The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia Spring 2010

Want To Be a Real Super Lawyer?

by Vicky O. Kimbrell and Susan Wells

The economic downturn that has devastated so many Georgians in the past year is also impacting resources available to victims of domestic violence. Several communities across the state are reporting the most deadly family violence in recent history.[1]

In small towns and medium sized cities across Georgia, private attorneys represent victims of domestic violence through the Georgia Legal Services Pro Bono Project. Other Georgia lawyers donate money to legal services to fund representation for victims. Rural Georgia has been particularly hard hit by the crisis. Seventy-two percent of Georgia's poverty population lives outside of metro Atlanta, yet only 30 percent of the lawyers practice in those remaining 154 counties.[2]

Studies show that legal representation is one of the most important determinants of whether a victim will survive and make it out of an abusive relationship — or whether she will die trying.[3] Although we all know that a TPO or a divorce order won't stop a bullet or a determined abuser, it can empower the victim psychologically and provide her with the economic support she needs to support herself and her children and escape the abuse.

Family violence is usually an escalating process that increases in severity. When a lawyer can get involved before the abuse is severe, the long-term costs ---- physical, mental, and monetary ---- are a fraction of what they are in cases after a pattern of abuse is established. The most severe and deadly family violence occurs when the victim tries to leave because batterers become angry when they feel they have lost control of their victims. That's one reason lawyers must get involved in cases before the victim tries to leave. Lawyers can refer victims to their local shelter groups for safety planning and can often set up restraining orders, economic support, and other protective structures to help the woman get away from the violent relationship before it becomes fatal.

We would all prefer to think of our golden years as a time of peace, but that's not always true. After repeated abuse, Ms. B, an 80+ year old woman feared for her life. Mr. B threatened to burn down her house down with her in it. The local victim assistance office helped Ms. B obtain an initial TPO. Mr. B hired an attorney and denied everything, including service. A GLSP attorney represented Ms. B at the final hearing. The GLSP lawyer subpoenaed the officer who served the TPO. Mr. B then admitted that he had been served, broke into Ms. B's home, and that he had continued to call her after the initial TPO. The Judge ordered him immediately arrested. He also gave Ms. B $800 per month in support and gave her possession of the car and the house.

The Georgia Coalition Against Domestic Violence reports that the number of calls to the domestic violence hotline [1-(800) 33HAVEN] has gone up from 70,557 in 1993 to over 91,000 in 2008. The 2009 Georgia Fatality Review Report shows that more than 500 victims were been killed in family violence incidents in the past four years.[4] In many parts of Georgia, however, there is little recognition of family violence as a community problem to be addressed by making more services available and holding batterers accountable.

Some attorneys find the dynamics of domestic violence difficult to understand and don't want to take these cases. They may think that "these women always go back and it's a waste of my time." But, experts tell us about the cycle of violence, the dangers of leaving abusive households, and the "charming batterer," who looks so normal to the outside world. To help survivors leave, lawyers must learn the importance of referring victims for safety planning and setting up economic support systems for the survivor. If the survivor can't afford housing, health care, or food for her children, she is going to go back to the abuser. She has no other choice.[5]

Yet there is so much that cannot be done because GLSP doesn't have enough lawyers to meet the need. GLSP needs additional Super Lawyers who will take the time to become educated on what is going on in a survivor's life and why it takes an average of SEVEN attempts before a victim is finally able to leave permanently an abusive relationship. There are more than 25,000 lawyers in Georgia. If each one took just one case or donated funds for one case to be handled by a GLSP attorney, there would be so many more resources to save lives. On behalf of the thousands of domestic violence survivors and their families who we have represented, we want to thank the lawyers who

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Editor's Corner

by Randall M. Kessler and Marvin Solomiany
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We are so pleased to be working together on this and future issues. Hopefully, this co-editorship will add to the substance of the FLR. Please feel free to approach either of us at anytime regarding the content of this, past or future issues. We also would like more interviews with judges, especially from outside of Atlanta, so all you volunteers (lawyers and judges), we await your interviews.

In case you have not noticed, Tina Roddenbery has led an ambitious year and has helped our section accomplish some great things. Our initiative with Georgia Legal Services, our contributions to AVLF and our assistance to the Georgia Legislature with family law legislation have all made our section a leading candidate for section of the year honors. Meanwhile, Paul Johnson has been working tirelessly to host an amazing program in Destin. The speakers are lined up, the presentations are being finalized and the anticipation level is rising. We hope you will all be there and continue the comraderie our section engenders. Thank you for reading this issue, and thanks again to all of our wonderful contributors who spend so much time preparing such great articles for us.

See you in Destin.

Randy & Marvin

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

Inside This Issue

If you would like to contribute to The Family Law Review, or have any ideas or suggestions for future issues, please contact Marvin L. Solomiany, co-editor at msolomiany @kssfamilylaw.com.

Chair's Comments

by Tina Shadix Roddenbery
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My year as chair is rapidly coming to a close. K. Paul Johnson, from Savannah, will become chair during the State Bar Annual Meeting in June. It has been an extreme honor to serve as the section's Chair this year. Our section had a very active and productive year and the leadership in the Section worked hard. As I write my last comments for the FLR, I want to review some of projects our section undertook this year. It was a very ambitious agenda.

We are extremely proud of all our first-time events/ contributions to the profession this year, including the children's session with Chief Justice Sears at the 2009 Institute, the first-time attendees' breakfast at the 2009 Institute, the special edition of the FLR addressing the 2009 changes to the child support statute, the new professionalism CLE at the Mid-Year meeting of the State Bar, the first-time charitable donation to AVLF, the first-time award of scholarships to Institute attendees in exchange for their acceptance of a pro bono case, and the first-time past Chairs' dinner. We are equally proud of the revisions to the website and the new Family Law Domestic Relations Long-Arm bill which is on the way to the Governor for his signature! We made significant contributions to the profession and to the State Bar of Georgia this bar year and had a good time doing it. I wish to formally thank my fellow members of the Executive Committee for allowing me to serve and for supporting me in my term as chair. Our Executive Committee met four times since the beginning of the bar year in addition to the countless hours spent working on the projects mentioned above. I also wish to thank Derrick Stanley, our State Bar of Georgia Section Liaison. He does an outstanding job and most of these accomplishments would not have been possible without his hard work.

Honoring Past Chairs of the Section.

On Friday night, February 26, 2010, 56 individuals enjoyed a special Black Tie Dinner honoring all past chairs of the Family Law Section. Twenty-two living past Chairs and most of the current executive committee attended this event. It was held at the Cherokee Towne Club in Atlanta. The purpose of the event was to obtain a living history of important events and actions taken by this Section. The program included a PowerPoint and verbal history, with each chair being able to contribute facts he or she found significant during his or her term as chair. Interesting events were discussed, such as the date the section was created (which was June 5, 1976). The Section dues were $3 then and, Jack Turner was the first chair. Each chair spoke about important events which occurred during his or her year. The information gathered from this evening will be compiled and incorporated in the history section of the Family Law Section website. Additionally, a DVD was made of the highlights and will be available to Family Law Section members at the Family Law Institute. This was the first time such a dinner was organized for the past chairs. Many past chairs expressed their deep appreciation for being honored in such a way.

The ABC's OF A.R.T.

by Sondra I. Harris

It is likely that most, if not all, family law practitioners either have in the past or will be, in the very near future, dealing with issues involving assisted reproductive technology. Whether it be dealing with frozen embryos in a separation agreement, bequeathing embryos in a Will, or determining the parentages and the support and visitation obligations concerning a child conceived through assisted reproductive technology, these issues reach all phases of our practices. However, when consulting with these clients, it sometimes feels to an attorney as if the client is speaking a foreign language. The following is a glossary of some of the most common terms, names and cases to help a family attorney understand the "lingo."

Assisted Reproductive Technology – most commonly known as A.R.T.

This term refers to various methodologies used to achieve a pregnancy by artificial means.

AZ v. BZ (Docket #SJC - 08098, Mass, 03/31/00) – The seminal (no pun intended) case regarding the disposition of frozen embryos. The Massachusetts Supreme Judicial Court stated that , as a matter of public policy, it would not enforce an agreement regarding the disposition of frozen "pre-embryos" if such would compel one of the donors to become a parent against his will. As a matter of public policy, forced procreation is not an area amenable to judicial enforcement. Most other states which have dealt with this issue have cited, and followed, this decision.

Baby M (*In re Baby M*, 537 A.2d 1227, 109 NJ 306, 1988) – This was one of the first cases involving surrogacy and certainly the most publicized. William Stein and Mary Beth Whitehead signed a surrogacy contract agreeing that Mrs. Whitehead would become pregnant with Mr. Stern's sperm, carry the child to term and then would do everything necessary to allow Mrs. Stern to adopt the child. Whitehead, during the pregnancy, changed her mind and refused to relinquish her rights to the child who was known in court filings as "Baby M." The Sterns sued to enforce the surrogacy contract. After a two month trial, various appeals and much publicity, the New Jersey Supreme Court held that surrogacy contracts were against public policy in New Jersey and the contracts were unenforceable. Nevertheless, it held that it was in Baby M's best interests that custody be awarded to the Stern's and Mary Beth Whitehead was to have visitation. When Baby M became 18 years old, she formally terminated Whitehead's parental rights and was legally adopted by Elizabeth Stern.

At least in part because of the Baby M. Case, there is no uniformity among the states as to whether surrogacy is legal.

