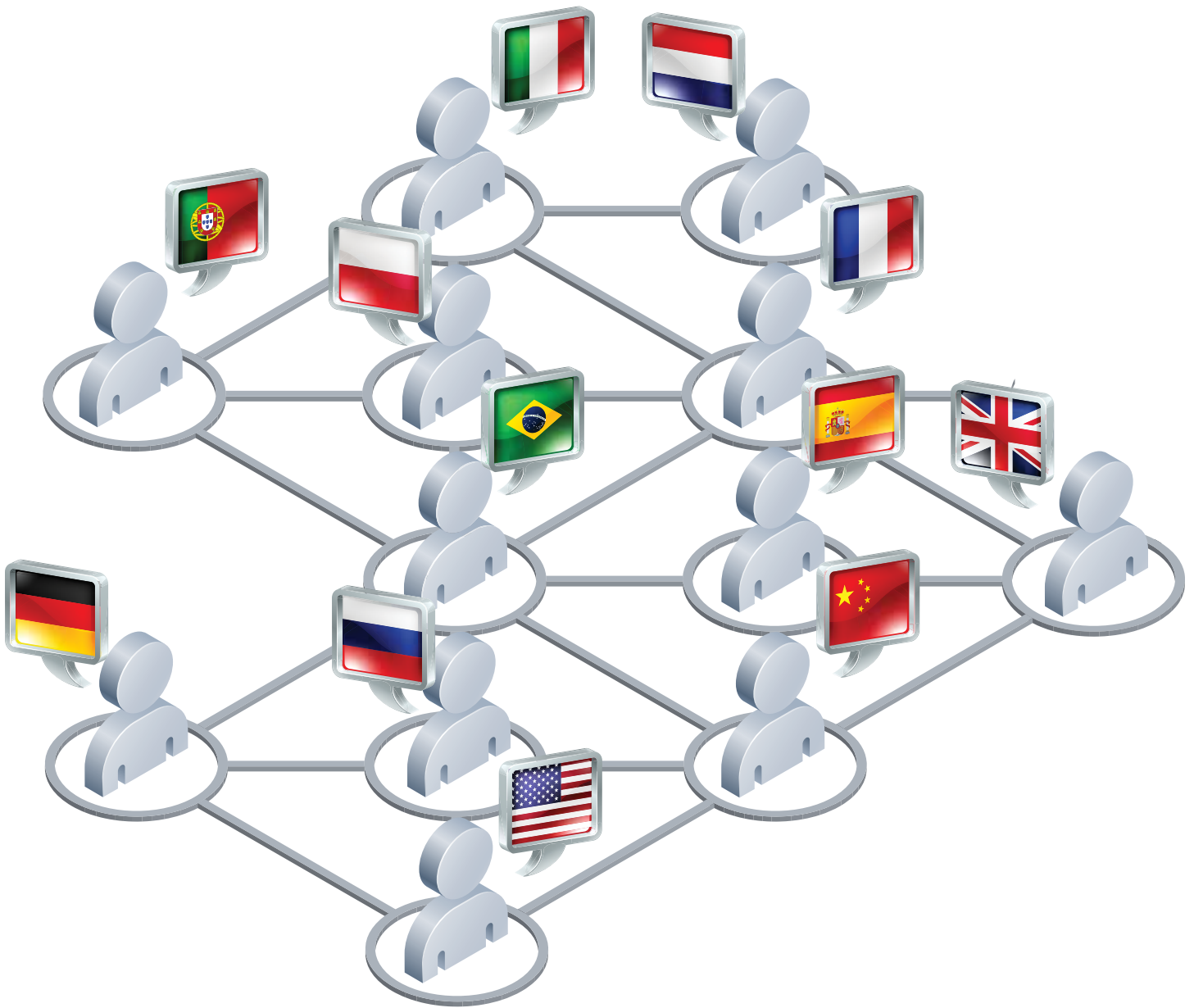


The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia – Summer 2013



Representing Georgia's Immigrants in Family Law: Key Issues

Editors' Corner

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All members of the Executive Committee are extremely excited about the start of the new year. As we begin this year, we are proud that our Family Law Newsletter is as "strong as ever" as we continue to receive great articles from a wide range of sources. Apart from receiving articles from family law attorneys in Georgia, we receive articles from other family law practitioners from the entire nation on topics which are relevant to the practice of family law in Georgia.



In addition, we are grateful for the contributions of forensic accountants, business valuers, psychologists, psychiatrists and social workers who have become important contributors to attorneys in our field.

To mark the beginning of the New Executive Committee, we have included a section in this Edition devoted to brief descriptions of all our Executive Committee members who work throughout the entire year to promote the goals of the section. It is our hope that by including a brief description of each member, that you will feel more comfortable in reaching out to any of us with any questions and/or suggestions you may have about our section.

We look forward to receiving your comments and articles to our Newsletter as we strive to improve each and every edition. *FLR*

**IF YOU WOULD LIKE TO
 CONTRIBUTE ARTICLES TO
 THE FAMILY LAW REVIEW,
 OR HAVE ANY IDEAS OR
 CONTENT SUGGESTIONS FOR
 FUTURE ISSUES,
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Chair's Comments

by Jonathan Tuggle
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I don't know that I have ever been more proud to be a member of this section than I was at the Family Law Institute this year. The interactive program, which covered 32 topics over the three days, showcased the high caliber of lawyers in our section and judges we appear before, but among the 627 lawyers and judges in attendance, there was a palpable feeling of warmth and camaraderie, particularly as we remembered our dear friend, Andy Pachman. Many commented that energy carried over throughout the week and made for a very memorable Institute. While we all practice family law for different reasons, I believe that compassion we share is a large part of why we do what we do. It is part of what makes our section different.

It is a tremendous honor for me to serve as chair of the section and to follow in the footsteps of my father, Joseph T. Tuggle Jr., who was chair of the section in 1996. I am equally honored to follow our outgoing chair, Kelly Miles. During her term, Kelly worked tirelessly on our behalf, always pushing for new ways to improve the section. With 1800 members, we are the third largest section in the bar, and under Kelly's leadership, the section has grown even more, as reflected by the 80 first timers among the record attendance at the Institute. In recognition of that hard work, the family law section received the Section Award of Achievement. Thanks to Kelly's efforts, as I reported at the Institute, the "state of the union" is strong.

The many accomplishments of the section over the last year are also attributable to the hard work of the Executive Committee members, all of whom are briefly profiled in this issue. You will note we have three new members of the Executive Committee: members at large: Michelle H. Jordan, Atlanta Legal Aid Society; and Pilar J. Prinz, Lawler Green Prinz & Gleklen; and YLD Family Law Committee co-chair, Kelly I. Reese, Stern & Edlin. I am very excited to have them aboard, and am confident they will make great contributions to the section. Please take a moment to familiarize yourself with the Executive Committee and allow each one of us to be a resource for any questions you have about the section or to be your liaison in getting more involved in the section.

Over my term as chair, it is my goal for the 2013-14 Bar year to be a year of "Service & Involvement" where we as a section broaden our involvement in community service projects across the state. Toward that end, the Executive Committee has already begun planning a grass roots initiative to identify family law related organizations and causes the section can partner with in these community service projects. We certainly welcome any suggestions you may have, as well as volunteers, particularly outside metro-Atlanta, who are interested in coordinating these efforts on a local level.

Another great way to get involved in the section is to join one of the section subcommittees, each of which is chaired by an executive committee member(s). If you have any interest in one or more of the subcommittees, contact the chair(s) to get involved:

- Diversity (Kelly Miles, Marvin Solomiany, Ivory Brown, Michelle Jordan)
- Sponsorship (Gary Graham, Ivory Brown)
- Military and Federal Employees (John Collar)
- Technology/Social Media (Scot Kraeuter, Kelly Reese)
- Community Service (Dan Bloom, Leigh Cummings, Pilar Prinz, Tera Reese-Beisbier)
- POP—Practicing Outside the Perimeter (Kelley O'Neill-Boswell, Regina Quick)
- Uniform Rules (Kelly Miles, Becca Crumrine, Ivory Brown, Scot Kraeuter)

As we say goodbye to summer and head into fall, be sure to mark your calendars for upcoming section events including the Nuts & Bolts - Atlanta seminar chaired by Regina Quick which will be recorded at GPTV on Nov. 22, 2013, our Annual Meeting and CLE being put together by Marvin Solomiany, Tera Reese-Beisbier and Scot Kraeuter on Jan. 9, 2014 at the InterContinental Buckhead Hotel and ultimately next year's Family Law Institute chaired by Becca Crumrine at the Amelia Island Ritz-Carlton over May 22-24, 2014.

It is going to be a great year. If there is anything I or the section can do for you, don't hesitate to give me a call. **FLR**

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

Representing Georgia's Immigrants in Family Law: Key Issues

by Laura Alvarez, A.B. Olmos & Associates, P.C. and Zaira Solano

Georgia's immigrant population has unquestionably grown in recent years and the numbers only continue to rise. In DeKalb County, as an example, 16 percent of DeKalb County residents counted by the U.S. Census from 2005-09 were foreign-born. Thus, divorces, legitimations and other domestic relations cases involving immigrants will only increase in the future. Family law practitioners must be apprised of legal issues specific to these cases. This article highlights several of these issues.

1. Federal law mandates language assistance to limited English proficient ("LEP") parents in public schools and health care

In ascertaining final decision-making authority for legal custody, counsel for a client who speaks proficient English might argue that the parent with limited English proficiency cannot communicate sufficiently well with the children's teachers, school administrators or doctors. Federal protections for such parents complicate this view.

As to schools, Title VI of the Civil Rights Act of 1964 ("Title VI"), codified in 42 U.S.C. §2000d, and Executive Order 13166, mandate that Limited English Proficient ("LEP") parents be provided with "meaningful access" to information and services of public schools and private schools that receive federal funds.¹ Schools must take "reasonable steps" to ensure parents get this meaningful access.² This means that parents must be provided with documents and forms in their language or interpreter services.

As an example, in Henry County, a Consent Agreement between the U.S. Department of Justice Civil Rights Division and the Henry County Board of Education requires that:

the District shall ensure that its schools communicate enrollment related information...to all parents in a language parents can understand. To that end, the District will have registration and enrollment-related documents, forms, and communications relating to a request for a social security number readily available in both Spanish and English. The District shall follow the procedures in Section B for parents who speak any language other than Spanish or English.³

"Section B" requires the use of interpreters, and that the school maintain a list of interpreters and translators.⁴ More specifically, the District is required to ask parents whether they need assistance in language other than English, and if so, shall provide translation and interpretation of enrollment and registration policies.⁵

Title VI, 42 U.S.C. §2000d, and Executive Order 13166 apply equally to access to medical services to recipients of

federal funding.⁶ Recipients of federal funding includes "virtually all" healthcare providers,⁷ particularly hospitals, as it includes any participant in Medicaid, Peachcare and Medicare, and any recipient of National Institutes of Health Grants, and Center for Disease Control monies.⁸ Thus, LEP parents have the legal right to language assistance services in any language from any health care provider.

In short, limited English proficiency on its own should not be used against a parent who would otherwise be capable of making wise decisions about his or her child's health care or education.

2. Immigration status, alone, cannot be the basis for determining the best interest of the child

In *In re M.M.*, 263 Ga. App. 353, 362, 587 S.E.2d 825, 832 (2003), a father who "admitted he had not entered the country legally" had his parental rights terminated by the trial court, which found that "he would face deportation, that the child could then be returned to protective custody or taken with her father to 'an unknown future in Mexico,' and that it was unwilling to subject A.P. to those possibilities." *In re M.M.*, supra, at 361. The Court of Appeals of Georgia reversed this decision, finding it improper to terminate parental rights solely based on the father's immigration status, where it was clear that the facts otherwise supported the father retaining his parental rights:

Essentially, the termination of the father's parental rights was based on the possibility that the father could someday be deported and, with her mother's parental rights also severed, A.P. might be returned to DFACS's custody or sent to Mexico. When we wield the awesome power entrusted to us in these cases, our decisions must be based on clear and convincing evidence of parental misconduct or inability and that termination is in the best interest of the child, and not speculation about "the vagaries or vicissitudes that beset every family on its journey through the thickets of life." [Citation omitted].⁹

Depending on the individual circumstances, the prospect of deportation of an undocumented parent may be less likely than the general public would assume.

First, a person residing in the United States without having obtained permission under U.S. immigration law, while being "unlawfully" present pursuant to the Immigration and Nationality Act ("INA") is not committing a crime. Such a person would run the risk of being removed (deported) from the United States if he comes into contact with the Department of Homeland Security Immigration and Customs Enforcement ("ICE").

Such contact with ICE typically occurs when the person commits a crime, such as a misdemeanor traffic violation for driving without a license, if that person is arrested based upon that citation, and ICE officials are notified that the person is in custody. If that occurs, an undocumented person may be subject to removal.¹⁰

However, even if removal proceedings are initiated, removal will not occur immediately. An individual is given the opportunity to appear before the Executive Office of Immigration Review and request relief, if available to that person. One of the most common forms of relief for a person who is undocumented is cancellation of removal for non-permanent residents.¹¹ A person may qualify for cancellation of removal if he has a U.S. citizen or permanent resident child, spouse or parent who would suffer exceptional and extremely unusual hardship if the person is removed from the United States; the person has been physically present in the United States for 10 years; the person has been a person of good moral character for 10 years; and the person has not been convicted of certain criminal offenses. *Id.* The duration of a removal case where a form of relief is asserted can last between one and three years. In the meantime, a person without a criminal history and with qualifying family members (U.S. citizen children) will likely be able to obtain bond from immigration detention.¹² Thus, even after an arrest, an undocumented person can remain in the United States, and available to parent his or her minor children for years.

Additionally, subject to prosecutorial discretion within the removal case, certain individuals may have an administrative hold place on his or her case by DHS, so that no action is taken in the removal proceedings for several years. If the person's case is administratively closed, he can obtain a work permit to work lawfully in the United States on a temporary basis, which would qualify that person to obtain a driver's license and a social security number.

In short, lack of federal permission for an individual to reside in the United States, without more (such as a criminal history) is not a basis to automatically deprive an undocumented parent of custodial rights over minor children.

At least one state's Legislature has affirmatively recognized in its family law statute that the determination of

the best interest of the child should NOT turn on a parent's immigration status. That Section states:

- a. Custody should be granted in the following order of preference according to the best interest of the child....
- b. The immigration status of a parent, legal guardian, or relative shall not disqualify the parent, legal guardian, or relative.¹³

3. All civil litigants are entitled to an interpreter free of cost to them

As previously noted in this publication and as outlined in *Ling v. State*¹⁴, Title VI also requires that LEP individuals be provided with interpreters in all Georgia courts, as all Georgia courts are recipients of federal funding. The Supreme Court of Georgia's most recent amendment of the Rules on Interpreters explicitly provides:

IV. Civil Cases: Foreign Language Interpreters

...

