate of immediate review from the trial court which she failed to do. Pursuant to O.C.G.A.§9-9-13 of Arbitration Code, states plainly and unambiguously that an Order vacating such an award constitutes as a Final Judgment for the purpose of an Appellate Review.

The Wife contends the Superior Court erred in vacating the arbitration award. O.C.G.A.§9-9-13(B) sets out the circumstances on which a Superior Court can vacate an arbitration award.

1. Corruption, fraud or misconduct in procuring the award.

2. Partiality of an arbitrator appointed as a neutral.

3. An overstepping by the arbitrator of their authority or such imperfect execution that the final and definite award upon the subject matter submitted was not made.

4. Failure to follow the procedure of this part, unless the party applying to vacate award continued with the arbitration with notice of this failure and without objection.

5. The arbitrators manifested disregard of the law.

These five statutory bases are the exclusive grounds for vacating the arbitration award. Unless the Court vacates or modifies the arbitration award, the Court must grant a party's application to confirm the award. Here, a number of the arbitration award sections began with a phrase "based upon the testimony and evidence presented at arbitration," but the award does not cite to or discuss any of the testimony or evidence presented at the arbitration hearing. Nor does the arbitration award contain any citations or legal authority or provide any legal analysis explaining the rational of the arbitrator's award. The arbitration award did not comply with the express provision of the Consent Order by providing finding of facts and conclusions of law.

The Wife also argues that even if findings of fact and conclusions of law were not included in arbitration award, the Superior Court erred in determining an imperfect execution of the arbitrator's authority because the general rule is an arbitrator is not required to make findings of facts or explain his or her reasoning for the arbitration award. However, Wife's cases cited simply set out the default rule that no specific form of arbitration award is required, but because arbitration is a matter of contract, the parties are free to contract around the default rule unless prohibited by statue of public policy which no statutory or public policy prohibition was in this case.

Wife also argues that the Husband's rights were not prejudiced by the arbitrator's imperfect execution of his authority. Here, the party's contracted for a specific arbitration parameter and thus the Husband did not receive the benefit of his bargain and his contractual rights were undermined when the arbitrator issued an award that ignored the terms of the party's agreement.

ATTORNEY'S FEES

Steed v. Steed, **A20A0316** (May 7, 2020)

The parties were divorced in 2015, with the Mother having primary custody. In 2017, the Father filed a Modification of the Parenting Plan and Child Support. After the hearing, the Trial Court declined to modify the Parenting Plan and increased the amount of child support owed by the Father and awarded $26,250.00 in attorney's fees to the Mother. The Father appeals and the Court of the Appeals confirms in part and reverses and remands.

The Father appeals, among other things, the Trial Court erred in awarding attorney's fees. The Trial Court awarded the Mother $26,250.00 in attorney's fees pursuant to O.C.G.A. §19-9-3(G) and §19-6-15(K)(5). §19-9-3(G) provides the Trial Court may order reasonable attorney's fees in child custody actions and §19-6-15(K)(5) provides for an award of attorney's fees, costs and expenses of litigation to the prevailing party in a proceeding for the Child Modification for Child Support. At the final hearing, the only evidence regarding attorney's fees was the testimony of the Mother where she paid her current attorney $7,256.00 to date and she owed him another $7,670.00. She also testified that she had paid her prior counsel $7,000.00 and she owed an additional $44,000.00. No bills were presented, no testimony from either the Mother's attorney or to the reasonableness of their fees and no breakdown to the establishment of what the services were provided by the attorneys. It is well settled 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 those costs. Without evidence of reasonableness of the fees, hourly rate of the attorney's or the services they rendered, or evidence of other similar factors, the Trial Court lacked a sufficient basis to award the fees to the Mother. Therefore, that portion of the case is vacated and remanded to the Trial Court.

CONFLICTS OF LAW

Mbatha v. Cutting, **A20A1303** (September 21, 2020)

Cutting was an attorney in New York and traveled to South Africa where she met Mbatha, an attorney working in South Africa. Cutting became pregnant in January 2018 and the couple married in New York on January 25, 2018. In February 2018, Cutting secured a Visa to move to South Africa. The couples embarked on a one-month honeymoon in Europe, but two months after the honeymoon, it began to sour. Mbatha eventually rented a separate apartment in South Africa for Cutting, but instead, she flew to Georgia to live with her parents in August 2018. The child was born in September 2018 and the Husband files for divorce in February 2019 in Forsythe County, Georgia. During the hearing in September 2019, the Court addressed the conflict of law issues. Cutting maintained South Africa law should apply to division of marital property because South Africa was the only marital domicile and Cutting was in Georgia by happenstance. Husband stated that New York law should apply because Cutting is cherry picking jurisdictions. Georgia is a system of equitable division and South Africa is a community property regime. A Trial Court concluded that because the parties executed their marital contract in New York, the Court would look to New York law to determine the conflict of law. New York uses a center of gravity approach and concluded that the law of South Africa should apply to the party's property division and alimony claims. The Trial Court found that the parties had negotiated the terms of the marriage in South Africa, entered into a New York marital contract and were domiciled in South Africa and that South Africa's community property regime would not offend Georgia's public policy. Mbatha files an interlocutory appeal and the Court of Appeals reverses and remands.

Georgia Courts have not determined the choice of law application in deciding which state or country's

law applies to issues of property characterization and distribution in divorce actions. The Husband argues that the law of the form should apply to the property division and Cutting argues that the marital domicile at the time of the property division should dictate because South Africa was the parties only marital domicile and the parties acquired the joint estate rights at the time of marriage. The Trial Court applied the *lex loci contractus* approach to conclude the parties married in New York thus forming the marital contract in the forum and apply New York's center of gravity approach. However, the Georgia Court should apply Georgia's approach in conflict of law analysis and therefore, the Trial Court erred in applying the New York center of gravity approach. Georgia Courts have continued to apply the traditional common law approach in conflicts of law. Therefore, the party's interest in any real property should be determined under the law of the jurisdiction of which it is located while interest and personal property should be determined under the law of the owner's domicile at the time the property was acquired. The record before the Court does not specify what property is at issue and therefore must be vacated and remanded.

