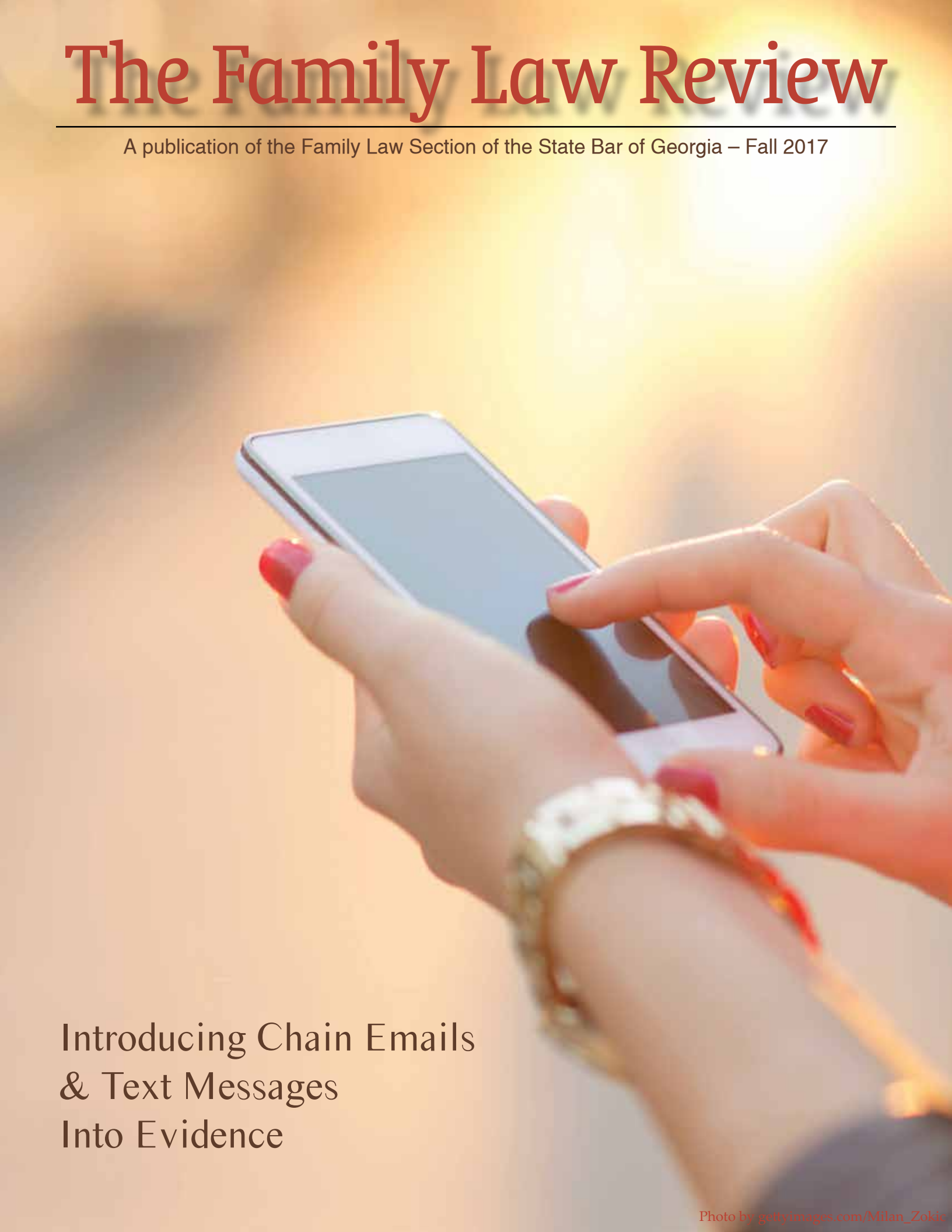
The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia – Fall 2017



Introducing Chain Emails & Text Messages Into Evidence

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Editors' Corner

By Leigh F. Cummings
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I thank the Executive Committee for the privilege to serve as Editor of the Family Law Review. It is an honor.

Hopefully you will find the information in this issue helpful in your practice of family law.

Thank you to the contributors of this edition. Your hard work is sincerely appreciated.

Our aim is to include articles concerning issues and events of importance to our section. So, please send me any article you would like to include in the upcoming edition. I look forward to hearing from you. *FLR*

Editor Emeritus

By Randy Kessler
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I hope everyone has continued to enjoy the Family Law Review. Ever since the days of Jack Turner, our initial Chairperson and Editor of the Family Law Review, the Family Law Review has strived for excellence. Thanks once again to all of our great contributors, including Vic Valmus, who continues to excel in supplying us the case law updates. We also continue to expand our reach and do our best to educate the Family Law community. This year our newest innovation is the Divorce Jury Trial Seminar which will hopefully become an annual event and a great learning experience for those who have tried or never tried a divorce jury trial. The collective experience of our section members is so vast that it only makes sense to share and to help each other.

Thanks once again for allowing me to continue to serve and to continue to share. *FLR*

***The Family Law Review* is looking for authors of new content for publication.**

If you would like to contribute an article or have an idea for content, please contact Leigh F. Cummings at cummings@connellcummings.com.

Inside this Issue

From the Chair

By Gary P. Graham
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We have officially commenced the beginning of the new year for the Section, and I am honored to serve as the 2017-18 Chair. We have new members on the Executive Committee, so please take a look at the back of the newsletter and contact any of us with questions, concerns or requests to be involved with the Section. With new members, we also have previous members no longer on the Executive Committee. I wish to thank Dan Bloom, Tera Reese-Beisbier, Lane Fitzpatrick and Pilar Prinz for their service and dedication to the Section.

As always, the Section will continue to sponsor informative and pragmatic seminars. Thank you to Randy Kessler for kicking off our year with his "Jury Trials in Divorce, a Lost Art?" seminar on Aug. 24, at the State Bar offices. Approximately 100 practitioners attended this incredible seminar, with excellent and experienced presenters. Ivory Brown chaired the Savannah Nuts and Bolts seminar on Aug. 25, and the Atlanta Nuts and Bolts on Sept. 28. Both had incredible agendas of topics. The Nuts and Bolts seminar is ideal for new family law attorneys, or even experienced family law attorneys looking for a refresher. Karine Burney and Katie Leonard are tasked with putting together what will be another wonderful seminar during our Mid-Year Meeting at the beginning of January. Last but not least, Scot Kraeuter is chairing the 36th Annual Family Law Institute, which will be held in Jekyll Island during May 24-26, 2018.

Leigh Cummings is our new Editor of the Family Law Review, and she will be continuing the tradition of providing quality content and articles. If you are interested in being published in the Family Law Review, please contact Leigh. Kyla Lines is our new Legislative Liaison, and she and her committee will be monitoring legislation that may affect our practice. Please feel free to contact Kyla with any questions or input on legislative matters.

I would like to increase the publicity of the Child Support Hotline, and increase our existing volunteers. The Child Support Hotline is a free service that provides one-time assistance with producing Child Support Worksheets for filing in the state's superior and juvenile courts. Michelle Jordan is the new point person for the Hotline, and will be looking for additional volunteers and getting this benefit more exposure before clerks, Judges and courthouses. If you are interested in being a volunteer, please contact Michelle.

Ted Eittreim will be in charge of resuming our webinar series. If you are interested in presenting a webinar, please contact Ted. We will be sending email blasts with the webinar schedule, and you may also check our section website.

For our community service projects, I feel that the biggest impact we make in our profession is on the children. I am also passionate about sports, and firmly believe in the benefit of children participating in sports or other extracurricular activities. As such, our community service project this year will be geared towards donating sporting equipment to local facilities, such as YMCA or Boys and Girls Club, that are in desperate need of sporting equipment for their children. We will also look for local libraries that are in need of children's books, and seek to donate new or used books. Stay tuned for more exciting and rewarding details.

I am looking forward to an exciting and productive year. Please do not hesitate to contact me directly with any questions or concerns about our Section.

2017 Family Law Institute

We had a fabulous and recording breaking turnout at this year's Family Law Institute at the Ritz Carlton in Amelia Island. We had 661 attendees! Thank you to everyone, from ICLE, the Executive Committee and the Ritz staff, who made it possible. I hope you enjoy the pictures from the Institute. Thank you also to those who completed the evaluations. If you did not complete the evaluations and have any comments or concerns regarding the Institute, feel free to contact me. The Executive Committee carefully reviews the evaluations to try to make the Institute better each year. Finally, I hope you learned from the Institute and came away a better family law lawyer.

Scot Kraeuter is already planning a fabulous Institute in Jekyll Island during May 24-26, 2018. It is never too early to think about sponsorship. If you or your firm would be interested in sponsoring the 2018 Institute, please email Karine Burney, new chair of Sponsorship Committee, at KBurney@ksfamilylaw.com.

Again, thank you to all who attended and made the 2017 Institute a great success. *FLR*

Save the Date!

The Annual Section Meeting and CLE will be on Jan. 4, 2018, at the Westin Perimeter North.

We will have Judges Glanville, Boulee, Childs and Lyles host a panel for attendees.

More information will follow.

Introducing Chain Emails & Text Messages Into Evidence

By Melissa Fuller Brown

Recently, I deposed a child therapist who was treating the divorcing parents' child. Prior to taking therapist's deposition, I subpoenaed her entire file, which included many long chain emails.

Upon receiving subpoenaed information (as well as discovery responses), our office procedure is to bate stamp all documents. Thus, as usual, we bate stamped the therapist's long chain emails and other materials.

When I took the therapist's deposition, introducing the bate stamped email chains became cumbersome. Long emails chains are duplicative and the emails are in reverse order (newest to oldest). This further complicated the question and answer process and made the deposition much longer than necessary.

Not long afterward as I prepared for trial, I dreaded the moment I would have to introduce the long email chains into evidence. The awkward, tedious process would likely upset the judge and losing control of the witness might occur. Authentication was also a concern because I did not want to "clean up" the emails by copying and pasting them into a Word document and reorganizing them oldest to newest because I would be manipulating the emails. If the other attorney was paying attention and objection on an authentication ground, the judge might deny my request to introduce them as evidence.

I decided to brainstorm with another close family law colleague who handled many family law trials. We came up with some great ideas, and when I used our "system" at trial, it worked beautifully so I wanted to share our ideas with you.

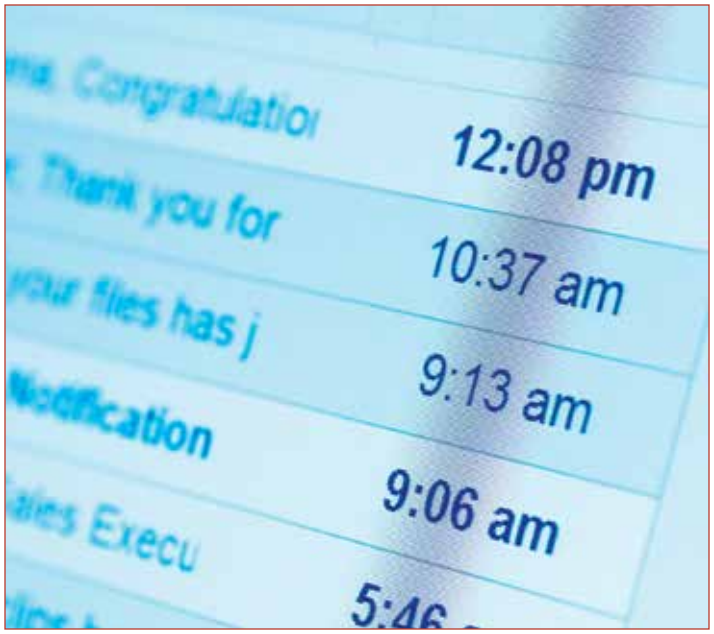

Photo by gettyimages.com/JanakaMaharageDharmasena

To introduce long email chains into evidence, do the following:

1. As opposed bate stamping all the emails from 000001 – 002000 as we do when sending or receiving discovery, for trial evidence we grouped chain emails by topic, including every email in the chain in the group. Then, we numbered the group starting with page one through the last email in the chain.
2. When I questioned my client about the group, she identified the documents. She explained that they were a group of emails in a long chain. She identified the email addresses and explained she knew the senders and she was a recipient. She also identified the dates and times of the emails.
3. I marked the group as Plaintiff's Exhibit 1 for identification. Then, since chain emails are in reverse order, I asked her to turn to the last page of the group, for example page 4, of Plaintiff's Exhibit 1 for identification and ask her to explain the significance of this email, and the next email on page 3 and then, page 2 and page .
4. The system worked very well. My client's testimony was smooth and easy for the judge and the opposing party to follow. When I moved to introduce the evidence, the opposing party did not object.