Buzzanca Baby (*In re Marriage of Buzzanca*, (Sup. Ct. No. 95D002992, 72 Cal Rep 2d 280) Jaycee Buzzanca was conceived during her parents' marriage, through an in vitro (infra) process using a donor egg and donor sperm. The resulting embryo was then implanted into a gestational carrier, who had no genetic relationship with the embryo or with the Buzzancas and who agreed to, upon birth, give the baby to the intended parents, John and Luanne Buzzanca. One month before Jaycee was born, John Buzzanca began divorce proceedings and, as part of such, alleged he was not obligated to pay child support for Jaycee since he had no genetic relationship with her. The trial court agreed, and essentially orphaned Jaycee, stating that no one involved was her legal parent under California law. The California Appeals Court reversed, and held that the parental relationship between the Buzzancas and Jaycee was established by the evidence that both Buzzanca's had initiated and agreed to all medical procedures, and it was their joint intent to create a child. Moreover, it was in the state's interest not to orphan a child. Thus, John Buzzanca was declared the father and obligated to pay child support.

Clomid – One of a group of common drugs used to induce regular ovulation. Its goal was originally to treat infertility, but is now also used to stimulate ovulation in either an intended mother or an egg donor before IVF procedures.

Cloning – the process of producing a genetically identical individual. There are three different types of cloning; DNA cloning, therapeutic cloning and reproductive cloning.

1) "DNA cloning" is also called "gene cloning" because it refers to the transfer of a DNA fragment from one organism to another. It is today a common molecular biologic process in laboratories, especially when dealing with bacteria or other micro-organisms. Several new drugs and therapies have been created through this procedure.

2) "Therapeutic cloning" is the production of embryos for use in research in order to harvest stem cells. It is also called "Somatic cell nuclear transfer." An entire nucleus of one cell is inserted in an enucleated ovum, which is stimulated to divide by shocking it. The new cells are used to create a replacement organ or nerve transplant.

3) "Reproductive cloning" is a technology, which, this time, can only generate an animal that has the same nuclear material as another existing animal. Dolly the Sheep was created through reproductive cloning by transferring genetic material from an adult sheep egg cell to an egg whose nucleus has been removed. The reconstructed cell was then stimulated by chemicals or electric current to become an embryo. Scientists hope to be able to use this process to reproduce animals in order to help relieve world hunger, or to create organisms with specific characteristics, such as genetically "unique" animals or animals which

produce specific drugs, or do certain tasks such as producing milk or laying eggs particularly well. At this time, no human has ever been proved to have been created through cloning.

Cryopreservation – A technique for rapid freezing in which embryos, sperm and/or eggs are preserved. Sperm was first frozen in 1953. The first successful pregnancy from a frozen human egg was in 1986.

Cytoplasmic transfer – An ART procedure where cytoplasm from a donor egg is injected into an egg with compromised mitochondria (an organelle that is considered the power plant of the cell). That egg is then fertilized and implanted in a womb, usually that of the woman from whom the original donor cell was received. In 2001, due to medical complications, the government curtailed this procedure as a technique for ART.

Donation: Egg, Sperm & Embryo
a) Sperm donations, The oldest form of ART, usually referred to as artificial insemination. Today all sperm donations through laboratories (except, possibly from intimate partners) are tested for infectious disease, and donated sperm is also "washed" in order to obtain the most motile sperm. The sperm is then cryopreserved for a minimum of six months before a woman is inseminated with the donated sperm, in order to make sure the sperm is disease free.

b) Egg Donation: An egg donor is a woman, compensated or not, who allows her ovum to be harvested and used by another to create an embryo. The egg donor is medicated through the use of various drugs in order to stimulate ovulation of as many eggs as possible, so such eggs may be retrieved by the lab.

The donor eggs are then removed through transvaginal ultrasound aspiration and then either frozen or used immediately in "in vitro" procedures to fertilize them. (See infra)

Most fertility programs today offer payment to both sperm and egg donors.

c) Embryo donation: after couples have created their own families, they sometimes have embryos left in cryopreservation which have been created through ART procedures which they do not plan to use. Such couples can, instead of destroying the embryos, donate these embryos to other infertile couples. The frozen embryo is then implanted into the intended mother, who has no genetic relationship to the embryo. It is estimated that there are over a half million frozen embryos in the United States, but only a small fraction of these are ever donated. Donors in this procedure are unpaid.

Davis v. Davis, 842 SW2d 588, was the first frozen embryo disposition case. Junior Davis and his wife, Mary Sue created seven frozen embryos through the use of A.R.T. procedures. Before ever using the embryos, the Davises began divorce proceedings. Mrs. Davis wanted possession of the embryos, in order to conceive a child after the divorce was final. Junior Davis wanted the embryos destroyed. The Court held, that embryos were neither human life nor personal property, but a unique category that provides the frozen embryos with special protections. It further held that it was in the best interests of these possible future children that the embryos be given to Mrs. Davis.

Most courts which have now dealt with this issue have rejected this approach and have adopted the approach of *AZ v. BZ*, supra.

Embryo – a fertilized human egg, up until about eight weeks.

Fallopian Tubes (a/k/a oviducts) are very fine tubes lined with cilia running from the ovaries to the uterus of a human female. Sometimes fallopian tubes are blocked due to infection or damage, leading to infertility.

Follicle, Ovarian – a spherical group of cells, found in the ovary that contain a single egg. Follicles can be stimulated by the use of drugs such as clomid (see above) in order for them to produce more than one egg in a month for use in infertility procedures, such as IVF.

Gestational Carrier a/k/a Non-Traditional Surrogate – a type of surrogate who is implanted with an embryo to which she has no genetic connection. This kind of surrogacy is used by women who cannot bring a child to term. Often, a gestational carrier is a blood relative of one of the intended parents.

GIFT stands for "gamete intra – fallopian tube transfer." It is an ART treatment in which the unfertilized eggs from a woman and her partner's sperm are both placed in her fallopian tubes through laporoscopic surgery in the hope that an embryo will result. It is rarely done today since it is considered intrusive and expensive and not as successful as other ART techniques.

Hatching, assisted or assisted zona hatching is a method in which a small hole or a "thinning" is made in the shell around the fetus before it is transferred to the uterus of the intended mother. It is believed that the procedure helps the embryo to implant in the uterus. It is often used with women who are 38 years of age or older, who have had trouble conceiving.

ICSI is an acronym for intercytoplasmic sperm injection. This process where a physician inserts a sperm directly into an egg in order to create an embryo and then implants it in a woman. It is often used where the male partner suffers from infertility from non-motile sperm. Sometimes, assisted hatching procedures (see above) are done in conjunction with ICSI, to maximize conception.

In Vitro fertilization or IVF is literally, fertilization in glass and refers to an egg and a sperm being fertilized outside of a woman's body. It is the generic name for all methods of assisted reproductive therapies in which eggs

are fertilized outside the womb.

IUI – Intrauterine insemination is an ART process in which donor sperm are injected directly into the uterus through a catheter. It is minimally invasive and lower in cost than many other ART procedures.

Kinderegan, Charles - a leading authority on surrogacy and the law. Co-author of Assisted Reproductive Technology. A Lawyer's Guide to the Emerging Law, ABA Publications.

Louise Brown, who was born July 25, 1978 in Oldham, Greater Manchester U.K. was the fist child known to be born using in vitro fertilization.

Mix-ups – The inevitable problems which are created when humans make mistakes handling genetic material. One of the earliest of these cases was *Perry-Rogers v. Fasano*, 276 AD2d 67 (2000). In that matter, the Perry-Rogers were patients in an in vitro fertilization program with the In Vitro Fertility Center of N.Y. Mrs. Perry-Rogers' frozen embryos were mistakenly implanted by the laboratory into Donna Fasano along with Fasano's frozen embryos. On December 29, 1998, Fasano gave birth to twin boys, one white and one African-American.

Fasano agreed to give custody of Akiel, the African-American child to the Perry Rogers, if they agreed to a visitation schedule for Akiel and for her son. The Perry Rogers executed such agreement and then brought a declaratory judgment action asking to be listed on Akiel's birth certificate as his parents, be given sole custody and for the visitation schedule be vacated. The Court held that in the circumstance presented, the Fasanos' lacked standing to contest the suit or to seek visitation.

This situation gave rise to two further malpractice suits, *Fasano v. Nash*, 723 NYS2d 181 (App. Div. 2001) which was litigation by the Fasanos against the doctor and clinic which withstood a motion to dismiss. In *Perry-Rogers v. Obasaju*, 723 NYS2d 28 (App. Div., 2001) the Courts held that there existed in New York a cause of action for the emotional harm the Perry-Rogers suffered in being deprived of the opportunity of experiencing pregnancy, pre natal bonding and the birth of their own child, as well as the four month separation from him. Both cases were then settled.

