

The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia – Spring 2014



We Are Family...

Diversity and Inclusion Membership Survey

Editors' Corner

by Marvin Solomiany and Randall M. Kessler
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We hope you truly enjoy this very special edition of the Family Law Review. We are in many ways a big family, and it is nice to celebrate the Tuggle family and their contribution to family law in Georgia. With Jonathan at the helm of our section, the section continues to do important work. John Collar, Regina Quick and others' help in the legislature, the committee chairs and of course, Rebecca Crumrine's work on the Institute have made this yet another successful year for our section. Please peruse the stories

and the case law update in this issue, and as always, let us know your thoughts and suggestions for future articles. We look forward to seeing everyone in Amelia Island this Memorial Day weekend. *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

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The opinions expressed within *The Family Law Review* are those of the authors and do not necessarily reflect the opinions of the State Bar of Georgia, the Family Law Section, the Section's executive committee or the editor of *The Family Law Review*.

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Chair's Comments

by Jonathan Tuggle
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As memories of Snowmegeddon give way to the promise of spring, we can look forward to an exciting calendar of events for the Section. First and foremost is the Family Law Institute. This year we will be returning to the Ritz-Carlton, Amelia

Island, Fla., on May 22-24. Rebecca Crumrine Rieder has put together an incredible three day program titled "Love You Live" which will be highlighted by "A View from the Gold Dome and Beyond" session with comments from Georgia Attorney General, Sam Olen, Majority House Speaker, David Ralston, and Minority House Speaker, Stacey Abrams. There will also be judges from 26 counties in attendance. Don't miss this tremendous opportunity to interact with members of the judiciary, the legislature and other section members. If you haven't registered, you may do so at iclega.org. Thank you to all of our sponsors. It is through your valuable contributions that the Section is able to put on such high caliber programs.

Look out for other CLE opportunities following the Institute. This summer, YLD Family Law Committee will be presenting a seminar on Aug. 20.

For those of you looking for entry or medium level programs, plan on attending the Section's annual Nuts & Bolts of Family Law seminar which will be held August 22, 2014 in Savannah and Oct. 3, in Atlanta. Our new Section Secretary, Marvin Solomiany, is already working on an informative and entertaining agenda. Be on the lookout as well for our continued "Lunch 'n Learn" webinar series.

Congratulations to Marvin and our other 2014-2015 officers elected at the Annual Meeting on Jan. 9, 2014: Rebecca Crumrine Rieder was elected to Chair and Regina Quick was elected to Vice-Chair. They will assume their new positions on July 1, 2014.

We had 100+ in attendance at the Annual Meeting and the "View from the Bench" CLE. The interactive program was as entertaining as it was informative. Ivory Brown also reported on the results of our diversity survey. From the almost 500 responses submitted we obtained valuable insight into the demographics of our Section allowing us to better serve our Section members. For those of you who were unable to attend, we had a great turnout for our Section mixer with the Fiduciary Law Section on March 12, 2014 at Seven Lamps in Buckhead. It was great networking opportunity with fun had by all. We will be having another mixer later this year. Be sure to attend.

I am proud to report that our fundraising efforts in support of Atlanta Legal Aid's Capital Campaign are well underway. On April 17, the Family Law Section hosted a reception for Atlanta Legal Aid at its aging and dilapidated

headquarters at 151 Spring Street to raise money to finance the purchase and renovation of its new headquarters in a historic building just blocks away at 54 Ellis Street. Its new home will provide adequate space to grow and to meet the ever expanding needs of its low income clients. As we all know, Atlanta Legal Aid is an invaluable resource for family law litigants throughout the state. Providing legal services to indigent people in Clayton, Cobb, DeKalb, Fulton and Gwinnett counties, the Atlanta Legal Aid Society has evolved into one of the best legal aid programs in the country. This Capital Campaign provides a tremendous opportunity for us as a Section and individuals to give back.

Toward that end, the Section has committed to match up to \$15,000 of individual contributions to the Capital Campaign and has set a total fundraising goal of \$50,000. At the reception we raised almost \$10,000 (\$20,000 with the matching funds). A great start but still far short of our goal. Thank you to the following firms and section members who have contributed:

Committee to Continue Besonetta Tipton Lane as Superior Court Judge; Dan Bloom; Jane Barwick; Janet Litt; Jonathan J. Tuggle; Kelly Anne Miles; Kessler & Solomiany; Nancy F. Lawler; Rebecca Crumrine Rieder; Rebecca Hoelting; Robert D. Boyd; Smith & Lake, LLC; Stern and Edlin Family Law, P.C.; Michelle H. Jordan; and, Warner Bates McGough McGinnis & Portnoy

To all other Section members, I urge you to make a contribution in any amount you can toward this important cause. Considering the money raised already by a small group of donors, there is no reason we can't meet our goal if everyone pitches and does their part. All contributions can be directed to me at:

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Boyd Collar Nolen & Tuggle, LLC
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Lastly, as hard as it is to believe, my year as Section Chair has almost come to a close. Before I go, I especially want to thank the members of the executive committee for their tireless efforts on behalf of the Section. I am excited about the great things to come under the new leadership in the Section. My sincere thanks as well to Derrick Stanley and the staff at the State Bar, as well as Steve Harper, Brian Davis and everyone at ICLE. It has been my honor to serve the section for the last eight years and have treasured the opportunity. I look forward to seeing everyone at the beach. **FLR**

Like Father, Like Son: Exploring the Impact of Family Law Attorneys, Joe and Jonathan Tuggle

Joe Tuggle is a “family law icon,” says Attorney John Mayo, of Mayo Gray Eittem. As a testament to his distinguished, 35-year career as a family law attorney, the Family Law Section of the State Bar of Georgia awarded Joe with its annual Professionalism Award in 1999 and later named it in his honor, “The Joseph T. Tuggle Jr. Professionalism Award.”

Astonishingly, Joe spent his entire career at the same law firm, which is known today as McCamy, Phillips, Tuggle & Fordham, and a mere two years after his start at the firm, he was named as a partner. During his tenure in family law, Joe was known for his impeccable honesty and commitment to helping others. He was a very active Rotarian, serving as president and the Georgia coordinator for the Rotarian International Student Exchange Program. Likewise, he was the chair of the Clients’ Security Fund, a fund to which clients can apply for reimbursement when they suffered a financial loss at the hands of a suspended or disbarred attorney. He also volunteered with the Fee Arbitration program. Sadly, Joe passed away in November of 1998, as a result of pancreatic cancer.

Attorney Mayo states: “It was my privilege to know and to be mentored by Joe Tuggle...[h]e was deeply concerned about the plight of divorcing litigants”, and “[i]t is great to see Jonathan carry on as a respected and active member of the family bar.” Attorney Hylton Dupree, of Dupree & Kimbrough, remembers Joe as “tenacious” and a “stickler for ethics...[h]e was a strong advocate of changing the Code of Professional Conduct to make it more user friendly”, says Attorney Dupree. Further, what set him apart from others is that “he showed his clients that he cared...”

Like father, like son, Joe’s namesake, Jonathan Tuggle, is a successful family law attorney in Atlanta, who is a partner with Boyd Collar Nolen & Tuggle, founded in 2009. Jonathan has a resume of leadership and philanthropic contributions similar to his father. Attorney Dupree admits: “I see a lot of his dad in him.” In fact, in his 15-year career as an attorney (the latter twelve of which have been spent in family law), Jonathan founded the Family Law Committee of the Younger Lawyers Division of the Georgia Bar, which annually raises tens of thousands of dollars for abused and neglected adolescents in Atlanta. Additionally, just like his dad, Jonathan is the current Chair of the

Family Law Section, which is the third-largest section of the State Bar. Jonathan is also a frequent lecturer at professional seminars and continuing legal education courses, and has authored numerous articles on a range of domestic relations issues. His accolades include receiving the Ray of Hope Philanthropic Award, as well as being named as one of Georgia Trend Magazine’s “40 Under 40—Georgia’s Best and Brightest” and “Legal Elite”. In short, Jonathan has successfully continued his father’s qualities of honesty, professionalism and commitment in his practice of family law.

The Tuggle men have made invaluable contributions to the Family Law Section of the State Bar and to the legal profession as the whole. Fortunately, through the respected and growing family law practice of Jonathan and the stamp he will undoubtedly continue to make in the world of family law, the legacy of his father, Joe, endures. Nonetheless, as family attorneys, we must frequently reflect on Joe Tuggle’s honesty, professionalism and commitment as we continue to navigate our careers. Our practice is a difficult one for reasons we all know. However, employing the values and qualities Joe embodied will certainly raise the bar of our practice of family law. *FLR*



The Good, The Bad And The Ugly Of Not Filing Responsive Pleadings In A Domestic Relations Case

by Dean Bucci

You don't have to file an answer in a domestic relations case, right?

Not exactly. In fact, failure to do so could cause your client to end up like an unarmed participant in a spaghetti western shootout.

THE GOOD

Under the Civil Practice Act, when an answer is not filed within the time required the case automatically goes into default.¹ However, O.C.G.A. § 19-5-8 provides that in “actions for divorce, alimony, and custody of minor children” there shall be no verdict or judgment by default, and the allegations of the pleadings shall be established by the verified pleadings, by affidavit, by evidentiary hearing, or otherwise, as provided in Code Section 19-5-10.² This prohibition of default judgments is rooted in the recognition that divorce cases involve issues of substantial importance to the fundamental well-being of the parties as well as the state and public interest in the institution of marriage.³

Although O.C.G.A. § 19-5-8 does not mention actions for the establishment or modification of child support, the term “alimony” has been defined to include child support.⁴ Accordingly, the statute prohibits default judgments in child support actions as well.⁵ But beware: an action by the Department of Human Resources to recover public assistance benefits is *not* a child support action but is rather an action to collect a debt which is *not* subject to O.C.G.A. § 19-5-8.⁶

It is therefore proper to allow a respondent to file defensive pleadings late, even months after service.⁷ A defendant may file a late answer and counterclaim at any time before judgment, even without paying court costs.⁸ A defendant may demand a jury trial in an untimely answer.⁹ A defendant can appear at trial and defend the action despite never having filed any answer at all.¹⁰ A defendant filing a late answer, or filing no answer, may fully contest the case, cross examine witnesses, and introduce evidence.¹¹

THE BAD

The fact that a respondent may appear and defend a divorce, alimony, or custody action without

having previously filed an answer does not necessarily place him or her in the same position as the careful respondent who took the time to file responsive pleadings. O.C.G.A. § 9-11-12(h)(1) lists defenses which are waived if not asserted in the initial responsive pleading or in a written motion made at or before the time of pleading. These include lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service.¹²

A respondent in an action for “divorce, alimony, and custody of minor children” as contemplated by O.C.G.A. § 19-5-8 is subject to this rule, and when he or she pleads to the merits without asserting one of these defense, the objection will be considered waived.¹³ On the other hand, if the respondent asserts the objection in his or her answer—even one which is filed late—the objection is preserved.¹⁴

But what if a respondent appears at trial without having filed any responsive pleading and verbally asserts a jurisdictional defense listed in O.C.G.A. § 9-11-12(h)(1) defense?