(B) Each non-English speaking party shall have the right to an interpreter at each critical stage of the proceedings *at no cost to the non-English speaking person.*

...

VII. Interpreter's Fees and Expenses: Foreign language interpreters

...

(B) The expenses of providing an interpreter in any legal proceeding will be borne by the local court or appropriate governing body.¹⁵

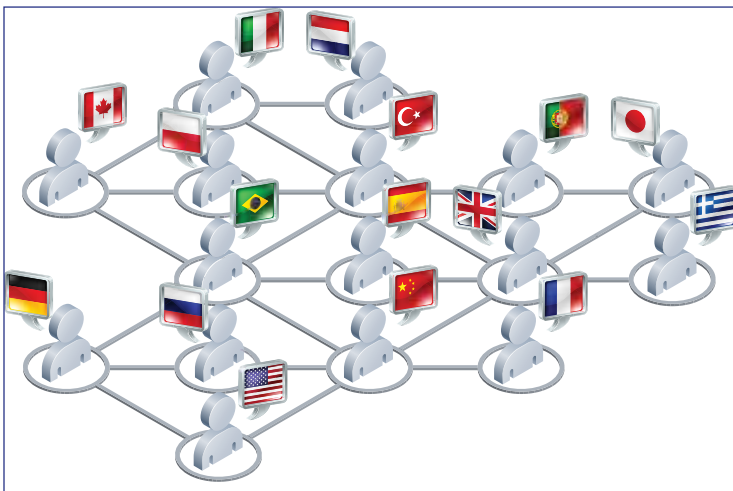
While the mandate does not require a written request for an interpreter, the best practice is for counsel to file a written a Motion for an Interpreter Paid For By the Court in advance of any hearing. Gwinnett, Cobb, Cherokee, DeKalb and Fulton counties currently have interpreter systems in place free of cost to litigants. Fulton County even has a user-friendly online system for reservation of interpreters free of cost to litigants.¹⁶

O.C.G.A. § 50-3-10, Which Makes English the Official Language Of the State of Georgia, Does Not Negate Individuals Rights Under Federal Law

O.C.G.A. § 50-3-100 (a) provides: "The English language is designated as the official language of the State of Georgia. The official language shall be the language used for each public record...."

Importantly, this state law does not negate any of the aforementioned LEP rights under federal law:

- b. This Code section shall not be construed in any way to deny a person's rights under the Constitution of Georgia or the Constitution of the United States or any laws, statutes, or regulations of the United States or of the state of Georgia as a result of that person's inability to communicate in the official language.¹⁷



Further, O.C.G.A. § 50-3-100(a) is inapplicable when in conflict with federal law¹⁸, and when public health, safety, or justice require the use of other languages.¹⁹

Counsel for LEP clients should take care to provide translated documents to their LEP clients, particularly agreements to be signed by clients. Translation ensures that LEP clients' signatures are voluntary. Translations should be filed with the court as exhibits. An original document or form that is in another language may be filed with the court so long as it is accompanied with an English translation.²⁰

5. Domestic Violence victims and victims of crime should NOT be turned away by the Courts or by law enforcement under S.B. 160

S.B. 160 of the 2013-14 Regular Session of the Georgia Senate, amended O.C.G.A. §§ 50-36-1 and 50-36-2 (both of which originated under H.B. 87 in 2011), require that, "unless required by federal law...no agency or political subdivisions shall accept...for any official purpose," identification unless it is a "secure and verifiable document."²¹ Pertinent to immigrant clients, the amendments narrowed the list of "secure and verifiable documents" to exclude "any foreign passport unless the passport is submitted with a valid United States Homeland Security Form I-94, I-94A, or I-94W or other federal document specifying an alien's lawful immigration status, or other proof of lawful presence in the United States under federal immigration law...."²²

Importantly, this requirement of showing a "secure and verifiable document" does NOT pertain to persons reporting a crime, or persons obtaining a Temporary Protective Order or those assisting persons obtaining a protective order or victims of a crime.²³ Thus, Domestic Violence victims and victims of crime should NOT be turned away by the Courts or by law enforcement under S.B. 160.

Conclusion

In sum, immigrant clients, regardless of immigration status, have legal rights under federal and state law. Attorneys for these clients should take care to be apprised of these protections, and attorneys opposing pro se immigrant clients should take care not to unethically deprive such litigants of their rights.²⁴ *FLR*



Laura Alvarez is an Associate Attorney with A.B. Olmos and Associates, P.C. A.B. Olmos & Associates represents largely immigrant clients in family law, personal injury, and traffic citations. Alvarez is an officer of the Georgia Hispanic Bar Association.



Section 2, pertaining to immigration law, was co-written by Zaira Solano, of the Solano Law Firm, LLC. Zaira Solano practices immigration law in Atlanta, with a satellite office in Birmingham, Ala.

(Endnotes)

- 1 Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency; Policy Guidance, 65 Fed. Reg. 50123 (hereinafter, "Enforcement of Title VI"; Department of Health, Education, and Welfare Memo Regarding Language Minority Children, May 25, 1970, available at <http://www2.ed.gov/about/offices/list/ocr/docs/lau1970.html>, last accessed July 31, 2013.
- 2 65 Fed. Reg. 50123, supra, 50124. "Reasonable steps" to ensure "meaningful access" will vary under the circumstances. Guidance on this issue is outlined in "Enforcement of Title VI."
- 3 *Agreement Between the United States of America and Henry County School District*, Complaint No. 169-19-70. Available at <http://www.justice.gov/iso/opa/resources/456201211914625474963.pdf>, last accessed July 31, 2013.
- 4 *Id.*
- 5 *Id.*
- 6 The implementing regulations are found at 42 C.F.R. Part 80. See also, U.S. Dep't. of Health & Human Services, "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons," 68 Fed. Reg. 47311, 47313 (Aug. 8, 2003), available at <http://www.gpo.gov/fdsys/pkg/FR-2003-08-08/pdf/03-20179.pdf>. Last accessed July 31, 2013.
- 7 David R. Williams, Ph.D., M.P.H. and Toni D. Rucker, PhD, "Understanding and Addressing Racial Disparities in Health Care," 21 Health Care Financing Review 75, 83 (2000).
- 8 Alice Chen, MD, MPH, M, Mara K. Youdelman, J.D., LL.M., and Jamie Brooks, J.D., "The Legal Framework for Language Access in Healthcare Settings: Title VI and Beyond," 28 Journal of Internal Medicine 362, 363 (2007). Peachcare is a federal SCHIP (State Children's Health Insurance program. See Georgia Department of Community Health, "An Overview of PeachCare for Kids," January 2012. Available from http://dch.georgia.gov/sites/dch.georgia.gov/files/imported/vgn/images/portal/cit_1210/53/63/70/650182PeachCareForKidsFY12.pdf, last accessed August 1, 2013.
- 9 *Id.*, at 362.
- 10 See INA § 212, 8 U.S.C. § 1182 (grounds of inadmissibility); INA § 237, 8 U.S.C. § 1227 (grounds of deportability).
- 11 See INA § 240A(b)(1).
- 12 INA § 236.
- 13 See California Family Code Section 3040(b).
- 14 *Ling v. State*, 288 Ga. 299, 302, 702 S.E.2d 881 (2010); Jana Edmondson-Cooper, "Breaking Free, Being Heard: A Domestic Violence Survivor's Right to an Interpreter in Georgia Courts," *The Family Law Review*, Winter 2013.
- 15 Georgia Supreme Court Rule on the Use of Interpreters for Non-English Speaking and Hearing Impaired Persons (including Amendments Received Through July 3, 2012), Appendix A, Section IV, available at <http://www.gasupreme.us/rules/rules.php>, emphasis added.
- 16 <http://www.fultoncountyga.gov/InterpreterPublic/>
- 17 O.C.G.A. § 50-3-100(b).
- 18 O.C.G.A. § 50-3-100(d)(1).
- 19 O.C.G.A. § 50-3-100(d)(2).
- 20 O.C.G.A. § 50-3-100(c).
- 21 O.C.G.A. § 50-36-2(c).
- 22 O.C.G.A. § 50-36-2(b)(2)(B).
- 23 O.C.G.A. §§ 50-36-2(f)(1)-(3).
- 24 See, e.g., Georgia Rule of Professional Responsibility 4.4, Respect for Rights of Third Persons: "In representing a client, a lawyer shall not...use methods of obtaining evidence that violate the legal rights of [a third person]."

Getting to Know the Executive Committee



Dan Bloom is a member of Pachman Richardson, LLC where he practices exclusively in the area of Domestic Relations. Bloom was deputy director of the Atlanta Volunteer Lawyers Foundation and a magistrate judge specially assigned to the Family Division of Fulton Superior Court.



Kelly Miles is a partner in Smith, Gilliam, Williams & Miles in Gainesville where she has practiced since graduating from Mercer Law School. Her practice is limited to family law and real estate. She is a fellow in AAML, has presented at CLE programs and served on the executive committee since 2006.



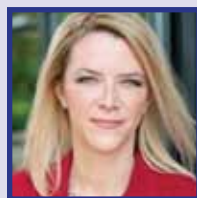
Ivory T. Brown has practiced law for more than 25 years. She served as a Gwinnett magistrate judge and also served two terms as the chair of the Entertainment and Sports Law Section of the State Bar. Her practice is currently family law with an emphasis on entertainment and sports related matters.



Kelley O'Neill-Boswell's expertise is in family law and personal injury litigation. Over the past 20 years, she has worked with divorces and in post-divorce modification issues. An Albany native and resident, she and her husband, Chris, have two children and are members of St. Teresa's Church in Albany.



John Collar is a Shareholder at Boyd Collar Nolen & Tuggle, LLC in Atlanta, a firm specializing in divorce and family law. He received his J.D. from the Cumberland Law School/Samford. He currently serves on the executive committee of the State Bar Family Law Section as the Legislative Liason.



Pilar J. Prinz is a founding member of Lawler Green Prinz & Gleklen, LLC. She served as the 2010-11 president of the Georgia Association for Women Lawyers (GAWL) and is a graduate of Emory University's School of Law and Goizueta School of Business.



Rebecca Crumrine is a founding partner of Hedgepeth Heredia Crumrine & Morrison. She has been practicing family law exclusively since 2004 and is president of the DeKalb County Bar Association, chair-elect of the State Bar of Georgia Family Law Section and is chair of the 2014 Family Law Institute.



Regina M. Quick is a 1987 graduate of the University of Georgia School of Law and practices family law in Athens. She represents House District 117 in the Georgia General Assembly and serves on the Juvenile Justice Committee. She has served on the Section executive committee since 2009.



Leigh Faulk Cummings has practiced family law with Warner, Bates, McGough, McGinnis & Portnoy for over ten years. She earned her Bachelors in English at University of Virginia, her J.D. from the Georgia State University College of Law, graduating cum laude.



Kelly I. Reese graduated cum laude from the University of Florida with a B.S. in Business Management where she also obtained her law degree from the Levin College of Law. She is the current co-chair of the Young Lawyer's Division, Family Law Committee and has exclusively practiced family law.



Gary P. Graham is a partner at Stern and Edlin and has exclusively practiced family law since 2000. He was the winning attorney in the precedent setting divorce case of Miller vs. Miller, 288 Ga. 274 (2010), and is the chair-elect of Family Law Section of the Atlanta Bar and is a fellow in the AAML.



Tera Reese-Beisbier runs a family law practice in Forsyth County. As a trial attorney, she also enjoys mediation practice and being a guardian-ad-litem. She started her career assisting low income Georgians in the GLSP Gainesville Office and has been in private practice for the last 12 years.



Michelle Jordan is the managing attorney of Atlanta Legal Aid's Fulton County Family Law Unit and was previously the coordinator of the Women & Children's Advocacy Project at the Georgia Law Center for Homeless. She has a J.D. from Emory University School of Law.



Marvin Solomiany has been practicing exclusively in the area of family law for the past 15 years and is the managing partner at Kessler & Solomiany, LLC. He is a member of the AAML and past chair of the Atlanta Bar Family Law Section. He is married to Kerry and has two children; Aaron and Amanda.



R. Scot Kraeuter is a partner with the law firm of Johnson, Kraeuter & Dunn, LLC, in Savannah, Georgia. He practices primarily in the areas of family law and personal injury cases and has 18 years of experience.



Jonathan J. Tuggle is a partner with Boyd Collar Nolen & Tuggle where he practices family law. He has been selected as one of the Best Lawyers in America (2011-14) in the area of family law." Last year, he was selected by Georgia Trend as one of the 2012 "40 Under 40-Georgia's Best and Brightest."

5 Must Have Mediation Strategies

by Andy Flink

Anyone who walks into a negotiation session unprepared is setting themselves up for potential failure. While the timing may not be right or the parties are so embroiled in conflict an agreement would appear unreachable, preparation “must-haves” will always serve your best interest. Getting yourself ready and having a grasp of the potential outcomes are paramount to success in reaching an agreement. Here are five that you should always have an understanding of for any mediation:

1. **Offer multiple options.** Effective negotiators make a series of offers within a proposal. I always think about the book “Predictably Irrational” by Dan Ariely. He did a study about the way we think, what shapes our decisions and makes them predictable. He uses the example of three different choices (all offered at the same price) for a vacation. The options are: Paris with free breakfast, Rome without free breakfast and Rome with free breakfast. The majority of the respondents chose Rome with free breakfast. Why? Because Rome with free breakfast is a much better deal than Rome without a free breakfast and it is easier to compare the two options for Rome than it is to compare Paris and Rome. Offering multiple options in a mediation session lets the other side decide what they believe to be the better choice.
2. **Listen.** Then listen more closely. You already know what you want to say. Sometimes we are so ready to tell our story that we don’t listen to what the other side is saying and asking for. It is very hard to hear what someone else is articulating when you are busy rehearsing your perfect strategy in your own head. Combine that with a lack of trust for what the opposing side’s position is and you’re really conducting the mediation session not with them.... but with yourself. Spend time preparing and understanding your case before the session. That preparedness will help you open your ears and your mind to really hear what the other side is revealing during the session.
3. **Limit exposure in the future.** I see this issue come up often in modification cases. Dad is paying more child support than he can afford. He wants to reduce his obligation but in the meantime is accruing arrearages at a breakneck pace. In the original agreement, Dad agreed to cover 90% of the extracurricular activity costs for the child but he DID NOT cap the amount he might have to pay. Mom is vested with final decision making authority on this issue and spends \$1,000.00 a month on horseback riding lessons. One year later Dad owes \$10,800.00 to Mom (90% of \$12,000.00). In this example, simply settling on extra-curricular activities isn’t enough. Make sure you define and

cap any situation where there may be a financial exposure that includes a lack of control.

