The Family Law Review

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

Happy New Year? You've Got to be Kidding

Editors' Corner

by Marvin Solomiany and Randall M. Kessler
msolomiany@ksfamilylaw.com
rkessler@ksfamilylaw.com
www.ksfamilylaw.com

It is unbelievable how fast time continues to fly. As the co-editors of the FLR, we continue to feel privileged to piece together this valuable resource for our section's members.

As we enter 2013, the section is as strong as ever and our leadership has grown and diversified. With our committees and new executive committee members we are covering legislative developments, increasing our young lawyer involvement and reaching out to lawyers in many areas of the state to ensure that we represent the entire state.

Jonathan Tuggle and Becca Crumrine are sure to produce excellent Family Law Institutes this Memorial Day weekend and in 2014. The recent seminar that our Section sponsored with the American Academy of Matrimonial Lawyers was very successful as over 140 attended the seminar that was chaired by Marvin Solomiany and Stephen Steele.

We hope you enjoy this edition of the FLR. We once again are fortunate to have some excellent contributions. Please send your proposed articles for upcoming issues. We want to hear from you.

Have a joyous, healthy and prosperous 2013. *FLR*

If you would like to contribute articles to The Family Law Review, or have any ideas or content suggestions for future issues, please contact Marvin L. Solomiany, msolomiany@ksfamilylaw.com.

Inside This Issue

Correction:
In the Summer 2012 Issue of *The Family Law Review*, the "Federal Firearm Restrictions in Georgia under the Violence Against Women Act (VAWA)" article was co-authored by Karen Henize-Geiger and Vicky O. Kimbrell. Henize-Geiger is the managing attorney of the Piedmont GLSP office. Her name was inadvertently omitted.

Chair's Comments

by Kelly Anne Miles
kmiles@sgwmfirm.com

I hope your new year is off to a fantastic start! I know that 2012 ended with a buzz of activity by the Family Law Section. Under the leadership of John Collar and Regina Quick, our Legislative Committee has attended many meetings and put in countless hours studying and drafting several new pieces of legislation. We are hopeful that the following legislation will be presented during the upcoming session: update of the Uniform Interstate Family Support Act (Georgia has not yet adopted the most current changes made to this Act); a change to allow the court discretion, upon petition, to inquire into the best interests of the child in testamentary guardianship proceedings; and passage of the Uniform Deployed Parents Custody and Visitation Act. (Our Section joined with the Military and Veterans Law Section to support this uniform law and, if passed, Georgia will be the first state to adopt this important piece of legislation. John Camp and other experts across the nation have worked for two years on this Act.) We also are working with the Appellate Section on other legislation. So, thanks to our hard working legislative Section members who have given many non-billable hours to help improve our area of practice.

I hope you have been enjoying our Lunch and Learn programs. So far, we have had five of them:

- *How to Determine Gross Income of a Military Member* – presenters: Kedra M. Gotel, Gotel & Associates, P.C. and John Camp, Chair of Military and Veterans Law Section, Westmoreland, Patterson, Moseley & Hinson, LLP.
- *UIFSA (Uniform Interstate Family Support Act) O.C.G.A. 19-11-100 et seq.* – Presenter: Marvin Solomiany, Kessler and Solomiany.
- *Navigating Business Tax Returns* – Presenter: Brad Whitfield, CPA, CVA, Deemer Dana & Froehle, LLP.
- *Dividing Retirement Assets: Information Every Attorney Should Gather Before Settling or Trying a Divorce Case* – Presenter: Emily McBurney, Kegel McBurney, LLC.
- *Recent Developments in Technology For Family Law Practitioners* – Presenter: Sean Ditzel, Kessler and Solomiany.

These presentations are available for viewing on the Family Law Section website for the next 12 months. They are extremely informative and I appreciate the presenters' hard work. So far, we are averaging over a 100 viewers for these presentations! Lunch and Learn will resume Jan. 16. This is a great way to get involved so let me know if you are interested in doing a presentation.

We had our first section mixer in October and I am very pleased to report that it was a great success with over a hundred attendees. Thanks to Shatoree Bates and Ivory Brown for their hard work in planning this event. By popular demand, we will have another mixer in February so look for details coming your way. If you are interested in having a mixer in your area of the state, please let me know.

Thanks to Tera Reese-Beisbier and Louis Tesser for helping Georgia Legal Services' by doing a one day training in divorce law for their attorneys. Congrats to Vicky Kimbrell and GLSP for their receipt of the IOLTA grant allowing them to do divorces through their offices for domestic violence survivors.

By the time you read this Newsletter, the annual meeting of our section will most likely have come and gone. I hope all of you attended the hour long CLE and Reception at this Jan. 10 event. John Collar and Gary Graham did a fantastic job coordinating the day's events.

Jonathan Tuggle has been working diligently on bringing you the most interactive Family Law Institute our section has ever known. I cannot wait for him to share the details with you! Be on the lookout for the brochure which will be coming your way in February. Make your plans to attend the Institute at the Hilton, Sandestin, Fla., May 23-25. Please also consider being a sponsor of the Institute. Eileen Thomas is committed, as always, to get as many sponsors as possible. This is a great way to market your firm and help insure that our section has a successful seminar. So please contact Eileen at eileen@ethomaslaw.com.

Thank you Marvin Solomiany and Randy Kessler for such a first class newsletter. There is always so much information packed into *The Family Law Review*! Plus, it looks great!

I hope one of your New Year's Resolutions is to get more involved in our Section. It really will make you a better lawyer and will give you the opportunity to make lasting friendships.

Thanks for being a Family Lawyer! ***FLR***

Visit the Family Law Section Website
http://goo.gl/E1KUY

Through the Looking Glass With the Hon. Warren P. Davis

by Ivory T. Brown

I've often thought that the courtroom offers us a view…sometimes a troubling view of past societal concerns, sometimes a view in hindsight of injustices and certainly a bird's eye view of current issues, along with the most troubling and promising trends of our times. We are even offered a foreshadowing of future laws, the judiciary and how the legal community will carry out its' function. The courtroom….in essence… offers us a room with a view…

Judge Davis, thank you for taking time out of your busy schedule to allow our profession a closer glimpse of the man who sits behind the bench, including a glance backward at the path that brought you here, a look at your current view from the bench and your vision of portents for our future.

A view from the galley (or spectator bench) in your courtroom reveals a judge courteous and respectful of his constituents, while mandating unconditional requirements for appropriate decorum and legal compliance by lay persons and legal professionals.

I.B. How do you manage to maintain that balance?

W.D. I find balance by focusing on my role as a trial judge. I remain cognizant that this is never "my courtroom" but the courtroom of the citizens of state of Georgia. They have entrusted it to me. It is my job to not let them down.

I.B. Long ago, an unfounded and unsupported notion was that courteousness was deemed the domain of the southerner, while straight forwardness a northern trait. If we followed that thought process, you appear a product of both environments. Would you share some of your background with us?

W.D. My father's side of the family was from Murray county, Ga. and northern Alabama while my mother's family was a Scottish family from the Maine. My father was a Methodist minister. Therefore, we moved every 2-3 years, living across the country. My father always liked country churches, so rural areas were where we landed. I became a bit of a hybrid both from ancestry and living in several states, from Maine to Idaho and a few in between.

I.B. You may be pleased to note that you have acquired a smidgen of an southern accent, though intermittent and fleeting.

W.D. That probably comes from living in southern Idaho or because I'm an avid Jeff Foxworthy fan.

I.B. How did your career path and journey bring you to Georgia?

W.D. Just a stroke of good luck. My southern genes didn't cope well with the frigid Wisconsin winters, so after I sold a business when I was in my early 20s, I decided to transfer to Georgia Tech.

I.B. Was the black robe your first uniform?

W.D. My career at Tech was interrupted by the birth of twin daughters. The Gwinnett County Police Department hired me as a uniformed patrol officer, badge #250. Few know this, but Hon. Henry Newkirk and I worked together as street cops, often backing one another up on difficult calls. After a stint in uniform, I worked undercover for a few years.

