

The Family Law Review

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



Movin' on Up: Issues in Relocation Litigation



PLUS:

A TRIBUTE TO JOHN C. MAYOUE
HOME SWEET GEORGIA HOME

BRACKETING FINANCIAL AND EMOTIONAL ISSUES IN DOMESTIC MEDIATIONS
SELECTED BANKRUPTCY ISSUES FOR THE FAMILY LAW PRACTITIONER

Editors' Corner

By Kelley O'Neill-Boswell
kboswell@watsonspence.com



I thank the Executive Committee for giving me the opportunity to act as Editor, what a privilege. I hope you all find this edition of the Family Law Review full of useful information. Thanks to Marvin Solomiany for an incredibly successful Institute and to

all those that shared their expertise with us. We would like to include articles reflective of the issues and events throughout Georgia so please send me any article you would like to contribute to our next edition. *FLR*

Editor Emeritus

By Randy Kessler
rkessler@ksfamilylaw.com



Wow, how time flies. We are nearly at the end of 2016 and time does indeed roll on. This year will unfortunately again be marked by tragedy in our section, most recently the passing of the icon of divorce and family law in Georgia, John Mayoue.

John was a friend, a mentor, and always consistently professional. He will be missed terribly and has left a true void in the practice of family law in Georgia. I hope it may serve as a reminder to cherish each day and to enjoy time spent with loved ones. I wish each of you a very fulfilling rest of the year and I look forward to seeing all of you again at future seminars and of course, at the Family Law Institute in Amelia Island next May. *FLR*

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

If you would like to contribute an article or have an idea for content, please contact Kelley O'Neill-Boswell at kboswell@watsonspence.com

Inside This Issue

FROM THE CHAIR.....	3
A TRIBUTE TO JOHN C. MAYOUE MARCH 27, 1954–AUG. 2, 2016	4
2016-17 EDITORIAL BOARD FOR THE FAMILY LAW REVIEW	5
HOME SWEET GEOGIA HOME	6
BRACKETING FINANCIAL AND EMOTIONAL ISSUES IN DOMESTIC MEDIATIONS.....	7
SELECTED BANKRUPTCY ISSUES FOR THE FAMILY LAW PRACTITIONER.....	9
REFORMING A BERT BELL/ PETE ROZELLE QDRO?.....	12
DFCS AND HIGH CONFLICT CUSTODY CASES.....	14
PAST FAMILY LAW SECTION CHAIRS	15
WHY BEING A GOOD DIVORCE LAWYER REQUIRES EMPATHY — AND OBJECTIVITY	16
FEDERAL INCOME TAX DEPENDENCY EXEMPTIONS IN DIVORCE: WHO GETS TO CLAIM JOHNNY?	18
LEGITIMATE CONFUSION: THE END OF ADMINISTRATIVE LEGITIMATION IN GEORGIA	22
MOVIN' ON UP: ISSUES IN RELOCATION LITIGATION	24
CASELAW UPDATE	28
2015-16 FAMILY LAW SECTION EXECUTIVE COMMITTEE.....	36

From the Chair

By Marvin Solomiany

msolomiany@ksfamilylaw.com



It seems like yesterday that we were participating in the Family Law Institute's return to the State of Georgia at Jekyll Island. The attendance and participation of over 600 attorneys and Judges vastly exceeded our expectations and I want to thank

everyone who made it possible. Based on the success of the event, I am happy to inform you that the Family Law Institute will be returning to Jekyll Island in May, 2018 with the 2017 Institute taking place at the Ritz Carlton in Amelia Island, Fla. from May 18 - 20, 2017. If your firm would be interested in sponsoring the 2017 FLI, please email Kyla Lines, chair of the Sponsorship Committee at kyla@rblfamilylaw.com.

Our Section continues to provide great benefits to our members. Just this past year, the Family Law Section was awarded the prestigious "Section of the Year" under the leadership of our past chair, Regina Quick. We just completed our two Nuts and Bolts Seminars under

program chair Scot Kraeuter in Savannah and Atlanta. Both Seminars were well attended with the seminar in Atlanta having more than 180 participants. The Executive Committee has made it a goal this year to try to increase the events offered to our members, ranging from additional seminars and social events. As such, please pay special attention to the emails from our Section throughout the year informing you of such events.

For those of you seeking to become more active in the Section, there are plenty of available opportunities. We are always looking for articles for the Family Law Newsletter as well as attorneys who are willing to participate in our webinar series. Other opportunities range from assuming more active roles in the legislative committee, child support worksheet hotline and our diversity committee.

I encourage you to contact me directly if you are interested in increasing your participation in our great Section. *FLR*

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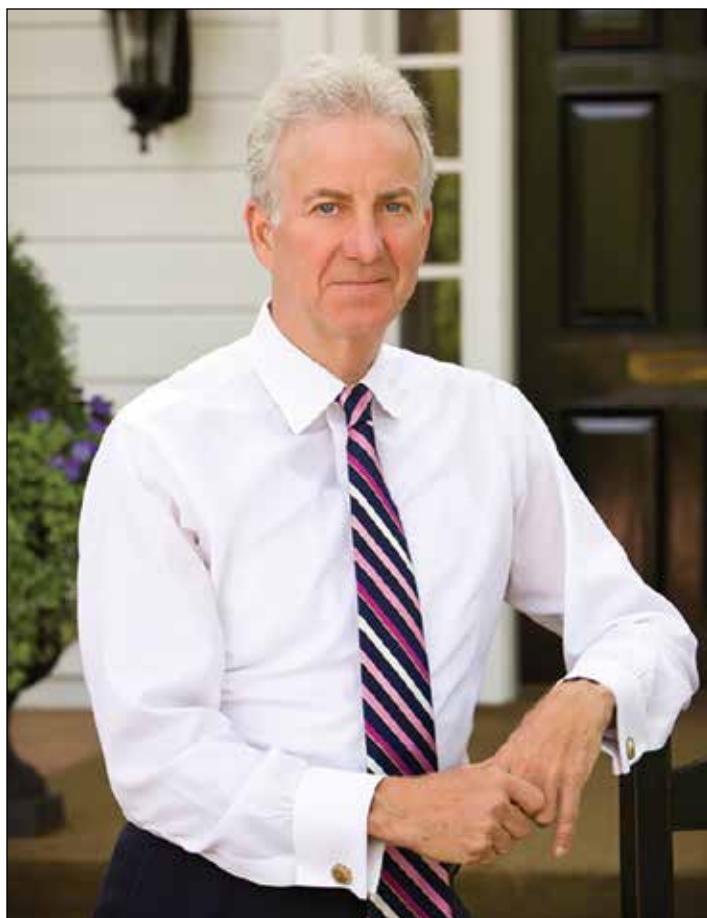
A Tribute to John C. Mayoue

March 27, 1954–Aug. 2, 2016

By Dennis G. Collard

John Mayoue was the most public, private person I've ever known. Frankly, he was a hard man to get to know. He selected what he allowed us to see, every word and action the result of careful consideration. He eschewed trivia and rarely made small talk.

Over the years, many people have asked me what it was like to work for John and I think the curiosity was not about the mechanics and policies of his office, but about the man himself. Throughout the thirteen years I knew him, I asked him for one-on-one advice about virtually every major decision in my life, and that is when I got to know John, the person. During these talks, he let his guard down, an exception to the formality that he usually preferred. In a way it was an honor. It was only in those rare instances that John shared personal facts with me, and even then only to the extent he thought it would help. He listened before speaking, laser focused on the question, and never interrupting. He showed incredible kindness and compassion. And I could trust that he would never share what we discussed with anyone. The rarest of qualities, John was a true confidant.



In public, John had an incredible presence and an undeniable charisma. He was not just our resident litigator-in-chief, he was our professor and the gentleman among us. John always wanted to learn more and do better. And he, sometimes forcefully, passed those attributes down to us. The last time we spoke in person, I told him that I thought he was somewhat of an idealist. At first he was surprised but thought about it for a moment, and said "a pragmatic idealist."

Our pragmatic idealist was not just one of the finest family law attorneys in Georgia, he was one of the finest attorneys in the nation, who just happened to practice family law. And that was our good fortune. In my view, John was as civilized as his opponents allowed him to be. When there was a fork in the road, one path leading toward raised voices and personal attacks, he took the road less traveled, a methodical, thorough, often quiet approach to litigation, always with a view of the long game. For his opponents, that meant a lot of work. And that was one of the keys to his success. All of the noise was of little use to him.

I remember a call when opposing counsel raised his voice at John. John quietly said, "thank you very much" and gently hung up the phone, then looked at me and said "let 'er rip." And that is how it was working for John. In fact, in the thirteen years I knew him, I never once heard him raise his voice. I knew he was tempted at times but would simply disengage until the moment passed. Rather, it was the intensity of his words that conveyed his ideas. In that way, and in many others, John was exceptionally self-disciplined. John never took on the personalities of his clients, rather he found a balance between detached objectivity and zealous advocacy.

Because John was so measured in his interactions, simple praise like "good job" or a thumbs up in court meant the world to us. One such instance was when I moderated the first Family Law Institute presentation about same sex issues, a topic very personal to me. He knew that I was apprehensive about how the subject would be received. As he listened from the audience, he wrote a letter telling me how proud he was of me. Receiving that letter days later was all the encouragement I needed.

I think that all of us who worked for John had similar feelings about him. To be blunt, John was a perfectionist, not in an arrogant or self-aggrandizing way, but because it was simply not in his nature to be any other way. He was demanding, but never required more from his people than he gave himself. In that way, he led by example, without exception. Working for John was a

complex existence. He was very formal. He pushed us hard. He did not mince words. He knew what we were each capable of and that was the standard from which he would not allow us to deviate.

John was not ostentatious or flashy. He never bragged of wealth or experiences, nor of his many professional accomplishments. He never acted as if he were entitled to the respect of others. Rather, he earned it by the careful way that he handled himself and his work. There was a confidence about John that some may have seen as smugness. But there was also humility. Everyone knew about his high profile clients. They were interesting to him but he showed them no more attention than other clients with complex legal issues. His office was completely devoid of any indication of who he had met or known. He drove an average car to work and wore the same, perfectly fitted suits year after year. He wore a coat and tie to the office every day. There was a consistent dignity about him that was very reassuring.

John was so devoted to work that he rarely took vacations, preferring to volunteer at Camp Sunshine (for children with cancer) each year. One year we pestered him about taking a vacation until he finally relented and went to England. While there, the Chattahoochee River flooded his house. Which of us would break the news to him was a profound conundrum and we never suggested that he take a vacation again.

John had the sharpest of minds coupled with a true intellectual curiosity. He did not just want to know the law, he saw the law as a representation of who we want to be as a society. And so, we have not only lost our litigator in chief, but our professor. He often said that he enjoyed learning something new every day and encouraged us to “stay close to the law.” Those words will always resonate with me.

John never rested on his laurels. He attacked work with a relentless fervor that inspired the firm and required our constant diligence. John’s stamina put lawyers half his age to shame. He was usually the first into the office and often the last to leave. Spending all day at work, eating at his desk, leaving in the evening to exercise, which he did religiously, and returning to the office afterwards. We had some of our best talks in those evenings when he shared kernels of wisdom with me as we walked to our cars.

John had a dry sense of humor. I remember a good laugh I got out of him telling the story of the first time he sent me to court solo. After hearing the complexity of the case in chambers, the senior judge was unimpressed with me, looked directly at our client, and said, “I think you need to see John Mayoue.”

John was not a show off, but he could dazzle an audience. The first time I saw him in court is something I will never forget. His dismantling of witnesses on cross-examination was so thorough that it would make me uncomfortable, and I was on his team!

John was a master of words, had an unparalleled command of law and facts and was lighting fast on his feet. When preparing for trial, he would literally take boxes of material home where he would go into hiding for days. When he emerged, he knew every fact, every document, every argument. He was a real force to be reckoned with, and I think reading this from the great beyond, he would agree with that sentiment.

John left an enduring charge to “do better.” That was essentially the theme of his life. And because of that, to whatever highly debatable extent I am a good attorney, I owe it largely to John.

We have lost the best among us, our gentleman scholar. John’s passing has left an irreplaceable hole in the fabric of our family law community. Personally, I’ve lost a towering figure who was larger than life and solid as granite. He was my mentor, my friend, and in some ways a father figure. I am so grateful that I told him so before he died and I will always treasure his response.

Cheers to you John, for a life well lived. It was our privilege to have known you. *FLR*



Dennis G. Collard is a founding member of Collard Shockley LLC, specializing in complex divorce and family law litigation in the metropolitan Atlanta area. He also serves as private mediator and arbitrator. He is an honors graduate of the Florida State University College of Law. He can be reached at (404) 249-0422, Dennis.Collard@CSFamilyLawyers.com and on the web at www.CSFamilyLawyers.com.

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Home Sweet Georgia Home

By Katie Kiihnl Leonard

For the first time in more than 15 years, the State Bar's Annual Family Law Institute has returned to Georgia. Institute Chair Marvin L. Solomiany, along with Section Chair Regina Quick and the 2015-2016 Executive Committee, were dedicated to bringing the Family Law Institute back within state lines. Instead of the traditional Amelia Island and Destin, Florida locations, the 34th Annual State Bar Family Law Institute was held at the brand-new Jekyll Island Convention Center. With more than 600 attendees, it was the most successful and well-attended Family Law Institute in State Bar history.

From May 18— 21, 2016, Institute attendees were treated to lectures featuring a wide variety of family law topics, speakers and after the sessions, a host of extracurricular activities. One of the most notable attributes of this Institute was the interactive nature of the sessions. On the first day, after attending the First Timer's Breakfast, where first-time attendees could meet members of the Executive Committee and the judiciary, attendees enjoyed interactive fact patterns that paired Superior Court Judges and the audience to discuss a wide variety of issues that arise in family law cases. Judge Leah Ward Sears, Judge Stephen Dillard and Judge William M. Ray II from the Georgia Court of Appeals presented a panel discussion on the family law bar's transition to exclusive appellate jurisdiction in the Court of Appeals. The Judges engaged in open discussion with the audience, addressing various questions and concerns about volume and attention to family law cases now that the Supreme Court's Pilot Project has ended. In addition, attendees were entertained by the keynote remarks of former State Governor Roy Barnes, who shared his lessons and experiences from his successful practice of law. As a special feature to the 34th Annual Family Law Institute, following the first day of sessions, attendees had the option of participating in "break out sessions" where they could work interactively with members of the Georgia Child Support Commission or fellows in the American Academy of Matrimonial Lawyers to address issues in their current cases and everyday practice.

The second day of the Institute treated audience members to a special opportunity to observe a live session of the Court of Appeals of Georgia, which held oral argument on pending cases for our observation. Attendees enjoyed additional in-depth topics including the intricacies of drug testing, a panel of renowned psychologists, and divorce issues facing service members. In addition, day two featured keynote remarks from Attorney General Samuel Olens, who spoke to the audience about his programs for the year. Attorney General Olens' spoke to the importance of fighting human trafficking, an issue plaguing our State. The Attorney General also encouraged our active participation in his annual food drive, the Legal Food Frenzy, which aims at raising hundreds of thousands of dollars to feed hungry children in Georgia. As with the first day, the second day provided optional break-out sessions on law firm management, marketing and additional child support worksheet training. The second day closed with the golf tournament, the YLD Beach Party, and the Section Reception, where attendees were entertained by our favorite band, the Standard Deviations.

In closing out the Institute, the third day featured informative lectures on financial issues, conflict management, and tips for metro-Atlanta lawyers who appear before non-metropolitan judges. Attendees on the third day heard keynote remarks from Xernona Clayton, an American Civil Rights Leader in Atlanta. The third day also continued the Institute's "interactive" theme by conducting an interactive session on family law evidentiary issues led by Prof. Paul S. Milich.

Over the course of the three-day Institute, attendees were offered an opportunity to enjoy the strong collegiality in the Family Law Bar, along with experiencing the benefits of the Institute returning to the state of Georgia. Attendees had the chance to stay at a variety of new resorts, all within a short distance of the Jekyll Island Convention Center, and enjoy new restaurants, shops and entertainment. Most importantly, the 34th Annual Family Law Institute brought tremendous financial resources to a developing area of our State. While we look forward to meeting again in Amelia Island for the 35th Family Law Institute, we are excited about the prospects of hosting the largest State Bar CLE Institute in Georgia in future years. *FLR*



Katie Leonard is a partner with the law firm of Boyd Collar Nolen & Tuggle, LLC in Atlanta. She focuses her practice on domestic relations actions, including simple and complex actions for divorce, support and child custody. She also serves as a member-at-large on the State Bar of Georgia

Family Law Section's executive committee.