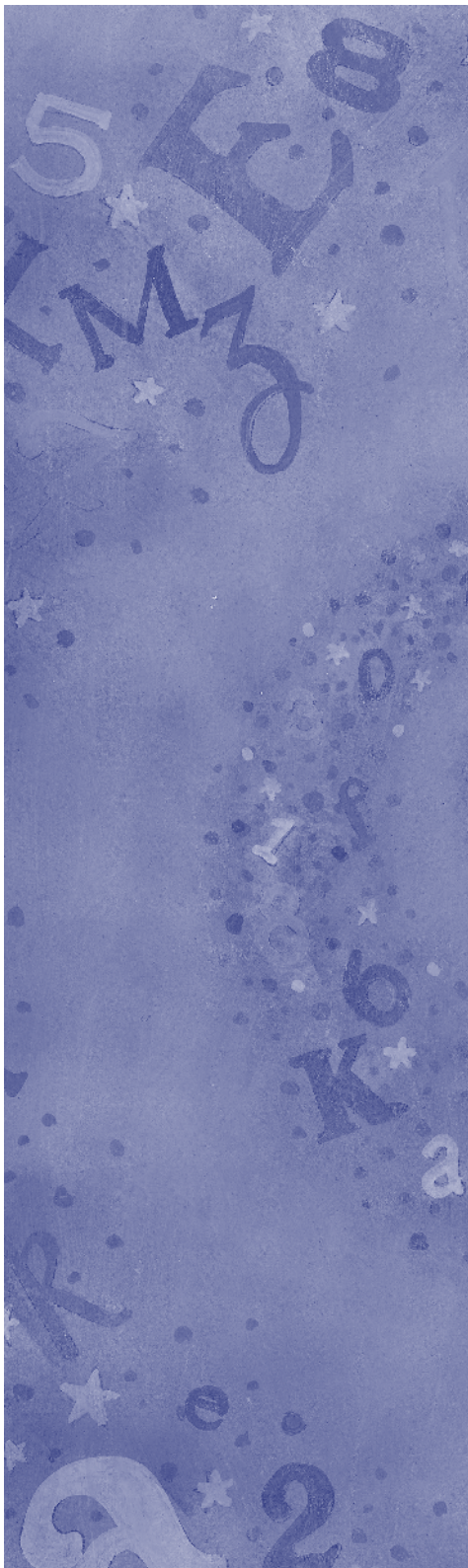
More recently, in Ohio, in 2009, Sean and Carolyn Savage discovered their implanted embryos had resulted in Carolyn's pregnancy. They then further discovered that the wrong embryos had been transferred and Carolyn had become an unwillingly gestational surrogate for another couple. The Savages agreed to give the child to the genetic parents without litigation. They also moved their frozen embryos to a different clinic and are hoping to arrange for a gestational carrier, since Caroline has been told she should no longer become pregnant.

OCR – also known as Trans-vaginal Oocyte Retrieval is a method in which a thin needle is inserted through the back of the vagina and into the ovarian follicles is inserted to collect a woman's eggs for ART procedures.

Octomom – Nadya Suleman, who gave birth to octuplets in January, 2009. Suleman had had four other single births prior to January 2009, through the use of ART. She had six frozen embryos left over from those procedures and requested all the frozen embryos be implanted at one time, despite the norm in medical practice being no more than two or three embryos in a woman her age. All the embryos were implanted, two embryos split into twins and all eight children were born alive. The children are only the second full set of octuplets ever to be born alive in the USA.

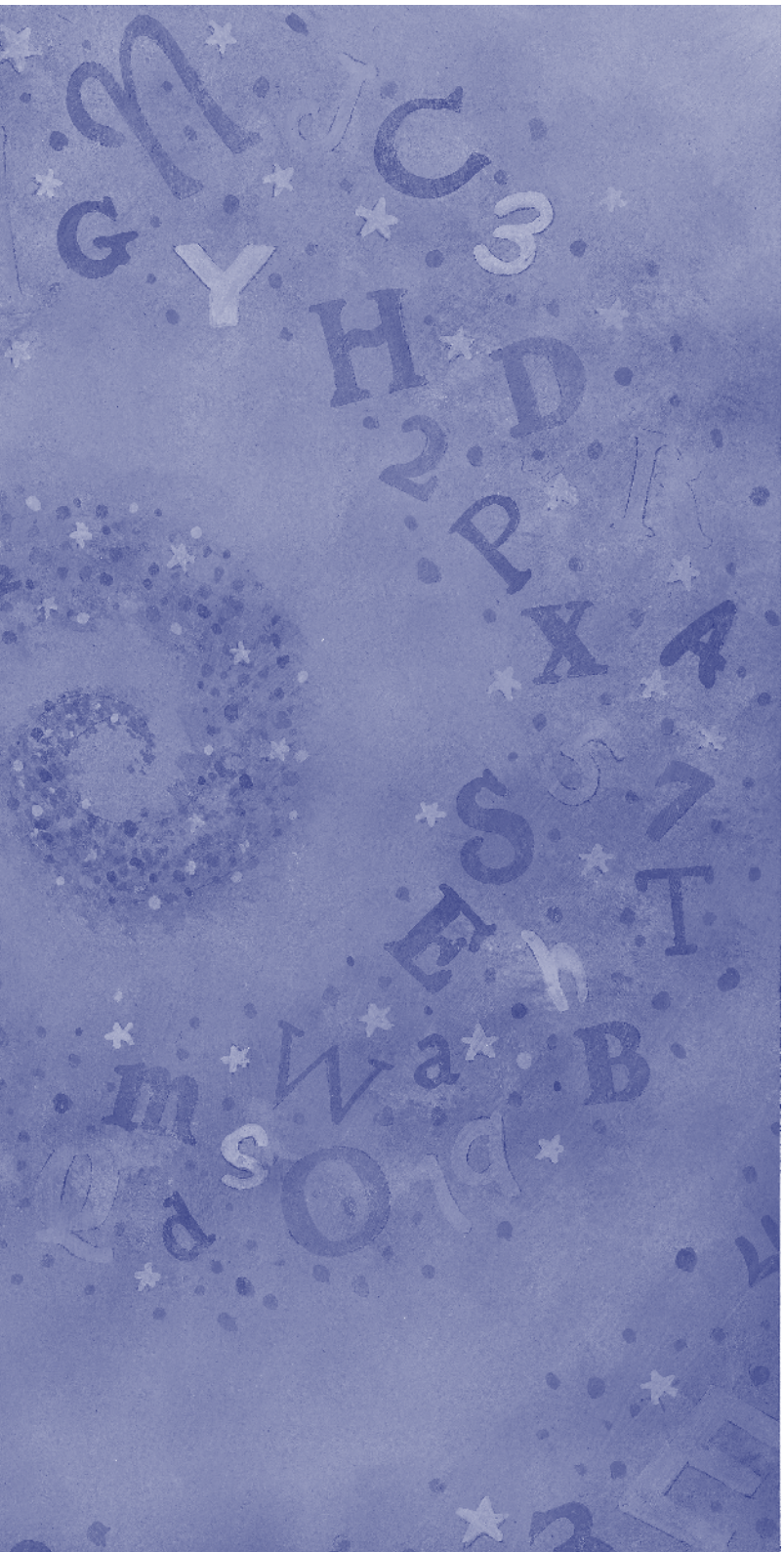
Oocyte – a female cell which develops through meiosis into an egg.

Posthumous Reproduction – refers to the birth of a child after the death of a genetic parent, using cryopreserved reproductive material. Professor Charles Kindregan has written extensively on the ethical and legal implications of this procedure. There have been a number of cases litigating this issue in a variety of forums. For example, in *Woodward v. Commissioner of Social Security*, 760 NE2d 257, 435 Mass 536 (2002). Lauren Woodward gave birth to twins, 24 months after her husbands death from cancer, using his frozen sperm. She then attempted to obtain social security benefits for the children. The Massachusetts Court held that a child, in order to be an heir under Massachusetts law, must meet the following criteria: 1) be a genetic child; 2) It must be shown the father must have intended before his death



to support the child; 3) conception must occur within a reasonable time after death; and 4) notice must be given all interested parties. The Court, after reviewing the facts, held that there was no evidence that Mr. Woodward intended to have or support a posthumous child, and therefore, the child was not his legal heir.

More recently, in 2007, the Supreme Court of New Hampshire, in *Eng Khahbag v. Commissioner of Social Security* held that pursuant to the New Hampshire Probate Statutes, a posthumous child is neither a "surviving issue" or a child of "unwed parents," and thus could not inherit (citing Woodward, supra).



In 2008, the Supreme Court of Arkansas decided *Finley v. Astrue*, 372 Ark 103, which asked the question "does a child who was created as an embryo through IVF during his parent's marriage but implanted into his mother's womb after the death of his father inherit from his father's estate." The Court answered that question by saying that under Arkansas law a posthumous child must be conceived during the lifetime of the decedent to inherit. All of these cases opine that who may inherit is a matter of public policy, is specific to state statutory and case law and is a matter solely within the purview of the legislature.

Postmenopausal Reproduction is defined as pregnancy after menopause by means of IVF, using donated eggs and sperm. While there appear to be no cases involving this issue at present, much has been written regarding the ethical dilemmas of such advanced maternal age mothers.

Rates – The number of successes and failures regarding ART procedures of a particular lab. The Center for Disease Control compiles statistics as to the success rates of ART procedures and of ART clinics throughout the United States. Statistics are also independently complied by SART (see below) and made available to the public on its website.

RESOLVE - the largest national infertility association which provides support, education and advocacy to persons who are infertile.

Society for Artificial Reproductive Technology (SART) is an organization of various professionals dedicated to the practice of ART.

Surrogate, Traditional - A method in which a woman becomes pregnant using the intended father's sperm and her egg. After the child is born, if all goes as intended she then relinquishes her rights as a mother and permits the untended mother to adopt the child. Surrogates can be relatives of either intended parents, a friend or a third party who can be paid for certain expenses. A traditional surrogate has a genetic link to the baby, which gestational surrogates do not. Surrogacy is not legal in all states.