I.B. Has your education and have your former careers supported your path to your seat on the bench?

W.D. Yes, I have been very fortunate. We are called upon to decide cases involving persons from all walks of life. I think a broader life experience fosters broader understanding. I learned a lot about domestic violence cases by growing up in some rough areas.

I.B. Do you find they also assist you in carrying out your duties as a judge?

W.D. Absolutely. My time in law enforcement not only taught me practical application of the law but also the impact of serious crimes. Within one week of joining the Gwinnett County Police Department I was the "ranking rookie" at a domestic homicide. I still remember seeing the terror in the eyes of two small children huddled behind a sofa as a parent lay in a pool of blood a few feet away with a butcher knife protruding from the chest. It is hard to forget scenes like that.

I.B. Did your stint as a domestic relations practitioner transport you to the bench with viewpoints about family law matters and family lawyers?

W.D. Many of my colleagues still shake their heads when I tell them I actually enjoyed practicing family law. I simply loved the stories and being able to weave those stories into an arguable case. If one thing family law teaches you, it is to keep an open mind. Clients could be strikingly forgetful about facts damaging (torpedoing) their case while have remarkable recollection of everything their spouse did wrong over the entire course of 20 years.

A new normal…

I.B. As a judge in fast growing county, you may be married to the law, but you are also married to a lawyer and have a successfully blended family. How does that help you in your role as a judge hearing family law matters?

W.D. Common experience fosters understanding embodying the adage of "walking a mile in the shoes" of another. I have seen from all sides the pain of a divorce, the exacting toll it takes on children of all ages and the challenges of healing and moving on. It makes me empathetic for what these folks are going through.

I.B. Blended families, cooperative parenting, single parents and even grandparent's rights are becoming part of what some might call the "new normal." Do you believe judges are being required to look at traditional custody arrangements in a different manner? Does a standard custody arrangement and visitation schedule truly exist anymore?

W.D. For those of us who are in the arena of family law, there is still a standard parenting plan of a primary parent that works well. We simply have more cases where extrinsic factors such as economic challenges, changing parenting roles, etc., require us to think outside the traditional box. Our cardinal principle remains the same, the best interests of the children. All too often competing parents will come up with elaborate parenting plans which meet their own personal needs and egos, but do very little to enhance the lives and stability of their minor children.

I.B. If there is a new normal, how can family lawyers made it the best next to normal possible?

W.D. I just see the issue differently. I don't particularly agree that there is a new normal. Our normal has to always be the guiding principle of best interests of the children. That normal should never change or vary. That normal may simply require crafting different parenting solutions.

A techno view…

I.B. Gwinnett county was on the cutting edge of technology in setting up the court's computerized system. You were involved in that process, why was it important to the county?

W. D. That was so much fun. We started the first court website in the entire southeast in the 90s. We created the video warrant system which earned a spot on CNN for technical innovation. By taking a lead in embracing the new technology we facilitated a culture that sought to harness more innovations and cost savings.

A view from above….

I.B. I understand that you had a pilot's license and flew your own plane and I note pictures of you on safari. Are you a bit of a dare devil? And, do you find that you are required to be daring from the bench?

W.D. Actually, if anything I am bit of a geek. I just happen to be interested in flying airplanes and adventure travel. I took a Gwinnett Bar CLE to Africa. Hard to beat having a CLE hour with an ostrich walking through the class. Or delaying class because a herd of elephants was crossing a river. What a great time with a great group of lawyers.

A parallel view….

I.B. You also appointed the first African American and first African American female judge to the bench in Gwinnett County, some could consider that daring. What guided your decision?

W.D. As chief magistrate, part of my job was to recruit judicial talent as magistrates. I deliberately built a diverse team of magistrates because I felt that diversity would make us all better judges. We all tend to listen best to our peers. So bringing more

diversity to our judicial peers would transcend into being able to better hear the cases of an increasingly diverse populace. I will proudly tell you that it worked. We all became better judges. It was fun and we all learned from one another.

I.B. Your county also maintains access to a variety of interpreters in your fast growing, multi-cultural county. Do you think the court services are keeping pace with the various needs and growth of the populace?

W.D. Empowering the role of skilled court administrators has enabled us to better keep pace with changing needs, such as interpreter services. Operating the infrastructure of a court is a different from being the judge in the courtroom.

Your view for the new...

I.B. What advice can you offer a new attorney practicing family law in your courtroom?

W.D. Quickly make me an effective listener. Tell me the issues so I know what to look for. Only after you do that should you tell me the facts to support your case.

Next, give me real and viable solutions. My courtroom décor does not display rainbows or unicorns. We don't engage in fairy tales and we don't mint money. Give me solutions that are feasible, pragmatic and just. Do not waste your time telling me what your client needs when only a winning lottery ticket will ever make that happen.

About the only thing I don't tolerate is personal bickering between counsel in the courtroom. Take that to the parking lot, not the courtroom. When counsel bicker on a personal level it distracts from the clients, the case and the law.

Lastly, if you want a trial you have come to the right place. Never apologize about putting up your case if that is what it needs. I took this job to hear cases, and I will gladly hear yours. A well-presented trial remains an enjoyable part of this job.

A positive view…

I.B. What are family law practitioners doing right?

W.D. Quickly working on settlements. Our pretrial settlement rates continue to increase which equate to increased client and attorney satisfaction. Actually I find the lawyers who quickly settle cases within the retainer are more financially successful than the lawyers who will never get paid after a grueling trial where everyone is often broke and miserable.

The Family Law Section of the State Bar of Georgia is phenomenal. The hallmark of the quality family law practitioner is that they care. This rings so true in the excellent work and leadership of the section.

A corrective view…

I.B. What could we do better?

W.D. Two things. Family law is a people business. The more that practitioners can learn about successfully dealing (coping) with difficult persons the happier and more fulfilled they will be in their practice.

Unless the case is pro bono, don't work for free. The unhappiest lawyers I know often have a heart of gold. They work 60-70 hours a week but get paid for only a fraction of their long hours. Their paying clients are slighted because the attorney's time and energy is drained by dead-beats. Their clients are unreasonable because they can afford to be. They never intend to pay for all that time and effort, so what is there to lose. These lawyers should work less, get paid for every single minute and use the new found free time to enjoy life and maybe find more paying clients.

A visionary view…

I.B. What do you see in our future?

W.D. Family law practitioners will continue to be challenged as the concept of a family broadens. That will require more insight, economic skills and creative solutions.

A look in the mirror…

I.B. What accomplishment leaves you most proud?

W.D. Probably, the simplest –the feeling of leaving the bench after a long day knowing that I gave folks the opportunity to be heard…that still makes me proud. It's still the best part of being a judge.

I.B. What do you hope to tackle next?

W.D. Probably another professionalism CLE, and becoming a better grandparent and spouse.

I.B. Your wisdom is appreciated. ***FLR***

Ivory T. Brown has practiced law for over 25 years, beginning her career as a prosecutor. As a general practitioner, she served as a part time magistrate judge, and while pursuing her passion for the arts, developed an entertainment and sports law practice, serving two terms as the chair of the Entertainment and Sports Law Section of the State Bar of Georgia. She continues to follow her passion and practices family law including cases with an entertainment and sports law focus and currently serves on the executive committee of the Family Law Section.

The Intersection of Family Law and Financial Security

by Christian Koch

This article introduces several themes all centering on family law from a financial advisors perspective. One of my first meetings with a family law attorney was extremely insightful. Over lunch, the family law attorney said to me "we don't like you CDFA's because you set our clients expectations too high." I thought to myself what an interesting perspective. Could it be that most family law attorneys hold this view? Specifically, in my divorce planning practice we use the client's financial position as a starting point to develop financial scenarios based on a proposed settlement offer. When acting as a Certified Divorce Financial Analyst ™ professional, I view my role as providing expert support to clients and family law attorneys. In my view, savvy attorneys clearly recognize the need for quality financial experts in order to help set correct expectations. Many clients come to the party with unrealistic expectations and they often need a financial reality check.