DISABILITY PENSION/DEVIATION/ALIMONY

Spruell v. Spruell, **A20A1007** (September 18, 2020)

The parties were married in 2016. The Husband served in the US Navy as a medic. He was injured several times in his deployment overseas and in 2017, the Navy involuntarily retired the Husband and gave him a 70 percent disability rating which allowed him to receive 70 percent of his base pay. At the time, he only served a little over 10 years and therefore was not eligible for the longevity retirement compensation. In light of his injuries, he was eligible to receive military disability retirement and he was given the option of waiving a portion of his retirement and instead received tax free Veterans Disability Compensation. Later in 2017, the Husband filed a Complaint for Divorce and sought custody of the couple's son. At the Bench Trial, the Court held an in-chambers interview with the couple's 11-year-old son with only a court reporter present. In the Final Decree, the Court awarded joint custody with the child living in the marital home with the Father which was 54 percent of the time and the Mother having the child 46 percent of the time. The Father's income was $7,896.00 and the Mother's was $4,086.00 and the Court declined to award the Husband any child support and stated that he converted a marital asset into a non-martial asset with his disability waiver and awarded the Wife lump sum amount of $60,000.00. Husband sought reconsideration and testimony was given regarding the military benefits. Court modified the original decree and awarded the Wife $30,000.00 lump sum award in alimony. The Husband appeals and the Court of Appeals reverses and remands.

Supreme Court of the United States held that the Service Former Spouse Protection Act provides that a state my treat as community property and divide at divorce a military veteran's retirement pay. However, the Act grants an exemption of any amount that the government deducts as a result of a waiver that the veteran must make an order to receive disability benefits. Therefore, a state cannot treat as community property the waived portion of the veteran's retirement pay and Federal Law completely preempts the states from treating waived military retirement benefits as divisible community property. Therefore, the Court overstepped its authority when it awarded the Wife $60,000.00 in alimony on that basis. In addition, the Husband also contends that the Trial Court erred in awarding alimony because the Wife never stated a claim for alimony in her Counterclaim for Divorce, nor did she ever amend her Counterclaim. In fact, alimony was never mentioned until the Trial Court's award of alimony in its initial Divorce Decree. The Trial Court's alimony award violated the Husband's due process rights because the Wife never asked for such relief and the Husband had no meaningful opportunity to be heard or prepare a defense to that claim.

Husband also argues the Trial Court erred by failing to support a deviation from the child support guidelines. Here, the Trial Court awarded the Husband primary custody of the couple's son, but split the custodial time with the Husband 54 percent and the Wife 46 percent. The Court determined that neither parent would pay child support without ever stating what the presumptive amount of child support would have been. The Court omitted the necessary findings to be included in the Final Judgment and Decree to support any deviation. In addition, the Husband argues that the Court erred basing its child custody decision on an in-chambers interview with the couple's son. Before the conclusion of the bench trial, the Trial Court conducted an in-chambers interview with the son where only a court reporter was present. The Court announced that the child expressed a desire to spend time with both parents, but sleep in his own bed. However, when asked, the recording could not

be found and therefore, there was no record of the in-chambers interview. In reaching judgments on child custody, the Court cannot rely on evidence that was not available to the parties or their counsel. Here, in light of the Trial Court's reference to the interview with the child in its Divorce Decree, it is apparent that the Court relied, at least in part, on evidence that was not available to the parties and therefore, the custody order must be vacated and remanded.

GARNISHMENT

Smith v. Robinson et al., **A20A0591** (May 13, 2020)

Robinson sued Smith in Federal Court and received a judgement of $1.1 million. Robinson filed a garnishment in Gwinnett State Court naming Smith's employer as a garnishee. Smith filed a response to the garnishment claiming an exemption from the garnishment for a portion of his wages equal to his child support obligation. The child support obligation stems from a 2010 Mississippi divorce as well as other contempt proceedings for his failure to pay child support. The garnishment court denied Smith's claimed exemption on the grounds that the payment of child support is not an exemption from wages. Smith appeals and the Court of Appeals affirms.

O.C.G.A.§18-4-6 identifies certain earnings and property of a garnishment defendant that may be exempt from garnishment. By statute, Georgia's Attorney General creates a list of general categories from the federal statutes, provisions of the Code of Federal Regulations, and Georgia statutes that address limits on garnishments. The Attorney General's document also lists "family support." Therefore, Smith argues that the amount of his wages that he is supposed to pay for child support is exempt from the garnishment. However, the Attorney General's list of exemptions does not create exemptions. It simply provides notice of the exemptions.

Smith also argues that because he was granted joint legal custody of the children, he has standing to assert their right to the amount of his wages that he is supposed to pay for child support. However, O.C.G.A.§18-4-19(E) provides that a garnishment defendant shall not be allowed to present evidence, make an argument or prevail on the claim that money or other property in a garnishment may be subject to a claim by a third party. Here, Georgia law does not exempt from garnishment of debtor's child support obligation under these circumstances.

