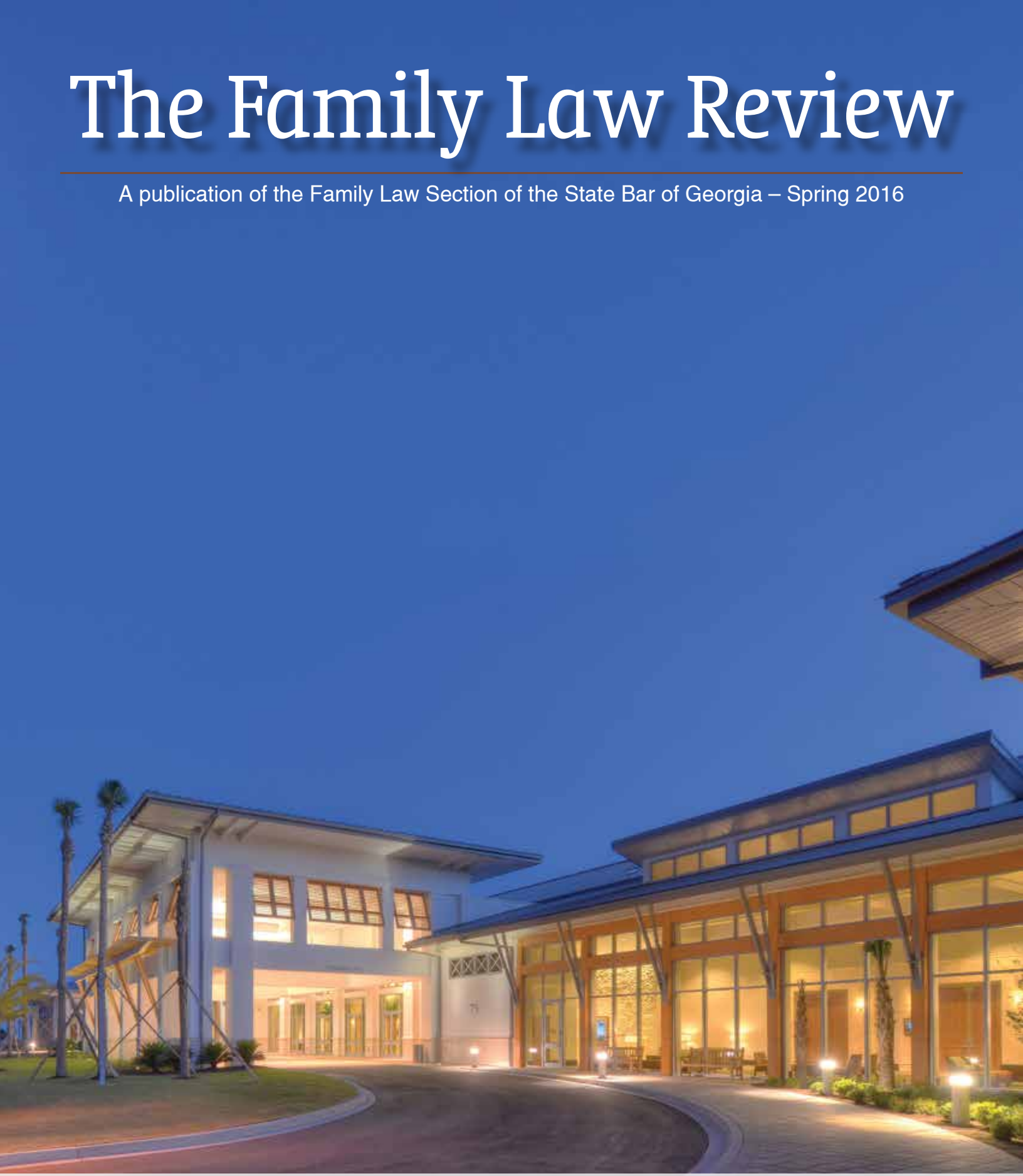
The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia – Spring 2016



The Family Law Institute Returns to Georgia!

Editors' Corner

by Scot Kraeuter
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We hope that you enjoy the spring edition of the Family Law Review as well as the Family Law Institute. This year's Institute, held for the first time in many years in Georgia, at Jekyll Island promises to be a continuation of the many fine Institutes that proceeded it. Enjoy this edition of the FLR, the Institute and all that Jekyll Island has to offer. *FLR*

Editor Emeritus

by Randy Kessler
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Here we are at yet another Family Law Institute, and the first one in Georgia in many, many years. I remain humbled and grateful to be involved in this organization. I truly have enjoyed the mentorship by my peers and the collegiality of our section. I hope you each enjoy and benefit from this year's Family Law Institute and that I am able to continue to make more friends in our section and to visit with old ones.

Enjoy this issue and keep the contributions coming! *FLR*

Correction

In the Winter 2016 edition of *The Family Law Review*, the article titled "Mediation Primer: The Client Preparation List You May Not Already Have" was written by Andy Flink. We apologize for this error.

***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 Scot Kraeuter at scot@jdklawfirm.com

Inside this Issue

Friends Are the Family We Choose

by Regina M. Quick
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In˚sti˚tute (noun)

/insta,t(y)oot/ - a society or organization having a particular object or common factor, especially an educational or social one

Welcome to a celebration of the 34th Annual Family Law Institute! Section leadership is pleased to showcase Jekyll Island, the Jekyll Island Convention Center and all of our partner hotels this year in a return to Georgia for the event. No doubt all will enjoy the individual treasures that collectively comprise the Golden Isles of Georgia. Jekyll Island is truly a special place.

Nature lives here. From wood storks and roseate spoonbills on the Jekyll Causeway to loggerhead sea turtles and purple muhly grass, there is much to appreciate. History lives here. If the Jekyll Island Millionaires Club holds no interest, how about Horton House, the site of Georgia's first brewery constructed in 1740 to supply ale to soldiers and colonists at nearby Fort Frederica? Or nearby Brunswick, named by George Washington in 1789 as one of the five original ports of entry for the 13 colonies. Now, family law lives here (at least temporarily).

Institute Chair Marvin Solomiany has put together an outstanding program. The event written materials are a "must have" for the family law practitioner and the experience a "must do" to enrich and enhance all who want to take family law practice to the next level. There is no other ICLE offering like this one by any Section of the bar - period. Simply the best.

The Family Law Institute is an annual testament to those who first had a vision of lawyers and judges from all over the state coming together over several days to learn together and to fellowship together. Over the years, the program structure has added professionals from other disciplines, speakers with national presence and elected officials whose work impacts our clients and family law. The receptions have also come a long way from the onion dip and chips of the early years!

As Ralph Waldo Emerson wrote "An institution is the lengthened shadow of one man." In this case, a group of friends who shared a profession created an Institute which has now become a long-established practice or custom - the very definition of an institution (and a positive institution to be embraced)[1]. The "lengthened shadow" we all now enjoy provides both an educational and social component in a unique setting. The continuing education of the seminar is unparalleled and family lawyers and judges certainly benefit from the camaraderie and interactions the structure provides. But we also catch up with the family we have chosen and purposefully reach out, recognizing that strangers are just family we have yet to get to know. The beach is icing on the cake.

Section leadership wants you to enjoy the Family Law Institute! Take time to embrace the spirit and re-trace the steps of those who first explored the Golden Isles of Georgia[2]. Learn a lot - inside and outside the building. But please take time to embrace the spirit of the founders of that first Institute and choose some family to take home with you. For those who missed the Institute this year, you've got some catching up to do! ***FLR***

1 Cf. "Marriage is a fine institution, but I'm not ready for an institution." Mae West

2 The Guale and the Timucuan, the Spanish colonists in San Miguel de Guadalupe in 1526, the French who founded Fort Caroline in 1564, General James Oglethorpe, and the Scottish Highlanders of Darien.

Kurt Allen Kegel

October 27, 1966 - April 30, 2016

Kurt Kegel, a vital and beloved member of the family law community, died suddenly of a heart attack while riding his bike on the morning of April 30. Kurt was known for his dry sense of humor, easy smile, and unflappable temperament. He was the calm in any storm. He was a formidable advocate and a great friend. If there can be any solace at this moment, he died while pursuing his passion for cycling.

Kurt's contributions to family law were extensive. Kurt has served at every executive level of the Family Law Section of the State Bar of Georgia, including a term as the Chair of the Section from 2007-08. Kurt has also held every leadership position of the Family Law Section of the Atlanta Bar Association, culminating in a term as the Chair of the Section from 2005-06.

Kurt was the current President of the Georgia Chapter of the American Academy of Matrimonial Lawyers, where he had previously served as Treasurer, Secretary, and Vice President. He was a Master in of the Charles Longstreet Weltner Family Law Inn of Court, and a member of the Georgia Trial Lawyers Association, the Association of Trial Lawyers of America, and a Charter Lifetime Fellow of the Atlanta Bar Foundation.

Kurt is survived by his wife and three children whom he loved and cherished. ***FLR***

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Tips on Collecting Child Support Arrearage

by Lane Fitzpatrick

INTRODUCTION

Parents have a legal and a moral obligation to support their children. O.C.G.A. § 19-7-2. Sadly, some do not meet this obligation. As attorneys, we are consulted by custodial parents who are owed support from errant parents and we are called upon to find a way to collect that obligation. We all know, or should know, the conventional ways to do so. The purpose of this presentation is to provide you with a list of the procedures most often used to meet our client's needs and to also introduce you to other little known ways to collect. But first, a word of advice is in order.

In the humble opinion of the author, trial courts too often overlook the holding in *Strunk v. Strunk*, 294 Ga. 280 (749 SE2d 701) (2013) in which the Supreme Court reversed the portion of the trial court's order providing for payment of an arrearage in child support. The father's $96,000 arrearage was ordered to be repaid at the rate of $250 per month until his obligation to pay child support ended and then $1,000 per month until his arrearage was paid in full. In a unanimous opinion Justice Hunstein cited "the general rule that children are entitled to financial support during their minority" in support of the holding that a trial court may not order the postponement of the payment of child support until the child reaches the age of 18. Despite the Strunk decision, trial courts too often enter orders that extend payment of a child support arrearage past a child's 18th birthday or graduation from high school. We should keep a copy of *Strunk* at hand each time we file a motion for contempt, especially where the arrearage is substantial, and remind the trial court of its holding.

Next, the law allows much the exercise of much greater latitude than is usually taken in punishing parents who owe a child support arrearage. How many times have we found that when a judge does lower the boom and places a payor parent in jail, the dollar amount necessary to free the payor parent from jail suddenly appears? The author of this article respectfully points both attorneys and trial judges to the words in *Reese v. Reese*, 189 Ga. 314, 316 (55 S.E. 2d 777) (1939), where a recalcitrant litigant was cited for contempt. In upholding the trial judge, finding contempt against the payor parent, the Supreme Court quoted Judge Bleckly in *Lester v. Lester*, 63 Ga. 356, 359 (1879).

The attachment will bring the actual resources of the respondent to a practical and decisive test. Pressure is a great concentrator and developer of force. Under the stress of an attachment, even the vision of the respondent himself may be cleared and brightened, so that he will discern ways and means which were once hidden from him, or seen obscurely . . . In reducing him to the alternative of prompt payment each month or being attached, the judge has put the respondent on the vantage side of all his resources, whatever they may be.

So attorneys please use the power of your platform and judges please use the power of your robe. While not all non-paying parents should be placed in the local hoosgow, you will be surprised how quickly money will appear if word gets out that "that Judge will put you in jail." Do it for the children, they are the ones going lacking. When a payor parent does not meet his child support obligation, focus on the child who is left with a single parent to provide food, clothing, shelter and other necessities of life. The questions not often asked of the payor parent are "Have you missed a meal while you have not been paying child support? Have you had a warm (cool) place to live? Have you watched television where you live? Have you had internet access at the place where you live? Have you had use of a vehicle to go places? Have you had clothes to wear?" All of these are considered necessities and yet the child whose support is not being paid can go lacking on any one or more of them when the payor parent does not meet his obligations.

Getting off the soap box, let's turn to several procedures not widely used to collect child support that you may not be familiar with.

CHARGING ORDER

LIMITED LIABILITY COMPANY.

A parent who owes child support may have assets shielded in a limited liability company (LLC), a partnership or a limited partnership (LP). How do we collect child support from a LLC, partnership or a LP? We attempt to do so by obtaining a Charging Order. O.C.G.A. § 14-11-504 permits a judgment creditor of a member of a LLC to apply to a court for a Charging Order. No hearing is necessary. A Charging Order permits the creditor to be paid all distributions from the LLC instead of to the member; however, please note that the parent collecting child support cannot request an order from the court requiring a foreclosure sale of the limited liability company interest.

What process do you follow?