My colleague and I also discussed the challenges of introducing text messages into evidence. Introducing screen shots of texts messages is not exactly the best method because screen shots rarely show the date the text was sent, the sender's name, the receiver's name and sometimes the time is indicated either.

Thus, unless the context of the text revealed this information, authenticating texts is a challenge. Then, even if I could overcome that challenge, deciphering the texts later is difficult for the Court when making their ruling.

The solution to introduce text messages efficiently was solved with an app for Mac computers called PhoneView. This app costs approximately $30. You connect an iPhone to a Mac Computer that has this program installed. When the program is running and the phone is connected, you can download text messages from a particular phone number and the program organizes the texts by the phone number (or name), in chronological order and the date, time the text was sent and time it was received are noted by the program. Reading the texts becomes easy and it is clear who is the sender and the receiver as well as the date and time of the texts.

To authenticate texts using this software do the following:

Have your witness describe the app, PhoneView, how she used it, why she picked the particular phone number and whether or not she manipulated any of the texts. For example, get the witness to testify as follows:

1. I purchased the program, PhoneView, and downloaded it to my Mac computer. I connected my iPhone to my Mac computer and "turned on" the app, PhoneView. I then selected Messages (text messages) and I downloaded the texts from the phone number 999 0.1234, which belongs to Mr. Smith. The texts regarding this number were texts between Mr. Smith and me.
2. I downloaded all texts for the period January 1, 2017 through March 31, 2017, and I did not delete any texts during the time period. (You must decide whether to print *all* or just some of the text messages. Making this determination is important. I learned that choosing texts by time period is best even if they contain some irrelevant texts because for authentication purposes, it is clear no texts between Mr. Smith and the witness during a particular period of time were deleted.)
3. Next, the witness explains that she copies the text grouping and pastes it into a Word document and numbered each page.
4. At Trial:
    a. Hand the witness the text grouping and ask the witness to identify the documents.
    b. Once the witness explains the context of the text group, ask the witness how the group was created.
    c. Get the witness to explain how she utilized the PhoneView app to download and organize the texts.
    d. Since these texts were no longer in the original format, asked the witness why she utilized this App.
    e. Have the witness explain that the App was used for Demonstrative purposes to organize the texts clearly by date, time, sender and receiver.
    f. Make sure you have the witness testify that the app created a fair and accurate representation of the texts and this format would assist the Court in understanding the chronology, dates, times, sender and receiver of the texts. Consider having the witness explain why this method is much better and more accurate than using screenshots.
    g. When asking about specific texts, for example, Plaintiff's Exhibit 2 for Identification beginning on page 1, have the witness turn to page 1, get her to explain the relevance of the texts on that page as well as the important texts on subsequent pages. Make sure the witness also testifies that she not manipulate, delete or rewrite any of the texts.
    h. If the opposing attorney objects to your introduction of the texts in this format,argue:
    i. PhoneView organizes the texts chronologically by date and time; it identifies when texts were sent and received. The format is demonstrative evidence offered under the Summaries rule from the Rules of Evidence, and the format will assist the Court by clearly identifying dates, times, sender and receiver. (You may also want to clarify why the Best Evidence Rule is not necessarily the best method to introduce this evidence, because screen shots, for example often fail to identify the date and time the text was sent.)

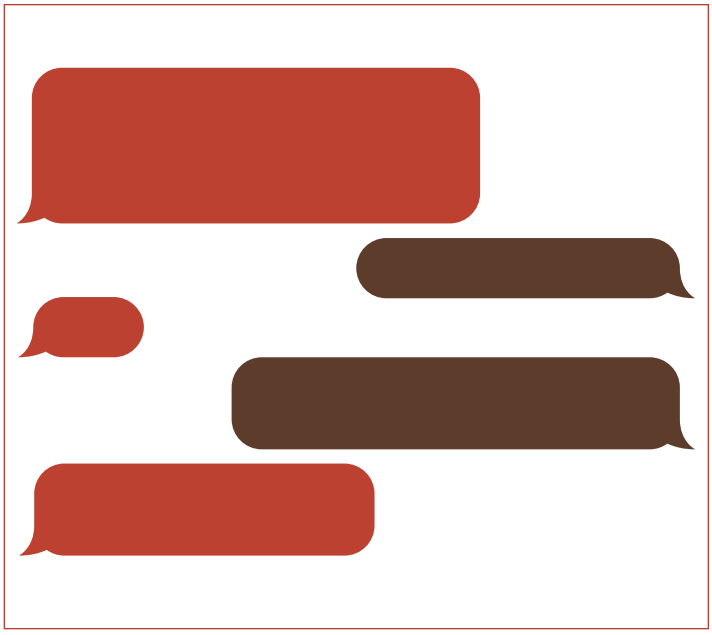

Photo by gettyimages.com/chaluk

Another tip: If you have time to organize either the chain email groups or text message groups ahead of time, attach them to a Request to Admit and ask the opposing party to admit to their authenticity. This could make the process of admitting the evidence much easier.

If you are worried the opposing counsel will fight you at every turn, especially the text messages, print all between the sender and receiver and send them to the OC as you would a deposition. Then, identify the pages you plan to introduce before trial like you would introduce portions of a deposition and get the materials authenticated this way.

Hopefully, these suggestions and tips will assist you the next time you are in trial and need an efficient and effective way to introduce these types of evidence. *FLR*

Melissa F. Brown, the principal and founding attorney of Melissa F. Brown LLC, has practiced law for over 20 years. Since she entered private practice, she has worked exclusively in the area of divorce and family law. She can be reached at: 56 Wentworth Street, Ste. 100 Charleston, S.C. 29401 (843) 722-8900, or at melissa@melissa-brown.com.

Alternative Strategies Concerning Child Witnesses in Domestic Actions

By Robert Tchack

Minor children may hold relevant knowledge on a variety of issues in domestic litigation. For instance, in custody cases, the law allows children 14 years and older to select the parent with whom they want to live, and expressly requires trial judges to consider the desires of children between the ages of 11 and 13.[1] Further, in custody cases, as well as other proceedings revolving around parental behavior or the parent-child relationship, children may observe or experience material acts of parental abuse, negligent care, or immoral or illegal conduct. Many litigating parents do not wish to subject their children to the pressures of courtroom testimony though. Even where parents seem willing, some judges refuse to allow trial testimony from children below a certain age. When confronted by either impediment, what are a domestic practitioner's options?

Altogether Avoiding Children's Involvement in Judicial Proceedings

Many parents would prefer to entirely insulate their children from domestic litigation. To achieve that goal, however, a third party must be able to convey the relevant knowledge of a child witness to the trier of fact in a manner which renders that information admissible in evidence or otherwise capable of judicial consideration.

If a child does not testify at a trial or hearing, then the hearsay rules ordinarily preclude another person from offering that child's statements in evidence to prove the truth of the matters asserted.[2] A court may rely on the truth of children's out-of-court statements only if those out-of-court statements are admissible in evidence pursuant to an applicable hearsay exception.[3] For those reasons, parents cannot testify to statements of their children, unless the parents do so for purposes other than proving the truth of the those statements (such as to explain a parent's subsequent motives or conduct).[4]

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Expert testimony may offer a viable, albeit limited, means of conveying children's information to a trier of fact. Pursuant to one hearsay exception, medical professionals may recite the substance of a child's out-of-court statements made to them for purposes of medical diagnosis or treatment.[5] Moreover, any expert witness potentially may rely on hearsay in forming an opinion: "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, [the facts or data upon which an expert bases an opinion] need not be admissible in evidence in order for the opinion or inference to be admitted."[6]

Experts capable of forming opinions in domestic actions, based on children's out-of-court statements, include guardians ad litem, custody evaluators, and treating physicians, psychiatrists and psychologists.[7] Those professionals should be able to interview and examine children in a non-threatening environment and then rely on the children's statements in forming opinions.[8]

A murkier question concerns an expert's ability to reveal the substance of a child's relevant knowledge. In custody cases involving children between the ages of 11 and 13, the statutory language authorizing a court to consider a child's desires regarding custody, through the report of a guardian ad litem, seemingly permits a guardian's report to convey the substance of the child's wishes.[9] Offering limited support for that interpretation, one appellate decision affirmed a child custody determination without mention of error in the trial testimony of a guardian ad litem, who reported the 9 and 12 year old children's stated desires to live with their mother and to have constrained visitation with their father.[10] Another appellate decision – predating the current juvenile code and relying on a provision omitted from current law – affirmed the inclusion in the record of portions of a custody evaluator's report which recited children's hearsay statements regarding their father's conduct and its impact on them.[11]

Even assuming that a guardian ad litem or custody evaluator can report the substance of a child's out-of-court statements, those statements should not be admissible in evidence. Appellate dicta has stated that a child's assertions to her guardian ad litem, regarding her father's drug usage, constituted non-probative hearsay which could not be used to uphold modification of custody based on the father's drug use.[12] In an analogous situation, the Court of Appeals held that a trial court could not rely on hearsay statements

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from a child's grandmother to the guardian ad litem recited in the guardian's report, to support a termination of parental rights.[13] Those rulings applied Georgia's old evidence code, but the same exclusionary interpretation should follow under our current code, with the exception that a party's failure to properly object to hearsay now renders that hearsay evidence legal and admissible.[14]

Courts in custody cases and other nonjury proceedings are presumed to have disregarded any inadmissible hearsay contained in evidence presented to them and to have considered only properly presented evidence.[15] Nonetheless, that presumption is a theoretical one and will not apply where affirmatively shown to the contrary.[16] A trial court accordingly will need to base any decision involving children on some evidence other than inadmissible hearsay statements of the children.[17]

Involving Children Without Their Trial Testimony

The nature of a case or a child's knowledge may demand a more direct presentation of a minor's observations or experiences to the court. Under certain conditions, children can submit their relevant information to a judge without formally testifying at a trial or hearing.

Uniform Superior Court Rule 24.5(B) in part outlines basic parameters for consultation between minor children and trial judges: "When custody is in dispute, if directed by the court, minor child/children of the parties shall be available for consultation with the court. At any such consultation, attorneys for both parties may be in attendance but shall not interrogate such child/children except by express permission from the court. Upon request, the proceedings in chambers shall be recorded."

Notwithstanding USCR 24.5(B)'s expressed authorization for attorneys to attend a trial court's interview of a child, a judge deciding a custody case can interview a minor, outside the presence of parties **and counsel**, where the parties do not object or otherwise can be found to have acquiesced to such an arrangement.[18] If neither parties nor counsel are present, but the interview is transcribed, the trial court cannot partly or wholly rely on the interview in making its custody decision unless it first provides the parties an opportunity to review the transcript and to explain or rebut the information contained in it.[19] Without transcription, irrespective of counsel's presence, a child's statements in chambers which are not on the record cannot be used to uphold the trial court's custody decision on appeal.[20]

USCR 24.5(B), on its face, applies only to custody cases. Nonetheless, without citing to that Rule, at least one appellate decision has recognized a trial court's right to interview a child witness outside the presence of the litigants in other contexts as well.[21] Whether such authority in non-custody cases requires the parties' lack of objection or acquiescence to the interview itself, or to the exclusion of parties or attorneys from the interview, remains unclear.

