The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia – Spring 2019

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Cultural Considerations in Custody Litigation in Our Diverse Community

Editors' Corner

By Leigh F. Cummings
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This issue of the *Family Law Review* contains many instructive articles on a wide array of family law topics and also highlights the upcoming Family Law Institute, which will be held at the Amelia Island Plantation on May 23-25. Additionally, some very special members of the Family Law Section are highlighted in this issue, including a tribute to a former Family Law Section Chairperson, M.T. Simmons, who passed away in 2019; as well as articles showcasing recipients of the Joseph T. Tuggle Professionalism Award (Steve Steele) and the Jack P. Turner Award (Ned Bates); and, an acknowledgement of the outstanding work performed by Vic Valmus in preparing the Case Law Updates in each issue of the *Family Law Review*. We are tremendously fortunate to count these individuals as members of our Family Law Section.

Lastly, thank you to all of the contributors for the quality content of this edition. Your efforts are appreciated!

See you all at Amelia Island! ***FLR***

Editor Emeritus

By Randy Kessler
rkessler@ksfamilylaw.com

I cannot believe it has been thirty years since my first FLI! It is amazing to see how far the section has come and how it has grown. One hundred attendees used to be considered a good turnout. I remain thankful to be associated with such a great group of lawyers and I look forward to continuing to share knowledge, experiences, war stories and laughter at this year's Family Law Institute at Amelia Island and to enjoy and learn from the amazing speakers Ivory Brown has invited. Let's enjoy each other's company as we continue to improve our own practices and the practice of family law in Georgia. ***FLR***

Inside This Issue

From the Chair

By Scot Kraeuter
scot@jkdlawfirm.com

It is time again for the annual Family Law Institute. Ivory Brown has worked tirelessly to bring us the best Institute yet. She has assembled a wonderful and accomplished selection of speakers and judges. Once again, Karine Burney has succeeded in raising the sponsorship dollars that are so critical for the Institute every year. Without our generous sponsors we would not be able to enjoy the Institute that we all look forward to and love. Thank you to each and every sponsor.

In keeping with recent traditions, Leigh Cummings and the *Family Law Review* Editorial Board have published this FLI edition of the *Review* just in time for the Institute. I hope that the knowledge it contains helps you in your daily domestic law practice. See you on the beach! ***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 Leigh F. Cummings at cummings@connellcummings.com.

THURSDAY–SATURDAY, MAY 23–25, 2019

37TH ANNUAL

FAMILY LAW INSTITUTE

LIGHTS, CAMERA, ACTION!
...REEL TO REAL FAMILY LAW...

16.5 CLE HOURS

1 ETHICS HOUR | 2 PROFESSIONALISM HOURS | 3 TRIAL PRACTICE HOURS

OMNI AMELIA ISLAND PLANTATION RESORT

State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

WEDNESDAY MAY 22, 2019

OMNI AMELIA ISLAND

6:00 **EARLY CHECK-IN**
(All attendees must check in upon arrival.)

7:00 **MOVIE NIGHT**

THURSDAY MAY 23, 2019

OMNI AMELIA ISLAND

DIRECTED BY:
ivory t. brown, Program Chair, ivory t. brown, p.c., atlanta

7:00 **REGISTRATION AND CONTINENTAL BREAKFAST** (All attendees must check in upon arrival. A jacket or sweater is recommended.)

7:15 ***BREAKFAST AT TIFFANY'S (1961)***
FIRST TIMER'S BREAKFAST

8:00 **OPENING REMARKS**
ivory t. brown

8:10 ***WIZARD OF OZ (1939)***
FACING YOUR FEARS: LIONS AND TIGERS AND BEARS, OH MY!
Bankruptcy, Real Property, Tax and Trusts
Will Rountree, Rountree Leitman & Klein, Atlanta, Bankruptcy Section
Aimee D. La Tourette, Schulten Ward Turner & Weiss LLP, Atlanta, Real Prop Section
Jason Wiggam, Wiggam Geer, Atlanta, Taxation Law Section
Abbey Flaum, Cohen Pollock Merlin Turner, PC, Atlanta, Elder and Fiduciary Sections

9:10 ***TO KILL A MOCKINGBIRD (1962)***
Considering and Countering Cognitive Bias in our Courts and with our Clients: What it is and Why it Matters
Elizabeth E. Berenguer, Associate Professor & Director of Upper Level Writing, Norman Adrian Wiggins School of Law, Campbell University, Raleigh, NC
Andrea Cooke, BSW, MFT, Developmental Director, The Southern Center for Choice Theory, Macon
Tomieka R. Daniel, Supervising Attorney, Georgia Legal Services Program, Macon
Rebecca A. Hoelting, Hoelting & McCormack, LLC, Atlanta
Teri A. McCurty-Chubb, Professor of Law, Mercer University, Macon

10:10 **INTERMISSION**

10:20 ***WEB OF EVIDENCE (1959)***
Evidence Fundamentals for The Family Lawyer
Michael S. Carlson, Assistant District Attorney, Cobb County, Marietta
Ronald L. Carlson, Fuller E. Callaway Chair of Law Emeritus, University of Georgia School of Law, Athens

11:20 ***DOUBLE INDEMNITY (1954)***
Temporary Hearings: Instant Relief or Temporary Insanity: Judges Weigh In
Moderator: *E. Noreen Banks-Ware,*
E.N. Banks-Ware Law Firm, LLC, Lithonia
Hon. Gregory A. Adams, Stone Mountain Judicial Circuit
Hon. Glen A. Cheney, Atlantic Judicial Circuit
Hon. Horace J. Johnson, Jr., Alcovy Judicial Circuit
Hon. J. Stephen Schuster, Cobb Judicial Circuit
Hon. Paige R. Whitaker, Atlanta Judicial Circuit

12:00 **INTERMISSION**

12:10 ***BRINGING UP BABY (1938)***
The Changing Face of Family: ART, IVF and Surrogacy
Lila N. Bradley, Claiborne Fox Bradley LLC, Atlanta
David B. Purvis, The Manely Firm PC, Savannah

12:40 ***THE CHILDREN'S HOUR (1961)***
Same Sex and LGBT Issues in Family Law
William B. "Will" Davis, Naggiar & Sarif, LLC, Atlanta
Donna-Marie P. Hayle, Ney Hoffecker Peacock & Hayle LLC, Atlanta
Elizabeth L. "Beth" Littrell, Southern Poverty Law Center, Atlanta

1:10 ***THE ODD COUPLE (1968)***
Custody Considerations and Co-Parenting for the Unmarried Parent: Tips from the Bench, Guardian ad Litem and Counselor
Honorable Amanda S. Petty, Ocmulgee Judicial Circuit
Tamika Hrobowski-Houston, Judicial Officer, Fulton Superior Court
Howard Drutman, PhD, Atlanta North Psychotherapy Center, Roswell
Amy Kaye, Ellis Funk, Atlanta

1:40 ***ANATOMY OF A MURDER (1959)***
Ethics and Professionalism: Pressing Issues in Our Practice
Moderator: ***B. Lane Fitzpatrick,*** Law Office of Lane Fitzpatrick, Danielsville
Hon. LaTisha Dear Jackson, Stone Mountain Judicial Circuit
Hon. Carol Hunstein, Retired Justice, Georgia Supreme Court
Hon. Robert D. Leonard, II, Cobb Judicial Circuit
Hon. Denise Marshall, Dougherty Judicial Circuit
Hon. Gail S. Tusan, Atlanta Judicial Circuit
Hon. Holly W. Veal, Flint Judicial Circuit
Hon. Timothy R. Walmsley, Eastern Judicial Circuit

2:20 **INTERMISSION**

OPTIONAL SESSIONS

2:30 ***WHO'S AFRAID OF VIRGINIA WOOLF (1966)***
How to Secure Your Device and Client Confidentiality – Computers, Telephones, Tablets

2:50 **THE END**

2:45 **OPTIONAL ACTIVITIES (GOLF, TENNIS, YOGA, SPA)**
For more activities to do with friends and family, please visit website to make your reservations (not included in registration fee): https://rebrand.ly/familylaw-activities

6:30 **WELCOME RECEPTION**

7:00 ***CASABLANCA (1942)***
Red Carpet and Opening Night Dinner and Awards Ceremony
(Open to all participants, pre-registration required.)

LegaLetters – TedTalks from the Court of Appeals of Georgia:
Hon. Elizabeth Gobeil, Hon. Steve Goss, Hon. Ken Hodges, Hon. Todd Markle, Hon. M. Yvette Miller, Hon. Brian Rickman

9:00 **OPENING NIGHT PARTY WITH DJ "KP THE GREAT"**

FRIDAY
MAY 24, 2019

OMNI AMELIA ISLAND

6:00 **YOGA ON THE BEACH**
(Registration required.)

7:00 **REGISTRATION AND CONTINENTAL BREAKFAST**

8:00 **LEGALETTERS (TEDTALKS)**
Hon. Christopher J. McFadden, Presiding Judge, Court of Appeals of Georgia, Atlanta

SIGNS OF THE TIMES

8:15 ***12 ANGRY MEN (1958)***
Bar Necessities: Tips for Handling Client Complaints, Lawsuits and Other Indignities
Megan E. Zavieh, Zaviehlaw, Atlanta, Professional Liability Section

8:55 ***THE WOMEN (1939)***
Make New Friends, but Keep the Old: Professionalism and Social Media
Erin H. Gerstenzang, EHG Law Firm, Atlanta

9:55 **INTERMISSION**

CUSTODY CONSIDERATIONS: THE IMPACT AND IMPORT OF TIE BREAKING DECISIONS

10:00 ***INHERIT THE WIND (1960)***
Deciphering Learning Differences and Other Educational Considerations
Hon. A. Gregory Poole, Cobb Judicial Circuit
Craig L. Goodmark, Goodmark Law Firm LLC, Decatur
Dawn R. Smith, Smith & Lake LLC, Decatur

10:30 ***THE BAD SEED (1956)***
The Impact of Childhood Trauma and Other Mental Health Matters
Hon. Christopher S. Brasher, Atlanta Judicial Circuit
Sherri T. Lake, Smith & Lake LLC, Decatur
Kim Oppenheimer, PhD, Atlanta Psych Consultants, LLC, Atlanta

11:00 **THE MIRACLE WORKER (1962)**
People with Disabilities: Securing Access on Myriad Fronts
Hon. Joseph H. "Joe" Booth, Piedmont Judicial Circuit
Kurt Lawton, Sarah Floyd Blake, P.C., Augusta
Kristen Lewis, Smith Gambrell & Russell, LLP, Atlanta, Elder, Fiduciary Law Section
Cameo Appearance by Etnie, Canine Assistants Spokes dog**
**Available for one-on-one canine therapy sessions after the presentation.

11:30 **INTERMISSION**

11:35 ***CAT ON A HOT TIN ROOF (1958)***
Mental Health, Addiction and Accountability: The Crisis on Our Corners Changing Courts to Handle Changing Communities
Moderator: *Jeff Davis,* Executive Director, State Bar of Georgia, Atlanta
Hon. Cynthia C. Adams, Douglas Judicial Circuit
Hon. Verda M. Colvin, Macon Judicial Circuit
Hon. Ann B. Harris, Cobb Judicial Circuit
Hon. Asha F. Jackson, Stone Mountain Judicial Circuit
Hon. T. David Lyles, Paulding Judicial Circuit
Hon. Eric W. Norris, Athens Clark Judicial Circuit
Hon. Kathryn M. Schrader, Gwinnett Judicial Circuit
Hon. R. Ashley Wright, Augusta Judicial Circuit

12:25 ***A MAN FOR ALL SEASONS (1966)***
Navigating Religion in Family Law
Aisha Rahman, The Baig Firm, Norcross

12:45 ***A STREETCAR NAMED DESIRE (1951)***
The Rush Towards the Robe
High Conflict Personalities in Family Law
Megan Hunter, MBA, CFO, High Conflict Institute, San Diego, California

1:20 **INTERMISSION**

MATINEE SESSIONS

SESSION A

1:30 ***MISTER 880 (1950)***
Funny Money in Family Law: Bitcoin and Crypto Currency
David G. Sarif, Naggier & Sarif LLC, Atlanta

2:00 **WITNESS FOR THE PROSECUTION (1957)**
Interlopers in Family Matters: Fraudulent Real Property Transfers and Other Conduct Considerations in Divorce
George O. Lawson, Lawson & Thornton PC, Atlanta
Leron E. Rogers, Lewis Brisbois Bisgaard & Smith, LLP, Atlanta

2:20 ***IT'S A WONDERFUL LIFE (1946)***
Financial Bootcamp: Advanced
Speakers TBA

SESSION B

1:30 ***DIVORCE AMERICAN STYLE (1967)***
Child Support: Deviations, Imputing Income and Other Emerging Issues
Lori Anderson, Atlanta Legal Aid, Atlanta
Mark Rogers, Rogers Economics, Atlanta

2:00 ***A RAISIN IN THE SUN (1961)***
Marketing and Social Media
Sean Ditzel, Abernathy Ditzel Hendrick Bryce, LLC, Marietta
Sana Rupani, Georgia Family Law Project, Atlanta

2:20 ***MIRACLE ON 34TH STREET (1947)***
Financial Bootcamp: Intermediate
Speaker TBA

2:50 **THE END**

3:00 ***GUESS WHO'S COMING TO DINNER (1967)***
Diversity Luncheon (RSVP required)

7:00 **COCKTAIL HOUR AND ENTERTAINMENT: SPECIFIC DEVIATIONS**

9:00 **KARAOKE NIGHT**

SATURDAY
MAY 25, 2019

OMNI AMELIA ISLAND

6:15 **MEDITATION WALK**

7:00 **REGISTRATION AND CONTINENTAL BREAKFAST**

8:00 ***IMITATION OF LIFE (1959)***
When Immigration Law and Family Law Matters Collide
Nilufar "Nilu" Abdi-Tabari, Law Office of Nilu Abdi-Tabari, Roswell
Alpa S. Amin, Georgia Asylum and Immigration Network, Atlanta
Judith Delus Montgomery, Law Office of Judith Delus, P.A., Atlanta
Hon. Meng H. Lim, Tallapoosa Judicial Circuit
Jesus A. Nerio, Law Office of Jesus Nerio, Atlanta

9:00 ***YOURS, MINE AND OURS (1968)***
Trending Topics in Military Law
Patty D. Shewmaker, Shewmaker & Shewmaker LLC, Tucker
Steve P. Shewmaker, Shewmaker & Shewmaker LLC, Tucker
Hon. J. P. Boulee, Stone Mountain Judicial Circuit
Hon. Ural D.L. Glanville, Atlanta Judicial Circuit
Helen W. Yu, Flanagan Law and Mediation PC, Augusta

9:40 **INTERMISSION**

9:50 ***ALL THAT HEAVEN ALLOWS (1955)***
Star crossed...it's over easy – Successfully Handling Difficult and Easy Divorces
Laura Wasser, Wasser, Cooperman and Mandles, P.C., Los Angeles

10:40 ***THE WOMEN (1939)***
Managing the Light: Media Management for Your Firm and Client
Randy Kessler, Kessler & Solomiany LLC, Atlanta

11:00 ***THE SNAKE PIT (1948)***
Caselaw and Legislative Update

11:30 ***THREE FACES OF EVE (1957)***
Personality Disorders and the Family: Alleviating the Impact of Personality Disorders on Families and Early Intervention in the Personality Development of Children
Frederic Bien, Personality Disorders Awareness Network, Atlanta

11:50 **INTERMISSION**

12:00 ***HUSH...HUSH, SWEET CHARLOTTE (1964)***
How to Deal with High Conflict Opposing Counsel and the Future of Family Law
Bill Eddy, High Conflict Institute, San Diego, California

12:30 **OPTIONAL SESSIONS**

SESSION A

12:30 ***THE PARENT TRAP (1961)***
Arbitration, Collaboration and Mediation – Tools to Tame the Beast

SESSION B

12:30 ***A STAR IS BORN (1954)***
Law Practice Management and Technology

1:00 **THE END**

SUNDAY
MAY 26, 2019

OMNI AMELIA ISLAND

2:00 **BOAT TOUR (OPTIONAL) (REGISTRATION REQUIRED)**

OMNI AMELIA ISLAND PLANTATION RESORT

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Cancellations reaching ICLE by 5pm the day before the seminar date will receive a registration fee refund less a $25.00 administrative fee. Otherwise, the registrant will be considered a "no show" and will not receive a registration fee refund. ICLE will either ship materials, or email a digital link, to every no-show. Designated substitutes may take the place of registrants unable to attend.