JURISDICTION

Kasper et al. v. Judy Martin et al., **A20A0244** (April 3, 2020)

Eleanor and Charles Kasper are the paternal Aunt and Uncle of the child at issue and filed a verified Petition asserting they should be given temporary and permanent custody of the child. The child's Mother had died shortly before the Petition was filed and the child's Father and Paternal Grandmother (Martin) were the named defendants. At the time of the Superior Court Petition, the child was subject to a dependency hearing in the Juvenile Court because the child tested positive for narcotics at birth in 2016. Two months prior to the Custody Petition, DFACS placed the child with Martin. The Kaspers motioned to intervene in the Juvenile Court proceedings. Kaspers would concede to a transfer of the matter to Juvenile Court under O.C.G.A.§15-11-15, if necessary, for report and recommendation. Martin answered and moved to dismiss the custody action on the ground that the Superior Court lacked jurisdiction because the Juvenile Court proceedings are already pending and the Kaspers had moved to intervene in that proceeding. DFACS also motioned to intervene. The Kaspers were granted the intervention in the Juvenile Court. The Superior Court commented that the Juvenile Court had jurisdiction over requests for permanent guardianship which the Court stated for all practical purposes is equivalent to permanent custody. The Superior Court then concluded it did not have jurisdiction and the case should be resolved in the Juvenile Court. The Superior Court dismissed the Kasper's action without transferring the matter to Juvenile Court. The Kaspers appeal and the Court of Appeals reverses.

The Juvenile Court has exclusive jurisdiction over juvenile matters of dependency and for permanent guardianship. The Superior Courts have exclusive jurisdiction to hear custody matters. A Superior Court may transfer the matter to Juvenile Court under O.C.G.A.§15-11-15(A) in which case the Juvenile Court has concurrent jurisdiction of the custody matter. A Juvenile Court does not have authority to award permanent custody without a transfer order from the Superior Court. Also, there is no merit in the Trial Court's reasoning that a permanent custody proceeding in a Superior Court is the equivalent of a permanent guardianship proceeding in Juvenile Court and that the rule of priority jurisdiction dictates that the Juvenile Court

had jurisdiction of the custody issue first. However, there is no evidence that the Juvenile Court appointed a permanent guardian and the Juvenile Code clearly distinguishes between permanent guardianship and permanent custody where it grants original jurisdiction to permanent guardianship to the Juvenile Court and original jurisdiction to permanent custody to the Superior Court. Therefore, the Superior Court erred by dismissing the custody action for lack of jurisdiction.

MEDIATION/GROSS INCOME/INTEREST/ PARENTING TIME DEVIATION

Spirnak v. Meadows, **A20A0158** (June 8, 2020)

Spirnak (Father) legitimated the child in 2010 where Meadows (Mother) had primary custody with the Father entitled to visitation every other weekend and various holidays. Father was ordered to pay $650.00 per month in child support. In 2013, the Mother moved out of state and shortly after, the Father began to pay $450.00 per month in child support and started to decrease his visits with the child. By April 2016, the Father only exercised visitation in April. At the time of legitimation, the Father was earning between $55,000-$67,000 per year, but was laid off in 2014, just before his diagnoses of cancer. However, at the time of this Petition of Modification, he was no longer receiving treatments and was only working part-time even though he had approximately 15 years of sales and marketing experience. In 2016, the Father filed a Petition to Modify Child Support and Visitation based upon the child living out-of-state.

The Mother counterclaimed for Contempt, Failure to Pay Child Support and Medical Expenses. The Mother also requested an upward deviation in child support due to the lack of visitation. In addition, the Father had been arrested in 2012 and 2014 for Family Violence Battery with his former girlfriend and was arrested again in 2016 on similar charges. The Mother's stated the Father was behind $30,187 in child support and calculated the accrued interest of $4,807.00. Trial Court denied the Father's petition and granted the Mother's Counterclaim for Modification and Contempt. The Court found upward deviation in child support was warranted under O.C.G.A.§19-6-15(G)(I)(2)(K) based on the Father's failure to exercise visitation and supervised visitation was also appropriate in light of the Father's past instances of domestic violence. The Father was not allowed a downward modification in child support because he was voluntarily underemployed and the Trial Court granted the Mother past due child support in the amount of $30,187.00 and accrued interest of $4,807.00. The Trial Court determined the amount of child support going forward was $818.00 per month, imputing income. The Trial Court also awarded $32,000.00 in attorney's fees under various code sections. The Father appeals and the Court of Appeals affirms in part reverses and remands in part.

The Father appeals, among other things, that the Court erred in requiring supervised visitation. Where a parent has committed act of family violence, the Trial Court may impose a condition that visitation be supervised by another person. There is nothing in statutory language that requires family violence to be against the other parent or the child. Here, there was evidence of several prior incidents of family violence by the Father which supported the Court's decision. Next, the Father argued the Trial Court erred in refusing a downward modification in child support because the Trial Court determined he was voluntarily underemployed. The Court noted the only evidence the Father submitted to show his attempts to obtain employment were 8 online job posts in a 3-month period. The Father also had 15 years of experience in marketing and sales work, but he was only working part-time in an unrelated field, maintained a gym membership, and traveled on vacation while not making child support payments. Father also has a college degree and the Court found the Father's testimony about income lacked merit.

Father also argued the Trial Court erred when it failed to use a self-employment schedule when determining child support. However, the Court imputed income based on the finding that he was voluntarily underemployed and since the Court imputed income, there is no reason for the Trial Court to use the self-employment calculator.

The Father next argues the Trial Court erred in awarding additional child support due to his failure to exercise his visitation. The Trial Court found that the Father admitted that he failed to exercise his visitation on numerous occasions between 2013 and 2018, and therefore imposed a parenting time deviation of $100.00. The Court stated that the presumptive amount of child support would be inappropriate because the Father rarely exercised his parenting time. Even though the Court was well within its discretion given the undisputed evidence that the Father rarely visited the child for several years, the Trial Court's Order failed to address how the deviation was in the child's best interest. Therefore, it must be remanded to

include specific findings that support the deviation.