Permitting and Protecting Children's Trial Testimony

The conveyance of a child's relevant knowledge to the trial court by an expert or via consultation with the judge cannot substitute for live testimony in all cases, and less so under current law. Revisions to Georgia's juvenile code and evidence code in recent years have increased the need for minors to testify in domestic actions. The juvenile code no longer contains a provision allowing a judge to rely on inadmissible evidence in custody proceedings.[22] A provision in the evidence code which previously demanded the mere availability of a child under the age of 14 to testify, as a prerequisite for another person to recite statements made by that child describing acts of sexual contact or physical abuse, now applies to children younger than 16 and requires those children to testify at trial.[23] Additionally, in actions to terminate parental rights, appellate courts have recognized a defendant's due process right to confront the witnesses against him/her.[24] That right of confrontation, in combination with the hearsay rules, may compel a child witness to testify in such actions.

Despite those considerations, trial courts retain authority to act as testimonial gatekeepers in certain situations. For example, the parties' minor children cannot give oral testimony at temporary hearings, except by leave of court.[25] A court determining custody can refuse to hear testimony of children ages 14 and older, regarding their custodial elections, if the court determines that the selected parents are unfit for custody.[26] A trial court also can refuse to hear testimony on custodial desires from children between the ages of 11 and 13, without expressed justification, because of the court's complete discretion in assigning custody.[27]

In recent years, a trial court's authority to preclude children's testimony has diminished with respect to witness competency. Under Georgia's old evidence code, the trial court acted as a competency gatekeeper, charged with resolving – through examination – allegations of witness incompetency on grounds including "infancy."[28] In contrast, our new evidence code deems every person

competent to testify as a witness, subject only to that person's ability and willingness to declare by oath or affirmation that he or she will testify truthfully.[29] This relaxation of competency standards should prevent judges from imposing bright line standards for preclusion of children's testimony below a certain age.

If a court permits a child to testify in a domestic action, it likely will impose conditions to protect the child from undue pressures. The available protections may depend upon the type of case. For instance, authorities speaking to the exclusion of parties or counsel while children testify have revealed a more forgiving standard for custody disputes than proceedings involving termination of parental rights. In a modification of custody action, the Georgia Supreme Court found no error in a trial court's exclusion of the parties from the courtroom while their minor children "were present at the instance of the judge, and were examined by him," because the judge allowed the attorneys to remain, with the privilege of examining the children.[30] In contrast, appellate courts in termination of parental rights cases have held that a judge cannot exclude the parties from the presence of their testifying children unless a) the judge first finds that the presence of a parent will be detrimental to the testifying children's well-being and bases that finding on evidence submitted, b) the parties' attorneys are permitted to examine the children and c) the judge provides a means for the parties to observe their children's testimony in real time and assist their attorneys in forming questions.[31]

Conclusion

The manner in which an attorney presents a child witness's evidence in domestic proceedings should depend upon the nature of the evidence, the type of case, and the likelihood that either party will appeal an unfavorable judgment. On the one hand, proof of child abuse, or submission of a child's relevant knowledge in actions to terminate parental rights, likely will require the child's trial testimony. On the other hand, in most custody actions, the presentation of a child's information through an expert's testimony or through an interview of the child by the trial judge should suffice. Prudence nonetheless dictates a higher degree of directness and formality in the presentation of a child witness's evidence in every case in which an appeal seems likely, in order to reduce the possibility of reversal. *FLR*

Robert L. Tchack is founder of Robert L. Tchack, LLC, a litigation and consulting law firm concentrating in appellate, domestic and commercial litigation services, as well as other litigation practice areas. He can be reached at robt@rltllc.com or (770) 313-6857.

(Endnotes)

1 O.C.G.A. §§ 19-9-3(a)(5) and (6).

2 See O.C.G.A. § 24-8-801(c) (defining "Hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"); and O.C.G.A. § 24-8-802 (providing in part that "[h]earsay shall not be admissible except as provided by this article…").

3 See Woodruff v. Woodruff, 272 Ga. 485, 486(1), 531 S.E.2d 714 (2000) (holding that trial court could not base its custody determination on children's hearsay statements of molestation by father and grandfather, unless hearsay statements were admissible pursuant to an applicable hearsay exception).

4 See, e.g., Wright v. State, 302 Ga. App. 101, 690 S.E.2d 220, 224(3) (2010) (holding that assault victim's testimony -- that he took a gun from defendant because he was told that defendant was going to shoot someone else with it – did not constitute hearsay, because testimony was offered to show victim's motive in taking gun from defendant); Club Southern Burlesque, Inc. v. City of Carrollton, 265 Ga. 528, 530(2), 457 S.E.2d 816 (1995) (holding that defendant-city's evidence of studies conducted by other municipalities and counties, citing the pernicious secondary effects of adult entertainment establishments, did not constitute hearsay, because the evidence did not rest on the veracity and competency of the studies themselves, but rather derived its value solely from the city's reliance on the studies and the relevance thereof to pass its own ordinance restricting adult entertainment establishments). But see A Child's World, Inc. v. Lane, 171 Ga. App. 438, 441-442, 319 S.E.2d 898 (1984) (deeming mother's testimony – of a day care employee's statement to her regarding another employee's spanking of child – inadmissible hearsay, despite possibility that mother's testimony explained her motive and conduct in subsequently investigating the spanking report and then filing suit for assault and battery, because mother's conduct and motives were not relevant to the issues on trial).

5 See O.C.G.A. § 24-8-803(4) (rendering admissible "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment"). See also In the Interest of C.W. D., 232 Ga. App. 200, 209(4), 501 S.E.2d 232 (1998) (holding that "[t]he history that a patient gives to a psychologist during examination or treatment is not hearsay and is admissible as an exception to the hearsay rule").

6 O.C.G.A. § 24-7-703. See also Evans v. Dep't of Transp., 331 Ga. App. 313, 319 fn. 3, 771 S.E.2d 20 (2015) (noting that an expert properly may rely on inadmissible facts and data such as hearsay in reaching an opinion, if the requirements of O.C.G.A. § 24-7-703 are satisfied).

7 See U.S.C.R. 24.9 (7) (providing that a guardian ad litem "is qualified as an expert witness on the best interest of the child(ren) in question"); and U.S.C.R. 24.9 (8)(a) (authorizing guardian ad litem to request custody evaluation by a mental health expert approved by the court). See also Fields v. Taylor, A16A1753 (2)(a) (Ga. Ct. App., January 18, 2017) (holding that medical experts could base their opinions on inadmissible hearsay evidence of a type reasonably relied upon by experts in their field in forming opinions).

8 See O.C.G.A. § 19-9-3(a)(6) (providing that in custody cases involving children between the ages of 11 and 13, "[t]he judge shall further have broad discretion as to how the child's desires are to be considered, including through the report of a guardian ad litem"). See also Frank v. Lake, 266 Ga. App. 60, 61, 596 S.E.2d 223 (2004) and Holt v. Leiter, 232 Ga. App. 376, 382, 501 S.E.2d 879 (1998) (no mention of error in guardian ad litem's interviews of minor children in custody modification actions).

9 O.C.G.A. § 19-9-3(a)(6).

10 See Martin v. True, 232 Ga. App. 435, 437(5), 502 S.E.2d 285 (1998).

11 See Gottschalk v. Gottschalk, 311 Ga. App. 304, 313(7), 715 S.E.2d 715 (2011); and former O.C.G.A. § 15-11-56(a) (permitting court in child custody proceedings to receive and rely upon all information helpful in determining the questions presented, to the extent of its probative value, even though not otherwise competent).

12 Frank v. Lake, 266 Ga. App. 60, 62(1), 596 S.E.2d 223 (2004).

13 In the Interest of A.G.I., 246 Ga. App. 85, 88, 539 S.E.2d 584 (2000).

14 O.C.G.A. § 24-8-802.

15 Gottschalk, supra, 311 Ga. App. at 313(7); and In the Interest of K.I.S., 294 Ga. App. 295, 296(1), 669 S.E.2d 207 (2008).
16 K.I.S., supra, 294 Ga. App. at 296(1).
17 See Woodruff, supra, 272 Ga. at 487-488(1).
18 Kohler v. Kromer, 234 Ga. 117, 118, 214 S.E.2d 551 (1975); and Blue v. Hemmans, 327 Ga. App. 353, 759 S.E.2d 72, 78(2) (2014).
19 Altman v. Altman, S17F0619, *7-9(2) (Ga., May 15, 2017).
20 Kohler, supra, 234 Ga. at 117; and Blue, supra, 759 S.E.2d at 78(2). See also Peeples v. Newman, 209 Ga. 53, 57(2), 70 S.E.2d 749 (1952) (holding that custodial desires of eight and ten year old children, and the reasons therefore, conveyed by them to trial judge in private conversation which was not part of the record, could not be used to establish a change in circumstances supporting a modification of custody); and Allen v. Clerk, 273 Ga. App. 896, 898(1), 616 S.E.2d 213 (2005) (holding that 13-year-old child's statements to judge, which were not on the record, could not be used to uphold the trial court's decision to issue a permanent stalking protective order).
21 See Allen, supra, 273 Ga. App. at 898(1) (finding no error in a judge's interview of a 13-year-old child outside the presence of the parties and their counsel, prior to issuing a temporary protective order against the child's uncle).
22 See former O.C.G.A. § 15-11-56(a).
23 Cf. former O.C.G.A. § 24-3-16 and current O.C.G.A. § 24-8-820.
24 See In the Interest of C.W.D., 232 Ga. App. 200, 209(5), 501 S.E.2d 232 (1998); In the Interest of B.G., 225 Ga. App. 492, 493-494(1), 484 S.E.2d 293 (1997); and In the Interest of M.S., 178 Ga. App. 380, 343 S.E.2d 152, 153-154 (1986)
25 USCR 24.5(B).
26 Moon v. Moon, 277 Ga. 375, 376-377(2), 589 S.E.2d 76 (2003).
27 Id., 277 Ga. at 377(2).
28 See former O.C.G.A. § 24-9-7(a). See also In the Interest of K.G.L., 198 Ga. App. 891, 891-892(1), 403 S.E.2d 464 (1991) (holding that inconsistencies in understanding the difference between the truth and a lie, displayed by 10-year-old child during her examination by the trial judge, were matters for consideration by the trial court in making its determination of competency and by the jury in determining the credibility of the witness).
29 See O.C.G.A. §§ 24-6-601 and 24-6-603.
30 Willingham v. Willingham, 15 S.E.2d 514 (Ga., 1941).
31 See In the Interest of B.G., 225 Ga. App. 492, 492-493(1), 484 S.E.2d 293 (1997) (finding reversible error in trial court's exclusion of mother from courtroom while child testified, without first making evidentiary ruling that mother's presence would traumatize child, and without making alternative accommodation for mother to assist her attorney in confronting the witness); and In the Interest of M.S., 178 Ga. App. 380, 343 S.E.2d 152 (1986) (finding reversible error in procedure used to take children's testimony – whereby only the guardian ad litem and her counsel were present in an interview room with the children, while the judge, court reporters and attorneys observed the child's testimony from behind a one-way mirror, and the attorneys' objections and cross-examination were relayed through the guardian's counsel – because the judge excluded the parents from the observation room, without reason, and consequently deprived them of an ability to assist their attorneys in propounding questions). Cf. In the Interest of C.W.D., 232 Ga. App. 200, 501 S.E.2d 232 (1998) (holding that examination of children via closed circuit television, outside the presence of mother, did not violate her due process right of confrontation, where the juvenile court a) found that testifying in the presence of their mother would be detrimental to the children's mental health and emotional well-being, b) based its finding on testimony of an expert clinical psychologist regarding the children's mental and emotional conditions and the precipitation of their conditions, and c) allowed mother to witness the children's testimony in real time and consult with her counsel).