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Ver. 7

37TH ANNUAL FAMILY LAW INSTITUTE | MAY 23–25, 2019 | 10213

- ☐ **EARLY REGISTRATION FEE:** **$525**
- ☐ **ONSITE REGISTRATION FEE:** **$625**

ADDITIONAL ACTIVITIES:

- ☐ **MOVIE NIGHT** — **INCLUDED**
  5/22 at 7:00p.m.
- ☐ **WELCOME RECEPTION, DINNER AND AWARDS** — **$125**
  5/23 at 6:30p.m.
- ☐ **YOGA ON THE BEACH** — **$47**
  5/24 at 6:00a.m.
- ☐ **FAMILY LAW DIVERSITY LUNCHEON** — **INCLUDED**
  5/24 at 3:00p.m.
- ☐ **COCKTAIL HOUR AND ENTERTAINMENT** — **INCLUDED**
  5/24 at 7:00p.m.
- ☐ **MEDITATION WALK** — **$5**
  5/25 at 6:15a.m.
- ☐ **BOAT TOUR** — **$99**
  5/26 at 2:00p.m.

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Expiration Date: Signature:

Cultural Considerations in Custody Litigation in Our Diverse Community

By M. Debra Gold

INTRODUCTION

America is, and always has been, a melting pot. Native Americans of numerous tribal affiliations populated the land long before it was explored and settled by the British, French, Spanish, Dutch and other immigrants to the "New World." African Americans were brought here as slaves. The Asian and Pacific Islander population grew in the West. And, in the past century, Eastern Europeans, Latinos, Middle Easterners and other immigrants from various ethnicities and cultures have added to the cultural diversity that America enjoys today.

Historically, most ethnicities, religions and races settled in pockets throughout the country, as it was only natural to gravitate to people with whom they had a natural affinity and connection. However, with increased immigration, and a mobile society in pursuit of educational and job opportunities, many people have moved away from their culturally insulated communities into mainstream America, which has become a multi-cultural America.

The U.S. Census Bureau recently published population projections which indicate that the "non-Hispanic White-alone" majority American population is shrinking, especially in the child population.[1] By 2020, "non-Hispanic White-alone" children are projected to be in the minority.[2] And, over the next few decades, the Census Bureau projects that the "Two or More Races population"[3] will be the fastest growing population. In fact, the Bureau projects that the numbers of children who are of "Two or More Races" will more than double by 2060, from today's 5.3 percent of all children, to 11.3 percent in 2060.[4] In Georgia, the "non-Hispanic Two or More Race Groups" population under the age of 18 years increased from 65,117 in 2008 to 91,475 in 2017.[5] As statistics show, the American family is becoming more and more multi-cultural, multi-lingual and multi-religion.

What this means to family law attorneys, guardians ad litem, custody evaluators and judges is that race, ethnicity, religion and culture are important considerations in custody cases. Immigration and intermarriage among various cultures has turned mainstream America into a diverse place of multi-cultures. It follows that bi- and multi-cultural divorces and child custody cases are becoming more common.[6] Thus, cultural issues and considerations in custody cases have become another important dimension to an already multi-dimensional area of law.

Custody and visitation laws, however, have not kept up with the growth of our multi-cultural society, and still do not appropriately address the issues encountered in family courts by litigants of various cultures different from "the norm." In many states, including Georgia, standards are vague. The lack of good direction in the statutes, appellate decisions and court rules often lead to an implicit and unrecognized bias. Discrimination grounded in stereotypes, unsubstantiated presumptions and pure ignorance about cultural nuances often place litigants of different ethnicities, religions, races and cultures at a large disadvantage in family courts. The obstacles they face are multi-layered.

CULTURE'S ROLE IN CUSTODY AND VISITATION CASES

A child is a product of both parents, and is entitled to enjoy his/her cultural inheritance from both parents. Cultural identity is a deep-rooted and important part of the child's development and identity. Cultural considerations must, therefore, factor into the child's best interests determination, and special considerations must be incorporated into parenting plans.

Merriam-Webster defines culture as "the customary beliefs, social forms and material traits of a racial, religious or social group; also: the characteristic features of everyday existence (such as diversions or a way of life) shared by people in a place or time."

Culture is the foundation for one's world view. It is the rules, standards and social expectations within a group that govern acceptable behaviors, and give people a sense of right or wrong. Think of culture as a tapestry with interwoven strands that create its structure, and form the people within the structure. Our culture influences our values, attitudes, daily rituals and beliefs, as well as our behaviors and our interactions and relationships with others.

Culture plays a large role in custody and visitation cases. Culture influences parents' attitudes toward child-rearing, concepts of fairness and perceptions of right and wrong. Family dynamics, relationships, communication, disciplinary tactics and other culture-specific behaviors are also heavily influenced by one's background. Thus, attorneys, guardians ad litem, custody evaluators, mediators and judges must have a general understanding of cultural nuances, as they affect the best interests of the children. A family law professional who does not have an appropriate level of cultural competency may miss, ignore, over-emphasize or misinterpret significant issues, and risks inaccurate conclusions. Thus, developing cultural awareness and competency is an absolute must for anybody involved in family law and child custody cases.

CULTURAL OBSTACLES IN FAMILY COURTS

Families of various ethnicities, religions, races and cultures face numerous obstacles and difficulties in family

courts, many of which are based on a lack of knowledge and understanding of their culture, and a lack of statutory and case law to address the questions that arise.

Obtaining Legal Representation

Finding good legal representation in family court is the first obstacle encountered in custody and visitation cases involving cultural, bi-cultural and multi-cultural families. This, of course, is truer in rural areas where there are fewer attorneys. Cultural services organizations that provide pro bono legal representation rarely become involved in family law cases. Legal aid organizations that offer assistance in family law cases are sometimes conflicted out if the other party has already consulted with them. As an additional resource, Georgia has several culture-based voluntary Bar associations, many of which provide referral services.

Outside of the above resources, finding an attorney who understands one's cultural heritage, practices and values can be a challenge. Many family law attorneys have little training or experience in cultural diversity and competency. Because of their lack of understanding of their clients' concepts of right or wrong, expectations of their children and other culturally sensitive issues, their own implicit biases (of which they are usually unaware) impact their ability to provide good representation. To effectively represent a parent of a different culture, attorneys must keep an open mind. They must know the right questions to ask their clients so that they can have a full understanding of cultural practices, beliefs and values that are unfamiliar to them. Depending on the facts and circumstances of the case, it may be wise to associate another attorney in the case who understands the cultural nuances involved.

Communication Issues

Language and communication barriers obviously impact a person's ability to effectively present his or her case to the attorney, the guardian ad litem and the court. People of different backgrounds communicate and interpret many things in different ways. The same verbal and non-verbal expressions can have different meanings in different cultures. This often results in important things being misunderstood, taken out of context, or "lost in translation."

When English is a second language for parents, children or witnesses, the attorneys, guardians ad litem and custody evaluators must exercise great caution to ensure that their communications are understood, and that they understand what is being communicated to them. Always listen closely, and ask questions when something is unclear. Refrain from using slang and metaphors. Be particularly sensitive to someone who is embarrassed, or afraid that their lack of English fluency will have a negative effect on their custody case, as they may be hesitant to seek clarification for fear of bringing attention to their non-fluency.

Body language also speaks differently in different cultures. A conversation between persons of Latin and Scandinavian backgrounds may look like a dance, as the Latino keeps moving closer, while the Scandinavian backs

GEORGIA CULTURE-BASED VOLUNTARY BAR ASSOCIATIONS

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Atlanta, GA 30302
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Georgia Asian Pacific American Bar Association
c/o De la Cruz Law LLC
2900 Chamblee Tucker Rd. Bldg 12 2nd Fl
Chamblee, GA 30341
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Georgia Association of Black Women Attorneys
P.O. Box 4381
Atlanta, GA 30302
(678) 825-5675
www.gabwa.org
Serving minorities statewide

Georgia Hispanic Bar Association *
P.O. Box 77205
Atlanta, GA 31119-1112
(404) 612-4800
www.georgiahispanicbar.org
Serving Hispanics statewide

Korean-American Bar Association of Georgia *
C/o Nelson Mullins
201 17th St. NW, Suite 1700
Atlanta, GA 30349
http://www.kabaga.org/
Serving Korean-Americans statewide

South Asian Bar Association of Georgia *
C/o Ogletree Deakins
191 Peachtree Street NE, Suite 4800
Atlanta, GA 30303
(404) 870-1745
www.sabaga.org
Serving South Asians statewide

** Do not offer referral services.*
*** This listing may not be complete. If any Georgia culture-based voluntary Bar associations have been left off of the list, please let me know at debbie@mdgcustodyconsulting.com.*

away in need of more personal space. The Scandinavian is also likely stoic looking with little expression, while the Latino is animated, expressive and talking with his or her hands.

Awareness of, and respect for, social nuances affecting communications is also important. For example, in some Arab cultures, it is improper for a male attorney to request an interview with a female witness without first obtaining her husband's consent. Respect also extends to language one uses when referring to different ethnicities, races, religions and cultures.

Attitudinal Biases

We see custody and visitation cases through our own cultural lenses. Customary practices that influence parental behaviors may not be customary, or even familiar to the family law professional. A parent's cultural traditions and core values may also conflict with our perceptions of the norms built into the family law system. These cultural blind spots and biases should never get in the way of seeing the full picture of what is in the best interests of the children.

Bias is defined as "a mental inclination or tendency; prejudice; predilection."[7] Personal biases are a natural part of human nature. We all have them, acquired, in significant part, from our upbringing, experiences and cultural background. Custody litigators, guardians ad litem and judges also form biases or leanings based on experiences in previous cases, statutory and case law, and continuing legal education seminars covering the best interests of the children. Many of our biases are buried in the subconscious, and we are unaware of them. Without even realizing it, such implicit biases influence how we perceive things, and they sway our judgment.

Attorneys, guardians ad litem, custody evaluators and judges must guard against knee-jerk beliefs about ethnicities, religions, races and cultures, and refrain from automatically ascribing characteristics to people based on stereotypes not grounded in reality. Such personal biases fail take into account a parent's actual parenting skills, practices and expectations, and the fact that the essence of parenting is found in the emotional, intellectual and ethical guidance that a parent gives to a child as he or she grows. Family law professionals must recognize their own natural tendency to apply pre-existing beliefs, expectations and hypotheses to different situations, resist the tendency to jump to conclusions, and focus on the totality of the factors that should be considered in custody and visitation cases. If a professional cannot overcome biases or other hurdles involved in cases involving persons of different cultures, then the professional should withdraw from the case.

Lack of Cultural Awareness and Competency

Cultural competency, as defined by The Child Welfare League of America is "the ability of individuals and systems to respond respectfully and effectively to people of all cultures, classes, races, ethnic backgrounds, sexual orientations, and faiths or religions in a manner that recognizes, affirms, and values the worth of individuals, families, tribes, and communities, and protects and preserves the dignity of each."

Attorneys generally have little training in cultural competency. Many are unable to recognize, understand or appreciate the implications of various culturally-related issues in custody and visitation cases, or the impact culture has on the litigants and their families. Culture-blind decision-making leads to simplistic "race-matching" based on stereotypes or the child's outward appearance, custody and visitation denials merely because one hails from an anti-American country, and other inappropriate custody awards. Cultural ignorance also results in omitting important cultural traditions and holidays from Parenting Plans.

Culture is not necessarily an easy concept to grasp. One's cultural characteristics can be fluid, and change over time with assimilation and acculturation. There are also cultures within cultures. Nigeria, for example, is home to more than 250 ethnic groups that speak more than 500 languages. Furthermore, similar to the United States, in most countries, cultural norms vary depending on whether one lives in urban or in rural areas.

Cultures are distinguishable from one another in many different ways. Parenting style variations, for example, can generally be ascribed to different cultures. Authoritative parenting is more prominent in some cultures while authoritarian parenting is more prominent in others. In Western cultures, parenting is generally individualistic, and traditionally more maternalistic than paternalistic. It follows that the acceptable norm for most American parents is, for example, to refrain from immediately comforting babies when they cry, and for children to sleep in their own beds. On the other hand, parents from many Asian collectivist cultures carry their babies until they are too heavy to handle, even after they can walk, and children sleep with their parents at least up to school age. In a paternalistic culture, it is not uncommon for the father to automatically get custody of the children upon divorce.

Understanding the cultural foundations of parenting behaviors and practices is vital before appropriate weight can be applied to them in determining what is in the best interests of the children. A lack of knowledge and understanding of the nuances characteristic of the parents' culture may raise unwarranted red flags. For example, in Chinese cultures, modesty rules, and parents often use shame to instill high principles in their children. An untrained eye may view a parent's focus on the child's negative behaviors, and the embarrassing, shameful comments as abusive, whereas to the parent and the child, it is a normal and loving way to raise successful and good children. Thus, attorneys, guardians ad litem, custody evaluators and judges must train themselves to recognize and familiarize themselves with relevant cultural differences so that issues are viewed not only through the lens of traditional family law judicial system norms, but also through the cultural lenses of the family in question. This can be a delicate balance.

Cultural competence also enables the family law professional to recognize, and factor into the custody decision, the potential adverse effects of Court rulings contrary to the family cultural norms. For example, in

paternalistic cultures where the father automatically gets custody of the children in a divorce, a mother who resorts to an American family court to get custody of the children may be punished by her community for bucking traditional laws. Punishment in the Roma culture, for example, can be a shaming and loss of reputation for the mother, or as severe as expulsion from the community. And, of course, the effects of such punishment always trickle down to the children.

