The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia – Winter 2015

What is Your Parents' Relationship Status?

Editors' Corner

by Gary Graham
gary@stern-edlin.com

I am excited and honored to be the editor of *The Family Law Review* (FLR). I look forward to continuing the excellent product that Randy Kessler and Marvin Solomiany delivered to our Section. In an effort to further enhance the FLR, I have formed an editorial board to collaborate on articles, features and overall content of the FLR. The board consists of Randy Kessler, Editor Emeritus, Kelly Miles, Kelley O'Neill-Boswell, David Marple and William Sams Jr. Please contact any one of us if you are interested in submitting an article, or have any questions or comments. We are always looking for quality content to publish in the FLR, and any ideas to enhance the FLR as a resource to our Section.

We hope you enjoy this FLR, and we wish you a healthy and prosperous new year. *FLR*

Editor Emeritus

by Randy Kessler
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I am honored to have been appointed "Editor Emeritus" of the *The Family Law Review*. I have thoroughly enjoyed being the editor for the last 10 years, including those with Marvin Solomiany as co-editor.

I am thrilled that Gary Graham will be taking over the reigns as the editor of this fine publication. *The Family Law Review* and the section are near and dear to my heart and will continue to remain a valuable resource for family law practitioners throughout the state. My intentions are to remain actively involved and to continue to solicit articles from peers, statewide and nationwide, and to assist Gary with whatever he needs. I am confident that *The Family Law Review* will maintain its quality and relevance for years to come. Please allow me to express my appreciation to everyone in the section for allowing me to serve as editor and for allowing me to continue to serve as Editor Emeritus, which is an honor that I believe has only been bestowed upon one other person as far as I know, and that is Jack Turner, the initial founder of our section and *The Family Law Review*.

I remain honored and indebted to all of you and look forward to continuing our work together to improve the family law system for each other, our bench and most importantly, for our fellow citizens here in Georgia. *FLR*

Inside This Issue

Chair's Comments

by Rebecca Crumrine Rieder
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As we round out the holidays, it is a time to reflect on the past year, and make goals ("resolutions") for the coming year. It is my hope each of you will include in your 2015 goals to volunteer on a pro bono project, whether with our Section or elsewhere. State Bar President Patrise M. Perkins-Hooker calls on all of us as members of the Bar to increase our pro-bono service. I would love to report to her in my end-of-the-year report of the Family Law Section that our 1700+ members took to her call for action! Please volunteer! Doing so helps our community and strengthens our Section with increased participation by our members. And, it provides you an outlet to meet people in our Section and become more involved. Below are updates on current opportunities within our Section.

Pro Se Child Support Project

Katie Connell of Boyd, Collar & Tuggle, along with executive committee members Leigh Cummings of Warner, Bates, McGough, McGinnis & Portnoy and Tera Reese-Beisbier of Reese-Beisbier & Associates, have been hard at work developing a Statewide pro bono "hotline." We hope to have it implemented in the next month and we will need volunteers. Please contact Katie (kconnell@bcntlaw.com), Leigh (lcummings@wbmfamilylaw.com) or Tera (tera@rbafamilylaw.com) for more information.

Legislative Committee

The legislature is in Session! Often, the legislature seeks opinions from the Family Law Section regarding proposals before it. If you are interested in being involved, please contact our Legislative Liaisons, John Collar (jcollar@bcntlaw.com) or Kyla Lines (kyla@prfamilylaw.com). Our Section has sponsored a bill to revise O.C.G.A. § 19-3-62. The Child Support Commission has also promulgated a number of revisions and your input will be much appreciated.

Military and Federal Employees Committee

We need volunteers. I was contacted this month by the State Bar regarding a serviceman who needed assistance with a divorce. If you are interested in working on this committee, or taking the lead, please contact me.

Technology/Social Media Committee

Scot Kraeuter of Johnson, Kraeuter & Dunn is heading this subcommittee. Kevin Rubin at Boyd, Collar, Nolen & Tuggle volunteered for the Committee and has been of great assistance thus far. This committee is working on updating our Section's web presence, our Section page with the State Bar, as well as providing updates on the involvement of our Section statewide. Please contact Scot if you would like to be involved.

Community Service Committee

Thanks to the leadership of Jonathan Tuggle last year, our Section was instrumental in raising funds for the Atlanta Legal Aid Campaign to assist with the costs of the new facilities for the family law division of Atlanta Legal Aid, which assists families across the State. That said, we have not met our goal and still need your help! We pledged to raise $15,000 from Section members. Please consider giving. Mail donations directly to Jonathan Tuggle, Boyd Collar Nolen & Tuggle, 3330 Cumberland Blvd, Suite 999, Atlanta, GA 30339. Dan Bloom of Pachman Richardson is spearheading additional projects, and we look forward to expanding our community service this year. Please e-mail Dan (dan@prfamilylaw.com) if you are interested in serving and expanding our community outreach.

Ethics and Professionalism Committee

Gary Graham at Stern Edlin is hard at work with a new mentoring project that would pair seasoned attorneys with attorneys who may need assistance dealing with difficult ethical or professional issues in particular cases. I look forward to this new program getting off the ground. Please contact Gary (gary@stern-edlin.com) if you are interested in working with this committee.

Diversity Committee

The next meeting of the diversity committee is Jan. 15, at 5 p.m. Please refer to the Section website page for additional information, and contact Ivory Brown (ivorybrown@aol.com) if you would like to be involved. Ivory chaired a great meeting in the fall and this committee is working on a number of functions and ideas!

Family Law Institute

Regina Quick has put together an amazing seminar, entitled "The Art of Love and War." The 2015 FLI will be at The Omni, Amelia Island on May 21-23. Make your reservations early; and, be sure to take advantage of sponsorship opportunities! Also, don't forget to mark your calendars for the 2016 Family Law Institute at Jekyll Island, Ga., which will be held May 19-21, 2016. Marvin Solomiany is already hard at work planning 2016.

This winter, look for our webinar series to start again. Keep an eye out for an e-mail blast or check the Section website for details on that series. I look forward to seeing all our Section members out and about – involved in the Bar and doing pro bono work! *FLR*

Becca

Strategic Mediation Reality Tests

by Andy Flink

It is common in mediation that a clients' view of compromise may be, shall we say, a bit unrealistic. Our job is to help them see why their position might not be considered reasonable, but we have to be careful about how we convey this information so as not to shut down the process. We are looking for ways to redirect the issues and point out why their view may be flawed. In mediation we call this reality testing and it is utilized throughout each session in different ways for different reasons.

Reality testing, or reality checking, is defined as: "a corrective confronting of reality, in order to counteract one's expectations, prejudices, or the like." What we are really trying to say is: "I don't believe your position is realistic, and I must find a way to significantly lower your expectations without offending you."

We must conduct ourselves in an environment of class and respect so that when we start asking the probing questions, we help the client reach the conclusion on his/her own. Over the years I have found these following methods to be very useful in helping parties better understand their positions without making them feel as though they are wrong.

1. **BCS vs. WCS:** No one achieves their best case scenario or agrees to settle for their worst case scenario in mediation. Your best case is their worst case and vice versa. If each of these are the "end zones," the objective is to "land" somewhere near the 50 yard line. One of the reasons for entering mediation is to attempt to reach a compromise, rather than risk being dealt one's own worst case scenario in litigation. Assuring each side understands the philosophy of best case/worst case helps everyone realize where the range has to be in order to reach settlement.
2. **How the court might view the issue:** I certainly cannot forecast what a judge may or may not do, nor would I ever offer an opinion on this topic. What I can do though, is help the parties and counsel evaluate what the potential outcome(s) might be. If a party is set on achieving a specific goal, but doesn't know what their probability of outcome is, they may be taking a risk that won't offer a reward. For instance, convincing the other side to commit to a car when their child turns 16, but the child is currently 6 months old, may be a difficult issue to prevail on in court.
3. **Time to move on?** Sometimes when we are close to an agreement, one party will hold onto the fight simply for the purpose of continuing to inflict more pain and suffering on the other party. But if it is time to settle the case, spending more time and money unnecessarily doesn't make sense for anyone. As an attorney once said to his client in this situation: "You can continue this and send my kids to college, or settle today and send your kids to college."
4. **What is currently working?** If parties in a divorce action are separated and operating under a parenting plan that is working for everyone, especially the children, why would either party seek to make significant changes? Often the permanency of a final divorce takes over and people become skewed in their thinking about how it is going to look in the future. Transitions with children are hard enough – making wholesale changes to an already functioning, successful plan may not be a risk worth taking.
5. **The divorce is final; I am done here:** Not exactly. Parties with minor children that reach an agreement now have to figure out the best way to work with each other. This is frequently overlooked by parties who believe that once the fight is over, they are done. To the contrary, that's when communication between the parties begins and when the communication between the attorneys ends. One effective step to help parties understand this is to meet with them separately without counsel and help them see what the future is going to look like from a communication standpoint. I'll mention that if they can't envision effectively interacting with each other in their future and need others to do the communicating for them, pick up the phone and call us all back in. This is what we do for a living.
6. **The legal road/the moral road:** Without knowing the legal landscape, clients in mediation are frequently blind-sided by the difference between what they believe to be fair and what the legality is. It is important to help clients understand that

while they may be right, the court, because they must follow the law, may see it differently. This isn't because the court doesn't agree, but simply because they have a duty to follow what the law says.

7. **Objective thinking:** When it comes to dissecting and offering solutions for your issues, I am an expert, but I'm rarely quite as skilled when dealing with my own personal concerns. Explaining to parties in mediation that we are all human and have a right to feel the way we do goes a long way towards earning the trust of clients and paving the way to open communication and compromise.
8. **If you can buy it at Target:** Early on in my mediation career I heard these words of wisdom from an attorney which were: "If you can buy it at Target, we are not going to argue over it in personal property division."
9. **Let's just go to court:** A great idea, if you believe that you may prevail, but in the event the fight is over $10,000 and it will cost you $20,000 to potentially win your point, it is time to realize it is not worth it.
10. **An 80/20 split is appropriate:** I have seen this in negotiating the equitable division of parties' assets and liabilities where, for one reason or another, one party believes they are entitled to a substantially higher percentage than the other. ("I went out and earned all of the income … all you did was stay home"). Of course in the event of an offset where a split that is significantly different than a 50/50 makes sense, this could be a reasonable resolve. But it never works when one side's position is this unreasonable … for no good reason. Need a few techniques to help clients see this more clearly? Simply refer to items 1,2,3,6 and 9 above.