The Father also argues the Trial Court erred in awarding interest on outstanding child support debt. Whether a party is entitled to interest on outstanding child support payments is a matter committed to the discretion of the Trial Court. Pursuant to O.C.G.A.§7-4-12.1, there are four factors a Trial Court must review when awarding interest whether to apply, waive or reduce the amount of interest owed, the Court shall consider:

> 1. Good cause existed for the nonpayment of the child support;
>
> 2. Payment of the interest would result in a substantial and unreasonable hardship on the parent owing the interest;
>
> 3. Applying, waiving or reducing interest would enhance or detract from the parent's current ability to pay child support.; and
>
> 4. Waiver or reduction of interest would result in a substantial and unreasonable hardship to the parent to whom the interest is owed.

Here, the Trial Court simply granted interest on the arrearage without any consideration of the four factors. The Father also challenges the calculation of the interest because the Father was ordered to pay monthly child support payments, the proper way to calculate past due is on a monthly, not an annual basis. Accordingly, 7 percent per annum must be converted to a monthly interest rate.

MOTION TO SET ASIDE

Paul v. Paul, **A20A0194** (June 25, 2020)

On November 5, 2015, the Trial Court entered the parties' Divorce Decree incorporating their Settlement Agreement. On November 2, 2018, the Wife filed in the divorce case a verified Motion to Vacate the Final Decree and set aside the parties' Settlement Agreement and reopen the divorce proceedings relying on O.C.G.A.§9-11-60(D)(2) for fraud. The Wife contends that the Husband concealed certain assets from her and she would not have signed the Settlement Agreement had she known of these assets. The Wife provided the Husband's attorney a copy of the Motion to Set Aside, but she did not affect personal service on him until February 5, 2019, which was a few weeks before the March 1, 2019 hearing. On December 17, 2018, in limited appearance, the Husband moved to dismiss the Wife's motion arguing that it should have been filed as a new action and thus timely personal service on him was required. The Wife did not file a response to the Motion to Dismiss. On May 3, 2019, the Court granted the Husband's Motion to Dismiss and denied the Wife's Motion to Set Aside concluding that the Final Judgement and Divorce Decree terminated litigation with prejudice resolving all issues between the parties in closing the action. The Trial Court also found that although the Husband had reasonable notice that the Wife had filed a Motion to Set Aside, reasonable notice alone did not confer jurisdiction of the Court to set aside the judgement. The Court stated the instant action had been closed for nearly 3 years and any attack on the Final Judgement would need to be brought as a new action and served as an original complaint. In the absence of proper service, the Court obtains no jurisdiction over the parties. The Wife appealed and the Court of Appeals reverses.

A judgement not void on its face is subject to an attack only by a direct proceeding in the Court in which it was rendered. If one is dissatisfied with the judgement, one does not merely file new action against the other party or his counsel, instead one must attack the prior judgement directly. The Court that issued the parties Divorce Decree does not lack jurisdiction to rule on a subsequent motion to set aside decree based on fraud. Therefore, the Trial Court erred by requiring the Wife to file her Motion to Set Aside in a separate case. The Trial Court further erred by concluding that the Wife had to personally serve the Husband with the Motion to Set Aside as if it was an original complaint. Here, the Wife properly filed this case as a motion in the original divorce case. It is undisputed that the Wife provide the Husband's attorney, who is still actively representing the Husband in the family law litigation with the Wife, with a copy of the motion by US Mail and via Odyssey electronic filing system. However, the Husband argues that the Wife was required to personally serve him with the Motion to Set Aside as an original complaint because it was file outside the term of Court in which the Divorce Decree was entered, but there is no authority for this argument.

NOTICE/LIQUIDATED DAMAGES

Nadal v. Nadal, **A20A0770** (June 23, 2020)

The parties divorced in 2018. The Settlement Agreement incorporated in the Final Decree provided that the Wife would assume the entirety of the existing business debt of $485,000.00 and retain her ownership and control over the business, in exchange for a non-compete agreement prohibiting the Husband from

liquidated damage provision stating damages would be half of the total of $485,000.00 debt owed by the companies or $242,500.00.

In April 2019, the Wife filed a petition for Contempt alleging the Husband had violated the non-compete agreement. The same day she also filed a Motion for an Immediate Injunction and Temporary Restraining Order. On May 15, 2019, the Wife prepared and filed a Notice of Hearing addressed to the Husband which stated, 'Please take notice that the Plaintiff has scheduled a Temporary Hearing on June 24, 2019 at 1:30PM.' The notice did not contain any other descriptions of the proceeding. There was a Certificate of Service attached stating that the Wife's counsel e-filed the notice and emailed it to the Husband's attorney. Also, on May 15, the Wife served a Notice to Produce and Request for Production of Documents and Interrogatories and Request for Admissions and Notice of Deposition to be held on June 19, 2019. The Husband moved to squash the discovery request and obtain a protective order. On June 25, 2019, parties appeared and were represented by counsel before the Superior Court. The Court asked whether this a final or temporary hearing, and the Wife replied we should proceed with a final hearing. However, the Husband objected. Husband continued to object that there was no Rule Nisi issued specifying what would be heard and over the Husband's objection, the Court had a final hearing. The final hearing was cut short because it lasted more than 2 hours and the Court then invited the parties to submit letter briefs on the law and announced any discovery disputes to be nonissues. After the briefs were submitted, a Final Order found the Husband in willful contempt and required him to pay half of the debt owed by the business of $242,500.00 as liquidated damages. The Order did not address the Husband's argument that the liquidated damages were unenforceable penalty. Husband appeals and the Court of Appeals reverses.

It is undisputed the only notice given to the Husband was notice mailed by the Wife, not a Rule Nisi issued by the Superior Court. The notice indicated that the hearing would be a temporary hearing and not stating the subject matter. Thus, by the time of the hearing there was a pending Petition for Contempt, a Motion for Temporary Restraining Order, a Motion for Immediate Injunctive Release, Notices of Discovery, Motion to Squash and Motion for Protective Order. The Husband also objected the Final Hearing on the merits. When the notice of a hearing is unreasonable, the fact that the contemptor voluntarily appears and defends at a hearing does not excuse the failure to comport with due process. Therefore, the Trial Court erred by holding a Final Hearing on the merits of the Wife's contempt petition.