Because cultural competency is more about what one perceives than what one sees, developing cultural competency requires a certain amount of introspection, and an appreciation of one's own background, demographics and cultural identity. This allows the professional to understand the differences between their own personal values, beliefs, attitudes and expectations, and those of the family with whom they are working. Such awareness enables the professional to uncover any existing implicit biases and recognize their natural tendency to apply pre-existing beliefs, expectations and hypotheses that may impede their ability to effectively serve as the attorney or other professional in the case.

Developing cultural competency also requires researching, learning and understanding that which we do not already know. This includes obtaining specialized knowledge on the culture's history, traditions, values, family systems, child-rearing practices, social practices and other things inherent in the culture. It may mean stepping outside of one's comfort zone and standing in someone else's shoes. The culture-specific knowledge that we gain gives meaning to what we observe. It also enables us to be culturally sensitive to issues outside of our kin.

Probably the best resource for building an understanding of the cultural idiosyncrasies involved in any case is your client. He or she is keenly aware of the import of their cultural practices, and how cultural issues have affected them and their children. The Internet, of course, is also a great resource to find general information. To get answers to specific questions about cultural norms and practices, cultural community and social service organizations are usually very willing to provide assistance. Our colleagues are another great resource for cultural information, as there are many voluntary Bar associations that specialize and focus on specific cultures. See Appendix 1. The State Bar of Georgia, the American Bar Association and many of the local and circuit Bars associations also have resources available.

Lack of Standards and Training for Guardians ad Litem

Guardians ad litem have little training in cultural competency, and there is an absence of well-defined standards giving them guidance. Uniform Superior Court Rule 24.9, the Georgia rules governing the appointment, qualification and role of guardians ad litem, provides only general direction for evaluating custody cases that involve cultural issues. USCR 24.9(2) provides that the guardian ad litem training should include "recognition of cultural and economic diversity in families and communities." USCR 24.9(3) adds that the guardian ad litem "should be respectful of, and should become educated concerning cultural and economic diversity as may be relevant to assessing the child's best interests." While those are great aspirations for guardians ad litem, as a practical matter, developing cultural competence in custody cases is left to the individual guardians ad litem, as trainings do not cover the subject in much depth.

For guardians ad litem to effectively assess parenting skills, trainings should include guidance on building an understanding of the various cultural nuances relevant in their cases, and their impact on parenting and the children. Guardians ad litem should have a general familiarity with concepts of culture, the parenting style variations that are common within those cultures, and the role of family support systems in cultures. For example, guardians ad litem should be taught that in many cultures, help from family members does not indicate a weakness in parenting, but rather is an acceptable and expected means of caring for children in collective communities. Communications, and respect for other cultures and their differences, should also be covered in the guardian ad litem trainings.

Guardian ad litem and custody evaluator assessments must focus on parenting competency, and should not give undue weight to unusual or different cultural practices, especially if those practices do not negatively affect the children. The relevant issue for guardians ad litem and custody evaluators is the degree to which a parent's cultural nuances impacts the child, the parent-child relationship, and the parent's ability to provide a safe, secure and wholesome home for the child. Guardians ad litem and custody evaluators need to work extra hard to ensure that their evaluations are free from bias, and are based on specific evidence, rather than speculation. Thus, it is important for guardians ad litem and custody evaluators to recognize and understand their own personal implicit biases, so that they can move beyond them to a more balanced understanding of people from different cultures, and avoid value judgments that may impede a full and fair investigation.

APPLYING THE BEST INTEREST OF THE CHILDREN STANDARD

Every state applies "the best interests of the children" standard in custody and visitation cases. Most state statutes, however, do not specifically require consideration of a child's cultural identity, or the parents' cultural practices. Georgia's juvenile code, guardianship code, social services code, adoption code and child support guidelines require consideration of a child's cultural background. Interestingly, O.C.G.A. §§ 15-11-26(12), 15-11-105(4) and 19-8-18(e)(9) require the court and the guardian ad litem in Juvenile Court proceedings, and the court in adoptions, to consider the "child's background and ties, including familial, cultural and religious," in their best interests analyses. Yet, Georgia's custody statute, with its long list of factors to consider in making a best interests determination, has no requirement to factor in relevant

cultural considerations. Case law giving guidance on cultural issues is also sparse.

Thus, there is a certain amount of vagueness in the law as to how decision makers in custody and visitation cases should take cultural factors into account, what weight should be given to a child's and the parents' cultural identities, and what weight should be given to cultural traditions and practices that are outside of the norm. Add this vagueness to the discretionary nature of the best interests of the children standard, and the sum total result is that judges, guardians ad litem and custody evaluators vary in their applications of the best interests standard in custody and visitation cases involving cultural considerations.

In applying the best interests standard, judges, guardians ad litem and custody evaluators must be extra careful not to take a culture-blind approach, and ascribe to the children the stereotypical identity of one parent based on assumptions about ethnicity, religion, race or culture. Awarding custody of a child to a parent based simply on culture-matching because the bi-cultural child looks more like one parent, would, of course, be an abuse of discretion. Rather, a full best interests analysis considering all of the factors contained in O.C.G.A. § 19-9-3(a)(3) is the only way to ensure that the children's and parents' rights to their cultural identities are protected from discriminatory stereotyping, while also considering all relevant factors, including cultural factors, in the custody determination.

Questions of cultural background and identity in custody and visitation cases need to be taken seriously. However, since O.C.G.A. § 19-9-3(a)(3) does not explicitly require consideration of these questions, either the "any relevant factor" catch-all permits consideration of them, or the 17 other factors contained in the statute must be interpreted broadly to address relevant and important cultural factors.

O.C.G.A. § 19-9-3(a)(3)(G), the "importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity" is probably the most explicitly relevant and useful consideration in custody and visitation cases involving cultural issues. Under this subsection, the guardian ad litem and the judge may consider the child's background and cultural influences, and weigh the importance of the child's ethnic, religious, racial, linguistic and community background. Children are entitled to their cultural heritage. Thus, an important inquiry is which parent is more inclined to continue to encourage and support the child's cultural identity. This is of particular importance if the child has always been raised within that culture.

One of the more heavily relied upon subsections by many guardians ad litem and judges also allows for consideration of significant cultural issues. O.C.G.A. § 19-9-3(a)(3)(N), the "willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child" is a particularly important consideration in bi- and multi-cultural custody and visitation cases. Bi-and multi-cultural children should be encouraged to positively identify with both parent's cultural heritages, and each parent is best situated to personally communicate their own cultural histories, values and ways of life. Thus, relevant questions should center around which parent is more empathetic, and willing to have an open approach to accommodate access to the children's multi-cultural heritage so that the children can explore and be exposed to all of their cultural backgrounds and histories. Included in this analysis is the question of which parent appreciates and understands the day-to-day realities of the other parent's culture, including discrimination and racism. Of course, the decision maker must ensure that facilitating a child's relationship with the non-custodial parent, and his/her cultural practices, is consistent with the best interest of the child. Thus, if a parent's cultural or religious practices place the child in an unsafe or unwholesome environment or situation, the judge may place restrictions on that parent's ability to expose the child to those practices, or require supervised visitation.

O.C.G.A. §§ 19-9-3(a)(3)(H) and (L), interpreted broadly, also invoke cultural considerations. Subsection (H) requires consideration of "each parent's support systems within the community to benefit the child" and Subsection (L) considers the "home, school and community record and history of the child." Thus, it is important to know the history of how the child was raised within the cultural community; whether the child attends a parochial school; what other cultural or family support systems have been in place for the child; to what degree the child observes traditions and practices; and, whether the parents will live in a community where the child will continue to have cultural opportunities.

Cultural implications may also come into play when considering the "love, affection, bonding, and emotional ties" between the parents and the children, and the parents' "capacity and disposition" to give the child love and affection. If, for example, the two parents are typical of Mediterranean and German backgrounds, the guardian ad litem and judge must be sensitive to their cultural differences, and take into account that outward affection is common and generally acceptable in the Mediterranean culture whereas, people of Northern European cultures are typically stoic, and do not outwardly express emotion.

Culturally influenced issues such as sleeping arrangements with children until school age, or excessive disciplinary measures are relevant factors under O.C.G.A. § 19-9-3(a)(3)(F), which requires consideration of the children's home environment, and the promotion of nurturance and safety of the children. Due weight should be given, for example, to a Chinese parent who punishes his children for disobedience in accordance with an old Chinese custom of shaming them, and locking them out of the house. Subsection (P), which considers family violence and mental or physical child abuse can also be broadly interpreted to address excessive disciplinary measures and language that may appear to be abusive.

The child's preference as to with which parent he or she wishes to live may also have significant cultural underpinnings. For example, if a child is bullied at school because of one parent's orthodox adherence to a cultural or religious dress code and traditions, the child may have a preference to live with the other parent who is more moderate, or from another culture. Thus, as in all election cases, understanding the child's motives for choosing to live with a parent is always important.

There are no hard and fast rules. In the big picture of what is in the best interests of the children, the 17 factors enumerated in O.C.G.A. § 19-9-6(a)(3) overlap, and some factors outweigh others. There is no basic formula for assessing the weight to be given to various cultural factors. Instead, the guardian ad litem and the judge must balance the child's needs, the biases and cultural practices of the family, the impact of the cultural practices on the child, and all other considerations contained in O.C.G.A. § 19-9-3(a)(3) when determining what is in the best interests of the children.

How much weight should be given to cultural differences depends upon all of the facts and circumstances of the case. Generally, the greater the impact of cultural beliefs and practices on the child, the more they should be taken into account. Additionally, the more distinct the cultural differences are from mainstream society, and the more the child's cultural heritage experiences bias, discrimination and hostility from society, the more important culture is as a consideration. Finally, the degree of the parents' and family's acculturation can have a significant bearing on how much importance is placed on their culture. It is important to know whether the parent/family is orthodox in practice, or whether they have assimilated to the mainstream culture, and adopted the practices.

The question also becomes one of how much deference, if any, should be given to cultural beliefs, traditions and practices when they go against acceptable mainstream norms. Context, of course, is always important. And, again, the impact of the belief, tradition or practice on the child is also important to determine if there is a threat to the child's safety or well-being. For example, should a Chinese parent lose custody of his child because he practices the same disciplinary custom of locking children outdoors that worked so well for him as a child? If the child is four years old, probably yes. But if the child is 15 years old such parental conduct may be less harshly judged.

Clearly, if a parent's cultural practices pose a threat to the child's safety and well-being, supervised visitation is an option. However, supervised visitation should never be imposed unless the objective facts clearly call for it.

The burden of proof should always be on the accuser to show the negative effects of the other parent's cultural beliefs and practices on the child. Parents should not have to be placed on the defensive, with the burden of having to affirmatively prove that his or her cultural beliefs will not harm or negatively impact the children. The courts should also provide specific findings of fact as to what cultural factors were considered in the custody decision. This should include the impact of a parent's cultural beliefs and practices on the health, safety and welfare of the child. If the judge limits a parent's custody or visitation rights based on cultural issues, there should be an explicit and pronounced nexus between the issue and the negative effects upon the child.

PRACTICAL THOUGHTS FOR ATTORNEYS

General Tips

- You cannot properly represent your client without at least a basic understanding and knowledge of his or her cultural nuances. You must be able to recognize how the client's cultural bias affects his/her case.
- Just as in all cases, you must be able to see your clients' cases through their eyes, and advocate from their positions.
- Adopt a non-judgmental posture. Don't be offended if, for example, a father from a male-dominated culture values his son more than his daughter, and only wants custody of the son.
- Documents may need to be translated to English. It is always advisable to hire an independent certified translator, especially if it is a legal document or something that will be used as evidence at trial. The translation should be accompanied by an original certificate of translation.
- Men from male-dominant cultures may not trust that a female guardian ad litem, custody evaluator or judge can be neutral.
- It is only natural for people to do what is most comfortable for them. Don't be surprised if your client resists your good advice because it goes against his or her cultural values, or because their community or religious leader does not approve.
- Jokes do not always translate well. Humor may also be taken as an insult, given the gravity of the situation.
- If a client's culture-based parenting practices are overboard (i.e., disciplinary practices), and if the client is willing to make appropriate adaptations to his/her behaviors, suggest intensive counseling and/or parenting classes so that they can overcome values and behaviors that are ingrained in them.

Tips If English Is a Second Language for Your Client

- You cannot properly represent clients if you cannot effectively communicate with them.
- Take extra care to ensure that your client understands everything. Plan for a longer initial meeting, if necessary
- Speak slowly, use simple language and don't use slang or metaphors.
- Ask the client to repeat things if you think he/she

does not understand.

- Make sure your client understands your contract, the pleadings, financial affidavits and anything else he/she swears to or signs. If necessary, hire a licensed interpreter, who is ethically bound to maintain confidentialities, to translate the documents and interpret communications between you and your client. An independent interpreter is important because the interpretation should reflect your client's words, not those of family members and friends who are emotionally involved, biased, and may embellish upon what your client says.
- If necessary, also hire an interpreter for meetings with the guardian ad litem, mediation, depositions and other legal proceedings.

Tips for Trial

- If the case goes to trial, it is the attorney's job to educate the judge about any cultural issues that may arise.
- It may be helpful to hire an expert to explain the culture, its traditions and practices and its benefits for the children.
- A picture is worth a thousand words. A child's cultural heritage becomes more concrete if the judge sees a picture or video of the child dressed in ritualistic clothing or participating in cultural activities.
- Cultural and language differences may render testing and clinical evaluations useless if they are not properly adapted to accommodate the differences.
- People with language barriers may feel intimidated by, and/or distrustful of the court system, particularly when they are involved in adversarial proceedings. Legal settings, especially in the courtroom or a deposition, can be scary.
- If your client is not fully fluent in English, it is wise to arrange for an interpreter since the stress and confusion of the trial can interfere with the client's ability to communicate in, and accurately understand, English.
- Uniform Superior Court Rule 7.3 sets out the rules for interpreters for court proceedings.
- Allow time for the interpreter and the client or witness to meet beforehand so that they can build a comfort level between them, and so the interpreter can assess any potential issues with his/her ability to effectively interpret.
- Make sure the interpreter speaks the same dialect and regional vernacular as the witness, as many words in the same language translate differently in different regions. If possible, vet the interpreter to make sure he/she is not sensitive to the issues in the case. Although unintentional, an interpreter's personal feelings and biases can affect the interpretation.
- If using an interpreter, be sure to estimate sufficient extra time in your time announcement to the Court.
- If your client needs special accommodations, such as prayer breaks at specific times of the day, it is best to inform the Court before trial and possibly by brief, explaining the need for the special accommodations.

PRACTICAL THOUGHTS FOR GUARDIANS AD LITEM

General Tips

- Uniform Superior Court Rule 24.9 mandates that guardians ad litem become well versed in the cognition of cultural diversity in families and communities, and in how culture may be relevant in assessing a child's best interests.
- Even if the guardian ad litem shares the same cultural background as the family, he/she may be on a different acculturation path, which may impact his/her ability to fully understand all of the cultural implications.