In *Jones v. Van Horn*, 283 Ga. App. 144 (2006), service was attempted pursuant to O.C.G.A. § 9-11-4(e)(7) “by leaving copies thereof at the defendant’s dwelling house or usual place of abode with some person of suitable age and discretion, . . .” The Respondent filed no responsive



pleadings or motion to dismiss but appeared personally at a temporary hearing and again at the final hearing. When he challenged the sufficiency of service of process (apparently for the first time on appeal), the court held that the objection was waived by the personal appearances. There was no transcript, no mention of whether the issue was raised during the trial, and nothing in the record showing the issue was preserved for appeal.

In *Hudson v. Easterling*, 301 Ga. App. 207 (2009), an ex-wife filed a petition for modification of visitation against her ex-husband, who was never served with process and who filed no responsive pleadings. Although there was no transcript, the court noted that the trial court's order indicated that the respondent appeared at the hearing and that "[n]othing in the record shows that (the respondent) raised the issue of insufficient service of process at that time." The defense was considered waived. The Court's statement that nothing in the record showed that the respondent asserted a service of process defense at trial, though dicta, raises the question of whether it would have made a difference had the respondent done so. However, the express language of O.C.G.A. § 9-11-12(h)(1) states that this defense is in fact waived if not asserted in responsive pleadings or motion as described in the statute.

THE UGLY

Although the failure to file responsive pleadings in divorce, alimony, and custody cases will not result in a default judgment, such failure *will* be deemed a waiver of all notices, including notice of trial and judgment.¹⁵ This means that although a petitioner must still make out his or her case where no answer is filed, this can be done without notice to the respondent, which could potentially produce a result every bit as devastating as an actual default judgment.

This rule has been applied strictly and at times despite seemingly extenuating circumstances.

In *Ellis v. Ellis*¹⁶ a wife acknowledged service of a divorce petition but did not file responsive pleadings. She later retained an attorney who claimed that the husband's attorney agreed to give him notice of the final hearing. The husband, through new counsel, then obtained a final divorce decree without providing notice of the hearing. The wife moved for a new trial based on the alleged promise of notice from the husband's attorney, but the court denied the motion and found that the wife had waived her right to notice by failing to file responsive pleadings.

In *Lucas v. Lucas*¹⁷ a husband acknowledged service of his wife's divorce petition but did not file an answer. Both parties were represented by attorneys. Despite the fact that the attorneys had been engaged in settlement negotiations, the Wife's attorney secured a final judgment without notice to opposing counsel. The husband moved to set the judgment aside due to the lack of notice, but the court denied his motion on the grounds that he had waived notice by not filing an answer. The Supreme Court affirmed despite professionalism concerns noted by dissenting Justices.

Some courts have been willing to find reasons to avoid such harsh results. In *Anderson v. Anderson*¹⁸ it was held that a *pro se* defendant who failed to file responsive pleadings was nevertheless entitled to notice of the final hearing because the trial court told him at a temporary hearing that he would receive that notice. In *Green v. Green*¹⁹ a divorce decree taken without notice was set aside after the court found that the husband's attorney had used "extraordinary efforts" to obtain a judgment in the absence of a *pro se* party whom he knew had moved out of state. In *Melcher v. Melcher* the husband did not file responsive pleadings and the wife obtained a decree without providing him notice. The court set aside that decree because the wife's attorney had led the husband's attorney to believe that settlement negotiations were continuing and that no hearing was imminent.²⁰ This opinion speaks of the trial court's wide discretion to grant a new trial to a respondent that did not receive notice if there is good cause shown.

In conclusion, respondents in domestic relations actions should take their responsibility to file an answer every bit as seriously as the obligation to do so in any other civil action. O.C.G.A. § 19-5-8 provides something of a safety net for the respondent who fails to file an answer or who files late, but this safety net contains some rather large holes. File your answer and file it timely in order to protect your client from waived defenses, waived notice, and a disastrous decree. **FLR**

(Endnotes)

- 1 O.C.G.A. § 9-11-55(a) states in part as follows "(a) When case in default; opening as matter of right; judgment: If in any case an answer has not been filed within the time required by this chapter, the case shall automatically become in default unless the time for filing the answer as been extended as provided by law. The default may be opened as a matter of right by the filing of such defenses within 15 days of default, upon the payment of costs. If the case is still in default after the expiration of the period of 15 days, the plaintiff at any time thereafter shall be entitled to verdict and judgment by default, in open court or in chambers, as if every item and paragraph of the complaint or other original pleading were supported by proper evidence, . . ."
- 2 O.C.G.A. § 19-5-10 provides generally that in non-defended divorce cases the court must determine that the grounds asserted are legal and sustained by proof. This can be accomplished via an evidentiary hearing, verified pleadings, affidavits, or other basis or procedure which the court deems proper.
- 3 *Cohen v. Cohen*, 209 Ga. 459 (1953); *Jolley v. Jolley*, 216 Ga. 51 (1960).
- 4 *Jones v. Jones*, 280 Ga. 712 (2006); *Spurlock v. Dept. of Human Resources*, 286 Ga. 512 (2010).
- 5 See e.g., *Johnson v. Still*, 225 Ga. 222 (1969); *McElroy v. McElroy*, 252 Ga. 553 (1984); *Dept. Human Resources v. Hedgepath*, 204 Ga. App. 755 (1992).
- 6 *Dept. Human Resources v. Hedgepath*, supra.
- 7 *Todd v. Todd*, 231 Ga. 647 (1974).

- 8 *Jolley v. Jolley*, 216 Ga. 51 (1960). But see *Barrett v. Barrett*, 232 Ga. 840 (1974) where a counterclaim for past-due alimony and child support was disallowed because it was filed late under the reasoning that Code Ann. § 30-113 (now O.C.G.A. § 9-5-8) was intended to prevent default, not to allow extra time for a respondent to assert claims.
- 9 *Johnson v. Still*, 225 Ga. 222 (1969.)
- 10 *Brown v. Brown*, 217 Ga. App. 245, 246 (1995).
- 11 *Cohen v. Cohen*, 209 Ga. 459 (1953).
- 12 For an excellent discussion on the need to assert such defenses, see Caroline C. Kresky and Malone W. Allen, “Jurisdictional Defenses –Opportunities and Responsibilities”, *The Family Law Review*, Winter 2013.
- 13 *Black v. Black*, 245 Ga. 281 (1980).
- 14 See, e.g. *Bonner v. Bonner*, 272 Ga. 545 (2000); *Hatch v. Hatch*, 287 Ga. App. 832 (2007).
- 15 But failure to file responsive pleadings does not constitute a waiver of service of pleadings asserting new or additional claims for relief. O.C.G.A. § 9-11-5(a); Also, where a *pro se* respondent files a letter after being served, and it is arguable as to whether that letter constitutes an answer, she is entitled to notice of the challenge to the sufficiency of the answer. *Brown v. Brown*, 217 Ga. App. 245 (1995).
- 16 *Ellis v. Ellis*, 286 Ga. 625 (2010)
- 17 273 Ga. 240 (2000)
- 18 264 Ga. 88 (1994)
- 19 263 Ga. 551 (1993). Although *Green* did not involve a failure to file responsive pleadings, it is instructive on the limits to which an attorney may go in obtaining a judgment without notice to a *pro se* party.
- 20 274 Ga. 711 (2002). In *Melcher*, the wife’s attorney scheduled a final hearing without providing notice to the husband’s attorney for a date which fell within a leave of absence filed by the wife’s attorney. She then sent a letter to the husband’s attorney discussing a settlement offer which was still open without mentioning the scheduled hearing. The Court found that the unusual facts of the case would have led a reasonable person to conclude that no hearing was imminent and that the wife’s attorney created that misunderstanding.

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Dalenberg v. Dalenberg

Attorneys Fees, O.C.G.A. § 19-13-4 (a) (10), Family Violence Petitions
Georgia Court of Appeals, Civil Case (2/27/2014, 3/10/2014) A13A1683

by Margaret Washburn

In this recent case, the Court of Appeals, Judge Billy Ray, reversed the award of attorneys' fees to the wife following the resolution of the parties' motions concerning the future status of a family violence 12-month protective order, holding that the trial court erred in awarding attorneys' fees under O.C.G.A. § 9-15-14 (a) because the husband had both a factual and a legal basis for filing his motion to dismiss or modify the order. No evidence refuted the husband's contention that the restriction on his possession of firearms set forth in the protective order had created an undue burden on his ability to obtain employment as a law enforcement or security officer, and a family violence protective order is a type of continuing judgment that is subject to future modification based on a change in circumstances. Further, the Court held that the trial court erred in awarding attorneys' fees under O.C.G.A. § 19-13-4 (a), as the goal of this statute is to bring about the cessation of acts of family violence, and such an award in this case would not serve that goal.

This case was brought by the Husband, on an application for discretionary review of an order awarding attorney fees pursuant to O.C.G.A. §§ 19-13-4 and 9-15-14 to his ex-wife, in his action to dismiss or modify a family violence 12-month protective order. The Court granted the Husband's application for discretionary appeal. The trial Court's award of attorneys fees was reversed.

The Court found that the Husband, Mr. Dalenberg, had been a White County Sheriff's deputy until his employment was terminated on or about July 22, 2011. Following his termination, Husband retained his P.O.S.T. certification

pending a review by the Georgia Peace Officer Standards and Training Council. Thereafter, the parties were divorced, on or about Oct. 18, 2011. Two weeks later, the Wife filed a family violence petition and obtained an ex parte protective order. The trial court entered a 12-month protective order, finding that the Husband had violated the Family Violence Act and prohibited the Husband from possessing any firearms during said 12-month period.

Approximately six months later, the Husband filed a motion to dismiss or, in the alternative, to modify the 12-month protective order on the grounds that the no-firearms provision had created a substantial hardship on his ability to obtain other employment in law enforcement and security-related fields. The Wife opposed the motion, arguing that a protective order is not subject to modification pursuant to O.C.G.A. § 19-13-4 (c) and that the Husband's motion was barred by res judicata. She also moved to covert the 12-month protective order to a permanent protective order.

The Husband was notified by the GPOSTC, in a letter dated June 6, 2012, that his P.O.S.T. certification would be revoked. On June 7, 2012, the trial court held a brief hearing on the parties' motions concerning the future status of the 12-month protective order. The trial court made some mid-trial statements and the parties announced that they were dismissing their respective motions, and the hearing concluded without the presentation of any evidence and without any ruling by the trial court. The trial court subsequently executed a mutual consent order, wherein the parties dismissed their respective motions. However, the parties agreed that the Wife could file a motion for attorney fees and that any such motion would be determined on briefs without the necessity of a hearing.

On Aug. 8, 2012, the GPOSTC executed a consent order which withheld the revocation of the Husband's P.O.S.T. certification. Thereafter, the Wife filed a motion for attorney fees pursuant to O.C.G.A. §§ 19-13-4 (a) (10) and 9-15-14 (a) and (b), contending that there was a complete absence of any justiciable issue of law or fact with regard to the Husband's motion, and that it lacked substantial justification and was interposed for the purposes of harassment. The trial court awarded the Wife attorney fees in the amount of \$6,172.77.

Pursuant to O.C.G.A. § 9-15-14 (a), the trial court could award attorney fees when a party asserts a claim with such a complete absence of any justiciable issue of law or fact that the



party could not reasonably believe that the court would accept it. Here, the record shows that the Husband had a factual basis for filing his motion. The Husband argued that he had abided by the terms of the protective order, that the purpose of the protective order had been accomplished, that there was no longer any threat of family violence, and that the restrictions in the protective order had created an undue burden on his ability to obtain available employment as a law enforcement or security officer.