The Husband also contends the Trial Court erred by making a liquidated damage award. Georgia Law requires that parties may agree in their contract to a sum of liquidated damages pursuant to O.C.G.A.§13-6-7. However, it requires a 3-part analysis:

1. The injury caused by the breech must be difficult or impossible of accurate estimation.

2. The parties must intent to provide for damages rather than for a penalty.

3. The sum stipulated must be reasonable pre-estimate of the probable loss.

Whether a provision represents the liquidated damages or penalty does not depend on the label the parties place on the payment, but rather it depends on the effect it was intended to have and whether it was reasonable. Generally, in cases of doubts, the Courts limit the recovery to the amount of damages actually shown rather than a liquidation of damages. Here, the Trial Court made no inquiry into these factors nor whether the parties adequately addressed the issues at the evidentiary hearing. Therefore, on remand any final judgement should include a determination as to the enforceability of the liquidated damage provisions consistent with the above stated law.

PERIODIC ALIMONY

Angst v. Augustine, **A20A1477** (August 17, 2020)

The parties divorced on September 18, 2017 with a final decree incorporating the parties' Settlement Agreement. In the Agreement in paragraph 39 under the heading of Spousal Support, it stated the Husband agrees to pay the Wife for a period of ten years the monthly sum of $5,652.33 as alimony. Said alimony shall begin on August 1, 2017 and shall continue and then cease after the 120th month. Paragraph 40 of the Settlement Agreement states the parties hereby agree NOT to waive all future rights to seek a statutory modification of alimony, rehabilitative or otherwise pursuant to O.C.G.A §19-6-19. Each party in signing this agreement intends and knowingly does not waive his/her statutory right of modification of alimony. Angst (Husband), properly made timely payments until he lost his job in July of

2019 after which he filed a petition to modify alimony based upon his change of income. The Wife moved to dismiss this petition and the Trial Court granted the Wife's motion to dismiss. The Husband appeals and the Court of Appeals reverses.

An obligation is considered lump sum if it states the exact number and the amount of the payments without other limitations, conditions or statements of intent. In contrast, an obligation is considered periodic alimony where the total amount of obligation is contingent and cannot be determined at the present. Only periodic alimony is subject to modification and lump sum alimony is not modifiable. The Court found the Husband's obligation was lump sum because there was no limitation or contingency such as remarriage or death upon the provisions for the Husband's payment to the Wife. In so finding, the Trial Court interpreted paragraph 40 of the Settlement Agreement as having no bearing on the description of the alimony obligation in paragraph 39. However, the record shows that paragraphs 39 and 40 of the Settlement Agreement are under the same heading of Spousal Support. An interpretation of the Husband's alimony obligation as lump sum would render paragraph 40 under O.C.G.A. §19-6-19 void. Therefore, the reservation of the right to seek a modification of alimony under O.C.G.A. §19-6-19 conditions the alimony award upon a change of income and upon a meretricious cohabitation.

The Wife argues that the Georgia Courts have only recognized two types of conditions that render an alimony obligation periodic: termination of alimony upon remarriage or death. However, there is no case law restricting limitation, modifications or expressions of intent to only remarriage or death. Here, the Husband's total alimony obligation is uncertain because of the possibility of modification upon a change of income or meretricious cohabitation. Therefore, the Trial Court erred in classifying alimony obligations lump sum rather than periodic.

SEPARATE PROPERTY

Calloway-Spencer v. Spencer, **A20A0546** (June 23, 2020)

In February of 2002, before the parties started dating, the Wife signed a purchase agreement for a townhome in Florida. In 2003, the parties were married in Florida and the construction on the townhome was completed in August of 2003. Only the Wife's name was listed on the warranty deed and the mortgage. After the parties were married and living in the townhome, the Husband deposited his paychecks in the joint bank account for which the Wife paid the mortgage. The parties moved out of the townhome to Georgia in the summer of 2008 and then the Wife began renting the townhome to her cousins and only charged enough rent to cover the mortgage and the homeowner's association fees. In November 2017, the husband filed for divorce. The parties settled as to the child custody and division of certain properties, but proceeded to a bench trial to determine the remaining issues which included the division of the townhome and child support. Trial Court found the townhome was a gift to the marriage by the Wife and ordered the Wife to pay the Husband fifty percent of the appraised value. The Wife appeals and the Court of Appeals confirms in part and reverses in part and remands.

The Wife appeals, among other things, that the Trial Court erred in finding that she gifted the townhome to the marital unit. To equitably divide marital property, the Court must first determine and classify the disputed property is either marital or non-marital. If the asset receives both marital and non-marital contributions and was not later gifted to the marital unit, then the Court should apply the source of the funds rule. In this case the Court found the Wife gifted the townhome to the marital unit because the parties moved into the home prior to the marriage, they continued to reside there once married, and the Husband contributed to the joint bank account from which the mortgage was paid.

Here, the Wife never took an action after the marriage manifesting an attempt to transfer her separate property into the marital asset such as transferring a full, partial or joint ownership in the property. Instead, the facts presented in this case called for an application of the source of the funds rule where one spouse separately purchases a house before the marriage and provided for the down payment and the marital unit contributed to the mortgage. In addition, the Wife argued Trial Court erred by ordering her to pay the Husband fifty percent of the appraised value of the townhome rather than fifty percent of the equity. However, an award is not erroneous simply because one party receives seemingly greater share of the marital property. The Court of Appeals did not address this particular issue at the given time, but on remand, advises that the Trial Court should be cognizant that it will need to account for the mortgage on the property if it intends to make an equal division of marital portion.