Investigation Tips

- In Asian cultures, since children are raised to bring honor to their families, they may not be forthcoming with information or with responses to your questions.
- Be respectful of cultural traditions during home visits. For example, in many cultures, people remove their shoes when entering a home. If shoes are collected at the doorway, remove yours too.
- Some cultures welcome guests with a full spread of food. Although the general rule is to maintain your boundaries and not accept favors, food or gifts from the parties, refusing food on home visits may be an insult in some cultures.
- It may be necessary to seek out your own expert to help you understand the cultural implications of the family with whom you are working.
- Beware of confirmation bias, which is defined as filtering information to suite (sic) a preference and reject the rest." This is one of the legitimate bases attorneys use to challenge the fairness of guardians ad litem's investigations and recommendations. Confirmation bias is more prevalent in emotionally charged and ambiguous cases, and it can result in a distortion of the facts, clouded judgments and faulty conclusions. To avoid falling into the trap, ask open-ended questions, and not loaded questions that suggest a response. Keep an open mind, and don't make quick judgments. Challenge your own impressions, consider alternative interpretations and think outside of the box. Critical thinking is vital.
- Obtain information from more than one source. Ask for the same information from both parties in the case.
- Work extra hard to see the facts and circumstances

of the cultural issues through the eyes of the children and the parents.

Recommendations Tips

- If a parent's cultural practices pose a threat to the child's well-being and safety, consideration should be given to recommending supervised visitation. In such cases, consideration should also be given to a parent's willingness to conform to mainstream practices through counseling and parenting classes. Recommend intensive counseling and classes if the parent is sincerely willing to make changes. However, many cultural beliefs and values are ingrained, and therefore difficult to change.
- In bi- or multi-cultural families, don't forget to consider, and if appropriate, designate special and important holidays, such as the Chinese New Year, or the Jewish Rosh Hashana and Yom Kippur, to the parent of that particular culture or religion.
- Ensure that recommendations are culturally sensitive. For example, do not recommend that a parent who prays at two o'clock every afternoon be the parent who must pick the children up from school every day.
- Be careful on cross-examination. If you do not do your homework, you'll get caught!

FINAL THOUGHTS

Several states have specific statutes requiring cultural competence for litigating attorneys. A few states, including Connecticut, Minnesota and South Carolina have also enacted statutes specifically addressing cultural considerations in custody and visitation cases. For example, Minnesota's custody statute mandates consideration of "a child's physical, emotional, cultural, spiritual, and other needs, and the effect of the proposed arrangements on the child's needs and development," as well as the parents' willingness to meet the child's spiritual and cultural needs. Minnesota's custody statute also expressly recognizes that parenting "may differ between parents and among cultures."

Would it be helpful for Georgia's custody statute to include similar provisions regarding the child's cultural and spiritual needs and the parents' abilities to provide for those needs? Maybe so, maybe not. As previously illustrated, the current Georgia custody statute can be interpreted broadly to include cultural factors in the best interests analysis. However, under the current statutory scheme, the child's cultural background, and other cultural factors and implications can be discounted or ignored. By explicitly requiring consideration of cultural factors in custody and visitation cases, guardians ad litem and judges would be specifically required to consider ethnic, religious, racial and cultural issues that impact the best interests of the children on a case-by-case basis.

As a final thought, the obstacles faced by families of different cultural backgrounds in family courts will take time to go away. To speed up the process, building cultural competency and understandings of cultural differences in custody and visitation cases should be a regular part of the training for guardians ad litem, and continuing legal education programs for attorneys. ***FLR***

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Endnotes

1 United States Census Bureau Press Release Number CB18-41, March 13, 2018 (as revised September 6, 2018) "Older People Projected to Outnumber Children for First Time in U.S. History." https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html
2 Id. Projections are that the greater majority of children (72%) will be "White alone, regardless of Hispanic origin."
3 The racial categories included in the U.S. Census questionnaire are: White; Black or African American; American Indian or Alaskan Native; Asian; and Native Hawaiian or other Pacific Islander. https://www.census.gov/topics/population/race/about.html
4 Id.
5 https://datacenter.kidscount.org Data source: U.S. Census Bureau.
6 Culture-related family law issues also arise in cross-cultural adoptions and termination of parental rights actions.
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8 https://www.childwelfare.gov/pubPDFs/culturalcompetency.pdf, A Closer Look: Cultural Competency, March 2009, The National Technical Assistance and Evaluation Center.
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10 East European Roma Culture Awareness Guide, The Roma Support Group, March 2015. www.grtpa.com
11 O.C.G.A. §§15-11-2(25), 15-11-26(12), 15-11-105(4) and 15-11-202(f)(3).
12 O.C.G.A. §§29-4-11(d)(3)(D) and 29-5-11(d)(3)(D).
13 O.C.G.A. §§49-5-3(16) and 49-5-222(8).
14 O.C.G.A. §19-8-18(e)(9).
15 O.C.G.A. §19-6-15(i)(2)(J)(ii) which allows for a special deviation for "activities intended to enhance the athletic, social or cultural development of a child."
16 O.C.G.A. §19-9-3(a)(3).
17 See, Applebaum v. Hames, 159 Ga. App. 552 (1981) and Greene v. Greene, 306 Ga. App. 296 (2010). See also, Sahibzada v. Sahibzada, 294 Ga. 783 (2014).
18 See, for example, Sahibzada, supra.
19 O.C.G.A. §19-9-3(a)(3)(A).
20 O.C.G.A. §19-9-3(a)(3)(C).
21 O.C.G.A. §§19-9-3(a)(5) and 19-9-3(a)(6).
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24 Minn. Stat. 518.17(a)(7)
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Joint versus Sole Physical Custody: What Does theResearch Tell Us About Children's Outcome? "Legitimate" Cause for Concern

By Linda Nielsen

Do children fare better or worse in joint physical custody (JPC) families where they live with each parent at least 35 percent of the time than in sole physical custody (SPC) families where they live primarily or exclusively with one parent? This question assumes even more importance as JPC has become increasingly common in the United States and abroad. For example, in Wisconsin JPC increased from 5 percent in 1986 to more than 35 percent in 2012. And as far back as 2008, 46 percent of separated parents in Washington state and 30 percent in Arizona had JPC arrangements. JPC has risen to nearly 50 percent in Sweden, 30 percent in Norway and the Netherlands, 37 percent in Belgium, 26 percent in Quebec and 40 percent in British Columbia and the Catalonia region of Spain.

At least 20 states are considering changes to their custody laws to make them more supportive of JPC. In April 2018, Kentucky became the first state to establish a rebuttable presumption of equal parenting time in all child custody cases, absent situations such as drug abuse or domestic violence that pose a danger to children. Arizona enacted a shared parenting statute in 2014, which has been functioning as a rebuttable presumption of equal parenting time. Four years after its enactment, lawyers, judges and mental health professionals evaluated the law favorably in terms of children's best interests and perceived it as having no impact on legal or personal conflicts between parents.[1]

But are children's outcomes better in JPC than SPC families—especially if their parents do not get along well as co-parents? And if JPC children have better outcomes, is this because their parents have more money, less conflict, better parenting skills or higher quality relationships with their children before they separate? Put differently, are JPC parents "exceptional" because they get along better than SPC parents and mutually agree to the custody plan from the outset?

Those who have expressed misgivings about JPC have made a number of claims that they report are based on the research. For example, in a 2014 judicial branch education seminar[2] and a 2016 seminar sponsored by the Nebraska Psychological Association,[3] Robert Emery stated that no study had ever found positive outcomes for infants or toddlers who spent overnight time with fathers after their parents separated. He went on to add that, according to an Australian study by McIntosh and her colleagues, babies who spent one overnight a week with their fathers were more irritable and more insecure than babies who never spent a night away from their mothers. In his book on child custody, Emery goes further by stating: "Conflict is more damaging to children than having only a limited relationship with your other parent (p. 51)."[4]

How accurate are claims such as these? Do the empirical data support them? To answer these questions, I reviewed all 60 studies that compared JPC and SPC children's outcomes, especially those studies that considered parental conflict, family income, and the quality of children's relationships with their parents when they separated. I also reviewed an additional 19 studies that compared JPC and SPC couples' levels of conflict in order to answer the question: Do JPC parents have significantly less conflict and more cooperative co-parenting relationships than SPC couples?

gettyimages.com/ kate_sept2004

META-ANALYSES OF JPC AND SPC CHILDREN'S OUTCOMES

Researchers sometimes conduct a "meta-analysis," which is a statistical procedure that compares the statistical findings from a group of studies selected by the researcher. There are only two meta-analyses that compared children's outcomes in JPC and SPC.[5,6] Both reached the same conclusion: JPC children had significantly better outcomes than SPC children. The first analysis by Bauserman[5] analyzed only 11 studies from peer reviewed academic journals because so few published studies existed 20 years ago. His analysis did, however, include 22 doctoral dissertations which also found JPC children had better outcomes. Bauserman also examined parental conflict and found that JPC children still had better outcomes even after accounting for parental conflict.

The second analysis by Baude[6] et al. included only 18 of the 55 studies that existed at the time and did not examine parental conflict. But they did address another important question: Do JPC children who live 50 percent time with each parent have better outcomes than JPC children who live 35 percent to 49 percent time with each? The answer was yes.

RESULTS OF THE 60 STUDIES

This article is an abbreviated version of an article published earlier this year that summarizes the results of all 60 studies that statistically compared JPC and SPC children's outcomes across a wide range of measures of well-being.[7] Fifty-three were published in English in academic journals. The other seven were published by Australian teams of academic researchers as part of their country's ongoing studies of JPC and SPC. These seven studies are included because they are often cited in the literature on JPC and because most of them have large, representative sample sizes. A detailed description of each of the 60 studies, their limitations and the reference citations are provided elsewhere and are available upon request (nielsen@wfu.edu). [7]

Data from the 60 studies can be grouped into five broad categories of child well-being:(1) academic or cognitive outcomes (2) emotional or psychological outcomes (3) behavioral problems which include teenage drug, nicotine or alcohol use; (4) physical health or stress related physical problems and (5) the quality of parent-child relationships.

The overall conclusion is that JPC children have better outcomes than SPC children. Compared to SPC children, JPC children had better outcomes on all of the measures in 34 studies; equal outcomes on some measures and better outcomes on other measures in 14 studies; and equal outcomes on all measures in six studies. In six studies JPC children had worse outcomes on one of the measures but equal or better outcomes on all other measures.

Did JPC children still have better outcomes when the researchers considered family income? Yes. In the 25 studies that considered family income before comparing the children, JPC children had better outcomes on all measures in 18 studies, equal outcomes on some measures and better outcomes on other measures in four studies, and equal outcomes on all measures in one study. In only two income studies did the JPC children have worse outcomes than SPC children on one of the measures—with equal or better outcomes on all other measures.

What about parent conflict? When parent conflict was high, did children fare worse in JPC than SPC families? In the 19 studies that considered conflict, JPC children still had better outcomes on all measures in nine studies, equal outcomes on some measures and better outcomes on other measures in five studies, and equal outcomes on all measures in two studies. In only three studies did JPC children have worse outcomes than SPC children on one of the measures.

One argument against JPC is the hypothesis that these parents had much better relationships with their children before their separation than did SPC parents. If that is true, then maybe it isn't the JPC arrangement, but the quality of the relationships, that accounts for the better outcomes. Nine of the 60 studies tested this possibility. JPC children had better outcomes on all measures in five studies, equal outcomes on some measures and better outcomes on others in two studies, and worse outcomes on one of several measures in two studies. Based on this small group of studies, it does not appear that the quality of parenting accounts for JPC children's better outcomes.

OTHER NOTEWORTHY FINDINGS

Several other noteworthy findings emerged from the 60 studies. First and foremost, in no study did JPC children have worse outcomes on all, or even most, measures than SPC children. JPC and SPC children had the fewest differences in regard to academic achievement or cognitive skills. This suggests that the custody arrangement has less impact on grades and cognitive development than on the other areas of children's lives.

The greatest advantage for JPC children was better family relationships. In 22 of 23 studies that assessed family bonds, JPC children had closer, more communicative relationships with both parents. The second greatest advantage for JPC children was better physical and mental health. In 13 of 15 studies that addressed physical health, JPC children had fewer psychosomatic, stress-related physical problems. Forty-two studies assessed children's emotional health: depression, life-satisfaction, anxiety, and self-esteem. In 24 studies, JPC children had better outcomes and in 12 studies there were no significant differences between the two groups. In six studies, the results were "mixed" depending on gender and which measure of emotional well-being was being assessed.

As teenagers, JPC children also had better outcomes. Twenty-four studies assessed one or more of these behaviors: drinking, smoking, using drugs, being aggressive, bullying, committing delinquent acts, getting along poorly with peers. In 21 studies JPC teenagers had better outcomes on all measures. In three studies the results were "mixed" because the differences between JPC and SPC teenagers depended on gender or on which measure was being assessed.

What about children's relationships with their grandparents—and why should we care? In all four studies that addressed this question, JPC children had closer relationships with their grandparents than SPC children. This matters because children who have close relationships with their grandparents after their parents separate tend to be better adjusted emotionally and behaviorally. Especially when the family is experiencing the stress of the parents' separation, strong relationships with grandparents can be a protective factor for children.

NEGATIVE OUTCOMES FOR JPC CHILDREN

In six of the 60 studies JPC children in particular circumstances had worse outcomes than SPC children on one of the measures of well-being. Four of these studies were with teenagers. They first examined a group of Australian teenagers. The boys in JPC were somewhat more likely than boys in SPC to say they "sometimes did not get along well with peers"— but the reverse was true for girls.[8] On the other hand, JPC teenagers reported better relationships with both parents, stepparents and grandparents than SPC teenagers.

The second study assessed a group of American teenagers, all of whom had high conflict divorced parents. When they gave one of their parents a low rating for "positive" parenting (making the children feel they mattered, establishing and consistently enforcing rules), JPC teens had more behavioral and emotional problems

than SPC teens. But when the teenagers gave both parents positive ratings, JPC teenagers had fewer problems than SPC teenagers.[9]

In two studies from Belgium, the results were also mixed. In the first Flemish study JPC and SPC adolescents had similar outcomes on all measures of well-being with two exceptions.[10] Ten teenagers who felt they had bad relationships with their fathers were more depressed and more dissatisfied in JPC than in SPC. And when parental conflict remained high eight years after the divorce, girls were more depressed in JPC than in SPC—but boys were less depressed in JPC.

In the second Flemish study "neurotic" (anxious, tense, depressed, sad) teenagers fared just as well in JPC as in SPC.[11] But highly "conscientious" (task oriented, rule oriented) teenagers felt more depressed and less in control of their lives in JPC than in SPC. In contrast, the least conscientious teenagers fared better in JPC.

SHARED PARENTING FOR BABIES, INFANTS AND PRESCHOOLERS

Six studies focused exclusively on children ages 0 - 5. I begin with the two studies that have received the most worldwide attention because both are frequently cited as evidence that infants and toddlers should spend little, if any, overnight time in their father's care.

