CASE LAW UPDATE 2012 –
(i.e., the best knives that your "Cutting Edge of Family Law" registration can buy):

Presented by two legal samurai:

Rebecca L. Crumrine Hedgepeth, Heredia, Crumrine & Morrison, LLC 404-846-7025 rcrumrine@hhcmfamilylaw.com	Sarah McCormack Kessler & Solomiany, LLC 404-586-6891 smccormack@ksfamilylaw.com

The Whetting Stone – Procedure / Jurisdiction

- *WHERE TO FILE*
  - Sumner v. Batchelor, 313 Ga. App. 878 (2012) – modif of custody action must be brought in county of legal custodian; see O.C.G.A. 19-9-22(2) (defining "legal custodian" as the parent who has the child the majority of the time).
  - Lowe v. Lowe, No. A11A2129 (Ga. App.) (March 9, 2012) – where legal custodian residing out of state, custody modification action should be filed in county where initial custody determination made
  - **Open question**: does this statutory provision trump Georgia constitutional protection giving a resident the right to be sued in his or her county of residence?

The Whetting Stone Cont.

- *WHOM YOU MAY EXERCISE POWER OVER*
  - Delgado v. Combs, No. A11A1948 (Ga. App.) (February 29, 2012) – need to get jurisdiction of child custody properly relinquished by initial state so as to proceed forward on modification in different state under applicable provisions of UCCJEA
  - Ennis v. Ennis, No. S12A0277 (Ga.) (April 24, 2012) – even where minimal contacts analysis does not permit exercise of personal jurisdiction over one party, divorce may be entered based upon in rem jurisdiction over marriage itself

The Whetting Stone Cont.

- *WHAT TO ASK FOR*
  - Lopez v. Olson, No. A1A1794, (Ga. App.) (March 2, 2012) – UCCJEA does not require that foreign state's order be registered before it can be modified (cf. must register under UCCJEA in order to ENFORCE that order through GA contempt powers)
  - Birchby v. Carboy, 311 Ga. App. 538 (2011) – you cannot "roll up" family violence proceeding into pending divorce without consent
  - Jordan v. Jordan, 313 Ga. App. 189 (2011) – you cannot collaterally attack settlement agreement incorporated into FJ&D; must move to set aside and hope you have grounds to do so
  - Kent v. Kent, 289 Ga. 821 (2011) – Party must expressly decline to participate in take-down in order to bar him or her from the right to request and pay for a transcript later (PP: confirm on record).

The Whetting Stone Cont.

- *WHAT YOU CAN RELY UPON*

  - Vaughn v. David, 290 Ga. 351 (2012) – t.c. can't rely on temporary hearing evidence at final hearing, at least absent express notice to parties
  - Graham v. Graham, No. S12A0367 (Ga.) (April 24, 2012) – party cannot rely upon his own failure to complete his portion of PTO as a basis to justify removal of case from applicable trial calendar
  - Gresham-Green v. Mainones, No. S11F1955 (Ga.) (March 19, 2012) unless other side consents, you cannot rely upon getting final GAL report into evidence without also having GAL testify

The Whetting Stone Cont.

- *WHEN YOU WILL / WILL NOT HAVE A REMEDY*
  - Edge v. Edge, 290 Ga. 551 (2012) – can only grant motion to set aside if problem on which motion is made"unmixed" with party's own negligence
  - Brabant v. Patton, No. A12A0294 (Ga) (April 27, 2012) – temporary custody order subject to direct appeal

Child-Friendly Cutlery:

Legitimation, Child Support, Custody, & Termination

- *LEGITIMATION*

- Caldwell v. Meadows, 312 Ga. App. 70 (2011) – in assessing whether a father has abandoned his opportunity interest to be a parent in the context of a legitimation proceeding, "a father's lack of involvement prior to a child's birth 'is as significant as such a disregard after the child is born.'"

- Magdangal v. Hendrix, 313 Ga. App. 522 (2012) – relevant inquiry re: abandonment of opportunity interest in legitimation proceeding does not turn upon whether "the father could have done more," but rather whether the father "has done so little as to constitute abandonment."

Child-Friendly Cutlery Cont.