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Bracketing Financial and Emotional Issues in Domestic Mediations

By Andy Flink

Bracketing is a strategy used in mediation to set a range of negotiation that establishes a high and low where parties will agree to continue settlement discussions. For instance, let's say that two parties are a mere \$500,000 apart on alimony. While one parties' opening offer of \$550,000 (in this case the Plaintiff) was unreasonable, so was the Defendant's counter of \$50,000. Now that everyone is keenly aware that neither side is willing to engage in the process, a tactic that I'll suggest after gathering more information is to provide a range by offering a starting figure for both sides, a mediator's proposal which includes a minimum and maximum bracketed value. In this particular real life case, I put the range between \$100,000 and \$300,000. This can jump start negotiations on this issue and move the settlement zone into a more realistic range. The movement is possible because I am evaluating the positions from a neutral stance and each side certainly welcomes my ideas much more than if offered by the person in the other room. We were originally apart by \$500,000 but that figure is now \$200,000.

However, with so many moving parts in a domestic mediation (custody, children, a lifetime of memories both good and bad), it is impossible to place all issues within a numerical range of settlement. While bracketing can be effective when discussing finances, it is an imperfect format where emotions play a huge role. What do you do when one or both parties are so immersed in the emotional aspects of the conflict they do not see numbers or ranges, they only see obstacles? When we can't rely on logic and have to consider addressing these hurdles, a very effective method I suggest is to remind everyone that there are many different phases of negotiation. By asking your client to focus on each specific area on its' own and what it will take to reach an accord you are helping them establish individual ranges. Don't allow clients to focus on a myriad of issues at the same time. Keep the spotlight on the issue being discussed. Here are some ways you can support your client through the emotional aspects, to help them understand how to establish a settlement zone and bracket emotions, one area at a time.

1. **Investigation and Introduction:** Both parties' arrived at the mediation with a set of expectations in mind that individually would be reasonable to settle the case. You certainly were clear about your own position, and perhaps you knew what your bottom line was; however, at this point in the session did you remember to consider and hear what the other side wanted? Sometimes we get so bogged down in our position that we forget it takes two to negotiate. Bargaining requires give

and take, and your position now shouldn't be the same as where you were to begin the day. Review where you started and compare it to where you are. Have you made any movement? Listen to what the other side wants. Don't simply dismiss it because you didn't like their proposal.

2. **Determine your BATNA:** What is your best alternative to a negotiated agreement? What does going to court look like? Does your client really understand the toll litigation can take, both financially and emotionally? If you began the session with the intent of reaching an agreement, your client needs to understand and evaluate the cost of not settling. Now is the time to talk them through their "let's just go to court so I can get what I believe is right from the judge" stance.
3. **Clarification and Justification:** Are you and the mediator articulating your position and the

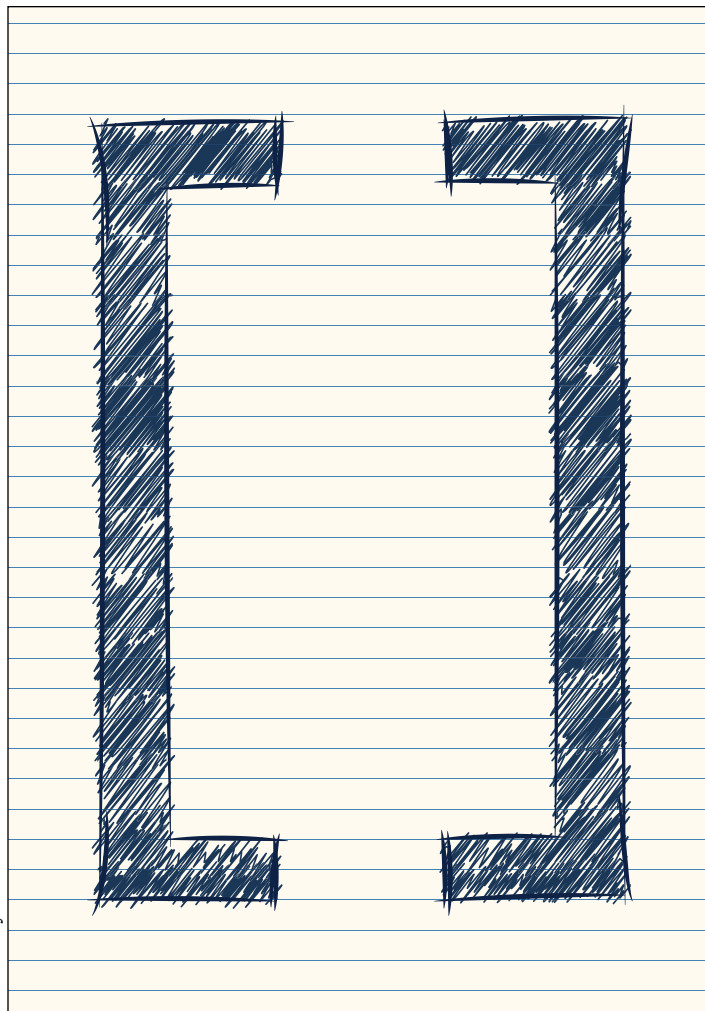


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“why” behind your requests? Sometimes we are so emotionally thrown by the other person’s demands that we justify our response with rapid judgement and not by careful evaluation. Break it down into smaller pieces and remind your client that this is a process. The complexion, leverage and tone of the session will be constantly changing throughout the day if we are progressing towards settlement.

4. **Compromise and Flexibility:** The rigidity that comes with parties’ positions and expectations is a constant in most mediations. At the same time both sides want and need to settle. The problem is that you cannot “get there” unless you are willing to compromise and are also able to be flexible. Remind your client that this is the pinnacle of movement in a mediation. If your client is willing to move, your client may ultimately achieve more of what they want and need.
5. **Closure:** You are present in mediation with the intent to get a deal finalized. Since it can only work if both sides agree, this has to occur before the process of moving towards closure can begin. Restate to your clients that what they are feeling and going through will only change if they can get this phase of the process accomplished to begin the healing process.

It is the mediator’s responsibility to help the clients and attorneys bracket positions. Usually, if this is successful but we still have not reached an agreement, look for that key moment in the mediation when the cost of continued litigation is greater than the cost to settle. Going back to the alimony example, the parties were ultimately \$10,000 apart but were each too stubborn to let the other side “win.” I reminded both clients that at this juncture the cost of litigation would easily be double the cost to settle. Explain to your client that by reaching agreement, regardless of who relented at the final offer, they **both** win by crafting an agreement that’s acceptable. Of course we all know that getting to the final written agreement from there is fairly straightforward (most of the time)! *FLR*



Andy Flink is a trained mediator and roster member of the 9th District, Cobb, DeKalb and Fulton County Superior Court ADR programs. 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 the components necessary to help parties reach comprehensive terms in financial and non-financial matters.

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

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Selected Bankruptcy Issues for the Family Law Practitioner

By Will Rountree

There are five types of bankruptcy cases, each designated by the chapter of the Bankruptcy Code under which the case is filed: A Chapter 7 case is a straight liquidation, which can be filed by either a business or a consumer; Chapter 11 is a reorganization available to both businesses and consumers, although utilized mostly by businesses; Chapter 13 is a consumer reorganization, or payment plan; Chapter 12 is specific to family farmers and fishermen; Chapter 9 is specific to municipalities; and Chapter 15 covers cross-border cases involving debtors and assets located in multiple countries. The relevant chapters for clients generally are Chapters 7, 11, and 13:

Chapter 7

A Chapter 7 case is a straight liquidation, which can be filed by either a business or a consumer. Individual debtors may be subjected to a “means test” to determine income eligibility for Chapter 7. However, if the majority of the individual’s debt is “non-consumer debt,” then the means test is not applicable and the individual will qualify for Chapter 7 regardless of income. Examples of “non-consumer debt” include personal guarantees given to creditors of a debtor’s business, credit cards or home equity loans used to fund a business, and even personal income tax debt.

Once a Chapter 7 case is filed, a trustee is appointed from the local standing panel of trustees to administer the case. The trustee becomes the owner of all property of the Debtor, except property allowed as exempt in individual cases. Georgia has “opted out” of the federal exemption scheme provided in the Bankruptcy Code; the Georgia exemptions are encoded at OCGA Section 44-13-100. The vast majority of Chapter 7 filings are “no asset” cases, meaning that the trustee does not administer any assets or make any distributions to creditors. A knowledgeable lawyer generally will not file a case under Chapter 7 if the debtor’s equity in any asset exceeds the amount that can be exempted. Most “asset” cases result from the trustee exercising powers to avoid preferences, fraudulent transfers, etc. The typical “no asset” Chapter 7 case lasts approximately 5 months. “Asset” cases can last many years.

Chapter 13

In a Chapter 13 case, a debtor proposes a payment plan to resolve all or part of the debt from future income over a period of three to five years. The case is administered by a Chapter 13 Trustee, a quasi-governmental office that accepts payments from the debtor, makes distributions to creditors, and generally oversees the case. If the debtor is able to get a plan confirmed at the beginning of the case and complies with all payments and other plan provisions

over the three-to-five year life of the plan, then the debtor receives a discharge upon completion. Chapter 13 provides for a “super-discharge,” whereby a debtor can discharge categories of debt that cannot be discharged under other Chapters, such as non-support obligations owed to an ex-spouse. *See infra*. NOTE: the Supreme Court held recently that a creditor is bound by a confirmed Chapter 13 plan where the creditor fails to object to confirmation, even if the plan violates statutory protections to which the creditor is clearly entitled. Therefore, it is extremely important that creditors review the Chapter 13 plan and file a timely objection to protect their interests.

Chapter 11

A Chapter 11 case may be filed by a business, or by an individual whose aggregate secured and/or unsecured debt exceeds the respective limits for filing a Chapter 13 reorganization – currently \$1,149,525 secured and \$383,175 unsecured. Unlike a Chapter 7 or 13 case, a trustee is not automatically appointed on the filing of the bankruptcy petition. Rather, there is a presumption that a debtor should remain in control over the administration of the estate. Upon the filing of a Chapter 11 case, the Debtor becomes a “Debtor-in-possession” and continues to operate its business through pre-petition management under court supervision, unless and until the court appoints a

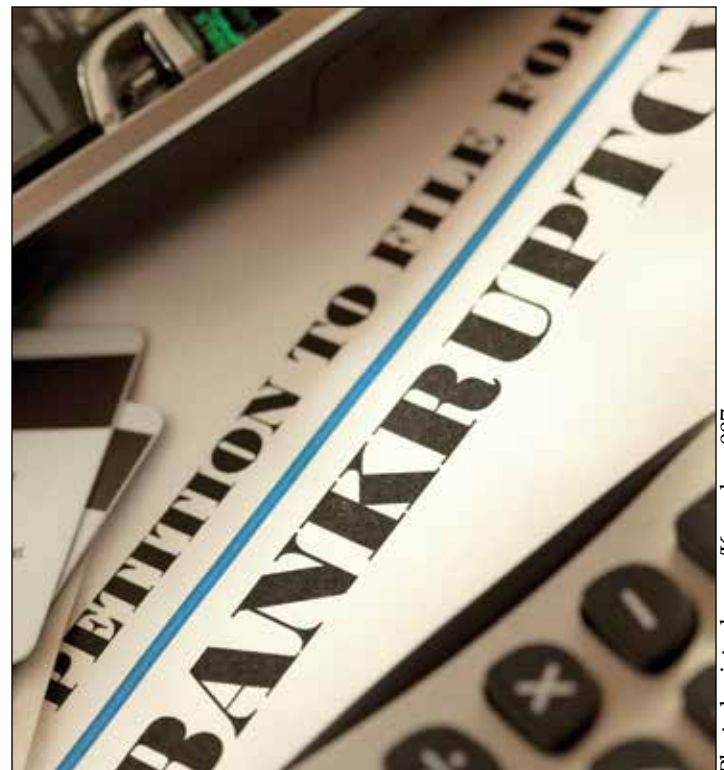


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Chapter 11 trustee for cause. A Chapter 11 case may be filed to attempt reorganization of the Debtor's business (or personal finances, in the case of an individual) or to attempt an orderly liquidation. In the context of liquidation, a debtor's principals will often choose Chapter 11 over Chapter 7 so as to retain control of the liquidation process and to maximize the value of the estate assets in an orderly wind down of the business. This is a particularly attractive notion to principals who are personally guaranteed on the business debts, and have a personal interest in generating dollars for creditor claims. One of the principal uses of Chapter 11 is to allow the Debtor to sell real or personal property free and clear of liens, with liens attaching to sale proceeds in order of priority. The sale of estate assets free and clear of liens does not require confirmation of a plan, but merely an Order of the Court granted after 21 days' notice to parties in interest. As a practical matter, sales free and clear of liens are utilized far more often than plans of reorganization and liquidation.

A. The Automatic Stay

The most basic element of bankruptcy is the automatic stay of 11 U.S.C. Section 362. When a bankruptcy case is filed, the automatic stay goes into effect immediately to act as an injunction against almost all collection actions against the debtor. However, there are some important exceptions to the automatic stay, particularly in the family law context. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") added amendments limiting the application of the automatic stay in a number of family law matters. Section 362(b)(2) now provides that the automatic stay does not act as an injunction:

- (A) of the commencement or continuation of a civil action or proceeding--
 - (i) for the establishment of paternity;
 - (ii) for the establishment or modification of an order for domestic support obligations;
 - (iii) concerning child custody or visitation;
 - (iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or
 - (v) regarding domestic violence;
- (F) of the collection of a domestic support obligation from property that is not property of the estate;
- (G) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;
- (H) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act [42 USCS § 666(a)(16)];
- (I) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act [42 USCS § 666(a)(7)];
- (J) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act [42 USCS § § 664 and 666(a)(3)] or under an analogous State law; or
- (K) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act [42 USCS § § 601 et seq.];

11 U.S.C. Section 362(b)(2).

Some of these exceptions to the automatic stay are fairly straightforward, but others can be quite ambiguous. For instance, there is frequently considerable disagreement over whether a particular obligation constitutes a "domestic support obligation" as defined under the Bankruptcy Code. *See infra*. Whether particular property constitutes property of the bankruptcy estate might also require complex analysis. A bankruptcy court can impose sanctions, including actual and punitive damages, for a violation of the automatic stay. Therefore, it is recommended that a creditor consult bankruptcy counsel before assuming that any of the above-listed exceptions apply.

B. Domestic Support Obligations.

The BAPCPA defined the term "domestic support obligation" in Section 101(14A) of the Bankruptcy Code:

(14A) The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for



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relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is--

- (A) owed to or recoverable by--
 - (i) (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
 - (i) (ii) a governmental unit;
- (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
- (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of--
 - (i) a separation agreement, divorce decree, or property settlement agreement;
 - (ii) an order of a court of record; or
 - (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
- (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. Section 101(14A).

Debts qualifying as domestic support obligations ("DSOs") are subject to special treatment in a number of bankruptcy contexts. As discussed in the previous section, there are exceptions to the automatic stay for the collection of DSOs. Moreover, DSOs cannot be discharged under any Chapter of the Code, and must be paid in full in order to confirm a plan under Chapter 11, 12 or 13. DSO arrearages receive first priority claim status under Section 507 of the Code, and the debtor must remain current on post-petition DSO payments under Chapters 11, 12 and 13.

Whether a debt qualifies as a DSO is determined under federal bankruptcy law, though state law can be instructive. The Eleventh Circuit has instructed bankruptcy courts to look to the substance of the obligation to determine whether it is actually in the nature of alimony, maintenance, or support. The labels placed on the obligation by the parties or the trial court are not controlling. The party seeking to establish that a debt is a non-dischargeable DSO bears the burden of proof.

Bankruptcy courts' construction of Section 101(14A) has been inconsistent, but the following factors have been considered in determining whether an obligation is actually in the nature of alimony, maintenance or support:

- Disparity in earning capacities;

- Relative business opportunities;
- Physical condition;
- Future financial needs;
- Educational backgrounds;
- Number and age of children;
- Length of marriage;
- Whether the agreement includes a waiver of support rights;
- Whether payments terminate on death or remarriage; and
- Benefits that each party would have received if the marriage had continued.

When drafting agreements and orders, the family law practitioner should:

- Include a detailed discussion of the factors that were considered in arriving at the award, bearing in mind the evidentiary factors that bankruptcy courts consider under Section 523(a)(5) of the Code; and
- Structure payment obligations to be received directly by the other party and to terminate upon death or remarriage.