In an Australian study led by Jennifer McIntosh,[12] the 19 JPC toddlers were "less persistent at tasks" than the 103 SPC toddlers. And the 22 JPC toddlers scored lower on a test of how they "interacted with" their mothers (sometimes refusing to eat, being clingy when she was leaving). These researchers interpreted this to mean that JPC created more "distressed relationships" with their mothers. In fact, however, JPC toddlers and the majority of toddlers in intact families behaved in these same ways with their mothers — and their scores were perfectly within normal ranges. For children under the age of two, according to their mothers, the 43 babies who overnighted more than four times a month were more "irritable" than the 14 babies who overnighted less than four times a month. The researchers interpreted this as a sign of "stress" from overnighting. But again, babies from intact families had the same irritability scores as the overnighting babies. The 59 infants who overnighted more than four times a month "looked at their mother" and "tried to get her attention" more frequently than the 18 babies who overnighted less than four times a month. The researchers interpreted this as a sign of "insecurity" caused by overnighting. This is a highly questionable interpretation because the researchers extracted the three questions from a test of language development where looking at the mother and trying to get her attention were positive signs that the baby was more ready to learn to talk. This study has been widely criticized for its questionable methodology and interpretations of data.[21,23]

The second was an American study supervised and co-authored by Robert Emery.[13] The study was based on a sample that was not representative of the general population or of divorced parents. The sample was comprised largely of single parent, never married, impoverished, minority families with high rates of incarceration, physical abuse, and mental health problems living in 20 large cities. Even in these families, children ages 0 - 5 who overnighted frequently or who lived in JPC families were not significantly different from those who did not overnight on six measures of well-being with two exceptions. First, children in JPC as three year-olds had fewer social problems at age five than children who were not in JPC at age three—a finding which, for unexplained reasons, is described as "chance." Second, the 111 infants and toddlers in JPC had more "insecure" scores on a test assessing their attachment behaviors toward their mother. The researchers interpreted this to mean that overnights away from the mother resulted in more insecure attachments to her. The problem here is that half of the JPC children were living with their fathers. So the attachment scores were assessing their behavior with their mother even though she was not their primary care-giver. Moreover, the attachment test was based on mothers' reports, not on reports from objective observers. This undermines its validity. In his seminars and book, Emery applies these findings to the general population and describes the study as the "best and biggest" study of the impact of overnighting on babies' attachments to their mothers.

The third study was a nationally representative Swedish study with three, four and five-year-old children. The JPC children had fewer psychological and behavioral problems on a standardized test and on preschool teachers' reports than did SPC children. This held true even after controlling for parents' education levels and the children's ages.[14]

Similarly, in an American study, college students who had lived in JPC families or had frequently overnighted with their fathers before the age of three had better relationships with both parents than those who had not overnighted.[15] They also had better relationships than children who only started overnighting or moved into JPC after the age of five. This held true regardless of the parents' educational levels or how much conflict they had when separating or in ensuing years. "Lost overnight parenting time at age two was not made up by parenting time later (p.11)."

In yet another American study, two to three year-olds who overnighted at least once a week did not have more behavioral or emotional problems than those who did not overnight.[16] Moreover, the four to six year-olds who overnighted had fewer attention problems and fewer social problems than the non-overnighters.

In the oldest of the six studies, the sample included an unusually high number of violent and high conflict parents for the overnighting children.[17] Only eight of the 44 overnighting infants spent more than three nights a month with their father, often going weeks without seeing one another. Nonetheless, the overnighting and non-overnighting infants were not significantly different in their attachment scores with their mothers. Even though the overnights had more "disorganized" scores (meaning the child's behavior was too inconsistent to classify) than babies in intact families, the lead author recently reiterated, that any attachment problems were due to poor parenting or negative characteristics of the parents, not to

overnighting.[18]

In sum, there is no reliable evidence that regular and frequent overnighting or that JPC harms infants, toddlers or preschoolers who are in the care of fit and loving parents. A recent article provides a detailed history of this debate and a summary of the literature relevant to infant overnights.[19]

WHY IS JPC BENEFICIAL EVEN WHEN PARENTAL CONFLICT IS HIGH?

The fact that JPC children still had better outcomes even after factoring in parent conflict undermines the claim that children do not benefit from JPC unless their parents have a low conflict, cooperative relationship. This might partly be explained by the fact that in a separate analysis of[19] studies, JPC couples did not have significantly less conflict or more cooperative, communicative relationships than SPC couples at the time they separated or in the years following separation.[20] Seven of these studies assessed whether most JPC parents had initially agreed to the plan without conflict or whether one or both of them had been "forced" or "coerced" into accepting JPC. From 30 percent to 80 percent of the couples who ended up with JPC did not initially agree to share. In these cases, one or both parents initially wanted sole physical custody. Yet in all seven studies, JPC children had better outcomes than SPC children.

LIMITATIONS OF THE STUDIES

All studies have limitations, and those discussed in this paper are no exception. First, these studies are correlational so they cannot prove that JPC caused the better outcomes. But a number of the studies ruled out conflict, income and quality of parent-children relationships as possible causes —which lends stronger support to the argument that JPC in and of itself is beneficial for children. Second, not all 60 studies are of equal quality. Still, the findings are very consistent which lends more credibility to the results. Third, because the data come almost exclusively from mothers, it is possible that the benefits of JPC are greater than what is being reported since mothers tend to be more opposed to JPC, at least initially, than fathers.

Finally, even though differences between JPC and SPC children's outcomes are statistically significant, the effect sizes are generally small to moderate. Several things must be understood, however, about effect sizes. Small effect sizes are common in social science studies — which includes studies on parental conflict. More importantly, small effect sizes in social science and in medical science have important implications for large numbers of people. Indeed, many public health policies and mental health treatment protocols are based on studies with weak effect sizes.

Then too, we need to consider the risks versus the benefits before dismissing small effect sizes as trivial. For example, if there is a weak but statistically significant link between JPC and teenage drug and alcohol use, we should attend to those results because the consequences can be serious, life-threatening or even fatal.

Moreover, JPC effect sizes are much larger in certain samples or for certain types of problems. For example, in Baude's meta-analysis, effect sizes were four times stronger for behavioral problems than for emotional ones, five times stronger in school samples than in national samples, and five times stronger when JPC children spent 50 percent time with each parent than when they lived 35 - 49 percent time.

CONCLUSION : NO WOOZLING ALLOWED

Woozling is the process where research findings are manipulated and distorted in order to support just one point of view—either by exaggerating or reporting only part of the data, or by excluding certain studies, or by interpreting ambiguous data in only one way.[21] To avoid woozling, I want to clarify several points about the 60 studies.

These studies are not saying that being constantly dragged into the middle of parents' conflicts has no negative impact on children—or that JPC is more beneficial than the quality of parent-child relationships—or that family income has no impact on children. What the studies are saying is that even when conflict is high—absent physically abusive conflict—and even after considering family income and the quality of parent-child relationships, children still benefit more from JPC than SPC. It is an injustice to children, and to the researchers who have conducted these studies, to frame the situation as if one single factor—conflict, income, JPC or quality of parent-child relationships—has to be the sole winner of some imaginary contest. Our goal should be to provide children with as many situations as possible that have been linked to their well-being after their parents separate.

JPC is generally linked to better outcomes than SPC for children, independent of parental conflict, family income, or the quality of children's relationships with their parents. Parents do not need to have a low conflict, communicative coparenting relationship or mutually agree to JPC at the outset in order for children to benefit from JPC. Nor is there reliable evidence that children under the age of four are harmed by or do not benefit from JPC or frequent overnighting. These 60 studies reflect the consensus of an international group of 110 scholars and mental health practitioners and a group of 12 renowned researchers: JPC is in children's best interest, absent situations such as substance abuse or violence, which pose a danger to children even when their parents are still together.[22,23]

* Due to space restrictions, references for the 60 studies and for the other studies summarized in this article could not be included. All citations and the results of each of the 60 studies are available upon request from the author: nielsen@wfu.edu. ***FLR***

Linda Nielsen is a Professor of Adolescent and Educational Psychology at Wake Forest University in Winston Salem, NC. She is an internationally recognized expert on shared physical custody research and father-daughter relationships. In addition to her seminars for family court and mental health professionals, she is frequently interviewed on the topic of shared parenting by journalists, including the New York Times, Time magazine and the Wall Street Journal. nielsen@wfu.edu www.wfu.edu/~nielsen

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Spotlight - Victor P. Valmus

By Karine Burney

For the last 13 years, Victor "Vic" Valmus has graciously volunteered his time to review the most recent appellate court decisions involving family law issues and write the case law update section of this publication. Vic also lends his wisdom to our community by presenting on numerous family law topics, including the case law update. For Vic's tireless commitment to our section, in a way that often goes unnoticed, the Executive Committee and the Family Law Section as a whole are incredibly grateful.

Vic is a Past President of the Family Law Section of the Cobb County Bar Association. He is a former program chair and current barrister in the Charles Longstreet Weltner Family Law Inn of Court. Vic teaches civil litigation at Kennesaw State University. In 2017, Vic started the Valmus Law Firm after practicing with Moore, Ingram, Johnson & Steele since 2001.

After a successful career as a guitarist, including touring with 38 Special, Vic graduated summa cum laude from Kennesaw State University in 1998. He graduated cum laude from University of Georgia School of Law in 2001, and was in the top 10 percent of his class. Vic splits his time between family law cases and criminal defense work. His office is located in Marietta, very close to the Marietta Square.

Vic is one of the most positive, caring and generous people in our great section. He is extremely talented—both as an attorney and musician, yet his humility and optimism are the qualities that define him best. We all owe a debt of gratitude to Vic for his continued efforts to educate and improve our bar. ***FLR***

Karine P. Burney is a partner with Burney & Reese LLC, where she exclusively practices family law. Burney is a Member at Large of the Executive Committee of the Family Law Section of the State Bar of Georgia. She is the current Family Law Institute Fundraising Chair. She is also the President of the Cobb County Bar Association Family Law Section. Burney likewise participates as a Program Chair and Barrister in the Charles Longstreet Weltner Family Law Inn of Court.

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A Call for Volunteers

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

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An Update from the Diversity Committee

By Rob Wellon

The Family Law Section Diversity Committee continues to be active under the leadership of Ivory T. Brown. In seeking to provide meaningful areas of interest in alerting our membership to be diverse and inclusive, Ivory created the Diversity and Inclusion Speaker Series, which was scheduled after each committee business meeting.

The Series began with a discussion by Prof. Elizabeth Berenguer from the Norman Adrian Wiggins School of Law at Campbell University on Cognitive Bias, citing five tactics to improve results and increase client satisfaction were cited.

1. Cognitive bias in judicial decision making
2. Anticipating and managing client cognitive bias
3. Drafting to persuasively utilize/neutralize cognitive bias
4. Acknowledging and managing our own biases
5. Potential dangers of cognitive bias.

The second installation featured a presentation on transgender equality and the law by Taylor Brown, from Lambda Legal, an advocacy group which provides materials and assistance on the legal issues dealing with transgender equality. The topic and talk were most timely and certainly broadened our understanding of this meaningful area of the law.

The third series subject was on Disabilities and the Law—Equal Access & Accommodations presented by Synge Tyson, MA, OMS. CPACC, who conducts training and workshops on disability etiquette, ADA & Rehabilitation Act Compliance, as well as presenting at international conferences on reasonable accommodation for people with disabilities. The other speaker was Vincent Martin, who was the first totally blind student to attend Georgia Tech. Martin has an MS in Human Computer Interaction, Computer Science concentrating in Human Centered Computing as well as several undergraduate engineering degrees. He is on the advisory board for the Georgia Vocational Rehabilitation Agency (GVRA) which provides resources for Georgians with disabilities. In a most interesting manner, they discussed inclusive behavior, a working definition of disability, access on IQ testing, a cautionary note that accommodation is not necessarily inclusion and moving from motivated reasoning to forward inclusive thinking.

The fourth installation was on Learning Differences: Discovering Dissecting and Directing Your Child's Educational Needs. The speakers were Dawn Smith, Smith & Lake; Craig Goodmark, Goodmark Law Firm; and Alisha Fisher, the principal at the Atlanta Heights Charter School. The presenters were most keyed in to the law, and even the lack of law, on advocating for your client's child and the knowledge and law necessary for parents to advocate for their children, including undertaking the IEP process and how to urge the child's school to evaluate the child when a parent feels it should be done.

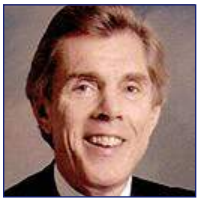
The final presentation in the Diversity and Inclusion Series for the year was in dealing with Navigating Religion and Ethnicity in Our Courtrooms and Community, presented by M. Khurram Baig and Aisha Rahman, both of the Baig-Firm. The interesting dialogue included details of actual litigation concerning bias and religious issues which we confront, such as the "Georgia woman jailed for wearing a headscarf to court."

The success of this series should augur well and foster future speakers for the committee to explore in guiding us to ensure our section members are well-versed in diversity and inclusion so we may more adequately serve our profession.

In addition to the Speaker Series, the committee has sponsored a luncheon at the Family Law Institute where many bar associations were represented and efforts on diversity were showcased, even to the ethnic food unique to the area. Community service pop-up clinics have been presented and a mentor program started.

The committee has also embarked on "Mindful Matters," and hosted a program on Co-Parenting Designed for Never Coupled Parents by Naomi Natale, MSW, Premier-planning.org. It has also instituted a "Ted Talks" series where committee members will be speaking as a prelude to possible inclusion at the Family Law Institute.

Yes, the committee has been very busy with these helpful and instructive programs. We invite more participants at our meetings and in providing service on this most meaningful committee. ***FLR***



Rob attended Emory College and Stetson Law School and began practicing family law with Jack Turner until he started his own practice, focusing on complex family law and contested custody matters. He was the founding member and first president of the Weltner Family Law Inn of Court, and the founder and first Director of the Litigation Section's College of Trial Advocacy, and received the State Bar Justice Marshall Professionalism Award in 2012. He has been serving as an adjunct faculty member of Emory Law School since 1995, and in 2013 he created a trial advocacy course in family law. And most importantly he is the father of two and grandfather of seven, and is most pleasant to all.

Jack P. Turner Award

By Ted Eittreim

In addressing the issue of legal professionalism at the Florida State University College of Law Symposium in 1999, the former Dean of Yale Law School, Prof. Anthony T. Kronman contemplated what makes the practice of law a profession as opposed to merely being a trade. In doing so, he posed the question: "Do the qualities of legal professionalism help to promote the welfare of the larger society we all inhabit?" Surely the answer to that question is "yes" and incumbent in that response is a realization that we lawyers owe duties not only to our clients, but also to society and to each other that extend beyond our own self-interests.

In further pondering these issues, we might be tempted to ask ourselves: "What does it mean to be a professional?" or "What are the qualities of professionalism that we should strive to incorporate into our everyday practices?" I would submit that one manner to find answers to these questions, and ultimately improve our own individual implementations of the ideals of professionalism in our practices, would be to look to others in our field who have embodied the term "professional" and made "professionalism" a totem of his or her practice. Edward E. "Ned" Bates is one such lawyer. Bates gives all members of the Family Law Section, and indeed all lawyers, a shining example of which to aspire. And therefore, recognizing a career dedicated to the ideals of professionalism and service to the Family Law Section and the practice of family law in general, Bates is the most recent, and a most deserving, recipient of the Jack P. Turner Award, which was bestowed upon him at last year's Family Law Institute held at Jekyll Island.