The second point that is important to emphasize is the need for humility. As a financial professional, I am not omnipotent on all things financial. However, I see the same need from family law attorneys. They are experts in jurisdiction and venue issues, litigating child support and knowing the critical issues for discovery but they are not financial experts. In my experience, I have seen too many family law attorneys not willing to admit they are "scared to death" of pensions, retirement plans, benefit programs, tax returns and evaluating other financial planning data. In fact, one family law attorney stated to me "I have two accounting degrees, and I even need this type of financial expert help." Furthermore, I believe a CDFA™ professional can be extremely helpful in the discovery process in terms of gathering financial information and knowing the right questions to ask in a deposition as many cases are won or lost in this beginning stage.

The third point and most important one is having a clear understanding of the delineation between a CDFA ™ and a (CFP®) Certified Financial Planner ™ professional. It is important for family law practices to distinguish divorce planning versus financial planning/investment advising. The profession of divorce planning is not synonymous with financial planning. Those individuals who hold themselves out as financial planners, in most states, are required to register as Investment Advisors. Having this dual role, investment advisors and financial planners, creates the effect of some form of Fiduciary standard. Whereas individuals who practice solely as divorce planners do not have to register with state or federal regulators because they are not providing advice or analysis regarding investing in securities.

When interviewing a CDFA ™ or CFP ® for a client engagement one should consider his credentials and qualifications. But more importantly can they fill the role of educating the client or the court on the key issues with compelling charts and graphs in an easy to understand, clear and concise manner much like a college professor would do in a classroom. Randy Kessler, partner with Kessler & Solomiany, suggests using of the "Rule of Five" to succinctly convey the relevant facts of a case.

Finally, when the dust has settled and the legal aspects of the divorce are complete, one of the key benefits a Fee-Only Certified Financial Planner ™ professional can provide is post-divorce financial planning. This takes the form of establishing a new financial road map for individual clients. Establishing a post-divorce financial framework and assisting individuals in making investment decisions about how to invest retirement accounts and other assets for retirement and specific capital allocation decisions is critical for long-term financial stability and success. ***FLR***

Christian G. Koch is founder and principal of KAM South, an investment management and financial planning firm located in Atlanta, Georgia. In additional to the Certified Financial Planner ™ and Certified Divorce Financial Analyst ™ designations, Mr. Koch is also a Fee-Only NAPFA Registered Financial Advisor. Those interested in learning more about the firm are encouraged to visit our website at www.kamsouth.com. Contact: Christian Koch 404-843-3745

Do Mediators Always Suggest Mediation?

A Dozen Dilemmas That Can Make Mediation Counter-Productive

by Andy Flink and JoAnne Donner

As mediators, we are frequently asked how a mediation session works. By the time we finish discussing this process with your clients, everyone has the same response…..mediation is a terrific alternative to litigation, and when two people are embroiled in conflict, it's their best option. But is mediation always a good idea when parties are in dispute? Every so often, deciding to sit down at the table can be a bad idea or an ill-timed misstep.

If both sides are openly willing to talk, why would there be a situation that, after anywhere from one hour to ten hours, everyone wonders why they bothered to meet in the first place? Here are a dozen reasons why mediation can be unproductive, why it may be time to re-examine strategies before starting negotiations, or when it may be best not to meet at all until circumstances change.

1. **Missing Information**. Rarely is a case resolved in mediation where there is a lack of discovery or incomplete, unverified financial information. There is already mistrust in the room; this simply adds to it.
2. **Lack of respect.** Knowing how to conduct yourself in a mediation session is important. We tell mediation coaching clients to pause and consider *everything* the other side is asking for and offering. If for no other reason than to appear that you are being respectful and considerate of their position, whether or not you really are. Parties in mediation have a tendency to "show their hand" through body language, tipping off the other side that respect is merely a song by Aretha Franklin.
3. **Unrealistic expectations.** "I get everything and you get nothing." Once we mediated a case where the plaintiff demanded a 90/10 split as equitable division because "he was the one who worked all the time." This kind of rigid, extreme thinking is not unusual but can send negotiations into the no-settlement zone.
4. **Bad timing.** Fortunately, courts send domestic cases through the mediation process. Unfortunately, it might be before discovery has even begun or before your clients are emotionally ready to consider settlement.
5. **It's a fishing expedition.** The other side shows up for the sole purpose of learning everything they can about what the other side's position is and why. They have no intention of settling and are manipulating the mediation process only for their own benefit.
6. **Subject-matter expertise.** When a personal injury lawyer represents a client in divorce mediation, it may not work very well. Typically, there is no substitute for experience and expertise in a specialized niche.
7. **A missing party.** Virtual communication technology is impressive, but when one party is 3,000 miles away in Seattle and the mediation session is in Atlanta, phone or Skype doesn't always reveal subtle cognitive or behavioral clues. It may be difficult to know what the long-distance party is really thinking, since much of what mediators look for are not only verbal cues, but nuanced, physical ones as well.
8. **Schedule conflicts.** The disputing parties and counsel are seven hours into a mediation moving towards a resolution when suddenly one of the parties declares they have a prior commitment. While they had plenty of opportunity to reveal this information earlier in the day they chose not to, sending the mediation into a tailspin.
9. **Lack of motivation.** A party prefers to maintain the status quo and strongly resists settlement. Sometimes this occurs where leverage is solely on one side of the table, or where one party has "everything to gain" and "nothing to lose" by keeping financial and emotional circumstances the way they are for as long as possible.

10. **Polarity or a desire for vengeance.** Rarely do couples in divorce mediation get to divorce at the same time for the same reasons. One party may feel a need for the other party to "pay dearly," whether or not this serves their best interests. When vengeance is a prime motivator, the ability to be fair and reasonable is dramatically compromised.

11. **Inflexibility.** Regardless of the truth, one party sees the facts in a completely different way than the other. If one party's parents funded the purchase of the marital home, they may insist that they are entitled to 100 percent of that asset with no consideration paid to the facts, the law, or equitable division. Parties' perceptions become their reality and, frequently, no matter what the facts are they refuse to alter their position.

12. **History of high-conflict.** Relationships that have been controlled by antagonism, intimidation, emotional abuse, or domestic violence, can make mediation the wrong choice. While mediators are trained to effectively address power imbalances, when one party's emotional or cognitive competencies are significantly impaired due to past abuse, a suitable and durable outcome is unlikely.

Mediation can be a demanding and dynamic process. Attaining a satisfactory settlement requires the expert coordination of a myriad of facts, figures, emotions, and negotiation strategies. Controlling the fall-out from "a dozen dilemmas" can create a mediation experience that meets your needs and your client's needs as opposed to creating an unwanted scenario that sabotages desired results. ***FLR***

Andy Flink is a contributing author on post divorce and trained mediator and arbitrator. He is familiar with the aspects of divorce from both a personal and professional perspective. He is experienced in both 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, arbitration and consulting. At One Mediation, he serves as a mediator and arbitrator who specializes in divorce and separation matters and has a specific expertise in family-owned businesses. He is a registered mediator with the state of Georgia in both civil and domestic matters and a registered arbitrator.

JoAnne Donner, CDFA, is president of Mediation Services of Georgia, Inc., and a neutral panelist with One Mediation. A member of Cohort XIII of the Master's Program in Conflict Management at Kennesaw State University, Donner focuses her mediation and mediation coaching practice in the areas of divorce, family conflict and elder care.

Happy New Year? You've Got to be Kidding

by Howard Drutman & Marsha Schechtman, Atlanta Behavioral Consultants

The first year following a divorce presents numerous challenges for the newly divorced. It is especially difficult for divorced parents to navigate that first holiday season. Not only do family members have to deal with the typical holiday stressors (family demands and financial strain), but also face changing long-standing traditions, shuttling children between two households and having less contact with children. It is important to provide our clients with strategies that can help make the first year post-divorce a bit more pleasant and less stressful. Next to a death, grieving the end of the family resulting from a divorce is one of the most difficult transitions in a person's life.