C. Discharge of Property Settlements and Other Non-Support Obligations

Prior to the BAPCPA, property settlements owed to an ex-spouse could be discharged under certain circumstances. That can now be accomplished only under Chapter 13. Under the other Chapters of the Code, Section 523(a)(15) now prevents discharge of all debts owed "to a spouse, former spouse, or child of the debtor" and that are "incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit." 11 U.S.C. Section 523(a)(15). It is no longer necessary for a creditor to file an adversary complaint to determine the dischargeability of a debt under Section 523(a)(15).

D. Fee Awards

One issue that frequently arises is whether a debtor can discharge attorney fees that were awarded directly to the non-debtor spouse's law firm. Such fee awards are usually found to be in the nature of support and thus non-dischargeable. Even where the award is found not to be in the nature of support, some courts have ruled the award non-dischargeable under Section 523(a)(15). However, the case law is not consistent on this issue, and counsel should be aware that these types of fee awards can be subject to discharge.

With regard to fees that the debtor owes directly to its own attorney, courts have consistently held that these are not domestic support obligations and are dischargeable. *FLR*

Reforming a Bert Bell/Pete Rozelle QDRO?

By Melody Z. Richardson

Christopher John Doleman, who was inducted into the Pro Football Hall of Fame in 2012, was one of the best and most tenacious right defensive end players in the history of the NFL. Several years after he retired from the NFL, his tenacity on the gridiron manifested itself in line-of-duty orthopedic injuries. As a result, the Bert Bell/Pete Rozelle NFL Player Retirement Plan ultimately awarded Doleman line-of-duty disability benefits in March 2012. Now, having been awarded those disability benefits, years after his divorce, imagine his shock when one-half of those benefits were paid to his former spouse.

The NFL retirement plans have undergone substantial changes, most notably with the addition of the neuro-cognitive disability benefits that were negotiated to settle the National Football League Players' Concussion Injury Litigation class action lawsuit. Additionally, the 2011 Collective Bargaining Agreement between the NFL and the NFL Players Association requires that line-of-duty disability (and all other non-total and permanent disability) benefits be paid from the NFL Player Disability & Neuro-Cognitive Disability Plan after January 1, 2015. Those changes rectify what was probably an unintended consequence of language that the NFL put in its model Qualified Domestic Relations Order (QDRO) form for the Bert Bell/Pete Rozelle NFL Player Retirement Plan prior to the creation of the NFL Player Disability & Neuro-Cognitive Disability Plan. In 2007 when Doleman was divorced, however, those unintended consequences were not foreseen.

Doleman and his former wife agreed to split equally his Second Career Savings, NFL Annuity, and NFL Pension, including the Bert Bell/Pete Rozelle NFL Player Retirement Plan (the Plan). The settlement agreement did not address disability benefits at all.¹ To effectuate the terms of the settlement agreement, a QDRO was entered for the Plan. At the time of Doleman's divorce, all disability benefits were administered through the Plan, including line-of-duty disability benefit payments and total and permanent (T&P) disability benefit payments. Accordingly, the Plan's model form of QDRO provided by the NFL Players' Association included the following provision:

The Alternate Payee is hereby awarded 50 percent of any disability benefits otherwise payable to the Player on or after the date of this order under the Retirement Plan. The Alternate Payee may only receive disability benefits when and if the Player becomes eligible to receive such disability benefits under the Retirement Plan. In the event that the Player becomes ineligible to receive disability benefits, the Alternate Payee's right to receive such benefits will cease. If the Alternate Payee predeceases the Player, the Alternative Payee's disability benefits will revert to the Player during the lifetime of the Player.

That condition regarding future disability benefits was included in the model form of QDRO because if a retired

player was approved for a T&P disability, the Plan paid the retired player the greater of his pension benefit or his T&P disability payment. If the T&P disability benefit was greater, the player received the T&P disability benefit in lieu of the retirement benefit. If that occurred, the former spouse/alternate payee would not receive 50 percent of the anticipated retirement benefits because retirement benefits would not be paid, and, accordingly, the above-quoted language was necessary to protect the former spouse.

Since that provision was included in Doleman's QDRO, the Plan Administrator interpreted the language to include the line-of-duty disability benefits as well as T&P disability benefits. Accordingly, Doleman received only 50 percent of his line-of-duty disability benefit, while his former wife received the other half of the payment each month.

Doleman, the one who actually suffers from the injuries, incurs the medical expenses, has a reduced quality of life and a reduced earning capacity, did not believe that his former wife receiving 50 percent of his line-of-duty disability payments was an equitable result, or that it was consistent with the parties' intent at the time the divorce settlement was reached. Doleman, therefore, filed a Petition for Declaratory Judgment and to Reform or Modify Qualified Domestic Relations Order and for Money Had and Received. Doleman filed his Petition in an effort to rectify what he contended was a mutual mistake in the language of the QDRO which was in conflict with the clear intent of the parties as set forth in their settlement agreement. Doleman argued that the language in the settlement agreement was clear and unambiguous and that the parties did not intend for Ms. Doleman to receive 50 percent of Doleman's line-of-duty disability payments.

Doleman's former wife moved to dismiss the petition on the ground that it failed to state a claim for which relief could be granted and on the further ground that the settlement agreement could not be amended, modified or reformed with respect to the equitable division of the retirement accounts. Doleman successfully defended the motion to dismiss and was ultimately successful in having the QDRO reformed after an arbitration hearing.

Doleman argued that the parties' settlement agreement was clear and unambiguous, and that the mutual mistake occurred in the drafting of the QDRO. The Employee Retirement Income Security Act of 1974 (ERISA)² provides for an exception to the principle that retirement benefits may not be alienated, in that a state court, in a divorce proceeding, may enter a QDRO assigning one spouse an interest (as marital property) in the other spouse's retirement benefits. The QDRO is not part of the Settlement Agreement or Divorce Decree; it is the tool required by ERISA to enforce the parties' agreement and effectuate the court's judgment to divide certain retirement benefits. In fact, the settlement agreement is not a QDRO under ERISA.³

Thus, Doleman contended, he was merely asking that the court enforce the provisions of the divorce decree by modifying or reforming the QDRO (not the settlement agreement) to reflect accurately the intent of the parties as clearly set forth in their settlement agreement. Doleman further argued that he did not seek to modify the equitable division of marital property as set forth in the settlement agreement incorporated into the final judgment and decree of divorce on the ground that “[t]he finality of the divorce decree is not affected by the presence or absence of a QDRO.”⁴ Since Doleman was only seeking to modify the completely separate QDRO, he was not attempting to modify a final judgment. The arbitrator agreed with Doleman and concluded that he was simply attempting to modify the terms of the QDRO to reflect the bargained for exchange by the parties.

Doleman’s former wife argued that Doleman incurred all his NFL injuries during his NFL career during the marriage, and, accordingly, actually earned the right to the disability benefits during the marriage. Doleman countered that it has long been the law in Georgia that “compensation for pain and suffering and loss of capacity is not subject to equitable division as a marital asset.”⁵ The parties’ intent, as clearly set forth in their settlement agreement, was that they were splitting traditional retirement benefits, not disability benefits.

Doleman also argued that because his settlement agreement provided that the parties waived their rights to any property obtained by either of them after the date of execution of the settlement agreement, and he did not obtain the right to receive disability payments until five years after the divorce, regardless of when the injuries occurred, his former wife also waived her rights to receive any disability benefits awarded after the divorce. In addition to the clear waiver of her right to any after-acquired property of her former husband, both parties waived any right to all marital rights and claims except those set forth specifically in the parties’ settlement agreement. Such an unequivocal waiver provision has been held to prevent a former spouse from collecting retirement benefits, death benefits, and IRA accounts, even where the beneficiary designation was never changed post-divorce.⁶

Finally, because the parties’ settlement agreement did not mention line-of-duty disability benefits, the arbitrator agreed with Doleman that the QDRO could be amended to reflect accurately the parties’ intent. Doleman argued that “[t]he controlling principle to be applied when interpreting a divorce decree which incorporates the parties’ settlement agreement is to find the intent of the parties by looking to the ‘four corners’ of the agreement and in light of the circumstances as they existed at the time the agreement was made.”⁷ The circumstances that existed at the time the agreement was made did *not* include that Doleman would receive disability benefits that do not reduce the pension benefits, as he testified at the arbitration hearing.

The arbitration award did not include any damages for money had and received, but other facts and

circumstances may provide a better opportunity to pursue a refund of the funds paid to a former wife of an NFL player. Doleman will be receiving 100 percent of his line-of-duty disability benefit until that benefit expires. If you have a client in a similar situation, the goal should be to move quickly so that the QDRO can be reformed as soon as possible, and your client can receive 100 percent of his line-of-duty disability payments. *FLR*

Melody Richardson is a founding member of Richardson Bloom & Lines LLC) where she practices exclusively family law. Richardson served as a board member of the Family Law Section of the Atlanta Bar Association from 2002-09, when she served as the Chair of that Section. She is a Master in the Charles Longstreet Weltner Inn of Court, where she also serves as the Vice Chair on the Executive Committee.

(Endnotes)

1 The Settlement Agreement provided that:

As an equitable division of property, Wife shall have fifty percent (50 percent) of the Husband’s Second Career Savings, NFL Annuity and NFL Pension (the “Plans”) computed as of the date this Settlement Agreement is executed, together with all losses and gains thereon through the date of division. The division shall be accomplished by the entry of Qualified Domestic Relations Orders (QDRO). Within 30 days of entry of the Final Judgment and Decree, the Husband shall have the QDROs prepared which shall each provide for payment of the Wife’s benefit to commence in the form and at the time in accordance with the terms of the Plans. The parties shall pay for the preparation of the QDROs equally. Said distributions shall be in full settlement of Wife’s claim for equitable division of Husband’s interest in the Plans. Each of the parties shall execute all documents needful or necessary in order to carry out the intention of this paragraph. Each party shall be responsible for and shall indemnify the other party against any financial liability associated with the transfer of funds from said Plans, and shall be individually responsible for any taxes, liabilities or penalties associated with his or her receipt of funds from said Plans. Wife, by and through her attorney, shall have the QDROs entered by this Court. **The Court shall retain jurisdiction over the provisions of this paragraph necessary to effectuate the intent of this paragraph, and shall retain jurisdiction to enforce, revise, modify or amend the QDROs insofar as necessary to establish or maintain the qualifications of the QDROs.**

(emphasis added)

2 29 USC § 1056(d)(1).

3 29 USC § 1056(d)(3)(B)(i)(I). *See also Appleton v. Alcorn*, 291 Ga. 107, 728 S.E.2d 549 (2012)(holding that ERISA does not bar state law claims where the plan administrator has properly paid out the benefits but where the 401(k) beneficiary waived her right to keep the funds under a settlement agreement.)

4 *Mermann v. Tillitski*, 297 Ga. 881, 884, 778 S.E.2d 191, 193 (2015) at footnote 5.

5 *Campbell v. Campbell*, 255 Ga. 461, 462, 339 S.E.2d 591, 593 (1986).

6 *See, e.g., DeRyke v. Teets*, 288 Ga. 160, 702 S.E.2d 205 (2010); *Young v. Stump*, 294 Ga. App. 351, 669 S.E.2d 148 (2008); *Kruse v. Todd*, 260 Ga. 63, 67, 389 S.E.2d 488 (1990). In each of those decisions, the Georgia appellate courts held that even the expectancy interest was “extinguished by release language in the parties’ settlement agreement.” *Young* at 355, 669 S.E.2d at 151.

7 *Mermann v. Tillitski*, 297 Ga. 881, 883, 778 S.E.2d 191, 193 (2015) (citations and punctuation omitted).

DFCS and High Conflict Custody Cases

By Lila Newberry Bradley and Lynn Holland Goldman

A parent who calls a lawyer when Georgia's Division of Family and Children Services knocks on the door is probably in a panic.

Emotions run high during a contentious divorce, and the couple may be battling over who can provide the best home for the children or how much time the non-custodial parent is allowed to spend with the child. One parent may become anxious, angry, and suspicious when the other parent introduces a new romantic partner to the children. Some parents take their anger and frustrations out on the children. Some parents accuse their children's other parent of abuse or neglect. Sometimes a grandparent makes the accusations.

Although DFCS tries to screen out calls arising solely from domestic disputes, allegations of abuse made by either parent or a third party, the state child welfare authority must take all allegations seriously. A report could develop into an ongoing case if allegations of abuse are substantiated. Some cases may not include physical abuse, but there may be allegations of emotional abuse or neglect. DFCS will use its own scoring system to determine which cases it investigates further.

Whether or not the abuse allegations are true, a DFCS case is a very serious matter. Do not take an investigation lightly or underestimate the state's power to determine what it considers best for a child. It comes down to an investigator's judgment call. A lawyer doesn't have to be an expert in custody cases to guide a parent when DFCS gets involved, but it's important to have a basic understanding of how the system works.

Stay calm, focused and in control

Parents naturally will be on the defensive when an investigator starts asking questions, but it is crucial to be respectful and cooperative. Stay focused on the welfare of the child and avoid lashing out at the other parent or whoever is suspected of making the report of abuse. Remind clients to hold their temper when dealing with case workers. DFCS investigators are human. They're overworked, under respected and underpaid. When case workers encounter attitude, they are often inclined to investigate more intently.

A parent under investigation should inform the case worker that the family is involved in a custody dispute and ask for a description of the allegations. The parent should be forthcoming with the DFCS investigator but should not admit to any abuse. It may be helpful to provide investigators with names of people who can be good references for their parenting.

From the beginning, it is important for the parent to take notes on all conversations with DFCS. Advise clients to get the name and contact information of each DFCS person they talk to as well as each person's immediate supervisor.

Understand how an investigation works

A lawyer who gets a call about a DFCS investigation should first know that it is an administrative case, not a court matter. The rules of evidence do not apply. Furthermore, a DFCS investigation is not a criminal investigation, and the parties are not entitled to a Miranda warning.

Case workers and investigators will usually refuse to talk to an attorney directly. It's best for a parent to give his or her side of the story under the advice of attorney, providing evidence and witnesses to back up assertions.

A parent is not required to talk to DFCS or allow the investigator access to the child, but refusal may leave the investigator with no option other than to seek court authorization to remove the child from a parent's care. The best approach is to consult with an attorney immediately and then cooperate with caution. (See DFCS Policy 5.15 for an outline of how the investigator is supposed to respond to uncooperative parents.)

Under DFCS policy, parents are entitled to certain portions of a case record, but DFCS is never supposed to disclose the identity of the person who made the report of abuse or neglect. (See DFCS Policy 2.10, attached, for an outline of the information required to be shared with parents upon request.)

Be prepared for a safety plan proposal

During the course of an investigation and for a period of time following the substantiation of abuse or neglect, DFCS may propose that a parent voluntarily enter into a safety plan, which could mean that a child will have limited contact or no contact with the parent under suspicion until an investigation is done.

For a parent under investigation, however, the request for a safety plan may not feel voluntary because he or she is afraid that the child could be taken away. (See DFCS Policy 5.4 and 19.11, for guidelines on the use of safety plans and safety resources.) DFCS should not instruct a parent to violate a court-ordered parenting plan, but it can and will inform a parent that failure to protect the child from a dangerous parent could result in removal of the child from the home.

A parent facing a request for a safety plan should contact his or her attorney immediately. The lawyer should advise the parent not to sign anything before reviewing it with a lawyer. The lawyer can assist the client in negotiating a safety plan that is strictly limited to protect the child and that has specific time limitations.

See the case from the state's point of view

Always remember that a child welfare case worker is following up on a report that the state is required to

investigate. The job of a DFCS investigator is to determine whether the child is at risk of harm and evaluate whether circumstances warrant monitoring as an ongoing case. (See DFCS Policy 3.2 and 4.2 for an outline of how DFCS makes its intake and safety decisions.)

DFCS is much more cautious with younger children because they have less ability to verbalize concerns. Cases can involve children into the early teens, but in the view of DFCS, the older the child, the more he or she can take care of himself or herself.

Racial and economic factors also may come into play. The vast majority of DFCS cases involve people living in poverty, at lower educational levels and with a disproportionate representation of minority groups. If a parent under investigation doesn't fit that model, he or she needs to be very careful not to give the impression of being above suspicion ("How dare you investigate me?") Accusations of racial and class bias against DFCS may encourage case workers to take extraordinary efforts to prove otherwise.