Importantly, the Jack P. Turner Award is not given every year; rather, it is only bestowed on a member of our Section when that member is identified as having demonstrated a career devoted to the practice of family law by being recognized by his or her peers as an exemplary lawyer, and one who has made substantial and significant contributions to improve, advance, and elevate the practice of family law in Georgia.

Bates, in his more than four decades of practice, has accumulated virtually every accolade possible in our profession, although you would likely never know that from speaking to him. He is a past president of our Family Law Section, and he is also a past chairperson of the Georgia Chapter of the American Academy of Matrimonial Lawyers. He is a prior recipient of the Joseph J. Tuggle Professionalism Award, having been given that honor in 2009, and he also, quite literally, wrote the book on family law forms in Georgia, Georgia Domestic Relations—Forms and Practice.

However, more than the voluminous accolades and formal professional recognitions, Bates has dedicated his career to practicing family law the "right way", meaning that while we family lawyers routinely find ourselves fighting alongside our clients in the emotional trenches created by the breakup of a family, Bates proves that we can disagree without being disagreeable. He shows through his example that it is possible for family lawyers to zealously represent our clients without degenerating into personal attacks on the opposing party or making ad hominem attacks on our opposing counsel. Mr. Bates embodies the spirit of what the American Academy calls "constructive advocacy," and in doing so, he shows all of us that it is not only possible, but preferable, to maintain the highest levels of civility with our courts and our colleagues even when navigating the tumultuous waters of a family law action.

In his brief remarks following the presentation of the Jack C. Turner Award, Bates spoke not of himself, but of Jack Turner. Bates spoke admiringly of and with reverence towards Turner, about how he had worked with him, about how he learned from him, about how he was missed, and about how he embodied professionalism in and out of the courtroom. Afterwards, it was said by more than a few people in the room that "only Ned could manage to accept an award and not talk about himself." In fact, one of Bates's first comments on being handed the award by his law partner and long-time friend Barry McGough was that he "wasn't sure that he deserved it."

Make no mistake, Mr. Bates, the rest of the Family Law Bar is certain that you deserved it. Congratulations. ***FLR***

Ted Eittreim is a partner with Gray Eittreim Martin, LLC, in Atlanta, and he has been practicing family law exclusively for nearly seventeen years. He graduated from the University of Virginia and Emory Law School. Ted is a member of the Executive Committee of the Family Law Section of the State Bar, and he speaks frequently on family law topics. He can be reached at teittreim@gemfamilylaw.com.

2019 Joseph T. Tuggle, Jr. Professionalism Award

By Karine Burney

Stephen C. Steele was honored as the 2018 recipient of the Joseph T. Tuggle, Jr. Professionalism Award during the 2018 Family Law Institute. The Joseph T. Tuggle, Jr. Professionalism Award is given in recognition of the individual attorney who has most exemplified the aspirational qualities of professionalism in his/her practice as a lawyer and/or a judge. Considering Steve's distinguished service to the Family Law Section and his unrelenting integrity and professionalism in his practice, he was a clear choice for the award.

Steele served on the Executive Committee of the Family Law Section of the State Bar of Georgia from 2000 through 2007. He was Chair of the Family Law Section from 2005 until 2006, during which the Section was recognized as Section of the Year. During his term as chair, Steele served on three of the five legislative sub-committees and advisory groups helping to implement the new Child Support Guidelines that became effective Jan. 2007.

Steele is a Fellow of the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers. Steve also served as president of the Charles Longstreet Weltner Family Law Inn of Court from 2010 until 2012. He has been named as a Super Lawyer since 2007. Steele was also named to Georgia's Legal Elite in 2010. He is included among The Best Lawyers in America, and serves on the National Advisory Board of The National Association of Family Law Attorneys.

Since 1987, Steele has practiced with the firm of Moore Ingram Johnson & Steele in Marietta. Steve graduated with honors from Georgia Tech in 1973. He graduated from Emory University School of Law in 1978. He served as an assistant solicitor in the State Court of Cobb County from 1978 through 1980, then as assistant district attorney in the Cobb Judicial Circuit from 1986 until 1987. Steele also taught in the Paralegal Civil Litigation program at Kennesaw State University for 25 years. Steele and his wife Nancy reside in the Talley-Turner-Steele home in historic Marietta. Steve and Nancy have two sons, Matthew and John Paul.

The Executive Committee and the Family Law Section as a whole congratulates Steve on an honor that is well deserved. ***FLR***

Karine P. Burney is a partner with Burney & Reese LLC, where she exclusively practices family law. Burney is a Member at Large of the Executive Committee of the Family Law Section of the State Bar of Georgia. She is the current Family Law Institute Fundraising Chair. Burney is also the President of the Cobb County Bar Association Family Law Section. Burney likewise participates as a Program Chair and Barrister in the Charles Longstreet Weltner Family Law Inn of Court.

The Impact of Patten v. Ardis on Grandparent Visitation in Georgia

By Erica F. Byrd

This past summer, the Supreme Court of Georgia overturned a portion of O.C.G.A. § 19-7-3, the statute governing grandparent visitation, and further limited grandparent visitation in Georgia. This most recent curtailing of grandparent visitation is yet another decision in a long line of cases upholding the autonomy of fit parents to raise their children as they choose, including deciding with whom to allow contact with their children.

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In 1988, the Georgia legislature enacted a new version of the grandparent visitation statute that permitted a trial court to grant grandparents "reasonable visitation rights upon proof of special circumstances which make such visitation rights necessary to the best interests of the child." In *Brooks v. Parkerson*, 265 Ga. 189 (1995), the Supreme Court of Georgia held that this statute violated state and federal constitutions because it violated the rights of parents to raise their children without undue state interference, a right that is protected by the U.S. Constitution and long recognized by the U.S. Supreme Court. In holding this prior grandparent visitation statute unconstitutional, the Court further held that grandparent visitation can only be imposed over the parents' objections on a showing that failing to do so would be harmful to the child.

The ruling in *Brooks* was subsequently codified, and the grandparent visitation law in Georgia remained substantially the same, but with some amendments, until the legislature amended the grandparent visitation statute in 2012. The 2012 amendment included a new subsection, currently O.C.G.A. § 19-7-3(d), that expanded the rights of grandparents in Georgia. This subsection allowed a trial court to grant reasonable visitation with a child to the parent of a deceased, incapacitated, or incarcerated parent "if the court in its discretion finds that such visitation would be in the best interests of the child." It is this subsection that is the subject of the recent Supreme Court of Georgia case, *Patten v. Ardis*, 304 Ga. 140 (2018), and the most recent reiteration of parents' rights to raise their children without undue state interference.

The facts in *Patten* are as follows: Robert Shaughnessy and Katie Patten married and conceived a child in 2015, and Shaughnessy died shortly thereafter. Patten, then a widow, subsequently gave birth to a child and permitted Shaughnessy's mother, Mary Jo Ardis, to visit with the child a couple of times, but then decided not to allow further visits. Ardis filed for visitation pursuant to O.C.G.A. § 19-7-3(d), and the trial court granted her visitation. Patten, the child's mother, appealed.

On appeal, the Supreme Court of Georgia held that O.C.G.A. § 19-7-3(d) is unconstitutional. The reasoning in *Patten* mirrors that of *Brooks*. In fact, the Court held that O.C.G.A. § 19-7-3(d) is "materially indistinguishable" from the statute invalidated and held unconstitutional in *Brooks*. The fatal flaw of O.C.G.A. § 19-7-3(d) is that it allowed a trial court to award visitation to a child without any showing of harm to a child. The Supreme Court of Georgia has made itself clear: it will not authorize an award of visitation to a grandparent over the objection of a fit parent under any circumstance unless the grandparent can demonstrate that a failure to do so will result in actual or threatened harm to the child. In so restating its prior rulings, the Court found O.C.G.A. § 19-7-3(d) to be unconstitutional; and, it is no longer the law in Georgia.

Notably, the ruling in *Patten* does not mean that there is not a situation in which the parent of a deceased, incapacitated or incarcerated parent may seek and be awarded visitation with a grandchild. Instead, a grandparent in such a situation must seek visitation under O.C.G.A. § 19-7-3(c), the same as he or she would in the absence of death, incapacitation or incarceration, and must demonstrate "by clear and convincing evidence that the health or welfare of the child would be harmed unless such visitation is granted." ***FLR***

Erica Byrd is an associate with Bovis, Kyle, Burch, & Medlin, LLC, and she has been practicing family law there for six years. She earned a B.A. from Agnes Scott College, graduating magna cum laude, and a J.D. from the University of Georgia, graduating cum laude.

Tips for Successful Mediation

By William A. Alexander

Mediation, in this writer's opinion, is the single best opportunity to resolve the case for your client—everyone is present for one singular purpose: to settle. But achieving that goal does not begin the morning of mediation. It begins in the days, weeks or months leading to that point. As Ben Franklin once stated, "by failing to prepare you are preparing to fail." Thus, naturally, the key to any successful mediation is preparation—not just for the attorney, but also for the client and any experts involved in the case. Mediation without successful preparation can easily result in wasted time and money.

Often, mediators can spend the first few hours of the mediation simply getting to know the parties and the issues involved. If you are dealing with complex issues, this exercise alone could take up the majority of the day. Because of this, it is paramount that you have spent time reviewing the issues, the law, the pleadings, and the documents ahead of time. This will place you in the best position to coherently and succinctly apprise your mediator of the facts and issues. Without this basic preparation, you will not be able to provide your mediator with the tools necessary to support the reasoning behind the offers made during mediation.

Sometimes, your mediator may be willing to prepare for a case in advance. Be sure to check with your mediator to see if he or she will review documents and position statements prior to mediation. Not only will your mediator be prepared to start the day brokering offers having already gathered vital background information, but he or she may be able to help ensure that all issues are addressed in every offer, rather than small unresolved matters cropping up at the end of an already long day.

Once offers are being brokered back and forth—whether from the outset or after each side has had a chance to present their facts to the mediator—the mediator is typically asked to provide a party's justification for his or her position. If you have adequately presented the mediator with the facts supporting your positions, as well as the applicable law (when necessary), your mediator may be able to provide the opposing side with an acceptable answer. Your mediator is there to be more than just a carrier pigeon for offers; they want to do everything in their power to help reach a successful resolution for the parties. Equipping your mediator with the ability to answer questions which arise in the other room when your offer is presented will assist your mediator in accomplishing their—and everyone's—goal: settlement.

Beyond ensuring that you have a grasp of all the legal and factual issues in the case, also prepare your client for the mediation process in general. Successful mediations can be a long and slow process. They can involve extreme or unreasonable settlement proposals. Prepare your client for all of this. If a client is not prepared to receive what they perceive to be an unfavorable settlement proposal, they may become emotional, unfocused, or seek to end the negotiation process before it even begins. If, however, you have prepared your client for the likelihood that the opposing side will start with an extreme offer, your client will be significantly better positioned to react appropriately and focus on forming a constructive response.

You may also wish to consider assisting your client in formulating their presentation of the facts. At some point, the mediator will want to hear from your client. If your client tends to be nervous when discussing their case, or, more often, wants to tell the mediator every detail of the relationship—regardless of relevancy—you run the risk of slowing down the process, when the main focus of the day should be on discussing proposals.

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Further, if you are involved in a case with a complex financial estate, prepare your financial expert or consultant to be present during mediation. The mediator or the opposing counsel will likely have questions regarding valuations, at how certain numbers were arrived, and the like. If you have been relying on your financial expert to address those issues, but he or she is not present, or unprepared, you could find yourself unable to answer such crucial questions. Make sure to meet with your experts far enough in advance of mediation to provide them with everything they will need to assist you in justifying your positions.

In preparations for mediation, a key topic to consider is how you intend to present your initial offer. The first offer made during mediation is usually the most difficult. Do you start with an aggressive offer or do you begin with a more reasonable position? Unsurprisingly, the answer to this question is "it depends." What it depends on, however, is something you can determine before the mediation even begins. For example, if you have favorable facts, you can be more aggressive in your proposals. If the law is on your side, you can also start with a more aggressive offer. But there are other, less obvious factors which enter into the equation. One factor to consider is

the personality of the other party. If the other party is motivated to settle, that likely weighs in favor of starting from a more aggressive posture. But if the other party is simply present at mediation to fulfill a requirement—due to an Order to Mediate, for example—an overly aggressive offer may cause the other party to abandon the mediation process without offering any response at all. Additionally, assess your opposing counsel. Some attorneys are willing to push their clients. Others, unfortunately, are not. So, if your opposing counsel is not willing to persuade their client to stick with the process and respond with a counter proposal (or, even worse, did not prepare their client at all), an over the top offer may lead the opposing party to leave the process, while their attorney willingly lets them go. While determining your best starting position is a difficult proposition, a good grasp of your facts, the law, the parties, and your opposing counsel, will allow you to strike the correct balance of aggressive advocacy and reasonableness.

While preparing for mediation with your client is incredibly important for any successful mediation, a common trap for many attorneys is detailing a comprehensive plan with the client during the preparation and sticking to that plan regardless of how the mediation process is progressing. This can lead to formulaic and inflexible proposals which may fail to take advantage of elements of the opposing party's offers. A good example of this may take place in alimony negotiations. One party may have a plan of the highest amount they would like to settle on, and the lowest amount they are willing to accept. If, however, the opposing party takes a different approach, e.g., a monthly amount plus premium payments for health insurance, or maintaining the mortgage, a plan to simply offer flat monthly amounts may fail to take advantage of the positive aspects of an offer from opposing counsel.

Having third parties, like financial experts, present at mediation can greatly assist in formulating offers and responding to counterproposals. Others, however, may not be so helpful. Emotions run incredibly high in nearly every family law case. Because of this, many clients want a friend or family member present during mediation. If that is something your client is requesting, be certain to meet (or at least speak with) that individual prior to mediation. Your client's support group may "empower" your client to their own detriment. This is not the friend's or family member's case. They are not spending their own financial resources litigating the case. So, while your client may appreciate the "take him for all he's worth" attitude the friend is bringing to the room during a difficult day, it could very easily derail a process that involves very reasonable proposals. A brief call or meeting with the third party ahead of the mediation will help you make an informed decision on whether to allow that person to be present during mediation.

Unlike a client's friend or family member, there may be times when other neutral third parties are present, and you will want to consider when, or if, they should be asked to leave the room. Some custody disputes, for example, involve a Guardian ad Litem. Having the Guardian at the mediation is always a good idea, as you will most certainly want him or her to weigh in on offers, persuade parties, and sign off on any parenting plan. Remember, however, the Guardian does not share the same confidences that you and your client share. If something is discussed in your room, the Guardian has the right to take it into account prior to formulating a final recommendation and/or share it with the other side. So, if you need to have a frank conversation with your client, or you are concerned about your client's emotional state, do not be afraid to ask the Guardian to step out for a moment. Similarly, your mediator is entitled to convey to the other side what is discussed in your room. And though it is often helpful to have your mediator part of discussions while formulating a counterproposal, you may run into a situation where you do not want the mediator privy to your conversations. Again, do not hesitate to ask the mediator to step out of the room for a moment.