The Court of Appeals found that the Husband had a legal basis for the filing of his motion. A family violence protective order is a type of continuing judgment that is subject to future modification by the restrained party based on a change in circumstances, including any undue hardships suffered by the restrained party as a result of the protective order. See *Mandt v. Lovell*, 293 Ga. 807, 810-811 (750 SE2d 134) (2013).

The Court also found that the trial court's conclusion that the Husband pursued his motion "in a clear attempt to re-litigate" the protective order was not supported by the record. The Husband's motion to dismiss or modify the protective order was mostly based on a change in circumstances which, arguably, made the terms of the protective order unjust and there was no evidence presented to the trial court to refute those allegations.

There was no evidentiary basis for the trial court's conclusion that the Husband "knew" that his P.O.S.T. certification would likely be revoked as a result of the prior termination of his employment as a law enforcement officer or that he had misrepresented his ability to return to law enforcement. Further, the Husband was ultimately allowed to retain his P.O.S.T. certification despite the loss of his job. The Court of Appeals noted that the trial court was aware of this fact prior to its ruling on the motion for attorney fees.

The Court of Appeals found the trial court erred in awarding attorney fees pursuant to O.C.G.A. § 9-15-14 (b).

The Husband also contended that the trial court's award of attorney fees pursuant to O.C.G.A. § 19-13-4 (a) (10) was not warranted under the circumstances of this case. The Court of Appeals agreed, finding that the trial court did not specify the basis for its award under this code section. It appears that trial court found that the code section was applicable because the Husband's motion involved a prior family violence protective order.

O.C.G.A. § 19-13-4 (a) (10) permits a trial court, in addressing a family violence petition, to award costs and fees to either party in furtherance of the goal of "bring[ing] about a cessation of acts of family violence." (Punctuation omitted.) *Suarez v. Halbert*, 246 Ga. App. 822, 824-825 (1) (543 SE2d 733) (2000). The Court of Appeals did not find that an award of fees under this code section would serve that goal in this case, and, therefore, reversed the trial court's award of attorney fees pursuant to O.C.G.A. § 19-13-4 (a) (10).

Trial Judge: David E. Barrett, White Superior Court. **FLR**

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Mediating in Good Faith

by Andy Flink

I've often wondered about the differences of opinion that are formed in mediation when it relates to each parties perspective of what defines "mediating in good faith." I begin every session with a review of the guidelines that include the statement that all parties "affirm they have the capacity to conduct good faith negotiations." While everyone nods and agrees to mediate in good faith, does it mean they actually *will*?

Good faith negotiations are defined as the "honest intent to act without taking an unfair advantage over another person or to fulfill a promise to act, even when some legal technicality is not fulfilled." It can also be expressed as the "ability to negotiate abstract and comprehensive terms that encompass a sincere belief or motive without any malice or the desire to defraud others." Yet whether or not someone is conducting themselves "in good faith" in mediation is completely subjective. Even if you felt someone was being thoughtless, insensitive and rude, due to the nature of the process might that simply be their style? I believe that the purpose of good faith negotiations is to get parties embroiled in dispute to cooperatively move towards a mutually agreeable set of terms that ends the conflict and removes them from the court process. We may not resolve all of the issues but certainly it should be our intent to do so.

What are some obvious examples of what we might all consider negotiating in bad faith? Is there ever an issue that cannot be resolved in mediation? I've seen attorney's state that no matter what, a particular item will not get resolved regardless of the offer the other side makes. Recently I saw this happen in a case as it pertained to child support. Certainly the custodial parent (who made this claim) had some idea of what the offer needed to be to resolve the amount. This was not a discovery issue as the case had been lingering for some time. As well they had not disclosed the inability to resolve this in their opening statement. Regardless of how I sought to frame the issue to get creative there was no room for negotiation. Opposing counsel explained that they would have provided any additional information or documents before the session if asked. Since this issue was not disclosed until too late, the non-custodial parent refused to entertain the idea of drafting even a partial agreement and after four hours we had an impasse.

Late in a session one party suddenly announces, due to time constraints and another commitment, they must leave. We have mediated for several hours and are moving towards resolve. A request is then made that we should be able to spend their remaining thirty minutes drafting, signing and distributing the complete memorandum. Sure, there can be emergencies but most of the time this happens because parties don't schedule correctly and believe that the mediation will be resolved quickly. I've learned how to avoid this issue by asking *at the beginning of the session* if anyone has a time restriction. When this comes as a surprise I've

seen opposing counsel become very upset and not take very well to the abrupt exit – sending the case spiraling.

What happens when one or both sides demand late additions to the agreement that we have already reached? We are in the drafting stage and as we are writing the document additional requests are being made. To avoid this I ask



the following questions several times during the process: "Are there any other issues that you consider important that need to be addressed with regard to a comprehensive agreement?" "Have we addressed all of your concerns so I may be sure the other side is aware of them?" "Here is the list of items that I have from our discussion that we are seeking to resolve. Does this appear to include everything?" A simple check-in with both sides throughout the day as well to make sure they have addressed each of their concerns can go a long way to avoiding these late case issues.

Certainly all of us have seen examples of what we would consider negotiating "in bad faith." But if we clear our schedules and appear ready to negotiate, and reach out to opposing counsel beforehand to review potential issues, we arrive better equipped to settle. We may not completely eliminate the potential of bad faith negotiations, but at least we all do what we can for the parties who are there to settle, and need to settle, in order to move forward productively. **FLR**



Andy Flink is a trainer mediator and roster member of 17 area Superior Court ADR programs including Fulton, DeKalb, Forsyth and Cherokee County. Familiar with the aspects of divorce from both a personal and professional perspective, Flink is experienced in business and divorce cases and has an understanding of cases with and without attorneys.

Flink is founder of Flink Consulting, LLC, a full service organization specializing in business and domestic mediation and consulting. He mediates both private and court connected cases and has specific expertise in family-owned businesses. He is a registered mediator in the state of Georgia for both civil and domestic matters.

Interview with Hon. Doris L. Downs

of Superior Court, Fulton County, Family Law Division

by Charla E. Strawser, Stern & Edlin

I was fortunate to sit down with Doris Downs to discuss her recent appointment to the Family Law Division Bench in Fulton County Superior Court. First and foremost, Downs asked for the Bar's patience and understanding while she and her staff get acclimated and sort through her massive case load. Undoubtedly, her biggest challenge is the overwhelming backlog of cases in her Family Law Division; nearly 700 cases have been assigned to Downs, some of which have been pending since 2011. Seemingly undaunted by this undertaking, Downs sees her strong suit as case management, and to her, good case management equates to meaningful deadlines.

Downs' experience thus far has been that the 30, 60 and 120 day status conference deadlines have lost their momentum in moving the pending family law case to resolution. Status conferences are being continually reset due to legal conflicts, mediation, lack of service, etc. One case may have as many as three or four 30-day status conference dates before the parties actually appear and the temporary issues are addressed. It is what Downs calls the "culture of resets" and it's the biggest obstacle to her desire for efficient case management. Her fix is to put an end to it. If you opt-out of a status conference, the case will progress to the next status conference; there will be "no re-dos." Downs intends to follow the "pipeline of the case" steadily through to the end; once the case reaches the 120 day status conference, it will be placed on a trial calendar. This is not to say that Downs is opposed to attorney input with regard to scheduling. To the contrary, she (and her Judicial Officers and Case Manager) will take into consideration the attorney's input on discovery, timing, out of town parties and witnesses, etc. in setting a case for a hearing. Her advice to lawyers is not to be too aggressive on timing because once you are on a trial calendar, there will be no continuances without legal cause. Downs' straightforward advice to family practitioners is, "don't ask for it if you don't want it."

Good case management to Downs also means that, to the greatest extent feasible, she is quickly available to hear emergency and temporary issues. Downs believes that for many reasons, temporary hearings serve an important function in family law cases. Temporary hearings give the parties a flavor of how their case is viewed and what to expect in the future. In Downs' opinion, a temporary hearing oftentimes can get the case resolved on a final basis.

A large contributor to the case backlog is lawyers routinely filing Rule 1000.4 certificates which preclude the Judicial Officers from making determinations on temporary issues. Downs has the utmost confidence in her Judicial Officers, all of whom have considerable experience and expertise in family law, and her hope is that family law practitioners will utilize their services

more to resolve temporary, contempt and discovery disputes. Downs views Rule 1000.4 certificates with a "suspicious eye", and sees them being used more as a tool to delay and circumvent determinations on important temporary issues, rather than a legitimate need for the assigned to hear the case. For this reason, if a lawyer files a Rule 1000.4 certificate insisting that Downs hear the matters, she will do so and she will do so expeditiously. Downs advises that if you file a Rule 1000.4 certificate before or at a status conference, you should be prepared for her to hear the temporary issues that are in dispute that very day, likening the filing of a Rule 1000.4 certificate to a demand for a speedy trial in a criminal law case.

Downs' top requests of the Family Law Bar are as follows:

- ❑ Please limit your emails to her office. Multiple emails or emails on substantive issues are prohibited. You should email the case manager with your motion for a hearing (a copy having already been filed with the court – do not rely on her office to file pleadings as they already are flooded with work) along with a blank notice of hearing. The merits of the case should not be argued by email. Downs has neither the time nor the inclination to read such argumentative emails. Argue your cases in the courtroom, not via unsolicited emails to the Court.
- ❑ Premark your exhibits and exchange your pre-marked exhibits prior to coming into court. Please do not forget to bring Downs a copy of the exhibits so that she may review them as the evidence is presented. Her experience has been that lawyers waste precious court time marking, showing exhibits to the other side, and locating a copy for the Court. Lawyers should also bring a marital balance sheet including a proposed division of the assets, pre-marked as an exhibit. A comprehensive proposed order including Child Support Worksheets should be emailed to the Court in Word and Excel formats, respectively, so that Downs can manipulate the worksheets and revise the order as she sees fit in her ruling.
- ❑ Be on time for your court hearing, and being on time means being early.
- ❑ Use mediation and/or the judicially-hosted settlement conference prior to coming to Court. Fulton County offers good non-litigated means to resolution and lawyers should avail themselves of those economical services.
- ❑ Most importantly, communicate with the other side BEFORE coming to court. Downs' biggest "pet peeve" is lawyers' lack of conferring prior to

entering the courtroom. Try to at least narrow the issues; do not wait until you get to court. Do not ask for time to talk in the hallway; that should have been done long before you came into the courtroom. Please make sure you have communicated Rule 1000.4 requests, legal conflicts and opt-outs before arriving. This will save time and money for you, your client and the Court.

Downs is leery of pretrial conferences but will grant them under special circumstances. Please email her case manager if you think a pretrial conference is warranted.

As to substantive issues of family law, Downs feels that she has not yet served long enough to inform family law practitioners as to how she feels on specific issues. She acknowledges that she is re-learning family law and encourages family law practitioners to bring statutory and case law to the courtroom to assist the Court in reaching an appropriate resolution; she wants the Family Law Bar to educate her and “spoon-feed” her the law. Be sure to bring copies of such law, highlighting the important sections, for both Downs and the other side. Having the law readily available for her at the time of trial makes her a better and makes her rulings more timely.