Uniform Parentage Act – An act written by the National Conference of Commissioners of Uniform State Law (NCCUSL) to provide a structure for establishing parentage of children of married and unmarried couples. It includes the Uniform Status of Children of Assisted Conception Act. It was adopted by NCCUSL in 2000 and amended in 2002. It has not been adopted in all states.

ZIFT - Zygote Intrafallopian Transfer – An ART procedure in which embryos are transferred into the fallopian tubes of an intended mother rather than into the uterus. ZIFT requires highly invasive surgery and, since it requires two procedures (egg harvesting and implanting) is expensive. It is also known to increase chances of having a multiple pregnancy. ***FLR***

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volunteer their time and resources to protect victims of family violence. ***FLR***

(Endnotes)

1 Aued, Blake, 2009-One of the Deadliest Years Ever In Athens' History, (January 2, 2010). http://www.onlineathens.com/stories/010210/new_541940614.shtml.

2 State Bar of Georgia Membership Department, Lawyer Distribution List, May 2009.

3 Farmer, A. and Tiefenthaler, J., Explaining the Recent Decline in Domestic Violence, 21 Contemporary Economic Policy, (2003). A study by two economics professors Amy Farmer of the University of Arkansas, and Jill Tiefenthaler of Colgate University found unequivocally that the increased availability of legal services to women had a direct positive impact on bringing down the numbers of domestic violence incidents in communities across the country. "Because legal services help women with practical matters such as protective orders, custody and child support, they appear to actually present women with real, long-term alternatives to their relationships," their study concluded. If she is dependent on her male partner for support, has little education, has no access to legal help, she has few options but to stay in the relationship, no matter how violent.

4 http://www.gcadv.org/html/what/fatality_review.html.

5 Victim compensation can also help a client get back on her feet financially. A family that has suffered the crime of domestic violence can apply for compensation up to $25,000 for certain expenses, including medical costs, loss of support, and funeral expenses. http://cjcc.ga.gov/.

WHERE SURVIVORS CAN GET HELP:

Emergency Assistance – 911

Georgia Legal Services – (800) 498-9469 (outside metro Atlanta) – www.glsp.org

Atlanta Legal Aid – (404) 524-5811 (metro Atlanta) – www.atlantalegalaid.org

Georgia DV Hotline – 1 800-33HAVEN (1 (800) 334-2836) – Shelter, Safety Planning, Services and Resources

Victim's Compensation – Criminal Justice Coordinating Council www.cjcc.ga.gov – Up to $25,000 for medical expenses, costs of counseling, funeral costs, and loss of support.

Office of Child Support Services – http://ocse.dhr.georgia.gov/portal/site/DHR-OCSE/

Georgia Coalition Against Domestic Violence – ww.gcadv.org

Local DFCS office for TANF, Medicaid, Peachcare, Food stamps

DCA – subsidized housing referrals and free foreclosure counseling – http://www.dca.state.ga.us/

RESOURCES FOR LAWYERS

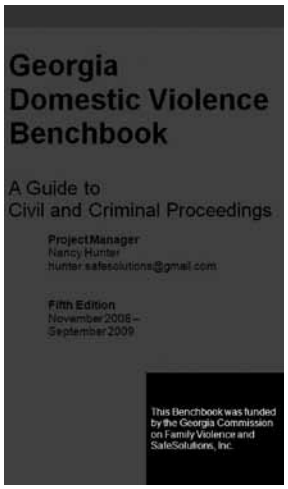
Georgia Domestic Violence Benchbook – http://www.uga.edu/icje/DVBenchbook.html

GLSP DV Trial Notebook – www.glsp.org

ABA Committee on Domestic Violence – Best Practices Manual – http://www.abanet.org/domviol/

Past Family Law Section Chairs

Edward Coleman	2008-09
Kurt Kegel	2007-08
Shiel Edlin	2006-07
Stephen C. Steele	2005-06
Richard M. Nolen	2004-05
Thomas F. Allgood Jr.	2003-04
Emily S. Bair	2002-03
Elizabeth Green Lindsey	2001-02
Robert D. Boyd	2000-01
H. William Sams	1999-00
Anne Jarrett	1998-99
Carl S. Pedigo	1997-98
Joseph T. Tuggle	1996-97
Nancy F. Lawler	1995-96
Richard W. Schiffman Jr.	1994-95
Hon. Martha C. Christian	1993-94
John C. Mayoue	1992-93
H. Martin Huddleston	1991-92
Christopher D. Olmstead	1990-91
Hon. Elizabeth Glazebrook	1989-90
Barry McGough	1988-89
Edward E. Bates Jr.	1987-88
Carl Westmoreland	1986-87
Lawrence B. Custer	1985-86
Hon. John E. Girardeau	1984-85
C. Wilbur Warner Jr.	1983-84
M.T. Simmons Jr.	1982-83
Kice H. Stone	1981-82
Paul V. Kilpatrick Jr.	1980-81
Hon. G. Conley Ingram	1979-80
Bob Reinhardt	1978-79
Jack P. Turner	1977-78



The Georgia Domestic Violence Benchbook (2009, 5th edition) has just been released for download on the Institute of Continuing Judicial Education's website: www.uga.edu/icje/DVBenchbook.html. A print version is also available at www.lulu.com/content/2196528.

Confessions of a Guardian Ad Litem: Should Georgia Adopt Parenting Time Guidelines?

by M. Debra Gold
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It is axiomatic and well established in Georgia law that the best interests of the child is the primary consideration in making custody and parenting time determinations. This, however, is a subjective and indeterminate standard which is based on discretion and does not necessarily consider the child's physical and psychological development. A handful of other jurisdictions have statutes and/or guidelines which consider a child's age and maturity in determining developmentally appropriate parenting plans. My confession for this issue of *The Family Law Revie*w is that I wonder if judges, attorneys and pro-se litigants in Georgia would benefit from something similar.

I was inspired to address the need for parenting time guidelines after reading the recent Supreme Court of Georgia case of *Bankston v. Lachman*, S09F1706, Supreme Court of Georgia (2/1/2010). The trial court in *Bankston* awarded primary custody of a one–year–old child to the mother. The father was awarded only four hours of parenting time every weekend until the child enters kindergarten on a full time basis, at which time the father became entitled to every other weekend, holidays and extended summer parenting time. The trial court explained that it based its decision on its understanding from childhood development specialists that young children are not "developmentally and emotionally ready to be spending a lot of time away from their primary residence…" On appeal, the father asserted that the trial court erred by not awarding him more parenting time. In support of this, he submitted a parenting time model published by the American Bar Association Section of Family Law; and a copy of the Indiana Parenting Time Guidelines by the Family Court Project of the Indiana Supreme Court. Both models presented by the father take a developmental, age-by-age approach to parenting time recommendations. Both models also suggest significantly more parenting time for the father, gradually increasing as the child ages and with overnights beginning at a much younger age. Unfortunately, the father did not present his models and arguments on the trial court level and he failed to show that the trial court abused its discretion. Accordingly, the issue of the parenting time allocation was never specifically dealt with by the Supreme Court and the father's limited parenting time was affirmed.

In reaching its decision, the trial court in *Bankston* applied some of the guiding principles contained in Georgia law. It is apparent that the judge recognized that "a close and continuing parent-child relationship and continuity" are

in the child's best interests. O.C.G.A. §19-9-1(b)(1)(A). It is also apparent that the judge recognized that "the child's needs will change and grow as the child matures." O.C.G.A. §19-9-1(b)(1)(B). Presumably, the judge, in his discretion, considered all relevant factors listed in O.C.G.A. §19-9-3 in determining what was in the best interests of the child. What seemed to be missing, however, was expert testimony or some form of guidelines to assist the judge in applying the foregoing principles and statues so as to formulate an age appropriate parenting schedule which addressed the practical implications of the developmental stages of the child. Instead, the judge relied on his own understanding and beliefs which are not consistent with today's research and standards.

Most judges, attorneys and pro se litigants are not psychologists or mental health professionals and many are not up–to–date on the research on childhood development and age appropriate parenting time schedules. While Georgia law provides some good general ideas to consider in developing appropriate custody and time schedules, it does not provide guidance as to what is appropriate given a child's age and psychological maturity. Clearly, what is appropriate for an infant is not appropriate for a six–year–old child. Nor what is appropriate for that six–year–old child is appropriate for a teenager. Without age-specific guidelines, judges, attorneys and pro se litigants are in the position of needing special expertise in childhood development in order to accomplish what is truly in the best interests of the children. Such special expertise is not always available or affordable. Recommended guidelines based on current research and standards would be a great aid for them to develop age appropriate parenting plans and to avoid disparate results such as the one in *Bankston*. Of course, such guidelines should only be guidelines. They should never be a substitute for discretion.

For now, Georgia has no such guidelines in place. However, attorneys should be aware of the model guidelines cited in the *Bankston* case as well as those in other jurisdictions such as Michigan and Maricopa County Arizona. They should take them to court and use them as examples when arguing about age appropriate parenting time schedules. The more information and knowledge they have and share with the courts, the more they will be able to ensure that our judges make informed decisions which will support a child's healthy relationship and growth with both parents.