Precisely how and when to use these techniques are mostly about "feel" to mediators during a session. Effectively reducing the tension and redirecting the issues by reality testing helps clients better understand their positions. As long as we operate within a range of conveying what is "reasonable," and assuring clients that we are listening to – and hearing their thoughts on the matter, we can do wonders in helping them alter their positions. ***FLR***

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

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

Past Family Law Section Chairs

Jonathan J. Tuggle	2013-14
Kelly Anne Miles	2012-13
Randall Mark Kessler	2011-12
Kenneth Paul Johnson	2010-11
Tina Shadix Roddenbery	2009-10
Edward Coleman	2008-09
Kurt Kegel	2007-08
Shiel Edlin	2006-07
Stephen C. Steele	2005-06
Richard M. Nolen	2004-05
Thomas F. Allgood Jr.	2003-04
Emily S. Bair	2002-03
Elizabeth Green Lindsey	2001-02
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H. William Sams	1999-00
Anne Jarrett	1998-99
Carl S. Pedigo	1997-98
Joseph T. Tuggle	1996-97
Nancy F. Lawler	1995-96
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Christopher D. Olmstead	1990-91
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Barry McGough	1988-89
Edward E. Bates Jr.	1987-88
Carl Westmoreland	1986-87
Lawrence B. Custer	1985-86
Hon. John E. Girardeau	1984-85
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M.T. Simmons Jr.	1982-83
Kice H. Stone	1981-82
Paul V. Kilpatrick Jr.	1980-81
Hon. G. Conley Ingram	1979-80
Bob Reinhardt	1978-79
Jack P. Turner	1977-78

What is Your Parents' Relationship Status?

The Effect of Cohabitation, Marriage or Remarriage of Parents on a Pre-Existing Child Support Obligation

by Sabrina Byrne

Jerry Springer has got nothing on what this Author has witnessed working for the Georgia Department of Human Services Division of Child Support Services (DCSS). DCSS is a government agency that "operates a program for locating parents or putative parents, establishing paternity, establishing or modifying support obligations, enforcing support obligations, and collecting child support." Ga. Comp. R. & Regs. r. 290-7-1-.02(b) (2011). In addition to establishing orders and enforcing their own child support orders, DCSS also enforces private divorce decrees and other private orders for support. In the majority of the cases, once an order for support is in place, the custodial parent obligee and noncustodial parent obligor will have limited interaction, except as to issues relating to the child's benefit, while DCSS collects the child support obligation (CSO) from the obligor. However, sometimes, this interaction leads to cohabitation or even marriage (or remarriage) of the parents. When this happens, some legal issues can creep in that are reminiscent of a 'hairy mother' hypothetical from a first-year law school exam. This Article discusses some of those factual scenarios, and explains the state of the law in Georgia, or, when the state of the law is unsettled, discusses the different possible outcomes, and offers an alternative analysis of the law.

Let us begin with a set of facts for which the law is settled. A married couple separates and a court order establishes a CSO that is to be paid to the obligee. What happens to the child support order if the couple gets back together and never divorces? If your first thought is that the obligation ends and the order is nullified, you might want to think again. As it turns out, O.C.G.A. § 19-6-12 states:

> The subsequent voluntary cohabitation of spouses, where there has been no total divorce between them, shall annul and set aside all provision made either by deed or decree for permanent alimony; *provided, however, that the rights of children under any deed of separation or voluntary provision or decree for alimony shall not be affected by such subsequent voluntary cohabitation of the spouses. Id.* (emphasis added).

Thus, while the couple is back together living in the holy state of matrimony, the CSO that was set out in the order continues; and, unless it is paid by the obligor, accrues over the months and years until the obligation is "modified, vacated, or set aside," *Allen v DHR*, 264 Ga. 119, 120 (1994); terminates according to the child support order; or terminates by operation of law when "the child reaches the age of majority, dies, marries, or becomes emancipated, whichever first occurs." O.C.G.A. § 19-6-15. For the obligor in this predicament, a glimmer of hope is found in *Wright v. Wright*, 205 Ga. 524 (1947).

In *Wright*, a husband and wife began living together again after a CSO had been established for their children. *Id.* at 527. The husband stopped paying the court ordered CSO to the wife, and the matter made its way to the Georgia Supreme Court. Id. The Court held that where "all relationships were restored just as they were before the separation," and where the husband actually supported the children, "he should at least be credited with whatever money is actually paid therefor." *Id*. It is interesting to note that Wright was interpreting the old O.C.G.A. § 30-217,[1] *Wright*, 205 Ga. at 527, which was adopted almost verbatim as current O.C.G.A. § 19-6-12 quoted supra. The legislature took the time to make stylistic changes to the old code, but left its substance intact, which should be interpreted to mean that they intended for this fractured rule, and the judicial remedy from *Wright*, to remain the law.[2]

Surprisingly, if the same couple divorces and subsequently remarries, it is unclear whether the obligation from the original child support order, the obligation set out in the divorce decree, or, for that matter, if any obligation survives the remarriage. This lack of clarity also exists with respect to a CSO set against an unmarried obligor who subsequently cohabitates with or marries the obligee. Since these factual scenarios have not been addressed by the legislature or the appellate courts, currently, the status of these CSOs varies from one judicial circuit[3] to another.

The purpose of the remainder of this Article is to highlight the issues that attorneys and judges face in trying to determine the status of child support orders when parents change their relationship status, and to offer the reader with a workable solution consistent with both law and equity.

The legislature has stated that a child has the right to be supported by each of his or her parents. *See* O.C.G.A. § 19-7-2. This right belongs to the child and the child alone, and while this right may be exercised by the child's custodian, that same custodian does not have the authority to waive the child's right. *Livsey v. Livsey*, 229 Ga. 368, 369 (1972). A child support obligation, once established, stays in place until it is vacated, set aside, or modified by another order. *Allen*, 264 Ga. at 120.

O.C.G.A. § 19-6-12 appears to reiterate the above propositions in the specific case of married parents, and ensures that the child's right to support is unaffected by the nullification of the couple's respective rights when the couple begins living together again. However, O.C.G.A. § 19-6-12

only addresses CSOs dealing with "spouses, where there has been no total divorce between" the parties. Since it would have been within the legislature's power to omit the quoted phrase, the rules of statutory interpretation dictate that this statute should not be used in cases where the parents have divorced or where the parents were never married.

Therefore, to determine whether a CSO survives in cases where O.C.G.A. § 19-6-12 does not apply, the question becomes: Does the marriage of the parents modify, vacate, or set aside a pre-existing order for child support? It is unlikely that the marriage modifies or vacates the obligation since these actions are done by a court's order. However, one definition of set aside is annul, *Hughes v. DOC*, 267 Ga. App. 440, 441 (2004); thus, if the order setting the CSO is annulled by the parents' marriage (or remarriage) to each other, it is likely that the CSO terminates. *Warren v. Warren*, a case dealing with a divorce decree followed by the parents' remarriage to each other and subsequent second divorce, comes close to holding exactly that rule. 213 Ga. 81, 81 (1957).

In *Warren*, the father was trying to enforce a visitation provision in the couple's first divorce decree by asking the court to find the mother in contempt of that decree. *Id.* The Supreme Court of Georgia held that the remarriage of parties of a divorce decree nullifies the decree, "and restore[s] the parental rights of the parties to the same extent as if no divorce had ever been granted." *Id.* Thus, the father was unsuccessful in enforcing the visitation provision in the first decree. *Id.*

However, a careful reading of *Warren* reveals that the Court did not address the effect of the parents' remarriage on a *child's right* to child support ordered in a divorce decree, rather, the Court was addressing the effect on a *parent's right* to visitation. Furthermore, there does not appear to be any case law in Georgia that addresses the effect of the parents' marriage on a child's right to child support. Yet, many circuits, likely extrapolating the rule on parental rights from *Warren* to the child's right to the CSO, treat the marriage (or remarriage) of the parents as a nullification of a pre-existing CSO. Furthermore, there is persuasive primary authority from other states that support this application of *Warren*. *Mitchell v. Mitchell*, 319 Ill. App. 3d 17 (2001) (holding that support did not accrue under the divorce decree once the parents remarried, even when the parents later separated and remained separated for five years); *Griffis v. Griffis*, 202 W.Va. 203, 205 (1998) (holding that "marriage or remarriage of parents automatically terminates the preexisting child support order," but that arrears are preserved).

However, a bizarre twist results when applying *Warren* in this manner because once a married couple separates and a CSO is established, the common law seems to favor the obligor who divorces and then remarries the obligee, thereby nullifying the CSO, rather than the one who attempts to reconcile the existing marriage. Another problem in relying on Warren is that it cannot be applied consistently. There are at least three scenarios where application of *Warren* poses problems. First, there are CSO orders where the obligee is not a parent.[4] To allow the marriage of the parents to nullify a CSO paid to a nonparent custodian would be absurd. Consequently, in such cases, the courts typically decline to apply *Warren* and allow the CSO order to remain in effect. Second, there are cases where the parents' marriage has nullified a pre-existing CSO order, but those parents separate again. In an attempt to do what is in the best interest of the child, some circuits allow the *revival* of the previously *nullified* CSO. Third, there are CSO orders where the child is listed as the plaintiff,[5] which, arguably, removes any uncertainty

Steven "Steve" Montalto

January 14, 1953 – October 12, 2014

by Stephen Clifford and Jonathan Levine

Steve was born on Jan. 14, 1953 in Brooklyn, N.Y., and passed away on Oct. 12, after a struggle with throat cancer.

He attended CW Post College in New York, worked his way through College by driving a taxi in New York City, followed by a six month program in the Marines. After graduating from CW Post College, Steve came to Atlanta to attend Emory University School of Law and graduated in 1979 while working his way through law school as a bartender.

Steve was survived by his mother, brother, daughter (Dana), two beautiful granddaughters and his significant other for the last 12 years, Wende Cherry.

Prior to taking medical retirement last year, he was an avid world traveler. Some may not know that Steve also competed in Iron Man competitions in the mid 90s, including the Hawaii course. He was a domestic attorney who believed that preparation would win cases. For those that knew him well, you could recognize his boisterous laugh from a distance. Steve enjoyed cooking and playing baccarat at casinos around the world. In retirement, his best friends became his two King Charles Cavaliers - Nelson and Lilly.

Steve will be missed by his friends and colleagues. ***FLR***

that the CSO is the child's right. Unfortunately, despite the fact that the child is listed as the plaintiff, courts routinely terminate the child's right to support under the order when the child's parents marry each other. Thus, there are unexpected issues that are introduced when courts apply *Warren* to nullify a CSO. Therefore, *Warren*, if it is to be applied to CSOs, must be applied inconsistently in order to achieve a fair result.

The Author humbly suggests that, at least for now, there is a way to reconcile the state of the law in Georgia with what equity demands. The analysis begins by recognizing that, at this time, the state of the law is that *every* CSO order remains in effect until another order modifies it, vacates it, or sets it aside, *Allen*, 264 Ga. at 120; it terminates according to the terms of the child support order; or it terminates by operation of law, O.C.G.A. § 19-6-15. This means that, currently, *any* CSO order survives marriage, remarriage, and cohabitation of the parents. Now, while the child's custodian is able to exercise the child's right and collect the CSO from the obligor, *Livsey*, 229 Ga. at 369, equity demands—and Wright provides the legal backbone—that once the obligor and obligee marry, remarry or begin living together, the obligor should be credited with any actual support he or she provides for the child, 205 Ga. at 527. This analysis acknowledges that the CSO, which is the child's right, remains in effect, but allows for a fair and consistent result in every set of possible relationship statuses discussed supra by preserving the child's right to receive support regardless of the child's parents' domestic situation.