Downs has no prejudices as between custody evaluator or Guardian *ad Litem*; in fact, she sees that some cases may warrant both. She is less inclined to award parents joint (50/50) physical custody where the parents have shown a complete lack of communication and co-parenting. However, there are exceptions to every rule and “time can heal many wounds.” First and foremost, the children and their best interests are her focus. Too often the children are the “real losers” in divorce cases. Family law practitioners

should encourage clients to attend the parenting seminar during the pendency of the case so that the parents benefit from the course while going through the divorce. Attorneys are routinely requesting 30 days following the divorce decree for the parties to attend the parenting seminar. She will not grant such requests going forward. Before a divorce is awarded (regardless of whether the case is resolved by agreement or trial), both parents must have attended the seminar. Motions for judgment on the pleadings will not be accepted absent an affidavit attesting that both parties have attended the seminar.

As to equitable division, Downs will carefully vet out the facts to determine if an equitable division warrants a division apart from the typical 50/50 division. Downs is encountering a considerable amount of cases with heavy debt burdens. Please be realistic in what the parties can and cannot afford in the short and long term.

There certainly are circumstances when Downs sees that alimony is warranted, i.e. when one parent has stayed at home to raise the children. The length and amount of alimony are dependent on the particular circumstances of the case, and she will take into consideration the training and education a spouse needs to obtain employment. Downs’ general feeling, however, is that alimony is “going out of style” in today’s world of dual income-earning parents. In that regard, attorneys need to encourage their clients to be independent and encourage them to seek employment. Sometimes, Downs feels that lawyers tend to do the opposite with dependent spouses – they encourage their clients not to get a job. Downs is inclined to award shorter terms and amounts of alimony to litigants whom she feels have intentionally not looked for employment or suppressed their income.

Last but definitely not least, be nice to Downs’ staff. Susan Shaver, Staff Attorney; Sheila Roser, Case Manager; and, Noreen White, Judicial Assistant, all work extraordinarily hard and Downs supports them one-hundred percent. She cannot do her job if we run them off.

I, along with the entire Family Law Section, thank Downs for taking the time to speak openly about her upcoming tenure on the Family Court Bench. Her commitment to the families of Fulton County and to managing the overwhelming backlogged calendar she faces is remarkable. We all certainly appreciate a committed decision-maker like Downs and look forward to working with her during her time in the Family Law Division. *FLR*

With 15 years of experience practicing exclusively in family law, Charla Strawser handles complex marital and domestic partner dissolutions, including high asset property division, contested child custody, spousal and child support, paternity and legitimation, and custodial and non-custodial parent relocation. She regularly drafts prenuptial and postnuptial agreements and also serves as the reviewing attorney for such agreements.

Strawser received her J.D. from Wake Forest University School of Law with high honors a B.A. in philosophy from the University of North Carolina at Chapel Hill.



We Are Family...

Diversity and Inclusion Membership Survey

by Ivory T. Brown

The Family Law Section of the State Bar of Georgia is committed to the promotion of diversity and the enhancement of inclusion in our membership, resources and activities. The implementation of the 2013-14 diversity survey by the Diversity Committee is one of many steps designed to achieve that goal. The objective of the survey is to uncover the diverse demographic attributes of our section in order to better serve our members. Demographic attributes list descriptive terms for race, ethnicity, gender, disability, religion and sexual identity, along with categories for age and number of years of practice, practice environment and specialty. Questions allowing each participant to rank the activities and services provided by the Section are also included in the survey. The survey was sent to each member of our section via electronic mail on Jan. 7, 2014. A reminder invite was sent on Feb. 10, 2014. Access to the survey remained open through Feb. 28, 2014. Mirroring much of the diversity survey established by the ABA Center for Racial and Ethnic Diversity in format and function, thirteen (13) simple questions offer us a single thread. That thread allows us to unravel the tapestry of our section and the fabric of our lives...

Synopsis -

Question – Please State Your Age? – (missing data)

Of the 480 respondents, the median age of the membership is 48.68. Respondents aged in range from 25 - 85.

25 to 35 years	98 (20 percent)
36 to 45 years	113 (24 percent)
46 to 55 years	91 (19 percent)
56 to 65 years	127 (26 percent)
66 to 85 years	51 (11 percent)

Question – Please State the City where you primarily practice

The majority of respondents practice primarily in the Metro-Atlanta; however, there are pockets of practitioners all around the state including: Savannah, Statesboro, Warner Robins, Hall County, Carrollton, Augusta and Macon.

Question – What is your Gender?

483 section members responded. Women form the majority. 270 of the survey participants are female (56 percent), 208 are male (43 percent) and 5 (1 percent) are transgender.

Question - Race and ethnicity: How do you identify yourself? (Check all that apply)

479 section members responded with 394 participants identifying as Caucasian (82 percent), 66 (14 percent) Black or African American, Hispanic/Latino(a) 11 (2 percent) and Asian and Native American each with 9 members responding (2 percent each)W.



Question – Sexual Orientation: How do you identify yourself?

478 responded to the four (4) selections were offered with the following responses: 446 Heterosexual (93 percent), 16 Lesbian (3 percent), 11 Gay (3 percent), 5 Bisexual (1 percent)

Question - Religious Preference: Please check the option that best applies to you.

This category offered six selections with the following responses: 480 replied: 343 Christianity (70 percent), 61 None (13 percent), 60 Judaism (13 percent), 12 Other (3 percent), 3 Buddhism (0.7 percent), 1 Islam (0.3 percent)

Question – Disability: Do you consider yourself as having a disability that affects your practice:

476 section members replied to the yes or no query:

14 (3 percent) yes and 462 (97 percent) no,

Question- Legal experience: How long have you practiced law:

The majority of our members are age 40 and under as indicated by the top three response categories.

Answer choices	Responses
0 to 5 years	77 (16 percent)
6 to 10 years	72 (15 percent)
11 to 20 years	113 (23 percent)
21 to 30 years	100 (21 percent)
31 to 40 years	98 (20 percent)
41 to 50 years	18 (4 percent)
More than 50 years	4 (1 percent)

Question – Practice Size: Check the option below that best describes your firm/work environment:

This survey question was answered by 471 participants. Most of those responding are in solo practice or with a firm with less than 5 attorneys.

Answer Choices	Responses
Solo practitioner	217 (46 percent)
Less than 5 attorneys	124 (26 percent)
11 to 20 attorneys	42 (9 percent)
6 to 10 attorneys	38 (8 percent)
Judge	14 (3 percent)
Legal Aid	12 (3 percent)
More than 20 attorneys	10 (2 percent)
Law clerk	8 (2 percent)
Government agency	6 (1 percent)

Question- Practice Specialty: What percentage of your practice is devoted exclusively to family law:

More than 37 percent of those responding to the survey practice solely in the area of family law:

Answer choices	Responses
90 – 100 percent	179 (37 percent)
50 - 79 percent	101 (21 percent)
25 - 49 percent	80 (17 percent)
80 – 89 percent	70 (15 percent)
0 – 24 percent	48 (10 percent)

Question- How long have you been a member of the Family Law Section?

The majority of the 477 survey participants have been members of the section for 10 years or less.

Answer Choices	Responses
Less than 5 years	146 (31 percent)
Between 6 - 10 years	122 (26 percent)
Between 11 – 20 years	105 (22 percent)
Between 21 – 30 years	66 (14 percent)
Between 31 – 40 years	35 (6 percent)
Between 41 – 50 years	2 (.5 percent)
More than 50 years	1 (0.5 percent)

Question – Family Law Institute: Please indicate the number of times you have attended the Institute in the last ten years:

480 participants responded. The combined numbers of participants who have attended the Family Law Institute form the majority (308).

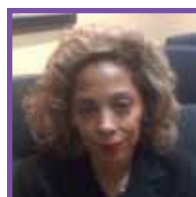
Answer Choices	Responses
1 - 3	134 (28 percent)
4 – 7	101 (21 percent)
8 – 10	73 (15 percent)
None	172 (36 percent)

Question - Section Education: Please rank the following in order of importance (1 = most important; 6 = least important):

The 465 Member participants ranked the Family Law Newsletter as most important with the Family Law institute ranking closely behind.

Answer Choices	Responses
Family Law Newsletter	199 (43 percent)
Family Law Institute	182 (39 percent)
Nuts and Bolts Seminar	62 (13 percent)
AAML/Family Law Seminar	12 (3 percent)
Mid Year Meeting	5 (1 percent)
Webinars	5 (1 percent)

The Diversity Committee is analyzing this data and will utilize the survey results to acknowledge the diversity of our membership base, promote an inclusive culture and implement future initiatives benefitting the needs of diverse groups and our overall membership. *FLR*



Ivory T. Brown has practiced law for over 25 years, beginning her career as a prosecutor. As a general practitioner, she served as a part time magistrate judge, and while pursuing her passion for the arts, developed an entertainment and sports law practice, serving two terms as the chair of the Entertainment and Sports Law

Section of the State Bar of Georgia. She continues to follow her passion and practices family law including cases with an entertainment and sports law focus and currently serves on the executive committee of the Family Law Section.

Caselaw Update

by Vic Valmus

CLOSELY HELD CORPORATION

Sullivan v. Sullivan, S14F00006 (March 28, 2014)

In 1997, the Husband began working for Environ Tech, a closely held Sub S corporation and in 1998 he purchased 150 shares of stock for \$1 per share and made an additional capital contribution of \$35,000. In 2001, the parties were married and in 2002 the Husband sold 50 shares of his stock for \$11,800 and retained 100 shares of the 1,000 issued shares of stock. The Husband was a minority shareholder. In 2011, the Husband filed for divorce. The Wife presented expert testimony regarding a business valuation and implied that the 100 shares of stock at the time of the trial were worth \$780,000. However, the experts' review was for 2005 to 2011 and no evidence was presented to value the stock at the time of the parties' marriage and there was no expert testimony about the Husband's role in Environ Tech. The Trial Court awarded the 100 shares to the Husband as his separate property. The Wife appeals and the Supreme Court affirms.

The spouse's interest in a closely held corporation may be a marital asset subject to equitable division even if the business was started with separate pre-marital funds. The key is whether there is an appreciation in the value of the business during the course of the marriage as a result of the spouse's individual or joint efforts. However, the appreciation of value of asset during the marriage does not render it a marital asset subject to equitable division if the appreciation is solely the result of market forces. For the Court to determine if there was any appreciation subject to equitable division, the Trial Court must first be able to calculate, if any, the amount of the appreciation occurred during the marriage. This means the Trial Court must be able to determine the value on both the date of the marriage and the date of the divorce. The party seeking equitable division of the appreciation has the burden to establish the interests' true market value at the time of marriage and divorce. In addition, the fact finder is not bound by the opinion testimony of a witness as to the value of property even if it is uncontradicted.

Wife argues the Superior Court could have calculated the value of the 100 shares in 2001 by referencing the amount the Husband received for selling 50 shares of his stock in 2002. Given the sale of 50 shares totaled \$11,080, in 2002, the Wife argues the remaining 100 shares were worth \$23,600 at the time of the marriage in 2001. However, the Husband testified the stock sales were motivated by the need to pay marital debts and free-up shares for a new shareholder and the company. No evidence was presented at trial that the \$11,800 price the Husband received was representative of the share's true market value at the time of the sale in 2002. In *Barton v. Barton*, this court stated the buy and sell agreements in closely held corporations do not necessarily reflect true market value because agreements can be manipulated.