1. Either you or your client must reduce the child support arrearage to a judgment by executing an affidavit for fi. fa. File the affidavit with the Clerk of Superior Court in the county where your client was divorced and request the fi. fa. be recorded in the General Execution Docket in that same county. *Brookins v. Brookins*, 257 Ga. 205, 207, 357 SE2d 77 (1987); McConaughey, *Georgia Divorce, Alimony and Child Custody* (2014-2015 ed.), § 14-19. Request the Clerk of Superior Court to issue a fi.fa. The current cost is $5.00 to record the fi.fa. in the General Execution Docket. O.C.G.A. § 15-6-77. Remember to add in the interest on each installment beginning 30 days after it became due. O.C.G.A. § 7-4-12.1. File

the fi. fa. in the county where the payor parent lives, and if the LLC has a registered office in a county other than the residence of the payor parent, record the fi. fa. in that county as well.

2. Obtain a Certificate of Organization for the LLC from the Georgia Secretary of State.
3. File an Application for Charging Order in the county where the registered office of the LLC is located.
4. Present an Order Charging Limited Liability Company Membership Interest to the assigned judge.
5. File a garnishment in the county where the registered office of the LLC is located to garnish the distributions from the LLC to the payor parent.

PARTNERSHIP.

O.C.G.A. § 14-9-703 permits a judgment creditor of a partner in a partnership to apply to the court for a Charging Order. No hearing is necessary. A Charging Order permits the judgment creditor to be paid distributions of money to the partner by the partnership which the partner is entitled to receive. The procedure for filing for a Charging Order against a partnership is the same as the procedure against an LLC.

LIMITED PARTNERSHIP.

O.C.G.A. § 14-9A-52 permits a judgment creditor of a limited partner to apply to the court for a Charging Order. No hearing is necessary. A Charging Order permits the judgment creditor to be paid the distributions of money or property the limited partner would have otherwise been able to receive from the limited partnership. Follow the same procedure filing for a Charging Order as you did on a limited liability company. For some reason known only to legislators, there is an additional remedy available to the parent seeking to collect from a limited partner. In a limited partnership context, the court has the authority to appoint a receiver and "make all other orders, directions, and inquiries which the circumstances of the case may require." O.C.G.A. § 14-9A-52(a). This language has been interpreted by the Court of Appeals to authorize a judicial foreclosure sale of the limited partner's interest. [1]

LEVY AND SALE OF ENCUMBERED REAL ESTATE

What does one do if the parent who owes child support has real estate with a security deed on it, yet the real estate has net equity? How is the net equity collected? Ordinarily, one cannot foreclose a lien without first paying off the secured indebtedness. O.C.G.A. § 9-13-60; *Hampton v. Gwinnett Bank & Trust Company*, 251 Ga. 181 (251 SE2d 181) (1983). In order to foreclose on the real estate owned by the payor parent with a judgment lien held by the payee parent, you can file a complaint seeking the appointment of a receiver under O.C.G.A. § 9-8-1, *et seq.* to sell the real estate. While the process to do so is somewhat cumbersome, by doing so your client will be able to collect without paying off the debt. The danger is if at the foreclosure sale the highest bidder is not sufficient to pay off the secured indebtedness, then the prudent course of action is to "no sale" and walk away. By doing so your client will eat the costs. Consequently, it is important to be comfortable with the amount of the presumed net equity in the real estate before embarking on this process. Yet the reward can be great for your client. The procedure is outlined as follows:

1. Obtain a fi. fa. for the amount of child support arrearage.
2. Check the General Execution Docket, Lien Index and Real Estate Index in the county where the property is located to verify the liens that are superior to your client's lien.
3. Record the fi. fa. in the General Execution Docket of the Clerk of Superior Court's office in the county in which the real estate is located.
4. File a complaint seeking the appointment of a receiver to conduct a Sheriff's sale and to foreclose your client's lien.
5. Obtain a Rule Nisi for a hearing.
6. Request an order to appoint a receiver at the hearing.
7. Consult with the County Attorney and discuss your plans with him, as a courtesy and to avoid any possible future complications.
8. Consult with the Sheriff of the county in which the real estate is located and request a copy of the Sheriff's procedures for the levy and sale of property. If possible, meet personally with the Sheriff or deputy in charge of the process to make certain you are familiar with the Sheriff's requirements. It is virtually a certainty that the

Sheriff or County Attorney will require you to submit a Certificate of Title to show you have researched title to the real estate in the deed records to verify ownership of the real estate and any liens against the real estate.

9. Post a Levy on Land on the real estate. Depending upon the Sheriff's Office, you may be the one to post the Levy under the supervision of a deputy sheriff, or the deputy sheriff may do the posting. Either way, be present when the posting is done.
10. Have the payor parent served by a deputy sheriff with the Levy on Land and Notice of Levy on Land.
11. Have the deputy sheriff sign an Entry of Service.
12. File with the Clerk of Superior Court a Notice of Filing of the Levy on Land, Notice of Levy on Land and Entry of Service.
13. Prepare an Advertisement of Judicial Sale to be run in the legal organ of the county for four consecutive weeks prior to the first Tuesday of the month in which the sale is to take place.
14. On the first Tuesday of the month, attend the foreclosure sale with your client to observe the sale on the courthouse steps. Depending upon the highest bid your client will instruct the receiver to accept the highest bid or "no sale" the property.
15. Prepare a Sheriff's Deed and Receiver's Deed to be executed by the Sheriff and Receiver and delivered to the buyer at the foreclosure sale upon the Receiver's receipt of the bid amount. The Sheriff is entitled to a fee for executing a levy on a fi. fa., a commission on the sale and for executing a Sheriff's deed. The fees are found in O.C.G.A. § 15-16-21. Be aware the closing attorney for the buyer may require that your client execute a quitclaim deed.
16. Prepare a Rule Nisi for a hearing for the court to receive a report from the receiver.
17. Prepare a Report of Receiver and file it with the Clerk of Superior Court.
18. Present a Final Order to the court which will close the case at the hearing.

LEVY AND SALE OF STOCK IN A CORPORATION

Should the payor parent own shares in a corporation, how does one levy on those shares of stock? Here is one method:

1. Consult with the County Attorney and discuss with him your plans, as a courtesy and also to head off any possible future complications.
2. Contact the local Sheriff and inquire about his procedure for levying on property.
3. File a motion for contempt and have the defendant served.
4. Serve a notice to produce the stock certificate.
5. Make arrangements to have a deputy in the courtroom at the hearing on the motion for contempt.
6. When the payor parent produces the stock certificate, have a deputy sheriff serve the payor parent with a Levy and Notice of Levy and take possession of the stock certificate.
7. Prepare an Entry of Service and have the deputy sheriff sign it.
8. Deliver the Levy and Notice of Levy and Entry of Service to the Sheriff's office.
9. Prepare an Advertisement of Sheriff's and Receiver's Sale and run the ad for four consecutive weeks prior to the first Tuesday in a month.
10. Consult with your client on whether to place a bid on the share certificate and the amount your client is willing to bid.
11. Attend the Sheriff's Sale with your client and if your client has decided to bid on the share certificate, coordinate making the bid with the client. For another method of accomplishing the same, see *Clark v. Chapman*, 301 Ga. App. 117 (687 SE2d 146) (2009) where a "Complaint for Injunctive Relief and Levy of Corporate Stock" was utilized.

The end result may be that your client becomes the owner or majority owner of the payor parent's

corporation. Your client can then decide to distribute the assets of the corporation or liquidate the assets of the corporation, thus obtaining assets or money for the support of your client's child.

EXECUTION OF WRIT OF FI. FA.

REAL ESTATE AND PERSONAL PROPERTY

An arrearage of child support can be collected by execution of a writ of fi. fa. *Lipton v. Lipton*, 211 Ga. 442, 444 (86 SE2d 299) (1955). You may have a levy made on both real estate and personal property. The process is virtually the same as set out above on the Levy and Sale of Encumbered Real Estate.

1. Obtain a fi. fa. and request the fi. fa. be recorded in the General Execution Docket in the county where your client was divorced and if the property to be levied upon is in another county, in that county as well.
2. Check the General Execution Docket, Lien Index and Real Estate Index in the county where the real estate is located to verify there are no liens superior to your client's lien. For personal property, specifically check for U.C.C. liens. If you are levying on real estate it is likely you will be asked by the Sheriff or County Attorney to provide a title search to the real estate certifying there are no liens superior to your client's lien. You may be asked for a similar document on personal property.
3. Consult with the County Attorney and discuss your plans with him, as a courtesy and to avoid any possible future complications.
4. Consult with the Sheriff of the county in which the real estate or personal property is located and request a copy of the Sheriff's procedures for the levy and sale of property. If possible, meet personally with the Sheriff or deputy in charge of the process to make certain you are familiar with the Sheriff's requirements. It is possible the Sheriff may require you to hire an auctioneer to conduct the sale of personal property.
5. Consult with the Sheriff. If he does not have a storage facility available to store the personal property you will be levying upon, rent a storage unit, preferably one selected by the Sheriff, and turn the key to the storage facility over to the Sheriff. An alternative to this would be to introduce to the Sheriff the auctioneer you have hired to conduct the sale and perhaps the Sheriff will authorize the auctioneer to store the property.
6. Coordinate with the Sheriff a date on which a deputy sheriff will accompany you to the payor parent's residence or place of business to commence the levy on personal property. You should have strong backs and sufficient transportation available to load and transport the personal property levied upon to the storage facility. Do not forget to levy on watches and jewelry if your client knows the payor parent has a Rolex or other expensive wrist watch, diamond ring and expensive jewelry that can be sold. Do not overlook class rings, especially from the 1970's and earlier as the gold content of those rings can be valuable.
7. Post a Levy on Land on the real estate. Depending upon the Sheriff's Office, you may be the one to post the Levy under the supervision of a deputy sheriff, or the deputy sheriff may do the posting. Either way, be present when the posting is done.
8. Have the payor parent served by a deputy sheriff with the Levy on Land and Notice of Levy on Land.
9. Have the deputy sheriff sign an Entry of Service.
10. File with the Clerk of Superior Court a Notice of Filing of the Levy on Land, Notice of Levy on Land and Entry of Service.
11. Prepare an Advertisement of Judicial Sale, have it approved by the Sheriff and publish the ad in the local newspaper once a week for four consecutive weeks before the first Tuesday in a month. As an alternative, file a request with the court to hold the auction at a location other than the courthouse steps and explain why the alternate location should be used.
12. Attend the auction with your client to observe.
13. Prepare bills of sale if the Sheriff requires them for items of personal property and the deed to real estate for the Sheriff to sign.
14. Remember, the Sheriff is entitled to a fee for executing a levy on a fi. fa., a commission on the sale of property and a fee for signing a bill of sale. See O.C.G.A. § 15-16-21.

FILE A LIEN ON A GEORGIA MOTOR VEHICLE CERTIFICATE OF TITLE

After you have obtained a fi. fa. you may present your client's fi. fa. to the Tax Commissioner in your county and request a search for vehicles titled in the payor parent's name. If your Tax Commissioner will not perform the search, Form MV-20 is used to request a title search to determine if the payor parent has a vehicle titled in his name. The fee is currently $1.00 per title. Form T-53A is used to place a judgment lien on a title.

The forms can be found at dor.ga.gov. Click on forms and type in the form number. Or you may Google "Georgia Department of Revenue" or "How do I place a lien on a motor vehicle in Georgia?"

SETTING ASIDE A FRAUDULENT CONVEYANCE

- The Uniform Fraudulent Transfers Act, O.C.G.A. § 18-2-70, *et seq.*, should be consulted when you

are faced with a spouse or former spouse who has transferred assets in an effort to avoid paying child support or alimony, or both. The form of a complaint to set aside a fraudulent conveyance is found in O.C.G.A. § 9-11-113.

- It is not necessary to reduce your client's claim to judgment in order to file a complaint to set aside a fraudulent conveyance. O.C.G.A. § 9-11-18 (b). Be aware there is a statute of limitations to file a complaint. See O.C.G.A. § 18-2-79.
- If the fraudulent transfer occurs during the divorce action, beside likely being in contempt of a Standing Order used in most jurisdictions, a count can be added to your client's divorce case to set aside the fraudulent conveyance and the transferee can be joined as a party in the divorce case under O.C.G.A. § 9-11-19 (a) (1). *Shah v. Shah*, 270 Ga. 649 (513 SE2d 730) (1999).
- Should the fraudulent transfer take place after the divorce case is over, a complaint in equity to cancel and set aside a fraudulent conveyance of property is authorized. *Wood v. McGahee*, 211 Ga. 913 (89 SE2d 634) (1955).

The more traditional means of collecting child support will now be discussed.

CONTEMPT

Filing a motion or attachment for contempt is the most widely used way to collect child support. O.C.G.A. § 19-6-4; *Lenett v. Lutz*, 215 Ga. 369, 370 (110 SE2d 628) (1959); *Aycock v. Aycock*, 251 Ga. 104 (303 SE2d 456) (1983).

1. File a Motion for Contempt.
2. Obtain a Rule Nisi for a hearing.
3. Have both the Motion for Contempt and Rule Nisi served on the defendant by a deputy sheriff.
4. At the hearing present a proposed order holding the defendant in contempt to the judge.

GARNISHMENT

Collection of child support by garnishment is authorized by *Herring v. Herring*, 138 Ga. App. 145, 146 (225 SE2d 764) (1976). Once a payor parent becomes in arrears in an amount equal to or greater than the amount due in one month. O.C.G.A. § 19-6-30 comes into play.