Unfortunately, until the appellate courts are presented with this issue, and can clarify whether *Warren* extends to the child's right to support, or the legislature decides to address this issue with legislation, the lower courts determination of the effect cohabitation, marriage or remarriage of the parents has on a pre-existing order for child support will continue to vary from one circuit to another. ***FLR***

Sabrina Byrne is the Assistant District Attorney assigned to the Georgia Department of Human Services Division of Child Support Services for the Houston Circuit.

(Endnotes)

1 The old code, O.C.G.A. § 30-217 states: The subsequent voluntary cohabitation of the husband and wife shall annul and set aside all provision made, either by deed or decree, for permanent alimony. The rights of children under any deed of separation or voluntary provision or decree for alimony shall not be affected thereby.

2 It is presumed that the legislature was aware of the judicial interpretation of O.C.G.A. § 30-217 in Wright when it reenacted the statute and left the substance in tact. Cf. Mitchell v State, 239 Ga. 3, 6 (1977).

3 In Houston Circuit, where this Author practices, the prevailing rule is that marriage (or remarriage) of parents nullifies a pre-existing CSO order, but subsequent cohabitation by the parents does not.

4 It is common for a grandparent, aunt, uncle, or even an older sibling to be the custodian of a child.

5 Any obligation established or modified by DCSS is brought in an action styled with the agency ex rel the child named as the plaintiff.

YLD Family Law Committee 2014 Charitable Efforts

by Annie Jordan, Senterfitt & Knight, LLC
Jamie Perez, Holland Roddenbery LLC
Katie Kiihnl, Boyd Collar Nolen & Tuggle, LLC

On Oct. 16, the YLD Family Law Committee hosted its 9th Annual Supreme Cork Silent Auction and Wine Tasting fundraiser at 5 Seasons Brewing Company Westside. The event was a great success for the beneficiaries, the Atlanta Volunteer Lawyers Foundation's (AVLF) Guardian ad Litem and Domestic Violence Programs.

Co-chairs of the Committee, Jamie Perez, Katie Kiihnl, and Kelly Reese attribute the success of this event to the service of committee members in mobilizing the legal community. The event would not be possible without the contributions of the committee members, sponsors, merchants who provided items for the silent auction, and the family law community as a whole. The Committee and AVLF extend their sincere appreciation to all of this year's sponsors, including the following:

Platinum Level

Allison B. Hill; Hawk Private Investigations; Holland Roddenbery LLC; Stern Edlin, PC

Gold Level

Boyd Collar Nolen & Tuggle, LLC; Lawler Green Prinz & Gleklen LLC; Warner, Bates, McGough, McGinnis & Portnoy

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This is the third year AVLF has been named as the beneficiary of the Supreme Cork, with the funds raised specifically for its family law programs. AVLF's Guardian ad Litem Program provides attorney volunteers, trained and supervised by AVLF, to serve as guardians ad litem for children from low-income households in contested custody cases. The Domestic Violence Program operates the Safe Families Office in conjunction with Partnership Against Domestic Violence, providing free legal and safety planning assistance on a walk-in basis at the Fulton County Courthouse to survivors of sexual assault, domestic violence, dating violence, and stalking. The program also trains and places volunteer attorneys to represent survivors at 12-month TPO hearings.

In addition to the Supreme Cork, the Committee has worked hard to network with other YLD Committees. On Nov. 5, the committee co-hosted a happy hour with the YLD Criminal Law and Solo/Small Firm Committees at Stillhouse at East Andrews. The Family Law Committee would like to thank Alvaro Arauz with 3a. Law Practice Management for his ongoing support of the Committee's efforts, as well as U.S. Legal Support and Peachtree Offices at Lenox for their sponsorship of the event.

On Nov. 13, the committee partnered with the YLD Juvenile Law Committee, Child Protection & Advocacy Committee, and Children & Courts Committee to host the "Code and Cocktails" and Winter Gift Drive Happy Hour at Hudson Grille Midtown, which aimed to educate attorneys on the new juvenile code while collecting gifts for children in foster care. Over 40 attorneys were in attendance to network and hear former Juvenile Court Judge Rawlings speak regarding the new juvenile code. In addition, the Committees collected over $200 in gifts for foster children for the holidays.

The YLD Family Law Committee has big plans for 2015, including planning its next "Meet the Judges" Happy Hour with the DeKalb County Superior Court judges. *FLR*

YOUNG LAWYERS DIVISION
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Hidden Money in Military Divorce Cases

by Mark E. Sullivan

Q **I'm representing Mrs. Roberts, the wife of Army Col. Bill Roberts, in her divorce case. What are some of the overlooked sources of money and benefits?**

A When representing the nonmilitary spouse, the accrued leave of the servicemember (SM) is a valuable but often overlooked part of marital property division. Each person in military service on active duty accrues thirty days of paid leave per year, regardless of rank. This leave is worth what its equivalent would be at the monthly pay rate of the SM, and one can calculate this easily by using the pay tables available at the Defense Finance and Accounting Service (DFAS) website, www.dfas.mil.

Thus, if Col. Roberts's gross pay is $6,600 per month and he has 12 days of accrued leave at the point of evaluation according to state law (i.e., date of separation, date of filing, date of divorce), his accrued leave would be worth about $9,900 (45/30 x $6,600), which represents gross pay before tax and other withholdings. Counsel for Mrs. Roberts should advocate use of the gross pay figure, whereas opposing counsel should use after-tax computations for the pay and eliminate any non-pay entitlements.

Counsel for the SM sometimes will attempt to confuse the issue by pointing out that the nonmilitary spouse cannot be awarded military leave. This argument misses the point. The issue is not who can use military leave but whether, under applicable state law, assets such as "vacation time" and "sick leave" are marital or community property if it is acquired during the marriage.

If the individual will not voluntarily produce his monthly leave-and-earnings statement (LES), counsel may resort to formal discovery procedures if the matter is in litigation. In addition, the DFAS office in Cleveland will honor a request for documents so long as it is in the form of a court order or a subpoena signed by a judge.

Sometimes the attorney for the retiree will disavow any knowledge of the existence of the LES, or the SM will claim that it was lost, misplaced or "floated away in that big flood last month." All SM's are eligible for a free "myPay" account at the DFAS website. This secure website is found at https://mypay.dfas.mil. Once there, it is a simple matter for the member to obtain his current LES; he just enters his "LogIn ID" and password, and then goes to the screen for current pay information. Sometimes a judge, when frustrated with the refusal of a SM or his attorney to produce an LES, will issue an order requiring both attorneys and the SM to use a computer to access the current or past LES from the myPay website.

DFAS even has a way that a third party can be given access to the secure website to view, but not to change, the SM's pay information. Here's what the DFAS website says:

> ***What is a restricted access Personal Identification Number (PIN)?***
>
> *You now have the ability to establish a Restricted Access PIN. The Restricted Access PIN may be given to others along with your Social Security Number to view your pay or tax statements without allowing them to create any pay changes. You may establish a restricted access PIN by clicking on the Personal Setting Page, and selecting the Restricted Access PIN option. You may delete the restricted access PIN at any time. If the user suspends their restricted access PIN you must reset the PIN and provide that new PIN number to the user.*

Q **What else can we do for the non-military spouse?**

A Even with a short marriage of, say, five years, the pension share is worth something. Don't waive it without getting a trade. Assume that the husband is a Sergeant First Class John Doe, in the pay grade of E-7, with 20 years of service, who will get an estimated $1,600 a month retired pay if he retires at the 20-year mark, which many servicemembers do. If there were only five years of marriage, his ex-wife would get 50 percent of 5/20 of $1,600, or $200 a month. If she is 40 when he retires and he were to live another 35 years, this would be worth $2,400 a year, or $84,000 (and this ignores all cost-of-living adjustments). That's a lot of money!

The lesson? If you want a pension waiver, you have to ask for it and pay for it. If your client is asked to waive military pension division, make sure she or he does it for a reasonable, fair trade – don't just give it away if the period of marriage is short. Look at the facts and calculate the numbers. Even if you trade the pension waiver for a washer, dryer and TV, you're doing better than just giving it away.

Q **What about reenlistment bonuses and other special pay?**

A "Reenlistment bonuses can be big money, especially when you consider the impact of signing reenlistment papers in a combat zone," according to Stephen T. Lynch, a Coast Guard legal assistance attorney in Cleveland. Lynch notes:

> *For military members who are 1) about to get divorced, and 2) about to reenlist, counsel should be sensitive to*

the timing of both events, and the potential impact of one on the other. Many enlisted personnel are eligible for a reenlistment bonus. For example, assume that Petty Officer Jake Jones (PO2) is a Navy Seal Independent Duty Corpsman. He would be eligible for a reenlistment bonus totaling as much as $75,000 – which will come free of state and federal income taxes if reenlistment occurs in a combat zone. There are obvious advantages for this sailor if he were to obtain a divorce prior to signing the reenlistment papers, and obvious advantages to Mrs. Jones is she were to delay the divorce until after Jake reenlisted and received his bonus. How much of the bonus, if any, would accrue to Mrs. Jones is a matter of state law and artful negotiation. However, if counsel for Mrs. Jones is unaware of the pending bonus and the timing implications, then counsel surely will fail to assert Mrs. Jones' interest in a sizeable payment that can be made in a lump sum and just might serve as a ready source for alimony, child support, and the payment of pending bills (such as mortgages, car payments, and attorney fees). Information about reenlistment bonuses may be found at: http://usmilitary.about.com/od/enlistmentbonuses/l/bl01bonus.htm.

Q **Is there anything else for the spouse who is not in the military?**

A Yes, and it has to do with insurance. Many military members, including Guard and Reserve, choose USAA for their insurance needs. A little known fact about USAA is that members have a Subscriber's Account (formerly called a "Subscriber Savings Account") which contains moneys contributed through premiums for property and casualty insurance (such as car insurance) and distributed from time to time to the subscribers. These periodic distributions amount to a refund of money not needed for operating reserves and they come as a credit on the quarterly or yearly premium, thus saving money for the customer. If one of the parties will be retaining USAA membership and benefits, including the balance in the Subscriber's Account, then it makes sense to ask how much is in the Account and allocate the sum to that party, even though it is money which can't be spent at present. The USAA pamphlet on this states (using SSA for "Subscriber Savings Account"):

> An SSA is not a bank account. A member cannot make withdrawals from, or deposits to, a SSA. Since SSA funds are an integral part of USAA's capital structure, they remain with the association as long as the member has at least one P&C [property and casualty] policy. If a member terminates all P&C policies, the balance of the SSA is paid out approximately six months later.