The Wife also contends the Superior Court erred in finding no evidence of marital investment resulting in stock appreciation. Here, the Husband was responsible for managing the company's pickups and deliveries and he had little influence in the running of the company. In addition, he testified that the rapid rise in the company's appreciation was due to the company's acquisition of new governmental contracts in which he was not involved. Therefore, if the Husband did not contribute to any growth in the company, then, by extension, the Wife's efforts to support the Husband in his career did not indirectly contribute to the growth of the company either and is not a marital investment.

CONTEMPT

Doritis v. Doritis, S13A1862 (Jan. 21, 2014)

The Husband and Wife were divorced in 2012 by a Final Divorce Decree incorporating the parties' Settlement Agreement. Several months later, the Wife filed a petition alleging the Husband had failed to return certain items of jewelry contained in a basement safe. The Husband counter-claimed, arguing the Wife had failed to comply with the decree's parenting and visitation provisions and failed to reimburse him for repairs made to the marital residence. The Trial Court did not hold either party in contempt, but pursuant to the terms of the Final Decree, the parties had agreed to a distribution of property, giving the Wife her jewelry from the safe and the Court ordered the Husband to return these items to the Wife. The Husband admitted to selling some of the items and the Court further ordered that, in the event the Husband was unable to return all of the pieces of jewelry, said items shall be appraised by a mutually agreed upon certified appraiser and the amount of the appraisal shall be subtracted from the amount the Husband owes to the Wife for reimbursement of jewelry. The Husband appeals and the Supreme Court affirms in part and reverses in part.

The Husband argues that the return of jewelry to the Wife constitutes an improper modification of the final divorce decree. The parties' decree stated that the parties would attempt to reach an agreement to divide personal property and in the event they were unable to do so, a specifically identified third party would make a final distribution. The parties produced emails between the parties regarding the division of the basement safe's contents. The Trial Court determined the parties had reached an agreement as to distribution of the jewelry and ordered the Husband to immediately return those items to the Wife or to provide her with compensation for the items he admittedly sold. This does not impermissibly modify the agreement as much as the Trial Court simply found that the parties entered into an agreement regarding the contents of the safe. The Court also did not find the absence from the decree of a specific reference to the safe's contents

to be determinative. The decree significantly specified a procedure to be followed in dividing personal property.

The Husband also argued that even if the Trial Court was authorized to enter an Order pertaining to the distribution of the jewelry, there was no credible evidence to support the Trial Court's evaluation of the items. However, the Wife identified from an inventory prepared by the parties with each piece of jewelry they had agreed belonged to her and estimated these items to have an aggregate value of \$40,000. Since the items that were already sold by the Husband could not be appraised, the Trial Court's order directs that the value of the missing items be determined by subtracting the appraised value of the items still in the Husband's possession from the \$40,000 aggregate value.

The Husband also argues a provision in the Final Decree entitled the Husband to reimbursement for repairs made to the marital home while it was listed for sale. The Husband counterclaimed that the Wife owed him for expenses he incurred for document shredding, light bulbs, housekeeping and landscaping. The Trial Court denied the Husband's petition stating that the parties did not intend repairs to include general household expenses or expenses related to his general maintenance asserted in his counterclaim.

In addition, the Final Decree specifies that the net proceeds from the sale of the marital residence shall be divided equally between the parties, but it makes no provision for the time within which such proceeds shall be distributed. Here, the Trial Court included in its contempt order a provision directing that the net proceeds from the sale of the marital residence shall not be distributed until the Husband returns the jewelry to the Wife or provides her with adequate compensation for the items that were sold. This was an improper modification of the Final Decree. Even though the Court has broad authority to enforce and seek compliance with its original decree, it cannot do so by imposing upon the Husband a precondition to his receipt of the net proceeds that did not exist in the original decree.

The Husband also contends the Court erred by not holding the Wife in contempt for violating his visitation and custodial rights. The Final Decree gave the Wife primary physical custody of their then almost 16-year-old daughter. The parties agreed the Husband was to have visitation as the minor child and Husband would mutually agree. Therefore, the Husband contends the Wife has supervisory authority over the child's decision to discontinue visitation. At the hearing, the Wife testified that it was not her, but the child who elected not to visit with the Husband. The fact that the relationship between the Husband and the child may have deteriorated to the point that the child does not wish to visit with the Husband, does not by itself demand the conclusion that the Wife has engaged in contemptuous conduct. There was no evidence that the Wife was interfering with visitation.

DEVIATION/GARNISHMENT

Strunk v. Strunk, S13A1217 (Nov. 25, 2013)

The parties were divorced in 2008 and the Wife had primary custody of the three children. The Husband filed a modification action in 2009 seeking downward modification of child support, modification of visitation, and gradual change in custody. While the modification was still pending, the Wife garnished Husband's wages in 2011, then the Husband amended his complaint and asked for the Court to release him from the continuing garnishment for support. By October of 2012, the Husband had remarried and had a new baby and three stepchildren. In November, 2012, the Trial Court found that a material change in circumstances had happened and granted the downward modification of support, granted a travel time deviation of \$200 per month instead of the requested \$700 and ordered the Husband to pay health insurance in the amount of \$300 per month. Regarding the \$96,000 arrearage in child support, the Trial Court ordered the Husband to pay \$250 per month until the child support obligation



ended and then \$1,000 per month until the arrearage was paid in full. Wife appeals and Supreme Court affirms in part and reverses in part.

The Wife argues that the Court erred by downward modifying child support. The Court found that the Husband was employed in the mortgage industry which has become unstable, downsized, and had been affected by the recession. Therefore, the Trial Court's imputed income reduction from \$75,000 to \$52,500 was not an abuse of discretion.

The Wife also contends that the Court erred by granting the Husband a \$200 travel deviation. Here, the Husband was asking for a \$700 travel deviation and the Court's Order stated reasons why the Trial Court rejected the Husband's request for \$700 per month but failed to state

why it departed from the presumptive amount of child support to award the travel deviation. Therefore, the Court erred by not making the necessary findings of fact required and the case is remanded for mandatory written findings.

The Wife also challenges the Court's decision to grant the Husband a credit as a result of the newborn living in his home which resulted in a downward adjustment to the Husband's monthly gross income. Contrary to the Wife's argument, the Father presented evidence that a parent child relationship with the new infant existed and therefore the reduction was allowable.

The Wife also contends the Trial Court erred by going beyond its authority in a modification action to fix the time and manner of back child support payments. The parties have a variety of remedies available for enforcing a child support order. The complaining spouse is not required to make an election of remedies. In addition, a Trial Court may not order the postponement of payment of child

support until the child reaches the age of 18. In a modification case, the Trial Court does not have the authority, unrelated to a contempt action to determine the amount of any arrearage or how it is to be satisfied. The Trial Court's order had the effect of releasing the Husband from the continuing garnishment then in existence and limiting any future garnishment action to the terms of the modification order entered here. The Wife's remedies for seeking and collecting arrearages have been curtailed and the Court violated her right to choose what action to pursue to collect the child support arrearage. Contrary to the general rule that children are entitled to financial support during their minority, the Trial Court's order on the arrearage payments limits the amount that the Husband was required

to pay while the children were minors living at home and postpone payment of the bulk of the arrearage until the children reached the age of 18.

FRAUD/LIABLE/FALSE LIGHT

Pampattiwar v. Hinson, et al., A13A2432 (March 12, 2014)

Pam Pampattiwar (client) contacted Hinson (attorney) to file a divorce action in Gwinnett County. The Wife had previously filed a separate maintenance action in Fulton County and the client had another attorney representing him in that matter. When asked by the attorney if there had been a counterclaim for divorce filed in Fulton County, the client stated it had not been. The attorney then went on the Fulton County docket to check and there was no

counterclaim for divorce filed in the separate maintenance action and the client insisted that a divorce counterclaim had not been filed. The attorney filed the divorce action in Gwinnett County and then shortly after, she received a scathing letter from opposing counsel that a counterclaim for divorce had been filed in the separate maintenance action almost a year earlier.

When the attorney confronted the client he assured her that he did not know about the counterclaim or the error on the Fulton County docket. The attorney retrieved a copy of a deposition given in the Fulton County action and it was clear from the deposition transcript that the client knew that the Wife had filed a counterclaim for divorce. The attorney then confronted the client regarding the deposition transcript and she accused him playing fast and loose with her bar license and making a fool out of her in the Courts in which she practiced by having her file a divorce petition in Gwinnett County when there was one already pending in Fulton. The client's response was you can't get out now, we are on the trial calendar. A dismissal in the Gwinnett County divorce case was eventually entered.

Over several months the attorney and client had multiple heated conferences over billing issues and the attorney moved to withdraw but was denied her motion. The attorney filed for reconsideration which the Court granted but the client pleaded with her to stay until arbitration was completed to which she acquiesced. The attorney finally withdrew representation on September 15, 2010 after the arbitration. The next month, the client contacted the law firm accusing the attorney and her staff of being crooks and claimed that they had duped him. After which, the attorney's law firm did an internet search and found out there had been posts on Kudzu.com by the name of Starea that described Hinson(attorney) as a crook lawyer and an extremely fraudulent lady who inflates her bills by 10 times and had duped 12 people in the last couple of years. Upon further investigation by the attorney, the posts came from the IP address that belonged to the client. The attorney filed an action against the client, alleging among other things, that he had published statements about her and her firm on Kudzu.com which constituted liable per se and also that he committed fraud during the initial consultation by falsely representing that no divorce counterclaim had been filed in Fulton County when he knew that his Wife had filed a counterclaim over a year earlier and that the attorney detrimentally relied upon the client's misrepresentation about the counterclaim leading her to suffer professional embarrassment and humiliation. Later another posting from the name of Real Police warned viewers not to trust positive reviews appearing for Hinson on Kudzu because she asked her office staff to post bogus positive reviews everywhere on the Internet. After a jury trial, a verdict was entered in favor of the attorney on her claim for fraud and liable per se/false light. The client appeals and the Court of Appeals affirms.

The client contends the Trial Court erred by denying his motion for new trial on fraud predicated on his alleged misrepresentation about the divorce counterclaim



because the attorney failed to prove justifiable reliance. One essential element of an action for fraud is justifiable reliance by the Plaintiff. Blind reliance precludes a fraud claim as a matter of law. Here, the attorney testified that for over 16 years she had relied on docket information as confirmation on what the client had told her about the Fulton County case because the docket had always listed answer and counterclaims in the pleading index. In addition, she doesn't typically assume the client is lying to her about such a basic fact. Here, the jury determined that the attorney exercised sufficient due diligence by checking the online docket to confirm the client's statement that the Wife had not filed a counterclaim for divorce. Therefore, justifiable reliance is a question for a jury to resolve.

The client also contends that the Trial Court erred in denying his motion for new trial on the fraud claim because she failed to show actual damage resulting from the alleged misrepresentation. Here, the attorney did not allege she suffered any pecuniary losses but the injury was to her peace, happiness, and feelings and she sought damages pursuant to O.C.G.A. §51-12-6 for wounded feeling. The client argues that wounded feelings are not actual damages and therefore cannot be recovered. Wounded feelings are permitted for fraudulent misrepresentation whereas here, the Plaintiff claims that the entire injury she suffered from the misrepresentation was to her peace, happiness, or feelings. The Court has stated in the past that wounding a man's feelings is as much actual damage as breaking his limbs. And injury to reputation is a personal injury and personal injury damages can be recovered in a fraud action.