Know what you can do for your client

When DFCS concludes its investigation the investigator, in consultation with the supervisor, determines whether to substantiate the allegations or unsubstantiate. (See DFCS Policy 5.9 for instructions on how DFCS is supposed to notify the parents of the outcome of the investigations.) A parent can appeal a finding of substantiation through the Office of State Administrative Hearings. (See DFCS Policy 20.2 for an outline of procedures for the OSAH review.)

So how can family law attorneys or other lawyers who are not specialists in child welfare investigations help their clients? They can partner with firms that specialize in the intricacies of DFCS investigations to advise and support the client through the investigation to reduce the chance of substantiation of allegations of abuse or neglect. Attorneys must help their clients understand the process, write emails and letters, show where to cite policy and, most importantly, offer guidance to avoid escalating an already-volatile situation. *FLR*



Lila Newberry Bradley and Lynn Holland Goldman are partners in Claiborne | Fox | Bradley LLC, a boutique law firm specializing in building and securing families through adoption and assisted reproduction. Lila and Lynn maintain a special interest in the legal issues surrounding children in foster care and provide training to foster parents on how the law and the court process can ensure that children's rights and interests are protected. They worked together with the Atlanta Volunteer Lawyers Foundation's Children's Law Programs where they trained



and supported volunteer lawyers in providing pro bono legal representation for children who were in foster care. They often consult with family lawyers whose clients are facing DFCS investigation during the pendency of a custody dispute.

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Why Being a Good Divorce Lawyer Requires Empathy — and Objectivity

By Randy Kessler

LinkedIn recently asked me, and many others to write an overview of whatever “industry” we work in. The following is what I wrote and want to share it with you all.

Family Law as an occupation or an *industry* is not going away anytime soon. And that’s a very good thing. The term *industry* can be horribly misleading as that makes it sound like there is an industry built by lawyers, which is absolutely wrong; it is an industry, if it can be called that, necessitated by the way people end relationships and society’s need or desire to step in and ensure civility. And lawyers, judges, psychologists and others are involved to try to bring closure to a relationship that they did not create or terminate. Without the family law *industry*, there would be chaos, or more chaos. If there is disagreement with this, all we need to do is to ask any gay couple who until last summer could not use the family law *industry* or the rules of divorce to disengage from their partner. They often had little, or very time consuming and expensive, recourse trying to simply establish parental rights, much less visitation with children they had raised. They could not divide marital property they had acquired after years of living together, because they were not allowed to be married.

There are so many misconceptions about divorce and family law, that it is impossible to cover them all. But as divorce lawyers, we often hear comments like “Well the lawyers make the laws so they can profit”. Lawyers do NOT make the laws. Legislators, politicians, elected officials do. Sometimes judges interpret those laws, but lawyers simply argue, advocate, mediate and litigate those laws. Sometimes they argue that the laws themselves are wrong, or unconstitutional. But lawyers do not make the laws.

Generally, what lawyers, particularly family lawyers do, is to try to problem solve. Yes some are better at it than others and some are not good at all. But the goal is to take the problem presented, and to solve it. Lawyers do not create the problem (although certainly there are some lawyers who make problems worse). Good lawyers truly try their best to bring resolution.

So where is the family law *industry* headed? Hopefully forward. Many of my colleagues nowadays got into, or get into this area intentionally. They want to ensure that what happened to them in their divorce or a loved one’s divorce, doesn’t happen again. They want to fix an imperfect system. And that is good. The problem is human nature. Divorce and family law resolution is often complicated by the vast array of human emotions. Those litigating a family law matter often clamor that it is not about money, it’s about.....principle. They often want vengeance for

being wronged (perhaps rightfully so). But the *system* or *industry’s* goal is to resolve the differences so that the parties can move forward and hopefully survive financially and with a quality relationship with their children. Every good lawyer knows that the more parties litigate, the harder it will thereafter be for them to communicate.

So what’s the future of the family law *industry*? I hope it is that more and more conscientious and caring people join the ranks. Human beings will continue to begin and end relationships, to have children, and to have disputes. Without an *industry* to turn to, the law of the land would be “might makes right”. And that is wrong, in a civilized society. *FLR*



Randy Kessler is the founding partner of the 12 lawyer, Atlanta family law firm known as KS Family Law. He has practiced family law for almost 30 years and is a former chair of Family Law Section of the American Bar Association and the State Bar of Georgia. He has authored Family Law books including:

Divorce: Protect Yourself, Your Kids and Your Future; Georgia Library of Family Law Forms; and How to Mediate a Divorce. Kessler also Teaches Family Law Litigation at Emory Law School.



Photo by istock.com/AslanAlphan

Child Support Worksheet Helpline

A Call for Volunteers

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

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

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

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

1. Name: _____

2. Bar Number: _____

3. Office Address: _____

4. Phone: _____

5. Email: _____

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

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

Number

____Interested Volunteer Georgia Bar

*Please email this form to cswgahelp@gmail.com

Federal Income Tax Dependency Exemptions in Divorce: Who Gets to Claim Johnny?

By April L. Stancliff

You have successfully navigated your client through the divorce process. Now, crafting the settlement documents to accurately and fairly reflect the parties' negotiations becomes center stage. As the experienced divorce practitioner knows, not every issue can be dispensed with at the settlement table. Thus, issues not specifically discussed during negotiations can become after-the-fact complications. When the parties cannot agree, the trial court will step in as the final arbiter of the remaining issues. However, one question that frequently arises during this complex process is which parent can claim the minor child(ren) on their federal income tax return?

Many Georgia trial courts faced with this issue struggle with the ability to award a tax exemption to a specific parent. However, the trial court is not empowered with discretion to allocate the exemption to one parent over the other. In Georgia, the seminal case addressing this issue is *Blanchard v. Blanchard*.¹ In *Blanchard*, Mr. Blanchard requested the trial court award him the tax dependency exemption for the parties' two minor children. The trial court declined to do so, arguing the lack of authority to make such award.²

It is within the power of Congress granted under the Sixteenth Amendment to create rules governing taxation and, provided Congress has not overstepped its Constitutional bounds, the trial courts cannot apply its broad powers to frustrate the unambiguous statutory language.³ Congress has the sole authority to tax income, and "the exertion of that power is not subject to state control."⁴ Only when federal law, by express language or by implication, makes its application dependent upon state law, then the state may exercise such control.⁵ Absent this clear expression, "when a state forcibly takes the tax exemption from a custodial parent, with earned income, that parent's income becomes subject to unauthorized tax liability."⁶ Accordingly, equitable considerations that ordinarily fall on the shoulders of state trial courts are inapplicable where the federal tax dependency exemption is concerned.⁸

The *Blanchard* decision was reaffirmed in *Bradley v. Bradley*.⁹ In *Bradley*, Mrs. Bradley was awarded primary physical custody of the parties' minor child. The trial court awarded child support to Mrs. Bradley, and assigned the dependency exemption to Mr. Bradley. In the final order, the Court included a provision that Mr. Bradley's child support would be reduced by \$100 each month if Mrs. Bradley successfully appealed the Court's grant of the dependency exemption to Mr. Bradley.¹⁰ The Court, relying

on *Blanchard*, reinforced the argument that a State court cannot shift the tax dependency exemption away from the custodial parent, and that by doing so, the trial court improperly infringed upon federal taxation authority.¹¹

In order for a party to claim the minor child as a dependent on his or her federal income tax return, the child must be considered a "qualifying child" as defined by the Internal Revenue Code.¹² It is natural to assume that a "qualifying child" is a minor child who is reliant upon a parent for financial support. But for tax purposes, the Internal Revenue Code has carved out specific criteria which must be met in order to claim a child as a tax dependent. Under the Code, the term "dependent" can mean either a "qualifying child" or a "qualifying relative."¹³ For purposes of this article, we look closely at the criteria for determining whether a child is a "qualifying child" for claiming the dependency exemption.

Who is a "Qualifying Child?"

The test for determining who is a "qualifying child" is multi-faceted - each layer overlapping the other. The Internal Revenue Code has provided a succinct list of the requirements for a child to be considered a "qualifying child." The child must 1) have a relationship to the taxpayer, 2) have the same principal place of abode as the taxpayer for more than one-half of the taxable year, 3) meet certain age requirements, 4) who has not provided over one-half of his or her own support for the calendar year in which the taxable year of the taxpayer begins, and 5) one who has not filed a joint return (other than only for a claim of refund) with the individual's spouse for the taxable year beginning in the calendar year in which the taxable year of the taxpayer begins.¹⁴ As discussed in more detail below, if the child meets these requirements, but can be considered the "qualifying child" of more than one person, only one person will be able to claim the dependency exemption.

Relationship Status

Relationship to the Taxpayer. To meet the relationship status requirement, the child must fall within one of the categories of kinship to the taxpayer. Specifically, the relationship to the taxpayer is limited to either a child of the taxpayer or descendant of such a child or a brother, sister, stepbrother or stepsister of the taxpayer or a descendant of any such relative.¹⁵ Adopted children will be treated as your own children for tax purposes.¹⁶

Where is the Child's Principal Place of Abode?

Must have the same principal place of abode as the Taxpayer for more than one-half of the taxable year. The term "abode" is commonly understood as the place where an individual lives. While the Internal Revenue Code does not specifically define "abode," the United States Code defines "residence" as the place of general abode. "General abode" is further defined as a person's principal, actual dwelling place in fact, without regard to the person's intent.¹⁷

A parent will argue that because the child remains with him or her a majority of the year, he or she is entitled to claim the tax dependency exemption. However, simply calculating the number of days to show that the minor child "resides" with one parent for more of the time during the year does not necessarily allow that party to claim the exemption. A child is treated as living with a parent if the child sleeps at that parent's home, whether or not the parent is present, or in the company of the parent, when the child does not sleep at a parent's home (for example, the parent and child are on vacation together).¹⁸

IMAGINE THE FOLLOWING SCENARIOS:

- *Scenario One:* Michael and Jane divorce. Jane has primary physical custody of their 10 year old son, Johnny, and her home is Johnny's primary residence. Jane has a heavy nighttime work schedule; therefore, Johnny lives for a greater number of days, but not nights, with Jane and Michael argues that Johnny lives with him. Jane is still treated as the custodial parent for dependency exemption purposes. On a school day, the child is treated as living at the primary residence registered with the school.¹⁹
- *Scenario Two:* Michael and Jane alternate visitation weeks. Over the summer, Johnny spends six weeks

away at camp. During the time Johnny is at camp, he is treated as living with Jane for three weeks and with Michael for three weeks because this is how long Johnny would have lived with each parent if he had not attended summer camp.²⁰

In most instances, a child will meet the remaining requirements to be considered a "qualifying child." However, this particular requirement of the Code can generate frustration between former spouses. Of important note is the consideration of "absences" by the custodial parent. Legislative intent dictates that temporary absences as a result of special circumstances, such as military duty, illness, vacations, and similar events do not qualify as an "absence" which would extinguish the residency requirement.²¹

Has the child met the age requirement?

Age Requirement. An individual will meet the age requirement to be considered a "qualifying child" if the individual is younger than the taxpayer and who has not attained the age of 19 as of the close of the calendar for the taxable year.²² However, a child can still be considered a "qualifying child" past the age of 19 if the child is a student who has not reached the age of twenty-four as of the close of such calendar year.²³ An exception exists where the child is permanently and totally disabled.²⁴ If, at any time during the calendar year, the child becomes permanently disabled, regardless of the child's age, the age requirements will be deemed to have been met.²⁵

Is the child self-supporting?

Who has not provided for over one-half of their own support. Johnny is 16 and working at the local store. Johnny has earned \$6,000 at his part time job for his own support, while Jane provided \$4,000 for his support. Because Johnny has provided more than half of his own support for the year, Jane cannot claim the dependency exemption for Johnny.²⁶

Has the child filed a joint tax return?

Who has not filed a joint return with their spouse. The final prong in the "qualifying child" analysis is that the child has not filed a joint return (other than only for a claim of refund) with the child's spouse for the taxable year beginning in the calendar year in which the taxable year of the taxpayer begins.²⁷

Johnny, who is now 18, marries his high school sweetheart, Jessie. Johnny and Jessie live in Jane's home all year. Johnny and Jessie both work, and file their income taxes jointly. Because Johnny filed a joint return with Jessie, he will not be considered a "qualifying child" for Jane.²⁸

While continuing to live in Jane's home, Johnny and Jessie both work, but earn very little in wages from various part time jobs. Ordinary taxes were taken out of their pay, so Johnny and Jessie file a joint tax return in order to claim a refund of the withheld taxes. Because Johnny and Jessie are only filing the tax return to claim a refund,



the exception applies, and Johnny will still meet the requirements for a qualifying child.²⁹

Who Can Claim the Tax Exemption?

When both parents argue that each should be entitled to claim their child(ren) for tax purposes, the Internal Revenue Code is the statutory authority upon which to rely. According to the Code, and as discussed above, when more than one parent is claiming a “qualifying child,” such child shall be treated as the qualifying child of the parent with whom the child has resided for the longest period of time during the taxable year.³⁰ Typically, this is the custodial parent.

The Internal Revenue Code defines “custodial parent” as “the parent having custody for the greater portion of the calendar year.” The “noncustodial parent” means the parent who is not the custodial parent.³¹ But what if the parties have a split custodial arrangement, and the minor child(ren) live with both parents an equal amount of time during the year? If parents share custody of the child(ren) equally – meaning each party has the child(ren) for the same amount of time during the taxable year – then the child is the “qualifying child” of the parent with the highest adjusted gross income if the parents claiming the child do not file a joint tax return.³²

When both parents share equal custody of the minor child, and neither parent qualifies as a “noncustodial parent,” the trial court can award the tax dependency exemption to *both* parents. See *Frazier v. Frazier*.³³ In *Frazier*, the trial court awarded joint legal and physical custody of the parties’ three minor children to both Mr. and Mrs. Frazier, with child support being paid to Mrs. Frazier. Both parties were awarded one child each for the tax dependency exemption, and the parties were to alternate years in claiming the third child. Mrs. Frazier appealed, arguing under *Blanchard*, that the trial court erroneously granted both parties the tax exemption because she was the parent with whom the children spent a greater portion of the year.

However, the Supreme Court found that the parties had an equal portion of time with the children, that Mr. Frazier was not the non-custodial parent as defined by the Internal Revenue Code, and therefore the rule in *Blanchard* did not apply.³⁴ The Court reasoned that Internal Revenue Code Section 152(e)(4)(a) [defining custodial and noncustodial parents] did not apply because Mr. Frazier could not be said to be the non-custodial parent, as neither parent had custody of the minor children for a greater portion of the calendar year. Accordingly, the Supreme Court found that the trial court did not err when it awarded the tax dependency exemption of each child to both parties.

Can the Noncustodial Parent Have the Exemption?

A custodial parent has the ability to waive his or her right to claim the federal tax dependency exemption (also known as the “Custodial Waiver Rule”). To waive the right

to the exemption, the custodial parent must sign “a written declaration that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and the noncustodial parent attaches such written declaration to the noncustodial parent’s return for the taxable year during such calendar year.”³⁵

The written declaration can be found in IRS Form 8332 (Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent). The written declaration can be very specific regarding the duration of the exemption. The exemption can be released for one year, for a number of specified years (i.e., if the parents elect to alternate years claiming the child), or a permanent declaration in which the noncustodial parent attaches the declaration to his or her tax return each year.³⁶

The custodial parent can also revoke the written declaration by simply completing the revocation portion of the waiver used to grant the exemption to the noncustodial parent. In order for the revocation to be effective, the custodial parent must give written notice of the revocation to the noncustodial parent in the tax year prior to the year the custodial parent intends to claim the exemption.³⁷ For example, Michael intends to claim Johnny on his 2017 tax return. If Jane intends to revoke the exemption waiver, she must give notice (or make reasonable attempts to notify) of the revocation to Michael in 2016.