Divorcing parents begin to deal with the reality of how things are about to change while they are working on the holiday portion of their parenting plan. Discussions of holidays such as Thanksgiving, Christmas Eve, Christmas Day and Chanukah often generate intense dread among parents. They begin to realize that they will not have the children for all of the holidays. Parents begin to realize that long-standing traditions will likely need to change. Many times clients begin to cry as they imagine a Christmas morning without seeing their children running around opening presents or the thought of both parents not standing together while their children are lighting the Chanukah candles. To assist our clients we need to help them look toward developing new traditions. They need to know that they and their children can find new traditions which can be as meaningful and fun as some of the traditions that they have had in the past.

Children of divorced families often spend holidays with only one parent. It is important for both parents to give the children a sense that it is OK for them to enjoy themselves during the holidays and that they do not need to worry about the parent who is not with them. Putting the children's needs first does not always mean your clients are happy. Parents need to make sure not to make the children feel guilty when they are not with them on a holiday. They need to remind the children that they will have the opportunity to celebrate the holiday with them another time. Attorneys should encourage clients not to isolate themselves on holidays, but to reach out to friends and extended family. For those without nearby family and friends, volunteering can be a great alternative activity.

Creativity in scheduling the holidays is important. Some parents split Christmas, but not in the traditional sense of splitting Christmas Day. One alternative is for one parent to get Christmas Eve which starts on Dec. 23 in the evening and ends on the 24 late in the evening. The children can open presents with that parent and enjoy a festive Christmas meal with family and friends. Late in the evening on the 24, the children transition to the other parent. The Christmas Day starts late on the 24 and ends on the 26. This arrangement allows the children to have a full day of Christmas activities with each parent. The parents would alternate years in terms of having Christmas Eve and Christmas Day.

Since divorce is a costly process, the holidays are a recipe for financial disaster. Funds are often limited and parents are sometimes forced to make choices whether to pay a bill or buy the children holiday gifts. Your clients must remember that

the holidays are not just about the number of gifts given or received. Encourage the client to budget. Many families find creative ways to make presents for one another. Parents must not get caught in the trap of buying the children's' love through extravagant gifts.

Loneliness and isolation are terrible emotional states for a newly divorced person to experience. Encourage your clients to become involved in activities and reach out to others. Many newly divorced individuals fear going out to meet other single people. Once again, a charitable activity can provide a personally meaningful activity as well as a source of socialization.

Most people who are married get into routines and have traditions which dictate many activities. With the divorce, the individual lacks the structure that provided some sense of normalcy and comfort. It is important to encourage the newly divorced parent to plan activities and look into the future, be it the next few days, the upcoming weekend, or into the long term. Prior planning prevents periods of aloneness.

The first year, many friends try and wine and dine the newly divorced person so they are not alone. At times the good intentions of friends and families can become intrusive and filled with unintended expectations. Your clients need to learn to say no when they need time alone, or when getting together with old friends brings up too much pain.

Maintaining a healthy lifestyle is one of the best ways to maintain a positive mood as one adjusts to a new single life. Eating right and exercise are extremely important to one's overall mood. Over indulging in too much alcohol, sweets, and food can lead to unhappiness and ill health.

Finally, if the challenges of divorce have not brought your client to the door of a mental health professional, encourage them to meet with a therapist who can help them with their 'first year holiday blues'. ***FLR***

Howard Drutman, Ph.D. is a psychologist in Roswell who specializes in forensic psychological services in family law cases. He provides Child Custody Evaluations, Parent Fitness Evaluations, Drug/Alcohol Evaluations, Reunification Therapy, Psychotherapy, Parent Coordination, Coparenting Counseling, Parenting Plan Development, Expert Testimony, Attorney Consultation on Issues Related to Divorce and the Best Interest of the Child, Reviews of Mental Health Professional Reports, and Collaborative Divorce Coaching.

Marsha Schechtman, LCSW is a Licensed Clinical Social Worker who also specializes in divorce related psychological services such as Child Custody Evaluations, Parent Coordination, Coparenting Counseling, Psychotherapy, Parenting Plan Development, Mediation, and Collaborative Divorce Coaching.

2013 Family Law Institute

(Hilton Sandestin, Destin Fla., May, 23 – 25) - Mark your calendars!

After two consecutive years in Amelia Island, the Family Law institute is returning to the beautiful beaches of Destin, Fla., and the Hilton Sandestin Resort (www.HiltonSandestinBeach.com). As is tradition, the Institute will be held over Memorial Day Weekend, beginning on May 23, and ending on May 25. There will be receptions on Thursday and Friday evening, including a performance at Friday's reception by our now-famous "Specific Deviations" Family Law Institute band, a tennis tournament on Thursday and a golf tournament on Friday. The Section also plans to invite a number of judges from across Georgia. With many jurists attending, there will be great opportunities to socialize and discuss relevant family law issues. Be on the lookout for information from ICLE about registration for the seminar and hotel and resort accommodations.

Our Institute chair, Jonathan Tuggle, has put together an exciting and comprehensive program titled "The Practical Guide for the Family Lawyer" which will cover a range of topics including post-election tax planning, rules of thumb – fact or fiction, effective use of discovery and the civil practice act, advanced family law evidence and trial practice, emerging custody issues, immigration, effective drafting of settlement agreements, alternative dispute resolution, and attorneys fees, among others. The program will be highlighted by multiple sessions where attendees can interact in real time with judicial panels using text, web and twitter on relevant family law issues. For those planning to attend, you are invited to email to Jonathan Tuggle (jtuggle@bcntlaw.com) any recurring custody, child support, alimony or property division related issues you have encountered which warrant a panel discussion, and he will make all efforts to incorporate it into the program.

Lastly, the Institute is made possible each year by the valued sponsorship of many lawyers, law firms and other family law related organizations. We have already received tremendous support from the sponsors listed below, and ask that all others consider contributing to this special Section event. For sponsorship opportunities, please contact Eileen Thomas (eileen@ethomaslaw.com). *FLR*

2013 Family Law Institute Sponsors*

Five Star ($7,500)

Boyd Collar Nolen & Tuggle, LLC

Double Diamond ($5,000)

Smith, Gilliam, Williams & Miles, P.A.

Diamond ($2,500)

Holland Roddenbery LLC

Kessler & Solomiany LLC

Bovis Kyle & Burch/ BKB Family Law

IAG Forensics

Lawler Green Givelber & Prinz, LLC

Warner, Bates, McGough & McGinnis

Hedgepeth, Heredia, Crumrine & Morrison, LLC

Double Platinum ($1,500)

Bennett Thrasher

Deemer Dana & Froehle LLP

Callaway Geer, CPA- Forensics and Valuations

Thurman Holder Gibbon, LLC

FairShare Financial, PC

Platinum ($1,000)

Law Office of Carolina Pineres and Assoc

Stern & Edlin, P.C

CapVal-American Business Appraisers, LLC

Manely Firm, P.C.

Keon & Ebel

Gold ($500)

Shuman & Shuman, P.C.

Pachman Richardson, LLC

Russell & Herrera, LLC

Moore Ingram Johnson & Steele, LLP

Peterson & Harris

Shewmaker & Shewmaker, LLC

Ordway Law Group, LLC

Huff, Woods & Hamby

Professional Document Services

Finch Mediation

Silver ($250)

White Elm Group, LLC - Forensic Accountants

Fryer, Shuster & Lester, P.C.

Collaborative Practice & Mediation Services, Inc.

The Shriver Law Firm

Dettmering Mediation

Karen Brown Williams

Daniel W. Mitnick & Associates, P.C.