The client also contends the Trial Court erred in denying his motion for new trial based on the false light invasion of privacy claim. Here, the attorney testified that the false statements posted by client on the internet, not once but twice, caused injury to her peace, happiness, and feelings. Because these were published to the public, there is evidence from which a jury could find that the element of publicity had been met and therefore the Trial Court was correct in denying the motion for new trial.

IMPUTED INCOME/CONTEMPT

Friday v. Friday, S13A1625 (March 3, 2014)

In 2008, the parties were divorced and the Husband was ordered to pay \$2,000 per month for the support of two minor children. This was based on the Husband's annual income of \$180,000. In 2010, the Husband lost his job and filed a petition to modify child support due to an involuntary loss of employment. He also filed a Child Support Worksheet with a new monthly obligation of \$179 which was based upon the income from the unemployment benefits of \$1,320 per month. Subsequently, the Wife filed a petition for contempt due to the Husband's failure to pay child support. At the hearing, the Husband stated he would not accept a job offer of a salary of \$100,000 or less per year. The Court found there was a substantial change in the income and the financial circumstances of the Husband warranting a decrease in child support and the Court ordered imputed income of \$4,180 per month and

reduced the Husband's child support obligation to \$1,040 per month. The Court found that the Husband was able to pay more than \$179 per month and found him in wilful contempt and required him to pay \$8,000 instant and purge himself of contempt. The Court then required him to prepare a Qualified Domestic Relations Order (QDRO)



within 30 days of the Order to pay the balance of the child support arrearage. The Husband appeals and the Supreme Court affirms in part and reverses in part.

The Husband argues the Trial Court erred in imputing income of \$4,180 per month to him in addition to the \$1,320 of monthly unemployment benefits he received. However, the Trial Court is empowered to impute income for wilful or voluntary unemployment or under employment. The Husband also notes that the Court did not make written finding of facts regarding the imputation of income and the Code does not require the Trial Court to make written findings as to why it decided to impute income to a spouse. Here, the Husband had approximately \$390,000 in retirement assets. He received \$7,500 per month in loans from his family in the 5 months preceding the trial and even though he was unemployed he would not accept an offer of employment that paid \$100,000 or less per year. Therefore, the Husband's self-imposed salary restrictions regarding his job search support a finding that the Husband was wilfully unemployed and/or under employed.

The Husband also argues the Trial Court erred in finding him in willful contempt for his failure to meet his child support obligations and argued that after December, 2010, he paid his child support in accordance with O.C.G.A. §19-6-15(j). However, a child support obligor who suffered involuntarily loss of income and seeks a downward modification to begin paying what he or she calculates as a new amount of child support is not the correct interpretation of the Code section. Once the child support obligor has submitted a petition for modification, the Code section states that the portion of child support attributed to a loss of income shall not accrue from the date of the service of the petition for modification. Under the

Decree, the Husband was to pay \$2,000 in child support. After December of 2010, he did not do so and paid \$179 per month or \$1,821 less than the original figure. The Court found the proper amount of child support was \$1,040, a figure of \$960 less than the original amount. Therefore, the Trial Court determined that \$960 per month was the portion of child support attributed to the loss income and not \$1,821 as the Husband claimed. Therefore, the Husband underpaid his obligation by \$861 for a total underpayment of \$12,915 in arrearage.

The Husband finally argues that the Court erred by requiring him to submit a Qualified Domestic Relations Order to pay the balance of the child support arrearage. The part of the Order requiring the Husband to pay child support arrearage from his retirement accounts via QDRO is a reapportionment of the retirement accounts constituting a modification of the Final Decree and therefore, the Trial Court erred and that part of the Trial Court's Order is reversed.

SUBJECT MATTER JURISDICTION/VENUE

Crutchfield v. Lawson, S13A1611 (Jan. 21, 2014)

The parties were granted a Final Divorce Decree in Paulding County in 2008. In 2011, the Wife filed an application for contempt against the Husband in Cobb County. The Husband answered the Wife's action in Cobb County and in addition filed a cross application for contempt for which he challenged Cobb County Court's jurisdiction. A hearing was held on the matter in 2012 and any jurisdictional defects were discussed by the parties. At the time, counsel for both sides consulted at length with their clients and reached an agreement, announced and accepted in open Court under oath consenting to jurisdiction in the Cobb County Court. Thereafter, the Cobb Court conducted a hearing ultimately finding the Husband in contempt. The Husband retained new counsel and filed a motion to set aside the contempt judgment arguing that Cobb County lacked subject matter jurisdiction which could not be waived and therefore the Cobb County Court's ruling was void and that only the Superior Court of Paulding County had subject matter jurisdiction to enforce the Order through a contempt action. Cobb County denied the motion to set aside, stating that Husband had participated freely in the Cobb County proceedings and was equitably estopped from challenging subject matter jurisdiction. The Father appeals, the Supreme Court affirms.

It has been a long rule in this State that an application for contempt must be filed in the court which rendered the order or judgment in question. This does not mean, however, that the Superior Court in which the original order was entered has exclusive subject matter jurisdiction to enforce its original Order. The phrase subject matter jurisdiction refers to subject matter alone i.e. conferring jurisdiction in specified kinds of cases. It is undisputed that a Superior Court has the authority to entertain an action for contempt of a Georgia divorce decree. Therefore, the question before us is not what type of court in which the entire class of contempt cases must

be brought, instead it deals with the question of which Superior Court may properly consider this particular case. Therefore, this case is a consideration of venue and not subject matter jurisdiction. As a general rule, subject matter jurisdiction may not be waived by the parties. On the other hand, venue can be waived or conferred upon a court by consent. Here, both parties, after being sworn, agreed and announced in open Court they consented to the jurisdiction of the Cobb County Court. Therefore, it is evident on the face of the record that the Husband consented to the venue in Cobb County and explicitly waived any subsequent objection.

SUPERSEDEAS

Franklin v. Franklin, S13F0735 (Nov. 19, 2013)

The parties were divorced and the Husband was awarded primary custody of the three minor children with the Wife to pay child support. The Wife filed a motion for new trial and the Husband filed a contempt motion based upon the Wife's failure to pay child support. The Court had a final hearing on the motion for reconsideration; granted the Husband's contempt motion for non-payment of child support; and ordered the proceeds of the sale of the marital residence to be equally divided between the parties. The Wife appeals and the Supreme Court reverses in part and affirms in part.

The Wife appeals, among other things, that the Trial Court erred without having resolved all of the issues relating to the division of the parties' marital property. However, the record reveals that at the final divorce hearing, the Husband's counsel represented to the Court that the only issues that needed to be resolved at the final hearing were custody and child support. Attorneys are officers of the court and statements made in their place, if not objected to, serve the same function as evidence. The Wife made no objection to this representation and cannot now be heard to complain that the Trial Court erred by concluding in its final order that there was no need for the Court to make a division of marital property because the parties had already made a division as to all marital property.

The Wife also argues the Trial Court erred by finding her in contempt for failing to pay the child support that had accrued during the time that a motion for new trial was pending. Wife argues that filing the motion for new trial acted as an automatic supersedeas, preventing the Trial Court from enforcing its judgment with respect to the Wife's child support obligation. Pursuant to O.C.G.A. § 9-11-62(b), the filing of a motion for new trial shall act as a supersedeas unless otherwise ordered by the Court. Here, the Trial Court stated that in the event of an appeal of this order, the provisions of the order shall constitute a new temporary order (superseding all prior temporary or final relief to the contrary) during the pendency of such appeal. When specifying that a new Temporary Order would take effect in the event of an appeal, the Trial Court properly insured the Wife's obligation to pay child support would remain in full force and effect even if the Wife challenged a final decree. Therefore, the Trial Court retained the

authority to hold the Wife in contempt for failing to meet her child support obligations as they existed in the Temporary Order while she challenged the Trial Court's final decree.

THIRD PARTY CUSTODY

Entrekin v. Friedman, S13A1898 (Jan. 21, 2014)

The parties were divorced in 2009 where the (Father) Kaminsky had physical custody of the child. The Parenting Plan also addressed the possibility that the Father might not survive the minority of the child expressing the desires of the parents that the paternal aunt of the child would have physical custody in the event of the Father's death. The Parenting Plan was approved by the Court and made part of the Final Decree. In 2013, the Father died. In the days after his death, the aunt took custody of the child and refused to give the child over to the Mother. The Mother filed a Petition for Writ of Habeas Corpus alleging she was entitled to custody of the child. Around the same time, the aunt filed her own petition for custody of the child. After the hearing, the Trial Court denied the Petition for Writ of Habeas Corpus and awarded temporary custody of the child to the aunt and allowed supervised visitation with the Mother. The Mother appeals the denial of the Writ of Habeas Corpus. Supreme Court affirms.

Here, the Mother raises the claim pursuant to O.C.G.A. § 19-8-24(a) which provides a physical custodian shall not be allowed to maintain any action against the legal custodian for a change of custody so long as the custody of the child is withheld from the legal custodian in violation of a custody order. The Mother argues that she was entitled by operation of law to custody of the child upon the death of the Father and the aunt therefore could not properly be heard to seek custody of the child for herself so long as she was among the persons withholding the child from the Mother. Here, the Court agrees with the Mother that she was entitled to at least presumptive relief to custody of her child following the death of the former Husband. However, it does not bar the aunt from seeking custody for herself. Under O.C.G.A. § 19-9-24(a) applies only when custody of a child is withheld in violation of a custody order. Here, the only existing custody order was the Final Decree of Divorce and it did not award physical custody of the child to the Mother. Therefore, the aunt was not withholding the child from the Mother in violation of a custody order.

The Mother also contends the Trial Court erred when it determined that the aunt had overcome the legal presumption that the Mother should have custody of the child. As the Court explained, the presumption that a surviving parent is entitled to custody can be overcome by clear and convincing evidence that the surviving parent is unfit. Here, the Trial Court found that the Mother was in fact unfit to be the custodian of the child. Here the evidence established the Mother had a long struggle with addictions to alcohol and prescription drugs and she previously had been convicted of driving under the influence and it had endangered multiple children and had violated the terms of her probation. Nor did she seek relief from the

provisions of the divorce decree that required supervision of her visitation with the child. The evidence amounts to clear and convincing evidence of the present unfitness to have custody of the child and therefore the Trial Court did not err in granting temporary custody to the aunt.

TRAVEL RESTRICTIONS

Sahibzada v. Sahibzada, S13A1307 (March 17, 2014)

The Husband is a native of Pakistan and has dual citizenship with the U.S. The Wife is a natural born American of Pakistani descent. Their two minor children are American born. The Wife was designated as the primary physical custodian of the children with the Husband having visitation rights. The Superior Court put restrictions on the Husband regarding the children's international travel in that the Wife shall retain possession of the children's passports and the Husband shall not procure any other passports for the minor children. The minor children can travel outside the U.S. with the consent of the Wife and should consent be given to travel, the Wife will be provided a detailed itinerary of the travel plans including the anticipated date they will return to the U.S. This international travel restriction shall expire to each child on that child's 16th birthday. The Husband appeals and the Supreme Court affirms.