Community Service: We Dig It!

By K. Jeanette Holmes

If you missed the Spring Service Project, you missed a great opportunity to get some fresh air, visit with members of the Family Law Section, and give back to our local community. On April 29, more than 20 family law practitioners, armed with sunscreen and bug spray, ventured into the forested area surrounding Whittier Mill Park. Whittier Mill Park is a beautiful, green space nestled in one of Atlanta's historic districts. Once the site of a cotton mill, it is now home to a playground, fields, and trails surrounded by woods. Upon arrival, we were greeted by John Ahern, the volunteer manager of Park Pride, a nonprofit organization dedicated to improving local parks. John introduced us to the tools we would be using to remove invasive plants and open up an overgrown area behind the playground. Attorneys from Atlanta Legal Aid; Kessler Solomiany; Hedgepeth Heredia & Rieder; Connell Cummings; Smith & Lake; Boyd Collar

Nolen & Tuggle; Richardson Bloom & Lines;, and many others rolled up their sleeves and got to work. The job was strenuous but rewarding. We removed countless invasive plants to create a large area for children to ride bikes, run, and play.

Special thanks to Leigh Cummings for organizing the event and to Park Pride for partnering with the Family Law Section. If you would like to get involved in Park Pride's efforts "for the greener good," visit parkpride.org. We hope you will join us in our next service project. *FLR*

Since graduating from Emory University School of Law in 2013, Holmes has practiced exclusively in the area of family law. She is currently an associate at Connell Cummings. She can be reached at holmes@connellcummings.com.

Child Support Worksheet Helpline

A Call for Volunteers

a service provided by the Family Law Section of the State Bar of Georgia and the Georgia Legal Services Program

Flex your child support worksheet prowess to assist income eligible, pro se Georgians with the completion and filing of child support worksheets!

- ❑ Convenient and easy way to serve the community
  - One-time legal assistance – not an ongoing legal relationship with the pro se litigant
  - Contact caller(s) from the comfort of your office or home on your schedule
- ❑ Flexible commitment
  - You may volunteer for as many cases as you would like to take
- ❑ Simple registration Email the form below to cswgahelp@gmail.com

Child Support Worksheet Helpline Volunteers

Tera Reese-Beisbier
Leigh Cummings
Katie Connell
B. Lane Fitzpatrick
Adam Gleklen
Rebecca Crumrine Rieder
Michelle Jordan
Alice Benton
Dawn Smith
Gary Graham
Mitchell Graham
*Hannibal Heredia**
Brooke French
*Adrianna de la Torriente**
Cindy English
Susan Stelter
Scot Kraeuter
Ivory Brown
Melody Richardson
Steven Kirson
Jamie Perez
Samantha Fassett
Jessica Reece Fagan
E. Lauren Ducharme
Jonathan Rotenberg
Mali Shadmerhy
Kimberley Colmey
Jennifer Keaton
Elinor H. Hitt
Julia E. Snow
Regina Edwards
Teri L. Brown
Steven R. Ashby
Obreziah L. Bullard
Sabrina A. Parker
Kelly Miles
Jennifer Tise
Audrey Bergeson

** denotes Spanish speaker*

I am interested in being a Volunteer for the Child Support Helpline*

1 . Name: _____

2. Bar Number: _____

3. Office Address: _____

4. Phone: _____

5. Email: _____

6. I would like to assist with no more than ____ callers per month.

7. l understand that by signing up for this volunteer position, I am certifying that I have a working knowledge of Child Support Worksheets in the State of Georgia and how to complete them based on information provided to me by a pro se litigant. I also certify that I am a member in good standing with the State Bar of Georgia.

_____ ___Interested Volunteer Georgia Bar Number

***Please email this form to cswgahelp@gmail.com**

A Substantial Change In Child Support

By Patricia Buonodono

The past 12 months have been both busy and productive for the Georgia Commission on Child Support. In August 2016, the Commission released the new Online Child Support Calculator, which is faster and more intuitive than the Excel version. The Online Calculator can be used on smart devices such as tablets and phones. Users always have the most up-to-date version of the calculator, since any changes made to it are immediately available. It creates a .pdf document of your worksheet, which is now shorter because it only prints what is relevant. There are many more good features about the Online Calculator, which we hope you will learn about by using it. Many people are asking, with fear and trepidation, when the Excel calculator is going to go away. The answer is that we are no longer supporting versions older than Excel 2007 or versions newer than Excel 2013. The Commission anticipates that it can support Excel for another year or two, but encourages everyone to create an account for the Online Calculator, and begin using it. All of the calculators may be found on the Child Support Commission's website, http://csc.georgiacourts.gov.

Another recent project of the Child Support Commission was to investigate potential changes to the Child Support Guidelines. This was done through the hard work of the Statute Review Committee, and was the culmination of a few years of discussions. The bill was drafted by Legislative Counsel, Jill Travis, for whose assistance the Commission is extremely grateful. The result was HB 308, which was ultimately attached to another bill, SB 137. SB 137 passed the General Assembly and was signed by Governor Deal on May 9, 2017. It contains a great deal of language clean up and correction, and changes language to make the Child Support Guidelines gender neutral. Substantively, SB 137 accomplishes four main things:

1. In Part I, Section 1-1(c), the bill requires that the final judgment shall have attached to it the child support worksheet containing the calculation of the final award of child support and any schedule that was prepared for the purpose of calculating the amount of child support.
2. In Part I, Sections 1-4 and 1-5, the bill allows for the filing of multiple worksheets when there are multiple children, so that when the oldest child is no longer eligible to receive child support, the child support order will provide for a second amount calculated only for the children who remain in the home. Per the child support guidelines, this subsequent amount must be supported by a worksheet; thus, the worksheets are prepared at the time the original child support is ordered. This will save parents money in that they will not have to modify child support when one of their children is no longer eligible to receive support. However, the bill does nothing to prohibit either parent seeking a modification of the amount of support if other circumstances (such as income of the parties or expenses of the children) have changed.

As a very simple example, let's say a family with three children files for support. Each parent earns $4,000 per month. With no other deductions or deviations, the amount of support the noncustodial parent will pay to the custodial parent is $895 /month. Once the oldest child turns 18 or finishes high school (up to age 20), whichever comes later, the noncustodial parent will only be paying support for two children. That amount is $784 per month. Finally, once the second oldest child turns 18, etc., the noncustodial parent will be paying support only for the one remaining child, and that amount is $563 per month. Thus, the appropriate amount of support is being paid based upon the number of children in the home without the parents having to go to court to file for a modification of child support.

3. Currently, a parenting time deviation is provided where the noncustodial parent has the children half, or nearly half, of the time. This deviation can only be used to decrease the amount of the support. Part I, Section 1-6 of SB 137 changes that language so that the parenting time deviation can go either upward or downward. If a noncustodial parent spends no time whatsoever with the child, and incurs no expense of having the child in their home for any amount of time, the custodial parent may request an upward parenting time deviation since the custodial parent is bearing the full cost of raising the children completely on their own.

4. Part III, Section 3-1 allows the judge or jury discretion to take the work related child care expense out of the child support calculation, when those child care costs are variable. This would apply when, for example, the parties have a child who is four years old going to daycare full time, at the cost of around $800/month, but the child will start kindergarten in a year. For that year of daycare, then, the judge may allocate pro rata shares of the $800 expense to the parties (based upon the percentage of total income each party earns), and order it paid by one party and reimbursed by the other as a specific dollar amount. Once the year is over, that expense is gone – but if it had been a part of the child support calculation, the noncustodial parent would continue to pay child support that includes that expense as part of the calculation until he or she files a modification petition to reduce the amount of support. This will also work in situations where child care costs vary, perhaps during summer months or school breaks. This provision saves the parents money by not requiring them to go back to court for a modification of child support simply because the child care expense ends.

The "As Passed" version of SB 137 is available at: http://www.legis.ga.gov/Legislation/20172018/170668.pdf.

As always, the staff of the Child Support Commission is here for you. We offer free training throughout the State on both the use of the Online Calculator and child support in general. Our website (http://csc.georgiacourts.gov) provides case law updates; video tutorials on how to use both the Online and Excel Calculators; the worksheets; the statute; and a step-by-step guide to completing Income Deduction documentation, along with fillable .pdf forms. Please let us know what we can do to help, by emailing patricia.buonodono@georgiacourts.gov. *FLR*

Patricia K. Buonodono is a 1994 graduate of the Georgia State University College of Law. She is now the Assistant Division Director for Communications, Children, Families and the Courts. She can be reached at patricia.buonodono@georgiacourts.gov.

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Managing Credit During and After Divorce: 9 Steps to to a Strong Financial Future

By Anthony Davenport

Divorce is messy. Your clients will undoubtedly be upset, stressed, and fatigued by the process. Untwining two lives isn't easy, and as with most major life changes, suddenly shifting paths often means dealing with a few miles of bumpy roads.

If your clients aren't careful to attend to their finances, they could wind up in a major credit hole with no easy way out. Good luck financing a home, car, or business investment with a tarnished credit history — your client could face either exorbitant interest rates or a lack of willing lenders.

As a credit management adviser, I've seen too many clients destroy their credit scores by missing payments, whether out of spite, neglect, or ignorance. Consider advising your clients to follow these steps during and after a divorce to keep them on the path to upstanding credit.

During a Divorce

Understand the Limits of a Divorce Decree

Responsibility for shared debts is split up via a divorce decree. Perhaps your client will have to cover the car loan, while the ex has to pay the mortgage. Make sure your client understands the limitations of such an agreement: It does not change the terms of the original loan or the rights of the lender.

Any joint accounts or shared debts — from credit cards to mortgages to auto loans — are not automatically dissolved by a divorce. Even if the court stipulates that your client isn't responsible for the mortgage, if he or she co-signed the loan, the lender can still legally demand payments from either party. And if they fail to pay? That's a black mark on both of their credit histories.

In fact, if your clients live in a "community property" state, lenders can even come after them for debts that aren't in their name at all. In such states, debts incurred during the marriage that benefit the marital union may be the responsibility of either party.

Pull a Credit Report

Once divorce proceedings have begun, advise your clients to pull their individual credit report. Federal law gives consumers the right to receive three free reports a year (one from each of the three major credit bureaus) through AnnualCreditReport.com. A personal credit report provides a complete picture of your clients' obligations, helping them budget both joint and individual payments going forward. It's imperative that your client monitor his or her credit rating throughout the divorce process — without a starting figure, you won't be able to understand how it's being impacted.

Eliminate Jointly Held Debt

A divorce does not automatically eliminate or separate shared debts. It's not difficult to imagine how jointly held accounts can cause problems: One party refuses to pay, another racks up debt out of financial distress, neither side communicates with the other. It all adds up to major credit damage.

You and your client should evaluate closing, consolidating, or refinancing all joint accounts and co-signed loans as quickly as possible. As long as the accounts are open, the reporting agencies can include the ex-spouse's history when calculating your client's creditworthiness. Once the debt is divided, move the balance into separate accounts and close the joint account.

Manage Larger Loans

In all likelihood, your client won't be able to refinance a mortgage or large loan on short notice. For debts that can't be immediately separated, the exes will have to work together amicably to avoid a credit catastrophe.