- *LEGITIMATION cont.*

\- Matthews v. Dukes, No. A11A2264, A11A2265 (Ga. App. (March 14, 2012) –

Proper to deny legitimation by biological father (wife's affair partner) where child still part of intact marriage, presumptively legitimate, and did not serve child's best interests to give biological father custodial rights; alternately finds that biological father had abandoned his opportunity interest to be dad.

Also proper to include no-contact prohibition between child and biological father, absent written permission from legal father (wife's husband) – opportunity here to refer to Mongerson and find that this prohibition warranted, given potential emotional harm to child, but appellate court ducks.

Not permissible to enter child support award against biological father where child presumptively legitimate / duty of support owed by legal father.

Child-Friendly Cutlery Cont.

- *CHILD SUPPORT*

- Brogdon v. Brogdon, 290 Ga. 618 (2012) –

  If t.c. fails to make mandatory findings required by the child support statute, including justification from presumptive amount (i.e., completing Schedule E, stating why more than presumptive amount "reasonably necessary" for child), then child support award will be reversed upon appeal.

  Where husband agreed to pay extracurricular expenses, he could not complain of failure to consider that factor in calculating his overall child support amount upon appeal.

  Also upholds imputation of minimum wage to primary caretaker of the chilc (**open question**: unfairness re: lack of child care cost, but imputation of income?)

Child-Friendly Cutlery Cont.

- *CHILD SUPPORT cont.*

- Johnson v. Ware/ Ware v. Johnson, 313 Ga. App. 774 (2012) – properly remanded on child support issue where t.c.'s CSW did not reflect ultimate amount awarded and where certain school and summer camp not included in Schedule E / no indication given how they factored into calculations

- Rowden v. Rowden, 290 Ga. 65 (2011) – t.c. findings that mother not willfully underemployed supported by evidence of the case; no obligation on t.c.'s part to suspend child support during non-custodial parent's extended summer vacation parenting time

- Ellis v. Ellis, 290 Ga. 616 (2012) – upholding one t.c.'s calculation of self-employment income, given evidence presented at trial; not mandatory on t.c.'s part to deviate child support on basis of extracurricula

Child-Friendly Cutlery Cont.

- *CHILD SUPPORT cont.*

- Dean v. Dean, 289 Ga. 664 (2011) – Varn waiver of modification language must be included to create enforceable waiver of downward modification of child support; cf. Jones v. Jones, 280 Ga. 712 (2006) (holding that Varn waiver in modification of alimony paragraph sufficient to create effective waiver of downward modification of child support)

- Finklea v. Finklea, 290 Ga. 357 (2012) – party cannot complain of child support error that she herself induced when she asked t.c. to rely upon her CSW that did not include rental income for other party

- Bagwell v. Bagwell, 290 Ga. 378 (2012) – final order on father's child support modification action as sanction for his failure to participate in discovery acted as an adjudication on the merits and therefore triggered two year bar on future similar modification actions by him

Child-Friendly Cutlery Cont.

- *CHILD CUSTODY – Initial Determinations*

- Avren v. Garten, 289 Ga. 186 (2011) – can dismiss modification of custody action if improper withholding of visitation rights by legal custodian per § 19-9-24(b)

- Ward v. Ward, 289 Ga. 250 (2011) – abuse of discretion where overly broad custodial prohibition on "any overnight male guests while the minor children [we]re present."

- Spurlin v. Spurlin, 289 Ga. 818 (2011) – trial court made proper legal and physical custody ward where, despite postnuptial agreement reflecting identical arrangement, it performed substantive analysis as required under O.C.G.A. § 19-9-3 based upon the parties' current circumstances

- Blackmore v. Blackmore, 311 Ga. App. 885 (2011) – for all appeals filed on or after July 1, 2011, t.c. level custody order will remain in effect during pendency of appeal; for all other earlier appealed cases, use Walker and ask for finding that relief from supersedeas serves best interests of child(ren)

Child-Friendly Cutlery Cont.

- *CHILD CUSTODY – Modifications*

- Reed v. Reed, 289 Ga. 193 (2011) – fact-driven, permits relocation of custodial parent because of depth of bond between that parent and child; stands for proposition that no presumption for or against relocation

- Gildar v. Gildar, 309 Ga. App. 730 (2011) – permissible for trial court to remove supervision requirement of visitation in context of contempt where reasonable evidence supported that modification

- Gallo v. Kofler, 289 Ga. 355 (2011) -- trial court had the authority to modify custody based upon one parent's planned out-of-state move, even if the petition alleging a "change of circumstances" was filed before such a move had, in fact, taken place

- Gottschalk v. Gottschalk, 311 Ga. App. 304 (2011) – t.c. has power to order custodial evaluation in modification of visitation proceeding; due process not violated where party's expert who had unauthorized access to custodial evaluation not permitted to testify

Child-Friendly Cutlery Cont.