Here is an outline of the rules for the Savings Account

- The Savings Account (formerly known as the Subscriber Savings Account) at USAA is only for the sponsor, that is, the one who has served in the military. A spouse or eligible child would not have such an account (assuming no military service)
- Thus there is no "division" of the Savings Account or allocation of it by USAA when parties divorce – it always stays with the sponsor.
- The refund of Savings Account money each December is proposed and approved by the Board of Directors, depending on how the company has done in the past year; if there are excess funds, then USAA pays out refunds.
- The refunds are paid out according to the premiums paid by a sponsor in the prior year. Thus if John had paid $2,000 in premiums for his family, while Jane – a single sponsor – paid only $1,000 for her own car, then John's refund would be twice what Jane receives.
- Before divorce, as afterwards, the spouse/former spouse can maintain vehicle coverage through USAA. After divorce, she or he would be known as a "legacy." The only difference is that – with a spouse or former spouse who has no independent eligibility for USAA through prior military service – there would be no Savings Account.
- When a sponsor has been with USAA for over 40 years, he or she is eligible for a Senior Bonus (10 percent of the Savings Account) if approved by the Board of Directors. This can be paid to the sponsor in February of each year, or else it can be left in the Acct.

An example of a Subscriber's Account Annual Statement for 2008 from USAA is at the end of this article.

Q **How can we save some money for Col. Roberts?**

A You can save money for Col. Roberts in several ways in negotiations over his pension or, if your trial judge allows it, in the courtroom. The first one to use a set dollar amount in specifying the pension share for his wife upon divorce. This means that the spousal entitlement is calculated (usually with 50 percent of the marital share as the model) and then converted in today's dollars to a specific monetary amount, such as: "Mrs. Roberts shall receive $495 a month from the disposable retired pay of Col. Roberts, the defendant." This method of dividing the pension, if accepted by the other side, means that all future increases in Col. Roberts' pay belong to him and, upon retirement, the cost-of-living adjustments (COLAs) which are applied to retired pay go solely to him. She receives none of these benefits. The COLA, when applied solely to Col. Roberts' pension, will roughly double its value over 20 years.

Another option, if the first won't work, is freezing the benefit for Mrs. Roberts at the rank and years of service of her husband at divorce or separation, whichever is used under state law for the point of evaluation of marital assets. In this way, we will be fixing his rank at the date of separation or divorce. That will mean that we're dividing the pension of a Colonel right now, not a two-star general, which he might be at the time of retirement.

Col. Roberts will also want to try to keep the denominator of the marital fraction as the total years of creditable military service, not the years up to the date of separation or divorce. In doing this, we are creating a marital fraction that is constantly shrinking in absolute value, not one that, in fairness, should be fixed as of the latter date.

A third step would be to state that we are dividing the retired pay of a Colonel with a certain number of creditable years of service, fixing the years of service at the date of divorce or separation. The years of creditable service would usually be stated in even numbers, so we could say "a Colonel over 20" or "a sergeant over 16" to show how many years of service at that rank. This likewise keeps the divisible pay down; we are fixing the benefit to be divided at the time of divorce or separation.

Finally, we would want to fix the pay tables involved as of the date of the separation or divorce, whichever is appropriate under state law. In doing this, we insulate Mrs. Roberts from any future congressional pay raises; all of these accrue solely to the benefit of Col. Roberts.

If we specify these in the pension division clause for Col. Roberts, it could mean a savings of tens or hundreds of thousands of dollars for him, in comparison to using his final rank upon retirement, and the pay tables that would apply when he retires.

Q **What about military medical care – is there some money to be saved there? Is Mrs. Roberts eligible for that after divorce?**

A Yes, if the marriage and the military career were long enough. There must be 20 years of military service concurrent with 20 years of marriage to get full military medical benefits. This means medical insurance coverage through TRICARE, the military equivalent of Blue Cross and some free medical care at military medical treatment facilities.

Pub. L. 98-525, the Department of Defense Authorization Act of 1985, expanded the medical (and other) privileges set out in Pub. L. 97-252 to extend certain rights and benefits to unremarried former spouses of military members. If the former spouse was married to a member or former member for at least 20 years during which he or she performed at least 20 years of creditable service (also called "20/20/20" spouses, which refers to 20 years of service, 20 years of marriage and 20 years of overlap), then the former spouse is entitled to full military medical care, including TRICARE, if not enrolled in an employer-sponsored health plan. He or she is also entitled to commissary and exchange privileges.[1]

If the former spouse was married to a member or former member for at least 20 years during which the member or former member performed at least 15 years of creditable service (also called "20/20/15" spouses, for 20 years of service, 20 years of marriage and 15 years of overlap), and the former spouse is not enrolled in an employer-sponsored health plan, then the length of time that the former spouse is entitled to full military medical care, including TRICARE, depends upon the date of the divorce, dissolution or annulment, as set out below. No other benefits or privileges are available for this spouse.

If the date of the final decree of divorce, dissolution or annulment of marriage was before April 1, 1985, then the former spouse is authorized full military medical care for life, so long as he or she does not remarry. If the decree date is on or after April 1, 1985, then the former spouse is entitled to full military medical care, including TRICARE, for a period of one year from the date of divorce, dissolution or annulment.

If the former spouse for some reason loses eligibility to medical care, he or she may purchase a "conversion health policy"[2] under the DOD Continued Health Care Benefit Program (CHCBP), a health insurance plan negotiated between the Secretary of Defense and a private insurer, within the 60-day period beginning on the later of the date that the former spouse ceases to meet the requirements for being considered a dependent or such other date as the Secretary of Defense may prescribe.

Upon purchase of this policy the former spouse is entitled, upon request, to medical care until the date that is 36 months after (1) the date on which the final decree of divorce, dissolution or annulment occurs or (2) the date the one-year extension of dependency under 10 U.S.C. 1072(a) (for 20/20/15 spouses with divorce decrees on or after April 1, 1985) expires, whichever is later.[3] Premiums must be paid three months in advance; rates are set for two rate groups, individual and group, by the Assistant Secretary of Defense (Health Affairs). CHCBP is not part of TRICARE. For further information on this program, contact a military medical treatment facility health benefits advisor, or contact the CHCBP Administrator, P.O. Box 1608, Rockville, MD 20849-1608 (1-800-809-6119).

A former spouse may also obtain indefinite medical coverage through CHCBP (under 10 U.S. Code 1078a) if she or he meets certain conditions. The former spouse:

- Must be entitled to a share of the servicemember's pension or SBP coverage;
- May not be remarried;
- Must pay quarterly advance premiums; and
- Must meet certain deadlines for initial application.

Details regarding application for this "CHCBP-indefinite" coverage may be found at www.tricare.mil/chcbp/default.cfm. The coverage is the same as that for federal employees, and the cost is the sum of the following: premium for a federal employee, plus premium paid by the federal agency, plus 10 percent. This amounts to less than $350 per month as of 2008. There is an article explaining this coverage in the Summer 2008 issue of Roll Call (the newsletter of the Military Committee, ABA Family Law Section) at www.abanet.org/family/military.

A former spouse who qualifies for any of these benefits may apply for an ID card at any military ID card facility. He or she will be required to complete DD Form 1172, "Application for Uniformed Services Identification and Privilege Card." The former spouse should be sure to take along a current and valid picture ID card (such as a driver's license), a copy of the marriage certificate, the court decree, a statement of the member's service (if available) and a statement that he or she has not remarried and is not participating in an employer-sponsored health care plan.

It is important to remember that these are statutory entitlements; they belong to the nonmilitary spouse if she or he meets the requirements of federal law set out herein. They are not terms that may be given or withheld by the military member, and thus they should not be part of the "give and take" of pension and property negotiations since the military member has no control over these spousal benefits.

Q **You said that military medical benefits depend on the date of divorce. What if my client has all the other requirements but is just six months short of 20 years of marriage?**

A Since 20-20-20 medical coverage depends not on the date of separation or the date of filing, you might need to postpone the divorce for 6 months. This may not be easy, but if you look hard enough you might be able to find something that you can contest, that the other side did wrong in the pleadings, or that you can at least question through discovery. I had a case several years ago where there was a question about the domicile of the SM – he was the one filing for divorce. We were desperate to delay the granting of a divorce. I started with a set of interrogatories and document requests related to domicile, which of course is an essential jurisdictional element in divorce. The plaintiff got so busy fighting off my discovery requests and my motions to compel that he went through two separate civilian lawyers before the court finally granted him a divorce. That was a year and a half after he'd filed!

Q **Are there any retirement benefits in the military similar to a 401(k) plan?**

A Yes. In addition to the military pension, which is a defined benefit plan that has existed all along, we now have another retirement benefit. This is the Thrift Savings Plan, or TSP. It's a voluntary defined contribution plan, it can be divided, and it's basically the same as the federal civil service TSP. Contributions are sheltered from taxes and are allowed to grow in a number of different funds selected by the servicemember.

Q **Are there any resources which can help attorneys understand the military TSP and how to divide it?**

A Yes. There's a booklet available on-line. Go to www.tsp.gov and click on Military – Forms and Publications, then click on Publications, then on Booklets, then on Court Orders. It's quite helpful and has sample clauses that'll make your work a lot easier and your TSP division order "rejection-proof." ***FLR***

Mark Sullivan is a retired Army Reserve JAG Colonel. He practices family law in Raleigh, North Carolina and is the author of The Military Divorce Handbook (Am. Bar Assn., 2nd Ed. 2011) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law since 1989. He works with attorneys and judges nationwide as a consultant and an expert witness on military divorce issues in drafting military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com.

(Endnotes)

1 10 U.S.C. § 1062.
2 10 U.S.C. § 1086 (a).
3 10 U.S.C. § 1078 a(g)(1)(C).

USAA Subscriber's Account Annual Statement

9800
Fredericksburg
Road San Antonio.
Texas 78288

Subscriber's Account Annual Statement for 2008

[redacted]

As a member-owned association, our mission is to serve our members. And were proud that in today's tumultuous economy, military families can depend on us. You can rest assured your association is strong, growing and well positioned for the future.

The Subscriber's Accounts assist in maintaining the association's financial strength and in meeting the needs of its members. Below you will see your allocation and distribution.

Subscriber's Account Annual Statement for 2008			
Prior Balance		$	4,972.45
Distribution on	12-08-2008		124.31
	Subtotal	$	4,848.14
2008 Allocation			201.21
	2008 Year-End Balance		5,049.35

This is not a bill.

What is a Subscriber's Account?
USAA is required to raise and maintain capital to satisfy legal and regulatory requirements, support current and future operations and pay large unexpected losses, such as member claims from catastrophes. As a reciprocal insurer, USAA does this in part through its Subscriber's Account program, which holds a portion of USAA's capital in *each* member's name. Subscriber's Accounts are a unique feature of membership with USAA. Each account remains in effect as long as that member has at least one property and casualty policy.

How is Money Deposited in the Subscriber's Account?
This is not a bank account where a member can make deposits. Rather, if there is sufficient income at the end of the year, the USAA Board of Directors may allocate funds to Subscriber's Accounts the following February. The amount of allocation to an individual Subscriber's Account depends on the member's existing Subscriber's Account balance and the amount of premiums that the member paid the prior *year* for his/her auto and property insurance. The amount allocated to your Subscriber's Account is shown in the box above.

How is Money Disbursed from the Account?
Tbis is not a bank account where a member can make withdrawals. Rather, the USAA Board of Directors may distribute funds from Subscriber's Accounts to members after considering a number of factors, including the regulatory and financial requirements of the association and USAA's investment portfolio and operational performance. The amount of your distribution made in December 2008 is shown in the box above.