The Husband argues the Trial Court erred by adding the restriction on the Husband's international travel with the children. This Court has unequivocally held that a Trial Court has discretion to prohibit the removal of the minor children from the United States. At trial, evidence showed the Husband had dual citizenship with U.S. and Pakistan and had no immediate family living in the United States. He had an elderly mother living in Pakistan, a brother living in Russia, another brother in Canada, and a sister living in Australia. In 2010, the Husband wanted to move the family to Pakistan but the Wife objected. Prior to the divorce, the Husband withdrew money from the money market account and stated he would only return it if the Wife would give him the boys' passports and social security cards. On many occasions, the Husband traveled outside of the U.S. without notifying the Wife of his whereabouts.



Before they were married, the Wife had been to Pakistan on many occasions and knows that she will not have any custodial rights with her sons after they reach the age of 8. Likewise, Pakistan is not part of the Hague convention. With regards to visiting relatives, the relatives have the ability to travel to the United States for visits. Because of the difficulty the Wife would have asserting her custodial rights in Pakistan where she is a non-citizen and the Husband is a citizen, the Trial Court did not err by placing restrictions on the Husband's travel outside of the country with the minor children.

UCCJEA/INCONVENIENT FORUM

Odion v. Odion, A13A2324 (Feb. 10, 2014)

The parties were divorced in Gwinnett County in 2003 and physical custody of the two children was awarded to the Mother. The Mother and the children moved from Georgia in 2003, first to New Jersey and then in 2011 to Texas. The Father filed an action in 2012, seeking among other things, primary custody of the children. The Mother filed a motion to dismiss on inconvenient forum along with an answer and counterclaim for contempt. The Court found Georgia was an inconvenient forum and administratively closed the case. The Father appeals and the Court of Appeals affirms.

The Trial Court must make specific findings either in writing or orally on the record demonstrating the Court has considered all 8 factors included in O.C.G.A. § 19-9-67(a). Here, the Court found it had jurisdiction under the UCCJEA because it had rendered prior custody determination in the parties' divorce case and the Father still is a resident of Georgia with ties to the State. The Father challenges the Court finding that acts of family violence have occurred in the past and are likely to continue in the future. However, the Trial Court is the fact finder and is free to ascertain for itself the credibility of the witnesses. The Mother's testimony supports the Trial Court's factual findings. The Father also argues the Trial Court erred in finding that Texas is a better forum given the location of evidence. The Mother testified that there were witnesses in Texas that she would call including the children's teachers, the healthcare providers and the 12 and 13-year-old children themselves and that Texas would be a better forum to expeditiously decide the issues. The Court found because the witnesses and the evidence required to resolve the issues are in Texas, except for the Father himself, Texas would be a better position to expeditiously decide the issues. Because the Trial Court weighed all 8 factors regarding the inconvenient forum, the Father has not demonstrated that the Court abused its discretion. **FLR**



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What Starts in Georgia Stays in Georgia

by Eric A. Ballinger

On Jan. 24, 2014, the Supreme Court of Georgia held that O.C.G.A. § 9-10-91(6) gives the Superior Courts of this state personal jurisdiction over a non-resident defendant to modify and enforce a divorce decree originally granted in this State. In *Barker v. Barker*, S13A1705, the Supreme Court overturned a decision by the Gwinnett Superior Court to dismiss a petition for contempt and modification of a Richmond County divorce decree.

David and Yvonne Barker were granted a divorce in 2005 by the Superior Court of Richmond County in the State of Georgia. In 2012 David filed a Petition for Contempt and Modification of the decree in the Superior Court of Gwinnett County, however Yvonne moved from the State of Georgia several years before. The Gwinnett County Superior Court held that since Yvonne was no longer a resident of Georgia she was not subject to the personal jurisdiction of the Court. The Supreme Court disagreed in an opinion that clearly establishes the precedent for Georgia Courts to exercise continuing jurisdiction over divorce decrees granted in this state.

The Domestic Relations Long Arm Statute, O.C.G.A § 9-10-91(6) enacted in 2010 provides that a Georgia court may exercise personal jurisdiction over a non-resident if that person;

[h]as been subject to the exercise of jurisdiction of a court of this state which has resulted in an order of alimony, child custody, child support, equitable apportionment of debt, or equitable division of property if the action involves modification of such order and the moving party resides in this state or if the action involves enforcement of such order notwithstanding the domicile of the moving party.

Writing for the Court, Justice Keith Blackwell states, "Moreover, the recent enactment of [Domestic Relations Long Arm Statute] amounts to a recognition in Georgia of the doctrine of continuing personal jurisdiction in divorce cases, a doctrine that long has been settled in other jurisdictions." *Barker* @ p.3 [Emphasis supplied.] In fact the Court looked to opinions out of California, Massachusetts, West Virginia, Maryland and Washington along with Georgia in its analysis of the doctrine.

The Supreme Court of Georgia adopted doctrine set out by the American Law Institute in 2 Restatement (Second) of Conflict of Laws § 26 (1971) "If a state obtains judicial

jurisdiction over a party to an action, the jurisdiction continues throughout all subsequent proceedings which arise out of the original cause of action." This doctrine is Constitutionally sound and set forth by the United States Supreme Court in *Michigan Trust Co. v. Ferry*, 228 U. S. 346 (33 SCt 550, 57 LE 867) (1913).

Justice Blackwell wrote that there is universal acceptance for this doctrine amongst jurisdictions; "... [i]t is well-established that once a court obtains personal jurisdiction over a party in an action, jurisdiction over the party continues for subsequent proceedings that arise out of that action." In re *Marriage of Rassier*, 118 Cal. Rptr. 2d 113, 116 (Ct. App. 2002)

It is as if the Court does not consider the modification or contempt action to be a separate matter but merely a continuation of the original divorce action. The Court, quoting a case out of the Supreme Court of Appeals of West Virginia;



With the matter of support and custody being placed in issue in the original proceeding, it cannot be said that the future welfare of children and matters relating to their support and custody requirements do not arise out of the original action. They are, indeed, an integral part of the original case. A party cannot place these matters in issue before a court, being himself subject to its jurisdiction and decretal orders, and later avoid the court's continuing jurisdiction to modify such orders as changing circumstances may require by the simple expedient of moving outside the court's geographical jurisdiction. Were the rule otherwise then litigants would become scofflaws.

State ex rel. Ravitz v. Fox, 273 SE2d 370, 372-373 (I) (W. Va. 1980). Again the Court quoted a case out of Supreme Court of Wisconsin; "...labeling an enforcement or modification proceeding as a new action does not change the essential fact that these proceedings arise out of and are incident to the original action. The personal jurisdiction obtained at that time continues in subsequent proceedings." *McAleavy v. McAleavy*, 440 NW2d 566, 570 (Wis. 1989).

Ultimately, the Court came back to Georgia authority to support its holding that the Domestic Relations Long Arm Statute satisfies the constitutional requirements that the defendant have minimum contacts with the state and

ensures fair play and substantial justice. Citing to *Smith v. Smith*, 254 Ga. 450, 330 S.E.2d 706 (Ga., 1985), a case involving the former version of the Domestic Relations Long Arm Statute, the Court held that despite the fact the defendant left the State of Georgia, she enjoys the benefits of support and custody arising out of the order, satisfying the requirement of minimum contacts with this state. Further, the interest of the state in protecting the rights of resident spouses, the non-resident's access to the courts of this state and the convenience to the remaining resident to enforce and modify a decree issues by this state satisfy fair play and substantial justice.

No longer can a spouse leave the state to forum shop or escape the Court's authority case sets forth a clear Doctrine of Continuing Jurisdiction in Georgia for the enforcement and modification of in domestic relations orders. Yet, most interesting is the Supreme Court of Georgia's view that contempt actions and modifications are not really new matters but an extension of the original. This may have implications on other aspects of modification and contempt actions in the future. **FLR**

With more than 80 felony jury trials under his belt, Eric A. Ballinger is a highly experienced trial litigator. After establishing the Law Office of Eric A. Ballinger in Cherokee County in 1993, he expanded his trial practice into areas of civil and domestic issues. He continues to serve Cherokee, Cobb, Pickens, Gilmer and Forsyth Counties.



Guard and Reserve Pensions on the Day of Divorce: Unraveling the Riddles

by Mark E. Sullivan

Introduction – An Office Visit

“I need some help – I’m lost in the woods,” exclaimed Sam Green when he sat down in his lawyer’s office.

“My soon-to-be-ex just told me she’s putting in for retirement next year from the East Virginia Army National Guard. I don’t know what the benefits are, when they arrive, what’s my share – anything! Whenever I try to look it up on the internet, I get completely confused.”

“Slow down, Sam,” replied Amanda Allen, his divorce lawyer. “What is it you want to find out?”

“Well, for starters, I want to find out how much Janet is going to get for the Guard pension. She’s been drilling for over 24 years, and 20 years of that was during our marriage. Shouldn’t I be entitled to some share of that pension benefit?”

“Yes,” answered Amanda. “Since she has 24 years of service, my calculations show that the court should grant you half of 20/24 of the pension.”

“But when will I begin to get payments? How much will I receive? If Janet dies first, will I get anything? How can we find out this information?”

“Not to worry,” responded Amanda. “All Guardsmen begin drawing retired pay at age 60, so that’s when you’ll start to receive your share. As for her death, there’s no way of telling whether she signed up for the Survivor Benefit Plan; if she did, she could have elected an option which cut you out entirely. To get the amount that she’ll be receiving – and all the other information, for that matter – we’ll have to serve a subpoena on the Army to require the release of that to us.”

“Wow – you really know your stuff, Amanda! I feel better already,” exclaimed Sam.

Riddles and Reality

Unfortunately, Sam didn’t get the right advice. Virtually nothing which Amanda told him was correct. While he asked the right questions, the answers from Amanda were bogus. The purpose of this article is to set out the correct answers to the main concerns of the spouse of an RC member. “RC” stands for *Reserve Component*, meaning Reserves and National Guard. These issues, as expressed by the client, are usually the following:

- ❑ When do the payments begin?
- ❑ How much will I receive?
- ❑ What if my former spouse dies before me – will I be cut out of payments entirely?
- ❑ Does my ex pay me, or can the government send me a check?

- ❑ What options did my former spouse have for Survivor Benefit Plan Coverage, and how can we find out what choice she made?
- ❑ Are the future payments a flat amount? Do they go up with inflation? Can they ever go down?

The answers will be found in this two-part article.

RC Retired Pay – the Nuts and Bolts

Members of the Reserve Component (RC) have a defined benefit retirement system.¹ An RC member must meet all of the following minimum requirements to be eligible for what’s known as “non-regular” retired pay:

- ❑ be at least 60 years of age;²
- ❑ have performed at least 20 years of qualifying service computed under Section 10 U.S.C. §12732;
- ❑ have performed the last six years (formerly eight years) of qualifying service while a member of the Active Reserve;
- ❑ not be entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve;
- ❑ must apply for retired pay by submitting an application to the Guard or Reserve.

When an RC member is under 60 and has applied for retired pay and stopped drilling, he or she is waiting for pension payments to begin. Avoid using the verb “retire” when referring to RC personnel, since it can have two meanings. One meaning is when Janet Green begins to receive retired pay. This is “pay status” for her and, as explained herein, it’s usually (but not always) at age 60. Another meaning is the point in time when Janet stops drilling and applies for retirement. These RC personnel are sometimes known as “gray-area retirees,” since the color of the identification card for them used to be gray. With two different meanings of retirement, there can only be problems when using “retire” in a pension division document.³

Retirement Points

When determining the retired pay of RC members, it is important to know how many points are involved and when the servicemember (SM) entered military service. The amount of retired pay depends on the number of points acquired during the minimum 20 years of service and also on one of two formulas.