4. **Sit in the other room.** Evaluating your own position is critical to being a good negotiator; evaluating the other parties’ position is even more important. Spend some preparation time thinking about and defining what the other side is going to ask for. Complete a list of what you believe those items are. As the mediation session proceeds, continue to revise your list. Be prepared to provide the other side information they may need in order to make informed decisions. Knowing what move to make is one thing. Knowing what move they are going to make and why is what you need to figure out. The idea of “putting yourself in the other person’s position” can be the difference between a settlement that you feel is fair and a settlement that may not happen.
5. **Know your BATNA.** Understanding your “best alternative to a negotiated agreement” (BATNA) gives you a sense of the potential results if the case doesn’t settle. How might the issues play out in court? Is there a chance we may not prevail if we cannot agree in mediation? Sometimes parties are so adamant about their position that it clouds their vision of what the potential outcomes might be. Not knowing what the possibilities are can be risky. Your BATNA is truly the best deal you can get somewhere else. If you don’t know what that is, then you don’t know your best deal at the negotiation table either.

Parties who appear at the session prepared and ready to negotiate help me be a more effective mediator. Even if both sides are “too far apart” and are reluctant to meet, sufficient preparation and hard work before and during the session can in fact be the formula that gets us to an agreement. Strategize and get yourself ready – you may be surprised at the results that can be reached by the end of the day. **FLR**



Andy Flink is a trained mediator and arbitrator. He is familiar with the aspects of divorce from both a personal and professional perspective, and is experienced in business and divorce cases. He has an understanding of cases with and without attorneys. Flink is founder of Flink Consulting, LLC, a

full service organization specializing in business and domestic mediation, arbitration and consulting.

At One Mediation, he serves as a mediator and arbitrator who specializes in divorce and separation matters and has a specific expertise in family-owned businesses. He is a registered mediator with the state of Georgia in both civil and domestic matters and a registered arbitrator.

The Triola Case:

Court Erred in Denial of Motion for New Trial in Divorce Without First Holding a Hearing, U.S.C.R. 6.3.

by Margaret Gettle Washburn

In the recent case of *Triola v. Triola*, Supreme Court of Georgia, Civil Case (4/15/2013, 4/18/2013) S13F0538, the Supreme Court held that the trial court erred in denying the Husband's motion for new trial without first conducting a hearing, holding as 'Uniform Superior Court Rule 6.3 requires, "unless otherwise ordered by the court," that a motion for new trial in a civil action "shall be decided" by the trial court only after an "oral hearing," even if the moving party does not request such a hearing. ' Justice David Nahmias authored the opinion for the Court.

The Court found that in January 2012, the Cobb Superior Court entered a final judgment and decree of divorce between the parties. The Husband then filed a motion for new trial, which the trial court denied without holding an oral hearing.

The Court found that the Husband's contentions were correct, finding that U.S.C.R. 6.3 requires, "unless otherwise ordered by the court," that a motion for new trial in a civil action "shall be decided" by the trial court only after an "oral hearing," even if the moving party does not request such a hearing. See *Kuriatnyk v. Kuriatnyk*, 286 Ga. 589, 592 (690 SE2d 397) (2010); *Green v. McCart*, 273 Ga. 862, 863 (548 SE2d 303) (2001). Moreover, if the trial court denies a motion for new trial in a civil case without issuing an order " 'except[ing] the motion . . . from this procedural requirement,' " and " 'without holding the mandatory hearing,' " the error will not be deemed harmless on appeal; instead, the order denying the motion must be reversed and the case remanded with

direction that the trial court comply with Rule 6.3 before disposing of the motion. *Kuriatnyk*, 286 Ga. at 592 (quoting *Green*, 273 Ga. at 863).

Rule 6.3 also provides: "However, oral argument on a motion for summary judgment shall be permitted upon written request made in a separate pleading bearing the caption of the case and entitled "Request for Oral Hearing," and provided that such pleading is filed with the motion for summary judgment or filed not later than five (5) days after the time for response."

The Supreme Court found that the trial court in fact did not hold an oral hearing before ruling on Husband's motion for new trial; further, that the order denying the motion did not reference Rule 6.3 or Husband's right to an oral hearing, nor did the court issue a separate order excepting the motion from the oral hearing requirement. The trial court's judgment was reversed and the case remanded with direction that the trial court comply with Rule 6.3 before ruling on Husband's motion for new trial. **FLR**



Margaret Gettle Washburn graduated from Emory University School of Law in 1979 and is a former state prosecutor. She has practiced in Lawrenceville since 1983. She is Past President of the Gwinnett County Bar Association and of the Georgia Council for Municipal Court Judges. She is the Chief Judge for the City of Sugar Hill.

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The Affordable Care Act Implementation - 2013 Update

by Vicky Kimbrell, Georgia Legal Services Program

With the United States Supreme Court decision in *Sebelius vs. Florida*¹, in June 2012, Georgia began the step-by-step implementation of the Affordable Care Act (ACA).² A key piece of that plan begins on Oct. 1, 2013, with the beginning of open enrollment for the purchase of health insurance for individuals through the Health Insurance Marketplace. Because Georgia has chosen not to run a state exchange, Georgians will use the federal Marketplace.³ As enrollment opens in Georgia and across the country, following is an outline of the basics that we will need to know about new Affordable Care Act.⁴

I. Georgians Currently Receiving Healthcare Coverage and Not Substantially Impacted by the Affordable Care Act Enrollment Requirements

One way to understand who the ACA will affect is to look at whose healthcare coverage will not change. Estimates are that 80 percent of Georgians will not be affected by the ACA enrollment provisions because they are already covered by some type of healthcare insurance that will not be substantially altered.⁵ This includes Georgians who receive their healthcare through Medicare, Medicaid, employer-based healthcare, or health insurance based on military service. Also left out, at this time are Georgians with incomes below 100 percent of the federal poverty level who do not fall into a current Medicaid category. Georgians with incomes less than 100 percent of the federal poverty level will not receive healthcare coverage because of Georgia's decision not to expand Medicaid.

A. Elder or Disabled Georgians who Receive Medicare or Adult, Blind, and Disabled (ABD) Medicaid Will Not be Substantially Affected by ACA Changes in Jan. 2014.

Elder and disabled Georgians who receive healthcare through the Medicare program or through ABD (Adult, Blind, and Disabled) Medicaid will not see substantial changes in their eligibility for or access to healthcare coverage.⁶ Georgians over 65 who receive Medicare coverage have already seen a variety of improvements, including mandatory coverage of preventive care, payments that help to cover the "donut hole" gap, and improved payments for prescription drugs, that were implemented since the adoption of the ACA.⁷ Disabled Georgians who receive Medicaid because they have low incomes and because they have been determined disabled by the Social Security administration, will continue to receive

SSI-related Medicaid. Similarly, Georgians who receive healthcare coverage because they are active, retired, or disabled military service members are not required to change their Tri-care or other service related health insurance coverage.

B. Children and Families Currently Receiving PeachCare or Medicaid Should Still Receive Healthcare Coverage.

Children in families with incomes below 235 percent⁸ of the federal poverty level will still be eligible for Georgia's current Peachcare⁹ or Medicaid programs. The major change that this group will see under the ACA will be certain changes brought about by standardizing federal and state policies on determining income and household size.¹⁰ Certain other Medicaid categories such as Medicaid for pregnant women, low-income Medicaid, cervical or breast cancer Medicaid should also remain substantially unaffected. The most substantial change for those categories will be changes in eligibility rules concerning household composition and income that will be based on financial eligibility rules determined under Modified Adjusted Gross Income (MAGI) definitions.¹¹ Most children, pregnant women, and certain very low income parents¹² who receive Medicaid now will still be eligible for the same coverage after Jan. 1, 2014.

C. Georgians Already Receiving Employer-based Insurance

Finally, Georgians who have employer provided health insurance will not see substantial changes in their healthcare coverage. Under the ACA, individuals will not be required to purchase health insurance, nor will they qualify for a Premium Tax Credit (PTC) when the employee has affordable employment-based coverage. Nor will these individuals receive any federal assistance in the form of a Premium Tax Credit to purchase a health insurance plan in the Healthcare Marketplace, even if their household income is below 400 percent of the federal poverty level (FPL), the income threshold for federal PTCs.

D. Georgia Has Chosen Not to Expand Medicaid

As of this date, some people in Georgia will still be without access to healthcare coverage after Jan. 1, 2014. The Affordable Care Act required

states to expand Medicaid coverage for persons below 133 percent of the federal poverty level in exchange for their continued acceptance of federal Medicaid funding. Under *Sebelius*, the United States Supreme Court allowed states to opt out of Medicaid expansion.¹³ So far, Georgia has decided not to expand Medicaid coverage. This means that Georgians with incomes below 100 percent of the federal poverty level who are non-disabled, adults without children, or adults with children who have incomes above the Georgia Low Income Medicaid limits, essentially those not currently covered by Medicaid now will not be eligible for ACA marketplace insurance or expanded Medicaid. Many low-income Georgians with incomes below 100 percent of the federal poverty level will still be left without coverage after Jan. 1, 2014. These individuals will not have access to primary or preventive care, will continue to use the expensive emergency rooms that we all fund for their health care, or will go without health care.¹⁴

So the question remains, who will be impacted by the Affordable Care Act? Who are the 20 percent that will be enrolling in healthcare coverage through the Marketplace beginning Jan. 1, 2014 and what is required of those individuals to obtain coverage?

II. The Individual Mandate to Purchase Health Insurance and Access to Healthcare Coverage Regardless of Pre-Existing Conditions.

The individual mandate provisions of the Affordable Care Act require that beginning Jan. 1, 2014, individuals must have healthcare insurance coverage or face a financial penalty.¹⁵ Penalties for noncompliance will be assessed for the 2014 year when the individual files a tax return in 2015.

The individual mandate to purchase insurance is the corollary to the requirement that prohibits insurance companies from denying coverage based on a pre-existing condition. Otherwise, people could simply wait until they were sick and then purchase health insurance. The individual mandate is the financial cornerstone of the Affordable Care Act to assure that (almost) everyone participates in the healthcare system to keep it financially viable.

A. Where Will Georgians who Need Coverage Purchase the Required Health Insurance?

Individuals and small employers will purchase health insurance through the Health Insurance Marketplace online at www.healthcare.gov, by telephone, in-person, or through the mail.¹⁶ Those who need consumer assistance can be assisted by impartial federally-funded Navigators who can help compare private health insurance options or Qualified Health Plans (QHPs) on the basis of price, benefits, and quality. Navigators or Certified Application Counselors (CAC) can also help by providing information on the premium tax credit program and cost subsidies that will be available for certain individuals with incomes between 100 percent and 400 percent of the federal poverty level.¹⁷ To be eligible for the Marketplace, the

consumer must live in its service area, be a U.S. citizen or national, or, a non-citizen who is lawfully present in the U.S. and, not be incarcerated.

The levels of coverage that will be available for purchase through the Marketplace are described as metal levels. The Bronze level will provide coverage for 60 percent of the actuarial value of healthcare expenses. The Silver plan will provide 70 percent, the gold 80 percent, and the platinum level will cover 90 percent of the actuarial value of healthcare expenses.¹⁸ Note that the levels of coverage are not defined using specific deductibles, copays, and coinsurance. Actuarial value (AV) in this context means that for a standard population, the bronze plan will pay 70 percent of health care expenses, while the enrollees pay 30 percent of deductibles, copays, and coinsurance. The higher the actuarial value, the less cost-sharing the enrollee will have to pay, on average. The actual percentage paid for any given enrollee may be



different from the actuarial value, depending upon the health care services used and the total cost of those services.

One final level of coverage that will be available is the catastrophic coverage plan. This plan will only be available to young adults under 30 years of age, who obtain a hardship waiver from the Marketplace. Catastrophic plans have high-deductibles and lower premiums. Catastrophic plans must still include coverage of three primary care visits and preventive services with no out-of-pocket costs. But essentially, this plan is for young adults who will receive basic protection from high out-of-pocket costs.

B. Medical Services Covered by Healthcare Policies Purchased Through the Marketplace

While healthcare plans can and will vary in services and costs, all plans must cover the essential health benefit (EHB) package. The Affordable Care Act ensures health plans offered in the individual and small group markets, both inside and outside of the Health Insurance Marketplace, offer a comprehensive package of items and services, known as essential health benefits. Essential health benefits must include items and services within at least the following 10 categories: ambulatory patient services--like doctor visits, emergency services, hospitalization, maternity and newborn care, mental health and substance abuse services, including behavioral health treatment, prescription drugs, rehabilitative and habilitative services and devices, laboratory services, preventive and wellness services, chronic disease management, and pediatric services, including oral and vision care. Insurance policies must cover these benefits to be certified and offered in the Health Insurance Marketplace, and Medicaid state plans must cover these services by 2014.

C. Georgians with Incomes from 100 percent to 400 percent of the Federal Poverty Level May Receive Subsidies through Premium Tax Credits or Cost Shares to Pay for Health Care costs.

To help pay for the required healthcare plans, Georgians with income from 100 percent to 400 percent of the federal poverty level who purchase insurance through the Marketplace can receive tax credits that will reduce health insurance premium costs.¹⁹ People purchasing insurance through the Marketplace, with incomes up to 250 percent of poverty also are eligible for reduced cost sharing, including lower deductibles and copayments, paid for by the federal government. Premium tax credits and cost-sharing assistance will begin Jan. 1, 2014 when healthcare coverage begins.²⁰

1. **Premium Tax Credits:** The amount of the tax credit will be based on the premium for the second lowest cost silver plan where the individual can purchase coverage. A silver plan is a plan that provides the essential benefits and has an actuarial value of 70 percent. The tax credit can be immediately paid to the insurance company to reduce the monthly premium payment. The amount of the premium tax credit is based on the percentage of income.²¹

Individuals are enrolled into the premium tax credits when they sign up for coverage through the Marketplace. The tax credit is based on current income and will be reconciled for the first time with the 2015 tax year filing.

2. **Cost Subsidies:** Individuals with incomes at or less than 250 percent of the federal poverty level who purchase (at least the second lowest cost) silver plan can also receive cost subsidies to help pay. Cost share subsidies can help pay deductibles, co-pays and co-insurance. The major difference in the metal levels of coverage is that the higher level plans, like platinum plans have lower cost shares and lower level plans, like the bronze plans have a higher cost share. The maximum out of pocket for 2014 is \$6,350 for an individual and \$12,700 for a family. Most importantly, persons who purchase silver plans through the Marketplace, with incomes below 250 percent of the federal poverty level can receive cost subsidies to pay or help pay for these out of pocket health expenses.

Navigators and Certified Application Counselors should be available after Oct. 1, 2014, to help consumers decide which of the health care plans will make sense for a consumer and which premium tax credit or cost sharing subsidy program will be most advantageous for the individual or family.