For more information about Subscriber's Accounts, please refer to the enclosed brochure or call us at 1-800-495-5957.

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Interview with Hon. Denise Marshall

Dougherty County Superior Court

by Kelley O'Neill-Boswell

Judge Marshall has served on the Dougherty County Superior Court since January of 2009. She was a city court judge beginning in January of 1994 and a magistrate court judge beginning January of 1998. Marshall started practicing in 1981 and worked for Georgia Legal Services Program (GLSP) for ten years. She has been a judge since 1994. In her work for GLSP, Marshall handled many domestic violence or divorce cases throughout Southwest Georgia for indigent parties.

She serves on the Dougherty County Superior Court which is a one county circuit. There are three judges in her circuit and the cases are rotated so that she gets every third case that is filed with the Clerk's office.

Her advice for family law lawyers is that it is important not to fight about discovery issues. If the documents are discoverable, make sure that you produce them and that you produce them in a timely manner. If the documents requested are voluminous, a summary of the information is always effective. She finds that many lawyers fight about discovery simply to try and confuse the issues. Marshall further advises family law lawyers that, regarding financial matters such as assets and property, the more you can simplify complex financial structures and transactions the more successful your argument will be. She reminds us that charts and diagrams, while helpful for a jury are also very helpful for a judge. She finds the secret to simplification of complex issues or protracted litigation is to have a good status conference with the judge to help define the issues. If she can get the lawyers together for a discussion with her, the issues are narrowed pretty quickly. Marshall reminds us that thumbing through a lot of paperwork during a hearing with a Judge is not helpful. Further, if you are going to use technology she has found it very helpful to engage a technological expert regarding the presentation of that evidence. She has been particularly impressed with lawyers who send an advanced technical team before a trial to meet with the courthouse technical person to make sure that all of the proposed use of technology is going to work on the day of the trial, whether it be a bench trial or a jury trial. She reminds us that what judges hate the most is delays.

Regarding the child support worksheets and schedules, Marshall believes the problem is that lawyers do not share their proposed child support worksheets and schedules with their opposing counsel before the date of the hearing. She finds that if the lawyers will exchange their proposed worksheets and schedules before the hearing, the issues can be narrowed. Of course the best case scenario is a consolidated worksheet and schedule which is agreed upon or at least certain numbers stipulated to by the attorneys who have exchanged their worksheets and schedules before the hearing, this is a big time saver at a hearing.

Marshall reminds us that letter briefs are helpful. If there is a particularly tough issue to be addressed at a hearing she welcomes a letter brief on that issue before the hearing which is of course copied to opposing counsel with time enough for opposing counsel's response.

Regarding the use of witness affidavits at a temporary hearing, she warns that even though some lawyers submit their witness affidavits to the court before the hearing, she rarely has time to look at those affidavits before the date and time of the hearing. Also, she knows what our client's witness affidavits are going to say. She has never seen a lawyer submit a bad witness affidavit on behalf of their client at a hearing. Marshall cautions family law attorneys to consider the credibility of those affidavits.

Marshall believes the hardest aspect of family law cases can be a complex property and asset structure which lawyers do not explain or prepare for adequately. However, she notes that a litigious custody battle is both time consuming and emotionally draining. Her heart goes out to parents in custody battles as she too is a parent. She again reminds us to make every effort to prepare demonstrative exhibits for the court in order to simplify a complex property or asset argument.

Regarding the use of a guardian ad litem in a custody case, she says guardians ad litem are very helpful and are great when the parties can afford to pay for one. However, in most of her cases no one can afford to pay for a guardian ad litem. It is very rare in her circuit that the money is there for this expense. However, in the cases where the parties can afford a guardian ad litem, it is a tremendous asset.

I asked Judge Marshall for her view on whether conduct issues really matter in a family law case. She believes that in issues regarding custody,

extra marital affairs matter if there is evidence that the misconduct of the parent has somehow compromised the child's wellbeing. The question is whether the child has been exposed to the parent's bad behavior. If the misconduct has been with discretion then she reminds family law lawyers that she is not the moral police. Regarding asset division, Judge Marshall does believe that misconduct matters. The question to her is whether the misconduct of one party caused the need for the other party to reestablish his or her life both financially and emotionally. Marshall says there can be a price to forcing the other party to start over. In cases where there is money or assets present to be divided, you have to consider an element of fairness regarding misconduct and asset division.

I asked her whether she felt her circuit utilized technology effectively. She says she has not yet skyped a witness to court in a family law case, but she would. She believes the use of technology to bring lawyers together for status conferences or to address financial issues with witnesses who are out of state can be very effective to move the case along. Judge Marshall notes that we are on the verge of having available some very effective technology which she believes will help streamline litigation.

In her closing remarks, Judge Marshall reminded me that mediation is a great tool. However, in some cases everyone just needs their day in court which mediation cannot provide. She also notes that in a lot of the cases she sees the parties simply cannot afford to pay a mediator.

On that note, Marshall remarked that a lot of her cases deal with parties who do not have any assets to divide and are simply dealing with debt division. When it comes to debt division she notes that the IRS and other creditors should be paid first, even in a divorce case. ***FLR***

Kelley O'Neill-Boswell's expertise is in family law and personal injury litigation. Over the past 20 years, she has represented husbands and wives in divorces and in post-divorce modification issues, such as child support, custody determinations, property division issues, protecting parental relationships and preserving marital assets. She also handles both domestic and international adoptions. She represents individuals in personal injury cases, including class action litigation and workers' compensation. She was admitted to the State Bar of Georgia in 1991. Kelley also is a member and a past president of the Dougherty County Bar Association, as well as a member at large of the Executive Committee of the Family Law Section of the State Bar Georgia and a member of the Association of Trial Lawyers of America.

O'Neill-Boswell received her bachelor's degree from the University of Georgia and her law degree from Mercer University, where she served as a director of the Moot Court Board, received the Class of 1983 Scholarship, and was appointed to the Order of Barristers.

An Albany native she and her husband, Chris, have two children and are members of St. Teresa's Church in Albany.

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

If you would like to contribute an article or have an idea for content, please contact Gary Graham at gary@stern-edlin.com

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 editor of *The Family Law Review*.

What is Your Worksheet IQ?—Part Deux

by Sabrina Byrne

Thank you to the family law community for the wonderful feedback I received on the first IQ Article[1]. I hope you enjoy round two!

QUESTIONS

Each question is completely independent from the others, so you can answer them in any order you wish. Good luck!

1. Action to establish an obligation for two minor children. The father and the children are covered under the father's health insurance plan, and his cost is $200 per month. How much is the credit, and where is it entered?

   A. The credit is $200 , and it is entered on schedule E in the father's column as a negative number to reduce his obligation.

   B. The credit is $200 , and it is entered on schedule E in the father's column as a positive number because he is paying the money.

   C. The credit is $200 , and it is entered on schedule D in the father's column as a negative number.

   D. The credit is $200 , and it is entered on schedule D in the father's column as a positive number.

   E. None of the above.

2. Action to establish an obligation for support for one minor child. The mother, who is the noncustodial parent, receives a Retirement, Survivors, and Disability Insurance (RSDI) benefit in the amount of $2,100 per month due to her permanent disability. The RSDI benefit is her only income. The minor child for whom the obligation is being established receives a Title II Social Security benefit as a dependent on the mother's account in the amount of $450 per month. Once all the schedules have been prepared in accordance with the guidelines, line 11 on the CS Worksheet shows a subtotal of $500 per month. What is the result?

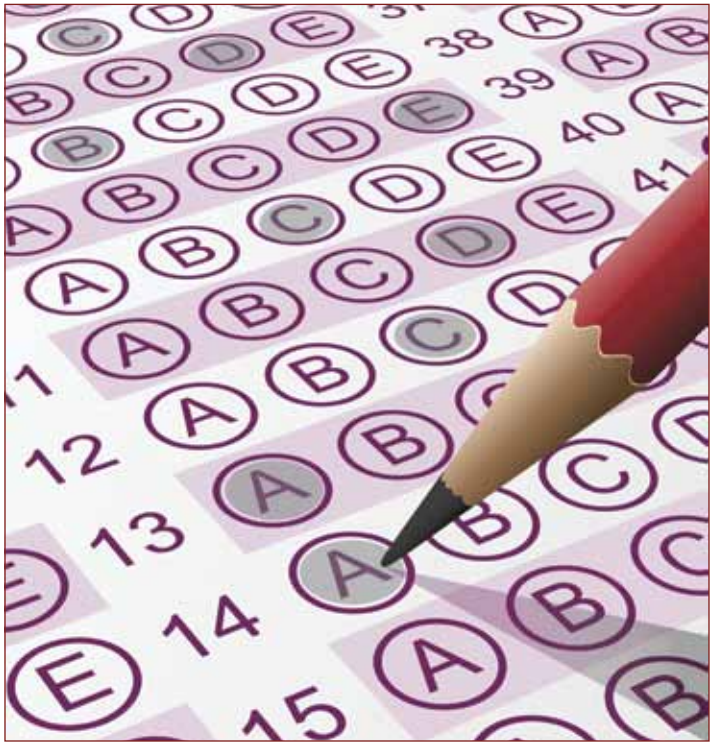
   A. The $450 must be entered on line 12 of the CS worksheet under the mother's column. Her obligation to the custodian is $50 per month.

   B. Since the mother receives RSDI, and this is her only income, the obligation will be reduced to $0 per month because the mother has a medically verifiable permanent disability and has no earning potential.

   C. The $450 may be entered on line 12 of the CS worksheet. The judge has the discretion not to enter the amount and the standard is "the child's best interest". However, if the judge allows the credit, the judge must give the full $450 credit.

   D. The $450 may be entered on line 12 of the CS worksheet. The judge has the discretion not to enter the amount and the standard is "the child's best interest". Using the standard, the judge may allow any portion of the $450 as a credit.

   E. None of the above.



3. Action to establish an obligation for one infant child, born July 4, 2014[2]. The mother is the custodian, and her pro-rata share of the parents combined income is forty percent. She has a year-round day care cost of $500 per month. The Court has made a finding that the day care cost is appropriate, and is necessary for the mother to be able to work. The mother receives a means based day care subsidy in the amount of $100 per month. The credit is entered in the mother's section on line 5 of schedule D. What is the credit amount?

   A. The credit is $6,000 , which is the total cost of day care for the year.

   B. The credit is $4,800 , which is the cost of day care actually paid by the mother for the year.

   C. The credit is $2,400 , which is the mother's pro-rata share of total cost of day care for the year.

   D. The credit is $1,920 , which is the mother's pro-rata share of the cost of day care actually paid by the mother for the year.

   E. None of the above.

4. On Jan. 1, 2000, Jack and Jill divorced and a child

support obligation was established for Jack to pay Jill $500 per month for support of their minor child. On Feb. 1, 2005, the obligation was modified upward to $700 per month. Since then, Jack has involuntarily lost his job, and has been unemployed for two years. Despite diligent attempts, he has been unable to find gainful employment; however, he is not mentally or physically disabled. In a modification action, what is the initial order date entered on CS worksheet, and how much is the income for the husband if the court determines Jack's income by "imputing gross income based on a 40 hour workweek at minimum wage." O.C.G.A. § 19-6-15(f)(4)(A).