If the parties are not divorced, but legally separated, the noncustodial parent can claim the minor child as a dependent if the parents are legally separated under a written separation agreement or lived apart at all times during the last six months of the year, regardless of marital status; the minor child received over half of his or her support for the year from the parents; the child is in the custody of one or both parents for more than half of the year; and the custodial parent signs a written declaration releasing the dependency exemption to the noncustodial parent.³⁸

For those parties who are separated, but the minor child lived with both parents prior to the separation, the custodial parent is the individual with whom the minor child lived for the greater number of nights for the remainder of the year.³⁹

Other Considerations

EFFECT OF THE TAX EXEMPTION ON CHILD SUPPORT OBLIGATIONS

Does the tax dependency exemption affect a party’s income for child support purposes? The simple answer is no. Because the exemption does not lower the payor’s actual gross monthly income, the recipient of the exemption will not be able to modify his or her child support obligation.⁴⁰

Tax Exemptions for Separated Parents

Specific rules apply to parents who are separated and not divorced. When the child can be considered the “qualifying child” of more than one person, the IRS has

provided “tiebreaking rules” to determine which parent can claim the exemption. Ask yourself the following questions to determine who can claim Johnny:⁴¹

- If only one of the persons is the child’s parent, the child is treated as the qualifying child of the parent.
- If the parents file a joint return together and can claim the child as a qualifying child, the child is treated as the qualifying child of the parents.
- If the parents do not file a joint return together but both parents claim the child as a qualifying child, the IRS will treat the child as the qualifying child of the parent with whom the child lived for the longer period of time during the year. If the child lived with each parent for the same amount of time, the IRS will treat the child as the qualifying child of the parent who had the higher adjusted gross income.
- If no parent can claim the child as a qualifying child, the child is treated as the qualifying child of the person who had the highest adjusted gross income for the year.
- If a parent can claim the child as a qualifying child but no parent does so claim the child, the child is treated as the qualifying child of the person who had the highest adjusted gross income for the year, but only if that person’s adjusted gross income is higher than the highest adjusted gross income of any of the child’s parents who claim the child. If the child’s parents file a joint return with each other, this rule can be applied by dividing the parents’ total adjusted gross income evenly between them.⁴²

Conclusion

Divorce and separation trigger numerous tax consequences that should be considered and addressed during the settlement process. Understanding how the dependency exemption works, and which parent is entitled to claim the exemption, can be beneficial to your client. While the tax dependency exemption will typically fall to the custodial parent having the child for the greater portion of the taxable year, the parties can always deviate from the Internal Revenue Code rules by agreement.

This article is intended only to highlight the applicability of the tax exemption credit as it relates to disputes arising between custodial and noncustodial parents. As with any highly specialized area of law, advise your client to seek the expert advice of an accountant or tax attorney with respect to specific tax-related questions and exemptions. *FLR*



April Stancliff is the owner of Stancliff Legal, LLC, where she practices in family law and criminal defense. She graduated Magna Cum Laude from Georgia State University with a degree in Criminal Justice in 2007, and received her Juris Doctorate from Northern Illinois University College of Law in 2011.

(Endnotes)

- 1 *Blanchard v. Blanchard*, 261 Ga. 11 (1991).
- 2 *Id.* at 11.
- 3 *Id.* at 13 (citing *Fears v. United States*, 386 F. Supp. 1223, 1227 (N.D.Ga. 1975).
- 4 *Id.* at 12 (citing *Burnet v. Harmel*, 287 U.S. 103, 110 (1932).
- 5 *Blanchard v. Blanchard*, 261 Ga. 11, 12 (1991).
- 6 However, “[N]either the statute nor case law dealing with the statute make having earned income a prerequisite to entitlement to the [tax] exemption.” *Bradley v. Bradley*, 270 Ga. 488, 489 (1999).
- 7 *Blanchard v. Blanchard*, 261 Ga. 11, 12 (1991).
- 8 *Id.* at 13.
- 9 *Bradley v. Bradley*, 270 Ga. 488 (1999).
- 10 *Id.*
- 11 *Id.* at 488, 489.
- 12 26 U.S.C. § 152(c)(1).
- 13 26 U.S.C. § 152(a).
- 14 26 U.S.C. § 152(c)(1)(A) through (E).
- 15 26 U.S.C. § 152(c)(2).
- 16 IRS Publication 501 (2015).
- 17 26 U.S.C. § 152.
- 18 IRS Publication 504 (2015).
- 19 *Id.*
- 20 For additional examples, please see IRS Publication 504 (2015), Children of Divorced or Separated Parents (or Parents Who Live Apart).
- 21 See “Definition of Qualifying Child for Purposes of the Dependency Exemption.” P.L. 98-369 (effective 2003).
- 22 26 U.S.C. § 152(c)(3)(A)(i).
- 23 26 U.S.C. § 152(c)(3)(A)(ii).
- 24 An individual is permanently and totally disabled if he is unable to engage in any substantial gainful activity as a result of any medical, physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve (12) months. See 26 U.S.C. § 152(c)(3)(B).
- 25 IRS Publication 501 (2015).
- 26 IRS Publication 501 (2015).
- 27 26 U.S.C. § 152(c)(1)(E).
- 28 IRS Publication 501 (2015).
- 29 *Id.*
- 30 26 U.S.C. § 152(c)(4)(B)(i).
- 31 26 U.S.C. § 152(e)(4)(A) and (B); Georgia statutory law virtually mirrors federal law and defines the “custodial parent” as “the parent with whom the child resides more than 50 percent of the time.” See O.C.G.A. § 19-6-15(a)(9).
- 32 26 U.S.C. § 152(c)(4)(B)(ii); See also IRS Publication 504, Qualifying Child of More Than One Person, Tiebreaker Rules (2015).
- 33 *Frazier v. Frazier*, 280 Ga. 687 (2006).
- 34 *Id.* at 688.
- 35 26 U.S.C. § 152(e)(2)(A) and (B).
- 36 IRS Publication 504 (2015).
- 37 *Id.*
- 38 See IRS Publication 504 (2015), Children of Divorced or Separated Parents (or Parents Who Live Apart)
- 39 *Id.*
- 40 See *Frazier v. Frazier*, 280 Ga. 687, 689 (2006).
- 41 IRS Publication 504 (2015).
- 42 IRS Publication 501 (2015).

Legitimate Confusion: The End of Administrative Legitimation in Georgia

By Robert B. Miller

Legitimation is the legal process used by unwed biological fathers to establish their custodial rights. Unfortunately without first “legitimizing” their relationship, fathers who have had a child out-of-wedlock have no custody rights in Georgia. This means that mothers are permitted to make every decision affecting their child’s health and welfare. In the most extreme (though not uncommon) cases, mothers can lawfully deny fathers the opportunity to visit their child until the father has legitimated. In addition to the lack of custodial rights, children born to unwed parents may also find it harder to inherit from their biological father.

Prior to July 1, 2016, the three most common ways for fathers to legitimate in Georgia were:

1. *To subsequently marry the mother* [O.C.G.A. § 19-7-20(c)],
2. *Judicially Legitimate* through the court system [O.C.G.A. § 19-7-22], or
3. *Administratively Legitimate* by signing an “Acknowledgment of Paternity” form and filing it with the Office of Vital Records prior to the child’s first birthday [O.C.G.A. § 19-7-21.1]. Most fathers, if present at the time of delivery, would be provided with this form by hospital staff prior to the Mother and child being discharged.

For obvious reasons, it may not always be practical for unwed parents to *subsequently marry*. Likewise, *judicial* legitimation often results in protracted and expensive litigation. In this context, *administrative* legitimation appeared to be a quick and easy way for fathers to establish their custodial rights and address the harsh legal realities that came with having a child born out of wedlock.

By all accounts, administrative legitimation, which took effect July 1, 2005, was an immediate success. In September 2005, the Department of Human Services (DHS) reported that in the preceding fiscal year—of the 53,000 births reported to unwed parents in Georgia—29,000 fathers acknowledged *paternity* in the hospital. The hope was that fathers would begin to use the same form to not only establish their biology (*paternity*), but also their custodial rights (*legitimation*). Indeed, it appeared to work and DHS reported that in July 2005, alone, 4,250 parents acknowledged *paternity and legitimation*.¹

Unfortunately administrative legitimation unwittingly caused substantially more confusion and issues than it actually solved. The two most notable shortcomings of administrative legitimation were that it did *not* establish

(1) specific parenting time for fathers nor (2) an extra-judicial means of enforcement. Consequently, mothers continued to deny access to legitimated fathers because there was no “court order” requiring them to allow parenting time. Ironically, despite one of the stated purposes of administrative legitimation being that parents could “avoid court,” the *only* redress for administratively legitimated fathers was to petition the court for redress which, as explained below, was not always successful.

The cases of *Ray v. Hann*² (decided July 15, 2013) and *Allifi v. Raider*³ (decided July 16, 2013), both dealt with the aftermath of administrative legitimation and illustrate how two similarly situated fathers could have two *substantially* different outcomes in court.

In *Ray v. Hann*, it was undisputed that the father (Ray) was the biological father and that both Ray and the mother (Hann) signed an “Acknowledgment of Paternity” and an “Acknowledgment of Legitimation,” thus administratively legitimating Ray’s relationship with the child and establishing his custodial rights. Following the child’s birth, Ray and Hann ended their relationship and two years later Hann’s new husband sought to adopt the child. Ray filed a Petition to Legitimate, which was unnecessary since he had already established his custodial rights. Ray tendered his “Acknowledgment of Paternity” and “Acknowledgment of Legitimation” into evidence, along with the child’s birth certificate which bore his name. Nevertheless, the trial court—using the “best interest” standard—*declined* to legitimate the child and Ray appealed. On appeal, the Georgia Court of Appeals reversed the trial court, holding that the “Acknowledgment of Paternity” and “Acknowledgment of Legitimation” were properly executed and filed and therefore it was an abuse of discretion for the trial court to decline to legitimate because Ray was *already* the legal father.

In *Allifi v. Raider*, the father (Raider) also signed an “Acknowledgment of Paternity” and “Acknowledgment of Legitimation” and his name was also listed on the child’s birth certificate. Following an engagement between Raider and Allifi (Mother), the parties called off their wedding and for two years Raider had regular visitation with his child. In September 2010, Raider filed a Petition to Legitimate, which Allifi contested. At trial, unlike Ray, Raider did *not* tender evidence of the signed “Acknowledgment of Paternity” or “Acknowledgment of Legitimation” and Allifi introduced evidence of Raider smoking pot and taking inappropriate pictures of the child. The trial court—also using the “best interest” standard—initially denied Raider’s petition and only granted it upon Raider submitting evidence

of his administrative legitimization at the hearing on his Motion to Set Aside. On appeal, the Georgia Court of Appeals *reversed* the trial court's grant of Raider's Motion to Set Aside, holding that Raider was aware of his administrative legitimization at the time of trial, but nevertheless failed to tender evidence of same. Consequently, he was not permitted to use his acknowledgment of legitimization as a basis to set aside the judgment. Therefore the underlying denial stood as a matter of law.

The *Allifi* Court noted the inconsistencies of the two cases, which were decided within one day of each other, stating, "This case shows that there is obvious potential for a statutory acknowledgment of legitimization to create *significant difficulty* for our trial judges and practitioners, and may result in *inconsistent findings* to the *unnecessary filing* of petitions for legitimization." (Emphasis added).

In the aftermath of Ray v. Hann and Allifi v. Raider, the Georgia General Assembly repealed administrative legitimization effective July 1, 2016. As a result, unwed fathers should petition the court to establish their custodial rights or subsequently marry the mother.

- **Practice Tip #1:** If your client is an unwed father who has come to you for advice related to his custody/parenting time, then you should instruct him to file a Petition for Legitimation pursuant to O.C.G.A. § 19-7-22. If he fails to do so, then

he will remain without custody rights and his parenting time will be at the whim of the child's mother. Additionally, his child's ability to inherit from him could be adversely effected.

- **Practice Tip #2:** You also need to be aware that a validly entered "Acknowledgment of Paternity" and "Acknowledgment of Legitimation" that occurred prior to July 1, 2016, *remains valid*. Therefore, you should still instruct your client to file a Petition for Legitimation pursuant to O.C.G.A. § 19-7-22, but additional steps need to be taken to avoid the adverse outcome noted in the *Allifi* case, above. Specifically, your client *must* tender his "Acknowledgment of Paternity" and "Acknowledgment of Legitimation" (and the child's birth certificate, if he is named on it) into evidence. *FLR*



Robert B. Miller focuses his practice on residential/commercial real estate closings and estate planning at the Law Offices of William A. Heath in Dunwoody, Ga. Prior to his current position, he practiced family law at the law firm of Kessler & Solomiany where he litigated divorce and child custody matters. Miller is active in the family law and estate planning sections of the State Bar of Georgia and Atlanta Bar.

(Endnotes)

- 1 <https://dhs.georgia.gov/new-child-legitimation-law-success>
- 2 *Ray v. Hann*, 323 Ga. App. 45 (2013)
- 3 *Allifi v. Raider*, 323 Ga. App. 510 (2013)

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Movin' on Up: Issues in Relocation Litigation

By Kim Oppenheimer

In the aftermath of divorce, some custodial parents propose relocating with their children from the geographic area they shared with their co-parent. Citing needs for a fresh start, re-marriage, educational or employment opportunities, family of origin support, and/or escape from their former spouse, these parents contend that the benefits to them and their children outweigh the ramifications to the left behind parent and his or her relationship with the children (Warshak, 2000). A relocation dispute necessarily has a binary outcome; it juxtaposes the custodial parent's right to choose that which he or she determines is in the best interest of the children with the non-custodial parent's right to continue an ongoing parenting relationship with the children. States vary in the presumption of a custodial parent's right to relocate. In Georgia, there is no statute that specifically addresses the issue of parental relocation except for requiring a minimum of 30 days' notice of such intention (O.C.G.A. 19-9-3). In the absence of a clear presumption, courts have had few guidelines upon which to rely.

In an effort to promote consistency across states, The American Academy of Matrimonial Lawyers adopted a model relocation act to guide the courts in making relocation decisions. It consists of eight factors: "(1) the nature, quality, extent of involvement, and duration of the child's relationship with the parent proposing to relocate and with the non-relocating parents, siblings, and other significant persons in the child's life; (2) the age, developmental stage, needs of the child, and likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child; (3) the feasibility of preserving the relationship between the non-relocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties; (4) the child's preference, taking into consideration the age and maturity of the child; (5) whether there is an established pattern of conduct of the parent seeking the relocation, either to promote or thwart the relationship of the child and the non-relocating parent; (6) whether the relocation will enhance the general quality of life for both the custodial party seeking relocation and the child, including but not limited to, financial or emotional benefit or educational opportunity; (7) the reasons of each person for seeking or opposing the relocation; and (8) any other factor affecting the best interest of the child" (Warshak, 1999, p. 9).

As evident, these factors call for a subjective analysis of the risks and benefits for an individual child. The court has three options in deciding relocation cases. It may allow the custodial parent to move with the child, thereby impacting the nature and frequency of contact with the

non-residential parent; switch custody to the non-moving parent, thereby impacting the extent and amount of contact with the parent who relocates; or the status quo if relocation is denied and the primary residential parent does not move (Austin, 2000). The AAML contends that the latter option should be excluded from consideration as it is prejudicial to the parent who desires to move (American Academy of Matrimonial Lawyers, 1998). Thus, the court is in the position of having to predict the likelihood of a negative outcome for a particular child and balance the impact of the relative loss or attenuation of relationship with either the relocating custodial parent or the non-relocating parent. Given the nature and complexity of relocation cases, courts have turned to psychologists and other mental health experts for guidance.