Several family law issues will substantially impact health care coverage eligibility and costs. The award of the personal tax exemption for the child will determine household size for the amount of the Premium Tax Credit and Medicaid/Peachcare eligibility. Child support will no longer be considered income for Medicaid or the Premium Tax Credit calculation, nor will there be an asset/resource test for many family-related Medicaid and Peachcare categories after Jan. 1, 2014. Family law attorneys may be called upon to explain the new law and to help people make coverage decisions. To do that, family law attorneys need to understand the family law, health law, and even tax law implications of the ACA. Regardless of one's political opinion, ACA enrollment will begin Oct. 1, 2013, and coverage will start Jan. 1, 2013. I hope this article has been a start in getting our heads around the options available so that we can competently advise our clients, our friends, and our families. *FLR*



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(Endnotes)

- 1 *National Federation of Independent Business, et al. v. Kathleen Sebelius, Secretary of Health and Human Services, et al.; Department of Health and Human Services, et al. v. Florida, et al.; Florida, et al. v. Department of Health and Human Services, et al.*, 569 U.S. ___, 132 S. Ct. 2566; 183 L. Ed. 2d 450 (2012).
- 2 Patient Protection and Affordable Care Act, Pub.L. 111-148, 124 Stat. 119, to be codified as amended at sections of the Internal Revenue Code and in 42 U.S.C.
- 3 www.healthcare.gov or 1-800-318-2596. The Marketplace will be open 24 hours a day, seven days a week and speak 150 languages.
- 4 A helpful glossary of terms used in the Affordable Care Act is available at: <https://www.healthcare.gov/glossary/>.
- 5 <http://www.hhs.gov/healthcare/facts/bystate/ga.html>.
- 6 The single state agency responsible for governing Medicaid is the Department of Community Health and many of the governing regulations for eligibility for the different types of enrollment and coverage are online at: <http://www.odis.dhr.state.ga.us/>.
- 7 <http://www.cms.gov/apps/docs/aca-update-implementing-medicare-costs-savings.pdf>.
- 8 In 2013, 235 percent of the federal poverty level (FPL) is \$55,368 for a family of four.
- 9 Peachcare is Georgia's state Child Health Insurance Program, see peachcare.org for eligibility criteria and applications in English and Spanish.
- 10 For example, child support will no longer be income to families and non ABD Medicaid or Peachcare will no longer have resource limits.
- 11 42 C.F.R. § 435.603.
- 12 Persons currently receiving Medicaid under programs like Right from the Start Medicaid (RSM) and LIM (Low Income Medicaid) . Eligibility rules and income limits on the over 42 categories of Medicaid can be found at the state Medicaid Manual at: http://www.odis.dhr.state.ga.us/3000_fam/3480_medicaid/medicaid.htm.
- 13 *National Federation of Independent Business v. Sebelius*, 132 Sup. Ct. 2566, 2603 (2012).
- 14 Andrew P. Wilper, Steffie Woolhandler, Karen E. Lasser, Danny McCormick, David H. Bor, and David U. Himmelstein , *Health Insurance and Mortality in US Adults*, American Journal of Public Health , December 2009, Vol. 99, No. 12 : pp. 2289-2295.
- 15 The Court upheld the individual mandate as a valid exercise of the taxing powers of Congress. *National Federation of Independent Business v. Sebelius*, 132 Sup. Ct. 2566, 2594 (2012).
- 16 www.healthcare.gov. This article will not discuss the small business requirements to provide healthcoverage through the SHOP program.
- 17 In 2013, for a family of four, this includes incomes up to \$94,200. <http://aspe.hhs.gov/poverty/13poverty.cfm>.
- 18 <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8177.pdf>.
- 19 <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/7962-02.pdf>.
- 20 People offered coverage through an employer are also not eligible for premium tax credits unless the employer plan does not have an actuarial value of at least 60 percent² or unless the person's share of the premium for employer-sponsored insurance exceeds 9.5 percent of income. People who meet these thresholds for unaffordable employer-sponsored insurance are eligible to enroll in a health insurance exchange and may receive tax credits to reduce the cost of coverage purchased through the Marketplace.
- 21 Center for Budget Policies and Priorities, at www.cbpp.org.



Separate v. Marital Property – Buy Sell Agreements

by Martin S. Varon

Very often we have clients who either own (or their soon to be ex-spouse owns) an interest in a closely held business. If the ownership percentage changes during the marriage, it is critical to determine if the change represents separate property or a marital component. Assisting the attorney in making an equitable distribution argument could have a significant impact on the amount of property settlement for your client.

Let's assume you represent the spouse ("out spouse") of a business owner in a divorce action. Opposing party received his/her interest in a closely held family business by gift, as an inheritance, or by starting the business prior to the marriage. Opposing party owns 50 percent of the business and an unrelated party owns the other 50 percent of the business.

Because opposing party received their interest by gift, inheritance or by starting the business before the marriage, the family attorney who has hired your firm as a financial expert witness informs you that opposing party has a "separate property interest" not subject to equitable distribution. Both parties want to know how much, if any, the value of the entity has increased since the date of the marriage.

During the marriage, opposing party has increased his/her ownership interest in the entity to 100 percent. Opposing party did not have the financial ability or the liquidity to buy out the unrelated party's 50 percent interest. However, a financial advisor devised the following plan which occurred during the marriage,

An appraisal was prepared and the entity was valued at \$1,000,000. For simplicity, let's ignore marketability and control discounts for this example. The entity borrowed \$500,000 from the bank and redeemed the unrelated party's 50 percent interest with the loan proceeds (know as stock redemption to lawyers; treasury stock to accountants). After the redemption, opposing party owns a 100 percent interest in an entity that has a total value of \$1,000,000 less \$500,000 of bank debt, or an equity interest to opposing party of \$500,000.

Opposing family attorney argues that the redemption, which admittedly occurred during the marriage, resulted

in no additional value to his/her client. He/she argues that prior to the redemption his/her client owned 50 percent of a \$1,000,000 equity interest (or \$500,000) and after the redemption his/her client owns 100 percent of a \$500,000 equity interest (still \$500,000).

"The prevailing case law from other states seems to indicate that increased percentage owned remains separate property; however, Georgia law is not clear. (*Hoffman v. Hoffman*, 676 S.W. 2d 817 (1984), a Missouri decision; *Anson v. Anson*, 777 So. 2d 52 (2000), a Florida decision; *Allison v. Allison*, Nos. 2006-CA-001 (2008) a Kentucky decision; and *Rhodes v. Rhodes*, Nos. 2009 -CA-0055 (2011), a Mississippi decision."

Subsequent to the redemption, and during the marriage, the business continues to operate, and the debt is paid down. Client's family attorney asks you to help your mutual client. You proceed to prepare a conclusion of value of the entity as of the date of the marriage, and as of the current date.

Let's assume your work produces the following results (See Table A below):

In many states, if the increase in value is a result of efforts of the opposing party as opposed to market forces, the out spouse is entitled to an equitable distribution of the increase in value.

Halpern v. Halpern, 256 Ga.639, 352 S.E.2d753 noted the now accepted principle that "property acquired during the marriage by either party by gift, inheritance, bequest or devise remains the separate property of the party who acquired it and is not subject to equitable division. Where the appreciation in the husband's family business, managed by the husband prior to and during the marriage, was attributable to outside market forces, the appreciation is not subject to equitable distribution. On the other hand, where the husband left his job to devote his energies to full-time management of his holdings, the court held that appreciation to his holdings was due to his active management rather than random market fluctuations, and, the appreciation could be considered a product of the marital partnership." Client's family law attorney asks if there is any other argument that may be made on behalf

(TABLE A) AS OF DATE OF MARRIAGE AS OF DATE OF REDEMPTION AS OF DATE OF DIVORCE

VALUE OF ENTITY	\$1,000,000	\$1,000,000	\$1,000,000
VALUE OF DEBT	\$0	\$500,000	\$350,000
VALUE OF EQUITY	\$1,000,000	\$500,000	\$650,000
OPPOSING PARTY'S EQUITY PERCENT	50 PERCENT	100 PERCENT	100 PERCENT

of the out spouse. Before we discuss a potential argument, a more detailed discussion about stock redemption agreements is necessary.

This case poses problems inherent with a stock redemption agreement. Let's assume Shareholder A and Shareholder B each own 50 percent of a C corporation. The corporation is valued at \$1,000,000. Corporate counsel drafts a stock redemption agreement and corporation purchases two \$500,000 life insurance policies on the lives of A and B.

POLICY #	1	2
INSURED	A	B
OWNER OF POLICY	CORPORATION	CORPORATION
BENEFICIARY	CORPORATION	CORPORATION
DEATH BENEFIT	\$500,000	\$500,000

When A dies, the life insurance company pays the \$500,000 death benefit to the Corporation. Under terms of the stock redemption agreement, Corporation pays the \$500,000 proceeds to A's family in exchange for A's shares in Corporation. The stock redemption agreement served its purpose and is, in effect, terminated because a corporation cannot subsequently redeem the shares from B who is now the only shareholder. If Company continues to maintain the policy on B's life, when B dies two years later the life insurance company pays \$500,000 proceeds to Corporation. Since the redemption agreement is no longer in effect, Corporation retains the proceeds.

The problems with a stock redemption agreement are as follows:

- Proceeds paid into a C corporation represent a preference item which may unnecessarily trigger an alternative minimum tax.
- After A's death, B's cost basis in Corporation remains the same. If B decides to subsequently sell Corporation to D, B will have a larger capital gain.
- Unequal results

What is the meaning of "unequal results"? A and B each owned 50 percent of Corporation. When A and B die, A's family ends up with \$500,000. B's family ends up with a corporation valued at \$1,000,000 and additional \$500,000 cash from the life insurance proceeds remaining in the corporate bank account.

Unequal results could have been avoided if Corporation entered into a cross purchase agreement where each shareholder owns a life insurance policy on the other shareholder's life.

POLICY #	1	2
INSURED	A	B
OWNER OF POLICY	B	A
BENEFICIARY	B	A
DEATH BENEFIT	\$500,000	\$500,000

If A dies first, the life insurance company pays B the life insurance proceeds in the amount of \$500,000. Under terms of the cross purchase agreement, B is required to pay the \$500,000 to A's family in exchange for A's shares in the corporation. B receives the insurance proceeds income tax free, and receives a step-up in basis for A's shares purchased with the insurance proceeds. If B subsequently sells Corporation to D, B reduces his capital gains.

If B continues to run Corporation, A's family inherits the policy on B's life under A's will and continues to pay the premiums. If B dies two years later, A's family receives the proceeds on B's life upon B's death. Because no proceeds were paid into Corporation, there is no alternative minimum tax. The final result is more equitable. A's family ends up with \$1,000,000 (\$500,000 received from B to buy out A's shares plus \$500,000 received from the insurance policy on B's life). B's family ends up with a corporation valued at \$1,000,000.

If opposing party had entered into a cross purchase agreement as opposed to a stock redemption agreement, it would have been advantageous from a tax standpoint and from a fairness perspective for two unrelated shareholders. If opposing party bought out an unrelated shareholder with marital funds under a cross purchase agreement, wouldn't the increased interest be deemed marital property in family court? Does it seem fair that opposing party is benefiting in family court (increased shares appear to be separate property under a stock redemption arrangement, but may be marital property under a cross purchase arrangement) for entering an inferior type of agreement? Would it be equitable for the family law judge to rule that the "other 50 percent" interest acquired by the opposing party is separate property under a stock redemption agreement; however, the same interest would be deemed marital property under a cross purchase agreement which would be preferable from a tax and fairness standpoint? Does opposing party benefit because he received inferior tax advice?

There are situations where a stock redemption agreement would be beneficial. For example, where there are numerous shareholders, it would be cost prohibitive to purchase a life insurance policy on each of the many shareholders. In that situation, a stock redemption agreement could be the best option. It is always advisable to check with your own tax advisor regarding your specific fact situation.

Understanding the financial structure of the closely held entity from a financial, tax and accounting standpoint will help the family attorney develop a strong equitable distribution argument on behalf of his/her client. A competent expert witness will be able to assist the attorney in negotiations, mediation, arbitration, or court. **FLR**



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Effective Tax Rate v. Marginal Tax Rate

by Caroline Chang

We were recently involved in a case where the attorneys agreed upon numerous issues after months of discovery, taking depositions, mediation sessions, and exchanging of multiple offers and counter-offers. The final issue to be resolved surfaced around the interpretation of the wording in a clause in the final counter-offer. Husband offered to transfer immediately the “net after tax value of a future retirement benefit.” Wife accepted the offer, but then the dispute ensued regarding what does “net after tax” mean? The tax rate schedule for a single tax payer in 2013 looks as follows:

IF TAXABLE INCOME IS...	THE TAX IS...
NOT OVER \$8,925	10 PERCENT OF THE TAXABLE INCOME
OVER \$8,925 BUT NOT OVER \$36,250	\$892.50 PLUS 15 PERCENT OF THE EXCESS OVER \$8,925
OVER \$36,250 BUT NOT OVER \$87,850	\$4,991.25 PLUS 25 PERCENT OF THE EXCESS OVER \$36,250
OVER \$87,850 BUT NOT OVER \$183,250	\$17,891.25 PLUS 28 PERCENT OF THE EXCESS OVER \$87,850
OVER \$183,250 BUT NOT OVER \$398,350	\$44,603.25 PLUS 33 PERCENT OF THE EXCESS OVER \$183,250
OVER \$398,350 BUT NOT OVER \$400,000	\$115,586.25 PLUS 35 PERCENT OF THE EXCESS OVER \$398,350
OVER \$400,000	\$116,163.75 PLUS 39.6 PERCENT OF THE EXCESS OVER \$400,000

Taxable income is determined after the subtraction of all deductions (mortgage interest, real estate taxes, etc.) and exemptions for dependents from all income reported on the tax return. According to the above tables, the tax on \$410,000 of taxable income would be determined as follows (ignoring some credits, alternative minimum tax, unearned income Medicare contribution tax and other tax complexities):

Since \$410,000 is \$10,000 in excess of \$400,000, we look at the final bracket in the table above. The \$10,000 excess is taxed at a 39.6 percent rate ($\$10,000 \times 39.6$ percent) or \$3,960 which is then added to \$116,163.75 for a total federal income tax of \$120,123.75.

The additional dollar of income created above \$400,000 will be taxed at the top rate of 39.6 percent. This is known as the MARGINAL TAX RATE and what husband's attorney had in mind.

However, if a taxpayer owes \$120,123.75 in federal taxes on \$410,000 of taxable income this is a 29.3 percent ($\$120,123.75 / \$410,000$) average rate or EFFECTIVE TAX RATE and what the wife's attorney had in mind.

The amount of the retirement fund being transferred was over \$300,000. The difference in the MARGINAL TAX RATE (39.6 percent) and the EFFECTIVE TAX RATE (29.3 percent) is in excess of 10 percent. Thus 10 percent of the \$300,000 retirement fund amounts to a \$30,000 dispute.