A. The initial order date is Jan. 1, 2000; and Jack's income is $1,256.67.

B. The initial order date is Feb. 1, 2005; and Jack's income is $1,256.57.

C. The initial order date is Jan. 1, 2000; and Jack's income is $1,261.50.

D. The initial order date is Feb. 1, 2005; and Jack's income is $1,261.50.

E. None of the above.

5. Action by father to establish support for a minor child against mother. The noncustodial parent's gross income is $1,300 per month. Which of the following is a true statement:

A. The custodial parent may ask the court to grant a low-income deviation to the noncustodial parent. The court may, in its discretion, grant the deviation.

B. The court may sua sponte grant a low-income deviation.

C. The noncustodial parent may ask the court to grant a low-income deviation. The court may, in its discretion, grant the deviation.

D. All of the above.

E. The noncustodial parent is the only person that can ask the court to grant a low-income deviation. Furthermore, if the noncustodial parent asks for this deviation, the court must grant it.

ANSWERS AND DISCUSSION

1. Answer: E.

O.C.G.A. § 19-6-15(h)(2)(A)(i) states:

> *The amount that is, or will be, paid by a parent for health insurance for the child for whom support is being determined shall be an adjustment to the basic child support obligation and prorated between the parents based upon their respective incomes. …. When a child for whom support is being determined is covered by a family policy, only the health insurance premium actually attributable to that child shall be added.*

Furthermore, "[t]he monthly cost of health insurance premium shall be entered on the Child Support Schedule D --Additional Expenses in the column of the parent paying the premium." O.C.G.A. § 19-6-15(h)(2)(B)(ii).

Therefore, the credit amount will be the portion of the $200 that is attributed to the cost for the two children for whom the order is being set; and, the credit is a positive number on schedule D in the column of the parent who pays the cost.

Since, most of the time, the cost for the child(ren) is not easily ascertained, the most common method of calculating the cost attributed to the child(ren) is to follow O.C.G.A. § 19-6-15(h)(2)(B)(ii), which tells us to calculate the cost "by dividing the total amount of the insurance premium by the number of persons covered by the insurance policy and multiplying the resulting amount by the number of children covered by the insurance policy." Therefore, in our example, since three people are covered under the father's health insurance (father plus two children), we would divide $200 by 3 ($66.67) and then multiply the result by 2 ($133.34). The $133.34 credit is entered in the father's column on schedule D since he is paying the cost.

Occasionally, the actual cost attributed to the children can be calculated, and, in those cases, that cost is used instead of the method above. For example, where coverage for "employee-only" and "employee plus child(ren)" is available from an employer, the difference may be attributed to the cost for the child(ren). Therefore, in our example, if the father could purchase health insurance for $40 per month for himself, then, the difference ($160) would be attributed to the cost for the two children.

Answers A and B are incorrect because the credit is not entered on schedule E. Answer C is incorrect because the credit is a positive number. Answer D is incorrect because the credit is not $200 .

2. Answer: A.

O.C.G.A. § 19-6-15(f)(3) states:

> *Social security benefits.*
>
> *(A) Benefits received under Title II of the federal Social Security Act by a child on the obligor's account shall be counted as child support payments and shall be applied against the final child support order to be paid by the obligor for the child.*
>
> *(B) After calculating the obligor's monthly gross income, including the countable social security benefits as specified in division (1)(A)(xiii) of this subsection, and after calculating the amount of child support, if the presumptive amount of child support, as increased or decreased by deviations, is greater than the social security benefits paid on behalf of the child on the obligor's account, the obligor shall be required to pay the amount exceeding the social security benefit as part of the final child support order in the case.*

Therefore the entire $450 dependent benefit must be placed on line 12 of the CS Worksheet, and the mother's obligation will reduce to $50 per month.

Answer B is incorrect because RSDI[3] is included as income. O.C.G.A. § 19-6-15(f)(1)(A)(xiii). Answer C is incorrect because the credit is not discretionary. Answer D is incorrect because the amount of credit is not discretionary. Answer E is incorrect because Answer A is correct.

3. Answer: B.

O.C.G.A. § 19-6-15(h)(1)(B) states:

> If a child care subsidy is being provided pursuant to a means-tested public assistance program, only the amount of the child care expense actually paid by either parent or a nonparent custodian shall be included in the calculation.

Therefore, the credit will be $400 per month ($500 less the $100 subsidy), which translates to $4,800 ($400 * 12). Schedule D of the worksheets released by the Georgia Administrative Office of the Courts (AOC)[4] is programed so that when the $4,800 in entered on line 5, both the monthly average and the pro-rata shares of the parents are automatically calculated and populated onto the schedule and the CS worksheet.

Answer A is incorrect because it does not account for the subsidy. Answers C and D incorrectly use the pro-rata share to calculate the credit amount. Answer E is incorrect because Answer B is correct.

4. Answer: C.

O.C.G.A. § 19-6-15(f)(5)(B)(ii) states:

> *The priority for preexisting orders shall be determined by the date and time of filing with the clerk of court of the initial order in each case. Subsequent modifications of the initial support order shall not affect the priority position established by the date and time of the initial order.*

The Georgia Uniform Superior Court Rule 24.2A provides, "In calculating monthly income based upon a forty hour work week, hourly salary shall be multiplied by 174 hours"; and, failure to use the correct conversion rates has been held to be reversible error, *Eldridge v. Eldridge, 291 Ga. 762, 764-65 (2012) (reversed when court used 4.3 instead of 4.35 to convert a weekly expenses to a monthly expense).*

Therefore, the date of the initial order is Jan. 1, 2000. The imputed wages are $1,261.50, which is found by multiplying $7.25 by 174.

Answer A and B are incorrect because the wages are not calculated using the correct conversion factor. Answer D is incorrect because the 2005 modification did not change the initial order date. Answer E is incorrect because Answer C is correct.

5. Answer: D.

O.C.G.A. § 19-6-15(i)(2)(B)(v) states:

> *Following a review of the noncustodial parent's gross income and expenses, and taking into account each parent's basic child support obligation adjusted by health insurance and work related child care costs and the relative hardships on the parents and the child, the court or the jury, upon request by either party or upon the court's initiative, may consider a downward deviation to attain an appropriate award of child support which is consistent with the best interest of the child.*

Therefore, the deviation may be requested by the custodian father (plaintiff), the noncustodian mother (defendant), or the judge may sua sponte grant the deviation. Answer D is correct because Answers A, B, and C are all correct statements of the law. Answer E is incorrect because the noncustodian is not the only person that may ask for the deviation, and, because the court does not have to grant the deviation just because it is requested. ***FLR***

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(Endnotes)

1 See the Winter 2014 issue of *The Family Law Review*.

2 Only the child's birth year, instead of the entire date of birth, will be entered on the CS Worksheet. O.C.G.A. § 9-11-7.1(a)(4).

3 Supplemental Security Income (SSI) is excluded from gross income on the worksheets. O.C.G.A. § 19-6-15 (f)(2)(B)(iii). However, the Georgia Supreme Court has held that the fact finder may impute wages to a parent who receives SSI. Larizza v. Larizza, 286 Ga. 461 (2010) (trial court imputation of wages after expressly excluding SSI benefit from its ruling on gross income upheld).

4 The AOC released version 9.0 of the child support worksheets on July 1, 2014. A copy of the current worksheet may be downloaded at http://cscalc.gaaoc.us.

Hardman v. Hardman

Danger for the custodial parent…and her attorney! Plus, a refresher on res judicata

by Robyn K. Adams and Kelly Anne Miles of Smith, Gilliam, Williams & Miles, P.A.

On Sept. 22, 2014, the Supreme Court of Georgia in *Hardman v. Hardman*, 295 Ga. 732 (2014), held that the trial court applied the doctrine of res judicata too strictly in the context of the parties' divorce case. Further, the Court emphasizes that it is the custodial parent's burden to have a settlement agreement and child support worksheet specify that the non-custodial parent has the obligation to pay private school expenses since Georgia law presumes that the custodial parent will pay all child-rearing expenses.

William and Mary Ann Hardman entered into a settlement agreement which was incorporated into their decree of divorce on March 25, 2013, by the Superior Court of Rabun County. Under the agreement, the parties were to share joint legal custody and the Mother was to have primary physical custody of the two minor children. The Father was given final decision-making authority on education and healthcare issues, while the Mother was to decide on religion and extracurricular activities. The Father agreed to pay Mother alimony but no child support was to be paid unless the alimony terminated while the children were still minors, at which time the Father would pay child support of $2,000 per month. Responsibility for private school expenses was not addressed.

The parties' two minor children attended Rabun Gap-Nacoochee School, a prestigious private school in Rabun Gap, Ga. Before the divorce, the Father would write the children's tuition check out of the joint marital funds. Once the parties divorced, the Mother refused to pay the children's tuition and even threatened to move the children to a public school in North Carolina if the Father failed to pay.

Interestingly, the settlement agreement contained no specific provision regarding who would pay for the children's private school expenses, and the child support worksheet did not include any deviation for extraordinary educational expenses. The Father made an advance tuition payment for the 2013-14 school year and then filed a complaint seeking reimbursement from the Mother and contempt against her for making the threat to remove the children from school if he didn't pay their tuition. He also sought a declaratory judgment as to whether the Mother was required to pay the tuition out of her $7000 monthly alimony payments and whether she was allowed to move the children to North Carolina if he failed to pay. The Mother filed a motion for summary judgment.

The trial court granted the Mother's motion for summary judgment finding that the Father's action was barred by the doctrine of res judicata. The trial court concluded that if the Father "intended for [Mother] to pay the private school costs out of the alimony he pays her each month, he should have written that intent in the Settlement Agreement." On appeal, the Father successfully argued that the trial court erred by applying the doctrine of res judicata so strictly in the context of the parties' divorce case.

The doctrine of res judicata prevents a party from re-litigating not only claims that *actually were* adjudicated previously, but also claims concerning the same subject matter that *could have been* adjudicated before between the same parties. (*Lay Brothers, Inc. v. Tahamtan*, 236 Ga. App. 435 (1999). Writing for the Court in Hardman, Justice Nahmias emphasized that the doctrine of res judicata "should not be applied 'mechanical[ly]' in divorce and alimony cases" or in cases involving child support issues (*Brookins v. Brookins*, 257 Ga. 205, 205-206 (1987)), and that the doctrine "does not bar litigation of matters that merely *could have been,* but were not actually, raised and decided in a previous action." Rather, in divorce and alimony cases, the true rule of res judicata is that the "final decree has the effect of binding the parties and their successors as to all matters which were *actually put in issue and decided*, or which *by necessary implication were decided* between the parties." *Id.* at 207 (emphasis changed).

The Supreme Court goes on to state that the Father was entitled to the declaratory judgment he sought and that the divorce decree should have been read as requiring the Mother, as the primary physical custodian, to pay the private school tuition so long as the Father decides that the children should attend a private school.