After spending days reviewing the pertinent documents, preparing your client, and formulating scenarios, sometimes the most powerful tool in any mediation is simply not to respond to an offer. If it becomes clear that the other side is not negotiating in good faith, or your client has reached his or her best and final offer, it is okay to tell the mediator to make clear to the other side that you are prepared to abandon the mediation. If the other side is truly negotiating in bad faith, then they may let you leave—and your client will at least save wasted money. If, however, the opposing party is motivated to settle, threatening to leave the process may cause them to make a more reasonable proposal, or accept the previous proposal as stated.

If you and your client are prepared to walk away from the process, be sure that you have used the day to gather vital information which may assist you in your preparations moving forward. Do not hesitate to seek justification behind every offer presented. If the opposing party refuses to back off of a separate property claim, for example, do not leave the mediation without understanding their reasoning behind it. If they are insisting on a restricted parenting time schedule, make sure you request (and see) their evidence supporting their claims that restricted parenting time is what is best for the child(ren). Discovering the reasoning behind the opposing party's claims will allow you to prepare your case for the next steps, and will ensure that your ultimately unsuccessful mediation has helped set your case up for future success. ***FLR***

William Alexander is an associate attorney at Richardson Bloom & Lines LLC, located in midtown Atlanta, Georgia. William focuses his practice on all aspects of family law, including custody disputes and divorce actions involving complex financial estates. William has dedicated his career to family law since his graduation from the Georgia State University College of Law in 2012, and can be reached at william@rblfamilylaw.com.

Case Law Update

By Vic Valmus

ATTORNEY'S FEES

Reid v Reid, A18A1498 (February 8, 2019)

The parties were married in 1995 and had two children. In 2011, the wife filed a Petition for Divorce. In 2012, a Temporary Order was entered giving the wife the marital residence and primary custody of the children. After a twenty-day bench trial, the court granted the wife's Petition for Divorce. The wife requested attorney's fees and the trial court suggested the parties address the fee issues in letter briefs and the parties agreed to do so. The wife submitted two affidavits from her attorneys. The court awarded her attorney's fees totaling more than $700,023 under O.C.G.A. § 9-15-14 and § 9-16-2. Husband appeals and the Court of Appeals affirms and reverses and remands.

Regarding § 19-6-2, the wife was a stay-at-home mother, working part-time to earn $2,800 a month and that during the litigation the Husband received $625,000 from his parents and $240,000 from other assets. The wife used her own funds from her own estate, sold jewelry and cashed in insurance policies. § 19-6-2 does not require the trial court to make any findings as to the reasonableness of the fees. Therefore, there is sufficient factual findings to show the trial court carefully considered the parties relative financial positions.

Regards to O.C.G.A. § 9-15-14(b), trial court found the Husband maintained positions and claims throughout the divorce action that lacked substantial justification and the husband unreasonably expanded the case with his conduct and litigious posturing. One example was the husband sought primary custody of the children despite the wife's years as a stay-at-home parent. The husband also made repeated attempts to point to the wife's alcohol consumption, but that was nowhere near as profound as the husband alleged. The court considered the wife's many attempts to settle the case where the husband submitted bad faith counter offers and the husband expanded and delayed the litigation and awarded the wife fees under O.C.G.A. § 9-15-14 in the amount of $473,394.41.

The husband also argued the trial court erred in awarding fees under O.C.G.A. § 9-15-14. Under this section, the award must be supported by sufficient proof of actual cost and reasonableness of those costs. The fee award must be limited by the fees incurred because of the sanctionable conduct. Georgia does not allow lump sum or unsupported attorney's fees award. Here, the trial court sufficiently identified the sanctionable conduct. However, there is no evidence in the record to show how the trial court arrived at a particular dollar amount it awarded. The wife concedes on the record that the court lacks evidence to conduct a meaningful appellate review regarding the amount of fees under § 9-15-14. Therefore, the husband contends that we must reverse the award outright, but the wife argues that we should vacate and remand for further proceedings. In previous cases where the proponent failed to put evidence in the record to support the amount of fees and a failure to provide evidence mandated reversal. However, the appropriate outcome in this case is to vacate the trial court's order and remand.

The husband also argues the trial court was not permitted to consider settlement offers to establish his liability for attorney's fees. However, the husband waived this argument when he agreed to address the settlement offers in the affidavits submitted to the court. However, even if he did not waive the issue, the statutory provisions excluding evidence of compromise negotiations contains an exception that such evidence offered for another purpose shall not be excluded, including, but not limited to, such evidence negating a contention of undue delay or abuse of process. Therefore, settlement offers are admissible for the purposes of determining whether the husband's actions constituted delay or abuse of process. Therefore, the trial court was permitted to consider these settlement offers when evaluating whether the husband delayed the proceedings.

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DIRECT APPEAL

Ford v Ford, A18A1156, (August 30, 2018)

The father appeals the trial court's judgment granting a divorce from the mother, challenging a series of orders entered by the trial court granting the parties' divorce and ultimately awarding the mother sole custody of the parties' four minor children. The father filed a direct appeal but the Court of Appeals dismisses the appeal for lack of jurisdiction.

Generally, appeals from orders in domestic relation cases must be pursuant to the discretionary application pursuant to O.C.G.A. §5-6-35. Although a direct appeal is proper under O.C.G.A. §5-6-34 from all judgments or orders "in child custody cases" that the award refused to change, or modified child custody, or orders that hold or decline that hold persons in contempt of child custody cases. However, child custody issues are ancillary in a divorce action and do not transform a case into a "child

custody case." Even if the only relief sought on an appeal pertains to the custody decision, the underlying subject matter is still the divorce action and its resulting Final Decree. Since the father did not pursue the discretionary review in this case, the Court of Appeals lacked jurisdiction.

GRANDPARENT VISITATION/EXTRA-CURRICULAR ACTIVITIES/GAL FEES

Reid v Lindsay, A18A1933, (January 22, 2019)

DR and JR were twin brothers born to Reid and his first wife in December 2005. JR was born with serious medical issues and the grandmother (Grandmother Lindsay) and her husband (Lindsay) took care of DR while the parents were taking care of JR. Over the next 10 years, DR lived almost exclusively with the Lindsay family. From 2006 until 2016, the Lindsays provided almost all of the financial support, home schooled DR, enrolled DR in sports programs, music lessons and took him to church and other activities. In 2011 when DR was five years old, his mother suddenly and unexpectedly died. In 2015, Reid remarried, and his wife had a daughter. In May 2016, Reid moved DR out of the Lindsay family's home and into his home to live full-time with him and his wife, twin brother, JR and his half-sister KR. Reid also stated that the Lindsays would not have any visitation or phone contact with DR unless Reid was present. In 2016, Grandmother Lindsay petitioned the court for reasonable visitation with DR. The court found that DR was very bonded with the Grandmother Lindsay, had already experienced significant loss during his childhood including the death of his mother and that his sudden removal from the Lindsays, his primary caregivers for 10 years. The court found by clear and convincing evidence that DR would be harmed if he were denied contact with the Lindsays and such contact was in his best interest. The court awarded the Grandmother Lindsay a minimum of 1 weekend each month, two weeks during the summer vacation, a portion of his school breaks and various holidays subject to certain conditions involving the extra-curricular activities and for Reid to pay 50% of the guardian ad litem fees. Reid appeals and the Court of Appeals affirms in part and reverses in part.

Reid contends, among other things, that the trial court erroneously failed to make specific findings of fact based on clear and convincing evidence that DR's health and welfare would be harmed unless visitation was granted. Here, the trial court made numerous factual findings and found overwhelming evidence that Grandmother Lindsay had significant parental control and support of DR throughout his childhood and the resulting emotional bond between her and DR was significant.

Reid also argues that the visitation with Grandmother Lindsay on the weekends and during the summer would interfere with or even prevent his participation in extra-curricular activities. The court outlined a specific visitation schedule in which it awarded Grandmother Lindsay visitation for 1 weekend per month during the school year, summer and holidays, but made the visitation subject to all of DR's school related extra-curricular activities and gave Grandmother Lindsay discretion as to whether DR participated in non-school related activities that occurred during her visitation. Reid argues that the trial court erred when it overrode the statutory mandate that grandparent visitation must be subject to the child's extra-curricular activities pursuant to O.C.G.A. § 19-7-3 (c)(4), which provides that in no case shall the granting of visitation rights to a family member interfere with a child's school or regularly scheduled extra-curricular activities. Construing extra-curricular activities as Reid argues would allow Reid to schedule so many extra-curricular activities for DR that the court's grant of visitation to Grandmother Lindsay would be vitiated. Therefore, the trial court's conclusion was correct; and, it was authorized to find that giving a grandparent visitation priority over non-school related extra-curricular activities was in the child's best interest.

Reid also contends the trial court erred when it ordered him to pay 50% of the GAL fees and that it violated O.C.G.A. § 19-7-3 which states in pertinent part that if a court finds that the family member can bear the cost without unreasonable financial hardship, the court, at the sole expense of the petitioning family member, may appoint guardian ad litem for the minor child. The record shows that shortly after the filing of the complaint, the parties entered into a Consent Order with a court appointed guardian ad litem and required Lindsay to pay the fees but reserved possible reallocation. The Consent Order included that the court retained jurisdiction over any and all of the GAL fees and expenses until final settlement or trial and gave the court the authority to reapportion any and all costs at the time as the court deems just and proper. Reid never objected or withdrew his consent from the Order. After the final hearing, based on the agreement by the parties, the court exercised discretion and ordered Reid to pay 50% of the GAL fees directly to Grandmother Lindsay within 6 months. A Consent Order constitutes a binding agreement between the parties with regards to the respective rights and obligations unless prohibited by statute or public policy. Here, O.C.G.A. § 19-7-3 (e)(1) plainly states that if guardian ad litem is appointed in a grandparent visitation case, then it shall be the sole expense of the petitioning grandparent. Therefore, the provisions of the Consent Order were prohibited by statute and cannot be used to justify the trial court's Order requiring Reid to pay half of the GAL expenses. This case is physical precedent only.

MOTION TO ENFORCE

Buchanan v. Buchanan, A18A1345 (October 30, 2018)

The parties were married in 1993 and the wife filed for a divorce in 2016. It is undisputed the parties own two homes in Georgia, three homes in Florida and several other accounts and assets. The parties acknowledge they met in March 2017 and discussed various matters concerning their property and the wife took hand written

notes of the meeting which the husband signed. The hand-written document was difficult to read but was divided into two sections. The husband signed both sections but the wife did not. Several days later, the wife presented the husband with a typed document entitled "Divorce Agreement". She maintained that she reduced the hand-written memorandum from March into a formal writing but the husband refused to sign it. Shortly after the wife filed a Motion to Enforce a Settlement Agreement in which she maintained the hand-written memorandum from the March meeting constituted a settlement agreement of all the property in the divorce proceedings and that the husband's payment of $1,700 for a trailer was consideration for the agreement. The husband argued that they met to discuss reconciliation and denied that the hand-written memorandum was intended to be a settlement agreement. At the October hearing, the husband testified that they did not discuss getting a divorce and maintained that the meeting was for the purpose of reconciliation. The wife testified the purpose of the meeting was to try to reach a settlement agreement in the divorce and she took notes of what was agreed upon in the meeting. However, she acknowledged that the hand-written memorandum did not discuss the husband's pension or all three of the Florida properties that had been acquired during the marriage.

After the hearing, the trial court entered an Order finding the parties entered into a hand-written settlement agreement of all property issues with respect to the divorce. The court reasoned that the wife was the offeror of the settlement and the husband accepted her offer by signing the top and bottom of the hand-written memorandum. The court also concluded that the April typed document, although not signed by the husband, was valid and binding because the drafting of the documents is not necessary to effectuate a settlement and execution of the settlement documents was not necessary for the husband to accept the wife's offer. Finally, the court concluded the husband had ratified and accepted the agreement by paying the wife $1,700 from the sale of a piece of farm equipment as contemplated in the hand-written memorandum. The husband applied for an interlocutory appeal and the Court of Appeals reverses.

The only enumeration of error by the husband was the trial court erred in concluding that he and wife had reached a settlement agreement. Here, the hand-written memorandum was incomplete with regards to property holdings in that it only addressed two of the three Florida homes. There is also an ongoing dispute about who owns the Florida rental property. The hand-written memorandum also does not address who will be responsible for the mortgage on each of the 4 homes still owned by the parties and how any other marital debt will be apportioned. In addition, the husband pointed out that the parties had several joint accounts, but the hand-written memorandum referred only to 1 single unspecified joint account. Thus, the hand-written memorandum was incomplete as an agreement because it requires a great deal of inferences from unspecified sources to determine who actually owns what and how the property will be split between the parties. In addition, the hand-written memorandum in this case said that the husband is to receive the rental home in Georgia and that the home is to be appraised and if the property is appraised at over $30,000, the parties will divide the excess amount equally. However, the hand-written memorandum does not address the method of the appraisal or which party is responsible for obtaining and paying for the appraisal. The Supreme Court has previously held that in a written divorce settlement agreement, the method of an appraisal of real property was a substantive term of the agreement and not merely facilitative. P.J. Ellington concurs in judgment only therefore, the opinion is physical precedent only.

LEGITIMATION

Brumbelow v Mathenia, et. al., A18A1117 (October 4, 2018)

Brumbelow (Father) and Mathenia (Mother) had one sexual encounter and Mathenia became pregnant. The parties discussed raising the child together, but Father repeatedly denied that he was the child's father, despite Mother's assertion to the contrary. Father accompanied Mother to a doctor's appointment. In February 2016, Mother cut off all contact with the Father. The child was born in July 2016. Mother voluntarily relinquished her parental rights and the child went home from the hospital with Lance and Ashley Hall who planned to adopt the child. Within a month of the child being born, Father contacted Mother and they agreed to raise the child together. Mother then changed her mind and decided to contest his efforts to legitimate and to proceed with the adoption. Thereafter, the Hall's Petition to Adopt was filed and consolidated with the legitimation proceedings. The court denied the Father's Petition to Legitimate but agreed to stay the adoption proceedings. Father appeals and the Court of Appeals reverses and remands.

The trial court erred by finding that Father abandoned his opportunity interest in developing a parent/child relationship. The law affords an unwed biological father an opportunity to develop a relationship with his offspring, and if he grasps that opportunity and accepts some measure of responsibility for the child's future, then he may enjoy the blessings of the parent/child relationship. This opportunity interest begins at conception and endures throughout the minority of the child. However, this is not indestructible. Some factors the court has previously considered that would support a finding of abandonment would include, without limitation, the father's inaction during pregnancy and at birth, a delay in filing a legitimation petition, and lack of contact with the child. When a father comes forward to participate in the rearing of his child, his interest acquires substantial protection under due process, but mere existence of a biological connection does not merit equivalent constitutional protection.