In drafting your settlement agreements, it will be advisable to add the words “net after MARGINAL tax rate” or “net after EFFECTIVE tax rate”. *FLR*

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Meet Cobb County Superior Court Hon. Gregory Poole

by Wayne Morrison

Judge Gregory Poole won a hotly contested election to the Superior Court of Cobb County in July 2012, taking office Jan. 1, 2013. Poole filled the vacancy created by Hon. Dorothy Robinson, who served Cobb County as a Judge for over 40 years. Prior to rising to the Superior Court, Poole worked a general practice in Cobb County for more than 18 years and then served the citizenry as a Juvenile Court Judge for more than nine years. Serving as a Juvenile Court Judge required him to serve one week per month as a Superior Court Judge. That opportunity provided valuable judicial experience to the diverse cases decided by Superior Court Judges and to some of the challenges they face. Speaking with Poole, he defined some of the differences between Juvenile and Superior Court and provided suggestions for lawyers practicing in his Court.

The Juvenile Court's mandate is to work with families in an effort to keep the family unit intact. To aid in this, the Juvenile Court has a host of resources including Guardians ad Litem and Court Appointed Special Advocates, which are utilized without cost to the parties. These resources are desperately needed as the Juvenile Court deals with children in the most precarious, dangerous and harmful situations. Poole has presided over bitterly contested custody matters in the Superior Court and has seen situations that are clearly not good for children. However, such situations are often quite tame compared to the issues he presided over in Juvenile Court. He is quick to note that the Superior Court's mandate is also very different than the Juvenile Court's mandate. In Superior Court he is there to equitably divide and to break up in the best manner possible keeping his focus on the best interest of children. But, he must do so focusing on the current circumstances. If circumstances change, it is up to the parties and to their lawyers to bring matters back to the Court. This is vastly different than in deprivation cases in Juvenile Court, where the Court maintains a supervisory capacity.

One challenge which Poole faced was managing his calendar. Simply put, there are only so many days where he can preside over cases. He feels very fortunate to have been able to keep Judge Robinson's Staff Attorney, Jennifer Marcotte, and to have his Assistant Andrea Sebesta. With their assistance, his courtroom operates efficiently. Poole schedules his calendar with two weeks of back-to-back criminal jury trials with specially set civil trials serving as backups. He has a domestic calendar which is typically ten positions and to the extent possible, pro se matters are on a separate calendar.

Poole stated that the best advice he can offer any lawyer appearing in his court is to be prepared. Where family law is concerned, he stressed that it is important for both the lawyer and the client to know the client's financial affidavit

and child support worksheets. He stressed that lawyers should not rely on paralegals to complete these important tasks. If there are mistakes in a party's financial affidavit he wonders what else is wrong; if he cannot trust in something so critical, albeit perhaps small, how is he supposed to trust in something larger. With regards to child support worksheets, Poole focuses on a family's historical conduct. He does not generally favor large deviations.

He stressed the importance of opening and closing statements. He reminds us that he does not know our case the way we do or the way our clients do. Poole relies on opening statements to set forth what relief a party wants and to provide an outline for what they believe the evidence will show. Similarly, he considers closing argument to be extremely important. He notes that his mind has been changed by a particularly good closing argument. What he looks for in closing argument is for a restatement of what a party wants and how the court is to accomplish giving that to the party. He urges lawyers to be creative and encourages the use of demonstrative exhibits. He takes copious notes during court and refers to them throughout trial, especially concerning matters that lawyers have stated are at issue during opening statement.

Poole commented on lawyers asking for pretrial conferences, noting that he is concerned about the perceptions of the parties. He will conduct such conferences, but not until he explains to the parties what has been requested and what will happen, then if the



parties consent he will conduct a conference. Absent the consent of the parties, he will not hold pretrial conferences. During such a conference, he is not hearing evidence and cannot state how he will rule.

When asked about Guardians ad Litem and expert witnesses, Poole commented that they can be great in complicated cases. However, they are not always needed and lawyers need to keep in mind the extent of their clients' resources. In appointing a Guardian ad Litem, he believes that both parties generally need to pay something up front, although the division of fees can be reallocated at the end of a case. Poole has Guardians testify last. He does not read Guardian ad Litem reports prior to trial unless both parties consent to his doing so. He notes that sometimes Guardians ad Litem change their minds during trial and he does not always agree with their recommendation.

As a Juvenile Court Judge, children regularly appeared before him and he spoke to and with them from the bench. That is not something he wants to do or believes is appropriate for a Superior Court Judge to do in most cases. Poole wants advance notice if a party believes it is necessary for a child to appear and does not want the child missing school. After listening to why it is believed that he should hear from a child, he will decide if it is appropriate and arrangements can be made for the child to be taken out of order and heard after the end of the school day. Judge Poole notes that most custody decisions are made without children appearing before the court.

Having practiced family law, Poole recognizes the value of mediation. However, he recognizes that not every case will benefit from mediation. He will entertain requests to be excused from mediation if the lawyers do not believe it will be beneficial. Additionally, he does not require mediation prior to Temporary Hearings or in Contempt Proceedings.

Finally, it is no surprise that Poole does not like discovery disputes. He urges lawyers to avoid them. He understands that materials are needed to prepare a case and that the breadth of discovery is wide. He also understands that discovery can be overly burdensome and used to harass a party. With these understandings, Poole cautions that if you are on the losing side of a Motion to Compel or other discovery related motion, be prepared to have fees assessed against you.

Judge Poole is a lifelong resident of Cobb County. He is married to Lucia Poole and together they have five children. Visiting his chambers, one sees that he is an avid hunter. In his spare time he also enjoys studying history and reading biographies. *FLR*



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Protecting the Family Violence Act

Is the Family Violence Act Unconstitutional by Lacking Service Requirements?

by Peter A. Rivner

I recently had a family violence protective order case where the alleged perpetrator of the family violence, the husband, avoided service by the sheriff. My client, the victim of the family violence, had left the marital home after suffering serious injuries at the hands of her husband and I filed a family violence petition on her behalf. The court issued an ex parte protective order as requested and the petition and order were forwarded to the sheriff's office for service. However, in the meantime, the husband hunkered down in the marital home to avoid service, changing the locks and putting curtains over the windows. While the ex parte order required the husband to be removed from the home, the order was meaningless until the husband was served by the sheriff. After several unsuccessful attempts at service by the sheriff, my office was faced with an increasingly frustrated client, who did not have access to her home or personal items, and who was incurring additional attorney's fees on service issues. The situation became so dire that my client began having second thoughts regarding the filing of the family violence petition in the first place. Additionally, the scheduled family violence show cause hearing was quickly approaching, and the court had informed me that my

client's petition and the ex parte order would be dismissed if service on the husband did not occur prior to the hearing.

Given this situation, I was forced to think outside of the box on ways to serve the husband, or at the very least give him notice of the hearing. I hired a private process server in the hope that he might be more successful in serving the husband. I mailed to the marital home and emailed to the Husband's email address the service package. I even called the husband on his cell phone – he promptly hung up on me once I identified myself – in an attempt to give the husband actual notice of the hearing. Essentially, I took every step I could think of that would show the court that my client had exhausted all available avenues of service but could not serve the husband due to his avoidance.

The husband in this case was eventually served by the sheriff when the husband (who had absconded from the marital home in the middle of the night allowing my client to return) entered the marital home and refused to leave. My client smartly called the police who retained the husband until he was served by the sheriff.

This true example raises the question of what service is actually required in a family violence case. This article will explore this question by examining the Family Violence Act and the Civil Practice Act. As the article will detail, it would appear that the Family Violence Act actually does not require any service or notice to the respondent before the issuance of a temporary twelve month protective order. If such is the case, then the Family Violence Act as written fails to ensure the respondent's due process rights and may be constitutionally inadequate if challenged.

The procedures for a family violence protective order are set out in the Family Violence Act ("FVA"), O.C.G.A. § 19-13-1, *et seq.* The purpose of the FVA is to establish "a system for providing quick, temporary relief for the protection of victims of family violence."¹ "Family violence is defined as acts between past or present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons living or formerly living in the same household where the commission of a felony or the commission of offenses of battery, simple battery, simple assault, assault, stalking, criminal damage to property, unlawful restraint, or criminal trespass occurs."² The FVA allows for ex parte temporary relief to protect victims of family violence immediately upon filing a petition.³ Within ten days of the filing of a family violence petition or as soon as practical thereafter, but in no case later than thirty days, a hearing must be held at which the petitioner must prove the allegations of the petition by a preponderance of the evidence, otherwise the petition stands dismissed.⁴ At this hearing, known as a show cause hearing, the Court is



authorized to enter a temporary protective order which remains in effect for a period of twelve months. Because the FVA sets forth abbreviated procedures and allows for the entry of ex parte orders, the FVA has been deemed a special statutory proceeding rather than a regular civil action by the Georgia Attorney General (unofficial opinion) and the Court of Appeals of Georgia.⁵

This article will now examine whether service is required by the special statutory scheme of the FVA. The FVA is silent as to what service procedures are to be followed in a family violence case.⁶ The lack of a service requirement in the FVA is in stark contrast to the service requirements of other special statutory procedures. For example, the statutory scheme for employer violence protective orders explicitly requires service on a respondent after an employee receives an ex parte temporary restraining order (valid for 15 days) against an employer and before a hearing on the petition for an injunction.⁷

Despite this apparent lack of a service requirement in the FVA, the Georgia Court of Appeals has interpreted the FVA to include a notice requirement. In the only Georgia appellate case to have examined service issues related to the FVA, the Court reversed a temporary twelve month protective order for insufficiency of service.⁸ The Court held that while service under the CPA is not required in a family violence action, the FVA did require notice to the respondent of the family violence petition prior to the issuance of a temporary twelve month protective order. The Court cited O.C.G.A. § 19-13-4(c) as support for this holding. This statute provides as follows: "Any order granted under this Code section shall remain in effect for up to one year; provided, however, that upon the motion of a petitioner and notice to the respondent and after a hearing, the court in its discretion may convert a temporary order granted under this Code section to an order effective for not more than three years or to a permanent order."⁹ A close review of the FVA, however, reveals that the Court of Appeals incorrectly held that the notice requirement found in O.C.G.A. § 19-13-4(c) applies to the issuance of a temporary twelve month protective order. Rather, the clear language of the statute instead

shows that the notice requirement applies only to the conversion of a twelve month temporary protective order into a three year or permanent protective order. As such, the FVA does not require either service or notice prior to the hearing and issuance of a temporary twelve month protective order. This conclusion is supported by the statutory language found in the FVA regarding the show cause hearing. O.C.G.A. § 19-9-3(c) addresses only what the petitioner must prove in order to support the issuance of a twelve month protective order. No provisions of the FVA, however, make any reference whatsoever of the respondent's presence or role at the show cause hearing.

Having concluded that the FVA does not have any special statutory procedures regarding service of or notice to the respondent prior to the issuance of a twelve month protective order, the next question is whether the service provisions of the Civil Practice Act ("CPA"), O.C.G.A. § 9-11-1, *et seq.*, would apply to fill this void. The CPA governs the procedure of all civil actions.¹⁰ This includes civil actions for divorces, alimony, custody and child support.¹¹ However, the FVA is considered a special statutory proceeding rather than a civil action.¹² As such, an action under the FVA is not governed by the CPA.¹³ Instead, the specific statutory procedures of the FVA take precedence over the general procedures of the CPA that apply to all civil actions.¹⁴ Furthermore, even where the FVA is silent as to special statutory procedures, the CPA would still not apply to cases filed under the FVA because the FVA is technically not a civil action.¹⁵ Specifically, the Court of Appeals has stated that proceedings under the FVA "are not subject to the service provisions of the Georgia Civil Practice Act."¹⁶

With no guidance from the FVA, and with the CPA not applying despite the FVA being silent, what is required, if anything, regarding service and/or notice prior to the issuance of a twelve month family violence protective order? Faced with this quandary, the appellate courts, the Attorney General and the Council of Superior Court Judges all agree that following the service requirements of the CPA "would certainly be sufficient" for service under the FVA.¹⁷ This may be good practice; however, it is clearly not what is required under the FVA.



Given the complete void regarding service, does the FVA comport with the constitutional requirements of due process? It would appear to not. For example, the FVA requires that the respondent file a cross petition for family violence at least three business days prior to the show cause hearing in order for the Court to issue any orders restraining the petitioner, including mutual restraining orders.¹⁸ The Court of Appeals has further stated that, in addition to the FVA, the requirements of due process entitle the petitioner to notice and an opportunity to prepare a defense before appearing at the show cause hearing where a temporary twelve month protective order could be issued against her.¹⁹ Thus, one could conclude that due process would likewise entitle the respondent to notice and an opportunity to prepare a defense before the show cause hearing

Fortunately, service by sheriff is generally successful. But, occasionally we are placed in a position where the respondent successfully avoids service. In such a case, would actual or constructive notice by registered mail or even by a telephone call be sufficient to allow a hearing to be held so as to ensure the end to family violence? This question remains unresolved under the current statutory scheme and appellate cases. As such, the legislature should amend the FVA to clearly set forth any special statutory procedures concerning service and/or notice prior to the issuance of a twelve month protective order. In so doing, the legislature should balance the respondent's due process rights with the overall purpose of the FVA to put an immediate end to acts of family violence. This important balance could be accomplished by allowing lenient alternative notice provisions for the show cause hearing, which could be utilized by the petitioner only after service by sheriff is unsuccessful. *FLR*



at (404) 843-1956.

1 1995 Op. Att. Gen. No. U95-7.
2 O.C.G.A. § 19-13-1.
3 See O.C.G.A. § 19-13-3(b).
4 O.C.G.A. § 19-13-3(c).
5 1995 Op. Att. Gen. No. U95-7; *Carroll v. State*, 224 Ga.App. 543
(1997)(dicta).
6 *Loiten v. Loiten*, 288 Ga.App. 638, 640 (2007).
7 O.C.G.A. § 34-1-7.
8 *Loiten*, *supra*.
9 O.C.G.A. § 19-13-4(c).
10 O.C.G.A. § 9-11-1.
11 But see Uniform Superior Court Rule 24.1, which provides that
actions under the FVA are domestic relations actions.
12 See footnote 5.
13 *Loiten*, 288 Ga.App. 640, fn. 2.
14 O.C.G.A. § 9-11-1; 1995 Op. Att. Gen. No. U95-7; *Carroll v. State*,
224 Ga.App. 543 (1997).
15 1995 Op. Att. Gen. No. U95-7. But see O.C.G.A. § 9-11-81,
which provides that the CPA “shall apply to all special statutory
proceedings to the extent that specific rules of practice and procedure
in conflict herewith are expressly prescribed by law.”
16 *Loiten*, 288 Ga.App. 640, fn. 2.
17 *Id.*; 1995 Op. Att. Gen. No. U95-7; “Domestic Violence Benchbook:
A Guide to Civil and Criminal Proceedings,” Benchbook Committee,
Council of Superior Court Judges, 2nd ed. (2006). Despite
concluding that the CPA would not apply, the Domestic Violence
Benchbook states service is required and that failure to assure proper
service on the respondent justifies dismissal without prejudice of the
petition by the court pursuant to O.C.G.A. §§ 9-11-4 and 9-11-41(b).
However, both statutes are part of the Civil Practice Act, which does
not apply to the Family Violence Act.
18 O.C.G.A. § 19-13-4(a).
19 *Williams v. Jones*, 291 Ga.App. 395 (2008).