First, the Court emphasized that the incorporated settlement agreement clearly and explicitly gave the Father the final decision-making authority as to education, which included "choice of schools." While the Mother was not in contempt for making threats that she would move the children to a school in North Carolina if the Father did not pay the tuition (Georgia law does not allow an "anticipatory contempt" claim), the Father was entitled to seek a declaratory judgment to ascertain his rights under the decree and the parties' contract that it incorporates.

Second, the presumption in Georgia's child support laws is that the custodial parent will bear the expenses related to the children, with assistance from child support paid by the non-custodial parent. O.C.G.A. § 19-6-15(b). Put a simpler way, the parent in whose home the children primarily live normally pays the child-rearing expenses with the help of the child support from the other parent. So in the Hardman case, the children's educational expenses, like the other expenses of raising them, remain the responsibility of the Mother as the primary custodian. The fact that the educational expenses are much higher than they would have been if the children attended public school, which is based on the decision of the Father under his final decision-making authority, matters not. The burden is on the primary custodial parent to specify in

the agreement and the worksheet that the non-custodial parent would have the responsibility for paying private school expenses because this is a provision that alters the presumption under our law that the custodial parent is to pay child-rearing expenses.

The implications of this case reach far beyond just private school expenses. The family law practitioner representing the custodial parent must anticipate specific child rearing expenses that should be paid, or shared, by the non-custodial parent and address these accordingly in the agreement and worksheet. The client should be told that it will be her responsibility, as the custodial parent, to pay all child-rearing expenses not specifically placed on the other parent (unless, of course, the other parent voluntarily agrees to pay the expense outside the terms of the decree). If the non-custodial parent is given final decision-making authority on any category, then the decree should address who pays the expenses that relate to that particular category. Or, if responsibility for the payment of the expenses cannot be resolved, then perhaps limitations on the final decision-making authority are appropriate. For instance, if responsibility for private school tuition is an issue that cannot be resolved at the time of divorce or private school is only a possibility in the future, perhaps limiting the final decision-making authority of the non-custodial parent to public education (unless both parties agree otherwise in writing) would be wise. Likewise, responsibility for extracurricular activities and religious training also come under this same authority set forth in the *Hardman* case (hopefully medical expenses would already be covered by the provision regarding responsibility for uncovered healthcare expenses). If the non-custodial parent is given the final decision making authority on extracurricular activities, the custodial parent will be left to pay for all of these expenses unless the decree states otherwise. Even if the parties have joint physical custody an assumption should be made that the non-custodial parent under *Hardman* precedence would be the parent who is designated as the non-custodian albeit only for child support purposes.

Hardman makes it abundantly clear that, in representing the parent who receives child support either as the primary custodian or as a joint custodian, we must take steps to limit the exposure our client has for extraordinary child-rearing expenses, especially if the non-custodial parent is given final decision-making authority over the category under which such expenses arise. ***FLR***

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Kelly Anne Miles is skilled in all aspects of family law and is committed to giving clients the support they need in resolving legal issues related to families and the break-up or separation of family members. She has effectively represented clients for over 25 years in complex divorce cases involving the sensitive area of child custody, the division of financial assets, tax implications and all other areas concerning divorce. Miles also handles modification of child support, alimony and custody cases.

Lunch and Learn in 30 Minutes

The 2015 Webinar Series Schedule

Thursday, Jan. 15 @ Noon

Child support issues: deviations, high/low income, and the rules on modifications

Presenter: Johnathan Dunn, Johnson, Kraeuter & Dunn, LLC, Savannah

Thursday, Feb. 12 @ Noon

Venue and jurisdiction especially in post divorce issues

Presenter: Tracy O'Connell, Ellis, Painter, Ratteree & Adams, LLP, Savannah

Thursday, March 12 @ Noon

Case law update

Presenter: Sean Ditzel, Kessler & Solomiany, Atlanta

Thursday, April 16 @ Noon

How Can I Live on That/How Can I Afford That? Presenting Cash Flow Scenarios for Parties in a Divorce

Presenter: Beth Garrett, Frazier & Deeter, Atlanta

Thursday, May 14 @ Noon

Small family law firm management

Presenter: Bill Sams, Augusta

Thursday, June 18 @ Noon

Grandparent visitation

Presenter: Melissa Griffis, Rosenzweig Jones Horne & Griffis, Newnan

Caselaw Update

by Vic Valmus

ATTORNEY'S FEES

Mironov v. Mironov, **S14A1051** (Nov. 3, 2014)

In 2006, the parties were divorced and the Father was directed to pay $3,750 per month for child support for two children. In 2008, by a Consent Order, the parties agreed to reduce the Father's monthly child support by $1,700. In April of 2010, the Mother petitioned to modify the child support upward because the Father's income had more than doubled since the time of the Consent Order. The parties recognized the Father's income fluctuated and reached an agreement setting the child support obligation at $1,834.27 and $2,755 per month depending on the income. The parties were unable to resolve the issue of attorney's fees and submitted the matter to the Trial Court. Each party claimed to have prevailed in the underlying action because the Mother secured an upward modification of child support and the Father because the settlement was less than $2,800 a month that the Mother had sought before filing the modification action. The Trial Court issued an order stating that since the parties reached an agreement with both the assistance of their counsel, this Court finds that both parties prevailed in this action and concluded that justice does not require the award of attorney's fees and recited O.C.G.A. § 19-6-15(k)(5) by which the Court may award attorney's fees to the prevailing party as the interest of justice may require. The Mother appeals and the Supreme Court reverses and remands.

O.C.G.A. § 19-6-15(k)(5) specifies that a Trial Court may award attorney's fees to the prevailing party. There is no basis for the determination thereunder that both parties prevail. The modification action resulted in an increase in the Father's child support obligation, even though not to the extent that the Mother first requested and thus make her the prevailing party under O.C.G.A. § 19-6-15(k)(5). It is only her that can be awarded attorney's fees under that statutory provision. The Code section gives the discretion whether to award attorney's fees to the prevailing party, but it does not authorize the Court to designate who is the prevailing party. The prevailing party is generally determined by the trier of fact. However, this passage does not mean that when, as here, the case is settled and there is no jury or other trier of fact, the Trial Court is without power to determine who the prevailing party is. So while the Trial Court has discretion under the statute to decline to award attorney's fees to the prevailing party, the Court cannot award attorney's fees to the party who did not prevail which the determination is made by the finder of fact, if one. Therefore, the Trial Court's exercise of discretion not to award attorney's fees to the prevailing party is error based on the erroneous conclusions that there could be and were two prevailing parties.

HIGH INCOME DEVIATION

Fladger v. Fladger, **S14F1711** (Nov. 3, 2014)

The parties were married and had two children, ages 10 and 6. The parties filed for divorced in 2011 and Final Order of divorce was entered. The Father filed a Motion to amend the divorce order alleging, among other things, that the high income deviation was not supported by evidence. The Child Support Worksheet showed the adjusted income of the Father was $54,166 and the Mother earns $5,097. The Father's presumptive child support amount was $3,551 and the Father's percentage of 91.4 percent was approximately $2,802 for two children. The Trial Court then applied a $2,000 upward deviation based on the Father's high income. The Court denied the Motion to amend. In December of 2013, the Court modified the Final Order adding the language that high income deviation is warranted both by the Respondent's high income and the disparity in the parties' income. The Father appeals and the Supreme Court affirms in part, reverses in part, and remands.

Here, the Trial Court in its amendment and associated Child Support Worksheets meets the first two steps of the three requirements: (1) why the Court deviated from the presumptive amount of child support and (2) the amount the child support would be required under the Code section if the presumptive amount of child support had not been rebutted, but the Trial Court failed on the third statutory requirement on how the Child Support Guidelines would be unjust or inappropriate considering the relative abilities of each parent to provide support and how the best interests of the child who is subject to the child support determination is served by the deviation from the presumptive amount of child support. The Trial Court failed to explain how the application of the Child Support Guidelines would be unjust or inappropriate and how the best interests of the child is served by deviating from the presumptive amount of child support. The Mother argues that the codified purpose combined with the Trial Court's written findings regarding the Father and Mother's

income in the two years preceding the original divorce order implies a finding that the $2,000 high income deviation and is in the best interests of the children because otherwise the Mother would not be able to provide the same economic standard of living the children enjoyed when supported by both parents. However, the Court cannot rely on implications or their own assumptions. The Trial Court's finding must connect the dots to explain why the Court deviated and for example, the Trial Court deviated here because it would result in a substantial decrease in the children's standard of living and thus the $2,000 high income deviation is in the best interests of the children because it will give them to the extent possible, the same economic standard of living enjoyed by the children living in an intact family with the parents earning about $60,000 per month.

INCONVENIENT FORUM/DIVORCE JURISDICTION

Spies v. Carpenter, **S14A1565** (Nov. 3, 2014)

The parties were married in California in December of 2000 and had two minor children. The family moved to Tennessee for a film project in 2006 and then to metropolitan Atlanta in 2011. The parties separated in August of 2013 and the Wife returned to California with the children and enrolled them in school. In the meantime, the Husband relocated to Virginia for another film project. In October of 2013, the Wife filed suit for a legal separation in California and he was personally served in Virginia. The California court then entered a temporary order awarding the Wife sole custody of the children. The same date, the Husband filed for a petition for divorce in Fulton County Superior Court in which he requested primary custody. The Wife entered a special appearance and moved to dismiss the Husband's petition on the ground that the Trial Court is an inconvenient forum under O.C.G.A. § 19-9-67 of UCCJEA. In February of 2014, the Court consulted with the California court and the Fulton County trial court granted to Wife's motion to dismiss the Husband's entire case on the basis of inconvenient forum. Husband appeals and the Supreme Court affirms in part and reverses in part.

Although the Trial Court had the authority to dismiss the custody portion of the Husband's case on the basis of forum inconvenience under O.C.G.A. § 19-9-67(d), it erred in dismissing the divorce case. The legislature enacted O.C.G.A. § 9-10-31.1 in 2005 it enabled the Trial Court to decline exercise of jurisdiction under the doctrine of forum inconvenience in matters other than child custody. Arguably, this Code section could serve to modify the holding in *Holtsclaw* to allow a trial court to dismiss a divorce action along with a child custody proceeding. However, the trial court did not expressly invoke O.C.G.A. § 9-10-31.1 to dismiss the divorce portion of the case and there was nothing in the record showing that the trial court considered the factors enumerated in that statute. Because the Trial Court had not considered 9-10-31.1 and the Wife has not argued its application in this appeal, we do not presently consider its application in this case.

The Wife also asserts the trial court was authorized to dismiss the Husband's Petition for Divorce independently because the Husband did not reside in Georgia six months prior to the filing of the suit. However, the Wife's position must fail because the Trial Court's dismissal of this action was based on forum non-convenience solely pursuant to O.C.G.A. § 19-9-67 and made no findings with respect to the Husband's residency.

The Husband contends the Trial Court erred in dismissing the custody part of the case. However, the Trial Court examined all eight factors as set forth in 19-9-67(b) in that the children had been living with their Mother in California for more than 6 months, attended school in California, the Husband was the primary breadwinner throughout the marriage, is more able to litigate in California than the Mother to litigate in Georgia and California already conducted two hearings and issued a Child Custody Order.