SET ASIDE/NONAMENDABLE DEFECTS

Skipper et al. v. Paul, **A20A0521** (July 2, 2020)

Paul (Mother) had a child on May 7, 2018 and the next day the Mother executed a surrender of parental rights to the adoptive parents, Skipper and Cowart, who are not related to the child. The Mother also agreed to relinquish custody of the child until the adoption was completed. Shortly after, Skipper filed a verified Petition for Adoption, which was completed on May 22, 2018, and in which the Court found that the Mother had surrendered her rights and had not withdrawn the surrender within 10 days. Five months later, on October 25, 2018, the Mother filed a motion to Set Aside the Adoption based upon alleged fraud and purported non-amendable defects appearing on the face of the pleadings. After a 3-day hearing, the Trial Court entered an Order denying the Motion to Set Aside based on the allegations of fraud, but granted the Motion based on the Courts finding of a non-amendable defect on the face of the records and pleadings. The Court found that the two forms executed by Brannon (Father) surrendering his parental rights were not supported by an affidavit from the Mother. Also, the two forms executed by the Mother surrendering her parental rights did not conform to certain statutory requirements and Skipper and Cowart's attorneys failed to file the civil statutory forms and documents with the Court. Skipper and Cowart appeal and the Court of Appeals reverses.

In order to set aside a judgement, the non-amendable defect must be one which shows that no claim exists. So, where there is a non-amendable defect appearing on the face of the record or the pleading which is not cured by verdict or judgement and the pleadings show that no legal claim in fact exists, the judgement is void. The presence of an amendable defect on the face of the record, however, does not void the action. When the defect in the record can be corrected by amendment, the judgement will not be set aside. The various defects in the pleadings and records cited by the Trial Court were not non-amendable defects showing that no claim for third party adoption in fact existed. Rather, they were defects of form that were amendable and could have been cured prior to judgement. Because the Trial Court's findings failed to establish the presence of a non-amendable defect on the face of the record or pleadings, the Court abused its discretion on granting the Motion to Set Aside. Judge Doyle dissents and therefore, this opinion is physical precedent only.

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Unresolved Questions About Separate Maintenance Actions

By Margaret E. Simpson

A separate maintenance action, sometimes referred to as a "legal separation," can be an alternative to divorce, but there are some potential pitfalls to be aware of. Understandably, given that separate maintenance actions are somewhat uncommon, the case law on this subject is a bit sparse and leaves a few questions without a clear answer. If you are considering pursuing a separate maintenance action, especially one that is contested, you should be aware of the gray areas in the law and the limitations placed on courts adjudicating separate maintenance actions.

1. What relief is a court authorized to grant in a separate maintenance action?

A. Alimony and Child Support

Although Georgia's separate maintenance statute[1] does not use the term "child support," it is clear that a court may award alimony and/or child support in a separate maintenance action. "[A] limony includes support for a spouse or for a child or children." *Jones v. Jones*, 280 Ga. 712 (2006). The child support statute also contemplates child support being awarded in separate maintenance actions. The statute provides for the duration of a child support obligation imposed "in any temporary, final, or modified order for child support with respect to any proceeding for divorce, **separate maintenance**, legitimacy, or paternity." O.C.G.A. § 19-6-15(e) [emphasis added].

For a court to grant separate maintenance, the parties must be living separately or in a bona fide state of separation, and there must be no action for divorce pending.[2] O.C.G.A. § 19-6-10. If an action for divorce is filed, a pending separate maintenance action would be held in abeyance, and any order for permanent alimony issued in the divorce matter would supersede a previous award for separate maintenance. *Id; Browne v. Browne,* 242 Ga. 107, 249 S.E.2d 594 (1978)(holding when, in a divorce case, the trial court adjudicates the issue of permanent alimony, a prior maintenance award is entirely superseded); *See also Southworth v. Southworth,* 265 Ga. 671, 461 S.E.2d 215 (1995)(holding it was unnecessary to set aside previous separate maintenance award since the award was superseded by the divorce decree). "If there is no prayer for alimony in the divorce case, the award in the separate maintenance case will stand." *Goodman v. Goodman,* 253 Ga. 281 (1984).

B. Child Custody

The separate maintenance statute does not make specific reference to child custody orders. O.C.G.A. § 19-6-10; *Thompson v. Thompson,* 241 Ga. App. 616, 620 (1999). However, the superior courts are authorized to award child custody in separate maintenance actions. *Brown v. Cole,* 196 Ga. 843 (1943)(upholding award of child custody in alimony suit); *Hayes v. Hayes,* 248 Ga. 526 (1981)(upholding separate maintenance judgment providing for custody, visitation, child support and alimony); *Grayson v. Grayson,* 217 Ga. 133 (1961)(affirming order adopting parties' agreement on custody in a separate maintenance action); *Breeden v. Breeden,* 202 Ga. 740 (1947)(holding "[a] wife living in a bona fide state of separation from her husband may maintain against the husband an action in the superior court for alimony for the support of their minor child, which the father is by law obliged to support, and in the same action may seek the custody of the child"). Even when a prayer for custody of minor children is not included in a petition for separate maintenance, the superior court has authority to award custody. *Mills v. Mills,* 150 Ga. 782 (1920) (finding no error where the court awarded custody to the mother despite no prayer for custody being included in her petition for separate maintenance).