The garnishment statue is found in O.C.G.A. § 18-4-60, *et seq*. Typically a garnishment is used to obtain the money in a payor parent's bank account.

1. The process begins by either you or your client, at your direction, executing a garnishment affidavit in the form found in O.C.G.A. §18-4-66(1). The affidavit must either be made before and approved by a judge, made before a notary public and approved by a judge or made before a clerk or deputy clerk of the court where the garnishment is to be filed and approved by the clerk or deputy clerk if the judge or judges of the court authorize the clerk to do so. O.C.G.A. § 18-4-61.
2. Prepare a summons of garnishment in the form prescribed by O.C.G.A. § 18-4-66(2) and file it with the clerk.
3. Prepare an answer of garnishee in the form prescribed by O.C.G.A. § 18-4-66(4) and file it with the clerk.
4. The following additional information must be provided in a garnishment on a financial institution: (a) other known names of the defendant; (b) the defendant's current and past addresses; (c) the last four digits of the defendant's social security number; and (d) last four digits of the defendant's account number, if known. O.C.G.A. § 18-4-66(7).
5. Service on the garnishee is accomplished in the usual fashion, that is by a deputy sheriff.
6. Service on the defendant in fi. fa. (the payor parent) is done in one of several ways found in O.C.G.A. § 18-4-64.
   - Subpart (1) is service on the payor parent by a deputy sheriff in accordance with O.C.G.A. § 9-11-4.
   - Subpart (2) is service on the payor parent by registered or certified mail or statutory overnight delivery, return receipt requested, within 3 business days after issuance of the summons and service of the summons of garnishment on the garnishee. Upon receipt of the return receipt, file it along with the mailing receipt with the clerk of court. If the defendant refused to accept delivery, file the envelope with the clerk with the certification.
   - Subpart (3) is personal service on the payor parent not more than 3 business days after issuance of the summons and service of the summons of garnishment on the garnishee. The person who delivers written notice of garnishment to the payor parent must file a certification with the clerk of court. "Written notice" is not defined in the statute and one can assume delivering a copy of the affidavit of garnishment and summons will satisfy the statute.
   - Subpart (4)(A) provides that where the payor parent resides outside of Georgia, has left Georgia, and cannot, after due diligence, be found within Georgia, or conceals his place of residence from the plaintiff, and the fact appears, by affidavit, to the satisfaction of the judge or clerk of court, the levy and attachment of the lien of the garnishment shall constitute sufficient notice to the payor parent. If there is a known address of the payor parent, the plaintiff must mail a written notice of garnishment to the address. If there is no known address of the

payor parent, the plaintiff must mail "written notice of the garnishment" to the address where the payor parent was served in the divorce proceedings. The terms "levy and attachment of the lien of the garnishment" and "written notice of garnishment" are not defined in the statute. Again, one can assume sending a copy of the affidavit of garnishment and summons of garnishment will satisfy the statute.

- Subpart (4) (B) requires that the mailings described in subpart (B) be done within 3 business days after issuance of the summons and service of the summons on the garnishee and a certificate of mailing be filed with the clerk of court.
- Subpart 5(A) is similar to (4) (A) in that where the payor parent resides outside of Georgia, has left Georgia and cannot, after due diligence, be found within Georgia, or conceals his place of residence from the plaintiff, service can be accomplished by publishing twice in the legal organ in the county where the garnishment is filed a written notice of the garnishment. The two notices must be published at least 6 days apart and the second publication must be made not more than 21 days after service of the summons of garnishment on the garnishee. The person causing the notice to be published must file a certification with the clerk that publication has been effectuated. If the plaintiff knows the payor parent's address, written notice of garnishment must be mailed to the payor parent at the address.
- Subpart (5)(B) requires that the written notice of garnishment be mailed within 3 business days after issuance of the summons and service of the summons on the garnishee and that a certificate of mailing be filed with the clerk of court.
- Subpart (6) permits a plaintiff to send written notice of garnishment by ordinary mail to the payor parent at the address at which the payor parent was served in the action which resulted in the judgment on which the garnishment is based within 3 business days after issuance of the summons and service of the summons of garnishment on the garnishee; however, this procedure may only be used if the garnishment is commenced within 60 days from the date of the judgment on which the garnishment is based. A certificate of the person who mails the notice must be filed with the clerk of court.
- Subpart (7) permits the plaintiff to serve the payor parent by ordinary mail, if the payor parent's address is known. Service with written notice of garnishment must be made within 3 business days after issuance of the summons and service of the summons of garnishment on the

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garnishee. A certificate of the person who mails the notice must be filed with the clerk of court.

The clerk of court will likely not disburse the funds paid into court until an order from the court is received.

CONTINUING GARNISHMENT FOR CHILD SUPPORT

Authority to file a continuing garnishment for child support is found in O.C.G.A. § 18-4-130, *et seq*.

A continuing garnishment for support is in effect for as long as the payor parent is employed by the garnishee.

The amount of earnings subject to a continuing garnishment for support is 50 percent of the payor parent's disposable earnings. O.C.G.A. § 18-4-20(f). "Disposable earnings" means the amount remaining after the deductions required by law to be withheld. O.C.G.A. § 18-4-20(a)(1). The deductions required by law to be withheld are generally federal and state income taxes, Social Security and Medicare. Deductions for health, dental, vision and life insurance are not required, nor are loan payments, savings account, 401(k) or payroll donations to charities.

The same procedures that apply in a garnishment proceeding also apply for filing and service of the affidavit of continuing garnishment and summons of continuing garnishment for support. O.C.G.A. § 18-4-130. The forms for a continuing garnishment are found in O.C.G.A. § 18-4-118. There are slight differences in the Affidavit for Continuing Garnishment and the Summons of Continuing Garnishment for Support. You must serve the garnishee with the form for an answer. O.C.G.A. § 18-4-112(c).

Because the payor parent's employer may not be aware of the increased amount of disposable earnings to be withheld, 50 percent, a letter to the employer is advisable.

ATTORNEY'S FEES

Of all the methods of collecting child support that we have gone over, only one has a statutory basis for requesting an award of attorney's fees, that being a motion for contempt. O.C.G.A. § 19-6-2. However, O.C.G.A. § 9-15-14 is always available if the payor parent or his attorney take actions in such a way as to provide a basis for a request under the statute. It is vitally important that you make a record to support an award under 9-15-14. Just as important, the court's order awarding attorney's fees under 9-15-14 must contain findings of fact to support the award specifying the abusive acts on which the award is based and whether the award is under subsection (a) or (b). Otherwise, the award is reversible on appeal. *William v. Becker*, 294 Ga. 411 (754 SE2d 11) (2014).

Unlike representing a client in a divorce case where a contingency fee arrangement is forbidden, Advisory Opinion No. 36 permits a contingency fee in collecting child support. Advisory Opinion No. 47 should be reviewed before entering into a contingency fee arrangement.

INTEREST ON CHILD SUPPORT ARREARAGE

Do not overlook O.C.G.A. § 7-4-12.1. Every arrearage on child support bears interest at the rate of 7 percent beginning 30 days from the day the payment is due. It is not required that the payee parent reduce the award of child support to judgment in order to collect interest. Caveat, a trial court has discretion to apply or waive past due interest based on four factors:

1. Good cause existed for nonpayment of child support;
2. Payment of interest will result in substantial and unreasonable hardship for the payor parent;
3. Applying, waiving or reducing the interest will enhance or detract from the payor parent's current ability to pay child support, including the consideration of the regularity of payments made for current child support for those dependents to whom support is owed; and
4. Waiver or reduction of interest will result in substantial and unreasonable hardship to the payee parent to whom interest is owed.

DEADBEAT PARENTS PUNISHMENT ACT (DPPA)

Sometimes Congress shows a sense of humor. What better name than "Deadbeat Parents Punishment Act?" 18 U.S.C. § 228 makes it illegal for a payor parent to wilfully underpay child support in certain circumstances.

- First, a payor parent is subject to federal prosecution if he willfully fails to pay child support ordered by a court for a child who lives in another state, or if the payment is past due for longer than one year, or exceeds $5,000. A violation of this statute is a criminal misdemeanor, and if convicted, the payor parent faces fines and up to 6 months in prison. 18 U.S.C. § 228 (a) (1).
- If, under the same circumstances, child support is past due for longer than two years, or the amount owed exceeds $10,000.00, it is a criminal felony and if convicted, the payor parent faces fines and up to 2 years in prison. 18 U.S.C. § 228 (a) (3).
- Finally, the statute prohibits a payor parent from crossing state lines or fleeing the country with the intent to avoid paying child support that has either been past due for more than one year or exceeds $5,000. A payor parent convicted of this crime may face up to 2 years in prison.

So how would you like to play Assistant U.S. Attorney and write that letter? "Dear Mr. Deadbeat, the purpose of this letter is to notify you that a bed with your name on it is open in the Federal Penitentiary in Atlanta, Georgia. You have ten days from the date of this letter to pay in full the child support you owe or a warrant for your arrest

will be sought before the United States Magistrate for the Northern District of Georgia. Have a good day. Sincerely yours." Or better yet, "Dear Mr. Deadbeat, the purpose of this letter is to notify you that a Federal Marshal in a navy blue blazer will be waiting on you when you arrive on the Redneck Riviera, otherwise known as Myrtle Beach, South Carolina. Obviously, you are fleeing Georgia to avoid paying child support since you have not paid child support in the past two years and owe $6,000, yet you have a room booked at the swankiest hotel near the Boardwalk (an oxymoron if I have ever heard one). Before you leave home, I suggest you swing by your ex-wife's house and leave her a check for $6,000. Otherwise, I am told the accommodations at the Federal Penitentiary in Edgefield, S.C. are not quite up to your standards. Enjoy. Very truly yours."

CHILD SUPPORT SERVICES

If a parent consults with you about a child support arrearage and cannot afford your fee, and you cannot represent the parent pro bono, by all means refer the parent to Child Support Services. There is no charge for representation. Even if a parent does not receive any public assistance from the State of Georgia, the parent is entitled to apply for Child Support Services. O.C.G.A. § 19-11-6(c). Granted, the parent becomes a number and likely will not receive the same level of service and attention to the case that you can provide, but the parent's child deserves child support to be collected. Remember, too, Child Support Services can take the payor parent's income tax refund, which we private attorneys cannot do. O.C.G.A. § 19-11-18(a). Further, Child Support Services is required to maintain a state-wide certified list of payor parents who are more than sixty days in arrears and all licensing agencies in the state are required to suspend all licenses or withhold issuance or renewal of any license. O.C.G.A. § 19-11-9.3. Liens can be filed by Child Support Services on any real and personal property owned by the payor parent, including, but not limited to, motor vehicles, insurance policies and endowment contracts. O.C.G.A. § 19-11-18. One inexpensive but useful tool is to write the payor parent and notify him or her that unless the child support arrearage is paid up by a certain date or at least a specific sum is not paid by a certain date your client will apply for Child Support Services and inform the agency of the payor parent's arrearage which will result in suspension of the payor parent's driver's license and/or professional license, a lien being placed on the payor parent's motor vehicle certificate of title, real and personal property owned by the payor parent. Doing so may motivate the payor parent to pay your client the amount of money stated in your letter.

GENERAL INFORMATION

All methods of collecting child support are available to the payee parent, either singly or concurrently. *Lenett v. Lutz*, 215 Ga. 369, 370 (110 SE2d 628) (1959); Lipton v. Lipton, 211 Ga. 442, 444 (86 SE2d 299) (1955); *Brookins v. Brookins*, 257 Ga. 205, 207(2) (357 SE2d 77) (1987); and *Herring v. Herring*, 138 Ga. App. 145(2) (225 SE2d 697) (1976).

The payee parent is not required to make an election of remedies, but only one recovery will be allowed. *Lipton v. Lipton*, 211 Ga. 442, 444-445 (86 SE2d 299) (1955).

"A trial court may not limit the remedies available to collect or enforce a child support order." *Hill v. Hill*, 219 Ga. App. 247 (464 SE2d 656) (1995); Department of *Human Resources v. Chambers*, 211 Ga. App. 763, 766 (441 SE2d 77) (1994).

A payee parent has a variety of remedies available for enforcing and collecting a child support order." *Department of Human Resources v. Chambers*, *supra*.

At the end of the day, if you are successful in collecting child support for your client you have not only performed your duty to your client, but you have also performed a duty to society to insure that a child has the necessities of life. In these United States no child should go hungry; no child should go without adequate shelter and clothing. We have a higher duty to do all that we can to provide for those who cannot provide for themselves. ***FLR***

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The information on Interest on Child Support Arrearage and Deadbeat Parents Punishment Act (DPPA) was obtained from Robert "Bert" Guy, Jr., Esq., of St. Mary's, Georgia.

Finally, in keeping with the Biblical admonition that the last shall be first, (Matthew 19.30), the author wishes to express his undying love and devotion to his wife of forty-two years, Norma F. Fitzpatrick, without whom he would not have graduated from law school nor been able to survive the trials and tribulations of this profession. Why she has loved and remained with him all these years is one of life's great mysteries that will never be known.