And, the question still remains…. Should Georgia adopt parenting time guidelines? I am curious about your thoughts and would like to hear from you on the issue. ***FLR***

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Effect of Distinguishing Between Enterprise Goodwill and Personal Goodwill of a Business in Marital Asset Division

by Sue K. Varon, Esq. and Martin S. Varon, CPA, CVA, JD
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The value of a professional practice or other closely held business is becoming more of a focal point in divorce litigation. Particularly in today's real estate market, with increasing reality that there is no equity in the marital residence, the parties' ownership interest in a closely-held business commonly is the most significant asset of the marital estate. There are two components making up the value of a business: tangible assets (i.e. equipment, material, etc.) and intangible assets, (personal goodwill, enterprise goodwill and identifiable intangible assets, such as patents, trademarks, customer lists and tradenames).

The determination of whether the business has value often turns on whether the business has goodwill, which usually is the most significant element that comprises the business's value. The two types of goodwill that should be considered are enterprise goodwill and personal (also known as professional) goodwill. Enterprise goodwill focuses on the business's reputation that is separate and apart from the owner or professional who works at the business. In contrast, personal goodwill attaches to the reputation, skill, and personal efforts of the professional. Enterprise goodwill can generally be transferred in a sale transaction while personal goodwill cannot.

To further clarify the differences between these types of goodwill, let's look at two Manicure Salons, "Nail Perfect" and "Nails R Us," located in the same part of town, each a partnership comprised of two owners, with the same assets, liabilities, revenues and net income. Profits at each salon are allocated based on the revenue generated by the individual owners. Nail Perfect is located on a main street in town, visible from the road, with a constant stream of "walk-in" clientele. Nails R Us is located off the beaten path, where customers make appointments with a specific manicurist. Although each salon produces the same income for each owner, the type of goodwill for each of the businesses is different. Nail Perfect's owners' income is tied to the enterprise, with enterprise goodwill being the primary component of goodwill. Nails R Us owners receive earnings directly attributable to their personal skills, repeat customers and reputation, resulting in these owners having a higher level of personal goodwill. In a sale to a third party, the enterprise goodwill of Nail Perfect would be easier to transfer because regardless of who was running the business there would be an expectation of continuation of income at historic levels. In contrast, the personal goodwill of Nails R Us would be a harder sell to a third

party, with a significant part of the goodwill made up of earnings from clients loyal to the original owners.

A source of conflict among 25 states is whether goodwill should be bifurcated into personal and enterprise goodwill. By extension, another source of conflict among valuators and courts is whether personal goodwill is a divisible marital asset. Some state's courts hold that personal goodwill is not divisible as a marital asset, concluding that it represents the ability to earn future income which should be reflected in support awarded to the spouse, not in determining the value of a business when calculating the division of the marital estate. These courts are of the view that to include personal goodwill in the marital asset calculation and as a factor in determining support would be double dipping. At this point in time, only Louisiana has a statute mandating that personal goodwill should be removed from the value of the business when calculating goodwill, in effect requiring the valuator to separately determine the value of personal goodwill and enterprise goodwill and deduct the former from the business value.

Regardless of how a particular jurisdiction views goodwill, the valuator must come up with a set value of the business prior to determining the separate components of goodwill (personal and enterprise). The focus of the task for the valuator is to determine transferable goodwill. Clearly, non-transferable goodwill has no value to a willing buyer and should not be included in the valuation. With respect to transferable goodwill, the valuator must quantify how much the efforts of the individual business owner impacts the success of the business.

A critical factor in the analysis is whether the owner has signed a covenant not to compete. A binding non-compete agreement will alter the value of the business and the value of the amount of goodwill (both enterprise and personal) that is transferable to a third party. Assuming (and this is a huge assumption knowing how often non-compete covenants are struck down) the owner is bound by a covenant not to compete, the valuator will attribute a greater percentage of the goodwill to personal goodwill. This part of the goodwill, personal goodwill, may then be excluded from marital property.

Although personal goodwill is excluded from the valuation and the marital estate because it is based upon the owner spouse's personal reputation, which cannot be sold at a price, enterprise goodwill is included in the marital estate as a real asset with value. The best way to value enterprise goodwill without valuing personal goodwill is to focus on comparable sales. There would be more comparable sales to look at if sales subject to non-compete agreements could be included in the analysis. They can be included if modification is applied since the non-compete agreement is essentially the sale of personal goodwill. The total sale price, minus the fair value of the non-compete covenant, would equal the transferable value of the business, including enterprise goodwill. The most difficult cases to value are those where no comparable sales exist. In such cases, the valuation is based upon an income formula, which result must be modified to account for the goodwill attributable to the personal goodwill.

Since family law courts are courts of equity, decisions are often founded on what a judge deems fair and reasonable based on the facts and merits of each case. The trend developing among jurisdictions is that personal goodwill should be excluded in the valuation. Particularly since closely held and professional businesses are owned by one or two people, courts are moving in the direction of bifurcating goodwill between enterprise and personal goodwill. An ultimate consideration in the allocation between personal and enterprise goodwill is the degree to which the business's success or failure depends upon the individual litigant's personal services. The law in this area continues to evolve and be a source of conflict among jurisdictions. The valuator will be charged with looking at and analyzing specific facts and circumstances of each particular business to more accurately estimate the degree to which enterprise goodwill and personal goodwill exists and the method of allocating each element in arriving at the business value.

A more in-depth discussion of this topic, including specific court-tested examples distinguishing between personal and enterprise goodwill, will be presented at the Family Law Conference in Destin in May. I Iook forward to seeing you there. ***FLR***

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2010 Legislative Update

by John L. Collar Jr.

The 2010 legislative session concluded on April 29, 2010. The amount of proposed legislation introduced by the Senate and House of Representatives is amazing. While much of the proposed legislation is not applicable to the Family Law Section, the Senate has introduced 551 bills and House has introduced 1,512 bills, not to mention numerous Senate and House resolutions. This article is to provide you with a quick update on the status of relevant family law legislation. We are still assessing the family law legislation passed and a more comprehensive article will be provided once all of the legislation is reviewed.

Senate Bill 491- Civil Practice; grounds of exercise; personal jurisdiction over non-residents involved in domestic relations cases; provisions.

Senate Bill 491 was proposed legislation to address the problem identified in *Daniels v. Barnes*, 289 Ga.App. 897, 658 S.E.2d 472 (2008) that Georgia courts do not presently have personal jurisdiction over non-residents under the Uniform Child Custody Jurisdiction and Enforcement Act in contempt applications. This proposed legislation would repeal existing O.C.G.A. Section 9-10-91(5) and establish the following as new subsections to O.C.G.A. Section 9-10-91.

New Section – O.C.G.A. Section 9-10-91(5) With respect to proceedings for divorce, separate maintenance, annulment or other domestic relations action or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or if the defendant resided in this state preceding the commencement of the action, whether cohabitating during that time or not, notwithstanding the subsequent departure of one of the original parties from this state and as to all obligations arising from alimony, child support, apportionment of debt, or real or personal property orders or agreements, if one party to the marital relationship continues to reside in this state. This paragraph shall not change the requirement for filing an action for divorce.

New Section – O.C.G.A. Section 9-10-91(6) Has been subject to the exercise of jurisdiction of a court of this state which has resulted in an order of alimony, child custody, child support, equitable apportionment of debt, or equitable division of property, notwithstanding the subsequent departure of one of the original parties from this state, if the action involves modification of such order and the moving party resides in this state, or if the action involves enforcement of such order notwithstanding the domicile of the moving party.

Current Status: This legislation **passed** and is on its way to the Governor's office for signature. Senate Bill 491 was of particular importance to the Family Law Section and we appreciate your support of this legislation. You can obtain a copy of this legislation by going to the following link and searching for SB 491: http://www.legis.ga.gov/legis/2009_10/

House Bill 545 – Commencement and service of actions; service of process; revise provisions.

HB 545 relates to amending Chapter 11, Article 9 of the Georgia Code. Specifically, this proposed legislation relates to the commencement and service of civil actions, to revise provisions relating to service of process, to address certification of persons authorized to serve process throughout Georgia, to provide for service of persons who live in gated communities and the filing of the return of service. This proposed legislation is to also provide for regulation of the professional conduct of process servers and, to define the crime of impersonating a process server. This bill was initially sponsored by Wendall Willard (49th) and Edward Lindsey (54th), among others.

Of particular interest is that authorized process servers will be provided access to gated or secured communities for a reasonable period of time during reasonable hours for the purpose of performing lawful service of process. Additionally, proof of service is to be made within five (5) business days of the service date. If not filed within five (5) business days, the time for a party to

answer does not begin until the proof of service is filed.

Current Status: The House voted and passed the bill on March 12, 2010 and referred it to the Senate on March 17 where it has been through two readings and favorably reported upon.

House Bill 917 – The Uniform Interstate Depositions and Discovery Act.

The purpose of HB 917 is to repeal the Uniform Foreign Depositions Act and replace it with the Uniform Interstate Depositions and Discovery Act. This proposed legislation specifically repeals and amends O.C.G.A. Section 24-10 and (a) defines the method for the issuance of a Georgia subpoena which originates from a foreign jurisdiction (another state) seeking discovery; (b) the method utilized by the clerk of court in this state when an out of state subpoena is received; (c) the manner and process in which witnesses in Georgia may be compelled to appear and testify at depositions; and (d) that the subpoena must be served not less than 24 hours prior to the time the appearance is required under the subpoena.

HB 917 also provides that an application for a protective order or to enforce, quash, or modify a subpoena issued by the clerk of court has to comply with the rules or statutes of Georgia and are to be submitted to the court in the county in which the discovery is sought. The proposed effective date of HB 917 is July 1, 2010 and shall apply to requests for discovery in actions pending on July 1, 2010.