Georgia's child custody statute is applicable to "all cases in which the custody of any child is at issue between the parents" and is not limited to divorce actions. O.C.G.A. § 19-9-3(a)(1). Likewise, O.C.G.A. § 19-9-3(b) permits modification of custody "[i]n any case in which a judgment awarding the

custody of a child has been entered." O.C.G.A. § 19-6-12 also contemplates custody being awarded in a separate maintenance decree and provides in pertinent part, "the rights of children under any deed of separation or voluntary provision or decree for alimony shall not be affected by such subsequent voluntary cohabitation of the spouses." When permanent child custody has been awarded to a party in a separate maintenance proceeding and a divorce action is filed subsequently, the issue of modification of the custody award is not proper before the divorce court unless the divorce is filed in the county of residence of the person who has been awarded custody. *Thompson v. Thompson,* 241 Ga. App. 616 (1999).

C. Property Division and Lump Sum Alimony

Georgia law does not authorize division of marital property in a separate maintenance action. The prevailing case law indicates that a claim for division of marital property can only be filed or maintained in and ancillary to divorce proceedings. *Segars v. Brooks,* 248 Ga. 427 (1981) (holding "[i]n a few words, no divorce means no equitable division of property"). However, the cases indicating that a divorce is the only avenue for equitable division of property are not separate maintenance cases; instead, they involve estate disputes.

In *Segars,* the administratrix of deceased Wife's estate petitioned for an equitable division of Wife's and Husband's marital property after Wife was murdered (allegedly by Husband) during the course of their divorce proceedings. The Court held that the unadjudicated claim for equitable division of marital property raised in the divorce action abated upon Wife's death and thus could not be asserted by her estate. 248 Ga. at 428. Citing *Stokes v. Stokes,* 246 Ga. 765, 767 (1980), the Court held, "[a] Stokes claim for equitable division of property cannot be filed or maintained separate from divorce proceedings. To the contrary, a *Stokes* claim only can be filed or maintained in and ancillary to divorce proceedings." Citing the *Segars* decision in a concurring opinion in *Rooks v. Rooks,* Justice Weltner notes that while alimony in the form of separate maintenance may be awarded absent a pending action for divorce, equitable division may not be so awarded – "even when the spouse seeking such allocation is murdered by her husband during the pendency of an action for divorce and 'equitable division.'" 252 Ga. 11, 16 (1984) (Weltner, C. concurring). See also *Hunter v. Hunter,* 256 Ga. App. 898 (2002)(overturning award of marital residence to decedent's surviving spouse as year's support finding the widow's claim, in essence for equitable division of the property, could not be maintained apart from divorce proceedings); *Owens v. Owens,* 248 Ga. 720, 721 (1982)(holding when decedent wife died before her claim for equitable division of property was adjudicated in her divorce action, her equitable property division claim died also, finding "no property rights are created in the assets of the marriage while the parties are still married").

Although the three separate *Goodman*[3] cases involve division of property in a separate maintenance action, the question of whether the judge in the separate maintenance action had authority to divide the parties' property is not presented. Rather, the *Goodman* cases arise from the Goodmans' divorce case and address the authority of the divorce judge to divide property given that a separate maintenance decree dividing property was previously issued, rightly or wrongly. In *Goodman II,* the Court comes close to confronting the question of whether a trial court may equitably divide property in a separate maintenance action but narrowly avoids it. There the Court held that *Segars and Owens* "cited by the wife in support of her contention that there can be no property division absent a suit for divorce, are inapplicable here because in the case before us there was in fact a division of property in the separate maintenance judgment upon which the wife relied in *Goodman I* and of which she cannot now complain." 254 Ga. at 64. The Court stops short of holding that *Segars* and *Owens* are not applicable to separate maintenance actions generally and gives no opinion on whether the Goodmans' separate maintenance judgment dividing property would have withstood scrutiny had anyone challenged it when it was issued or had Ms. Goodman not relied on it in *Goodman I*.

Gideon v. Farlow mirrors the *Goodman* cases in that a separate maintenance judgment that included a division of property was issued, and the parties later divorced. 258 Ga. 633 (1988). *Gideon* holds that spouses voluntarily cohabitating with each other after a separate maintenance judgment has no effect on property division awarded in the separate maintenance judgment. *Id*. But as in the *Goodman* cases, the issue of whether it was proper in the first place to divide marital property in a separate maintenance judgment was not presented. *Id*. A similar situation arose in *Browne v. Browne*, where the parties entered

into an agreement regarding alimony and division of property which was adopted and incorporated into a separate maintenance judgment. 242 Ga. 107 (1978). A subsequent divorce judgment was challenged on the grounds the court erred in finding the wife had waived her right to alimony, but the issue of whether division of property was authorized in the separate maintenance action was not presented. *Id*. Justice Hill's concurring opinion in *Stokes v. Stokes* lends some credence to the idea that equitable division of property should be permitted in separate maintenance actions. 246 Ga. 765, 772 (1980). The opinion provides suggested jury charges regarding equitable division to be applied in "a suit for permanent alimony incident to divorce or **legal separation**," but of course this is not binding precedent. *Id*. [emphasis added].

Georgia's appellate courts have not directly addressed a claim for equitable division of marital property or lump sum alimony between two living spouses outside the context of a divorce. No exception has been created to the holdings in *Segars, Hunter* and *Owens* that a divorce action is the only avenue to pursue a claim for equitable division of marital property. These cases do not appear to foreclose the possibility of a claim for lump sum alimony or an award of property in the form of lump sum alimony in a separate maintenance action. See *Daniel v. Daniel,* 277 Ga. 871 (2004) (holding that lump sum alimony is merely in the nature of property settlement, but is not necessarily equivalent to an equitable division of marital property). However, the factors a trial court must consider and the bases upon which an award of lump sum alimony can be made differ from factors and bases for an award of equitable division, and an award of lump sum alimony may not dispose of all of the marital property.

Although *Segars, Hunter* and *Owens* indicate that a trial court is not authorized to equitably divide marital property outside of a divorce action, *Gideon, Browne* and the *Goodman* cases provide rules which govern situations where a trial court has done exactly that. So even though it is not clear whether a separate maintenance judgment awarding equitable division of property is actually allowed, there is some clarity regarding how the court in a subsequent divorce action should handle a case where marital property has already been divided in a previous separate maintenance action.