(Endnotes)

1 *Nigri v. Lotz*, 216 Ga. App. 204, 205 (453 SE2d 780) (1995); *Stewart v. Lanier Medical Office Building*, 259 Ga. App. 898 (2) (578 SE2d 572) (2003).

Interview with Judge Nels S.D. Peterson

by Gary P. Graham[1]

I had the honor of interviewing one of the newest members of the Court of Appeals, Judge Nels Peterson. Based on the Judge's previous experience, it is without question that he will be an invaluable asset to the Court.

Peterson was appointed by Gov. Nathan Deal to the Court of Appeals in December 2015, and took office Jan. 1. He has thoroughly enjoyed being on the Bench, and notes that the Court of Appeals' staff did a fantastic job preparing for the addition of three judges at the same time. The transition has been seamless.

Peterson attended college locally, graduating from Kennesaw State University with a B.S. in political science and a minor in economics. While at KSU, he served as president of Student Government and chair of the Student Advisory Counsel to the Board of Regents, and was named Outstanding Senior in Political Science and Student of the Year.

He received his J. D. from Harvard Law School. At Harvard, he was executive editor of the Harvard Journal of Law and Public Policy,executive vice-president of the Federalist Society, and was a finalist in the Ames Moot Court Competition. Most importantly, Peterson met his wife at Harvard Law School. His proudest accomplishment was convincing his wife to say yes to marriage.

Upon graduation from law school, he served as a law clerk to Hon. William H. Pryor Jr. of the U.S. Court of Appeals for the 11th Circuit. Peterson then practiced at King & Spalding LLP in Atlanta, where he focused on securities litigation, corporate governance litigation, merger-related litigation, and appellate litigation.

He then moved to the Governor's Office, where he served as executive counsel and deputy executive counsel to Gov. Sonny Perdue. In addition to his role as the Governor's chief legal advisor, he also served as advisor on a broad array of policy issues, including water, natural resources, education, the judiciary, and criminal justice. A sampling of some of the most interesting issues he addressed in this role were the removal of accreditation of the Clayton County schools, the investigation of the Atlanta Public Schools cheating scandal, and being the point person for the water disputes.

At the expiration of Perdue's term, Peterson moved to the Attorney General's Office as counsel for Legal Policy, where he oversaw major policy issues such as health care reform and water rights litigation, as well as the rewrite of the state's Open Records and Open Meetings Acts.

In 2012, the Attorney General appointed him as Georgia's first Solicitor General. In that position, he oversaw all of the state's appellate litigation and played a lead role in all policy-related litigation, and served as a senior advisor to the Attorney General. It was in this position that he acquired family law experience by having personally reviewed every appellate brief they filed, with the majority being termination and deprivation cases.

Peterson was then appointed vice chancellor for Legal Affairs and secretary to the Board of Regents of the University System of Georgia, a position he held until his appointment to the Court of Appeals.

Comparing previous experience to now being on the bench, he explained that the biggest adjustment is the completely different role he now plays on the bench. Specifically, his most important consideration is "what's the right answer," as opposed to arguing a certain position.

In terms of appellate tips and pointers from Peterson, the key issue on appeal is the standard of review, as it is a very dispositive issue. Attorneys should directly address the standard of review, and explain why their position should win under that standard. If not, the implication is that the attorney cannot defend his or her position. Attorneys should not ignore the weaker parts of their case. Instead, the attorney should acknowledge those parts and address them directly. In briefs to the Court, he recommends an introduction that explains what the case is really about and why the attorney should win, rather than same being buried in miscellaneous pages throughout the brief.

Peterson likes to cook, currently serves on the board of the Atlanta chapter of the Federalist Society, is an active member of Johnson Ferry Baptist Church, and lives in Cobb County with his wife, Jennifer, and two children.

The Family Law Section wishes Judge Peterson a very rewarding and satisfying tenure on the Court of Appeals. ***FLR***

(Endnotes)

1 Thank you to Judge Peterson and his staff for a very detailed biography that contributed to this interview and article.

Meet Judge Brian M. Rickman

by Lane Fitzpatrick

Judge Brian M. Rickman was appointed by Gov. Nathan Deal to a newly created judgeship on the Court of Appeals of Georgia effective Jan. 1, 2016. Rickman is a native of Madison County, in the Northern Judicial Circuit. After graduation from Piedmont College *cum laude* in 1998, and the University of Georgia School of Law in 2001, he returned to his family's ancestral home in Rabun County, where he practiced law for a period of years as a partner at Stockton & Rickman. He was involved in civil litigation and was defense counsel in several cases including murder cases. In January, 2008, he was appointed District Attorney of the Mountain Judicial Circuit where he served until his appointment to the Court of Appeals.

Q: I know you handled domestic relations cases in private practice because you and I squared off against each other. As an advocate, what lessons did you learn that will serve you as an appellate judge in domestic cases?

A: I tried to keep in mind each day that I am at the Court what the reality of being in private practice and serving domestic relations clients looks like. The lessons that I learned were invaluable. First, the practice of law is not an easy undertaking. Lawyers must tend to the business of a law practice, while also trying to counsel clients and be good students of the law. Second, when it comes to domestic relations cases, the emotional complexities for litigants are enormous, the stakes are the highest, and thus there are often no "simple" or "easy" solutions for the practicing domestic relations attorney. I believe that my experiences have given me a very genuine sense of empathy and understanding for the difficulties faced by both litigants and attorneys.

Q. While District Attorney you handled cases involving family violence and domestic abuse. Tell us your takeaways from prosecuting those cases.

A. Over the years, I have handled murder cases, assault cases, aggravated stalking case, and everything in between. I have both prosecuted and defended these types of cases. While I was a brand new attorney, I recall the quiet frustration with victims or clients when their ideas or direction for a case did not match my own, or perhaps I thought my ideas were best for them. This can be especially true for family violence cases, of course, when the feelings of a party can be complex and changing.

I think if there is one overriding lesson I have learned, it is that these cases or controversies are not about us as attorneys; they are truly personal to all the litigants involved. At the end of the day, the parties are the most important people involved, and not the attorneys or judges. We all work for them.

Q. Since you have only been on the bench for a little over four months now. What tips can you give us for writing briefs?

A. Simplicity is a beautiful thing. Each time I draft something, upon review I find more that should come out. I think all of us, me included, tend to write too much in an effort to do our best job in conveying a thought. A truly effective brief is simple, concise, and plain.

Q. What tips do you have for us for oral argument?

A. Never be afraid to concede an obvious point. A lawyer earns much credibility when they concede where they should. You almost want to present your case as if you have objectively analyzed it, even though you are an advocate. Always be humble and polite.

Q. What is your most important role?

A. That is the easiest question. It is being a husband to my wife Maggie and father to my two children. ***FLR***

Talking with Judge Amanda H. Mercier

by Rebecca Crumrine Rieder

Judge Mericer is the lawyer we should all strive to be. She is learned, focused, keenly sharp; and, welcoming, down to earth and open. She brings to the Appellate Bench her experiences as a trial attorney and Superior Court Judge, bringing litigation eyes to appellate matters.

Mercier took office in the Court of Appeals of Georgia in January 2016 as one of the three new seats created by statute during the 2015 legislative session. She had a unique opportunity to work with all the Judges on various panels during the January term. Once April term started, she was assigned to the Fourth Division, consisting of Presiding Judge John J. Ellington and Judge Elizabeth L. Branch. Ellington says he "inherited" her and insists "she came fully trained. She has great judgment and has been a wonderful addition on the Court of Appeals."

Prior to her appointment she served for five years on the Appalachian Judicial Circuit Superior Court. Prior to her appointment on the bench, she practiced in her hometown of Blue Ridge, Georgia, where her family established Mercier Orchards. Her private practice focused on the areas of criminal and family law. She also brings her experience in the U.S. Attorney's Office where she worked during her third year of law school at Syracuse. While there, she was honored as a member of Order of the Coif. Never fear Bulldog fans, her undergraduate is from University of Georgia! She spent 10 years practicing both civil and criminal law, "doing something good for people in a very difficult time." The work was rewarding. She wanted to make sure clients felt they had their day in court.

Her work in Superior Court, and as a trial attorney, and more specifically a family law attorney, definitely affects her position on the Court of Appeals. Mercier reflected on being a trial attorney and a trial judge which opened her eyes to the whole case. She hopes to use her experience to deduct what actually happened in the trial, as opposed to what we noted in the brief.

It was a difficult decision to leave the Superior Court because she loved it. She loved serving her community. To that end, the joy of being on the Court of Appeals is that she is able to give back to the whole state, not just her hometown.

Mercier is humble and introspective. She works hard to get things right. She quickly asserts that she is human and may "mess up or get it wrong," but when that happens, she owns it and makes efforts to correct it. "Being wrong doesn't mean you didn't do a good job." As she says, "I want to learn everyday how to be a better judge. Humility is something people appreciate and it goes a long way."

Regarding advice for practitioners generally, she relies on the advice of a law professor who said a good lawyer should be able to stop mid-sentence at any point in a case, and pick up and argue the other's side's case. She opines that family law matters are the most challenging. The area of law is very emotional and is not an arm's length transaction. There is nothing more personal and more emotional than divorcing. There is not a "magic pill" to fix an unfixable situation – we have to follow the law and the law cannot fix divorce. We have to do the best within the confines of the law.

Specific to practicing in appellate courts, she suggests to be short, concise and to the point and to make your best arguments by focusing on the few strongest points. To paraphrase a Winston Churchill idealism Mercier has adopted, "the length of the document defends itself on the likeliness that it won't be read." She likes oral arguments, and she grants them often, especially with complicated issues or unique/novel legalities.

Mercier wants to give back to lawyers. From the appellate bench, she seeks to detail a well thought out opinion that provides the issue, the facts, the answer and the opinion. She feels like she learns something new every day by digging deeper into the law than she did as a trial judge. Her need to look at all aspects of a specific issue and the present law makes her a better lawyer.

Judge Mercier doesn't want to forget what shaped her as a lawyer and as a Superior Court Judge. And that molding assists her in the incredible responsibility she has now as an appellate court judge: to learn everyday so she leaves behind well thought out case law that applies the law and is helpful to the lawyers who depend on it to defend or prosecute cases, and, to interpret the law so the lawyers can represent their clients. ***FLR***

Judge Kathy S. Palmer

by Lane Fitzpatrick

Judge Kathy S. Palmer is a Johnson County native who grew up picking cotton and tobacco on family farms. Not surprisingly, she participated in 4-H, worked hard to become a Master 4-H'er and was awarded a 4-H scholarship to college. Perhaps toiling away in the fields provided the motivation to attend the University of Georgia where she majored in Home Economics.

Working while studying was par for the course throughout her undergraduate days. She set her sights on becoming a County Extension Agent, but shifted her focus to the law, including a stint as a UGA police officer. She was the first Home Economics major ever admitted to the Lumpkin School of Law. Palmer remains both a staunch supporter of her school, now known as the College of Family and Consumer Sciences, and anything "Bulldawg." Her tailgates at football games each fall are legendary.

After graduating from law school, she became an instructor for the Prosecuting Attorneys Council of Georgia and an assistant solicitor in DeKalb County. Next,she returned to rural Georgia to practice law in the Middle Judicial Circuit. There she handled both civil and criminal cases, including death penalty cases. When she decided to run for a vacancy in the bench created by a retiring judge, she ran against a long-time district attorney and won, becoming the first woman elected to a judgeship in the circuit. Palmer ascended to the bench in January, 2001, where she remains, having never garnered any opposition in an election. Her judicial philosophy in domestic relations cases is rooted in her belief that parents are to rear their children as cooperatively as possible. When that is not possible, she has the backbone to make the hard but necessary decisions.

Palmer has been a speaker at countless ICLE seminars, especially at Family Law Section seminars. On occasion she has "come off the bench and pinch hit" when a scheduled speaker was unable to attend and more than once she has held a "rocket docket" to take care of her judicial chores before leaving for a seminar. Recently, she was elected Secretary-Treasurer of the Council of Superior Court Judges and, in time, will move up to the presidency. Palmer is now the Chief Judge of the Middle Judicial Circuit consisting of Candler, Emanuel, Jefferson, Toombs and Washington Counties.

Judge Palmer married her husband Danny during her freshman year of college. They are the parents of two sons and the proud grandparents of one grandson. Be prepared to sit a spell and listen if you ask about her grandson. ***FLR***

Nuts and Bolts of Family Law Upcoming Dates

Aug. 19 - Hyatt Regency Savannah
Savannah, Ga.

Sept. 30 - State Bar Conference Center
Atlanta, Ga.

Time, Decisions and the Ongoing Battle. Custody Discussions in Mediation

by Andy Flink

OK I admit it - I'm not the "end-all be-all" expert on custody issues in mediation. I've been a cooperative co-parent most of the time and maybe not the perfect textbook co-parent at other times.

As mediators and attorneys, our jobs are certainly more challenging when we begin the day with diametrically opposed parents. However, if we can get them to a place of compromise and relative fairness, we've done our work effectively. I wish we could simply sprinkle pixie dust on mom and dad when they start the day – a way of saying, "let's put the focus back on what is in your children's best interests, not on what interests you." When parties are in the throes of a divorce or a combative modification, custody agreements can be difficult to achieve. Please note that I am not referring to cases containing accusations of domestic violence or substance abuse issues; this article explores your average Jane and Joe that are as opposite thinking as two people could possibly be.