QDRONOW.com

Atlanta Behavioral Consultants

Bronze ($100)

Eileen Thomas, LLC

Bivek, Brubaker & Prescott, LLC

The Adams-Carter Law Firm, P.C

The Law Office of Eric A. Ballinger, PC

Ronne G. Kaplan LLC

Grier Law Office, P.C.

Family Solutions Counseling Center & The Cooperative Parenting Institute

Nedra L. Wick, Esq., LLC

*as of 12/18/12

Caselaw Update

by Vic Valmus

ADOPTIVE CHILD

Hastings v. Hastings, S12F0873 (Oct. 1, 2012)

The Husband filed for divorce in February of 2011. The Husband is the biological father of two children whereas the Wife is the adoptive mother of one of the children and the biological mother of the other. At the time the couple was married in 2006, she was aware that the Husband's former girlfriend was pregnant and following the child's birth in October 2006, the Husband retained custody with the Wife eventually adopting the child. In February 2009, the Wife gave birth to the couple's second child. At the final hearing, the Trial Court found that it was in the best interests of the children for the Wife to be awarded primary physical custody of the children and that splitting physical custody of the children between two parents would cause emotional harm. The Husband appeals and the Supreme Court affirms.

The Husband contends that the Trial Court erred by granting custody of the Husband's biological older child to the Wife as a specified third party as defined under O.C.G.A. § 19-7-1(b)(1). The Husband claims that in order to rebut the statutory presumption in favor of paternal custody, the Wife as an adoptive parent, was required to prove by clear and convincing evidence that the Husband's biological older child would suffer physical or emotional harm if the Husband was awarded custody. In dealing with the question of how parental power may be lost by a parent in a custody action involving a select group of non-parental relatives or an adoptive parent, the Court has stated the issue for determination shall be what is in the best interests of the child or children. Although including a rebuttable presumption that it is in the best interests of the child or children for custody to be awarded to parents over a designated third party, including adoptive parents which further provides that the presumption may be overcome by showing that an award of custody to such third party is in the best interests of such child or children and requires the third party to prove by clear and convincing evidence that the child would suffer physical or emotional harm in order to overcome the statutory presumption in favor of parental custody.

However, these constitutional terms are not applicable in a third party being awarded custody as an adoptive parent as in the instant case. Georgia law simply provides that a decree of adoption creates a relationship of parent and child between the petitioner and the adoptive individual as if the adoptive individual were the biological issue of the petitioner. Both the legislatures and the courts have repeatedly confirmed that an adoptive parent stands on the same footing and has the same rights and obligations as a biological parent. Therefore, adoptive rights equals those of the biological parent. For a court to award custody to an adoptive parent over a biological parent only the statutory showing of best interest is required. Therefore, the Trial Court did not err by awarding the Wife primary custody of both children.

ATTORNEY'S FEES/CHILD SUPPORT PAYMENTS

Jarvis v. Jarvis, S12F0889 (Oct. 29, 2012)

The parties were married in 1997 and the Husband filed for divorce in 2009. After a 5 day bench trial in March 2011, the Trial Court granted the parties a Final Judgment and Decree of Divorce signed by the Judge in April 2011. The Trial Court gave the Wife primary physical custody of the parties' three minor children and required the Husband to pay $3,370 per month in child support, $1,500 a month in alimony for 36 months or until the Wife's death or remarriage, whichever occurred first, and for the Husband to maintain a life insurance policy of at least $500,000 for the children, with the Wife and the children listed as beneficiaries. Also, in the event of a delay in the payments of the proceeds of the life insurance benefits to the Wife, the Wife would receive payments from the Husband's estate according to the terms of the decree and until the obligation of the Husband herein to provide life insurance death benefits, were fully satisfied. The issue of attorney's fees was reserved and in October 2011, the Court awarded the Wife attorney's fees of $125,477 pursuant to O.C.G.A. § 19-6-2. The Husband appeals and the Supreme Court affirms.

The Husband argues that the Trial Court erred and abused its discretion because the Court considered financial support the Husband received from his mother

in awarding attorney's fees under O.C.G.A. § 19-6-2. At trial, the Husband testified that he received financial support from his mother during the marriage and after his separation from the Wife. In addition, the mother provided financial support for him for many years prior to his separation. His mother provided him financial support to pay his attorney's fees, his credit card bills, his temporary support obligations and other living expenses. The Court's award of attorney's fees did examine all of the financial information. The Trial Court noted the Husband's base salary was $125,000 and that he had a potential bonus of $125,000 from his current employment. The Husband's past earnings were in excess of $200,000 per year and for 10 years of the marriage, the Wife was a homemaker. At the time of the hearing she earned $2,750 per month. As a trier of fact, the Trial Court is authorized to weigh and credit the testimony of the parties and all other evidence regarding the parties' financial circumstances. Since there is no statutory limitation on the type of evidence of "financial circumstances," that a Trial Court may consider under O.C.G.A. § 19-6-2, it cannot be said that the Trial Court abused its discretion in the attorney's fees award.

The Husband also alleges the Trial Court erred by requiring his estate to pay his child support obligations until the life insurance death benefits were fully satisfied. The Trial Court has the discretion to require a parent to provide life insurance for the support of minor children. The Court is unaware of any authority that would prevent the Husband's estate from temporarily paying child support as a stop gap measure in the event there is a delay in the payment of life insurance proceeds and the Husband has not proffered any such authority.

CHILD SUPPORT

Eldridge v. Eldridge, S12F1078 (Oct. 15, 2012)

The Wife filed for divorce after being married for 7 years. The Husband was active duty Naval Officer. A bench trial was held and a Final Judgment and Decree of Divorce issued which granted joint legal custody of the couple's two children to both parents, (with primary physical custody to the Wife), ordered the Husband to pay $1,379 per month in child support, assigned to Wife responsibility for her student loans and adopted its own parenting plan. The Wife appeals and the Supreme Court affirms in part and reverses in part.

The Wife argues the Trial Court should have included the Husband's sea-pay in his gross income. The Husband's leave and earning statements for January 2011 was admitted into evidence, which included $325 in career sea-pay. The Husband testified that his compensation had not changed since January but he would not receive sea-pay after he transferred to Connecticut. He also testified that he may lose his housing allowance following his transfer in the barracks because he is now single.

The Husband's testimony and his earning statements provided ample evidence to support the Trial Court's calculation of his gross income. In addition, the Husband testified that his sea-pay is a form of incentive pay and the Child Support Guidelines provide that except as determined by the Court or a jury, special or incentive pay shall not be considered as gross income.

The Wife also argues that the Trial Court erred by failing to use the correct conversion factor when it calculated Wife's work related childcare costs. The Court in completing its calculations, estimated that the Wife incurred $158 per week in work related childcare expenses and applied a conversion factor of 4.3. However, Uniform Superior Court Rule 24.2(a) requires that a conversion factor of 4.35 per week be used. Therefore, the use of the incorrect conversion factor did not result in a deviation, but resulted in a slight miscalculation of the child support.

The Wife also appeals stating the Trial Court erred by providing a deviation without the required findings of facts in that the Husband and Wife were to evenly divide the daughter's uninsured medical expenses. The Child Support Guidelines provide that the parents shall allocate the uninsured healthcare expenses which shall be based on the pro-rata responsibility of the parents or as otherwise ordered by the Court. The Trial Court was not required to make the written findings of fact that allocate uninsured healthcare expenses in a manner other than based on the pro-rata responsibility of the parents.

CHILD SUPPORT

Hendry v. Hendry, S12F1302 (Nov. 5, 2012)

The parties were married in 1998 and had three children. The Trial Court awarded primary physical custody of the children to the mother and ordered the father to pay $2,400 per month in child support. The Trial Court included $935 in the Father's gross income that was paid to the Father each month by his employer to reimburse the amount he pays for premiums for his family's health insurance. The reimbursement covers the entire cost of the premium and his employer identifies the reimbursement as a benefit and not salary. The Father appeals and the Supreme Court affirms in part and reverses in part.