- *CHILD CUSTODY – Modifications cont.*

- Sigal v. Sigal, 289 Ga. 814 (2011) – improper use of nunc pro tunc when effect, as a practical matter, is to eliminate transitory period from supervised to unsupervised parenting time (impacts children as innocent third parties . . . limited to the "unique circumstances" of that case)

- Earle v. Earle, 312 Ga. App. 139 (2011) – t.c. permissibly clarified its order giving father final say over extracurriculars to custodial parent where it found that the mother could spend her parenting time weekends with her children "in any way she deems appropriate" (and did not necessarily have to take them to the extracurricular activities that took place on that weekend)

- Johnson v. Johnson, S11F1856 (Ga) (Jan. 9, 2012) – where self-executing modification of visitation requires a best interest of the child analysis, will be void if that analysis is vested in a third party – here, a therapist who gets to decide when supervision ends (obviously a condition that was put in place in consideration of welfare of child);
  open question: maybe cf. change in visitation based upon age of the child?

Child-Friendly Cutlery Cont.

- *CHILD CUSTODY – Third Party Considerations*

- In the Interest of J.C.W., 311 Ga. App. 894 (2011) -- in order to support a long-term third party custody award, the trial court must make two express findings (i.e., cannot be implied):

  1) That "reasonable efforts to reunify a child with his or her family would be detrimental to the child" per the applicable statute; and

  2) That "referral for termination of parental rights and adoption is not in the best interest of the child."

Child-Friendly Cutlery Cont.

- *TERMINATION*

- Weber v. Livingstone, 309 Ga. App. 665 (2011) – two-pronged standard for termination of parental rights, both of which must satisfy “clear and convincing” evidentiary showing:

  1) Requisite statutory lapse of support or contact (failure to communicate / attempt to communicate in meaningful way for more than one year; failure to provide monetary support for more than one year);

  2) Lapse of support or contact must be demonstrated to have been “without justifiable cause.”

Grandparent Visitation: [B]ringing a Knife to a Gunfight?

- *NEW AMENDMENTS TO O.C.G.A. § 19-7-3 EFFECTIVE MAY 1, 2012*:

- In considering whether child's health or welfare would be harmed without grant of visitation to grandparents, t.c. "shall consider and may find that harm to the child is reasonably likely to result where, prior to the original action or intervention:"

  1) Child resided with grandparents for 6+ months;
  2) Grandparent provided $$ for basic needs of the child for at least one year;
  3) Established parent of regular visitation or childcare by grandparent with child; or
  4) "Any other circumstance . . . indicating that emotional or physical harm would be reasonably likely to result if such visitation is not granted."

Grandparent Visitation: ringing a Knife to a Gunfight?

- *NEW AMENDMENTS TO O.C.G.A. § 19-7-3 EFFECTIVE MAY 1, 2012 cont.*:

- Parent's decision re: grandparent visitation must be given deference, but shall not be "conclusive" re: lack of such visitation will cause emotional harm to child

- Rebuttable presumption created that "a child who is denied any contact with his or her grandparent may suffer emotional injury that is harmful to such child's health."

- Any grandparent visitation shall "not be less than 24 hours" in any one month period, and shall not "interfere with a child's school or regularly scheduled extracurricular activities"

- If one of the parents dies, his or her parent(s) may be awarded "reasonable visitation" during that child's minority if serves that child's best interests; custodial parent's preferences will be given deference but not deemed conclusive re: this determination.

- Even if visitation not granted, court may direct a custodial parent in court order to give grandparents notice of every performance for child to which public admitted (sporting events, musical concerts, etc.).

Grandparent Visitation: ringing a Knife to a Gunfight?

- *MORE VISITATION CONSIDERATIONS:*
  - Kunz v. Bailey, 290 Ga. 361 (2012) (distinguished by Hudgins v. Harding) – adoptive parent properly deemed to be "parent" for the purpose of prohibiting original action for visitation rights by grandparents where child's "parents" not separated)
  - Hudgins v. Harding, 313 Ga. App. 613 (2012) – grandparents may have right to pursue original action for visitation, even if adoptive parent is stepparent versus blood relative, but still only have right to do so if "parents" are separated (remanded so as to determine if separation in fact in place)

Grandparent Visitation: Bringing a Knife to a Gunfight?