The adage that mediators are most effective when they "think outside the box" is less applicable in custody discussions since it's difficult, for instance, to move more retirement money from one parent to the other in exchange for parenting time. Thinking outside of the box in the context of custody is about applying creative thinking and offering ideas in three areas of mediations. The first, which I label "time," relates to your standard discrepancy on parenting time and how you can effectively quantify your way to an agreement. The second discussion is about "decisions" - how you can seek common ground in decision making areas. The third area is a broader, longer term perspective relating to the "ongoing battle," situations where if we don't begin to get very creative, parents will be in and out of litigation for as long as there are minor children.

Time

In recent years we've seen parenting time for the non-custodial parent move away from a typical Friday to Sunday schedule. It's now an every two week extended, Fri-Mon/Thu-Sun/Thu-Mon schedule with additional time in week two. Here, if one parent requests 50/50 and the other is offering something similar to a "modified standard," keep in mind that equal time when calculated is a 7-day out of a 14-day schedule, and the new standard can be a 4 or even 5 out of 14-day schedule. The magic compromise number is 6 (out of 14). Not that the parties will wholeheartedly agree on your suggestion that we simply meet in the middle; but quantifying the differential can be effective in explaining to mom and dad that they may be much closer to finding common ground then they actually think. You can also facilitate an agreement by utilizing the time in the summer to help parties get where they need to be.

Decisions:

Find creative ways to allow both parties to feel vindicated when negotiating decision making. The goal? To create effective co-parenting where each parent is involved in the children's development and future well-being. For example, we can vest mom with education, but allow dad to control decisions that occur outside of school, such as tutoring, learning programs and after school child care activities and facilities. When we discuss extra-curricular activities we can split seasons or perhaps propose that each parent have one activity per season that doesn't infringe significantly on the other parent's time. We can offer one parent summer and the other parent the school year extra-curricular decisions. Medical: I've had parties agree to give one parent medical decisions and vest the other with dental and vision decisions. We can split mental health, physical health, and who picks the doctor for which specialty. If we can't agree on the doctor, have one parent offer three names to the other parent and have that parent choose one. Even where we can't split this effectively, it can be helpful to remind the non-deciding party that medical decisions usually involve an expert (the doctor). We can offer the concept of a second opinion for more invasive issues (surgeries, ongoing medications) and again utilize the "you pick 3 and I'll pick 1" philosophy. Religion? Outside of the extreme it can be as simple as offering each parent the opportunity to take the children to their chosen house of worship during their respective parenting time.

Please keep in mind:

Mediators always need to consider whether these suggestions will cause more harm than good. For example, is this a case where we have fundamentally different opinions on education? Does one parent feel that a child who is "doing their best" in school is acceptable where the other believes that any grade short of an "A" is unacceptable? Will one parent use the underlying decision making to "get back" at the other parent? Weighing these factors is an important component and they must be evaluated in each and every case.

Let's not overlook the costs associated with these decisions, either. Who pays for what doesn't have to be a fight if we cap certain expenses and realize that there are resources in all areas that can keep the financial outlay reasonable and controlled. Finally, and this goes without saying, these decisions are supposed to be made after

a "good faith" discussion. I'll remind parties they were actually utilizing the decision making process *before* they got divorced since each party played their particular role during the marriage or relationship, but may not have realized it at the time (or for that matter, cared).

The Ongoing Battle:

I recently had a case in which Mom had primary custody and Dad had liberal parenting time (Thursday to Monday in week one, Thursday overnight in week two) with their 6-year old child. Dad filed a modification of custody which was the THIRD such action in their brief ineffective co-parenting history. They fought continuously, agreed on nothing, and kept copious notes about how poorly the other acted in front of the child. This case ultimately required a guardian. The guardian recommended that dad be vested with primary and mom secondary on the same schedule, a flip of the parenting time. Mom freaked. Her strategy at that point was litigation at any and all cost. She would require a judge's order. Dad was of course quite pleased as he achieved his "win." But did he?

We met in mediation shortly after the guardian's recommendation. I suggested they both consider a straight 50/50 with each parent being vested with two of the four decisions and that they attend several sessions with a co-parent counselor. Why did I offer this? Short of an agreement between the parties, this case will be an ongoing, repetitive litigation nightmare for all involved. They are setting a standard to be in and out of court for the next 12 years. Dad will prevail if the court follows the guardian's recommendation, and then mom will begin to dissect every "harmful" action taken by dad to prepare for the next modification. They'll continue this behavior for years and they'll be in a perpetual fight. Granted, it is the attorney's job to advocate, but sometimes we have to think more long term and make attempts to prevent this repetitive behavior. I've suggested this in past cases and checked in later with respective counsel – in the sessions where parties and counsel reluctantly agreed to try this, there have not been any future litigation steps made thus far.

Please keep in mind:

Check in with the guardian to be sure that they are agreeable to the terms if the parties find their own common ground. The elements of one case may be very different from another, so be sure that this is a possible option before suggesting it. It may turn out that you don't have all of the facts and consensus from the guardian to take these steps.

As a final comment:

Offering the option of a parent coordinator or co-parenting counselor to parties in any of these situations can be very effective with little downside. Parents may have a willingness to cooperate but simply do not know how to collaborate in real life. Adding this layer can be a terrific way to bring people back to focusing on their children's best interests. They may even learn that they actually agree in certain areas where they never thought they did, or would. ***FLR***

Flink is founder of Flink Mediation and Consulting, LLC, a full service organization specializing in business and domestic mediation and consulting services. He mediates both private and court connected cases and has specific expertise in closely held businesses. He is a registered mediator Georgia and the GODR for both civil and domestic cases.

Interview with Hon. Timothy R. Walmsley

By Christie Ayotte Baer

When Judge Timothy R. Walmsley was appointed to the Chatham County Superior Court in the Eastern Judicial Circuit in 2012, it was the first time a new judge had joined the Chatham Superior Court bench in 10 years. In typical Savannah fashion, long-standing members of the Savannah Bar continue to talk about it as if the appointment happened six months ago.

Judge Walmsley is routinely described as "new" by those who have practiced in Chatham County for many years. Oddly, these same lawyers never offer any follow up adjectives that would inform a curious newcomer about his judicial temperament. Just "new." That's all anyone will say. It is so un-Savannah (where gossiping competes only with running and drinking as favorite past times) that is has shrouded the judge in a bit of mystery.

In some ways though, Walmsley *is* new – or new to the domestic relations bar, at least. Chatham County's Superior Court bench is comprised of only six active judges. Beginning in 2013, the Court changed the manner in which it assigned cases to better handle major high-profile criminal cases such as murders and rapes by dividing its cases into two divisions: the Major Crimes Division (MCD) and the Other Felonies & Domestic Division (OFD). Each year, two judges rotate: one leaves MCD for OFD, and one moves from OFD and MCD.

On Jan. 1, 2016, Walmsley rotated off of MCD to join the Other Felonies & Domestic Division, and Judge Louisa Abbot rotated on to MCD. In doing so, Walmsley traded in murders, armed robberies, and other major crimes for drug cases, divorces, and custody disputes. I met with him less than two weeks into his new role to see if I could unravel some of the mystery.

First, some basic background: Judge Walmsley graduated from Allegheny College in Meadville, Penn. with a B.S. in Environmental Studies in 1991; he received his law degree and a Certificate in Environmental Law from Tulane University School of Law in 1996 and moved to Savannah. Between college and law school, he worked as an environmental consultant for a firm in Washington, DC doing extensive site work and investigating a variety of environmental issues. He says that his work with environmental experts and attorneys fueled, in part, his interest in law.

Over time, his interests shifted, and he began to gravitate toward plaintiff's personal injury work. In 2001, he opened a general practice which included a wide variety of civil litigation issues. As his practice transitioned again, this time to focus more on commercial litigation, he joined what is now known as HunterMacLean where he became a partner. He then served as General Counsel for the Chatham County Board of Tax Assessors. In 2012, he replaced Judge Perry Brannen Jr. on the Chatham County Superior Court bench.

Upon ascending to the bench, Walmsley intentionally kept Brannen's staff in order to take advantage of their institutional knowledge. His current staff attorney, Samantha Smith, had worked with Brannen for nine years. He says he has established two rules for everyone in his office, himself included: (1) Be professional, and (2) Be prepared. Attorneys appearing before the judge are well-advised to take the same rules to heart. When applied to himself, Walmsley says being professional and being prepared means knowing the file, treating everyone fairly, and providing an opportunity to be heard.

Background aside, the interview with Judge Walmsley moved to the burning questions of the domestic relations bar in Savannah. Here are some things you need to know when appearing before him:

- *Final Decree by Mail*. As a general rule, he will not grant a divorce by mail via a Motion for Judgment on the Pleadings. If it was important enough for the parties to appear in person to get married, it is important enough for them to appear in person to divorce.
- *Temporary Hearings*. He does not limit the duration of temporary hearings, but asks attorneys to be professional, be prepared – and get to the point. There are 10,000 new cases filed each year in Chatham County Superior Court, and the Court has a 100 percent disposition rate. They are busy.

- *Custody.* He is generally not in favor of 3-2-2 parenting plans requiring the children to rotate between the parents' homes every few days because it often seems that those arrangements serve the needs of the parents more than the needs of the children. However, he is unwilling to say he would never order such a plan for physical custody. He is more neutral about week on/week off parenting plans; his decision will be influenced by the attitudes of the parents and how well they can co-parent.
- *Parenting Deviations.* Sometimes Walmsley will award parenting time deviations when calculating child support. The important issue, he says, is that the reasons for any child support deviation must be properly documented so that in a year or five years, anyone can look at the file and see why any deviation was granted. It is not enough for a party to claim that he or she cannot afford the presumptive amount of child support, for example – he wants the party to prove it.
- *Adultery.* Proof of adultery on the part of one spouse does not necessarily influence his decisions concerning the equitable distribution of property unless the other party can show that marital assets are being used for the benefit of the third party (the paramour).
- *Attorneys' Fees.* Judge Walmsley has no bright line rule regarding attorneys' fees but he does not award them as punishment. He is more likely to award attorney's fees when the evidence suggests that one party has acted in bad faith, or is in contempt of a court order, although this depends on how many times that person has been in contempt and the level of contempt.

In closing, Walmsley asks attorneys to follow the same standards he applies to himself and his staff: be professional and be prepared. If you are filing a contempt claim, for instance, point out the relevant language in the order that applies to the claim, attach the relevant documents, and include citations of law.

Of course, any trial attorney who reads publications like this one probably already does all of these types of things regularly, right? Welcome to the Domestic Relations rotation, Judge Walmsley! ***FLR***

Christie Ayotte Baer is a family law and estate planning attorney who specializes in high-conflict family law litigation in both superior court and juvenile court. She has an expertise in serving the LGBT community. She practices in Savannah and in Atlanta, where she began her firm. Baer received her J.D. from Emory University School of Law and her B.A. from Smith College.

A Call for Volunteers

Child Support Worksheet Helpline

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

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

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

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

Name: _____

Bar Number: _____

Office Address: _____

_____

_____

Phone: _____

Email: _____

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

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

Please email this form to cswgahelp@gmail.com

Caselaw Update

by Vic Valmus

ATTORNEY DISCIPLINE

In the Matter of Robert B. Eddleman, **S16Y0125** (Feb. 8, 2016)

Eddleman (attorney) represented his secretary's now ex-husband in several credit card collection cases and did not charge a fee due to the client's financial circumstances. Later, the attorney insisted on being paid, but could not agree with the client and considered himself discharged from the cases. However, he did not obtain an order allowing withdrawal in at least one of the cases until February 2013. The attorney was still the attorney of record in October of 2012, when he represented his secretary in a divorce from his previous client. He did not obtain written informed consent to the divorce representation from his secretary or her now ex-husband. The attorney admits that he had a personal intimate relationship with his secretary (now his wife) and violated Rule 1.7 while the divorce action was pending. In addition, the attorney was aware of this Court's repeated admonishments against lawyers entering into extra-marital relationships with clients.

In addition, the client admits that during the course of his original representation of his former client, there were documents material to the case that appeared to bear the client's signature. After the bar grievance was filed, the attorney's secretary stated that she had signed the documents with her now ex-husband's permission (which the ex-husband disputes) and the statements in one of the documents was a release of liability in favor of the attorney. The attorney admits that he did not adequately train and supervise his non-lawyer staff and thus he violated Rule 5.3. Therefore, the Court accepts the attorney's petition for voluntary discipline and hereby orders he receive a public reprimand.

CONTEMPT/DUE PROCESS

Coppedge vs. Coppedge, **S15A1450** (Feb. 22, 2016)

The parties were divorced in December of 2006. The parties had two minor daughters for which the Wife had primary custody. In 2010, the Husband filed a petition seeking modification of the final decree, child custody, and visitation awards. The Husband subsequently reduced the amount of his monthly child support payment by the amount of the cost of sending the children to an after school and summer care at St. Luke child care. The Wife answered with a counterclaim for contempt alleging that the Husband had failed to pay approximately $7,000 in child support. After a hearing, the final order denied the Husband's motion for modification and held him in contempt for failure to pay his share of after school and summer care expenses. The Husband appeals and the Supreme Court affirms in part and reverses in part.