Pursuant to O.C.G.A. § 19-6-15(f)(1)(c), gross benefits do not include other employment benefits that are typically added to the salary, wages or other compensation that a parent may receive as a standard added benefit, including but not limited to employer paid portions of health insurance premiums. There is nothing in the record to show that if the cost of the premium decreases, the employer continues to pay the same amount to the Father as a benefit or that he could redirect a portion of the benefits in excess of the cost of the premium to his ordinary living expenses. The Father's reimbursement cost covers the entire cost of the premium and his employer identifies reimbursement as a benefit and not salary. The Wife argues that the Father himself remits the premiums to his insurer and the employer does not directly pay any amounts to the insured. However, the Father's monthly reimbursement for the cost of health insurance premiums represents the employer's paid portions of the health insurance premiums and the reimbursement should not count in his gross income.

The father also argues the Trial Court erred in adopting the child support worksheets presented to the Court by the mother that were never entered into evidence or filed with the Court and were presented only during closing arguments. Although O.C.G.A. § 19-6-15(c)(4) provides that the parties shall submit to the Court the worksheets and schedules, it does not provide when they should be submitted or that they should be introduced as evidence at trial. The father also argues that Uniform Superior Court Rule 24.2 which requires child support worksheets and schedules to be completed to the extent possible, filed with the clerk and served on the opposing party along with financial affidavits at least 15 days before the hearing. However, neither O.C.G.A. § 19-6-15(c)(4) nor Rule 24.2 states the consequences of failing to file the worksheets and schedules or filing them in a untimely manner. Where a statute or rule directs a thing to be done in a certain time without prohibiting the subsequent performance, generally, the provisions of time is directory only, and therefore the subsequent performance is substantial compliance with the statutory requirement. Therefore, the Trial Court did not err in accepting the wife's child support worksheets at closing arguments.

CUSTODY AND MODIFICATION

Stoddard v. Meyer, S12A1131 (Oct. 15, 2012)

The parties were divorced in 2007. The Mother was awarded primary physical custody of the minor son. The Father had liberal visitation (5 days out of 14), plus holidays and summer visits and the Father paid the Mother $200 a month of child support. After the Final Decree, the parties conceded that they followed a different visitation schedule where the child was in the custody of each parent an equal amount of time, one week on and one week off. This mutual agreement continued for a period of approximately 3 years. In November 2010, the Father petitioned to modify custody and child support because of the equal parenting time and because the Mother had the higher income of the two parents. The Mother counterclaimed for a modification increasing the child support obligation. While the case was pending, the parties reverted back to the visitation schedule set forth in the Divorce Decree. A hearing was held in August 2011 and the Court issued a Final Order allowing the Mother to retain primary physical custody of the child but also modified visitation such that the parties had equal parenting time and ordered the Mother to pay monthly child support to the Father in the amount of $667 which was the difference between the Mother's child support obligation of $1,037 and the Father's child support obligation of $370. The Mother moved for reconsideration and in December 2011, the Trial Court modified its Final Order for the purposes of child support only, designated the Father as the primary custodial parent, and ordered the Mother to pay child support to the Father. The Mother appeals and the Supreme Court affirms.

Pursuant to O.C.G.A. § 19-6-15(a)(9) a custodial parent is defined as the parent with whom the child resides more than 50 percent of the time. Where a custodial parent has not been designated, or a child resides with both parents an equal amount of time, the Court shall designate the custodial parent as the parent with the lessor support obligation and the other parent as a non-custodial parent. In the Father's petition, he averred that the parties' equal parenting schedule was a basis of modifying. The September 2011 Order stated the change is not material enough to warrant granting primary physical custody to the Father. However, when the Trial Court issued its December 2011 Order, the Trial Court decided because it had found the parties' parenting time to be equal, it was obligated to designate the Father as the custodial parent and the Mother as the non-custodial parent. The equal parenting agreement the parties adopted after the divorce constituted a substantial change in the child's needs authorizing modification of child support and custody. Extended visitation may be the basis to modify child support payments and it is undisputed that after the 2007 Order, the child was spending an equal amount of time with the parents. The Mother had a higher income and higher child support obligation than the Father which required the Trial Court to designate the Father as the custodial parent.

DIRECT APPEAL

Collins v. Davis, A12A1445 (Oct. 30, 2012)

Collins (Father) filed a petition to legitimate his daughter in 2007. A Final Order was issued regarding child custody, visitation, and child support. Four years later, Davis (Mother) filed a petition for modification of custody, visitation and child support as well as a motion for contempt and demanded attorney's fees. The Father counterclaimed requesting a downward modification of child support. A final hearing was held and a new Order was issued establishing a new visitation schedule and ordering a reduction in the Father's child support. The Father filed an application for discretionary review challenging the Court's Order with regard to child support claiming the Trial Court

should have further decreased his child support payments, but he does not appeal the new visitation schedule. Father appeals and the Court of Appeals affirms.

The Court of Appeals granted the application for discretionary review for the sole purpose of determining whether the Father properly applied for discretionary review or whether he was in fact entitled to a direct appeal. There are two code sections to determine the method for pursuing appeals: O.C.G.A. § 5-6-34 which describes Trial Court's orders that may be directly appealable and O.C.G.A. § 5-6-35, which list cases in which an application for appeal is required. Before 2007, there was no right of direct appeal in any domestic relations or child custody cases and the present case clearly would have fallen under the former O.C.G.A. § 5-6-35.

In 2007, the General Assembly amended both § 5-6-34 and § 5-6-35, removing all references in child custody cases in § 5-6-35(a)(2), and enacting subsection 11 in § 5-6-34 to provide for direct appeals to be taken from all judgments or orders in child custody cases including but not limited to, awarding or refusing to change child custody or holding or declining to hold persons in contempt for such child custody judgments or orders. O.C.G.A. § 5-6-35(a)(2) still mandates that judgments or orders in divorce, alimony and other domestic relations cases including but not limited to the granting or refusing of divorce or temporary or permanent alimony or holding or declining to hold persons in contempt of such alimony judgments or orders require application for appeal. It is clear that matters concerning child support fall into the category of other domestic relations and therefore require application for discretionary appeal.

The Court has previously held that regardless of how the case was couched or pursued, if it involves the collection of child support monies, then it is a domestic relations matter. The issue in this case is whether a direct appeal on a child custody case applies when the party strictly appeals a child support award in an order that also involves child custody or visitation. In this case, the Father appeals the modified child support award that was rendered and ordered that also modified visitation. If the Father would have appealed the modification of visitation portion of the Order, there is no doubt that the case would be directly appealable as a child custody proceeding. The underlying subject matter generally controls over the relief sought in determining the proper procedure to follow on appeal. Accordingly, while the appeal in this case strictly deals with the child support award, this award was rendered in a child custody case and was directly appealable.

DORMANCY STATUTE

Baker v. Schrimsher, S12A0665 (Sept. 10, 2012)

The Husband and Wife were divorced in 1998 by Final Judgment and Decree of Divorce. The Settlement Agreement incorporated the Final Judgment to require the Husband to refinance the mortgages for the marital home and the auto loan for the 1998 Ford Explorer in his name and required the Husband to assume all payments on all indebtedness on each piece of property within 60 days. If the Husband failed to refinance the vehicle in his name, he was required to transfer ownership of title and interest in the vehicle to the Wife. The Husband was required to hold the Wife harmless and indemnify her from any liability for any indebtedness. The Husband failed to meet the obligations and in March 2002 a default judgment was entered against the Wife for the automobile loan and in June 2009 a payment demand letter was sent to the Wife from the mortgage company seeking to collect the outstanding balance on the residence.

The Wife filed a contempt action in March of 2009 and the Husband moved to dismiss arguing that after the passage of almost 10 years, the Final Judgment was dormant pursuant to O.C.G.A. § 9-12-60 and the Wife was barred by laches. The Trial Court denied the Motion. The Trial Court found the Husband in willful contempt and ordered him to pay the Wife $37,506.28, the total amount of the indebtedness for both properties. The Husband appeals and the Supreme Court affirms.