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Computer-Generated Psychological Test Interpretation

by Howard Drutman

Computer-generated interpretation of psychological tests has exploded over the past ten years. Unfortunately, the idea that a computer is giving an objective interpretation is as false as saying that if something is on the internet, it must be true. The publishers of the psychological tests use mathematical algorithms to generate interpretive statements. The problems with these interpretations are many. Most significantly, they are based on proprietary algorithms that are known only to the publisher and the author of the instruments. It is not clear how the particular algorithms are generating their hypothetical interpretations and how well the various aspects of the test are integrated. Interpretations that are computer-generated can have contradictory statements or make interpretations which are not consistent with a full understanding of how various scales on a test are interrelated. In reference to the use of computer-generated test interpretation (CGTI) and the MCMI-III (Millon Clinical Multiaxial Inventory-Third Edition), Gould wrote:

The CGTI does not provide information about the contribution of score adjustments on clinical personality pattern scores, leading to erroneous interpretation about DSM-IV diagnoses. These diagnoses may inappropriately find their way into the evaluator's report or testimony (2006, p. 285).

I believe that it is unethical for a psychologist to

use computer-generated test interpretation as the sole means of interpreting a particular psychological test. The American Psychological Association (APA) ethics code 9.06 (Interpreting Assessment Results) states:

When interpreting assessment results, including automated interpretations, psychologists take into account the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences, that might affect psychologists' judgments or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations.

The APA ethics code in Section 9.09 (Test Scoring and Interpretation Services) states:

Psychologists who offer assessment or scoring services to other professionals accurately describe the purpose, norms, validity, reliability and applications of the procedures and any special qualifications applicable to their use. (b) Psychologists select scoring and interpretation services (including automated services) on the basis of evidence of the validity of the program and procedures as well as on other appropriate considerations. (c) Psychologists retain responsibility for the appropriate application, interpretation, and use of assessment instruments, whether they score and interpret such tests themselves or use automated or other services.

Any psychologist who would participate in evaluating a litigant solely based on a computer-generated test interpretation would be in violation of the APA ethics code.

The AFCC Model Standards of Practice for Child Custody Evaluation section 6.6 (Use of Computer-Generated Interpretive Reports) states:

Evaluators shall exercise caution in the use of computer-based test interpretations and prescriptive texts. In reporting information gathered, data obtained and clinical impressions formed and in explaining the bases for their opinions, evaluators shall accurately portray the relevance of each assessment instrument to the evaluative task and to the decision-making process. Evaluators shall recognize that test data carry an aura of precision that may be misleading. For this reason, evaluators shall not assign to test data greater weight than is warranted, particularly when opinions expressed have been formulated largely on some other bases.



Too often, attorneys, judges, and juries assume that computer-generated interpretations of psychological tests are more objective than the careful interpretation done by the psychologist who is conducting the evaluation. Assuming the psychologist conducting the evaluation is competent to interpret psychological tests, the CGTI are not more objective and certainly not as well integrated with the actual person being evaluated.

Psychological tests are not as objective as many in the legal community believe. At best, psychological tests describe characteristics that a sample of people share who have obtained similar score configurations on the test, to the particular litigant's score configuration. It is possible that two people can have exactly the same score on the Depression Scale of the MMPI-2 and yet their mood is expressed quite differently. One person may be crying, withdrawn, and suicidal, while another may feel helpless and useless, but still functioning on a day-to-day level. The proper forensic investigative protocol of multiple-methods would assist in correlating the hypotheses developed using the psychological tests to the actual functioning of the individual. It is only through the integration of the test results with the other pieces of information that an evaluator can come to conclusions that are to a psychological certainty.

Some in the legal community have proposed relying on computer-generated interpretations of psychological tests in lieu of full psychological evaluations. This idea is usually suggested as a cost effective strategy to obtain answers about an individual's mental status. While I understand the desire for less costly assessments, this approach fails to recognize the inherent problems in relying on CGTI. While the computer administration and scoring of psychological tests provides a cheaper alternative to psychological evaluations, the interpretation of these tests does not integrate any of the necessary information to make an accurate, valid, and ethically sound evaluation of an individual. There would be no way to say to a psychological certainty that what the computer interprets accurately reflects the individual under investigation. I doubt most attorneys would say that a LegalZoom computer generated legal document is the most comprehensive way for individuals to manage their legal needs. I assume a competent attorney's evaluation of the legal needs of a client is more comprehensive than the results of some online questions that a computer integrates into a document template.

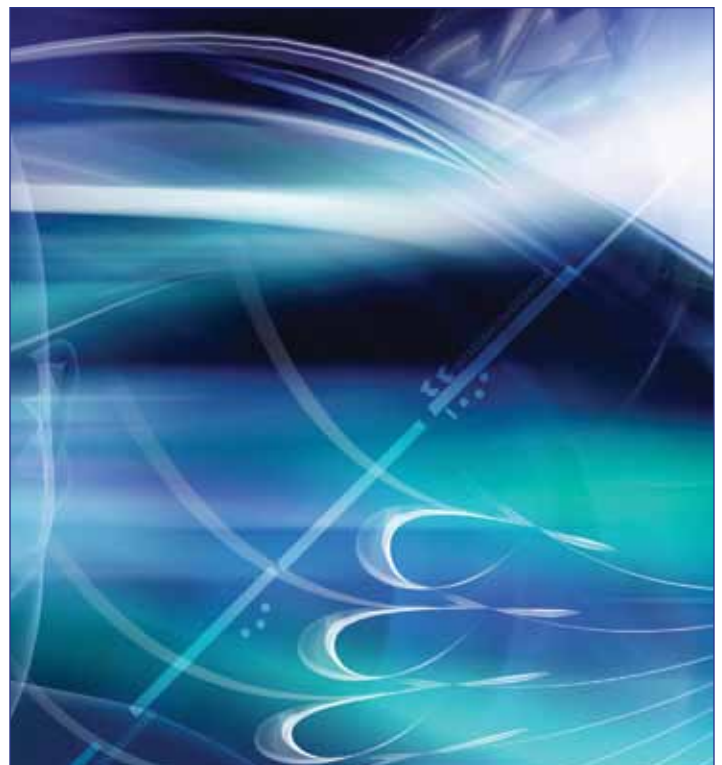
It would be unethical for a psychologist to participate in an evaluation that consisted of a client taking a psychological test and using the computer generated interpretation as the sole means of understanding that client's mental status. The psychologist would be "rubber stamping" the computer-generated interpretation and not integrating any of the test data with all of the other pieces of relevant information. I would question how an interpretation of unknown validity and reliability could be admitted as expert testimony in a legal case. Radiologists have computerized screening programs for Mammograms, x-rays, MRI, and CT scans.

Nevertheless, they rely on their own interpretation of the significance of any findings. A diagnosis, or lack of a diagnosis, is never determined solely on the computer's interpretation. The radiologist has to correlate the findings of the computer with other information specific to the patient. The same can be said of the psychologist who is ethically interpreting psychological tests.

Non-psychologists can incorrectly interpret many CGTI reports. As mentioned above in reference to the MCMI-III, a high proportion of custody litigants would have elevated scales on Histrionic, Compulsive and Narcissistic Personality traits. These findings would lead to many healthy litigants being mislabeled as having a Personality Disorder. That is why many researchers have recommended that the MCMI-III not be used in child custody evaluations.

As an attorney, you should never allow a computer-generated test interpretation of your client that has not been reviewed by a competent psychologist to be used as part of any forensic or clinical evaluation. Furthermore, the test alone should never be used in isolation of other data.

Forensic Psychologists use interviews, psychological tests, document reviews, and collateral interviews to gather data, which is ultimately integrated into a cohesive picture of the client's mental status and perhaps parental fitness. Each piece of information adds to the total understanding of the client. This multi-method approach to forensic evaluations leads to a convergence of information from clinical interviews, test results, collateral sources, etc. This is the best way to reach a valid and reliable finding about a litigant. Testing is one piece of the process and one source of data. Most attorneys are surprised to find out how little the actual psychological testing adds to the overall understanding of the individual under investigation.



Although it typically adds very little to the total data reviewed by the psychologist, the results are occasionally pivotal to fully understand the client.

Since the underlying algorithms behind computer-generated test interpretation are not known, the court would have no way to know the relationship between the data and the expressed opinion (the computer-generated test interpretation print-out). Since there is no way to directly connect the opinion in the computer generated interpretation to the underlying data there would be potential admissibility issues. Jay Flens, Ph.D. (2005) wrote in reference to expert testimony (which would include the interpretation of psychological testing):

In 1997, the U.S. Supreme Court extended their thinking on *Daubert* in *General Electric Co. v. Joiner* (1997). The *Joiner* decision focused attention on the need for the expert to show how opinions expressed were connected to the data upon which the opinions are based. No longer was an expert's say-so appropriate. An expert had to show a relationship between reliable data and expressed opinion. (2010, p. 12).

The CGTI does not provide the connection between the underlying "interpretation" and the data or research that justifies the interpretation.

For a psychological test to be appropriate in a specific case, the test must be reliable and valid. The legal community's use of the term reliable refers to what social scientists term validity. Jay Flens, Ph.D., has published extensively on psychological testing in child custody evaluations (2005). He defines reliability as referring, "... to the consistency of results, including but not limited to consistency across time, situation, and evaluator; it asks the question, "Does the test consistently measure what

it purported to measure? (p. 5)" Flens defines validity as referring to "... the accuracy of the test; it answers the question, "Does the test accurately measure what it is purported to measure? (p. 5). Just because a test is reliable, does not mean it is valid for use in a particular situation. Some tests are only valid to use with very specific populations. Even on well-known forensic psychological tests, like the MMPI-2, some scales should only be interpreted with very specific populations. For example, the Over Controlled-Hostility Scale on the MMPI-2 is valid for use among prisoners, but not child custody litigants. Nevertheless, the CGTI report gives interpretations of that scale, even in child custody cases.

The MCMI is currently in its third edition (MCMI-III). The test has norms that are based on a clinical population. They are not based on samples of child custody litigants. Furthermore, until the past couple of years, the test had separate norms for women and men. Unfortunately, women would routinely obtain extremely high scores on the scales "Histrionic" and "Compulsive" relative to men taking the same test. The publisher has "re-normed" the test to do away with separate norms for men and women. Unfortunately, most of the research, which has used the MCMI-III, is based on the old norms.

When given to people with a reason to respond in a highly defensive and desirable way, the MCMI-III will often yield scale elevations on the "Histrionic," "Compulsive", and "Narcissistic" scales. Individuals undergoing child custody evaluations and other forensic evaluations are often attempting to present a positive picture of their personality and functioning. The litigant, taking the test that is consciously or unconsciously presenting with positive impression management, will likely have those three scales elevated. Halon (2001), writing in the *American Journal of Forensic Psychology* (The Millon Clinical Multiaxial Inventory-III: The Normal Quartet Child Custody Cases) referred to these three scales (Histrionic, Compulsive, and Narcissistic) as the "normal quartet." Jonathan Gould wrote in reference to the normal quartet:

The three personality scales have several items in common, and each scale is highly correlated with the Desirability Scale. Thus, a common finding among parents undergoing child custody evaluations is that various combinations of the fake good triad will be elevated in a child custody context, some of which may represent healthy and adaptive personality traits and some of which may represent maladaptive and pathological states (2006, p. 284).

Unfortunately, the untrained eye would easily see these elevated scales as signs of a personality disorder or traits, when they may be indicative of healthy functioning. Those of us who review the reports of other psychologists have unfortunately seen too many evaluators who have misdiagnosed a litigant with a histrionic, narcissistic, or compulsive personality disorder. This was due to improper interpretation of the scale elevations without taking into consideration the context in which the test was administered and the population of test takers.



Most attorneys and judges who have worked with psychologists or heard the testimony of psychologists have heard terms such as standard deviations, T-scores, and Z scores. These are various measures of the central tendency of scores around the statistical mean. The T-score is a specific cut-off for the likelihood of a score deviating from a normal range. Many attorneys and judges know that on the MMPI-2 the standard deviation is 10. A score over a T score of 65 is significantly deviating from the norm. On the MCMI-III, T-scores are not used. Instead, the test utilizes Base Rate Scores, which approximate the presence of the disorder or traits in the population. A base rate of 75 is normal. The untrained individual looking at an MMPI-2 profile and an MCMI-III profile are likely to confuse the two very different types of scores. A score on a scale of the MMPI-2 of 75 is significant, while the base rate score on the MCMI-III of 75 is not.

A non-forensic psychologist, attorney, or judge reading the CGTI on the MCMI-III may conclude, wrongly, that an individual has a serious mental disorder such as a Narcissistic, Compulsive or Histrionic Personality Disorder. The reality may be the client who took the test was defensive and trying to show him or herself to be in the best possible light. This type of defensive, positive impression management response is all too common in family law litigation. *FLR*



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Case Law Update

by Vic Valmus

DFACS RECORDS

Donohoe v. Donohoe, A13A0389; A13A0390 (July 8, 2013)

The parties had two children and were divorced in 2009. The Father was awarded physical custody of the children. In 2010, the Father filed a Petition for Modification of Custody to obtain sole custody of the children, alleging the Mother had violated the Final Order many times and had become disruptive to the children. Thereafter, the Mother filed a Petition to Modify Custody and Visitation, alleging the Father had failed to consult with her about decisions regarding the children and the Father had not allowed the children to spend any time with her beyond the minimum required by the parenting plan. In February of 2011, the child reported to a teacher that his Father grabbed his arm, slapped him, and punched him in the forehead. The incident was reported to DFACS. The case was investigated and it was closed for lack of evidence. Later that same year, the child told a counselor at school that his Father had physically abused him. This was also reported to DFACS and later dismissed. The Mother filed a motion to subpoena the DFACS records, filed a motion under O.C.G.A. §49-5-41(a)(2), and asked the Trial Court to review the records to determine if the records were necessary to resolve any issues before the Court and, if so, to release those records to the parties. The Trial Court did not rule on the Mother's Motion. At trial, there was no mention of the DFACS records nor were they admitted into evidence. Additionally, no DFACS representative testified with regards to the agency's investigation into the reports of abuse made against the Father. Other evidence was presented at trial showing that, in the custody of the Father, the children were excelling academically and were straight "A" students. The children also participated in numerous activities, including, martial arts and piano lessons. Numerous witnesses testified that the Father was very attentive to the children's needs, that he had a great relationship with his children, and that he never became physically abusive with his children.