The Husband contends the Trial Court erred in holding him in contempt for the payment of reduced child support amounts after the children stopped attending St. Luke summer and after school care. The Trial Court concluded as a matter of law that the final decree did not confine payments to St. Luke's after care or summer camp. Here, the Wife is claiming an obligation of the Husband to pay a proportional share of the cost of a babysitter hired by the Wife versus provided by St. Luke. A careful review of the language of the decree demonstrates that it is capable of more than one reasonable interpretation. The decree states that the Husband would pay his proportional shares of any amounts paid in connection with either after school or summer care for either or both of the children. This clause, read in isolation, could reasonably be interpreted as imposing upon the Husband a general and unrestricted obligation to contribute to the cost of after school and summer care even if not provided by St. Luke, thus not permitting him to deduct from his direct cash payment. However, the next sentence creates ambiguity regarding this issue. It provides that the parties shall equally divide any increase or decrease in expenses associated with St. Luke for either or both children including after school or summer care amounts. Given the ambiguity in the divorce decree regarding the Husband's obligation to pay for after school and summer care expenses provided by someone other than St. Luke, the Trial Court abused its discretion holding the Husband in contempt.

The Husband also argues that his procedural due process rights were violated by the eight-month delay between the trial and the entry of the final order. However, considering the nature and the history of the proceedings in the case, including the Husband's decision to file a post-trial prejudgment motion requiring the Trial Court's attention thus delaying the entry of the final decree was reasonable and did not result in deprivation

of the Husband's due process rights. Neither federal nor state constitution due process rights guarantees a particular form or method of procedure and each is satisfied if a party has reasonable notice and opportunity to be heard and to present its claim or defense. This is the case notwithstanding 19-9-3(8) which provides that if requested by any party on or before the close of evidence in a contested hearing, the permanent court order awarding child custody shall set forth specific findings of facts as to the basis for the Judge's decision. Such order shall be filed within 30 days of the final hearing in custody cases unless extended by order of the Judge with agreement of the parties.

DECLARATORY JUDGMENT

Belcher v. Belcher, **S15A1451 (**Jan. 19, 2016)

The parties were divorced in 2005 and the divorce decree required the Husband to pay the Wife $500 per month alimony until her death or remarriage. In December of 2013, the Husband stopped making alimony payments. In April, 2014, the Wife called the Husband's telephone number and spoke with his current wife regarding non-payment of alimony. In early May, she sent the Husband and his current wife certified letters stating that her Nov. 13, alimony check was denied. In May of 2014, the Husband's attorney wrote to the Wife acknowledging her certified letter and stating that the Husband has held the alimony payments in savings. The letter also demanded adequate proof of the Wife's current health status and whether she was alive. The Wife responded stating she is alive and demanded immediate payment of all past due alimony. In July, 2014, the Husband filed a verified Petition for Declaratory Judgment stating that the Wife had cancer and that he did not know if she had survived the treatment. On July 9, the Wife was personally served. She then filed a verified Answer and Motion to Dismiss the Petition. In September, the Court held a hearing and dismissed the Husband's petition holding the divorce decree is clear and ambiguous on the issue of alimony and that the Husband's request for proof that the Wife was alive was moot given the evidence including her appearance in court. In September of 2014, the Wife filed a Motion for Attorney's Fees under 9-4-9 and 9-15-14. The Court entered an order recognizing that attorney's fees are not costs under 9-4-9 but granted the motion as to 9-15-14(a) and scheduled an evidentiary hearing for a later date. In a very short order, the Husband was required to pay the Wife $2,500 in attorney's fees but the Court did not make any express finding specifying the abusive conduct for which the award under 9-15-14(a) is proper. The Husband appeals and the Court of Appeals reverses and remands.

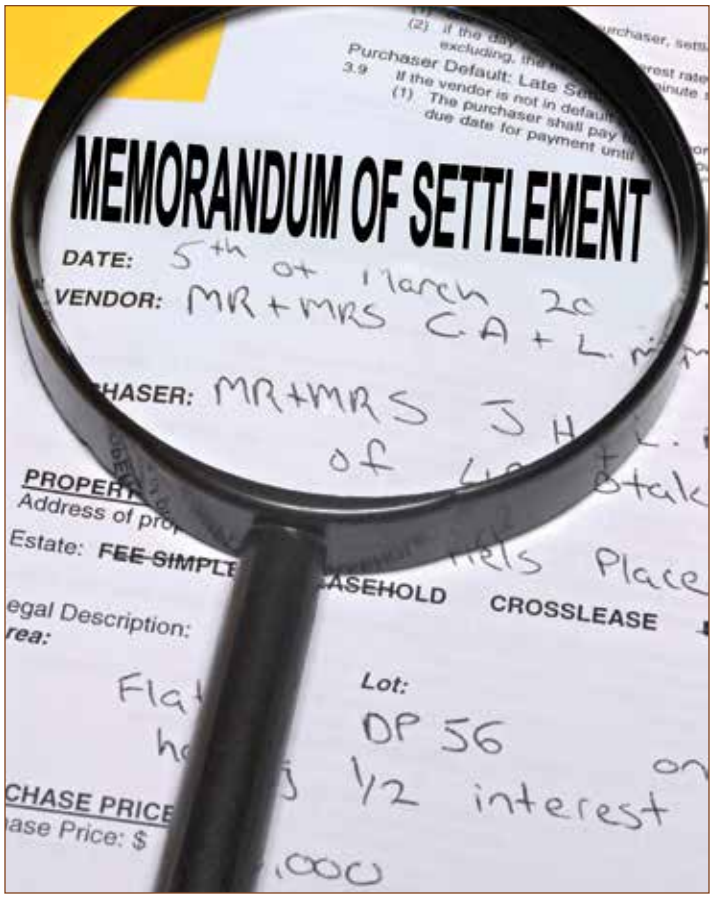
The Trial Court erred to the extent of the award of attorney's fees under 9-4-9 and 9-15-14(a). Here the Wife correctly concedes the Court erred to the extent it awarded fees under 9-4-9 and it was procedurally improper under 9-15-14(a) in that the Court did not make the specific findings of fact abuse of conduct for which an award was made.

MOTION TO ENFORCE

Steele v. Steele, **S15F1535 (**Feb. 1, 2016)

The Wife filed a Complaint for Divorce in 2011 and just before jury selection in November 2014, the parties through their counsel negotiated a Memorandum of Settlement which was partially typed and partially hand written and signed by the parties and their respective counsel. Pursuant to the Agreement, the Wife would receive lump sum alimony to be satisfied either by a $400,000 lump sum cash payment or by a deed granting the Wife 40 percent interest in this Husband's residence in Rosemary Beach, Florida. The Memorandum also provided the Husband would file or cause others to file a dismissal with prejudice of certain lawsuits being prosecuted by him and his adult sons against the Wife. The parties announce the settlement to the trial. Each acknowledged under oath that they had signed the Agreement and believed it to be fair and reasonable. Afterwards, the Husband refused to sign the drafted proposed divorce incorporating the terms of the Memorandum. One month later, the Wife filed a Motion to Enforce the Agreement, and after evidentiary hearing, the Court approved the agreement and granted the divorce. The Husband appeals and the Supreme Court affirms.

The Husband contends the Trial Court erred by adopting the provisions of the Memorandum because it lacked essential terms and, therefore, was unenforceable. Divorce settlement agreements are constructed in the same manner as all other contractual agreements. The contact is enforceable if all the essential terms are agreed to which



include subject matter, the purpose of the contract, identity of parties and consideration. The Husband cites a litany of items that were not addressed in the Memorandum. However none of the admitted items were essential with the formation of a binding agreement. For example, the time frame for execution of the written agreement and the approval by the Trial Court and the method for presentation of the agreement to the Court relate only to non-material procedural matters. Also, the omission of the legal description or the address for the Rosemary Beach property is of no consequence and it is undisputed that the Husband owns only one property in Rosemary Beach. The same is also true of the failure to include the case names or styles of the lawsuit the Husband agreed to dismiss since there is no dispute between the parties as to the identity of the lawsuits in question. The Court's failure to address jointly owned property is not a fatal ommission given the fact that there is no evidence that any such property exists. Therefore, the Memorandum was not inadequate or unenforceable as a result of leaving substantive matters for later resolution.

The Trial Court must also determine whether the agreement is enforceable and has a duty to make an independent determination of whether the agreement is within the bounds of the law. Here, the Trial Court conducted an evidentiary hearing on the Wife's Motion to Enforce. The Court also received evidence that a few weeks after the Memorandum was signed, the Husband conveyed the Rosemary Beach property to a judgment creditor for secure payment under a consent judgment settling a separate litigation. So now the Husband claims a change of circumstances. However, the Husband agreed to mortgage the property despite having full knowledge of the obligations he had already assumed under the Memorandum.

The Husband argues that the Divorce Decree sets forth certain terms more artfully and with the greater specificity than the Memorandum but that does not render it inaccurate or improper. The fact that the Memorandum provided that each party would keep all property in their respective names whereas the Final Decree states that each party is to keep all property in their possession is of no difference absent any evidence that either party actually possesses property that is titled in the other's name.

PARENTING PLAN

McFarlane v. McFarlane, **S15A1704 (**Jan. 19, 2016)

The parties were divorced in 2006 and given joint custody of two minor children with the Wife being the primary physical custodian. In 2011, the Husband filed a modification of custody and support. The Wife answered and counterclaimed alleging he was in contempt of his financial obligations. After hearing, the Trial Court denied the change of custody but reduced the Husband's child support obligation and found the Husband in arrears of his child support and out of pocket medical expenses and health insurance premiums. The Husband appeals and the Supreme Court affirms in part and remands in part.

The Husband argues, among other things, that the Trial Court erred in failing to incorporate a Parenting Plan in its modification order. Pursuant to O.C.G.A. § 19-9-1(a) the Final Decree of any legal action involving the custody of a child, including modification actions, shall incorporate a permanent Parenting Plan. The Wife assets that the Court denied the modification request and the denial of the modification action leaves the previous Parenting Plan in place and makes a new Parenting Plan unnecessary. Because no Parenting Plan was entered by the Trial Court in compliance with the requirements of 19-9-1(b) the case is remanded. In addition, the original Decree was entered in 2006, and there were no Parenting Plan requirements until January of 2008.

The Husband also asserts the Trial Court erred because the Wife's claim for past due medical expenses was barred by laches. However, laches requires proof of harm caused by the delay and the Husband has failed to show harm or prejudice from the delay.

RECUSAL

Price v. Reish, **A15A1800 (**Dec. 23, 2015)

This case arises from an ongoing conflict between attorney West and Judge Lane. West was retained to represent several parties in a matter pertaining to the estate of Judge Lane's deceased sister in DeKalb County. The Probate Court granted West's motions over the objection of Judge Lane in Probate Court allowing West to subpoena several email service providers to obtain emails of Judge Lane's deceased sisters relating to the reelection campaign. From 2012 to 2014, Judge Lane recused herself from every case assigned to her in Family Division in which West represented one of the parties. Some orders were *sua sponte* while others were upon the motion of the parties. Judge Lane's recusal orders were entered separately until September 2013 when she entered the standing order of recusal. In May of 2014, Judge Lane entered an order

vacating the standing order of recusal for the reason that the standing order of recusal could prompt Judge shopping and could undermine the system of random assignment of cases and could cause cases to be transferred from one division to another thereby exposing extra delays and expenses upon litigants and extra burdens upon the Judge of the Family Division.

Reish (the Father) filed a Petition to Modify Custody and Visitation and Child Support against Price and the case was assigned to Judge Lane. Price filed a pro se response and subsequently retained counsel but her counsel withdrew in January of 2015. Then, West entered an appearance on behalf of Price and the same day she filed a Motion to Recuse Judge Lane along with an attached Affidavit which attached and discussed the prior recusal orders for the Probate Court litigation. Later in January, Judge Lane entered an order vacating West's entry of appearance and denying the Motion to Recuse, finding that West had entered several cases after the entry of a final order requiring a new Judge to pour over the record to duplicate the original Judge's familiarity with the facts and circumstances presented the order and went on to find that Ms. West knowingly hired into a conflict in permitting Price to hire Ms. West into an existing conflict would be the equivalent of allowing Judge shopping. Price appeals and the Court of Appeals reverses.

Pursuant to USCR 25.3, whenever a motion to recuse is presented to the Court, the Court shall immediately determine the timeliness of the motion and the legal sufficiency of the affidavit, assuming any of the facts alleged in the affidavit to be true. Then another Judge shall be assigned to hear the motion to recuse. Here, Judge Lane did not find Price's motion for recusal or the supporting affidavits to be legally or factually insufficient. Rather, she looked beyond the motion and affidavit to find that West had intentionally hired into a conflict situation and was engaged in the pattern of Judge shopping. It is the duty of the Judge to pass only on the legal sufficiency of the facts alleged to ascertain whether they support a charge of bias or prejudice. Neither the truth of the allegations nor the good faith of the pleader may be questioned, regardless of the Judge's personal knowledge to the contrary. Therefore, the recusal order is vacated and remanded.