The Husband argues, among other things, the Trial Court was required to dismiss the contempt action because the parties' November 1998 divorce decree had become dormant. O.C.G.A. § 9-12-60 applies only to judgments or decrees ordering the payment of a sum of money. The dormancy statute does not apply to a judgment that requires the performance of an act or duty. Here, the divorce decree required the Husband to perform separate acts and did not involve the payment or a sum of money. Therefore, the dormancy statute is applicable to this case.

MODIFICATION OF CHILD SUPPORT

Odom v. Odom, S12A1433 (Oct. 29, 2012)

The parties were divorced in 2007. The Wife was awarded primary custody of the parties' three minor children and the Husband was ordered to pay $2,065 per month in child support. The Decree also required the Husband to pay private school tuition for the 2008 through 2009 academic year and provided that he shall not be responsible for any expense of private school other than set out in the parties' Settlement Agreement. In 2008, the Husband filed a Petition to Modify Visitation and hold the Wife in contempt. The Wife answered and counterclaim for modification of child support. After a hearing, the Court denied the Husband's motion and granted the Wife's motion for upward modification of child support and determined there had been a substantial change in condition of the Husband's income and financial status and increased the child support to cover the expenses of private school for the children. The Husband's obligation increased from $2,065 per month to $5,435 per month. The Trial Court deviated in the presumptive amount of child support based on the conclusion that the presumptive child support was unjust and inappropriate because the educational needs of the children could not be met. The Husband appeals and the Supreme Court affirms.

The Husband argues the Trial Court erred by modifying his child support on the doctrine of res judicata. The actual modification of child support was based on the change of income, financial status, or needs of the child and is not identical to the original divorce action and therefore, res judicata does not prevent the former spouse from seeking modification of child support. The Wife presented evidence the Husband's gross monthly income increased from $8,898 to $10,700 since the entry of a Final Divorce Decree. In addition, there is evidence that the Husband's net worth increased by almost three million dollars. Therefore, the evidence supports the Trial Court's finding of a substantial change of condition, change in income and financial status sufficient to authorize a modification of the support award. The same evidence supports the Trial Court's deviation from the presumptive amount of child support based on the parents' financial ability to provide for a private school education. In addition, there is a change in income or financial status sufficient to warrant a modification in the amount of child support payable on a per capita basis. The Court was authorized to modify the per capita award into a group award.

MODIFICATION

Wetherington v. Wetherington, S12A1001 (Oct. 15, 2012)

Husband and Wife entered into a settlement agreement in 2007 which incorporated a Final Decree of Divorce. The Husband's annual gross income was approximately $300,000 and the Wife's was zero and Husband agreed to pay $7,000 per month in child support for the parties' two children with the amount to decrease when the oldest child turns 18. They also agreed they would evenly share the financial obligations associated with the ownership interest in the vacation condominium. The Husband earned $25,000 per month. The child support amount was $2,884 per month. However, the Trial Court imposed a $7,000 per month obligation from the settlement agreement explaining that it was deviating from the presumptive amount of child support based on the parties' agreement which the Court found in the best interests of the child. In 2008, the Husband filed a petition for downward modification of child support based upon a material reduction in his income and a temporary order reducing his obligation to $5,950 per month. The Husband's modification petition added a count for contempt that the Wife had not paid her share of vacation condominium expenses. A final hearing was held in 2011 in which the Husband's CPA firm testified that as a basis of child support, his anticipated income of $300,000 actually was $183,213 in 2008 and in 2009, the Husband earned $219,267 but lost his job with the firm in October, 2009. The Husband accepted a new job which began in January 2010 earning $12,699 per month and, therefore, the present income did not enable him to pay $5,950 per month in child support. Also, with regards to the share of the condominium expenses, the Wife stipulated that the amount at issue was $28,806.62.

In August 2011, the Trial Court entered an Order on the modification and contempt actions and the Court found the Husband agreed to the deviation set out in the settlement agreement and is bound by his actions, but said it would give the Husband credit for his actual 2007 income of $240,000 instead of $300,000 and then concluded that because $240,000.00 is 80 percent of $300,000.00 the Husband's child support will be adjusted to 80 percent of the $7,000 or $5,600 per month. The Court found the Husband in contempt by failing to pay $11,800 in child support and the Trial Court held the Wife in contempt for failure to pay her share of the condominium expenses, finding that she owed the Husband $19,200 as of February 2011. The Husband appeals. The Supreme Court affirms in part and reverses in part.

The Husband contends the Trial Court erred when it failed to consider whether there has been a substantial change in his financial circumstances between the time of the divorce decree and the modification hearing and in failing to apply child support guidelines. This Court explained that the showing of a change in the parents' financial status or a change in the needs of the child is a threshold requirement in a modification action. If the Trial Court determines there has been a change, the Court must enter a written order specifying the basis of the modification and shall include all of the information set forth under the Code section. Thus, if the Trial Court finds a change in the parent's financial circumstances warranting a modification of a child support award, the Court must consider the amount of child support using the Child Support Guidelines. The Trial Court in this case did not address whether there had been a change in the financial circumstances of the Husband or the needs of the children since the original child support award in June 2008 and the Court did not use the Child Support Guidelines in calculating the Husband's modified child support obligations. Instead the Court ruled that the Husband was bound by the terms of the parties' October 2007 Settlement Agreement but with the substitution of $240,000 for the income of $300,000 specified in the agreement. If the Husband's financial status had not substantially changed, then no modification was appropriate. If the modification was appropriate, then the Court was required to use the Child Support Guidelines to calculate the amount.

The Wife argues that the Husband was estopped from seeking to lower his child support obligations because pursuant to the Settlement Agreement, she refinanced the marital home and vehicle and put those loans in her name in reliance on his agreement to pay $7,000 a month in child support. Whether divorce decrees are based on settlement agreements or bench trials, they generally include financial obligations for both parties. Notwithstanding, the General Assembly has granted the parties in all divorce actions the statutory right to petition to modify child support. Additionally, a party may be estopped from seeking to lower his child support obligation only by expressly and specifically agreeing to waive the right to modify that the law grants. This Court has held that for there to be a valid waiver of statutory right to seek downward modification of child support, the parties' agreement must expressly waive the right to modify child support by referring specifically

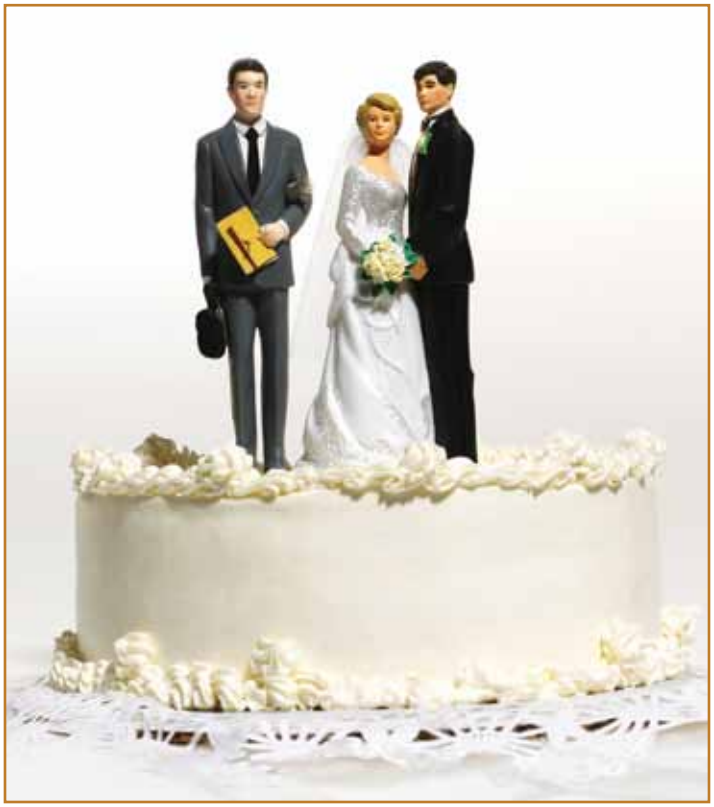
to that right. The right to modification will be waived by agreement of the parties only by very clear waiver language which refers to the right of the modification, similar to the language in *Varn v. Varn*. It appears that the Trial Court stated the Husband was bound by the Settlement Agreement which appears to have waived his right to modify. However, the Settlement Agreement contains no express waiver specifically referring to the right to modification and the Husband's mere agreement to pay more than the presumptive amount of child support cannot constitute a valid waiver of his statutory right to seek modification of his child support obligation under the appropriate circumstances.