Current Status: The House passed and adopted this legislation on March 9, 2010. The Senate read and referred this legislation to Judiciary Committee on March 10, 2010.

House Bill 954 – Amendment To O.C.G.A. Section 19-6-5; Factors Relating To Determining Amount of Alimony.

HB 954 proposes amending O.C.G.A. §19-6-5(8) to the following:

> "(8) Such other relevant factors as the court deems equitable and proper; provided, however, that previous marriages or relationships shall not be considered."

Current Status: This legislation is effectively dead as of March 16, 2010.

House Bill 1046 – Amendment To O.C.G.A. § 15-11A relating to the Family Court Division of the Superior Court of Fulton County.

HB 1046 proposes revision to O.C.G.A. §15-11A to provide that the Fulton Superior Court Family Division shall continue to exist as a pilot project for a limited duration and shall have the powers, rules of practice and procedure, and selection, qualifications, and terms of judges of the superior court as adopted by the superior court for the family division. The duration of the project shall be determined by a majority of the Fulton Superior Court judges and shall continue until discontinued by majority vote of those judges.

Current Status: This legislation was passed by the House on March 17, 2010 and then referred to the Senate where it has been read, favorably ruled upon (April 13, 2010) and read in the Senate a second time (April 14, 2010).

Senate Bill 292 – Courts; juvenile proceedings; revisions.

Current Status: Senate Bill 292 is a comprehensive overhaul of the juvenile code. This legislation was read in the Senate on April 3, 2010 and referred to the Judiciary Committee for further review and consideration.

Senate Bill 429 – Increase in number of Supreme Court and Court of Appeals judges.

Current Status: This proposed legislation provides an increase in the number of Supreme Court judges to nine (9) and the number of Court of Appeals judges to fifteen (15). SB 429 was read and referred to the Judiciary Committee on February 17, 2010.

House Bill 24 – Evidence; revise, supersede, and modernize provisions; provide definitions.

Current Status: This proposed legislation provides a comprehensive re-write of the evidence code. The House adopted and passed this legislation on March 17, 2010. The Senate read and referred it to the Judiciary Committee on March 18, 2010.

House Bill 1085 – Reunification of Family; additional case plan and permanency plan requirements; provisions.

HB 1085 is proposed legislation to amend O.C.G.A. §15-11-58 relating to reasonable efforts concerning reunification of families and additional requirements for case plans submitted and approved by the juvenile court for children in the custody of DFACS.

Current Status: This legislation was passed by the House on March 10, 2010 and the Senate on April 20, 2010.

As you know, there is always a flurry of legislation passed in the closing days of the session and sometimes as additions to other bills. We will provide you a more comprehensive overview of the legislation passed as soon as we can. In the meantime, if you have any questions, please feel free to contact me at jcollar@bcntlaw.com. ***FLR***

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Case Law Update

by Vic Valmus
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Alimony

Moore v. Moore, **S09F1667** *(February 8, 2010)*

The wife filed for divorce and requested equitable division of marital property, but did not seek alimony. After a hearing, the trial court awarded the wife $400 per month for 100 months for a total of $40,000 in alimony and provided that the obligation would not terminate upon death or remarriage of either spouse. Husband appealed. Supreme Court affirmed.

The husband contends that the wife did not request alimony and the trial court erred by awarding it. Here, the couple had little to divide except $53,000 in debt for which $40,000 was marital, and therefore the principle issue at trial was how to divide the debt of $40,000 which was incurred by the parties in the wife's name during the course of the marriage. The trial court stated that the wife would still be responsible for the $40,000 in her name, but because the court found an obvious disparity in income and earning capacity, the husband would be required to pay alimony of $40,000 at $400 per month for 100 months. The trial court then asked if the parties had any questions or if they would like to voice any concerns. No one did. Shortly thereafter, the court entered a final judgment ordering the husband to pay. Husband appealed. Supreme Court affirmed.

The award constituted a property division. Along with any awards in a divorce judgment, the court will ascertain the nature of the awards as a matter of law and on the basis of substance rather than of labels. Therefore, the trial court's characterization of the obligation as alimony is not controlling. Because the award to the wife was for a given sum that was clearly intended to equalize the distribution of the parties' marital debt, and because the trial court specifically stated that the $40,000 award would not terminate upon the death or remarriage of either spouse, the Court concluded that the award constituted property division, not alimony, and therefore was not subject to reversal on the grounds raised by the husband.

Appeal

Todd v. Todd, **S10A0471** *(March 29, 2010)*

Trial court entered a final divorce decree dissolving the marriage, distributed property and awarded primary custody of the parties' minor child to the mother. During the same term of court, the father filed a motion for reconsideration. After a hearing, the court vacated the ruling and revised the decree and awarded physical custody of the child to the father. The mother filed a direct appeal challenging the custody award in the final divorce decree. Supreme Court dismisses the appeal.

A direct appeal will not lie from a judgment granting a divorce. Instead, an appeal from such judgment must be brought by the application process in O.C.G.A. § 5-6-35(a)(2). In 2007, the General Assembly amended O.C.G.A. § 5-6-34 and 5-6-35, removing all reference to child custody cases in 5-6-35(a)(2) and enacting subsection 11 in 5-6-34(a) to provide direct appeals taken from judgments or orders in child custody cases including, but not limited to, awarding or refusing to change the child custody or holding or declining to hold persons in contempt of such child custody judgments or orders. In this case, the underlying subject matter is the divorce action resulting in a final divorce decree. Although the divorce decree here determined among other things, child custody, such determination does not transform this case into a child custody case. The above action is not a child custody proceeding, but is a proceeding brought to determine whether a marriage should be dissolved. Because this is not a child custody case but is a divorce case in which child custody is an issue, O.C.G.A. § 5-6-35(a)(2) requires an application for discretionary appeal and a direct appeal is not authorized by O.C.G.A. § 5-6-34(a)(11).

Attorney's Fees

Lurry v. McCants, **A09A1743** *(Feb. 1, 2010)*

In August of 2006, the parties entered into a consent order which awarded joint legal custody of their daughter. In 2008, the father

petitioned for modification of child custody to support an alleged change in material conditions and circumstances enough to warrant a modification. In January 2009, there was a hearing in which the court found there was no showing of a change warranting a modification and entered an award of attorney's fees of $5,000. The father appealed. Court of Appeals affirmed in part and reversed and remanded in part.

With regards to the modification of custody, it was affirmed and the award of attorney's fees was reversed and remanded. The father contended that the trial court erred by awarding attorney's fees under O.C.G.A. § 19-9-3 and that there was no evidence presented to the court regarding the reasonableness of attorney's fees. There was a generalized proffer of evidence concerning the amount of attorney's fees that the wife incurred prior to the date of the hearing, but the proffer lacked billing records or other evidence showing precisely how her attorney's time had been spent. When a party seeking attorney's fees has failed to present an essential element of proof, but the trial court nevertheless awards attorney's fees, this court has consistently reversed and vacated that portion of the judgment awarding attorney's fees and remanded the case to the trial court to hold an evidentiary hearing for the party to cure the matter, if possible. Therefore, the case was remanded to trial court for an evidentiary hearing on the amount of attorney's fees and expenses, or for other proceedings consistent with this opinion.

Cotempt/Attorney's Fees

Roberts v. Tharp, **S09A1961** *(March 1, 2010)*

The parties were divorced in 1997. The parties had one child, but the divorce decree did not contain any award of child support. The parties filed multiple contempt actions and in early 2007, the case was transferred to juvenile court and an interim order resolving the custody and visitation issues was entered and ordered the mother to begin paying child support in the amount of $200 per month. Six months later, the juvenile court denied the mother's motion for contempt, and granted the father's motion, and reserved the issue of child support and attorney's fees. In 2008, the juvenile court ordered that child support remain $200 per month and that both parties be responsible for their own attorney's fees. Father appealed and the Supreme court reversed.

The father contended, among other things, that the juvenile court erred by refusing to award attorney's fees to the father pursuant to the provision of the 2005 consent order, which states in pertinent part: "In the event it becomes necessary for either party to initiate a motion for contempt to enforce the terms of this order, and the court finds the other party in contempt, then in that event, the party found to be in contempt shall be responsible for the payment of the other parties' attorney's fees." Here, the juvenile court found the mother to be in contempt. The general rules on an award of attorney's fees are not available unless supported by statute or contract. Therefore, the juvenile court was not allowed to alter the settlement arrangement and thus nullify important provisions of the contract reached by the mother and father, which had been made a part of the 2005 consent order. Because the parties agreed that the party found to be in contempt of the consent order would be responsible for the payment of the other parties' attorney's fees, the juvenile court's award that both parties would be responsible for their own attorney's fees must be vacated and the case remanded to the trial court with direction that an award of attorney's fees consistent with the parties' agreement, be entered.

Contempt/Service

Dennis v. Dennis, **A10A0500** *(March 10, 2010)*

The parties were divorced in November 2006, with the mother having primary custody of the minor children and the father having regular visitation. In 2007, the mother filed a motion for contempt alleging that the father had failed to pay $8,000 under the divorce decree and in January 2008, the father filed a motion alleging that the mother was interfering with his visitation. Both matters were tried in January 2008. The trial court announced its decision and instructed the parties to negotiate the visitation and other issues and submit a draft order within 10 days. No order was filed in 2008. In April 2009, the father filed a new motion for contempt which was styled as "Amended Motion for Contempt," alleging that the order was never prepared because the parties could not agree to its contents and the mother had violated their visitation during a recent Spring Break. The father served the new motion on the mother's attorney of record. Two weeks later, counsel for the wife prepared an order including the 2007 and 2008 proceedings, nunc pro tunc to January 2008. The trial court granted the wife's motion to dismiss on the ground that the allegations of the father's new petition were too generalized and he could not assert new matters after the close of the evidence on January 2008, even before the filing of the final order. The husband appeals and the Court of Appeals reversed and remanded.