RC members are awarded retirement points for weekend drills and various forms of active duty training. In general, an RC member may currently obtain up to 90 inactive duty points for each year of reserve service, plus an unlimited number of active-duty points. A weekend drill counts as four points (two mornings, two afternoons), while a two-week period of annual training counts as 14 points (Reserves) or 15 points (Guard) since the RC member is *serving on active duty*. RC SMs also receive points for on-line courses, serving at military funerals, and other special duties.

Twenty years of creditable service must be acquired for retirement application from the Guard or Reserves. To obtain a “good year” for retirement purposes – one that qualifies toward the minimum of 20 necessary – an RC SM must acquire 50 points in that year. The points acquired in each year, regardless of whether it is a “good year,” count toward calculation of retired pay.

It’s a different story when a mobilization occurs. If an RC member is “called up” or mobilized for a 12-month tour of duty, either individually or as part of a unit, the retirement points accounting statement, or RPAS, would show 365 points at the end of a full 12 months of duty – one point per day. No more than 365 points per year (366 for leap years) may be acquired.

When working one of these cases, counsel needs to obtain a current RPAS (or “points statement”) in order to determine how many points have been acquired, both during the marriage and since the start of military service. The Guard and Reserves issue RC member an RPAS once a year, usually within two or three months after the RYE (Retirement Year End date) of the member.⁴ Don’t let the attorney for the member try to claim that there is no points statement, it cannot be located, or “it must have floated away in the big flood in Smallville last year.” One is available to each Reserve Component SM on-line. All she or he has to do is log in to the RC website involved, insert his or her log-in name and enter his or her password. Here is an example of what an Air Force Reserve points statement might look like for Sergeant John T. Doe:

Service History

See chart on page 26.

Calculating Retired Pay

RC points earned are computed based on an equivalent year of service with a standard of 360 days in a year. Thus, for instance, if an RC SM receives 3600 points, this equates to 10 years of equivalent service. From this example we can determine the RC SM’s percentage share of retired pay. If a 20-year active-duty SM receives at retirement 50 percent of his or her base pay, then a 10-year RC SM would receive retired pay equal to 25 percent of base pay. The formula is: $\text{Points} \div 360 \times 2.5 \text{ percent} \times \text{final base pay according to rank and years of service at pay status}$.

At present there are two different computations for RC SMs. For those whose Date of Initial Entry into Military Service (DIEMS) is before Sept. 8, 1980, years of creditable

service are multiplied by 2.5 percent up. The resulting percentage is applied to the base pay in effect for the RC SM on the date retired pay starts to determine monthly retired pay. In the above example, the 25 percent figure would be multiplied by the base pay of the RC SM at the time of receipt of retired pay. If the active duty pay of a SM at retirement were \$4,000 a month, then in this example he or she would begin receiving 25 percent of that, or \$1,000 a month. This retirement plan is known as the Final Basic Pay plan.⁵

Those RC SMs whose DIEMS is on or after Sept. 8, 1980, but before 1988, have the same retired pay multiplier, namely, 2.5 percent per year times years of creditable service. The difference lies in how the actual retired pay is calculated. The retirement percentage is applied to the average of the highest 36 months of basic pay of the SM, effective at age 60, to determine monthly retired pay. Thus, this retirement plan is known as “High-3.” For one who transfers to the Retired Reserve, this is usually the rates of pay to which the RC member would have been entitled if serving on active duty immediately before the date when retired pay is to begin.⁶ Members who request a discharge from the Retired Reserve before 60, however, can only use the basic pay for the 36 months prior to their discharge.

The Guard and Reserve are required to notify RC members when they have completed sufficient years for retired pay purposes. A letter with the subject “Notification of Eligibility for Retired Pay at Age 60,” commonly referred to as the “20-year letter”, accomplishes this.⁷ The RC SM should receive this letter within one year of completing 20 qualifying years of service for retired pay purposes.⁸ The member is required to acknowledge receipt and to decline or accept the Survivor Benefit Plan (SBP). If the member is married or divorced from a spouse with an interest in military retired pay, the member cannot lawfully decline SBP without the written and notarized consent of the other party. Since the acknowledgement can take place before any notary public, it is not unheard of for a spouse or former spouse to find out that an impersonator has executed a waiver of SBP.



ANG/USAFR POINT CREDIT SUMMARY for Sgt DOE, JOHN T., 123-45-6789

FROM DATE	THROUGH DATE	AD	IDT	ECI	IDS	MBR	RETIRE	SATSVC YR MO DY
1985 Jul 23	1985 Oct 07	Delayed Enlistment Program						
1985 Oct 08	1986 Oct 07	365	0	0	0	0	365	01 00 00
1986 Oct 08	1987 Oct 07	365	0	0	0	0	365	01 00 00
1987 Oct 08	1988 Oct 07	366	0	0	0	0	366	01 00 00
1988 Oct 08	1989 Oct 07	315	00	0	0	0	315	00 10 11
1989 Aug 19	1990 Aug 18	15	44	29	0	15	75	01 00 00
1990 Aug 19	1991 Aug 18	57	48	24	0	15	117	01 00 00
1991 Aug 19	1992 Aug 18	13	48	0	0	15	73	01 00 00
1992 Aug 19	1993 Aug 18	68	40	0	0	15	123	01 00 00
1993 Aug 19	1994 Aug 18	365	0	0	0	15	365	01 00 00
1994 Aug 19	1995 Aug 18	365	0	0	0	15	365	01 00 00
1995 Aug 19	1996 Aug 18	365	0	0	0	15	365	01 00 00
1996 Aug 19	1997 Aug 18	365	0	0	0	15	365	01 00 00
1997 Aug 19	1998 Aug 18	365	0	0	0	15	365	01 00 00
1998 Aug 19	1999 Aug 18	365	0	0	0	15	365	01 00 00
1999 Aug 19	2000 Aug 18	365	0	0	0	15	365	01 00 00
2000 Aug 19	2001 Aug 18	365	0	43	0	15	365	01 00 00
POINTS SUMMARY		4486	180	96	0	180	4721	15 10 11

Janet's RC pension begins about one month after her 60th birthday. The payments to Sam, if all his papers are in order according to Defense Finance and Accounting Services (DFAS), will begin about two months later, or about 60-90 days after Janet turns 60. The pension payments will include an annual cost-of-living adjustment, or COLA, whenever that occurs. The only exception is when Sam's pension award is phrased as a "set dollar amount," as will be explained in Part 2 of this article.

At the beginning of this article, Sam Green asked about what the retired pay of Janet Green would be. Estimating this is difficult, but not impossible. Since she is still drilling, there is no way of telling how many points she will have accumulated at retirement, and those points determine what she will be paid. There is, however, a retired pay calculator at the Army's Human Resources Command website, and it works equally well for all Reserve Component (RC) branches of service. Go to www.hrc.army.mil and type "how to estimate your retired pay" into the SEARCH window. You'll find that there is chart which asks for Year Born, Grade at Retirement, Total Years of Service at Retirement, and Total Points at Retirement. Once these are filled in, the form will generate a retired pay estimate.

Part Two of this article will cover pension division, indemnification, disability, the Survivor Benefit Plan, the marital fraction (points vs. months of service) and the drafting of a dual-option clause to cover Sam if his wife goes on to earn an active-duty retirement. **FLR**

Mark Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina and is the author of [THE MILITARY DIVORCE HANDBOOK](#) (AM. BAR ASSN., 2ND Ed. 2011) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law since 1989. He works with attorneys and judges nationwide as an expert witness, as a consultant on military divorce issues and in drafting military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com.



(Endnotes)

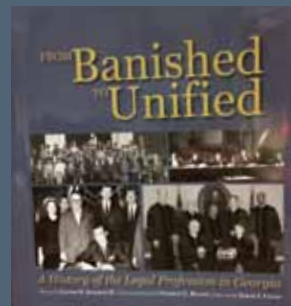
- 1 The DoD Financial Management Regulation (referred to herein as DoDFMR), DoD 7000.14-R, Volume 7B, "Military Pay Policies and Procedures—Retired Pay" contains full details about retired pay for the Army, Navy Air Force and Marine Corps. You can access it at <http://comptroller.defense.gov/fmr>. For a summary of military retirement, go to Chapter 1 of Volume 7B, "Initial Entitlements – Retirements," and review Section 0101, "Military Retirement Overview." This can be found at http://comptroller.defense.gov/fmr/07b/07b_01.pdf.
- 2 The FY 2009 National Defense Authorization Act made it possible for certain RC members to start receipt of retired pay as early as age 50, depending on additional time spent on active duty after January 28, 2008. 10 U.S.C. § 12731(F). Generally speaking RC members can drop three months from their mandatory retirement age of 60, at which they begin to draw retired pay, for each period of 90 days served on active duty in any fiscal year. Qualifying time does not include weekend drill time or annual training. The reduced age for pay doesn't change the age-60 requirement for medical benefits. For the rest of this article, references to retired pay will state that it starts at age 60, even though there are exceptions for those members who have served on active duty as above since 2008.
- 3 Assume, for example, that a pension division order involves an Army Reservist who has stopped drilling at age 40 with 20 years of creditable Army Reserve service, 16 of which were during the marriage. He has applied for transfer to the Retired Reserve, and the order states that the ex-spouse will receive 50 percent of the final retired pay of the member times a fraction, the numerator of which is 16 and the denominator of which is the number of years of service at retirement. The ex-spouse's interpretation of "retirement" would be "20 years," and thus the marital fraction would be 16/20. The Reservist, however, might take the position that "retirement" means when he begins to draw retired pay, and at age 60 his years of service would be 40, since he transferred to the Retired Reserve (thus permitting the military to recall him in the future) instead of requesting a discharge. The difference for the ex-spouse is that she might receive half of 40 percent of the pension (under the Reservist's analysis) instead of half of 80 percent. The faulty wording could lead to an expensive battle in court or negotiations, and might result in her loss of half of the expected pension share benefit.
- 4 The document for the Army Reserve is AHRC Form 249-2E, DARC Form 249 or AGUZ Form 115. For National Guard points, see NGB Forms 22 and 23. The Air Force Reserve document is AF Form 526, and the Navy Reserve document is NAVPERS Form 1070-161. For the Coast Guard Reserve, obtain CG HQ Form 4973.
- 5 On some Leave and Earnings Statements (LESs), there are "RETPLAN" and "DIEMS" blocks, while on others these blocks don't appear. If the blocks appear on the LES, it is up to the member and member's servicing personnel office to ensure that the blocks are complete and the information is accurate. Since Active Guard/Reserve (AGR) personnel get Active Duty pay and benefits but are members of their RC paid using the RC pay system, there can be discrepancies.
- 6 DODFMR, Vol. 7B, ch. 1, § 010102.
- 7 This is also referred to as the NOE, or Notice of Eligibility.
- 8 A wealth of information about RC retirement, applicable to all RC branches of service, is found at the following Army Reserve web page: <https://www.hrc.army.mil/site/reserve/soldierservices/retirement/index.htm>

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