After the hearing, the Trial Court ordered that all provisions of the decree of divorce remain intact, with the exception that the Mother's visitation rights were restricted. In its Order, the Trial Court noted that it reviewed the DFACS records and had used the information gleaned from the DFACS reports in reaching its verdicts. The Trial Court also stated that it did not release the DFACS records to the parties because neither party requested that they be admitted into evidence or included in the Trial Court's record. The Trial Court also stated that neither party moved to preclude the Trial Court from considering these records. The Mother appeals and the Court of Appeals reverses.

The Mother contends, among other things, the Trial Court erred by misapplying the law and in evaluating the Petition for Modification of Custody by considering matters

not included in the record in reaching its verdict. The Petition to Change Child Custody should be granted only if the Trial Court finds there has been a material change of condition affecting the welfare of the child since the last custody award. If there has been such a change, then the Trial Court should base its new custody decision on the best interests of the child. The Trial Court erred in several ways. The Trial Court used *Ormandy* which established that a custodial parent has a *prima facie* right to retain custody. However, *Ormandy* has been overruled. The *prima facie* right of a custodial parent to retain custody has been eliminated. Likewise, the requirement that there be a change in circumstances for the worse, has been eliminated. To be clear, the Trial Court is authorized to modify custody where the evidence shows a change of material conditions that has a positive effect on the child's welfare as well as changes that adversely affect the child.

The Trial Court also erred in considering matters outside of the record. The Trial Court expressly stated it considered matters not included in the record in reaching its verdict. The DFACS records were never entered into evidence and no one from DFACS testified. The Trial Court also erred in not addressing the Mother's request for the DFACS records. The Mother's motion under O.C.G.A. §49-5-41(a)(2) specifically requested that the Trial Court provide such records if it believed the records were necessary to resolve any issues before the Court. The plain language of the statute clearly requires the Trial Court to provide confidential records which it determines should be considered in resolving issues before it.

EQUITABLE DIVISION

Arthur v. Arthur, S13F0339 (May 20, 2013)

The parties were married in 1995 and had two minor children. The Husband filed for divorce in 2010. After a bench trial, the Trial Court entered a Final Judgment and Decree of Divorce in 2012 which awarded the Wife primary custody of the children and also made equitable division of marital property. The Court awarded the marital residence to the Wife subject to the Wife's obligation to assume and hold Husband harmless for existing indebtedness on the property. It also required the Wife to use her best efforts to refinance the indebtedness in order to remove the Husband from the indebtedness and generate funds to pay the Husband \$20,000 for his interest in the marital home. If the Wife's efforts to refinance were unsuccessful, then, upon the sale of the marital residence, the Wife was to pay the Husband \$20,000, plus interest. The Husband appeals and the Supreme Court reverses.

The Husband argues the Trial Court abused its discretion with respect to the amount awarded to him from the equity in the marital home because it failed to set forth any findings as to the factual basis for the award.

The Husband filed a written request for findings of fact and conclusions of law after the hearing in this matter but before the judgment was entered and thus the request was timely. In this case, the Final Judgment simply awards the home to the Wife. No finding of fact was made that the Husband was entitled to an equitable divisions of assets, though that may be inferred by the Trial Court's finding that the Husband's equitable interest in the marital home was \$20,000 . It is not the intent of this Court to require the Trial Court to make precise findings of the total value of the marital estate before determining the equitable division of property. But, when one party requests that the Trial Court make findings of fact, at a minimum, the requirement that the judgment contain not just the results of the Trial Court's exercise of discretion in arriving at the equitable division, but also sufficient findings of fact to clarify the Court's rationale for its award. The degree of detail to be set forth in the findings of fact in a final judgment awarding equitable division of marital property should, as a practical matter, depend on the degree of complexity of the issues presented. In this case, the equitable division of the marital estate is simple and straightforward. Thus, less detail is required and should have been included in the final decree of divorce.

The Husband also argues, among other things, that the Trial Court erred by allowing the Wife to delay the ultimate payment of funds to the Husband for an indefinite period of time. The final judgment did not in fact make any definite award to the Husband. Instead, as entered, the final judgment requires no payment at all to the Husband if the Wife is unable to refinance the home and never sells it. A party's obligation to make an equitable division of property cannot be extended for an indefinite period of time as it was in this case.

EQUITABLE DIVISION

Driver v. Driver, S13F0152 (April 15, 2013)

The Husband filed for divorce in December of 2008 after being married for 20 years. The Wife answered and counterclaimed seeking child custody, child support, alimony, equitable division of marital property and attorney's fees. The marital estate consisted mainly of commercial property holdings and corporate entities which the Husband had an interest along with associated liabilities. On April 1, 2008, the Husband filed a financial statement indicating his net worth exceeded 11.3 million and by September 30, 2009, his net worth in the same properties had allegedly fallen to 2.6 million. A final bench trial was held in August of 2011. In January of 2012, the Husband filed a Motion to Reopen the Proof. In March of 2012, the Court entered a detailed Final Judgment and

Decree of Divorce. After the Final Decree in March, the Husband filed a Motion for New Trial on March 27th and he filed a Motion to Amend and/or Make Additional Findings of Fact Pursuant to O.C.G.A. §9-11-52. In July of 2012 the Court denied both Motions as well as the Husband's Motion to Reopen. The Court awards, among other things, \$500,000 in equitable division of marital property to be paid in two equal installments and \$200,000 in lump sum alimony to be paid in monthly installments of \$3,500 per month for the next 5 years. The Husband appeals and the Supreme Court affirms.

The Husband argues, among other things, the Trial Court failed to divide the marital property equitably. The Husband argues by the Trial Court failing to determine the liability associated with the marital assets and made no findings as to the value of the marital assets as a whole making it impractical to evaluate whether the property division was equitable. The Trial Court's conclusion that the award of property in kind did not provide the Wife with sufficient equitable division of marital property and the sum of \$500,000 was appropriate as an equitable share based upon the Court's findings of fact and was supported by evidence and the record. The Trial Court found that the Husband had secured his financial status by constantly maneuvering properties and assets and manipulating financial information. The Court found the evidence the Husband offered in support of his claim to be very troubling. One example that supports the Court's findings is that the Husband had crossed collateral lines of commercial properties that constituted most of marital assets. Therefore, we see no error in the Trial Court's failure to make a precise finding of the total value of the marital estate before determining equitable division. The Husband cites no authority requiring such a finding and the Trial Court generally is not required to make findings of fact in a non-jury trial unless requested by one of the parties prior to the entry of judgment. The Husband did not request findings of fact until the post judgment Motion to Amend



and/or Make Additional Findings. At that point, the Trial Court had discretion to make additional findings but was not obligated to do so. Therefore, the Court cannot say the Trial Court abused its discretion in not making the specific total marital estate valuation.

The Husband also contends the Trial Court erred in awarding the Wife \$200,000 in lump sum alimony to be paid in monthly installments of \$3,500 per year. Here, the Trial Court found the Husband was capable of earning at least \$150,000 per year based on more than \$660,000 in gross receipts from his income producing properties during each of the two previous years as well as his monthly income of \$5,500 as a consultant for the bank that was the primary mortgage holder of his commercial properties. The Court made the lump sum alimony award for the purposes of assisting the Wife in completing her education and becoming financially independent after the finding that she had been forced to leave the marital residence due to a foreclosure. That she worked part-time as a waitress and was enrolled in college and that she struggled with tuition payments as well as day-to-day living expenses. The Court noted the Husband resided with his girlfriend, and she paid virtually no living expenses and did not appear to suffer financially. The Trial Court was correct in the amount of alimony awarded under the evidence disclosed by the record and all of the facts and circumstances in this case.

The Husband argues, among other things, that the Trial Court erred in denying his Motion to Reopen the Proof to consider evidence of his financial status had changed for the worse since the trial and issuing a divorce decree without consideration of the additional evidence. It is generally not error to refuse the reopening of a case after both parties have closed and the Trial Court's decision to deny a parties' permission will not be reversed absent a manifest abuse of discretion. The Trial Court here did not abuse its discretion in declining to reopen the proof. The Court correctly determined that the Husband had waived his right to a hearing on the Motion by failing to request a hearing on one of the 3 days that the Court had offered and by failing to properly notify the Court and the Wife of his Motion. Moreover, the Court eventually denied the Husband's Motion on the merits after holding a hearing on all of his post-trial motions in April of 2012. There is no transcript of the hearing, nor is there any other indication in the record that the Husband ever properly proffered his new documents as competent evidence.

MARITAL DEBT/LAW SCHOOL LOANS

Zekser v. Zekser, S13F0408 (June 17, 2013)

The parties were married in 1993 and divorced 8 years later. The Final Decree of the Court awarded the marital residence to the Wife as well as a vehicle and her retirement accounts. The Trial Court awarded the Husband his consulting business and his own retirement account. The Trial Court also required the Mother to pay \$102,612 to the Husband which represented approximately half of the equity in the marital residence. The Court also directed that the Wife solely responsible for the debt secured by the

marital residence and the loans that financed her law school education. The Wife appeals and the Supreme Court affirms.

The Wife asserts that the division of debt was inequitable because the Husband should share an obligation to repay the indebtedness for her law school education. The Court has explained before that an equitable division of marital property does not necessarily mean an equal division, but a fair one. With respect to the Wife's school loans, the Trial Court found that the Husband advised the Wife against attending law school for financial reasons and advised the Wife that, by attending law school, she would in fact drain the family's financial resources. While attending law school, the Wife was distracted from some of her obligations to the family and, apparently, had extra-marital affairs with law school classmates. The Trial Court found that, although the Wife's law school education did not benefit the family unit, it would benefit the Wife in the future. Therefore, the Trial Court did not abuse its discretion by making the Wife solely responsible for repaying her law school loans.



MODIFICATION OF CUSTODY/VENUE

Colbert v. Colbert, A13A0092 (May 22, 2013)

The parties were divorced in Fulton County in 2007. In July, 2010, the Mother filed a Petition in Clayton County, where the Father resided, seeking modification of child support and contempt. Following a two-day hearing, the Trial Court entered an order based upon evidence submitted at the hearing, finding that neither party was in contempt; modifying physical custody of the children from the Mother to the Father; and ordering the Mother to pay child support. The Mother appeals, and the Court of Appeals affirms.

The Mother argued that the Trial Court erred by considering the Father's counterclaim for custody. In Georgia, after the Court has determined who the legal custodian of the child is, any complaints for change of legal custody of the child shall be brought as a separate action in the county of residence of the legal custodian of the child. The defense of lack of personal jurisdiction and proper venue, however, clearly may be waived, even in child custody cases. Here, the Mother did not file a pretrial written objection to venue or jurisdiction in regards to the

Father's counterclaim for custody and because there is no transcript of the bench trial or authorized substitute, any objection she may have at trial is not contained in the record on appeal. Therefore, in the absence of a transcript, the Court must assume the Trial Court's findings were supported by the evidence and that its actions were appropriate. Because the record did not show that the Mother objected to the Father's counterclaim for custody before or during the trial, the Court affirmed the Trial Court's ruling on the issue.

The Mother also argued that the Clayton County Superior Court was without jurisdiction to consider the parties' Motions for Contempt because the divorce judgment was entered in Fulton County. Generally speaking, contempt applications must be filed in the court that entered the Order complained of. However, there is an exception to this rule. In the context of divorce and alimony cases, a contempt action must be brought in the court where the divorce decree was entered unless another court acquires jurisdiction and venue to modify the decree. Where a non-resident voluntarily institutes a suit in a county in this State, she submits herself for the purposes of that suit to the jurisdiction of the court of the county in which the suit is pending. Therefore, Clayton County properly acquired jurisdiction to modify the divorce decree independent of the contemporaneous Motion for Contempt.

ORAL ARGUMENTS

Triola v Triola, S13F0538 (April 15, 2013)

The Trial Court entered a Final Judgment and Decree of Divorce and the Husband filed a Motion for New Trial, which the Trial Court denied without holding an oral hearing. The Husband appeals and the Supreme Court reverses.

Pursuant to Uniform Superior Court Rule 6.3 requires, unless otherwise ordered by the Court, that a Motion for a New Trial in a civil action "shall be decided" by the Trial Court only after an oral hearing, even if the moving party does not request such a hearing. If the Trial Court denies a Motion for a New Trial in a civil case without issuing an Order excepting the Motion from the procedural requirement and without holding a mandatory hearing, the error will not be deemed harmless on appeal. Here, the Court did not hold an oral hearing before the ruling on the Husband's Motion for New Trial. The Order denying the Motion did not reference Rule 6.3 or the Husband's right to an oral hearing nor did the Court issue a separate Order excepting the Motion from the oral hearing requirement. The Trial Court's judgment is reversed and remanded with direction that the Court comply with Rule 6.3 before ruling on the Husband's Motion for New Trial.

POSTNUPTIAL AGREEMENT

Eversbusch vs. Eversbusch, S13A0494 (May 20, 2013)

The parties were married in 1985 and after marital problems arose in 2001, the couple engaged in counseling

and other efforts in an attempt to save their marriage. In 2002, the Wife, who was not an attorney, prepared a 6-page document in a letter form entitled "Letter of Agreement Between Andreas W. Eversbusch v. Helene H. Eversbusch" outlining the behavioral expectations for continuing the marriage and alleged promises between the parties in the unfortunate event of divorce. The agreement reflected it was signed by both parties in 2002. In 2012, the Wife filed for divorce and filed a Motion to Enforce the Agreement. The Superior Court considered the criteria set out in *Sherer* and enforced the agreement addressing division of assets but would not enforce the alimony and child support provisions. The Wife appeals and the Supreme Court affirms.

The Wife contends the Superior Court erred by striking the entire alimony section of the agreement as unenforceable because it contains two separate formulas for calculating alimony that were vague and because there was no meeting of the minds as to the issues of alimony and child support. The Wife argues that the parties intended for her to receive one-half of the Husband's total annual income and that the second of the two calculations in the letter expressed that intent and is enforceable. She concedes, however, that the first calculation, if considered in isolation, is flawed as it is unclear as to what the Husband is to pay as child support versus alimony to the Wife.

In order for an alimony provision in a Postnuptial Agreement to be enforceable, its essential terms have to be present and have to be agreed upon by the parties. If the Court is to enforce the parties' contract as written, it requires the parties to have agreed on all of the material terms. The terms cannot be incomplete, vague, uncertain or indefinite. Whether considered in isolation or in the context of the parties' letter agreement as a whole, the alimony terms are replete with significant omissions, vague references, and sweeping generalizations. The alimony terms, which are to take effect after the parties' children have graduated from college, are far from complete, certain or definite. Therefore, the alimony terms are unenforceable.