If your client is stuck in this situation, make sure he or she treads carefully. Due to "double reporting," a late payment from either party will appear on both of their credit reports. It's nearly impossible to re- move such stains from the records, and your client and his or her ex- spouse will have to wait seven to 10 years

Photo by gettyimages.com/fotopoly

for them to disappear naturally. Too often, divorce decrees are finalized without an in-depth forecast of the spouses' post-divorce credit profiles. Your clients may be compelled to refinance an ex-spouse out of a mortgage, only to realize that the parties can't qualify to do so after separating incomes and joint credit accounts. Have a professional verify your client's ability to refinance before agreeing upon a decree.

Preserve Credit History

If your client had little or no credit before the marriage, removing him or her from a joint account may result in the loss of vital credit history. Ensure that some of the debt is transferred into your client's name and paid down. If possible, it may be best to pay off the joint account together, and then close it.

After Divorce

Changed Last Names

Many women return to their maiden name after a divorce. If your clients wish to do so, advise them to legally change their name before applying for new accounts; this avoids confusion and clerical errors down the road. Of course, a name change does nothing to affect a client's credit rating: Credit scores are generally tied to Social Security number and all legal names are listed on a report.

Build Credit Post-Divorce

Your client should continue to pull his or her credit reports regularly after a divorce to confirm that all joint accounts are closed. Staying on top of credit reports also prevent identity fraud and can help your client catch any forgotten obligations.

To continue to build strong credit, your client should open a personal credit card and consistently make payments on time — this is the key to solidifying a strong standing. If re- covering credit quickly is a priority, keeping balances below 10 percent of the credit limit will result in faster gains.

Pay Down Joint Accounts

Unfortunately, many clients may not be able to close all jointly held accounts, putting them in a pre- carious position. If their ex-spouses aren't making the necessary payments, your clients can preserve their credit by paying down those debts themselves — even if the courts absolved them of any responsibility.

In some situations, it's smarter to make the payment in the first place and then seek reimbursement from the ex-spouse, rather than taking the hit of repeated missed payments on the credit report. If the ex-spouse successfully files for bankruptcy, your client may be solely on the line for any shared debt. Even if the divorce agreement held your client harmless for such debts, it's best to pay them first and seek any possible damages later.

Protect Against Identity Theft

It's not pretty, but many spurned spouses have committed identity theft against their former partners. They are in the unique position of being equipped with their ex- spouse's Social Security number and personal information, and there's almost no limit to the damage they can inflict. In fact, a 2005 survey by the Better Business Bureau found that 50 percent of identity thieves were close contacts of their victims.

To guard your clients against such dangers, encourage them to sign up for a credit monitoring service to alert them of any unusual activity. While monitoring will catch fraud early on, it cannot prevent it; credit blocking actually stops fraud by putting an impenetrable hold on a client's account. The block is tem- porarily lifted when the client needs to access new credit. Recurring pay- ments and credit card use are not affected.

Conclusion

Divorces are stressful, hectic, and painful. Beyond the emotional strain, the process can often prove to be a fiscal nightmare. Unfortunately, maintaining good credit through a divorce is a challenge that many recognize too late. By understanding the common pitfalls and knowing how to prevent them, you can help your clients through a divorce without compromising their good credit. *FLR*

Anthony Davenport knows the ins and outs of the credit industry. His firm helps manage and protect the credit and identities of some of the highest profile entertainers, professional athletes and ultra-wealthy individuals in America. He can be reached at Regal Credit Management, 1350 Avenue of the Americas, 2nd Floor, New York, NY 10019, or anthonyd@regalcredit.com.

Basic Title Examination for Family Lawyers

By Tracy Rhodes

As family lawyers, we wear many hats in our relationships with our clients: lawyer, counselor, therapist, friend, and reality check specialist. We also wear many different legal hats as the divorce practice requires working knowledge of other areas of the law. Divorce overlaps with criminal law, business law, finance, psychology, and real estate. Every divorce attorney needs to be able to accurately advise her client on basic real estate issues and make sure that the eventual divorce settlement appropriately reflects the parties' intentions, helps the parties **move on**, and protects the lawyer from any future malpractice claims (always important!).

The first step is evaluating the real property in a divorce is to determine who **owns** what and who **owes** what. The following are **unreliable** sources of this information:

1. The Client
2. County tax records
3. Opposing counsel

The best practice to determine who owns what real estate is to conduct a basic title search. (Note: The instructions that follow are not sufficient for a title insurance policy or to certify title for a closing, but it will provide a basic overview of how to research real estate title for divorce cases.) Upon ascertaining from the Client what real property is available for division (marital residence, business property, investment real estate), you should then locate the "vesting deed" for the Client's property. For divorce lawyers, this is the deed that shows when the Client or opposing party originally got the property, and this may be before or during the marriage.

For explanation purposes, I will use my own home as an example. My home is in Marietta and is located at 525 Hickory Drive. Public tax records are a good first starting point. First, go to the county tax assessor's website. Simply put "COBB COUNTY TAX ASSESSOR" in your Google search. Once you locate the Assessor's website, you can easily find a search option that will enable you to look up property by address, name, parcel number, or map search. My search pulls up this image:

You can then click on this record and find a host of information, but remember, tax assessor records are not necessarily legally reliable. They may not accurately reflect which party actually owns the property. Within the tax assessor's record you will usually find much the following (not necessarily accurate) information:

- Owner names
- Dates of sales and transfers with deed book and page numbers
- Valuation for tax assessment purposes (not a reliable indicator of actual property value)
- Lot details such as size
- Building details including square footage, style of building, floor plan
- Link to the property on the county tax map
- Photos of the property

Save a copy of this information to your client file, so it will be readily accessible in future.

The tax assessor's site has given a good bit of information about my house. We can tell from it's records that my home sold or transferred in 1998 for $141,000 , in 2002 for $241,000 , in 2006 for $291,000 , and finally in 2012 for $1.

At this point, it's helpful to know that my husband's name is Knox Withers and that we married in May 2007. Therefore, the "vesting deed" we're going to be interested in is the deed reflecting the July 2006 sale from "Plaehn Helen" to "Withers C Kn." This is the deed reflecting where my husband bought this home prior to our marriage.

Having located what we think is probably the vesting deed for the property in this marriage, the next step is to get a copy of this actual deed. While some counties make deeds available online for free, many do not. The Georgia Superior Court Clerks' Cooperative Authority makes these documents available for approximately the last 30 years (sometimes more) and offers a subscription service. See www.gsccca.org.

Because the tax assessor's website has given a deed book (#14362) and page number (#3771) for the July 2006 sale, we can locate the deed at the real estate recording office. In this case, the tax record is correct on this point. This book and page reflect a warranty deed from "Helen Hughes Plaehn and Timothy H. Plaehn" to "C. Knox Withers." However, the tax assessor record is inaccurate on the date of sale. While the tax record reflects a July 13, 2006 sale date, the deed is actually dated July 12, 2006 and recorded July 26, 2006. Again, tax records are very useful but not necessarily reliable. It is a best practice to find the source documents.

This deed also gives us another useful bit of information for the divorce attorney. All deeds include a stamp reflecting the Real Estate Transfer tax. The real estate transfer tax is 0.1 percent of the purchase price. This 2006 deed shows a real estate transfer tax of $291 . Therefore, the purchase price for this property was $291,000 .

Return to: Akin & Tate, PC
Post Office Box 878
Cartersville, Georgia 30120

GEORGIA, BARTOW COUNTY

LIMITED WARRANTY DEED

This indenture made and entered into this 12th day of July, 2006, between HELEN HUGHES PLAEHN and TIMOTHY H. PLAEHN, as party of the first part, hereinafter called Grantor and C. KNOX WITHERS, as party of the second part, hereinafter called Grantee (the words "Grantor" and "Grantee" to include their respective heirs, successors and assigns where the context requires or permits).

In summary, from this deed we learn the following important divorce facts:

- This property was acquired prior to the parties marriage in 2007.
- The premarital value was $291,000 .

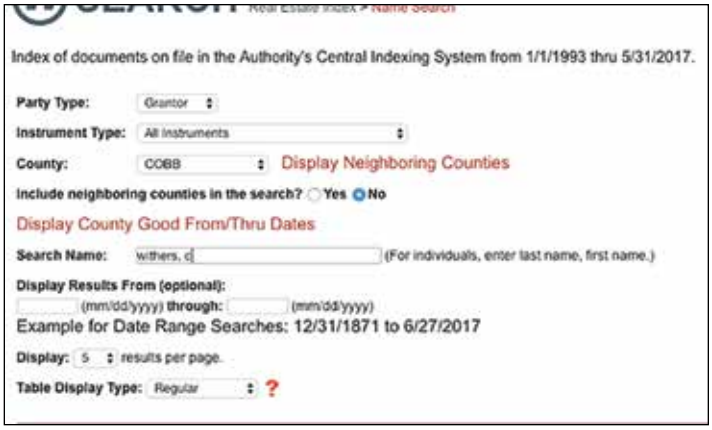
The next step in your divorce title examination then is to "come forward" from this deed and determine if there have been other transfers or encumbrances to the property. "C. Knox Withers" is the "Grantee" in this vesting deed, meaning that he "received" or was "granted" the property interest from the deed. What we now want to know is what he "granted" or "gave" of his property interest. In other words, was he ever the "Grantor" for this property? Your search then would search for all transactions using the "Grantor" real property index.[1]

This search will retrieve all deeds from "Withers, C" in Cobb County. In completing this search, we find a total of six transactions for "Withers, C. Knox" in Cobb County. These include:

- Two 2006 security deeds reflecting first and second purchase money mortgages for the home
    - Both of these deeds were eventually "cancelled," meaning that the underlying promissory note was paid.
- A quitclaim deed in August 2012 to Tracy Rhodes (Wife) (remember the Tax Assessor record showing a 2012 $1 transfer?)
- A new 2013 security deed

For the divorce attorney, we learn the following relevant facts then:

1. Husband made a possible gift to the marriage of his non-marital interest by the quitclaim deed to Wife (me) in 2012.
2. The first two security deeds are cancelled, so the 2006 promissory note has been satisfied.
3. The current debt on the home is reflected in the 2013 security deed.



Index of documents on file in the Authority's Central Indexing System from 1/1/1993 thru 5/31/2017.

Party Type: Grantor
Instrument Type: All Instruments
County: COBB Display Neighboring Counties
Include neighboring counties in the search? Yes No
Display County Good From/Thru Dates
Search Name: withers, c (For individuals, enter last name, first name.)
Display Results From (optional): (mm/dd/yyyy) through: (mm/dd/yyyy)
Example for Date Range Searches: 12/31/1871 to 6/27/2017
Display: 5 results per page.
Table Display Type: Regular ?

Finally, to conclude this divorce title examination, the best practice would to check whether the Wife made any transfers of her property interest after receiving her undivided, one-half interest in the marital property in 2012. A grantor index search of my name would reflect only my conveyance (with C. Knox Withers) of a security interest in the property as shown in the 2013 security deed. One should check the lien records under both names to see if there are any other "clouds" on the title to this property to be resolved in the divorce.

Having conducted a basic, cursory title examination of the marital property, the divorce lawyer must learn if Husband claims any non-marital interest in the property, the current value of the property, and the current indebtedness on the property. The parties' settlement agreement or the final judgment and decree will also need to divest one party of his/her title to the property; one party will have to execute a quitclaim deed to the other. The process of conducting this title examination is a bit cumbersome, but it is essential to good preparation of a divorce case for mediation or trial. *FLR*

Tracy Rhodes owns Rhodes Law Firm with offices in Marietta and Atlanta. She specializes in contested divorce and real estate litigation, with a focus on representing clients with real estate disputes arising out of their prior divorce or family relationship. Reach out to Tracy at tracy@rhodeslaw.com or 770-590-1529.