In the few studies that examined the effects of relocation in children whose parents have divorced, the findings suggest that there is a correlation between moving away from the child's "home" community and adjustment indices such as school performance, such that there appears to be a general risk factor to children relocating (Austin, 2000). However, these studies do not differentiate transient reactions commonly associated with environmental change with more enduring patterns of maladaptive behavior. In addition, these studies report aggregate statistical

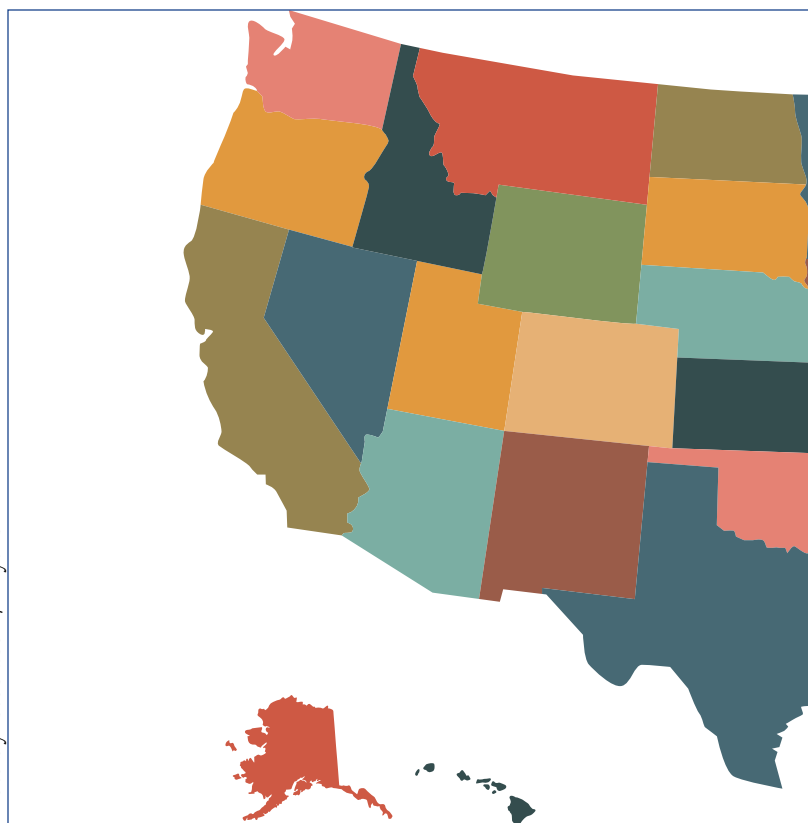


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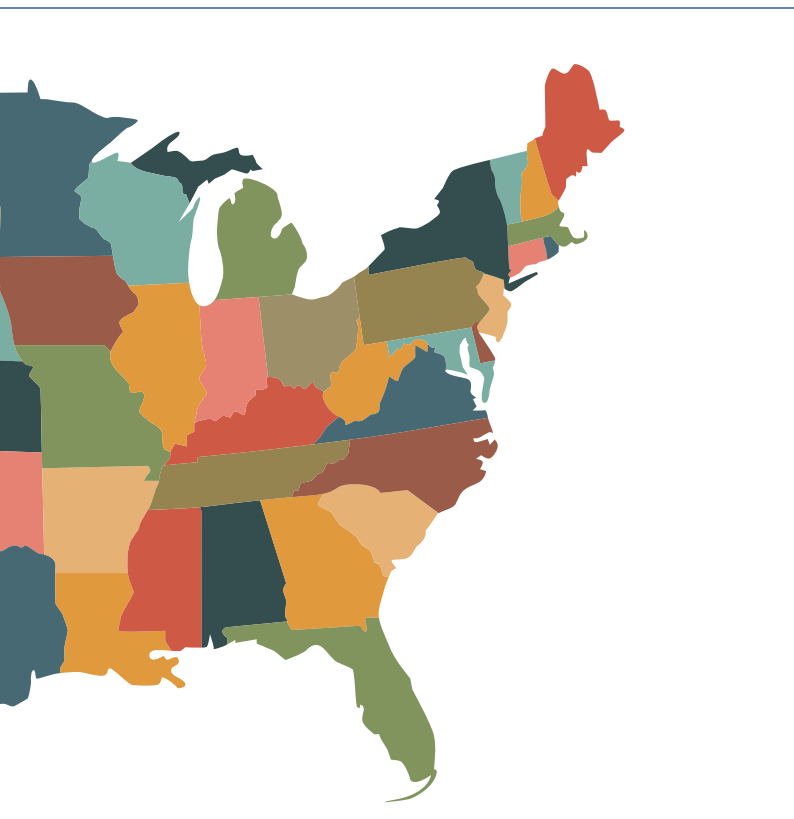
data as opposed to predictions for an individual child or family (Austin, 2000). In the absence of empirical studies in relocation cases, psychologists and other mental health professionals have relied on several lines of inquiry to assist them in their opinions regarding relocation. These include the literature on (1) attachment, separation, and developmental stage; (2) the effects of divorce on children; (3) and resiliency (Austin, 2000). Thus, the findings from research in these areas are inferentially applied to relocation outcomes.

The literature on attachment, separation, and developmental stage indicates an interactional effect, with varying putative responses to relocation as a function of a child's age. Relocation of infants and toddlers can have significant negative consequences. Children of this age are capable of forming multiple attachments to multiple caregivers (Pruett, Ebling, & Insabella, 2004) such that frequent overnight visits with both parents are essential for bonding. When frequency of contact between an infant or toddler and a parent is reduced due to geographical distance, there is significant risk of attenuating the bond between the child and the noncustodial parent, if not extinguishing it altogether (Austin, 2000). Some studies also suggest that an infant forms a hierarchy of attachments, with the parent in the primary parenting role being the strongest (Pruett et al, 2004). Theoretically, this mitigates any negative impact associated with very young children relocating with the custodial parent. However, recent research suggests that infants simultaneously form attachments to both parents (Lamb, 2012; Ludolph, 2012). Mother and father figures often provide complementary functions for the child, with the parent in the maternal role providing comfort and security (i.e., secure

attachment) and the other parent providing stimulation and play (i.e., secure exploration; Waters & McIntosh, 2011). Grossman and colleagues (2002) indicated that an infant's maternal attachment and a toddler's paternal attachment were positively associated with the child's ability to form attachments at age ten. However, by age sixteen, only father's early encouragement of secure exploration was related to an adolescent's ability to form attachments (Ludolph, 2012). This research suggests that a child's access to both parents is essential for long-term adjustment, arguing against relocation that limits a child's ability to have a meaningful relationship with both attachment figures.

The effects of divorce on children are well-known (Emery, 1998; Heatherington, Bridges, & Insabella, 1998; Wallerstein and Kelly, 1980). In comparison to their peers from intact families, as a group, children of divorce have more emotional, behavioral, and academic problems. However, longitudinal studies suggest that most children cope well with the dissolution of their parents' marriage, although short-term adjustment problems are common. Highly predictive of post-adjustment to divorce is a child's pre-separation functioning (Kelly, 1998). In addition, variables such as gender, time with each parent, and parental conflict mediate the relationship between divorce and children's adjustment. Research suggests that low parental conflict, cooperative co-parenting, and the availability of a healthy father who spends time with his children are predictors of prosocial behavior and positive adaptation following divorce (Warshak, 2000b). In general, boys have more adjustment problems than girls and the frequency and quality of contact between boys and their fathers is related to post-divorce outcomes. For those who have had adjustment problems, when their mothers remarry, boys demonstrate improved functioning. This suggests the importance of a father figure in boys' lives. In the custody of their mothers, girls show no significant differences on indices of adjustment than girls from intact families (Austin, 2000). Much has been written about the negative impact the loss of a mother has on girls, but little is known about girls' adjustment when the focus variable is father custodianship. For both boys and girls of all ages, a good father-child relationship appears to have a positive influence on mood and self-esteem. Children who had infrequent contact with their fathers consistently reported wanting more time with them (Kelly, 2014). However, central to post-divorce adjustment is not the amount of time a child spends with his or her father but the extent to which he maintains his parental role by providing structure, discipline, and guidance.

Most of the research on the effects of divorce on children was conducted on custodial mothers and noncustodial fathers (Warshak, 1999). Extrapolating these findings to the issue of relocation stresses the importance of the noncustodial parent's role in children's adjustment. Simply put, children need both parents. Consistently with the attachment literature, the quality of a child's relationship with the noncustodial parent is strongly associated with positive outcomes. Moves



that involve long distances are particularly problematic for children and the left behind parent to maintain a meaningful relationship. Proponents of relocation argue that technologies such as Skype and Facetime encourage continuity of the relationship between a parent and child. Without question, they help; but very young children do not have the attention span or conversational skills for anything but a brief encounter. If the child and parent are in different time zones, scheduling calls that do not interfere with school hours, extra-curricular activities, bedtime routines, and a parent's work schedule adds a significant level of complexity to these interactions. In addition, Skype and Facetime do not substitute for comforting or playful physical contact (i.e., hugging, sitting on a parent's lap, tousling hair, piggy back rides, etc.), thus attenuating the secure attachment and/or secure exploration bond. Proponents of relocation also contend that schedules can be altered to give the non-relocating parent significant time with his or her children (Warshak, 1999). For example, breaks in the school calendar, summers, alternating primary residences annually, or switching custody at pre-defined grade levels that coincide with transitions to middle or high school. In theory, these options may be viable but there is no research on the effects of varying custody/parenting time schedules and children's adjustment. Furthermore, young children need frequent contact with both parents to develop secure, healthy attachments and older children are likely to resist and resent having to leave friends, summer activities, or change schools for time with his or her nonresidential parent (Warshak, 1999). Another complicating factor is that most parents need to work and cannot be away from their paid employment for extended periods of time. It defeats the purpose of extended parenting time for maintaining the parent-child relationship if the child is in the care of a nanny, sitter, or step-parent for a large part of the working day. Under these circumstances, the left behind parent is likely to be viewed by his or her child as selfish and uncaring, thus greatly increasing the probability of a strained parent-child relationship. Psychological distance now becomes superimposed on physical distance. To compensate, the left behind parent may abdicate his or her role in disciplining or setting limits with the child owing to how

little quality time they may have together, thus creating the polarity of the nonresidential parent being associated with vacations and fun and the custodial parent being associated with homework and chores (Warshak, 1999).

In addition to the aforementioned issues, international relocation poses specific challenges. Oftentimes, nonresidential parents who are self-employed, work remotely, or have the ability to transfer offices within large corporations move domestically with a custodial parent and their child; rarely, is this case in an international relocation (Warshak, 2013). Thus, rather than parenting time with the child, parent-child contact becomes visitation. Cultural and language differences between the United States and a foreign country may be disadvantageous to the visiting left behind parent, not to mention the expense of travel, lodging, and other costs associated with spending time with one's child or children. Children may return to their home community on breaks from school which may or not be feasible depending upon the child's age and his or her ability to fly as an unaccompanied minor. Travel time, the complications of increased airport security, customs, flight delays, and jet lag tax most adults' coping resources, let alone a child's (Warshak, 2013). Of particular concern in international relocation is the history of the relocating parent in promoting or hindering the relationship between the nonresidential parent and their child. If the relationship has been fraught with problems, the parent who moved to a foreign country can deny the other parent access to the child with little consequence and the non-residential parent having little recourse. Thus, if the country to which the child has moved does not routinely enforce original custody orders, a relocating parent can use the legal system in the destination country to obtain whatever hoped for outcome that was not granted by the court having original jurisdiction. Courts should weigh the laws, customs, and political climate of a destination country to determine if it will protect a child's best interests, promote the non-custodial parent's right to access his or her child, and respect the original parenting plan (Warshak, 2013).

Countries vary considerably in the degree to which they will enforce custody orders from the United States. The Hague Abduction Convention (1980) delineated provisions for returning a child who has been wrongfully removed from his or her habitual residence in an effort to preserve custody decisions from the country of origin (Warshak, 2013). In essence, the Hague Convention was designed to prevent a parent from having any legal or practical advantage in gaining custody by taking a child to a foreign country. The non-custodial parent must petition for the child's return within a year of the child being removed from his or her home country, otherwise the custodial parent may claim that the child should not be returned because he or she is now settled in the destination country; in other words, is a habitual resident. In 1996, the Hague Convention was expanded to include provisions for resolving disputes over custody and access. Countries differ greatly with respect to how easily one parent essentially can be eliminated from a child's life, especially if the custodial parent has citizenship and the other parent

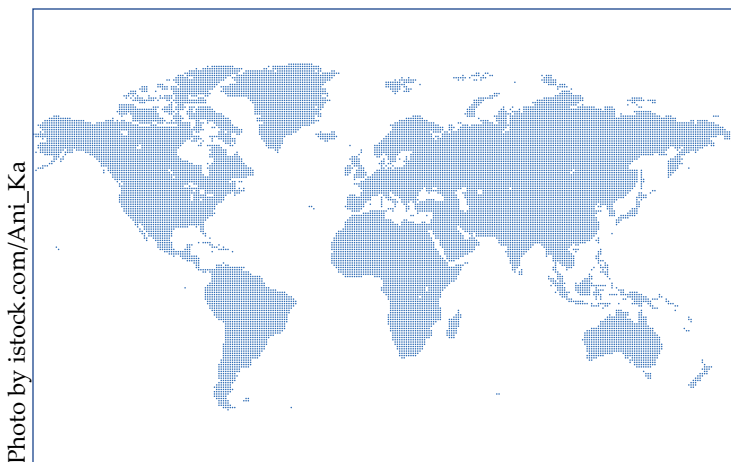


Photo by istock.com/Ani_Ka

does not. However, according to Warshak (2013), the Hague Convention lacks any enforcement power even for countries who have signed it. In addition, foreign courts may modify a custody order under the habitual residence provision if the custodial parent and the child have lived in the destination country continuously for six months.

Some children cope better with change than others. Those who do not have any special needs, are fairly independent and resourceful, have an easy-going temperament, have well developed social and emotional regulation skills will likely adapt well to any major environmental change such as relocation. These are resilient children. However, for children who do not possess these characteristics, relocation is a major stressor that can tax the child's coping mechanisms, resulting in unintended consequences to the parent-child relationship as well as other emotional and behavioral problems in the child (Austin, 2000).

Austin (2000) has developed a hierarchical model to assist custody evaluators and the courts in making relocation decisions for a particular child. Consistently with a family systems perspective, it is a set of factors specific to the child, such as age, special needs, and adaptability; factors related to both the residential and nonresidential parents, such as extent of parental involvement with the child, parents' psychological stability, level of conflict, and history of cooperative co-parenting; and contextual factors such as geographic distance, recency of divorce, and the availability of outside resources, such as extended family and community support (Austin, 2000). Research strongly suggests that how a child coped with the separation and/or divorce is predictive of how he or she will cope with relocation (Austin, 2000; Warshak, 1999). By virtue of having experienced the major life event of loss of the family unit, children facing relocation are a vulnerable population. According to Austin (2000), an analysis of each of these variables can predict potential negative outcomes in the areas of emotional well-being, social adjustment, and academic success. This model, however, has not been empirically investigated.

In summary, relocation decisions require a risk/benefit analysis for any given child. There is no "one size fits all" approach to weighing all the factors that courts and evaluators need to consider in permitting one parent to move a child away from his or her other parent. Child-focused variables such as age, gender, coping resources, and resiliency; parent-focused variables such as reason for desiring to relocate and history of the co-parenting relationship; and contextual variables such as recency of divorce/separation, geographical distance, domestic or international relocation, community support, and educational/financial benefits all need to be considered when courts are faced with the dilemma of a custodial parent's right to move in the best interests of the child with the non-custodial parent's right to continue an ongoing parenting relationship with his or her children. *FLR*



Kim Oppenheimer, Ph.D. is a Clinical Psychologist who specializes in forensic psychological and child custody evaluations. She conducts this work through her company, Child Custody Solutions, LLC. She is also founder and owner of Atlanta Psych Consultants, LLC, a multi-disciplinary private practice located in Sandy Springs, Georgia.

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Caselaw Update

By Vic Valmus

Arbitration

Brazzel v. Brazzel, **A16A0680** (June 10, 2016)

The parties were divorced in 2010 with two minor children with the mother being awarded primary custody. In 2013, the mother filed a modification of custody. The father counterclaimed for custody and support modification. Both parties filed for contempt. The parties agreed to consolidate and submit to binding arbitration of all issues presented in the motions including the agreement pursuant to O.C.G.A. § 19-9-1.1. Following the hearing, the arbitrator issued a decision that there had been a material change of condition affecting the welfare of the children and awarded primary custody to the mother and the mother moved pursuant to O.C.G.A. § 9-9-12 for a Superior Court confirmation of arbitrator's decision. The father moved pursuant to O.C.G.A. § 9-9-13 for the court to vacate the decision. The Superior Court entered an judgment denying the father's motion to vacate and granting the mother's motion to confirm the arbitrator's decision. The father appeals and the Court of Appeals affirms.

The father alleges that the Trial Court erred because the Trial Court erroneously found that it was bound by the arbitrator's decision on these issues and that it had no independent duty to determine the best interest of the children. Here, the father agreed to binding arbitration and, having done so, the arbitrator's decision shall be incorporated into the Court's final decree awarding child custody unless the Judge makes specific written factual findings that the arbitrator's award would not be in the best interests of the children. Nothing in O.C.G.A. § 19-9-1.1 authorize the Court to independently decide the custody issue based on the Court's determination of the best interests of the children or substitute the Court's custody decision for the decision of the arbitrator. The Court considered the circumstances of the parents and the children and found no basis to conclude that the decision would not be in the best interests of the children. Nothing in the Court's Order can be considered the show that the Court erroneously believed it was bound by the arbitrator's custody decision regardless of the circumstances of the parents and children.

The father also claims upon various grounds that the Superior Court erred by denying the motion to vacate the arbitrator's decision. An application to vacate an arbitration award is strictly limited to five statutory grounds:

1. Corruption, fraud, or misconduct in determining the award.
2. Partiality of an arbitrator appointed as a neutral.
3. Overstepping by the arbitrator of their authority or such imperfection execution that a final and definite award upon the subject matter submitted was not made.