2. Can a division of marital property made in a separate maintenance action be modified in a subsequent divorce action?

"Lump sum alimony or property division made in a separate maintenance action becomes part of the separate estate of the party to whom it is awarded. It is thus not subject to division under *Stokes v. Stokes,* 246 Ga. 765 (273 SE2d 169) (1980)." *Goodman v. Goodman,* 253 Ga. 281, (1984) ("*Goodman I*). "Once separated by judicial determination in a separate maintenance judgment, property becomes part of the separate estate of the party to whom it is awarded and it is not thereafter subject to equitable division in a later divorce action." *Goodman v. Goodman,* 254 Ga. 703, 704 (1985) ("*Goodman II*"). Property acquired by either spouse after entry of a separate maintenance judgment is not marital property and not subject to equitable division in a subsequent divorce. *Goodman v. Goodman,* 257 Ga. 63 (1987) ("Goodman III").

The three separate appellate actions arising from Mr. and Mrs. Goodman's 1980 separate maintenance judgment and their 1984 divorce decree lay out the standards for division of property after a separate maintenance judgment dividing property has been entered. In *Goodman I*, the husband appealed the divorce court's judgment arguing that he was entitled to a portion of the proceeds from the sale of the marital residence although the residence had been previously awarded to the Wife as lump sum alimony under the separate maintenance judgment. The Supreme Court of Georgia affirmed the divorce trial court's award of the proceeds to the wife holding that the proceeds were her separate property because the marital residence became her separate property when it was awarded to her as lump sum alimony in the separate maintenance action. 253 Ga. at 281.

In *Goodman II*, the Wife appealed the divorce court's decision to exclude Husband's pension and stock options (which were awarded to husband in the separate maintenance decree) from the marital property subject to equitable division in the divorce. Wife argued that the parties' voluntary cohabitation after entry of the separate maintenance judgment annulled and set aside the provisions of the separate maintenance decree. As discussed above, Wife also argued that the court in the separate maintenance case had no authority to award any division of marital property, and the separate maintenance judgment should be set aside on those grounds. The Supreme Court affirmed the divorce court's award

of the pension and stock options to husband finding subsequent cohabitation did not affect the finality of the separate maintenance judgment and that Wife could not challenge that judgment after previously relying on it. 254 Ga. at 705.

In *Goodman III*, the wife sought a division of assets acquired by husband after the separate maintenance judgment, including employer and employee contributions to deferred-compensation accounts and stock-option plans. Wife did not seek a division of any appreciation in the balances of husband's retirement assets awarded to him in the separate maintenance action, but only a division of those contributions to said accounts made after the separate maintenance judgment. The Supreme Court of Georgia held that the property acquired by either party after a separate maintenance judgment is the separate property of that party and not subject to equitable division in a subsequent divorce. 257 Ga. at 65. See also *Friedman v. Friedman,* 259 Ga. 530, 532 (1989). The Court explained its rationale thusly, "once the family no longer operates as a unit, working and contributing to and for the good of the marital estate, the basis for equitable division of property is removed. The property acquired by each spouse is thenceforth a result of that spouse's sole industry, without support or contribution -- financially, morally or otherwise -- from the other spouse." 257 Ga. at 66. This begs the question, if a court can only divide marital property in a divorce (and not a separate maintenance action), but property acquired by each spouse after a separate maintenance action is that spouse's separate property, is the only property that is subject to division in a subsequent divorce the marital property that existed at the time of the separate maintenance action?

If your client is interested in pursuing a separate maintenance action, it is important that he or she is aware of the risk that the court may decline to award any division of marital property or that any division the court may award could be challenged as improper. If your client's spouse is seeking separate maintenance and asking for equitable division, you might consider arguing that while child support, custody and alimony are on the table, equitable division is not. It will be interesting to see how the case law develops if the appellate courts are ever directly presented with the question of whether a trial court actually has authority to divide marital property in a separate maintenance action and how a ruling on that question will affect the rules in place governing a divorce court's authority to divide property after a separate maintenance judgment has been issued.

Endnotes

1. O.C.G.A. § 19-6-10, entitled "Voluntary separation, abandonment, or driving off of spouse -- Petition for alimony or child support when no divorce pending -- Order and enforcement; equitable remedies; effect of filing for divorce" provides:

   When spouses are living separately or in a bona fide state of separation and there is no action for divorce pending, either party, on the party's own behalf or on the behalf of the minor children in the party's custody, if any, may institute a proceeding by petition, setting forth fully the party's case. Upon three days' notice to the other party, the judge may hear the same and may grant such order as he might grant were it based on a pending petition for divorce, to be enforced in the same manner, together with any other remedy applicable in equity, such as appointing a receiver and the like. Should the petition proceed to a hearing before a jury, the jury may render a verdict which shall provide the factual basis for equitable relief as in Code Section 19-6-9. However, such proceeding shall be held in abeyance when a petition for divorce is filed bona fide by either party and the judge presiding has made his order on the motion for alimony. When so made, the order shall be a substitute for the aforesaid decree in equity as long as the petition is pending and is not finally disposed of on the merits.
2. However, where a party has filed a petition for divorce and alimony, the prayer for divorce may be stricken and the action could then proceed as to alimony only. *Estes v. Estes,* 192 Ga. 94 (1941).
3. *Goodman v. Goodman,* 253 Ga. 281, (1984) (hereinafter "*Goodman I*"); *Goodman v. Goodman,* 254 Ga. 703, 704 (1985) (hereinafter "*Goodman II*"); *Goodman v. Goodman,* 257 Ga. 63 (1987) (hereinafter "*Goodman III*")

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