- *CUSTODY VS. VISITATION CONSIDERATIONS:*

  - Shotwell v. Flip, 314 Ga. App. 93 (2012) – upholding change of custody to father where mother had, for all intents and purposes, surrendered her primary physical custody to child's maternal grandmother (at which time a prima facie right to custody vests in the other parent versus the third party acting in loco parentis) and where other steps taken by mother and maternal grandmother to marginalize dad's role in child's life

  - Trotter v. Ayres, No. A12A0702 (Ga. App.) (March 5, 2012) – award of custody to grandparents upheld where two showings made: 1) child would experience long-term harm if custody awarded to her mother; and 2) custody in grandparents would best promote that child's welfare and happiness.

The Age-Old Knife Dilemma: Japanese (Thomas) Versus German (Lerch)

- Highsmith v. Highsmith, 289 Ga. 841 (2011) – where failure to provide adequate evidence to perform tracing analysis, permissible for the t.c. to find funds to be presumptively marital; more shockingly, okay for part of husband's business to be found to constitute separate property based upon his (presumably self-serving) testimony alone (THOMAS)

- Shaw v. Shaw, 290 Ga. 354 (2012) – investment accounts and real properties funded solely with separate property were properly considered marital by t.c. where husband placed them in joint tenancies and even where no contribution by wife during marriage (LERCH)

Equitable Division: The Chainsaw

- Shaw v. Shaw, 290 Ga. 354 (2012) – demonstrates t.c.'s broad discretion in determining what constitutes a marital assets and how to effectuate equitable division of same

- Pina v. Pina, No. S12A0156 (Ga.) (April 24, 2012) – current value of real property unnecessary to proper exercise of equitable division where no evidence presented as to value of that property at beginning of marriage, marital contributions on part of husband were minimal, and property essentially "paid for itself" through rental payments

Equitable Division: The Chainsaw

- <u>Hammond v. Hammond</u>, 290 Ga. 518 (2012) –

- t.c. upheld where husband had non-divisible pension and therefore, in equitable division context, court awarded wife equity in the house, gave husband majority of debts, gave wife $750.00 in alimony until husband started receiving his pension, and upped alimony award to $1,250.00 per month after that.
- Wife wouldn't be heard to complain about alimony award in lieu of pension, even if total award less than one-half total value of pension, since it was her idea.
- Where court ordered a party to pay certain debts, t.c. did not abuse discretion in requiring that same party to indemnify and hold other harmless as to same.

Pre- and Postnuptial Agreements: The Scalpel

- <u>Spurlin v. Spurlin</u>, 289 Ga. 818 (2011) -- Financial aspects of the postnuptial agreement were enforceable, despite a lack of financial statements being attached to that agreement, in light of 1) the listing of most major assets of the parties in the body of the agreement itself; and 2) the wife's level of familiarity with the husband's family business, income, and assets.

- <u>Sides v. Sides</u>, 290 Ga. 68 (2011) -- The Georgia Supreme Court confirmed enforceability of a prenuptial agreement under the <u>Scherer v. Scherer</u> three-pronged test where:

  1) The parties' marital estate doubled from $4M to $8M during the marriage (increase in value of assets was foreseeable); and

  2) Full financial disclosure was made, although not in the form of attachments to the agreement, and the wife was aware of the husband's financial condition before their marriage due to years of courtship.

.

Alimony: The Deepest Cut

- Branham v. Branham, 290 Ga. 349 (2012) – in order to resolve ex-husband's failure to pay alimony and ex-wife's failure to pay mortgage on certain home, trial court could not retroactively reduce ex-husband's alimony to zero; no retroactive modification of alimony judgment except under modification statute available under law

- Bowerman v. Bowerman, No. A11A1895 (Ga. App.) (March 1, 2012) – t.c. could not effectuate award of attorneys' fees from ex-wife to ex-husband by giving ex-husband a certain credit on going-forward alimony amounts; modification only permitted as provided under Georgia law (again, does not seem to necessarily override equitable set-off)