4. A failure to follow the procedure of this part.
5. The arbitrator's manifest disregard of the law.

Here, the burden was on the father to demonstrate existence of a statutory ground for vacating the arbitration award. The Court reviewing the application pursuant to the Georgia Arbitration Code (GAC) to vacate an arbitration award the Judge is prohibited in considering the sufficiency or the weight of the evidence presented to the arbitrator and demands the Court give extraordinary deference to the arbitrator's process and awards. Here, the father claims pursuant to Section (b)(3) that the arbitrator did not address the allegations in his contempt petition and thereby had an imperfect execution of arbitrator's authority. It is undisputed that the arbitration hearing was transcribed and that the father did not produce a complete transcript of the arbitration hearing in support of his motion to vacate with the Trial Court. Rather, the father provided the reviewing court with transcripts of selected excerpts of the arbitration hearing. Without a complete transcript of the arbitration hearing, the reviewing court was unable to determine whether any evidence was presented to the arbitrator on the issue. The fact that the father filed a complete transcript of the arbitration hearing in the appellate court, does not change the result. Therefore the Court of Appeals will not consider a transcript of the arbitration hearing not presented to or reviewed by the Court below.

Attorney's Fees

Hoard v. Beveridge, **S15A1685** (March 7, 2016)

In 2009, Beveridge (husband) filed an action for divorce against Hoard (wife). There was one child born of the marriage and the primary issue was custody of the child. Dr. Webb was appointed as custody evaluator, concluded both parties were fit and loving parents, and recommended a joint custodial arrangement. After a hearing in April of 2011, the Court entered a temporary order granting the parties joint physical and legal custody with equal parenting time. Afterwards, the mother learned that in 2006, Dr. Webb had asked opposing counsel's husband, then a state representative, for a letter of recommendation for reappointment by the Governor. The Mother, throughout much of the remainder of the divorce proceedings, filed numerous motions seeking to disqualify Dr. Webb and filed motions to set aside, for a new trial, for mistrial and to amend and reopen her motion to disqualify. Following a 10-day trial in October of 2012, the Court issued a final order granting the parties joint legal and physical custody with equal parenting time. The mother asked for fees in the amount of \$431,411 and the father asked for \$400,974. The Trial Court denied the wife's request for fees but awarded the husband \$232,114 which was the exact amount of all costs he claims to have incurred from the date of the

temporary hearing and the Trial Court's denial of the wife's first motion to disqualify Dr. Webb. The mother appeals and the Supreme Court affirms.

The Trial Court made its fee award under O.C.G.A. § 19-6-2 and § 9-15-14 but did not allocate the fees. The mother argues that the Trial Court erred by failing to identify which portion of the fees was awarded pursuant to O.C.G.A. § 9-15-14 and which was awarded pursuant to § 19-6-2 and must be reversed because the Trial Court's findings are not sufficient to independently sustain a full award under either statute. Regarding § 9-15-14, the Trial Court concluded that the wife's numerous attempts to disqualify Dr. Webb unnecessarily expanded the litigation, but made no specific finding as to the amount of fees warranted under § 9-15-14. In fact, the evidence shows that his costs related to the Wife's sanctionable conduct did not exceed \$65,000.

However, § 9-15-14 was not the only basis stated for the fee award. The record shows that evidence was presented at a hearing regarding the parties' financial circumstances, income and a respective equity and interest in real property. The Court also found that the mother had liquidated marital assets to pay a portion of her attorney's fees while the husband used his own non-marital assets and obtained a loan against his 401(k) to pay a portion of the fees. The Trial Court carefully considered the parties' relative financial positions and awarded the husband substantially less than the total amount of fees he claimed to have incurred. The Trial Court's full fee award can be sustained under § 19-6-2 and will not be disturbed on appeal. The mother also argues that an award of fees under § 19-6-2 was punitive or improperly predicated on a finding that she engaged in misconduct. Nothing in the language of the order suggests these factors played any part in the Court's decision to award fees to the husband pursuant to § 19-6-2.

Grandparent's Custody

Strickland, et al. v. Strickland, S15G1011 (March 7, 2016)

This case involves a custody dispute between the biological mother and her parents over three minor children. The grandparents obtained emergency custody over three minor children whereby the Juvenile Court found all three children were deprived. The grandparents filed for permanent custody and the case was transferred to Cobb County Superior Court. After a 5-day bench trial, the Superior Court entered an Order granting the grandparents custody. The mother appealed and finding that the grandparents had failed to meet the high burden of proof to deprive the mother of her custodial rights of the children, the Court of Appeals reversed the Trial Court. The grandparents filed a petition for writ of certiorari. The Supreme Court found that the Court of Appeals failed to apply the correct standard of review and therefore reversed the Court of Appeals' decision.

Custody suits between a natural parent and a close third party are governed by O.C.G.A. § 19-7-1(b.1). The Trial Court in its detailed order concluded the grandparents

had established by clear and convincing evidence that the children would suffer significant long-term emotional harm if the mother received custody. The Superior Court order referenced recommendations of the Guardian Ad Litem and the children's psychologist. The grandparents argued that the Court of Appeals erred in failing to give proper deference to the Superior Court's factual findings in the case. In an appellate review of a bench trial, the Trial Court's factual findings must not be set aside unless they are clearly erroneous. Due deference must be given to the Trial Court, acknowledging that it has the opportunity to judge the credibility of the witnesses.

Here, the Court of Appeals conducted its own review of the evidence giving insufficient deference to the Trial Court's findings of fact and credibility determinations. For example, the Court of Appeals concluded that the evidence showed the mother had a job working from home, had a stable living environment with her fiancé, had completed substance abuse treatment and passed drug tests and was drug free, maintained a strong bond with her children, and was capable of addressing the children's psychological needs. In making these findings, the Court of Appeals disregarded much of the evidence on which the Superior Court relied including evidence that the Mother frequently stayed overnight at places other than her fiancé's residence, received no income from her alleged employment, and evidence contradicting the notion that she was drug-free. The mother's emotional immaturity, lack of parenting skills, inappropriate conduct, drug abuse, and irresponsibility toward her children were all documented in the record. Although the Mother presented evidence aimed at showing that she was prepared to meet the children's current and future needs, it was for the Superior Court, not the Court of Appeals, to resolve the conflicts in testimony. Here, we cannot conclude that the Trial Court's findings of fact were clearly erroneous. Therefore, the Superior Court was authorized to conclude that the statutory presumption in favor of the Mother had been overcome by clear and convincing evidence and that the children would suffer significant long-term emotional harm if she was awarded custody.

Habeas Corpus

Bales v. Lowery, S16A0200 (June 6, 2016)

Bales (mother) and Lowery (father) were divorced in Wilkerson County in 2013. The parties were awarded joint legal and physical custody of their two daughters with the girls residing with the mother during the school year, the mother having final decision-making authority involving education, and a visitation schedule that gave the father the girls for the entirety of the summer except for one week, but required the return of the children to the mother 5 days before the start of the new school year. The decree also had an unusual provision giving the father the right to take temporary physical custody immediately should the wife be incarcerated or should either minor child advise both parents that she wishes

to reside on a full time basis with the father. The father would then be required to file within 30 days a petition in the appropriate court for a change of custody.

The father later moved to Baldwin County and the mother moved to Henry County. The mother allowed the oldest daughter Jamie to reside with the father in Baldwin County and attend school during 2013-2014. But in 2015, a disagreement about custodial time arose and the mother decided not to allow Jamie to reside with the father in Baldwin County and to attend school there. The father refused to return Jamie to the mother. In August 2015, the mother filed a petition for writ of habeas corpus against the father in Baldwin County Superior Court. The hearing was held and the father inaccurately stated to the court that he had filed a petition in Henry County. The Court interviewed Jamie outside the presence of the parties and their attorneys and informed them that the girl, who was then 11 years old, said she wanted to reside with the father in Baldwin County and continue to go to school there. The Court then announced that it would deny the mother's petition for habeas corpus and instructed the parties to resolve their custody dispute in Henry County. Later, in August, the Trial Court signed an order denying the mother's habeas petition. The mother appeals and the Supreme Court reverses.

When a parent withholds a child from the other parent in violation of a valid custody order, the other parent may seek to secure the return of the child by filing a habeas petition in the judicial circuit where the child is allegedly being detained illegally. A habeas petition cannot be used to seek a change in child custody and even when the legal custodian brings a habeas action, no complaint seeking a change of legal custody or visitation rights may be made as a counterclaim or in any other means in response to the petition for writ of habeas seeking to enforce a child custody order. The father did not allege, and the Trial Court did not find, that the mother had lost her right to custody of the oldest daughter through unfitness or any other legal grounds. Nor did the father allege, nor the Trial Court order find, that the school year custody of the child had been transferred to the father under the decree's odd temporary custody provision. The Trial Court was not entitled to disregard the custody provisions of the divorce decree on the ground that there had been a material change in circumstances warranting modification and that it was in the child's best interests to continue residing with the father in Baldwin County. Therefore, if the father wishes to change the custody provision of the divorce decree he may seek to do so through a modification action in Henry County where the mother resides.

Imputed Income

Jackson v. Sanders, **S15G1896** (July 5, 2016)

In 2001, the parties divorced in Florida. At the time, Jackson's (Father) salary was \$250,000 and child support was \$1,005 per month. Subsequently, the parties relocated to the Atlanta area. In 2013, the Father filed for modification of custody and child support and the Mother counterclaimed seeking upward modification of support. In March 2014, a

bench trial was held which the Court granted the Mother's motion for a directed verdict on the custody modification and granted the Mother's request for upward modification of child support. The Court found the Father was not forthcoming with proof of his gross income and did not provide significant information to determine his gross income and that the Father was incomplete, inconsistent, inaccurate and not credible with regard to his financial status. Accordingly, the Court applied O.C.G.A. § 19-6-15(f)(B)(4) which provides, in pertinent part, that on modification actions, if a parent fails to produce reliable evidence of income then the Court may increase the child support of that parent for failing or refusing to produce evidence of income by an increment of at least 10 percent per year of such parents' gross income for each year since the final child support award was entered. It's undisputed the Father's annual income at the time of the original 2001 child support order was \$250,000 and imputed an increase of 4 percent per year for each of the 13 years since then equals an imputed annual income of \$380,000. Using this number coupled together with the Mother's annual income the Father's child support obligation was \$3,994 per month. The Father appealed to the Court of Appeals and divided whole Court opinion vacated and remanded the issue. This Court granted certiorari to address the proper construction application of O.C.G.A. § 19-6-15(f)(4)(B).

The Code section makes clear that applications is only in child support modification actions and there are two condition precedents to apply (1) a parent's failure to produce reliable evidence of income and (2) an absence of any other reliable evidence of such parent's income or income potential. If these two condition precedents are met then a trier of fact may resort to the remedy of increasing child support of that parent by an increment of at least 10 percent per year since the last child support ordered was entered. If the trier of fact determines the condition precedent has been met, it is discretionary to apply the Code section, but if the trier of fact elects to use the Code section, it is required to utilize the prescribed increments of at least 10 percent and is not at liberty to select a lower increment. If the Trial Court elects not to apply the Code section, then it may turn to methods it ordinarily employs in determining a parent's gross income from incomplete information such as references to evidence of expenses, cash withdrawals, personal use of business accounts, extrapolating information from assets, earning capacity, giving, specialized skills or other relevant circumstances.

Legitimation And Injunction

Baskin v. Hale, **A15A2232, A16A0654** (June 15, 2016)

Baskin (mother) and Hale (father) were never married and had two biological sons. The mother also had a daughter (AJ) from a preceding relationship. The parties ended their relationship in 2006; and, in 2007, the father sought to legitimize their son. The consent order legitimizing the son provided the parties with joint legal custody of both children giving the mother primary custody of the daughter and the father primary custody of the son and visitation with both

children, the father for 4 nights a week and with the mother 3 nights a week. The order acknowledged that the father was not the daughter's biological father but had raised her as his own. In 2014, the mother filed a petition for modification of custody and the father answered and counterclaimed for contempt and to legitimate the second son.

At the final hearing, the Superior Court entered a final award of custody awarding the parties joint legal custody of all three children with the father having primary physical custody and granting the mother visitation every other weekend. The Court concluded that the mother interfered with the father's visitation rights and engaged a pattern of parental alienation. The Court also acknowledged that the father was not the biological father of the daughter but the father had acquired parental status during the 2007 consent order. The Court also entered an order granting an injunction until the youngest son reaches the age of 18 which prevented the parties, attorneys or the guardian posting any information concerning the case on any social media website or other public median. Both parties appeal and the Court of Appeals affirm in part and reverses in part.

The mother appeals contending the Trial Court erred by granting custody of her daughter to the father. Only the mother of a child born out of wedlock is entitled to custody of the child unless a father legitimates the child. Otherwise, the mother exercises all parental power over the child. Here, the biological father never made any efforts to legitimate the child and the father has made no efforts to terminate the biological father's parental rights or to adopt the daughter. Parental rights over a child may be lost pursuant to a voluntary contract releasing the rights to a third party. The Trial Court interpreted O.C.G.A. § 19-7-1(d)(1) as allowing a permanent partial surrender of parental power, however the mother did not permanently surrender her parental power or custody rights to the daughter in a 2007 consent order. In the 2007 order, there was no indication that the Superior Court had decided the father would have permanent ongoing custodial rights of the daughter. By entering into the consent order, the mother simply agreed that the father was entitled to joint custody of AJ with liberal visitation at that time and did not bestow the father permanent custodial or parental rights of the daughter. The father's argument is that the 2007 order was res judicata and that the mother consented to the custodial arrangement and now she is barred from arguing that the father has no legal right of custody to the daughter. However, this argument ignores the fact that unlike adoptions or termination of parental rights, custody and visitation rights are subject to review and modification. Therefore the doctrine of res judicata does not control in this case.

The mother also argues that the Superior Court erred by entering a permanent injunction. The Court stated it was proceeding under O.C.G.A. § 9-11-65(e) which empowers a court in actions for divorce, alimony, separate maintenance, or child custody to make prohibitive or mandatory orders that deem just and cited *Lacy v. Lacy*, which allows a court to issue temporary restraining orders when posting matters about each other or their current litigation on Facebook or

other social network sites and directed the parties to refrain from making derogatory remarks about the other before the children. Restraints of speech are not unconstitutional per se but a very heavy presumption against their constitutional validity and generally require a balancing test. Here, the Superior Court failed to properly balance the dangers from the prohibitive speech with the parties and the attorneys' First Amendment rights. The Court recognized the authority granted to the Trial Court to restrict the parents' communications and posting on social media during the pendency of a divorce or custodial proceeding, as the Trial Court did in *Lacy*, but the Appellate Court cannot condone the Superior Court's attempt in this case to restrict the parties and lawyers' right to publicly criticize the court for the next 10 years. Given the absence of any evidence of immediate danger to a compelling interest of such magnitude that the restraint on the parties and their lawyers' free speech would be warranted as well as the Superior Court's failure to properly conduct their balancing test and narrowly tailor the restrictions, the permanent injunction is vacated.

Postnuptial Agreement

Murray v. Murray, S16A0857 (October 3, 2016)

The parties were married for 34 years and, in 2014, the Wife initiated divorce proceedings. The parties attempted to reconcile and the Wife wrote a letter of apology renouncing all her rights in the marital estate. Shortly after, the Husband hired counsel to draft a formal Postnuptial Agreement providing for disposition of the couples' marital property upon dissolution of the marriage by divorce or death which was very favorable to the Husband. Several months after the agreement, the parties were unsuccessful at reconciliation and the Wife filed for divorce. The Husband moved to enforce the postnuptial agreement. The Wife objected claiming that the agreement was a product of fraud and that the Husband had induce her to sign the agreement with the promise that he would tear it up as soon as it was signed making her believe her execution of the agreement was merely a symbolic gesture of love and devotion and had no practical effect. The Husband on the other hand contended that he merely promise to destroy the agreement if and when he was comfortable they were in love again. At the hearing, the Trial Court found credible the Wife's testimony in its entirety and denied the motion to enforce the agreement. The Court found what occurred was a mutual expression of love and trust and a promise not to enforce the agreement. A marriage creates a quasi-fiduciary relationship and the effect of the Husband's representations that the parties' agreement would not be enforced is that it cannot be enforced. The Husband files an interlocutory appeal and the Supreme Court affirms.