However, the disciplinary rules require that an attorney cannot ethically accept the representation of a pending case where the attorney knows that the case has been assigned to a Trial Judge with whom the attorney has an existing conflict with the intent of orchestrating the Judge's recusal in obtaining a more favorable outcome from a different Judge. If on remand, Judge Lane finds that USCR 25.3 has been satisfied, the Judge assigned can then hear the motion to recuse on the merits would not be without recourse. If the Judge were to find that there was an intentional effort of Judge shopping in the case, a motion for recusal can be denied on the merits. In addition, the assigned Judge has the authority to sanction an attorney for improper conduct related to the recusal motion which one sanction for violating with disciplinary rules is disqualification of counsel.

RETROACTIVE MODIFICATION

Moore v. McKinney, **A15A1905** (Feb. 29, 2016)

The parties were divorced in 2002 and McKinney (Mother) was given primary custody. In 2014, the Mother physically abused the children and they moved into the Father's home with a Temporary Protective Order. Both children signed affidavits of election indicating a desire to live with Moore (Father) on a full time basis. In February 2014, the Father petitioned to modify physical custody and child support. Pursuant to the Consent Temporary Order, the Father was given primary custody of the children and the Mother was to provide medical, vision, and dental insurance for the children and to equally split medical expenses. The Trial Court terminated the Father's child support obligation effective Jan. 31, 2014, and reserved the issues of the Mother's child support liability starting Feb. 1, 2014. Afterwards, the Father sent several receipts requesting the Mother's share of the uncovered medical expenses and she refused to reimburse the Father and the Father filed a motion for contempt. At the hearing, the Trial Court held the Mother in contempt and awarded physical custody of the children to the Father; ordered the Mother to provide health insurance and to pay $117 a month in child support until they reached 18 years of age. She was also ordered to pay $1,287 in back child support, but not the January 2014, payment, or any portion of unreimbursed medical expense. The Father appeals and the Court of Appeals reverses and remands.

The Father argues the Trial Court erred by failing to order the Mother to reimburse him for the child support payment in January of 2014 because the children were living with him that month. In the Feb. 18, 2014, the Temporary Consent Order provided that the Father's

obligation to pay child support terminated retroactively Jan. 31, 2014. A child support judgment is enforceable until modified, vacated, or set aside. However, a child support judgment cannot be modified retroactively. Therefore the Court could only modify child support prospectively. The Father next argues the Trial Court erred by failing to require the parties to share the uninsured medical expenses for the child. 19-6-15(h)(3)(A) states in pertinent part the parents shall divide the uninsured health care expenses pro rata unless otherwise specifically ordered by the Court, and the Trial Court erred by failing to include this provision in the Final Order.

SELF-EXECUTING CHANGE OF CUSTODY/ NEWLY DISCOVERED EVIDENCE

Lester v. Boles, **A15A1895** (Feb. 10, 2016)

Lester (Father) and Boles (Mother) were never married and had a son in 2009. In 2011, the Trial Court entered an order legitimating the child and established custody and child support, with the Mother as the primary physical custodian. In 2012, the Father filed a petition to modify based upon the Mother's extensive work related travel. After a hearing, the Court found a change in circumstances and ordered the parties to alternate physical custody of their son on a weekly basis until he began first grade. After that, the son would live primarily with the Mother and have visitation on alternating weekends, holidays, and school breaks with the Father. The Mother filed a motion for reconsideration and new trial on the grounds that the Father had been drinking and driving on two occasions, one which occurred after the modification hearing. The Father also filed a reconsideration and new trial arguing that the Court erred by entering a self-executing change of custody. After the hearing, the Court granted the mother's motion and entered language prohibiting both parents from consuming alcohol while the child was in their custody. The Father appeals and the Court of Appeals affirms.

The Father argues that the Court abused its discretion by including a self-executing provision in its custody award. The challenged provision in the custody order in this case provides that when the child begins first grade approximately 16 months after entry of the order, the Mother will assume primary custody and Father will have regular visitation. Though it is admittedly self-executing, it is not an open-ended provision conditioned upon the occurrence of some future event that may never take place. Rather, it is a custody change corresponding with a planned event that will occur at a readily identifiable time. In addition, the triggering event is not an arbitrary change that may or may not affect the child's best interests at some unknown date, instead, the event is the child beginning first grade at which point according to the Trial Court's finding, he will need the additional stability associated with having one primary residence.

The Father also contends the Trial Court lacked authority to add alcohol related provision to the custody order because Mother failed to satisfy the 6 criteria for new trial based on newly discovered evidence. However, the Father's authorities apply to extraordinary motions for new trial which are filed more than 30 days after entry of the challenged judgment. Here, the Mother's motion for new trial was filed within 30 days of the judgment. A motion for new trial can be granted if any material evidence, not merely cumulative or impeaching in its character but relating to new and material facts are presented. Here, there is evidence consisting of a police officer's testimony that the Father was arrested for DUI in January of 2014 which was 3 months after the modification hearing. To show a pattern of behavior, the Mother also presented testimony of another officer that arrested the Father in April of 2010, under similar circumstances.

SEPARATE PROPERTY

Flory v. Flory, **S15F1331** (Feb. 22, 2016)

The parties were married in November of 1993, and the Wife filed for divorce in November of 2013. During the bench trial, the Husband and Wife each claimed certain assets should be classified as separate, non-marital property. The Wife sought to recoup the value of the certain stocks which she owned prior to the marriage and were liquidated for the purpose of purchasing a marital residence. The Husband argued that he should get credit for funds advanced by his mother that were used to make improvements on that residence. The Trial Court acquiesced in the respective party's classification and relied on the maxim that he who would have equity must do equity and must give effect to all equity rights of the other party respecting the subject matter of the actions. The Trial Court reasoned the Husband and Wife's respective claims for separate property were on equal footing and thus could similarly be granted. Both parties appeal and the Supreme Court reverses and remands.

In order to equitably divide marital property, the Trial Court must first classify the disputed property as either marital or non-marital. Whether an item of property can

legally constitute a marital asset is a question of law for the court, and whether a particular item of property actually constitutes a marital asset may be a question of fact for the trier of fact to determine from the evidence. Only real and personal property and assets acquired by the parties during the marriage are subject to equitable division of property. The property originally classified as separate such as gifts, inheritance, or premarital property may be converted into a marital asset if the spouse takes action manifesting intent to transfer that separate property asset into a marital property. In addition, a spousal gift of non-marital property to the marital unit transfers the separate property into marital property and makes it subject to equitable division. On the other hand, assets deemed separate property are not subject to equitable division, nor is the appreciation on those assets marital property, where the appreciation is solely attributed to market forces. Any appreciation of separate property resulting from the efforts of either or both spouses become marital asset subject to equitable division. Under the source of the funds rule, a spouse contributing non-marital assets toward the acquisition of property is entitled to an interest in the property in the ratio of a non-marital investment to the total non-marital and marital investment of the property pursuant to *Maddox*. The remaining portion of the property is marital property subject to equitable division. Here, the Trial Court failed to apply any of those well-established legal principles in portioning the separate property between the parties.

UCCJEA/EMERGENCY JURISDICTION

Prabnarong v. Oudomhack, **A15A0978 (**Nov. 19, 2015)

The parties were divorced in Washington in 2005 and, pursuant to the Parenting Plan, the Mother was awarded primary custody of the child, VP. Later the Mother moved to Georgia, remarried, and had another child and resided in Georgia for 9 years until she died in October of 2014. VP's maternal grandparents and uncle resided nearby in Georgia. The Father had continued to live in Washington and exercised visitation with VP during the child's summer breaks from school. After the Mother's death, the Father obtained, an Order awarding him primary physical custody of VP from a Washington court. Days later, VP's maternal uncle filed a Motion for Emergency Hearing in the Superior Court of Gwinnett County. He also filed a petition requesting that the 2005 Washington Parenting Plan be registered in Georgia and asked that the Parenting Plan to be modified to award joint legal and primary physical custody of VP with the uncle being primary and the Father continuing to have summer visitation. In the Petition, VP, currently 13 years old, filed an Affidavit of Election which expressed a desire to visit with the Father but stay in Georgia. There are two handwritten Affidavits, one entitled "Why I Want to Stay in Georgia" and the other entitled "Why I Don't Want to Stay in Washington." The Father responded to the uncle's Petition, with a pleading requesting the registration of the foreign judgment and a motion to enforce. The Court found that it had emergency jurisdiction pursuant to 19-9-64(a) based on the Affidavit of Election of VP in which she stated that she had been the subject of mistreatment or abuse." The Court also held that VP shall" remain in the custody of the uncle pending transfer of the case to the Juvenile Court and appointment of a Guardian to determine the proper permanent custodian of VP. After the hearing, the Gwinnett Court entered an Order adopting the Washington Decree and awarding primary physical custody of VP to the uncle. The Father appeals and The Court of Appeals reverses.

The Father argues that the Trial Court erred by exercising temporary emergency jurisdiction where the circumstances and wellbeing of the child did not demand immediate action. Under 19-9-64(a) the Court of this State has temporary emergency jurisdiction to modify child custody determination made by a court of another State if the child is present in the State and is necessary in an emergency to protect the child because the child is subject to or threatened with mistreatment or abuse. However, the handwritten documents by VP attached to her Affidavit stated she felt safe in Georgia and needed to be there for her younger sister and loved the school she attended and made good grades and knew everybody at school and was concerned that her credits for high school level courses would not transfer to a school in Washington. In her other Affidavit she stated that when she was 6 or 7 her Father permitted someone that she did not know to supervise her and on another occasion left her at a public swimming pool in the sole care of her cousin and sometimes she feared her step-brother because he had guns, knives, and smoked and drank in his room. In this case, there was no true emergency which required the Georgia court to exercise jurisdiction for the protection of VP. VP is in no immediate danger under any version of the facts alleged in her Affidavits and attachments nor is the Court persuaded as the uncle asserts, certain consequences of VP going to live with her father in Washington that she would no longer live with her step-father and half-sister or near maternal relatives and friends in Georgia amounted to an act of mistreatment or abuse by the Father. Therefore, the uncle's claim should be presented in Washington.

Also, the Court's Order fails on another statutory requirement: if the Court exercises emergency jurisdiction, the Temporary Order "must specify what the Court considers adequate time to allow the person seeking the Temporary Order to obtain an order from the court maintaining continuous jurisdiction over the custody of the child." The Order issued in this State remains in effect until an Order is obtained from the other State within the period specified or the period expires. Here, the Trial Court failed to specify in its Order any period of time which the uncle must obtained an Order from the Washington Court. ***FLR***

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Divorce and Personal Injury Claims: Who Gets The Money?

by Jarome E. Gautreaux and B. Dave Driggers

Common sense may suggest that the proceeds from a personal injury case belong solely to the injured person, rather than the spouse of the injured person, when the spouses are going through a divorce. Comments such as "she's already getting the dog, and now she wants my settlement money too!" are not uncommon.

But this common sense view is not coextensive with the governing rules under Georgia law. This article will describe the rules that govern the allocation of funds in a divorce when one spouse is injured. The authors hope this article will assist you in advising, whether retained in the divorce action or the personal injury case.[1]

Marital vs. Non-Marital (Personal) Property

There are two main relevant categories of property when dividing assets in a divorce: (1) marital property and (2) non-marital (personal) property. Marital property is subject to division between the spouses, while non-marital property is not. *Campbell v. Campbell*, 255 Ga. 461, 462 (1986) (finding that property outside the marital estate is property which is very personal to the party to whom it belongs and which was in no sense generated by the marriage). However, courts are not uniform in their approach to deciding to which category a personal injury claim belongs.

Thus, the question becomes whether a personal injury recovery is classified as marital property or, instead, as non-marital (personal) property. To make this determination, Georgia has adopted the analytical approach, in which the classification of property as marital or personal depends upon the nature of the underlying loss. *Id.*; See also Kurtis A. Kemper, Annotations, *Divorce and Separation: Determination of Whether Proceeds from Personal Injury Settlement or Recovery Constitute Marital Property*, 109 A.L.R. 5th 1 § 5 (2003 & Supp. 2015).