PRENUPTIAL AGREEMENT

Newman v. Newman, S12F1549 (Oct. 1, 2012)

The Husband and Wife were married in May 2007, but just before their wedding, they executed a 20 page typewritten Prenuptial Agreement to which they added a handwritten provision acknowledging "that there are certain ambiguities contained within the body of this document which each party agrees to clarify and rewrite within 30 days of the date of the execution thereof." The Wife filed for divorce in 2011. At the hearing, the Trial Court granted the Wife's motion to enforce the prenuptial agreement and entered a judgment of decree of divorce incorporating the terms. The Husband appeals and the Supreme Court affirms.

Husband contends that the Trial Court erred by enforcing the prenuptial agreement because the addition of the handwritten language left the parties with an unenforceable "agreement to agree". The Court agrees with the Husband that a contract to enter into a contract in the future is of no legal effect. However, the Court does not agree that the agreement in this case constitutes such a contract. First, there is nothing in the language of the agreement itself that demonstrates it was incomplete or tentative at the time it was executed. Second, the Husband has not identified any essential term left to the future negotiations. In fact, the Trial Court noted that the Husband has failed at every point in the litigation to identify any ambiguity in the agreement. In addition, the inclusion of the provision indicating the parties' belief that the agreement contains ambiguities does not render the agreement an unenforceable agreement to agree.



The review of the document demonstrates the agreement between the parties contains all the essential elements of an enforceable contract. The agreement was voluntarily executed after lengthy negotiations and consultations with independent counsel and it clearly and precisely identified the parties' intent to resolve all issues in the event the marriage ended in divorce, the legal rights each waived by entering into the agreement, the property rights of each should the marriage end in divorce and the assets belonging to each prior to the marriage. The language of the agreement itself presents no lack of certainty which would render the entire agreement unenforceable. The fact the parties believe that the contract contained certain ambiguities does not mean that they did not intend to be bound by the essential terms to which they had already agreed.

THIRD PARTY CUSTODY/JURISDICTION

Stone-Crosby v. Mickens-Cook, A12A1258 (Nov. 1, 2012)

Stone-Crosby (aunt) brought this action in Fulton County Superior Court seeking custody of her niece and nephew orphaned by the murder-suicide of her parents. Twelve days later, Mickens-Cook (paternal grandmother) (herein referred to as grandmother) moved to intervene and filed an answer to the petition. On the same day she also filed a deprivation petition in Fulton County Juvenile Court and testamentary guardianship in Probate Court. She moved to dismiss the Superior Court action for lack of jurisdiction. The Superior Court denied the motion, but granted the grandmother's motion to intervene. There was an investigation by Social Services and a hearing was held and the Court awarded custody to the grandmother. The aunt appeals and the Court of Appeals affirms.

The aunt appealed, arguing among other things, that the Superior Court lacked jurisdiction to hear the custody matter. The aunt cites no statute expressly providing for jurisdiction of the Superior Court over custody when both parents are deceased. The Georgia Constitution provides that the Superior Court shall have jurisdiction in all cases except as otherwise provided in this Constitution. The Superior Courts have original jurisdiction over contests of permanent child custody in the nature of habeas corpus between parents, parents and third parties or between parties who are not parents. It is also true that the Superior Court's jurisdiction to hear custody matters are concurrent in certain circumstances with the Juvenile

Court but that only occurs when the issue is transferred by proper order of the Superior Court. The Juvenile Court has exclusive jurisdiction when the child is alleged to be deprived or when termination of parental rights is sought except in connection with adoption proceedings in which the Superior Court also has concurrent jurisdiction. But, when a termination petition is brought in Juvenile Court as a disguised custody matter, it is not within the court's discretion to take jurisdiction.

In determining the issues of competing jurisdictions, this Court has repeatedly applied the principal that where common law courts have concurrent jurisdiction, the first court taking jurisdiction will retain it. In the past, we have held that the Superior Court lacked jurisdiction because the Juvenile Court had already exercised its concurrent jurisdiction. Here, in contrast, the custody action in Superior Court was filed before the action in Juvenile and Probate Court.

The aunt also argues that jurisdiction was proper in the Probate Court because of its statutory authority to order a Guardian for the children. The aunt cites *Zinkhan v. Bruce*, but in *Zinkhan*, the deceased parents' will nominated a testamentary guardian under O.C.G.A. § 29-2-4(b) and the Guardian had filed a request for letters of testamentary guardianship and the Probate Court had issued letters to the Guardian. Only then did the opposing parties file a petition for custody in the Superior Court. We held that this collateral attack on the guardianship was improper when the Probate Court properly had jurisdiction and the opposing parties could have moved to revoke or suspend the letters of testamentary guardianship. In this case, both parents died without a will and the Probate Court action was not filed until after the Superior Court custody action was pending and the common law rule is that the court first taking concurrent jurisdiction will retain it unless some good reason is shown for equitable interference. ***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.

Past Family Law Section Chairs

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
Robert D. Boyd	2000-01
H. William Sams	1999-00
Anne Jarrett	1998-99
Carl S. Pedigo	1997-98
Joseph T. Tuggle	1996-97
Nancy F. Lawler	1995-96
Richard W. Schiffman Jr.	1994-95
Hon. Martha C. Christian	1993-94
John C. Mayoue	1992-93
H. Martin Huddleston	1991-92
Christopher D. Olmstead	1990-91
Hon. Elizabeth Glazebrook	1989-90
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
C. Wilbur Warner Jr.	1983-84
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

2012 Family Law Institute Photos

Ritz Carlton, Amelia Island, Fla.




















Family Law Section
State Bar of Georgia
Randall M. Kessler, co-editor
Marvin Solomiany, co-editor
104 Marietta St., NW, Suite 100
Atlanta, GA 30303

Presorted
Standard Mail
U.S. Postage Paid
Atlanta, GA
Permit No. 1447

2012-13 Family Law Section Executive Committee

Kelly Anne Miles, Chair
kmiles@sgwmfirm.com

Jonathan Joseph Tuggle, Vice Chair
jtuggle@bcntlaw.com

Rebecca Lin Crumrine, Secretary
rcrumrine@hhcmfamilylaw.com

Randall Mark Kessler, Immediate Past Chair / Co-Editor
rkessler@ksfamilylaw.com

Marvin L. Solomiany, Co-Editor
msolomiany@ksfamilylaw.com

John Lind Collar, Jr., Legislative Liaison
jcollar@bcntlaw.com

Regina Michalle Quick, Member-at-Large
rmqpc@mindspring.com

Kelley O'Neill-Boswell, Member-at-Large
kboswell@watsonspence.com

Scot Kraeuter, Member-at-Large
scot@jkdlawfirm.com

Gary Patrick Graham, Member-at-Large
gary@stern-edlin.com

Daniel Bloom, Member-at-Large
dan@prfamilylaw.com

Ivory Tertenia Brown, Member-at-Large
ivorybrown@aol.com

Tera Lynn Reese-Beisbier, Member-at-Large
tera@rbafamilylaw.com

Leigh Faulk Cummings, Member-at-Large
lcummings@wbmfamilylaw.com

Sean Michael Ditzel, Co-Chair of Family Law Committee of YLD
sditzel@ksfamilylaw.com