Endnotes

1 All real property transactions in a county are indexed by the giving "Grantor" and the receiving "Grantee" parties.

36th Annual Family Law Institute Call for Sponsors

The Family Law Section is extremely excited to announce the 36th Annual Family Law Institute! Our always excellent and educational program will provide family law practitioners and judges in attendance with hands-on information, from practice pointers and the latest trends to oral argument before the Court of Appeals of Georgia, and everything in between over the seminar's three days.

This year's Institute returns to Georgia and will occur at the Jekyll Island Convention Center. The 2018 Institute will be held over Memorial Day weekend, from May 24-26, 2018.

We anticipate that the attendee list will continue to grow as it has each year. This year's sponsorship opportunities begin at $250 and increase incrementally up to $7,500.

We have included a list of sponsors as of Oct. 16, and it would be easy to add your name to the list as a firm that supports the practice of Family Law in Georgia!

Simply contact Karine P. Burney at kburney@ksfamilylaw.com and ask for a sponsorship package. *FLR*

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**as of Oct. 16, 2016*

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Richard Tunkle

Family Law Institute Reception Highlights

Caselaw Update

By Vic Valmus

Appellate Procedure

Voyles v. Voyles, S17A0970 (April 17, 2017)

The parties were divorced in February of 2015 and the mother was awarded primary physical custody of the party's child. In December 2015, the husband filed a petition holding the wife in contempt of portions of the parenting plan and sought to be named the primary physical custodian. The wife filed her own petition for contempt and sought to modify the parenting plan. The husband answered with a counterclaim, again requesting a modification of custody. The two cases were consolidated into a joint hearing at which the husband was not present. The trial court entered a joint order on August 2, 2016 granting the wife's motion to dismiss the husband's complaint and counterclaim and granted her motion to find the husband in contempt and modified various aspects of the parenting plan. Acting pro se, the husband filed a motion to set aside the August 2nd order and sought a new hearing on the grounds that he was unaware of the hearing date and he had not received proper notice. After conducting a hearing, the court denied the husband's motion to set aside. The husband then filed the notice of direct appeal to the court of appeals seeking to review the October 16 order denying his motion to set aside. Court of appeals transferred the case to the Supreme court.

Generally, appeals from orders entered in domestic relations cases must be pursued by discretionary application pursuant to O.C.G.A. § 5-6-35(a)(2). A direct appeal is proper under O.C.G. A § 5-6-34(a) (11) from judgements or orders in child custody cases that award, refuse to change, or modify child custody, or orders that hold or decline to hold persons in contempt of child custody orders. Direct appeals are from the types of orders specified in the statute that are entered in custody cases but not from orders related to child custody issues that are entered in divorce cases. Even if the appeal arises from a type of order specified in 5-6-34(a) (11) and that order was issued in a child custody case, this court has looked to the issues raised on appeal in determining whether the party was entitled to a direct appeal. Previously, this court has treated visitation as an aspect of child custody for the purposes of the appellate procedure. In addition, this court has granted discretionary application where the case started as a child custody modification action, but child support was the only issued raised on appeal.

For the clarity of the bench and bar, this court reiterates that" the issue raised on appeal" rule applies to appeals from orders or judgements in child custody cases. This means that the proper appellate procedure to employ depends on the issues involved in the appeal even if the order or judgement being challenged on appeal is a type listed in 5-6-34(a) (11) and was entered in a child custody case. Here, the husband has not directly challenged on appeal the court ruling refusing to change custody. This is an appeal from an order denying a motion to set aside the trial courts order on the grounds of inadequate notice of a hearing. Therefore, custody is not an issue on the appeal and the husband failed to follow the discretionary application procedures as set out in 5-6-35 and thereby his appeal is dismissed.

Attorney's Fees

Merrill v. Lee, S17A0630 (April 17, 2017)

The parties were divorced in 2005. In 2015, the husband filed a petition for downward modification of child support asserting he was unable to pay the amount required by the agreement due to his health issues, his declining business and his obligation to support his new wife and three children. Later, wife's attorney sent a letter to the husband's attorney stating the modification action was barred by paragraph 5C of the settlement agreement. He warned that if the husband went forward she would seek attorney's fees. Paragraph 5C states, in pertinent part, that the husband specifically waives his statutory right to modify his monthly child support obligation below the amount set forth in the agreement. The husband did not withdraw his modification action, so the wife filed a motion to dismiss. The trial court converted the motion to dismiss into a motion of summary judgement and in reviewing the settlement agreement, granted a summary judgement to the wife. Shortly after, the wife filed a motion seeking attorney's fees under paragraph 20A of the settlement agreement for which she attached an affidavit from her attorney detailing $49,610.59 in fees. The court, without holding a hearing, summarily denied the wife's motion for attorney's fees. The husband's appeal was dismissed and this court granted the wife's application of appeal for which the Supreme Court reverses and remands.

The wife contends the trial court erred in refusing to enforce paragraph 20A of the settlement agreement which states, in a pertinent part, that if either party files an action requesting relief against the other in connection with the settlement agreement, which if relief is later denied to the moving party by the court, the moving party shall pay the reasonable attorney's fees and expense of litigation of the defending party in connection with defending the action, including all expenses incurred in support of defense of the litigation. Husband's petition for downward modification of child support was a request for relief. The husband argues that enforcement of paragraph 20A would be contrary to public policy, but there is no public policy against contracting the recovery of attorney's fees. Therefore, the trial court erred and was without authority to alter the fee agreement and thus nullify important provisions of the contract between the wife and the husband.

Attorney's Fees/Proffer

Landry v. Walsh, A17A0449, A17A0450 (May 25, 2017)

The party's 2011 divorce decree awarded joint legal custody of their two minor children to Landry (mother). In March 2014, Walsh (father) filed a custody modification and motion for contempt. Over the next year and a half, both parties vigorously contested numerous issues concerning the children's medical and psychiatric care. Following a two-day bench trial, the court granted the father sole custody of the children and directed the mother's visitation be professionally supervised and ordered her to pay the father $4000 in attorney's fees under O.C.G.A. § 19-6-2 (first fee award). Father filed a motion for new trial regarding attorney's fees and also moved for attorney's fees under O.C.G.A § 9-15-14. After the motion for new trial, the trial court awarded the father $50,000 in attorney's fees under O.C.G.A. § 9-15-14 (Second fee award). The mother appeals and the Court of Appeals affirms in part and reverses in part.

The mother contends that the trial court erred when it ruled that her children's psychiatrist joint communications with her and the children are privileged and barred the psychiatrist from testifying as an expert at the trial on that basis. A trial court retains broad discretion in determining whether to admit or exclude evidence. To establish reversible error, parties seeking review of the trial court's ruling excluding testimony must show how the testimony would have benefited the case. To make this showing, party must proffer the excluded testimony to the trial court. Absence of such a proffer, the appellate has no basis in the record to disturb the trial court's ruling. The father moved to exclude the testimony of the psychiatrist and that the communications were privileged. The court heard arguments from both parties on the motion during the custody hearing. When asked why the psychiatrist testimony was important, the mother responded merely that he has extremely pertinent information with regard to the wife's ability to parent. The court granted the father's motion to exclude the testimony. Later in the hearing, the mother asked the court to reconsider excluding the doctor's testimony asserting, without elaboration, that the psychiatrist could speak directly to the children's mental state and what would potentially be in their best interest because he had treated them for approximately two years. Court sustained its earlier ruling. At no point, did the mother seek to proffer the substance of the psychiatrist testimony on any topic. Although the mother briefly listed a handful of categories of reportedly non privileged information the psychiatrist could have provided, such as unidentified information provided by third parties, the dates of treatment and prescribed medications, she has identified neither the substance of any such testimony nor how such testimony would have benefited her case and therefore, absent of proffer, the mother cannot establish prejudice resulting there.

The mother also challenges the trial court's second attorney's fees award under O.C.G.A. § 9-15-14. Here, the trial court's order awarding the father $50,000 in

attorney's fees under O.C.G.A. § 9-15-14 neither contains any findings identifying the conduct underlying the award nor identifies the statutory sub section or sub sections by which the award is premised. Ordinarily, the court would vacate the award and remand the case to the trial court to reconsider the issues in light of the evidence considered. However, the father presented no evidence identifying any specific fees incurred as a result of any specific sanctionable conduct. Although the father's counsel, asserted that he had incurred a total of $115,718.72 in attorney's fees in this action, counsel introduced no evidence supporting either that initial calculation or counsel apparently implied assertion that some unidentified portion of that amount was attributed to sanctionable conduct. Therefore, the father's failure to meet this burden requires us to reverse the second fee award.

Mother lastly challenges the first fee award under O.C.G.A. § 19-6-2. The father argues that the fee award is warranted here under various other statutes and asked for this court to remand for an evidentiary hearing on that basis. Under O.C.G.A. § 19-6-2, after considering the financial circumstances of both parties, the court can award attorney's fees. Therefore, the financial circumstances of both parties are prerequisites to an award. Here, the evidence did not support such an award because there was no evidence as to the party's relative financial circumstances. To the extent that the father may have been entitled to an attorney fee award under another statute, he waived any such claim by failing to bring such a request to the trial court's attention.

Child Support Arrearage/Laches

Wynn v. Craven, S17A0580 (April 17, 2017)

Wynn (mother) and Craven (Father) were divorced in March of 2000. They had one child together. The mother was awarded primary physical custody and the father was to pay child support in the amount equal to 20 percent of his gross weekly income but not less than $100 per week. In May of 2009, the mother's attorney sent the father a letter informing him that he owed $1,500 in child support arrearage based on the mother's understanding that he was to pay $100 per week and the father paid this amount in full. In 2014, the mother, with the assistance of child support services, contacted the father and said he had $3,493 in arrears, an amount calculated again on the understanding that the father is to pay $100 per week and the father paid the requested amount. Later in 2014, the father sought change of custody; in response, the mother filed a motion for contempt claiming the father should have been making child support payments equal to 20 percent of his weekly income and not merely $100 per week and argued the father was $72,146 in arrears. Trial court granted the father's motion for change of custody and denied the mother's motion for contempt based on laches. The trial court concluded that the mother sought and accepted payments of $100 per week for more than a decade and she never sought the production of income records or otherwise exercised reasonable diligence in seeking child support in the amount of 20 percent of the father's gross weekly income. The court then directed applicable child support amount due from the date of entry of the divorce decree until the date of this order shall be calculated at $100 per week. Mother appeals and the Supreme Court reverses.

It is clear from the divorce decree that it required the father to pay more than he did and he concedes that he would be $72,146 in arrears if the divorce decree required him to pay the twenty percent of his gross weekly income in child support. The $100 per week requirement was a floor and only a floor, not a ceiling. It is well established as a child support order is a judgement and entitled to full force and effect and is not subject to retroactive modification. Any modification shall operate prospectively only. The father argues that the doctrine of laches barred the mother's contempt action because her almost fifteen-year delay in asserting her claim was inexcusable and she twice had sought to collect arrears and had the opportunity on those occasions to determine whether the father owed additional support, but instead only asked for $100 per week. Laches may bar belated equitable claims when it would be inequitable to allow a party to enforce his or her obligation rights. Here, the mother is not asserting her right to child support rather she was asserting her child's right to this support. A parent cannot waive a child's right to support. The mother's delay cannot relieve the father of his obligation to pay child support. The court was without authority to modify the clear language of the divorce decree that required the father to pay twenty percent of his gross weekly income which had the effect of forgiving the arrearage that had accrued under the decree. Although equitable principles could not bar the mother's contempt action on remand, the trial court may consider the party's circumstances in determining the timing and manner of the payment of the arrearage.