RECUSAL

Murphy v. Murphy, A13A0206 (July 12, 2013)

The parties were divorced in 2006 and, in 2012, the Father filed an action to modify custody. Effective May 6, 2013, the Legislature amended O.C.G.A. §5-6-34(a)(11) to provide that a party can file a directed appeal from all judgments and orders in child custody cases. The Mother filed a direct appeal of the Order Denying her Motion to Recuse. That Order did not award, refuse to change, or modify child custody and, therefore, it was not appealable under O.C.G.A. §5-6-34(a)(11). Thus, the Court lacked jurisdiction and had to dismiss the appeal.

The Mother argued that the Court had jurisdiction under the collateral order doctrine. The Supreme Court established that the collateral order doctrine applies if the Order: (1) completely and conclusively decides the issues on appeal such that nothing in the underlying action can affect it; (2) resolves an issue that is substantially separate

from the basic issues in the Complaint; and (3) might result in the loss of an important right if review had to await final judgment, such that the Order would be effectively unreviewable on appeal. Because the recusal issues are fully reviewable on appeal from a Final Judgment, the collateral order doctrine does not apply.

SERVICE OF PROCESS

Jahanbin v. Rafieishad, S13F0190 (April 15, 2013)

The parties met in their native country of Iran but were married in Atlanta, Georgia in 2007. The Husband has dual citizenship in Iran and United States and the Wife is a citizen of Iran and a resident alien in the United States. During the marriage, the Husband begins traveling internationally and spending time in Iran while the Wife remained in the marital residence in Atlanta. In May of 2011, the Wife filed for divorce in the Fulton County Superior Court. The Wife attempted to have the Husband personally served in Iran but was unsuccessful and the Trial Court entered an Order providing further directions regarding service. The Order instructed the Wife to utilize the provisions of O.C.G.A. §9-11-4(f)(3)(B)(iii)(II) and deliver the summons and complaint to the Clerk of the Court who was directed to mail the correspondence to the Husband's residence in Tehran, Iran. When the Wife presented the documents to the Clerk, the Clerk instructed the Wife's attorney to complete the register mail receipt in "FARSI" and to transact the mailing herself. A Final Judgment and Decree was entered and the Husband filed a Motion to Set Aside the Final Judgment and Decree and was denied. The Husband appeals and the Supreme Court reverses.

Proper service is necessary for the Court to obtain jurisdiction over Defendant. The Court generally requires strict compliance with the service provisions of O.C.G.A. §9-11-4. Pursuant to O.C.G.A. §9-11-4(f)(3)(B)(iii)(II), service of process on a person in a foreign country such as Iran can be made by any form of mail requiring a signed receipt to be addressed and dispatched by the Clerk of the Court to the party to be served. The plain language of this provision requires the Clerk of the Court to be the person who addresses and dispatches the mail containing

the Summons, thus insuring that an officer of the court, disinterested in the proceedings, were able to verify both the contents of the mailing and the address to which it is sent. Registered mail addressed and dispatched by the Wife's attorney does not meet this requirement. While the Court recognizes difficulties incumbent in the fact that mail sent to a foreign country may require the address to be written in a foreign script, this does not permit the Clerk of the Court to direct someone else to address and dispatch the mail for this service of process. Without proper service, the Trial Court does not obtain jurisdiction of the Husband and thus erred in denying the Husband's Motion to Set Aside the Final Judgment.

TPO

Norman v. Doby, A12A2497 (March 29, 2013)

Norman (Wife) filed a Petition for TPO against Doby (Husband) alleging the Husband called her 50 times during one month in October of 2011, sent her 20 to 30 text messages within a 24-hour period. Wife also claims the Husband followed her after she picked up the children for 10 miles until she pulled into a store parking lot and took the children inside for fear of their safety. The acting Superior Court Judge hearing the case issued a 12 Month Protective Order. The Husband filed a Motion for New Trial, but before the new trial was ruled on, the parties twice consented to the entry of an Amended TPO to provide for visitation between the Husband and the children. On the hearing on the Husband's Motion for New Trial, a Superior Court Judge heard the case and found the evidence was insufficient as a matter of law to support the original un-amended Protective Order. However, the Trial Court directed the parties to comply with the visitation provisions of the TPO as amended by the parties' consent. The Wife appeals and the Court of Appeals affirms in part and reverses in part.

The Wife first argues that the Trial Court erred in finding that the evidence at the original hearing was insufficient as a matter of law to support the TPO. The evidence showed that the Husband followed the Wife in a car one time for approximately 10 miles and followed her into a store where he screamed and cussed at her in front of the children for approximately 5 minutes. Husband repeatedly called and texted the Wife over the course of one weekend and the children were afraid. However, the Husband testified that calling the Wife was the only way he could contact his children. Therefore, testimony arguably supports a finding that the Husband initiated the phone calls for a legitimate purpose. Thus, the Wife has not shown that the phone calls met their statutory definition of harassing and intimidating contact which serves no legitimate purpose. Moreover, the single incident in which the Husband followed the Wife to the store was insufficient to establish a pattern of harassing and intimidating behavior necessary to support the issuance of the Protective Order. Therefore, the Trial Court's finding that the evidence was insufficient to support the TPO was correct.

The Wife also contends that the Trial Court erred in ordering the parties to comply with the Amended Consent



Order and modifying Orders without the parties' consent. In response to the Husband's Motion, the Trial Court entered an Order finding that insufficient evidence supported the original TPO, but the Court specifically ordered the parties' compliance with the visitation related amendments to the original TPO. Pursuant to O.C.G.A. §19-3-4(a)(4) gives the Trial Court the authority to establish temporary visitation rights only upon a granting of a Protective Order or approval of a Consent Agreement to bring back cessation of acts of violence. Therefore, when the Trial Court found insufficient evidence to support the Protective Order, it no longer has the authority to impose or continue ancillary relief such as to visitation in the instant case because the Trial Court's authority to grant that visitation exists only when it has determined that the evidence supports underlying Protective Order itself. Since the Court found insufficient evidence to support the original TPO, the Trial Court lacked authority to direct the parties to comply with the provision of their consent agreements and therefore the visitation schedule is reversed.

The Wife also contends that the Trial Court erred in allowing the Husband to retain a copy of the transcript of the original TPO hearing after the Trial Court granted the Wife's Motion to Exclude and seal the transcript. When the Trial Court heard oral arguments on the Husband's Motion for a New Trial, the Wife also motioned to exclude and seal the transcript of the TPO hearing. In a civil case, a court reporter and an official transcript are not generally required but may be needed to obtain a full appellate review. Once the notes of a proceeding have been transcribed, however, the Court Reporter must certify the transcript and file the original and one copy of the Clerk of the Trial Court. Upon filing, the transcript becomes a public record which is equally available to all parties. A party who elects at the start of a proceeding to solely bear the takedown cost for preparing a transcript may keep the other party from obtaining the transcript if, at the start of those proceedings, the other party expressly refuses to participate in a takedown cost. In this case however, the record shows that both parties declined the option to share in the cost of the takedown at the hearing on the original TPO. The court reporter took notes at the hearing pursuant to the Superior Court policy providing for takedown of all TPO applications. Following the hearing, the court reporter prepared a transcript and filed it with the Clerk's office. Upon filing the transcript became part of the public record that was equally available to both parties. Since the Wife did not contract with the court reporter at the beginning of the proceedings to take the notes or prepare the transcript, the transcript was public record and the Wife cannot show that the Trial Court erred in allowing the Husband to retain a copy of the transcript. *FLR*



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Forensic Accountants Within Law Firms

by Athena (Tina) Harris

Forensic Accountants (FAs) looking to forge a unique career path might not have considered working for a law firm, but there are many untapped opportunities awaiting those willing to hone specific skill sets. Law firms looking to gain advantage over competitors by offering clients added resources at reduced costs would also do well to consider hiring an internal FA.

Internal FAs can help initially identify many essential financial matters necessary for a law firm to efficiently represent a client: key financial information, anomalies and issues within the opponents' documents, and pertinent information needed for the case. They can assist attorneys with preparing discovery requests, preparing for depositions, and analyzing information received through discovery and preparing exhibits for trial. Maryilyn. Feuchs-Marker, a partner with Smith Moore Leatherwood who routinely works with an internal FA notes, "FAs are extremely helpful in the mediation process as they are often able to contribute their expertise to financial issues, without the need of an outside financial expert. If court testimony is needed, internal FAs assist in locating and preparing the financial expert for trial."

Most legal cases contain significant financial elements such as evaluation of businesses and other assets, discovery of assets and of financial wrongdoing by opponents and asset tracing. Public accountants, particularly auditors, are trained to understand how


businesses operate, their accounting systems, and documents commonly produced and utilized by businesses. They are familiar with financial software commonly used in reconstructing and summarizing data, which is extremely helpful in creating exhibits for trial. Add to these skills knowledge of law and court proceedings and an FA becomes an invaluable resource to a litigation team.

Materials covered in the CFF (Certified in Financial Forensics) certification curriculum offered by the AICPA provide ideal preparation for forensic accounting work within a law firm. The CFF certification demonstrates to potential law firm employers that the CPA has forensic training and experience that is needed for litigation. But a successful law firm-FA relationship will depend on the skills of the FA being properly utilized, and the following tips can help to achieve a solid working foundation.

1. **Obtain commitments from attorneys with financial work.** Even in larger law firms, the internal FA will need a steady source of continuing cases from one or more attorneys. Family law, commercial litigation, and financial crime investigation are areas of the law that frequently require financial analysis.

2. **Mentoring is important for a successful transition into the firm.** An experienced litigation attorney willing to assist with navigating the firm's culture, establishing goals, settling scheduling conflicts, and leading the FA through the firm's systems will enhance the internal FAs success. Most attorneys within the firm have established their own methods of addressing financial issues and may have accountant relationships outside of the firm. A mentor can assist the FA in communicating with other attorneys and with overcoming their resistance to change. The earlier in the case that the FA gets involved, the more that attorneys are able to see the value of FAs and utilize their expertise in dealing with financial issues.

3. **Continue to think like an entrepreneur.** The FA is responsible for his or her own billable time. Ultimately the internal FAs success depends upon value provided to the firm's clients and the number of billable hour worked. In a law firm it is unlikely that anyone sets the FAs schedule. It is up to the FA to continuously search for ways to assist and to consistently demonstrate exceptional value.



ENTER INFORMATION ON CURRENT INCOME STATEMENT				
Rev +	\$18,000		COGS as % of Revenue =	\$5.88% (Default = 1
EBIT +	\$892.00		Current Capital Spending =	\$438.00
Int. Exp =	\$200.00		Working Cap. as % of Revenues =	16.00%
Deprec'n =	\$540.00		Interest rate on Debt Currently =	12.00%
CASHFLOWS FROM LBO				
	PRE- LBO	AFTER LBO		
	CURRENT	1	2	3
Revenues	\$10,000	\$11,400	\$12,988	
Expenses	\$8,568	\$9,768	\$10,630	
Depreciation	\$540	\$616	\$692	
		\$892	\$1,017	\$1,142
Type 1	\$200	\$272	\$344	\$416
Type 2	\$0	\$0	\$0	\$0
Type 3	\$0	\$0	\$0	\$0
Type 4	\$0	\$0	\$0	\$0
Pre-tax Income	\$692	\$420	\$605	\$878
Taxes	\$277	\$107	\$242	\$351
Income	\$415	\$313	\$363	\$527
Deprec'n	\$540	\$616	\$692	\$768
Op. Oper.	\$955	\$685	\$2	\$1,987
Capital Sp.	\$438	\$499	\$550	\$611
Chg	\$196	\$224	\$250	\$276
n. Rep:1	\$0	\$0	\$0	\$0
n. Rep:2	\$0	\$0	\$0	\$0

4. **Be available.** Attorneys and clients need and expect you to be available. The demands of litigation sometimes require long hours with short notice. While the work schedule may sometimes accommodate personal needs such as outside appointments, there are times that personal time must switch to work time on a moment's notice.
5. **Maintain and cultivate relationships with accountants outside of the law firm.** Outside accountants are a valuable resource for the internal FA. Having a broad contact base of accountants knowledgeable in various industries and topics provides the internal FA a research tool. When expert testimony is needed, familiarity with skills and experience of outside accountants is critical in selecting the best expert. Outside accountants are also potential referral sources. When their clients become victims of financial crimes, shareholder disputes, or individuals going through divorce, accountants are often the first to know.

A law firm can offer an exceptionally wide variety of both interesting and challenging work, but it will likely be up to the FA to initiate an employment relationship. Working with a law firm as a consulting or testifying expert provides opportunity for the FA to develop relationships within the firm, to understand the firm's culture and practice, and to identify ways that he or she could benefit the firm.

Because internal FAs are agents of the law firm, their role is different than the role of the outside experts. Internal FAs may communicate freely with the attorneys as these communications are not discoverable by the opponents. This is a tremendous advantage to attorneys as they evaluate facts, and discuss alternative strategies for a case. Internal FAs do not testify or issue expert reports, but their efficient transfer of information to the testifying expert results in savings to the client, and in fees being retained by the firm.

Forensic accounting within a law firm offers many opportunities to assist others, and this can be exceptionally rewarding. The attorney-accountant relationship has potential to grow and can be mutually beneficial as firms realize the benefits of having an internal FA and accountants seek creative ways to use their skills and experience. *FLR*



Athena (Tina) Harris, CPA/CFF, CFE. Prior to joining Smith Moore Leatherwood LLP in 2002, Tina Harris had practiced in public accounting for 19 years. Her accounting skills and background in financial reporting and management advisory services provides an advantage to the attorneys in representing the firms' clients. Harris has

investigated suspected white collar crimes and has assisted with their defense or prosecution, and has assisted with numerous commercial litigation and family law cases.

Barry B. McGough Named 2013 Joseph T. Tuggle Jr. Award Recipient

At the 2013 Family Law Institute in Sandestin, Fla., Barry B. McGough, Warner, Bates, McGough & McGinnis, was named the recipient of this prestigious section award. McGough is the personification of this award and the section thanks him for his dedication to the practice of family law, constantly maintaining the highest level of professionalism.

The Family Law Convocation on Professionalism was commenced in March of 1992 in response to the Supreme Court's initiative on professionalism. The Convocation is held annually and involves discussion and analysis of issues regarding judicial and lawyer professionalism. Starting in 1995, the Family Law Section in conjunction with the Convocation on Professionalism established the Family Law Section Professionalism Award. The award was given in recognition of the person who the Section deems to have most exemplified the aspirational qualities of professionalism in their practice as a lawyer and/or a judge. In 1999, the award was officially named the Joseph T. Tuggle Jr. Professionalism Award and was given to him that year shortly before his death. *FLR*



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