Application for contempt is a motion and not a complaint. A contempt action to enforce a court ordered custody arrangement, including child support payments, is an independent proceeding that is ancillary to a divorce action and is not a new civil action. This ancillary status applies whether the divorce action is still pending or whether the trial court has entered a final judgment. A trial court is not required to make findings of facts or inclusions of law on motions for contempt arising from the enforcement of a divorce decree, but a trial court is expressly authorized to modify visitation rights, even on its own motion, during a contempt proceeding. Because relevant information concerning a child custody matter must be received up and until the court rules, the trial court

erred when it refused to consider the information before ruling. Here, the trial court failed to consider the husband's allegations, as inadequately plead, and dismissed his new motion on that basis, sua sponte, without a hearing. No matter whether the visitation at issue occurred in March 2007 or March 2009, it occurred after the trial in January of 2008, but before the final order of April 2009.

With regards to the service of process, the father's January 2008 contempt motion was still pending when he served the wife with his new motion on April 14, 2009. The wife's attorney does not dispute that she was properly served in January 2009 with the new matter, and that counsel had not prepared the final order concerning it when she was served with the new motion. This service of the new motion on the wife's attorney of record in the husband's pending 2008 action was therefore sufficient to confer personal jurisdiction over the wife to the trial court.

Notice/Hearing

Kuriatnyk v. Kuriatnyk, **S09F2030** *(March 1, 2010)*

The parties were married in 2007 and lived in Florida. There was one child born in April 2008. The wife later moved with the child to Georgia and filed for divorce in Georgia on Dec. 11, 2008. The husband was served with the verified complaint in Florida, but did not file a motion or an answer. The trial court entered a final judgment and decree of divorce upon evidence submitted and established child support. The husband filed a motion to set aside, or in the alternative, for a new trial. The trial court entered an order on the husband's motion noting the absence of any supporting affidavits, depositions, or verified pleadings and denied the motion to set aside and the motion for new trial. The Supreme Court affirmed in part and reversed and remanded in part.

The husband contended that the trial court lacked jurisdiction over the res of the marriage, and that the wife was not a bona fide resident of Georgia for 6 consecutive months before the filing of the complaint. This raised the issue of subject matter jurisdiction. As the party seeking divorce, the wife had to show that the trial court had jurisdiction over the res of the marriage resulting from her domicile in the state for a six–month period preceding the filing of the action. The wife's verified complaint showed that she had been a resident of the state of Georgia for six months prior to the filing of the complaint and that Georgia was the home state of child. In the husband's notice of appeal, he stated that no transcript evidence of the proceedings will be filed for inclusion in the record on appeal. Thus, it was impossible to determine the evidence of the wife's domicile or of the child's home state that was presented at trial, so the court assumed that the evidence supported the exercise of jurisdiction.

The trial court denied the husband's motion for new trial on the day after it was filed. Uniform Superior Court Rule 6.3 provides, in pertinent part, unless otherwise ordered by the court, a motion for new trial shall be decided after an oral hearing. Here, the trial court did not enter an order excepting the motion filed by the husband from this procedural requirement. Instead, it summarily denied the motion without holding a mandatory hearing. Therefore, a portion of the trial court's order which denied the motion for new trial must be reversed and the case was remanded with directions that the trial court conducts the hearing as required by law.

Military Pension

Michel v. Michel, **S10F0372** *(March 29, 2010)*

The parties were married from September 1995 until February 2002. They divorced and remarried seven months later and divorced again in June 2009. The wife sought a portion of the husband's military retirement benefits based on the service of the husband in the U.S. Army since 2002 until June 2009. The trial court denied the request finding that the marriage of the parties, from Sept. 12, 2002 until the present, did not justify an award an equitable division of the retirement benefits because the marriage did not last 10 years or more. Therefore, the court could not award the wife any part of the federal pension pursuant to 10 U.S.C. § 1408(d)(2). Wife appealed and the Supreme Court reversed.

Federal code clearly authorizes equitable division of military benefits and also creates a payment mechanism under which the federal government will make direct payments to a former spouse. The direct payment mechanism is limited in two ways: 1) only a former spouse who was married to a military member for a period of 10 years or more during which the member performed at least 10 years of service, and 2) the federal government will not make payments that exceed 50 percent of the disposable retired or retainer pay.

This direct payment mechanism has no bearing on the state court's authority to treat military retirement benefits as marital property subject to division, even if the marriage lasted less than 10 years.

Notice

Ellis v. Ellis, **S09F1798** *(Feb. 1, 2010)*

The husband filed a complaint for divorce in June 2008 and the wife, who was not represented by counsel at the time, acknowledged service of the complaint, but failed to file any responsive pleadings. The wife eventually retained counsel who filed an entry of appearance on the wife's behalf on Aug. 11, 2008. However, the counsel did not file a responsive pleading to the husband's complaint. The husband's attorney provided wife's attorney with notice of a final hearing which was ultimately continued, and depositions were scheduled for February 2009. According to the wife's attorney, the husband's attorney agreed to inform him of any rescheduling date for the final hearing after it had been set by the court.

Prior to the depositions, another attorney filed an entry of appearance on behalf of the husband, and she moved the trial court to enter a final judgment of divorce on the pleadings without holding an evidentiary hearing. The court granted the husband's motion. On Feb. 27, 2009, the wife's attorney filed a motion for new trial stating the agreement made between the husband's previous attorney was to provide him with notice of any final hearing. The superior court denied the motion, stating that the wife's counsel could not contend that the court failed to properly give wife notice because she waived notice by failing to file any responsive pleadings irrespective of any outside agreement between counsels. Wife appealed and the Supreme Court affirmed.

Failure of a party to file pleadings in an action is deemed to be a waiver by him or her of all notice, including notices of time and place of trial and entry of judgment, except service of the pleadings asserting new and/or additional claims for relief. Therefore, in this case, the wife waived any notice regarding the final hearing by failing to file responsive pleading and the trial court properly denied her motion for new trial. Justice Hunstein, Carly and Benham dissented.

Paternity

Williamson v. Williamson, **A09A1767** *(Jan. 26, 2010)*

The parties married in 1996 and bore a child in January 2004. In November 2005, the parties separated and in May 2006, the wife filed for divorce. In her complaint, she alleged that the father might not be the child's biological father and requested a court ordered DNA test to resolve the issue. The father opposed paternity testing. A hearing was held in July 2006 and a temporary order providing the parents share joint legal custody of the minor child of the parties; the mother would have primary physical custody of the child, and the father would pay child support. The same day the court entered the temporary order, the attorney for the mother forwarded to the attorney for the father a letter stating that there is no longer an issue as to the paternity of the minor child and that there would be no paternity testing in the case. In July 2008, after retaining a new attorney, the mother moved again for paternity testing to ascertain whether her husband was the biological father of the child. The father opposed the testing. The trial court denied the mother's motion, finding that she was precluded from contesting paternity and that paternity testing would not be in the best interests of the child. The mother files an interlocutory appeal and the Court of Appeals affirms.

The mother contends that she is not precluded from paternity testing. All children born in wedlock are deemed under the law to be legitimate but the mother is correct that the legitimacy of a child in wedlock may be disputed. However, the presumption of legitimacy is not easily rebutted. The Supreme Court stated that the presumed father who seeks to set aside a determination of paternity thereby de-legitimizing the child, has a very high hurdle and is required to include several things in his motion. While the code section does not address the situation where the mother seeks to de-legitimate the child, case law requires that a trial court consider the best interests of a child in a legal father's claim for de-legitimation. Therefore, the trial court must also consider the child's best interests in considering a mother's claims for de-legitimation. The mother clearly raised the issues early in the pleadings and there had yet to be a final decree adjudicating the parties' rights in the case. Under the circumstances, the alleged agreement by the previous attorney does not prevent the mother from contesting paternity. Because the law favors legitimation even when the child's legal father may not be the biological father, a mother who wishes to de-legitimate a child is not automatically entitled to compel the legal father to submit to genetic testing, but must first come forward with evidence sufficient to show that de-legitimating the child is in the child's best interests. The record of this case contains no such showing. Therefore the trial court did not abuse its discretion in denying the mother's motion to compel paternity testing.

Separate Estate/Stock Options

Newman v. Patton, **S09F1718** *(March 22, 2010)*

The parties were married on Sept. 1, 2002, and separated on Aug. 1, 2007. The parties' primary dispute concerned the division of stock options which the wife was awarded from one of her employers. The wife had a total of 140,750 stock options issued to her from her employer for whom she worked from May 1999 to April 2006. Although all of the stock options were awarded to her prior to the marriage, a portion was vested before the marriage and portion was vested during the marriage. When she left her employment in April 2006, the wife risked loosing all of her accumulated options unless she exercised them within two years of leaving the company. Accordingly, she exercised her options in 2006 and 2007 and used them to create a separate Charles Schwab Investment Portfolio. The final hearing was held on Sept. 9, 2008, where the court issued a final decree of divorce which held that 56, 993, options which were vested before the marriage, were not marital property and 83,757 options, which were vested during the marriage, were akin to deferred compensation and constituted marital property in which the husband was entitled to an equitable share of 40.5 percent. The trial court also determined that the husband was entitled to 40 percent of the IRA which the wife opened prior to the marriage and she made only a $500 contribution, and held that the husband was entitled to $200 of the deferred compensation account, which the wife opened prior to the marriage and made no contributions during the marriage. Wife appealed. Supreme Court reversed.