LOST POST NUPTIAL AGREEMENT

Coxwell v. Coxwell, **S14A0835** (Nov. 3, 2014)

The parties were married in 1995 and the Wife filed a Complaint for Divorce in 2012. The Husband filed a

motion to enforce the parties' Antenuptial Agreement which both parties agreed was valid and in force. However, neither party had been able to locate the agreement in either its original or other form and their dispute centers on the agreement's terms. A 3-day hearing was conducted at which the parties both testified and presented evidence in support of their respective recollections of the agreement, after which, the Court denied the Husband's motion to enforce. The Court found that neither party intentionally destroyed, hidden, or failed to produce the Antenuptial Agreement, that the parties both testified truthfully and their own recollections of the terms of the Antenuptial Agreement was believed to be correct. Since they were unable to ascertain the agreement's terms, it could not be enforced. The Husband appeals and the Supreme Court affirms.

The issue on review was the standard of proof necessary for establishing the contents of a lost antenuptial agreement, with the Wife arguing to adopt a clear and convincing evidentiary standard. However, divorce is a civil proceeding and the Georgia Code says that in all civil proceedings, the preponderance of evidence shall be considered sufficient to produce mental conviction. In addition, the specific provision in our newly revised evidence Code addressing the admissibility of secondary evidence of lost documents contains no reference to a heightened standard of proof. This Court has never applied a heighten standard of proof to establish the validity of an Antenuptial Agreement. Therefore, the appropriate standard to establish the contents of a lost Antenuptial Agreement is a preponderance of evidence.

Here, the Trial Court did apply the preponderance of evidence standard in determining that the Husband had failed to prove the terms of the Antenuptial Agreement. The evidence showed that both parties were given a copy of the agreement after it was signed and that one of those copies was put in a file cabinet that ultimately ended up in the Cobb County residence where the Wife lived after the parties separated. The Wife testified she last saw the file folder in which the agreement was stored in 2003 and searched the file cabinet but to no avail. All other attempts to locate the document failed to produce a copy. The Husband likewise testified that he had searched the Cobb County residence and checked the contents of the safe deposit box and attempted to contact the drafting attorney and made inquiries regarding possible recordation. All evidence shows that neither party had reviewed the agreement for many years. Faced with conflicting testimony the Trial Court found that the parties honestly believed in the truth of their respective positions and opined that the parties' divergent recollections were attributed to faulty memories, passage of time and the power of others suggestiveness. Therefore, the Trial Court found the Husband failed to carry his burden by a preponderance of the evidence.

MATERIAL CHANGE IN WIFE'S INCOME/ DEPENDENCY EXEMPTION

Blumenshine v. Hall, **A14A1328** (Oct. 30, 2014)

The parties divorced in Wyoming in 2008 with three minor children. The Wyoming divorce decree awarded the parties' joint legal custody of the children and awarded the Mother physical custody subject to the Father's visitation right. The Mother relocated to Georgia and both parties subsequently married new spouses. The Father in 2011 filed a petition to modify the Wyoming decree and the Mother counterclaimed. The 2011 Order gave the Father and Mother joint physical and legal custody of the three children and gave each parent primary physical custody of the children for alternating years. The children were with the Father primary custody for the first year in June 2011, through June 2012. The Father filed another modification in December of 2011, seeking sole custody on the grounds the circumstances had changed showing the Mother was not fit to have the children return to her primary custody for the next year under the April 2011 Order. The Court then ruled that the Mother shall have primary physical custody of the children and ordered the Father to pay child support and gave the Mother the right to claim income tax dependency exemption for the children. The Father appeals, is affirmed in part, reversed in part and remanded.

The Father contends the Trial Court erred by changing custody and awarding physical custody of the three children to the Mother. Here, the evidence supports the Superior Court determination that while the children were in the Father's primary custody, he

denied the Mother the opportunity to have contact with the children on more than one occasion and took actions attempting to alienate the children from the Mother. Because there was evidence to support the Court's Order modifying custody between fit parents, the Order awarding physical custody to the Mother was not an abuse of discretion.

The Father also contends the Superior Court erred by allocating income tax of the dependency exemption for the children to the Mother. The Father argues that because the 2008 Wyoming divorce decree awarded him the income tax deduction exemption for one of the children and the Superior Court in Georgia was bound by the Wyoming decree. However, the Father did not contest the jurisdiction of the Georgia court under the UCCJEA, but there was reasonable evidence of a change in circumstances which supports the Superior Court's award of physical custody of the children to the Mother and the Court was not bound by the prior ruling of the Wyoming Court with respect to the dependency exemption.

The Father also contends the Superior Court erred by considering his new wife's income in calculating his child support obligations. Here, the Court used the calculation for the Father's obligation that he had a monthly gross income salary and wages of $4,000 and stated that the Court uses one-half of the Father's new wife's income which significantly reduces his living expenses exclusive of the BAH (Basic Allowance for Housing) in order to have an accurate reflection of the parties' income and lifestyles and in the best interests of the children. However, nothing in O.C.G.A. § 19-6-15 authorized the Court to consider the income or other resources of the Father's new spouse as part of the calculation of his child support obligation. The Father's new wife had no legal obligation to contribute directly or indirectly to the support of the Father's children from his prior marriage. Even if the Husband's new wife reduces living expenses, contribute to a better lifestyle or enable him to devote more of his income to the children, the Court erred by using his wife's income.

The Mother, however, argues that the Court found that the Father had the monthly income earning capacity of $4,000. In certain circumstances the earning capacity rather than gross income may be used to determine child support. While the parties' past income is some evidence of earning capacity, it alone is not conclusive and must be considered along with other relevant circumstances. Even if the Court determined the child support on the basis of the Father had an earning capacity to earn monthly gross income of $4,000, it is apparent from the Court's Order that this determination is based in part on an erroneous consideration of the income of the Father's new wife. Here, the evidence of the Father's income from military disability payments and other sources were substantially less than the monthly gross income of $4,000.

OVERNIGHT GUEST

Norman v. Norman, **A14A0922** (Nov. 7, 2014)

The parties were divorced in February of 2013. The Settlement Agreement incorporated into the Final Judgment and Decree of Divorce included the paragraph that when the minor children of the parties are in either of the parties' physical custody, neither party shall allow a non-relative adult person of the opposite gender to remain overnight in the same house, apartment or other place being occupied by that party and the minor children, provided however this restriction shall not apply to overnight guests of the minor children. A month after the Final Decree, Toby (father) filed contempt against his ex-wife for repeatedly violating provisions by allowing her boyfriend to stay in her home overnight while she had physical custody of the children. Darby (mother) filed a motion to strike the provision from the decree arguing these provisions were overly broad, overly burdensome and unenforceable under the circumstances. A hearing was held, neither party testified but the Court considered deposition testimony filed by the parties. The Trial Court found the mother had admitted to violating the overnight guest provision and that violations would be harmful to the minor children's emotional wellbeing. The Trial Court also noted that the mother understood and agreed to the inclusion of the provision in the Settlement Agreement with the advice of counsel. Therefore, the Trial Court denied the mother's motion to strike the provision and that the provision drawn was rationally related to the harm it seeks to prevent and is in the best interests of the children. The mother appeals and the Court of Appeals affirms.

The mother's position is correct that contracts against the public policy of law cannot be enforced; but the parties' Settlement Agreement and divorce decree does not violate these public policies. The overnight guest provision is neither overly broad nor unduly burdensome. The provision applies to both parties and prohibits unrelated overnight guest of the opposite gender is a restriction that neither singles out one particular individual for a blanket provision nor includes relatives. The provision does not make an arbitrary distinction based upon race, sexual preference or any other such classification.

The mother also contends the Trial Court erred by enforcing the overnight provision when there was no showing of harm justifying such a restriction. Even without the Trial Court's explicit finding that these children would be harmed if the provision went unenforced, the fact remains that the provision was entered into by the consent of the parties in their Settlement Agreement. Given this posture, the imposition of this provision is procedurally inapposite to cases in which the Trial Court modifies an existing agreement and imposes such a provision on the parties' *sua sponte*. Thus, in the absence of any evidence rebutting the same, the Court presumes that the mother and father were acting in the best interests of their children when they agreed with advice of counsel to enter into the overnight guest provision.

PRIVATE SCHOOL

Hardman v. Hardman, **S14A1187** (Sept. 22, 2014)

See in-depth article on page 22.

TRAVEL DEVIATION BASIC HOUSING ALLOWANCE

Wallace v. Wallace, **S14F0646** (Nov. 24, 2014)

The parties were married in 2002 and the Father was active duty in the Navy. The parties had three minor children and in December of 2012, the Mother filed for divorce and agreed that the Mother had primary physical custody of the children. At the beginning of the final hearing, both parties agreed to waive findings of fact and conclusions of law. The Court announced it intended to set the Father's child support amount to $1,300 per month and award him a deviation for travel expenses of $400 per month resulting in a total support obligation of $900. After the Court's pronouncement, the Mother orally requested the Court make findings of fact and conclusions of law only as it pertains to child support. The Court said it would do so if the Mother furnished a transcript of the hearing. The Mother did not provide a transcript to the Trial Court before the Court issued its Final Judgment and Decree of Divorce. The Mother appeals and the Supreme Court affirms in part, reversed and remanded in part.

The Mother states the Trial Court failed to enter required findings of fact to support the travel deviation. Neither the Decree nor the associated Child Support Worksheets set forth how the application of the Child Support Guidelines would be unjust or inappropriate or how the best interests of the children would be served by the deviation. However, the Father asserts that the Mother waived the requirement that the Trial Court enter specific findings by agreeing at the hearing to provide a transcript and then not doing so. However, the transcript is not necessary for the required findings the Court must enter even if a transcript does not exist. Also, the actions of the parties do not waive the Trial Court's compliance with a mandate to enter findings pursuant to O.C.G.A. § 19-6-15(c)(2)(E). Even if a party agrees to deviate, it does not alter the statutory requirement. The Mother's failure to provide the Trial Court with a transcript does not override the statutory requirement that prior findings be made.

The Mother also challenged the Trial Court's failure to calculate the gross income contributed to the Father. Evidence of the Father's income presented at the final hearing was based upon his active deployment and the Mother argues that the Father's entire monthly military Basic Allowance for Housing (BAH) compensation was $3,553 and should had been included in his gross monthly income rather than the $702 proportion the BAH Trial Court used to calculate the gross income. Pursuant to O.C.G.A. § 19-6-15(f)(i)(E)(iv) which provides that basic allowance for housing is to be considered as gross income, but shall include only so much of the allowance that is not attributable to area of variable housing costs. Here, the Mother does not contest that the difference between the BAH amount that the Trial Court used and the amount which she contends should have been used is attributable to the Father's deployment in Bahrain and thus she fails to show error. ***FLR***

Vic Valmus graduated from the University of Georgia School of Law in 2001 and is a partner with Moore Ingram Johnson & Steele, LLP. His primary focus area is family law with his office located in Marietta. He can be reached at vpvalmus@mijs.com.

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Sincerely,

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33rd Annual Family Law Institute

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