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Contempt of Dismissed Temporary Order

Lee v. Sherbondy, S17A0558 (April 17, 2017)

In May of 2015, the wife filed a complaint for divorce against the husband. In September of 2015, the court entered a temporary order requiring the husband to pay the wife $800 in child support every month beginning on Oct. 15. The parties failed to appear at the February 2016, hearing date and the court entered an order dismissing the complaint for the wife's failure to appear or to file a motion for judgment on the pleadings in lieu of making an appearance. In April, the wife filed a petition for contempt alleging the husband had willfully failed to pay her the monthly child support due under the temporary order as well as his share of the child's education costs. In response to the contempt petition, the husband alleged his financial position had declined leaving him unable to pay the ordered sums and that the dismissal of the divorce action nullified the court's temporary order and deprived the court of jurisdiction for contempt. In June, the court denied the petition for contempt on the sole ground that the wife cannot file a contempt petition after the case was dismissed. The wife appeals and the Supreme court reverses.

Dismissal of an underlying domestic relations action does not bar the later enforcement allowed by contempt of temporary alimony payments that came due before the dismissal. The application of this rule is even more compelling in a situation such as this where temporary child support is implicated. This is because of the long-standing principle that the right to receive child support belongs to the child and cannot be waived by the custodial parent. Accordingly, this court has held that the claim for arrearages in child support under the temporary order was not waived by the plaintiff's failure to assert a claim at trial. Therefore, the trial court's dismissal of a divorce action did not bar the wife from later seeking to hold the husband in contempt for his alleged failure to pay temporary child support that accrued before the dismissal.

Contempt/Remedies

Sponsler v. Sponsler, S17A0001 (May 30, 2017)

The parties separated in the fall of 2007 and a Final Decree was entered on June 16, 2009. Pursuant to the decree, the wife was supposed to sell or refinance rental property. But due partially to the husband's long-standing refusal to cooperate in any efforts to get the property refinanced or sold, the rental property has been allowed to deteriorate to the point of near worthlessness. On Jan. 14, 2013, the wife filed a contempt claiming the husband failed to satisfy his obligation under the divorce decree. Pursuant to the agreement, the rental property was encumbered by an equity line of credit in the husband's name. The agreement required the Wife shall sell or refinance in her own name on or before March 1, 2009, and Wife shall be exclusively liable for all debts, mortgage payments, repairs, maintenance taxes and insurance for the foregoing property until the wife refinances or sells.

After the initial hearing in November 2013, the court ordered a receiver in order to sell the property. After the receiver found a buyer for the property, the husband refused to cooperate with the sale. The court found that from early March, 2009, the husband had exclusive possession and control over the property. In February, 2009, the wife discovered the property had been damaged and no longer in good marketable condition. The husband refused to participate in any insurance claims and no repairs were made to the property. Trial court found the husband intentionally allowed the rental property to be spoiled and refused to assist with the insurance claim and to timely execute a Quit Claim Deed. The trial court ordered the husband to spend $35,000 to bring the property back to marketable condition and to make payments on the HELOC and taxes equally with the wife until the rental property was sold. The husband appeals and the Supreme Court reverses.

There is ample evidence to support the trial court's conclusion the husband was in contempt, but with regards to the remedies, the trial court went too far. In regard to the repairs, the decree places that responsibility on the wife for all period of time after March 1, 2009. Likewise, the trial court erred when it ruled that each party shall be equally responsible for the HELOC payments and taxes on the property until it is sold. This ongoing obligation is directly contrary to the terms of the decree which places the ongoing responsibility HELOC payments on the wife after March 1, 2009.

Regards to attorney's fees, the court awarded attorney's fees to the wife pursuant to O.C.G.A. § 9-15-14 however, it cannot be determined whether any part of the award flowed from the husband's litigation of the remedies that had been reversed in this order and therefore, attorney's fees are vacated and remanded.

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Deviations

Heintz v. Heintz, S17A0759 (May 15, 2017)

The parties were divorced in 2006 and had one son who is currently a teenager. In 2016, the mother filed a modification action due to her son's behavioral problems and enrolled him in a private military school and requested an increase in child support. The court granted the mother's request and applied a deviation from the presumptive amount of child support for extraordinary educational expenses. Pursuant to O.C.G.A. § 19-6-15(i)(2)(j)(i), the trial court also ordered that the increase of child support payments had to be made until the child becomes 20-years-old. The trial court also adjusted the mother's gross income for a pre-existing child support order. The father appeals and the Supreme Court reverses and remands.

To apply deviation from the presumptive amount of child support, the court must comply with O.C.G.A. § 19-6-15(2)(e) which requires written findings of facts stated reasons the court deviated from the presumptive amount of child support, the amount the child support would have been under this section if the presumptive amount of child support would not have been rebutted and how the court's application of child support guide lines would be unjust or inappropriate. The trial court did make a finding that enrollment in the military academy significantly improved the child's behavior, but made no findings in regards to the two other required factors. In addition, the trial court erred in awarding the deviation amount until the party's son reached the age of twenty. The trial court omitted any requirement that the party's son be enrolled in and attending secondary school to extend support beyond the age of majority. Lastly, the trial court erred in adjusting the mother's gross income because of a pre-existing child order in the absence of such an order actually existing (as required by O.C.G.A. § 19-6-15(f)(5)(z)). Therefore, the trial court's modification of the non-existing order is simply a nullity and must be vacated.

Evidence/Sealing Court Records

Altman v. Altman, S17F0619 (May 15, 2017)

The parties were married in March, 2004 and had two daughters born in 2005 and 2007. Parties separated in December, 2010. The mother accused the father of twice having touched their older daughter inappropriately. DFCS investigated and found the allegations to be unsubstantiated, nevertheless, mother filed three *ex-parte* applications for TPO's against the father which all were dismissed for lack of evidence. February, 2012 the father filed a complaint for a divorce for which the court appointed a psychologist to conduct psychological custody evaluation and temporarily awarded the mother primary custody of the children with the father having restrictive visitation. In May 2013, the custody evaluator submitted a thirty-page report which the trial court sealed from public access. In September 2013, the trial court held a three-day bench trial, but two months later, the court entered an order saying it needed more information. The court then ordered psycho-sexual evaluations and co-parenting therapy and appointed Dr. Hill. After the evaluations and review of the report, in July 2014 the court awarded the father temporary sole custody of the children and the mother has limited supervised visitation. In October 2015, the courts set a final hearing and instructed the parties to appear with the children.

At the final hearing on Nov. 4, 2015, the trial court announced its intention to interview each child in chambers without the parties. The father objected to the court's interviewing the children at all, but agreed if the children were going to be interviewed, it should be done in chambers without parties or counsel present. The father insisted however, that the court reporter be there to create a record. The court agreed to allow a court reporter, but said the transcript of the interviews would be sealed. The father again objected arguing the court cannot base its ruling on information gained during the interviews if the court denied parties and counsel access to the transcript. The court met with each child separately in chambers for about twenty minutes a piece. Shortly after the hearing, the court contacted the court reporter and instructed him to prepare a transcript of the in-chamber interviews for the court's eyes only. The court reporter certified the transcript and delivered it to the court in an envelope labeled "Highly confidential" and "For Judge Barre's eyes only". The parties were not notified, no sealing order was entered and the court's docket did not reflect any filing. On Dec. 31, 2015, the court entered a lengthy final order granting the mother primary physical custody of the children. The father's attorney contacted the court reporter for a copy of the transcript but she could not give the transcript of the final hearing of the in-chamber interviews without authorization from the court. The father filed a timely application for discretionary appeal. After a lengthy delay, the trial court clerk transmitted the record including the transcript of the in-chamber interviews and numerous other sealed items. The Supreme Court reverses and remands.

Courts cannot rely on evidence that was not available to the parties or their counsel. In the court's findings of fact and conclusions of law, the court references his in-chamber interviews with the children. Therefore, it is apparent from this order as well as other comments the court made at the final hearing the court took into account what the children said in chambers. The father and his counsel had no opportunity to review, explain or rebut the information before the court entered its final custody order and even now on appeal, the transcript of the in-chamber interview still has not been available to them. Therefore, the final custody award is vacated and remanded to make a custody determination not based upon evidence which was not available to the parties or counsel.

It was also improper for the trial court to keep the interviewed materials entirely off the record. The sealing of court records is addressed in Uniform Superior Court Rules 21-21.6. Rule 21 says that all court records are public and are to be available for public inspection unless public access is limited by law. Rule 21.1 then states upon motion of a

party or on the trial court's own motion and after hearing, the court may limit access to court files, but access shall not be granted except upon a finding that the harm otherwise resulting to the privacy of the person in interest clearly outweighs the public's interest. It is not enough for the court to simply recite in the sealing order the standard set out in Rule 21.2, rather the court must set forth the findings that explain how the invasion of privacy threatened by the public access to seal the materials differs from the type of privacy invasion that is suffered by all parties in civil suits. Here, trial court did not hold the proper hearing. Also, the court's conclusory findings are insufficient to support a restriction on the public access to court records, much less a restriction access by the parties litigating the case. Therefore, this part of the case is remanded that a hearing held in accordance with Superior Court rules to determine if the record should be sealed.

Fraudulent Transfer

Wallin v. Wallin, A17A0434, (May 18, 2017)

In 1990, Jack Wallin and his wife Linda purchased the property at 317 Beerhead Cove Road (property). In 1994, Jack and Linda conveyed the property to Gene Wallin via warranty deed but executed no promissory note. In 2002, Jack and Linda divorced, and allegedly as a means of satisfying Jack's divorce settlement, Gene executed a promissory note in favor of Linda for $150,000. Gene also executed a security deed in favor of Linda pledging the property as collateral for the $150,000 promissory note, but the deed was never recorded. Thereafter, Cassidy and her husband, Jeremy Wallin (Gene's son) rented the property from Gene but paid rent directly to Linda. Cassidy and Jeremy paid the mortgage, insurance, taxes and made significant improvements to the property under an alleged oral agreement that if they did so, he would deed the property to them. In 2009, Gene reportedly breeched the contract and Cassidy filed suit against him and her soon-to-be ex-husband seeking damages under breach of contract and quantum meruit. The jury awarded Cassidy $276,000 on a quantum meruit claim. On the same day, Gene executed a second security deed in favor of Linda pledging the subject property as collateral for the 2002 promissory note. Shortly after, Cassidy learned of the security deed and filed suit against Gene. After a bench trial, the court found that the conveyance was fraudulent because it was executed to defeat and hinder Cassidy's ability to collect her judgment. Gene, Jeremy and Linda appeal and the court of appeals reverses.

Under the Uniform Fraudulent Transfers Act (UFTC, O.C.G.A. § 18-2-70) states a transfer made or an obligation incurred by a debtor is voidable as to the creditor whether the creditor's claim arouse before or after the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay or defraud any creditor of the debtor. There are several listed factors known as badges of fraud to be considered under the UFTA. Even Gene's testimony acknowledged that the second deed to secure debt was drafted to defeat the ability of the plaintiff to collect the judgement of $276,000. However, under Georgia Law, satisfaction of a judgement authorized a levy only upon property which a judgment debtor owns. Therefore, the 2002 unrecorded security deed pledging the subject property as collateral for the debt Gene owed to Linda, could not characterize Gene's ownership interest in the property as an asset. Even though the 2002 security deed was not recorded, it is nevertheless a valid lien on property as far as Cassidy's judgement is concerned. An unrecorded deed does not have priority over a subsequent deed to a bonafide purchaser for value without notice. The holder of a prior unrecorded security deed has priority over a subsequent judgement lien creditor. Despite not being recorded, the 2002 security deed executed in favor of Linda, pledging the property as collateral for the $150,000 promissory note, gave Linda, as one of Gene's creditors, priority over Cassidy's judgement such that the property could not be characterized as Gene's "asset" under the UFTA.