The trial court was incorrect in stating that the stock options were marital property because they were akin to deferred compensation. The correct rule is that property is subject to equitable division if it is acquired as a direct result of the labor and investments of the parties' during the marriage. The wife's stock options, which had vested prior to the marriage, were not marital property and were not subject to equitable division, because they were neither generated by the marriage nor accumulated during the marriage. As for the stock options that were awarded prior to the marriage and invested during the marriage, the trial court analysis was inaccurate and incomplete. The trial court was required to look at the evidence and determine whether the vesting of the previously awarded stock option was the direct result of the parties' labor and investments during the marriage. If the previously awarded stock options vested because of efforts made by either party during the course of the marriage, then they are marital assets, otherwise they are the wife's separate property. There are a multitude of factors to consider, including, but not limited to, whether the marital or premarital funds were used to exercise the options and the employer's purpose for granting the options (i.e. for past, present, or future service); or tax obligations resulting from the distribution. The fact that the previously awarded stock options vested during the marriage is not determinant, in and of itself, of whether the options constitute a marital asset.

In addition, any appreciation in value of a separate property during the marriage may or may not be separate property, depending on the circumstances giving rise to the appreciation. If the fact finder determines the appreciation is due solely as a result of market forces, the appreciation is separate property; to the extent that the fact finder finds the appreciation is a result of efforts of either of the spouses, appreciation is a marital asset. With regards to the deferred compensation plan in which the husband was entitled $200, the evidence shows that the deferred compensation plan was created prior to the marriage and no contributions were made during the marriage. Therefore, it is the wife's separate property. With regards to the IRA account, the wife contributed $500 during the marriage; therefore, the husband is entitled to a portion of the $500 marital contribution to the IRA and any appreciation in value thereto because of a direct result of the parties' labors during the marriage.

Visitation

Bankston v. Lachman, **S09F1706** *(February 1, 2010)*

The parties separated in early 2008 and the husband filed for divorce. There is one female child born as issue of the marriage on Oct. 31, 2007. The court awarded primary physical custody of the child to the wife and secondary custody to the husband. The court awarded, among other things, parenting time for the husband of four hours each weekend until the child enters kindergarten full time. Thereafter, the husband can have visitation every other weekend from 6 p.m. Friday until 6 p.m. Sunday and holidays pursuant to a set schedule. The court also found that the husband earns $1,680 per month as a security guard and pays $275 for a child from a previous marriage, but found that the husband has an earning capacity and imputed income in the amount of $2,500 per month for the first four months following the entry of the final decree, and then $3,000 per month thereafter and awarded child support of $605 and $697 respectively. The husband appealed. Supreme Court affirmed.

The husband contended that the trial court erred by denying the husband's request for overnight visitation. Instead, the court awarded visitation, at this time consisting of only one four–hour period per week until the child enters kindergarten on a full time basis. The trial explained that it believed that young children should not spend long periods or weekends with non-custodial parents. The husband asserts that the trial court erred in refusing to award additional visitation and that the trial court is out of sync with the current opinion about the need to establish a firm parental bond between the child and his/her non-custodial parent. The husband points to two models: one published by the ABA and the other by the Family Court Project of the Indiana Supreme Court. The models recommend that children have more visitation time, including overnight visits, with the non-custodial parent, beginning at an early age and increasing as the child grows older. These models are attached to the husband's brief on appeal, however, the record did not reflect that these models were presented to the trial court nor does it show that the counsel made the argument which the husband asserted on appeal. In addition, the husband pointed to no evidence which would lead this court to conclude that the trial court abused its discretion in setting a visitation schedule. ***FLR***

The section would like to thank Vic Valmus for his consistent contribution to the *Family Law Review*. His summation of updates to Case Law benefits all members of the section. His hard work is deeply valued and greatly appreciated.

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AGENDA

Presiding: ***K. Paul Johnson,*** Program Chair; McCorkle & Johnson, LLP, Savannah

THURSDAY, MAY 27, 2010

7:15 **REGISTRATION** (All attendees must check in upon arrival. A removable sweater or jacket is recommended.)

8:25 **OPENING REMARKS**
Tina S. Roddenbery, Chair, Family Law Section, State Bar of Georgia; Holland Schaeffer Roddenbery Blitch LLP, Atlanta

8:30 **THE INITIAL CLIENT INTERVIEW**
Edward J. Coleman, III, Surrett & Coleman, P.A., Augusta
Jonathan J. Tuggle, Boyd Collar Nolen & Tuggle, LLC, Atlanta

9:30 **BREAK**

9:45 **PLANNING YOUR CASE STRATEGY (SURVEILLANCE, DOCUMENTS, ETC.)**
Thomas P. Hawkins, Jr., Hawk Private Investigations, Inc., Atlanta
Richard M. Nolen, Boyd Collar Nolen & Tuggle, LLC, Atlanta

10:45 **DISCOVERY/EVIDENCE**
Hon. Adele P. Grubbs, Judge, Superior Court, Cobb Judicial Circuit, Marietta
James C. Metts, III, James. C. Metts, III, P.C., Savannah
Tyler J. Browning, Browning & Smith LLC, Marietta
Stephen C. Steele, Moore Ingram Johnson & Steele, LLP, Marietta

11:45 **BREAK**

12:00 **TEMPORARY HEARING (WHEN TIME IS SHORT)**
Hon. J. Stephen Schuster, Judge, Superior Court, Cobb Judicial Circuit, Marietta
Randall M. Kessler, Kessler, Schwarz & Solomiany, P.C., Atlanta

1:00 **RECESS**

2:30 **TENNIS TOURNAMENT**

6:30 **WELCOME RECEPTION**

FRIDAY, MAY 28, 2010

8:30 **MAKING MEDIATION SUCCESSFUL**
Carl S. Pedigo, Jr., Attorney at Law, Savannah
Wendy W. Williamson, The Mediation Center, Savannah
Leigh F. Cummings, Warner, Mayoue, Bates & McGough, Atlanta

9:30 **ETHICAL AND CRIMINAL ISSUES**
Hon. David L. Dickinson, Judge, Superior Court, Bell-Forsyth Judicial Circuit, Cumming
Hon. Mark Anthony Scott, Judge, Superior Court, Stone Mountain Judicial Circuit, Decatur
Kurt A. Kegel, Davis, Matthews & Quigley, P.C., Atlanta
Barry B. McGough, Warner, Mayoue, Bates & McGough, P.C., Atlanta

10:45 **BREAK**

11:00 **UNUSUAL CUSTODY ISSUES: RELIGIOUS DIFFERENCES, SEXUAL ORIENTATION, ETC.**
Hon. Jeffrey S. Bagley, Judge, Superior Court, Bell-Forsyth Judicial Circuit, Cumming
Hon. Gail S. Tusan, Judge, Superior Court, Atlanta Judicial Circuit, Atlanta
Charles E. Bailey, Warner, Mayoue, Bates & McGough, Atlanta
Sarah C. Brogdon, LCSW, Peachtree Psychological Associates, Atlanta
Rebecca L. Crumrine, Davis, Matthews & Quigley, P.C., Atlanta

12:00 **EQUITABLE DIVISION (VALUING ASSETS, NONMARITAL PROPERTY ISSUES)**
Kelly A. Miles, Smith Gilliam Williams & Miles, P.A., Gainesville
R. Scot Kraeuter, Savage Turner Pinson & Karsman, Savannah
Martin S. Varon, Alternative Resolution Methods, Inc., Smyrna

1:00 **RECESS**

1:30 **GOLF TOURNAMENT**

6:30 **SECTION RECEPTION**

SATURDAY, MAY 29, 2010

8:30 **TAKING THE CASE TO TRIAL**
Hon. Lawton E. Stephens, Judge, Superior Court, Western Judicial Circuit, Athens
Regina M. Quick, Regina M. Quick, P.C., Athens
Katheleen B. Connell, Boyd Collar, LLC, Atlanta

9:30 **BREAK**

9:45 **DRAFTING THE FINAL JUDGMENT AND DECREE/SETTLEMENT AGREEMENT**
Hon. Bill Reinhardt, Chief Judge, Superior Court, Tifton Judicial Circuit, Tifton
Kelley O'Neill Boswell, Watson Spence LLP, Albany

10:45 **PROTECTING YOUR CLIENT AFTER THE ENTRY OF THE FINAL JUDGMENT AND DECREE**
Hon. Cynthia Wright, Judge, Superior Court, Atlanta Judicial Circuit, Atlanta
Gwenn D. Holland, Holland, Schaeffer Roddenbery Blitch, LLP, Atlanta
Kice H. Stone, Stone & Driggers LLC, Macon

11:45 **BREAK**

12:00 **CASE LAW UPDATE AND RECENT DEVELOPMENTS**
Jonathan V. Dunn, McCorkle & Johnson, LLP, Savannah
Sarah McCormack, Kessler, Schwarz & Solomiany, Atlanta

1:00 **ADJOURN**

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