The factors considered in deciding the validity of a postnuptial agreement are set out in *Scherer* which are (1) was the agreement obtained through fraud, duress, or mistake after misrepresentation or non-disclosure of material facts, (2) was the agreement unconscionable, or (3) have the facts and circumstances changed since the agreement was executed as to make this enforcement unfair

or unreasonable. The Husband's promise to tear up the agreement amounted to fraud. The mere failure to comply with a promise and to perform an act in the future is not fraud in a legal sense, but when the failure to perform the promised act is coupled with the present intention not to perform, fraud, in a legal sense is present. Here, the Wife testified that if she signed the agreement he would understand that she loved him and he would not divorce her and he would tear up the agreement. In light of the confidential relationship between spouses, the Wife was entitled to trust the Husband's representation. However, the Husband did not destroy the agreement as he had promised, instead he retained the document for nearly six months while the parties were attempting reconciliation and produced it for enforcement when she filed for divorce. Even though the evidence is slight to support the Trial Court's ruling, it is sufficient to establish existence of fraud especially in light of the relationship between the parties and the nature of the agreement.

Self-Executing Change Of Custody

Oxford v. Fuller, **A16A1056** (August 11, 2016)

The parties had three children and were divorced in 2012, and pursuant to their agreement they followed a week-to-week custodial arrangement. They also stated that the Mother agreed to live and reside in Upson County or any county which is contiguous to Upson County until further Order of the Court. In 2013, the Mother moved to Coweta County with her current husband and filed a Petition for Change of Custody. In response, the Father filed a Petition for Modification of Custody in Coweta County which was transferred to Upson County. In April of 2015, a trial was held hearing both petitions and testimony from two guardians where one testified the Mother should have custody and the other Guardian testified that the arrangement should stay the way it is. After the trial, the Trial Court ruled that the parties would alternate on a year-to-year custodial arrangement beginning on July 1st of every year and primary custody and final decision-making authority would transfer with the change. The Mother appeals and the Court of Appeals reverses.

The Mother contends the Trial Court erred by entering a custody order because it was self-executing without making a determination as to whether custody change at the time was in the best interests of the children. A self-executing change of custody provision allows for an automatic change in the custody based on a future event without any additional judicial scrutiny. While a self-executing change of custody provisions are not expressly prohibited by statutory law, any provision that fails to give paramount import to the child's best interest and change of custody as between parents violates the State's public policy. Here, the Trial Court ordered that the change of custody would change every year on July 1st without any determination as to whether the custody change was in the best interests of the parties' children at the time the change would automatically occur. In absence of annual hearing prior to the change in custody, the order violates the State's policy as expressed

in O.C.G.A. § 19-9-3 that a Trial Court take into account the factual situation at the time the custody modification is sought. In addition, there was no evidence presented that these changes would be in the best interests of the children. Both Guardian Ad Litem have finished their testimony and neither Guardian Ad Litem recommended an annual change in custody or testified as to what effect the annual change in custody would have on the children.

Source Of The Funds Rule/Attorney's Fees

Horton v. Horton, **S16F0167** (May 9, 2016)

The parties were married in October 2011 and separated 19 months later. There were no children born of the marriage. The parties have each been married before. In August 2014, the parties appeared for trial and stipulated the marriage was irretrievably broken. The main issue was equitable division of the husband's house. And after jury selection open statements the wife presented her case and she testified she spent more than \$15,000 to remodel the husband's house in the months leading up to the separation. In February 2013, the husband deeded the house to her in contemplation of filing a bankruptcy petition due to a large out of state judgment against him and on March 28, 2013 she deeded the house back to him after he learned that the first transfer would not place the house beyond the reach of the bankruptcy trustee. The wife rested her case and the husband moved for a directed verdict on equitable division of the house noting the parties had stipulated to the division of all personal property and argued the wife had failed to produce sufficient evidence to find that the house or any part of it was marital property subject to equitable division. The Superior Court granted the motion and dismissed the jury. The Superior Court denied both request for attorney's fees under 19-16-2 but granted the husband's request for attorney's fees under 9-15-14 in the amount of \$14,876.25. Wife appeals and the Superior Court affirms.

Wife argues the Trial Court erred in determining as a matter of law that the house constituted the husband's separate property. There was no dispute that the house was the husband's separate property at the time of the parties' marriage thus what affect, if any, the brief inter spousal transfer of the house on its original status as separate property. However, the related question of the nature of the transfer must be considered whether the transfer was a gift. In circumstances involving conveyance of real property or the payment of certain funds between spouses, there has been a presumption in Georgia law that such a conveyance or payment is a gift and has a status of marital property. The evidence was that the brief transfer to the wife was anything but a gift to her or to the marital estate and whatever the effect of the conveyance of the house to the wife, its conveyance back to the husband in the same way confirmed the status as his separate property. However, if non-marital property appreciates in value during the marriage, then such appreciation is also an effort of either or both spouse's the appreciation becomes marital assets subject to equitable division. The method of equitable division is the "source of the funds rule". In order to utilize the benefits

of this rule, there must be evidence of the appreciation of the property in relation to its fair market value during the parties' subsequent marriage. The wife claimed to use separate funds to make payments on the mortgage and also she used more than \$15,000 of her own funds to make improvements to the house and therefore the property was a marital asset. Even assuming that the wife's mortgage and home improvement payments for the house were gifts to the marital estate and contributed to the equity in the house, the wife did not present evidence necessary to apply the source of the funds rule to determine the value of any such marital property. There was no evidence of the fair market value of the house at the time of the marriage, at the time of the wife's payments, or at the time of the divorce. Therefore there is simply no evidence upon which to calculate the ratio of the wife's investments much less any appreciation in the value of the house as a result of either market forces or the efforts of either the wife or the husband or both.

The wife also argues the Trial Court erred in awarding the husband attorney's fees through 19-15-14 without holding an evidentiary hearing. As far as lack of hearing, it is true that unless a party against whom the attorney's fees award may be awarded waives the hearing expressly or by its conduct, then the court must hold the evidentiary hearing. A timely objection to the motion for attorney's fees under 9-15-14 even without a specific request for hearing is generally sufficient to preclude a waiver of conduct of the right to an evidentiary hearing. The wife never requested an evidentiary hearing in regards to attorney's fees nor is there any evidence in the record of any timely objection by the wife including objection to the evidence or the calculation of the amount of the husband's attorney's fees.

Justice Melton concurs suggesting that instead of focusing on the appreciated value of the home, the court should focus on whether there is equity in the home. The example is that when a spouse owns a home the separate estate home is \$150,000 with a \$100,000 debt and the other spouse pays \$30,000 with separate funds to pay down the debt, but the fair market value remains the same, then the equity in the home has increased by \$30,000 and should be considered in the marital estate.

Third Party Custody

Holdaway v. Holdaway, **A16A1239** (August 3, 2016)

In 2009, the parties divorced and as of the terms of the agreement, the Mother was awarded primary physical custody of the child. Shortly after the divorce, the Mother, the child, and the Mother's older daughter moved into the maternal grandparents' home (grandmother) and she became the primary caregiver of the children and developed a strong bond with them. The grandmother also became the legal guardian of the older sister. In the years after the divorce, the Mother suffered a drug and alcohol addiction and she was admitted to several in-patient programs. During the years, the Father acquiesced to the grandmother serving as the primary caregiver because she provided a more stable environment than the Mother and he had erratic employment and did not exercise all of his visitation

pursuant to the divorce decree and was sporadic on paying child support or providing health insurance as required by the agreement.

In 2014, following the dispute over summer visitation, the Father filed a Petition to Modify Custody against the Mother and sought primary physical custody. The Trial Court allowed the grandmother to intervene. At the bench trial, several witness testified about the uncharacteristically close relationship between the child and her older sister and the strong bond between the grandmother and the two sisters. The grandmother was the stabilizing force in the girls' lives. The grandmother testified that it would "emotionally kill" the girls to be separated from the same household. The Father testified that he had lived at 5 different residences and had 11 different jobs since the divorce and conceded that he had not consistently paid child support on time or provided health insurance. The Father who was currently 26 years of age began dating a 17-year-old high school student which he believed was a good role model for the child. At the conclusion of the trial, the Judge found that giving custody of the child to the Father or the Mother would completely undermine the stability of the child's current home and would traumatically change the continuity of the child's life. It would sever her relationship with her closest sibling and the Court was unwilling to do separate the children. The Court gave custody to the grandmother and visitation to the Father. The Mother was awarded no visitation. The Father appeals and the Court of Appeals affirms.

Here, the Court found that the grandmother's home was the only home the child has ever known and the only stable place that the child has known. In addition, the grandmother was the only caregiver the child has ever known for the last 6 years during which the child has resided during the very important years of key development. The Court stated the ruling essentially solidifies the situation as it existed over many years and awarding custody to the Father would completely dramatically undermined the stability of the child's home and child's life. The Court found by clear and convincing evidence that it would be emotionally harmful for the child to award primary custody to the Father. Pursuant to O.C.G.A. § 19-7-1(b).1 establish a rebuttal of presumption that it is in the best interests of the child to be awarded custody to the parent of the child. The Father argues that the Trial Court erred by finding that the award to him would cause the child to suffer long-term emotional harm. There are a variety of factors the Trial Court would need to consider and go beyond the parents' biological connection such as (1) who are the past and present caretakers of the child, (2) with whom has the child formed psychological bonds, (3) have the competing parties evidenced interest in and contact with the child over time, and (4) does the child have any medical or psychological needs that one party is better able to meet? It is clear from the ruling that the Court considered the factors set forth above in finding the child would suffer significant long-term emotional harm if custody was granted to the Father. The evidence was that the Father acquiesced to the grandmother as a

day to day caregiver for the child for many years and he failed to exercise all his visitation available to him under the divorce agreement and had repeatedly changed jobs and residences and had engaged in a romantic relationship with a high school student that he considered to be a model relationship for the child. While some level of stress and discomfort may be warranted when the goal is reunification of the child with the parent, the Trial Court was authorized to find that the emotional harm to a child would exceed the routine level of stress inherent in any change of custody.

TPO

McCarthy v. Ashment, **A16A1013** (September 22, 2016)

The parties were married in 2004 and have four children. In May of 2012, McCarthy (Mother) filed for a divorce against Ashment (Father) where the Mother was granted physical custody of the children and the Father had visitation rights. In September of 2013, the Paulding Superior Court granted the Mother's Petition for Family Violence Protective Order. In May of 2014, the Court issued a bench warrant for the Father's arrest for aggravated stalking. In August 2014, the Mother filed a Motion for Permanent Protective Order and on the same day the Father was arrested and incarcerated in Cobb County for civil contempt of failure to pay child support. As a result, he was unable to attend the hearing in Paulding on the Petition for Permanent Protective Order. After the hearing, the Trial Court granted the Permanent Protective Order and prevented the Father from having any contact with the Mother or her immediate family but did not specifically rule on the Mother's request for sole physical and legal custody of the children. Following the Father's release from jail, he filed a Motion for Set Aside the Permanent Protective Order arguing, among other things, that he was not a resident of Paulding County and the Protective Order was procured by fraud and sought to remove the prohibition of no contact with his minor children. The Trial Court denied his Petition. The Father appeals and the Court of Appeals affirms in part or reverses in part.

The Father first appeals that the Court lacked personal jurisdiction over him. However, the lack of personal jurisdiction arising from the defects of invalidity of service or improper venue may be waived if such defenses are not made either by motion or in an original responsive pleading. The Father filed no responsive pleadings and he never objected to venue and therefore was waived. The Father also argues that the Protective Order was procured by fraud. However, if fraud was or could have been discovered and raised in the court below, a party is prevented from setting aside a judgment allegedly procured by fraud. With respect to his claim that the Mother fraudulently alleged she lived in Paulding County, the allegation was plainly in the petition. In addition, whether the allegations in the petition were true or not, he failed to raise the issue in the Trial Court.

The Father also argues that the Mother hindered his ability to attend the hearing. However, it is undisputed

that the Father did not attend the hearing because he is incarcerated for failing to pay over \$30,000 in child support. The Father's failure to pay and not the Mother's attempt to collect on child support he owed, was the reason why the Father could not attend the hearing. Here, the Father did not file an answer to the petition and did not ask for or file a motion to be produced for the September hearing. Lastly, the Father argued the Trial Court erred ruling that he is permanently prohibited from contacting his children and the limitation amounts to an unconstitutional termination of parental rights. Here, the Trial Court lacked authority to permanently enjoin the Father from having contact with his children. In granting a Protective Order, the Trial Court is authorized to award temporary custody of minor children and establish temporary visitation rights. Therefore, the Trial Court erred when granting the Petitioner permanent custody of the children when awarding the Permanent Protective Order.

UCCJEA

Koegel v. Koegel, **A16A0128** (May 18, 2016)

The parties were married in Texas in 2011. They had one child, XK, born in 2013. In January 2014 the family relocated to Georgia, but in April 2014 the mother returned to Texas with XK under the auspices of visiting a sick relative. When the mother did not return, the father filed for a divorce in the Superior Court of Murray County, Georgia in July of 2014. In August 2014, the Trial Court conducted a hearing but the mother had not filed an answer and she did not appear. The Court awarded temporary custody of XK to the father finding the mother was making a temporary sojourn to Texas. The mother filed an answer and counterclaim in November 2014 and a motion to vacate the temporary order in April 2015. A hearing was held on the mother's motion in June 2015. The court found that the mother established that she was leading the father on to make him think she was returning to Georgia when she wasn't, and that her trip to Texas was temporary. Now she maintains that she was lying. The court finds that all of the mother's actions and misrepresentations of her intent and contempt of court appear to be self-serving and contrary to the best interests of the child. The court also took issue with the timeliness of the mother's challenge to the subject matter jurisdiction. The court denied the mother's motion to vacate the temporary order. The mother appeals and the Appeals Court reverses.

Regarding the issue of timeliness of the mother's challenge to the Trial Court subject matter jurisdiction, it is well established that a court's lack of subject matter jurisdiction cannot be waived and may be raised at any time either in the trial court, in a collateral attack on the judgment, or on appeal. Therefore, a party after losing a trial may move to dismiss the case because the court lacked subject matter jurisdiction. Thus, to the extent the Trial Court took issue with the timeliness of the mother's challenge to the subject matter jurisdiction and any way it held that against her in the ruling upon her motion to vacate, it erred in doing so.

With regard to subject matter jurisdiction, UCCJEA provides that a court has jurisdiction to make an initial child support determination if Georgia is the home state of the child on the day of the commencement of the proceeding or was the home state of the child within 6 months before the commencement of the proceeding and a person acting as a parent can reside in the state. It further provides that a period of temporary absence of any of the mentioned persons is part of the 6-month period. However, the UCCJEA does not define what constitutes a temporary absence. Here, the parties moved to Georgia in January 2013 and the mother returned to Texas with the child in April 2014 and never returned to Georgia. Although the mother represented to the father that she would eventually return to Georgia with the child, it was clear from the statements on the record that the mother had no intention of returning to Georgia. The Court held that the mother's presence in Texas was a temporary sojourn but the record does not establish that. Georgia could therefore not qualify as XK's home state under the UCCJEA. Although the father testified that he was led to believe the mother would eventually return to Georgia, he also testified that the mother told him only a few days after she left that he would be lucky if he ever saw her and XK again and that she was in no uncertain terms not coming back. She made excuses about the repair condition of her vehicle supposedly delaying her ability to return. In addition the mother testified that she never intended to return to Georgia and she left to flee an abusive relationship with the father and out of fear for her and XK's safety.

Here, the mother maintained employment in Texas and XK had been born in and previously lived in Texas, had extended family with whom he frequently visited in Texas, attended church in Texas, had a regular doctor in Texas and received public benefits in Texas. In contrast, XK never attended church in Georgia, the extent of his medical treatments limited to an emergency room visit for diaper rash and for only familial connection was a distant cousin who lived in Atlanta whom they never visited. Therefore, looking at the totality of the circumstances, the record reflects that XK's time in Texas was not a temporary absence from Georgia. It follows then, that Georgia was not XK's home state and because XK had not lived in Georgia for at least 6 months immediately preceding commencement of the proceeding. Additionally at the time of the custody determination, even if XK had no home state, Georgia still lacked jurisdiction to make an initial child custody determination and neither of XK's parents had a significant connection with this state other than mere physical presence and Georgia did not have substantial evidence concerning XK's care, protection, training, and personal relationships. *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@mijjs.com.



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Family Law Section
State Bar of Georgia
Kelley O'Neill Boswell, Editor
104 Marietta St., NW, Suite 100
Atlanta, GA 30303

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msolomiany@ksfamilylaw.com

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kyla@rblfamilylaw.com

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

Jonathan W. Brezel, YLD Representative
jonathan@ordwaylawgroup.com