Prenup/Attorney Fees

Vakharwala v. Vakharwala, S17F0101 (May 1, 2017)

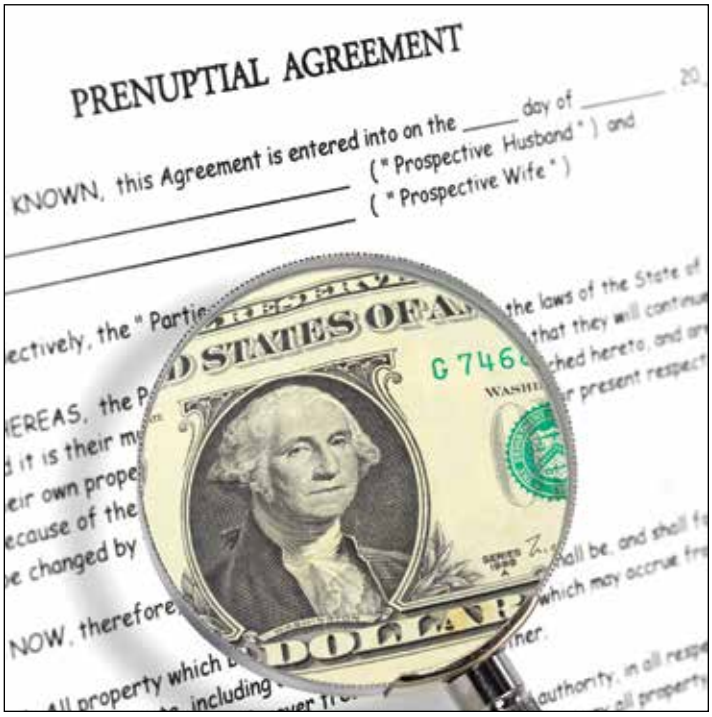
Prior to the parties' marriage, they executed a prenuptial agreement. They married in 2012 and the husband adopted the wife's child. The husband filed for a divorce in 2014 and on Sept. 23, 2015, a final decree was entered which reserved the issue of legal fees. Numerous disputes arose during pendency of the matter with respect to child custody and several experts had been appointed. In addition, the trial court entered orders requiring the husband to pay a total of $24,000 in temporary support before the temporary support was suspended in a response to the husband's motion to enforce a prenuptial agreement. The trial court also ordered the husband to pay directly to wife's counsel a total of $25,000 for temporary attorney's fees. After the final decree was granted the wife requested attorney's fees which the court awarded $98,385 pursuant to 9-15-14(b) as well as the award in the amount $60,000 pursuant to § 19-6-2. The husband appeals and the Supreme Court confirms in part and reverses and remands in part.

The party's prenuptial agreement stated that neither party shall seek or obtain any form of alimony or support from the other. At the hearing, the wife conceded the agreement was binding and enforceable and the trial court also terminated its previous temporary alimony order requiring the husband to pay the wife monthly sums for temporary alimony. On appeal, the husband challenges the award of attorney's fees for the wife and further asserts that even if attorney's fees were properly awarded, the trial court erred in failing to offset the final attorney fees awarded in the amounts he had previously paid as temporary support in attorney's fees. Here, the wife sought attorney's fees under § 9-15-14(b) and § 19-6-2. The husband engaged in numerous acts of improper conduct throughout the litigation that were interposed for delay and harassment and represented a blatant abuse of the discovery process. The husband stated on the record that he would spend whatever it takes to win and his income

and other resources greatly exceeded those of the wife. And therefore, the wife's award of $98,385 was proper and that portion of the attorney's fees is affirmed.

The trial court also awarded the wife $60,000 in attorney's fees pursuant to § 19-6-2. The conduct of a party in a divorce proceeding does not provide a basis for awarding attorney's fees pursuant to § 19-6-2. §19-6-2 authorizes an award of attorney's fees in an action for alimony, divorce and alimony or contempt of court arising out of such cases. Attorney's fees are awarded to a spouse pursuant to § 19-6-2 for the purposes of enabling that spouse to contest the issues in an action covered by the statute, and are considered to be a part of alimony. Here, alimony is not an issue in the divorce action since a trial court deemed a prenuptial agreement to be enforceable. Therefore, the wife was barred from recovering any claims for alimony and was also barred from attaining the award of attorney's fees under § 19-6-2.

The husband also asserts the trial court erred in failing to offset the fees awarded to the wife in the amount he previously paid as temporary support and attorney's fees. The fees awarded pursuant to 9-15-14(b) are unrelated to alimony and are not subject to offsets for the amount the husband paid for temporary support and attorney's fees. In addition, this opinion reverses and vacates the portion of the trial court's order granting attorney's fees pursuant to § 19-6-2, and the assertion that the award should be reduced by the sums is made moot. In the husband's motion to enforce a prenuptial agreement, the husband sought to have the agreement enforced in the final decree and did not seek the return of any sums paid during the pendency of the action for temporary support and attorney's fees. Even to the extent his appellate argument can be interpreted as asserting a trial court error by failing to credit or return such payment to him or by awarding such payments in the first place, that argument was waived.



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Significant Change of Condition

Odum v Russell, A17A0477 (June 20, 2017)

The parties divorced in 2008 and pursuant to the original divorce decree, the parties were granted alternating week to week custody with Odum (father) having final decision-making authority over education and Russell (mother) having final decision making over health-related issues and giving both parents joint authority over extracurricular activities. In 2014, the father filed a motion to modify custody and child support and a motion for contempt. Mother filed an answer and a counterclaim that she should be given final decision-making authority on all matters and that summer custody should be modified. After the hearing, the court found no material change in conditions that would authorize a change in custody or reduction in the mother's parenting time. Trial court found however, parenting issues in the original divorce agreement that needed adjusting for the best interest of the child.

Even though the court found no material change in condition, the trial court modified several parenting provisions of the original divorce decree, including changing final decision-making authority over education from the father to the mother, changing the decision making about extracurricular activities from joint to the father and deleting a week of the father's custodial time during the summer. Trial court did find a substantial increase in the father's income and adopted the mother's child support worksheet. The court awarded $1,000 pursuant to O.C.G.A. § 19-6-2 for defense of the contempt and modification of child support and awarded the mother fees pursuant to O.C.G.A.§ 19-9-3 in the amount of $44,770.37. The father appeals and the Court of Appeals affirms in part and reverses in part.

Father first argues that the trial court erred in modifying the child custody because there was no material change in circumstances. Because the trial court expressly found there has been no material change in circumstances, the trial court was not authorized to modify the original custody order including which parent would have final authority of certain decisions relating to the child. The court notes that a trial court is expressly authorized to modify visitation rights even on its own motion during a contempt preceding, but removing the father's extra week of custody during the summer was a modification of joint physical custody arraignment and not merely visitation.

The father also argues trial court error in awarding attorney's fees pursuant to O.C.G.A. § 19-6-2 and § 19-9-3. The $1,000 award to the mother under § 19-6-2 was not based solely on the child support modification, but also on the contempt allegations that arouse out of the original divorce decree and thus, the trial court's award was not a use of discretion. However, it is unclear to what extent the trial court's erroneous decision to modify the decision-making authority of the parents and to modify summer custody affected the award of the fees under §19-9-3. Therefore, that award is vacated and remanded.

Trust

Gibson v. Gibson, et al, S17F0593 (June 5, 2017)

The parties were married in 1993 and had one child born in 2004. Even though the wife had threatened to divorce the husband many times, he never took the threat seriously until she actually filed for divorce in 2014. In March of 2008, the husband created an Irrevocable Trust, the Gibson family trust (GF Trust); naming his mother, Julia Gibson, as trustee and the wife, their daughter and their daughter's descendants as beneficiaries. The terms of the trust gave discretion to the trustee to distribute income and principal to the wife and their daughter during the husband's life and stripped his wife of her rights and interest in the trust if the husband and wife divorce or legally separate. In July 2012, the husband created a second Irrevocable Trust (SLG Trust) again naming his mother as trustee and multiple beneficiaries. Between 2010 and 2013, the husband placed approximately 3.2 million dollars' worth of assets into the GF and SLG Trusts. The husband was neither a trustee nor beneficiary of the trust. When the wife filed for divorce, she raised a conversion claim against the husband and fraudulent transfer and claims against the husband and the trustee of the trust. Wife claimed the conveyances of the trust were fraudulent because they were made with the intent to hinder, delay or defraud the wife in the event of a divorce. After a six day bench trial, the husband testified that the GF trust was set up for liability protection purposes and for the benefit of their daughter and that he and the wife never discussed any financial matters. The wife did not know about the trust or her beneficiary status.

The trial court found 2.2 million dollars in assets as marital property subject to equitable division and involuntarily dismissed the wife's fraudulent transfer claims. The court found the parties did not have a confidential relationship because they did not maintain joint financial accounts or share financial information. The court also found the husband did not fund the trust at the time he knew the wife was contemplating divorce or with the actual intent to defraud her or to conceal the transfers from the wife. The court likewise found that although two Charles Schwab accounts reportedly in the trust listed the husband as the trustee, this was due to a brokerage firms administrative error and the husband demonstrated an intent to convey the assets to the trust. The wife appeals and the Supreme Court affirms in part and reverses in part.

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The wife argues trial court erred in failing to classify the trust assets as martial assets. Here, the husband is not the beneficiary or the trustee of the trust. Therefore, for equitable division purposes, the transfers of property to the trust were equivalent to transfers to a third party and only subject to equitable division if the wife can show that the transfers were fraudulent. The wife relies on the confidential relationship between spouses and that the husband's failure to tell her about the transfers made those fraudulent as a matter of law. Spouses generally enjoy a confidential relationship that entitles one to trust the other. But, that doesn't mean that a person must gain the consent or even inform his or her spouse before undertaking every financial transaction. Under the Georgia Uniform Transfers Act (UFTC, O.C.G. A. § 18-2-74) transfers made or obligations incurred by the debtor are fraudulent as to the creditor whether the creditor's claim arose before or after the transfer was made or the obligation was incurred if the debtor made a transfer or incurred the obligation with the actual intent to hinder, delay or defraud any creditor of the debtor. The trial court properly cited § 18-2-74(B) regarding "badges of fraud" and the court made factual findings to the effect that several of these factors weighed against concluding that the husband intended to defraud the wife.

The wife also argues that the trial court erred by finding the husband's intent to transfer 1.3 million dollars held in accounts titled in the husband's name as trustee did not satisfy the requirements that a transfer of property to a trust shall require a transfer of legal title to the trustee. The two Charles Schwab accounts reportedly held in trust bore the name of the husband as trustee. The trial court found it sufficient the husband intended to title these accounts in the trust's names and trial court noted both Charles Schwab accounts listed the Federal Tax Identification numbers to the trust, and not the husband's social security number, and the naming of the trustee was a mere administrative task that could be accomplished by the successor trustee. However, legal title must be transferred to the trustee; therefore, the trial courts attempt to salvage the incomplete transfer of the assets in the Schwab accounts is unavailing. Once the trial proceedings began, it was too late for the husband to put assets in trust and thereby exempt them from equitable division. The wife's initiation of the proceeding in the July, 2014 divorce case subjected the parties to a standing order. *FLR*

Victor Valmus was a partner at Moore, Ingram, Johnson & Steele for 8 years before leaving in February 2017 to start his own practice which consisted of a primary focus on domestic relation matters. He graduated from Kennesaw State University, sum cum laude in 1998 with a degree in Political Science, and graduated from the University of Georgia School of law, cum laude in 2001. He currently is an instructor at Kennesaw State University teaching Civil Litigation.

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