Open question: neither seems to overrule equitable set-off permitted in very limited factual scenarios – see, e.g., Walters v. Walters, 238 Ga. 237 (1977) (permissible for t.c. to order that certain escrow money from sale of the marital residence be credited against husband's alimony and CS arrearage where wife supposed to use that money to pay off debts in husband's name)

Contempt – The Guillotine

- *HOW TO AVOID IMPERMISSIBLE MODIFICATION:*

- Greenwood v. Greenwood, 289 Ga. 163 (2011) – trial court improperly modified decree in context of contempt where $10,000.00 monetary penalty for failure to sell house converted into a lien and time for sale of MR extended due to "market conditions"

- Doane v. LeCornu, 289 Ga. 379 (2011) – trial court impermissibly modified final decree in context of contempt when it ordered a party to sell an asset in order to purge himself of contempt

  Practice pointer: this opinion suggests that the decree should have contained language requiring the ex-husband to sell the house if he failed to make the payments / that the decree should have made the ex-husband's receipt of the house contingent upon him selling it "by a date certain."

tempt – The Guillo

- *HOW TO AVOID IMPERMISSIBLE MODIFICATION cont.:*

- Cross v. Ivester, A12A0318 (Ga. App.) (May 3, 2012) – cannot modify alimony in order to "fix" contempt problems

- Scherer v. Testino, No. S12A0222 (Ga.) (May 7, 2012) – t.c. cannot modify parties' agreed-upon decree provisions in order to "fix" contempt problems

- Jett v. Jett, No. S12A0075 (Ga.) (May 7, 2012) – t.c. could not order ex-husband to pay down more of MR mortgage in order to be able to refinance it, despite finding him in contempt for failure to do so; 50/50 division of MR proceeds applied whether those "proceeds" were positive or negative (hse underwater)

Attorney's Fees: The Final Blow

- Abt v. Abt, 289 Ga. 166 (2011) -- trial court's award of fees under O.C.G.A. § 9-15-14(b) was proper where the trial court found that the wife had improperly expanded the litigation by causing the children to "vacillate in their respective custodial elections," by exposing the children to a problematic boyfriend, and by otherwise creating circumstances that led to the need for procedural safeguards such as a guardian ad litem, a restraining order, and emergency hearings.
- Ward v. Ward, 289 Ga. 250 (2011) – appears to indicate that O.C.G.A. § 19-9-3(g) does not provide an independent basis for fees – rather party must travel under O.C.G.A. § 19-6-2, etc. – BUT SEE VISKUP DECISION.
- Viskup v. Viskup, No. S12A0276 (Ga.) (April 24, 2012) – O.C.G.A. §19-9-3(g) is available to recoup attorney's fees in custody modification cases even where O.C.G.A. §19-6-2 does not apply.

Attorney's Fees:
The Final Blow

- Outlaw v. Rye, 312 Ga. App. 579 (2011):

- In post-divorce custody modification action, attorney did not have a proper lien against her client's former house under O.C.G.A. § 15-19-14 as a result of her custody case work simply because of language included in her retainer agreement

- Because this statute is in derogation of common law, it must be strictly construed. Since no portion of O.C.G.A. § 15-19-15 contemplates creation of a lienable interest in real or personal property through simple contract alone – on the contrary, the lien may only "attach[] to the fruits of the labor and skill of the attorney" – then this lien was invalid and foreclosure of the lien was properly denied by the trial court.

- The appellate court seemingly left it an open question as to whether or not the attorney could have properly placed a lien under O.C.G.A. § 15-19-14 on the $50,000.00 that the ex-husband received as part of the settlement of the custody case, and it also hinted that, at times, it might be proper for a trial court to impose an "equitable lien" against certain property.

Attorney's Fees: The Final Blow

- Avren v. Garten, 289 Ga. 186 (2011) – Supersedeas upon appeal does not deprive t.c. of ability to award attorneys' fees.

Miscellaneous: Various Implements of Torture

- Birchby v. Carboy, 311 Ga. App. 538 (2011) – t.c. in family violence proceeding not required to make findings of fact, but was required to permit clerk to send order off to family violence registry

- Scott v. Scott, 311 Ga. App. 726 (2011) -- how standard applied in grandparents' visitation rights differs from third party custody standard; somewhat moot analysis in that grandparents' visitation standard altered by recent amendments to O.C.G.A. § 19-9-3