Under the analytic approach, the three different types of recoveries arising out of personal injury claims are (1) compensation for the injured spouse for that spouse's pain and suffering, disability, and disfigurement, (2) compensation for the injured spouse for lost wages, lost earning capacity, and medical and hospital expenses, and (3) compensation for the other spouse for loss of consortium. *Campbell*, 255 Ga. at 462; *Weisfeld v. Weisfeld*, 513 So. 2d 1278, 1280 (Fla.App. 3 Dist 1987). The finder of fact must determine the portion of the award that is allocated to each category. *Bass v. Bass*, 264 Ga. 506, 508 (1994); *Johnson v. Johnson*, 259 Ga. 658, 661 (1989); *Stokes v. Stokes*, 246 Ga. 765, 768 (1980) (recognizing the authority of a trier of fact to award one spouse interest in real property titled in the name of the other spouse not as alimony but as an equitable division of property). The determination of the parties' respective entitlements to those payments constituting marital assets are questions of fact for the trier of fact. *Johnson*, 259 Ga. at 661. In *Johnson*, a settlement agreement in the personal injury case allocated proceeds between the spouses. Nonetheless, the court held that the allocation of the personal injury claim in the settlement agreement was not binding in the divorce proceeding. Rather, the court held, the proper allocation of the settlement funds as marital or personal property was a function for the jury in the divorce proceeding. Presumably, a similar jury allocation in a personal injury case would be enforceable as well. But it seems that an allocation in a settlement agreement may not always suffice.[2]

While compensation paid to a spouse for non-economic and strictly personal loss is considered to be that spouse's personal, non-marital property, the portion of damages paid to the injured spouse as compensation for economic loss during the marriage is deemed marital property. *Campbell*, 255 Ga. at 461; *Dees*, 259 Ga. 177-178. The portion of the award that represents compensation for pain and suffering or loss of capacity is personal to the party who receives it, the injured spouse. *Campbell*, 255 Ga. at 462. On the other hand, the portion of the award attributable to loss of consortium is personal to the party who suffered the loss of consortium, the uninjured spouse. *Id.* Further, any portion of the award representing compensation for medical expenses or lost wages during the marriage is considered marital property which can be equitably divided among the parties. *Id.* The jury must divide the amount attributed to marital property in an equitable manner according to the facts and circumstances of the case. *Johnson*, 259 Ga. at 661.

Property purchased with the proceeds from a settlement or award from a personal injury claim may also be considered marital property subject to equitable division. *Coe v. Coe*, 285 Ga. 863, 864 (2009); *Brock v. Brock*, 279 Ga. 119, 119-120 (2005) (ruling that husband was unable to overcome the presumption that the conveyance was a gift when wife held legal title and husband had no proof of an implied trust). In *Coe*, the husband purchased a home after the parties were married and placed the deed in the names of both spouses. The Supreme Court of Georgia ruled that "if the property acquired by one spouse is the result of an interspousal gift of marital property, the property retains its status as marital property." *Id.* Although the husband purchased the home with the proceeds from his personal injury settlement, he did not rebut the presumption that the home was a marital gift. *Id.*

Further, portions of a recovery awarded for future income may be considered when calculating a spouse's gross income and child support responsibilities. *Cromer v. Denmark*, 273 Ga. 290, 291 (2001). Whether an award falls within "gross income" depends upon a factual analysis of the elements of damage the award was intended to remedy. *Id.*; *Dees*, 259 Ga. at 178. The Supreme Court of Georgia

ruled in *Cromer* that "gross income" referred to in O.C.G.A. § 19-6-15(b)(1) must include awards made specifically to remedy damage to "future income benefits." 273 Ga. at 291. Although the award in *Cromer* was specifically from a workers' compensation settlement, this rule could apply to any award that is intended to remedy the injured party's loss of future income. *Id.* The purpose of the award determined whether the income from the award was included in the spouse's gross income in calculating child support. *Id.*

Some Practical Considerations

While areas of uncertainty remain, the safest route in settling personal injury claims in the divorce context would seem to counsel in favor of being certain that there is a specific allocation among the various categories of damages – specifically including loss of consortium, medical expenses, lost wages, and pain and suffering – in the settlement agreement. Unlike the situation in *Johnson*, there is likely a stronger argument for the allocation to be binding if both spouses agree to the allocation.

This situation can also give rise to conflicts that counsel should carefully evaluate. It would likely be prudent for the spouses to be separately represented in the personal injury claim so as to avoid any actual or potential conflicts.

Conclusion

As this discussion shows, an award from a personal injury claim can be divisible marital property in the event of a divorce if a portion of the award was intended to be compensation for lost wages or medical bills, which are damages suffered by the marital estate. Amounts provided as compensation for non-economic damages such as pain and suffering or loss of consortium are personal to the spouse who incurred the loss. ***FLR***

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(Endnotes)

1 The authors are grateful for the research and editorial assistance of Caitlyn Clark, a student at Mercer University's Walter F. George School of Law and a law clerk with Gautreaux & Sizemore, LLC.

2 In *Johnson*, the wife refused to sign the settlement agreement. There remains uncertainty about the result if she had signed it, and then attempted to have a different allocation in the divorce proceeding.

Wendy Glasbrenner - Champion of the Poor

by Tera Reese-Beisbier*

A special thanks for assistance from Dan Bloom and input from many others from whom we received overwhelming support for this article.

Have you ever worked with someone or met someone, and thought, "I am a better person because I know her?" I have. I had the honor of meeting and working with Wendy Glasbrenner at the Georgia Legal Services Program (GLSP) from 1998-2002. Those four years shaped my life and my legal career. In the process of writing this article, I have found so many who share my sentiments about Wendy Glasbrenner - our own "Champion of the Poor."

To know her is to respect her. She has dedicated her life to others. In 1979, after graduating from the University of Georgia Law School, Magna Cum Laude, Phi Beta Kappa Wendy began working at GLSP. Since then, she has been advocating for those Georgians who have no voice—the poor, the abused, the forgotten. She quickly became a leader at GLSP, becoming a lead attorney in 1983 and managing attorney since 1999. In both roles, she has trained many of our fellow family law attorneys. In addition to managing her own caseload, she trained and assisted new attorneys. She understood and embraced new attorneys and their eagerness to help others; Wendy rarely pushed back when another case came through the door that needed attention. Wendy let her attorneys take on as big of a case load as they wanted, even if that meant more work for her-- and it did. The domestic violence cases we encountered at GLSP were heart breaking (as many are), especially when extreme poverty truly prevented a victim from leaving the abuser/bread winner. She taught patience and empathy to young attorneys, and helped us all understand that everyone, no matter their financial status in this world, deserves not just adequate legal representation, but the best legal representation. No attorney under her went to a hearing unprepared. No stone was left unturned and her advocacy and commitment helped not just her clients, but the clients and future clients of all attorneys she trained.

Wendy also assisted and prepared several key family law appellate cases in Georgia; *Weaver v. Chester*, 195 Ga. App. 471 (1990), *In the Interest of A.D.*, 208 Ga. App. 438 (1993), and *Watkins v. Watkins*, 266 Ga. 269 (1996), to name a few.

When asked, Kelly Miles, her close friend and former chair of the Family Law Section of the State Bar of Georgia said "Wendy is the personification of legal professionalism. She elevates our practice to a level we should all aspire to obtain through her honest and integrity in all of her dealings with the Bar and Bench, the respect and dedication she shows to each and every client, the mentoring she has provided to so many young attorneys, and, most importantly, through her sacrifice of self to others and our profession."

Hannibal Heredia, of *Hedgepeth, Heredia & Rieder*, worked with Wendy in the late 1990's couldn't agree more with Miles. Heredia remembers Wendy fondly: "When I was a 'baby attorney', Wendy showed me, by her example, that all challenges could be taken on with preparation and strategic intelligence. She taught me that compassion and understanding, and especially listening, were essential to representing any client. Most importantly, she taught me to maintain a sense of humor through it all."

Phyllis Holmen, GLSP executive director, has worked with Wendy since the beginning. "Wendy has been an incredibly effective advocate for her clients in a range of case types, but her special emphasis has been on family law. She also has been an engaged supervisor and mentor to many lawyers. We can always count on her wise counsel. She's also a proven leader, and GLSP is very fortunate to have Wendy as managing attorney of the Gainesville region and an important part of our statewide law firm."

Recounting her favorite story about Wendy, Vicky O. Kimbrell, Family Law Specialist for GLSP, shares, "In some small courthouse in North Georgia, Wendy was negotiating with a lawyer on a case and finally he said, 'Don't mess with her; she brings the law.' That's become her rallying cry and certainly how we see her. She's one of the most respected lawyers at GLSP for her level of knowledge and skill in most any area, and she can be counted on to bring the law when we consult her on any topic. Wendy continues to serve as an inspiration for all of us who believe in GLSP's mission to provide opportunities out of poverty and access to justice for all Georgians."

Megan Miller, staff attorney for the Hon. Jane Barwick and former Georgia Law Center for the Homeless and Atlanta Legal Aid Society attorney, described Wendy with a huge smile on her face: "Wendy has never met a social injustice she hasn't wanted to take on. She's so engaging, I've considered her a good friend since the first day I met her 13 years ago as a new attorney. I don't know anyone who sets the bar higher for humor, work ethic, and dedication to her peers and clients."

She also marched for justice throughout Georgia, including in 1988 with Hosea Williams in Forsyth County,

and was attacked by white supremacist groups. Friend and co-worker, Marta Shelton, remembers that day vividly, "Wendy and I just wanted to silently march for justice for others. That's Wendy though, ALWAYS showing up for others and trying to stay under the radar. We had no idea that a few years later Wendy would be one of the Plaintiffs in a lawsuit filed against the hate groups and brought by the Southern Poverty Law Center, and which brought down the Klan in North Georgia. I am honored to have worked with Wendy for so long. She has the strongest moral compass of anyone I have ever known. Her seeking of justice for others inspires me every day."

In 1987, Wendy founded Rape Response in Gainesville, Ga. and was a sitting board member from 1987 through 2009. She saw a need to provide services for rape victims and recruited six women to help her form an organization to do so. Elaine Gerke, Rape Response's first executive director and longtime friend, said Wendy led the research and funding effort, working tirelessly to create an independent agency, and then served as the first board president. Gerke attributes her own consciousness of women's issues and poverty issues to Wendy, stating, "Wendy has been my role model most of my adult life. She works tirelessly to help those in need and to advocate for those who lack a voice in our society."

While in Dalton, Wendy helped found the Georgia Network against Domestic Violence, which worked with the Department of Human Resources to ensure that services were available to abused women.

Wendy was also active in the following professional and community groups over the years:

- Gainesville-Northeastern Bar Association, president 2005-06
- Northeast Georgia AIDS Alliance, 2005-09
- Hall County Commission on Children and Families, 2003-present, former chair
- Northeastern Circuit Domestic Violence Task Force, 2000-present, former chair
- Circle of Hope, Shelter for Battered Women, Board of Directors 1996-2001
- Gateway House, Inc., Shelter for battered women, Board of Directors, 1983-1988
- Friends of the Parks, Board member 1996-2000
- Supreme Court Commission on Interpreters, 2002-05
- Women's Giving Circle of North Georgia, chair
- Hall County Chamber of Commerce Vision 2030 Diversity Committee
- W. Wycliffe Orr Inn of Court
- Family Connection, Board Member

Wendy has been recognized for her community service and service to others, receiving the 2001 Chief Justice Robert Benham Award for Community Service and the 2007 Dan Bradley Award, Access to Justice Committee, Georgia Supreme Court. Since 1998, the Chief Justice Robert Benham Award for Community Service has been presented to honor lawyers and judges in Georgia who have made significant contributions to their communities and demonstrate the positive contributions of members of the Bar beyond their legal or official work. The Dan Bradley Award recognizes the work of an Atlanta Legal Aid or Georgia Legal Services Program attorney who has excelled in the commitment to the delivery of quality legal services to the poor and to providing equal access to justice. Not surprisingly, Wendy was honored for her years of commitment to providing quality legal services to low-income Georgians and for excellence in managing the delivery of legal services for 24 counties in northeast Georgia. Wendy was also been praised by the Bar for her work to build community approaches to poverty and family violence issues.

Wendy is often called on for her input in news articles written about the impoverished and the working poor. Bonnie Miller, attorney at GLSP, provided several articles to show that Wendy's input is needed and heard by the community. Miller adds, "There is very little 'downtime' for Wendy. There is always a way to educate others about the needs of the working poor, the abused and the needy."

Wendy's legal career brought a lot of respect from Judges, but also a lot of push back. I remember her stories of ridicule from a rural Superior Court Judge who referred to her as, "Wendy Glasbrenner, the champion of the poor." This was after the filing of a Writ of Mandamus seeking the granting of pauper's relief. If you heard the tone, it was not meant as a compliment; however, she wore that title proudly.

Hall County Superior Court Judge Kathlene Gosselin, also sees Wendy as a champion of the poor. "Wendy's conscientiousness is key. She takes her job very seriously, not only in her training of new attorneys but also her own advocacy. Wendy is a true professional, always showing good grace and good humor. She is a great advocate for her clients." Gosselin recalls when Wendy was shaken by the murder of her client after a final divorce hearing. "One of Wendy's clients and client's sister were tragically gunned down by the ex-husband after driving away from the final hearing. This occurred in front of her client's children. Wendy and the Judge were told the ex-husband may be looking for them as well and were protected by law enforcement. Although this reminded Wendy of the danger she is in everyday, this tragedy did not dampen her enthusiasm or her resolve to advocate for low-income Georgians. Nothing sways Wendy.'

In our daily lives, we look for champions; we need champions. Champions help us strive to achieve greater things and to be better people. Today, you found one—Wendy Glasbrenner, "Champion of the Poor." To Wendy Glasbrenner we say thank you! ***FLR***

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