The trial court applied the wrong legal standard in that the court decision was based on everything Father did not do as opposed to all the things he did do. The

appropriate inquiry is not whether Father could have done more, but whether Father has done so little as to constitute abandonment. Here, the court relied heavily on Father's un-involvement and failure to provide financial support or emotional support during the wife's pregnancy despite his ability to do so. The court found his only action demonstrating any intent to develop a familial bond with the child was filing his Petition for Legitimation, but as the Father has noted, the trial court has applied the wrong legal standard for considering legitimation petitions. Therefore, the court's conclusion that the only action Father took was filing the legitimation petition is unsupported by the evidence and also is in direct conflict with the court's own factual findings. Here, Father filed legitimation petition shortly after the child's birth and this court has put at least some significance on the length of time that the biological father waits before filing the petition. The petition was filed when the child was less than two months old, before the Halls filed the Petition to Adopt, and months before the DNA test confirmed he was the father. The court makes no reference to the date on which Father's legitimation action was filed and that omission is notable.

The court also discounted other evidence that was either undisputed or supported by Mother's testimony. Father had disregarded his opportunity interest during the Mother's pregnancy and the court found this significant. However, Mother admitted engaging in actions that would have made it difficult for Father to contact or assist during the pregnancy. Mother never asked for assistance and cut off contact with him a few months into the pregnancy. The court found Father made no attempts to contact Mother during the remainder of her pregnancy, but it is undisputed that Mother had already decided not to have any contact with the Father. The court also found that Father had not provided any emotional or financial assistance to Mother or the Halls since the birth of the child; however, Mother never had custody of the child, but in Father's petition, he agreed to assume all of the birthing expenses. The trial court also erred by limiting its consideration to how developed the relationship between the Father and the child was when the child was only one month old and was in the custody of the Halls. Because Father has not abandoned his opportunity interest since the birth, if the court determines he is a fit parent on remand, the petition must be granted.

LEGITIMATION

Chalk v. Poletto, A18A0563, (June 21, 2018)

Chalk (Father) is the biological father of two children born in 2011 and 2012. The parties lived together until October 2015 when Poletto (Mother) evicted Chalk from her apartment. Shortly afterwards, Mother obtained a six-month TPO preventing Father's contact with her or the children. Father consented to the TPO and immediately filed a Petition to Legitimate the children. A hearing was set and Father, who was an Army Reservist, asked for a continuance and provided a copy of his military orders. On the day of the scheduled hearing, Father instead attended a marketing conference out-of-state. At the bench trial in February 2017, Father testified he had financially supported the children while he lived with Mother and enjoyed a close relationship with them. However, on cross examination, Father had no documentation of any such support. He admitted that after he was evicted, he provided no support for the children and was over $200,000 in debt for student loans. In addition, he plead guilty to a felony in Virginia for making false statements to receive benefits. At trial, the father claimed he had no assets; but in 2016, he had taken a six-week trip to South America, attended the Olympic Games in Brazil, hiked Machu Picchu, rode the "Swing of Death" and took a dune buggy tour in Ecuador. He had also traveled to Thailand, Costa Rica, Las Vegas, Orlando and Opryland. Father had posted these travels on social media and had paid for indoor skydiving, laser hair removal, college classes and renewal of his private pilot's license. After the presentation of Father's case, the mother moved for a directed verdict that Father had missed his opportunity interest in establishing a relationship with his children and that the legitimation was not in the children's best interest. The court stated, "If this man says today is Tuesday, I would have to look at my calendar and he is lucky that he is not in jail for perjury. He's a liar." The court then issued an Order denying legitimation. The Court of Appeals affirmed.

Father argues that the trial court erred when his testimony was clear and undisputed on many issues and that he was involved with the children for nearly a five-year period that ended only when Mother evicted him from the home. When considering a Petition to Legitimate, the trial court must first determine whether the father abandoned his opportunity interest to develop a relationship with the child. In that respect, a biological father is afforded an opportunity to develop a relationship with his offspring if the father grasps that opportunity and accepts some measure of responsibility. The court admitted multiple exhibits during Father's cross examination demonstrating his extensive travel including a six-week journey throughout Latin America, all the while reporting very little annual income from wages and negative net self-employment income. The court also considered Father's prior felony conviction for making false statements; and therefore, the court was not required to believe his testimony, including his assertions that he had a close relationship with the children and that he had supported them financially. Moreover, there is evidence that undermined or contradicted Father's testimony and that Father did not attempt to legitimate his children until after Mother evicted him from her apartment in 2005. There is no documentary evidence that Father ever financially supported his children even while he was living with Mother or after she evicted him, even though there were significant sums of money spent on his travel and personal enrichment. This evidence supported the trial court's finding that Father abandoned his opportunity interest.

Father also argues that the trial court erred in awarding attorney's fees under O.C.G.A. § 19-9-3, because

legitimation was denied and the court never addressed custody. This code section affords wide discretion to the trial court to award reasonable attorney's fees and expenses in child custody actions. The trial court noted in its Order that Father's petition for legitimation included a prayer that the parties shared joint legal custody of the children and for liberal visitation. Father has provided no authority to support his argument that O.C.G.A. § 19-9-3 does not apply in legitimation cases that include claims for custody or visitation. When a legitimation petition is filed, the amount of child support is one of the issues to be determined along with custody and visitation. Here, because the Father requested visitation and joint legal custody in his legitimation action, the trial court could have awarded visitation and custody under O.C.G.A. § 19-7-22(g). Therefore, the court had authority to award attorney's fees and other costs of child Custody under O.C.G.A. § 19-9-3(g).

PRO SE

Bazan v. Bazan, A18A1476, (August 22, 2018)

The parties divorced in 2010. The Final Decree provided that the father was the primary custodian and the mother would have the children at all times when the father was at work. Neither party was to pay child support. The mother filed Petition for Modification in 2011. A hearing was held in May of 2014. The father was represented by an attorney, but the court adjourned before the mother had rested and would complete the case at a later date. In November, 2015, the hearing was resumed but the court adjourned before the mother had rested. The court last heard evidence in September 2016, by which time the father was no longer represented by counsel. At the final hearing, the court asked the father do you have any other witnesses you wish to call and the father answered no and moved on to the mother's request for attorney's fees. After the mother's counsel presented evidence of attorney's fees, the court asked if the father had any questions about the fees or wanted to make a closing argument and the father responded he wanted to call the wife to the stand. The court determined that evidence was closed and the court refused to hear any more evidence. The Final Judgment gave the mother legal and physical custody of the children and provided supervised visitation, a child support obligation for the father and awarded attorney's fees to the mother. The father appeals and the Court of Appeals affirms.

The father argues that the trial court never afforded him an opportunity to tender his witnesses and other evidence and failed to accommodate his pro se status. When the father realized his mistake when asked if he had additional witnesses, it was within the court's discretion to reopen the evidence and allow the father to cross examine the mother as he requested or to introduce other evidence. Whether to reopen the evidence after both parties have rested, it is a matter committed to the trial court's discretion. The trial court should exercise its discretion to reopen the evidence after the parties have rested if and when it appears to the court that it would be a manifest injustice to refuse it. Therefore, the father argues that the trial court failed to accommodate his pro se status by reopening the evidence after he stated he did not intend to rest when the court asked him about other witnesses. However, this is improper. Georgia law makes it clear that a litigant's pro se status does not entitle him to any deferential treatment. It is true that pro se litigants are held to less stringent standards than attorneys with respect to their pleadings. Other than this exception for the pleadings, a court cannot apply different standards for pro se civil litigants. Although the trial court could have been more lenient under the circumstances, we cannot say that the trial court manifestly abused its discretion in refusing to reopen the evidence or grant a new trial.

REASONABLE AND NECESSARY EXPENSES

Perkins v Perkins, A18A1412, (September 19, 2018)

The parties were married in January 2004 and the minor child, JP, was born in 2004. In June of 2016, the mother filed a Complaint for Divorce seeking, among other things, reimbursement for expenses associated with the caring for JP. In the pleadings, both parties stated JP was a minor child born of issue of the marriage. A hearing was held in August 2015 and a Final Judgment was entered granting the Divorce and awarding primary custody of JP to the mother and ordered the father to pay child support in the amount of $263 per month. The court also found that the father had failed to provide any financial support for the minor child since the parties' separation over 10 years ago and that the mother had incurred reasonable and necessary expenses for the minor child pursuant to O.C.G.A. § 19-7-24 in the amount of $67,672.58 and is entitled to reimbursement of the same. In addition, this debt will accrue interest at the annualized percentage rate of 3 percent which amounts to a minimum monthly payment of $375.96. The father filed a Motion for New Trial. The court made modifications to the Order but did not revisit the reimbursement award and ordered the father to pay $1,000 in attorney's fees based upon the lack of compelling evidence that would warrant a new trial. The father appeals and the Court of Appeals reverses.

The father argues the trial court erred by requiring him to reimburse the mother for reasonable and necessary expenses related to JP pursuant to O.C.G.A. § 19-7-24 which states in pertinent part, "[i]t is the joint and several duty of each parent of a child born out of wedlock to provide for the maintenance, protection and education of a child until the child reaches the age of 18 or becomes emancipated." A child born out of wedlock is a child (1) whose parents are not married when the child is born and who do not subsequently marry, (2) a child who is the issue of an adulteress intercourse of the wife during the wedlock, or (3) a child who is not legitimated. No matter of the precise date of JP's birth, it is uncontested that she was born in 2004, the parents married each other in January 2004, and she is not a child whose parents were not married

when she was born or did not subsequently marry each other. Thus, the trial court erred by ordering the father to reimburse the mother for expenses pursuant to O.C.G.A. § 19-7-24. The attorney's fee award is reversed.

SELF EXECUTING CHANGE OF CUSTODY/HEALTH INSURANCE & DAYCARE EXPENSES

Bridger v. Franze, A18A1230 (October 19, 2018)

The parties became involved in a romantic relationship in December 2011 while living in Colorado. The child was born in December 2014 and the father signed the birth certificate. In 2015, the mother moved to Atlanta and got a permanent job and in November 2015, the father came to Atlanta. In March 2016, the father filed a Petition for Legitimation and sought joint legal custody and physical custody. A guardian ad litem was appointed. The guardian ad litem witnessed several problems during the father's visitation as well as positive parenting behaviors. On the guardian's recommendation, the father was granted unsupervised visits. In December 2016, the mother arrived at the father's home and saw the child was carrying an open jar of gummy fish oil supplements. Afterwards, the child vomited between 15 to 20 gummy fish. The guardian revoked the father's unsupervised visitation. At the bench trial, the mother presented evidence the father had failed to pay child support consistently and also asked for attorney's fees and expenses in the amount of $116,598.92. She also argued to be awarded sole custody. At the conclusion of the hearing, the trial granted the parties joint legal and physical custody with the mother being primary custodian. The Order also stated that the father would have parenting time as outlined in the Permanent Parenting Plan which specified that if the father should relocate to the Atlanta area, then the parties shall have joint physical custody. The court ordered child support and for the mother to continue health insurance and denied the mother's request for reimbursement of past child support expenses and attorney's fees. The Court of Appeals confirms in part and reverses in part.

The mother appeals, among other things, that the trial court erred when including a self-executing change of custody in favor of the father. The Supreme Court has repeatedly held that a self-executing change of custody designed to take effect on the occurrence of a contingent event such as remarriage or relocation is an abuse of discretion. The trial court is required to exercise its discretion concerning a change in custody in light of the child's best interest as evaluated at the time of the proposed change. A self-executing change of custody can be summarized as having one of two critical flaws:

1) Self-executing provisions that rely on a third party's future exercise a discretion essentially delegates the trial court's judgment to a third party.

2) Self-executing provisions that execute at some uncertain date well into the future are not permitted because the trial court is creating provisions that cannot be known at the time of their creation what

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disposition that future date will serve the best interest of the child.

Therefore, the trial court's inclusion of a self-executing change of custody contingent on the father's relocation to Atlanta is an abuse of discretion.

The mother also argues the trial court erred in its calculation of child support by omitting the amount of health insurance premiums from the child support worksheets and by failing to include all of her work-related child-care expenses in the child support worksheets and in the final order. In calculating child support, the trial court must prorate child care and health insurance expenses between the parents to arrive at an adjusted support obligation. Here, the trial court ordered the mother to maintain the health insurance policy however, this amount was not reflected in Schedule D of the child support worksheets. In addition, the mother argued the trial court erred by failing to include the total amount of her work-related child-care expenses. In its Final Order, the trial court found that the mother's work-related child-care costs were $847.66 per month for a nanny but did not include the amount the mother paid each month in day care expenses. The evidence showed the mother worked five days per week. The nanny works three hours per week day and the child is in daycare for the remainder of the day. The mother testifies she pays approximately $1,420.46 per month for child daycare and this childcare is necessary for the mother to be able to go to work. The record clearly contradicts the findings of the trial court that the mother's only work-related childcare expenses were those she incurred in hiring the nanny.

The mother also asserts trial court abused discretion when it failed to award her medical, housing and other costs already incurred in support of her daughter. However, there was evidence that the father provided financial support to the mother and child while they were living in Colorado and that he deposited money into the mother's bank account thereafter. O.C.G.A.§ 19-7-24 entitled the mother to seek child support from the father, the trial court was entitled, as a trier of fact, to find that the father had satisfied his past child support obligations and thus declined her request.

UCCJEA

Plummer v. Plummer S18G0146 (January 22, 2019)

In 2013, the Superior Court granted a Final Judgment and Decree of Divorce with the mother, who moved to Florida while the divorce case was pending, having primary custody. On May 21, 2015, the father filed an action to modify while he was still living in Georgia, and served the Mother in June 2015. Then, on July 1, 2016, the father relocated to Virginia pursuant to his assignment in the U.S. Navy and the Temporary Order was entered on July 8, 2016. On Aug. 19, 2016, the mother filed her Motion to Dismiss for lack of jurisdiction. After the hearing, the court determined that it had lost subject matter jurisdiction pursuant to O.C.G.A. § 19-9-62, that the Father now lives in Virginia and the Mother lives in Florida, and the court lost exclusive continuing jurisdiction over the child custody determination. The Father appealed and the Court of Appeals affirmed. The Supreme Court granted certiorari to consider whether the trial court properly concluded it was without jurisdiction to rule on the custody modification action.

O.C.G.A. § 19-9-62 (a)(2) states that the court has jurisdiction to modify the child custody determination unless and until there is a judicial finding that neither the child nor the child's parents reside in the state. Therefore, the mother argues that the plain meaning of the subsection supports the trial court's dismissal of the father's modification action because the court made that determination at the time of its order. Generally, in the context of domestic relations cases, the court has held that jurisdiction, whether it is subject matter or personal, is dependent upon the state of things at the time that the action is filed (emphasis supplied) and that a party cannot escape the court's continuing jurisdiction by moving to another state. Accordingly, jurisdiction attached at the time of the filing of the father's petition for the modification of custody. The trial court had jurisdiction over the modification action. Jurisdiction was not lost when the Father later transferred away from Georgia even though the Mother, the Father nor the child remained in the state. Therefore, the trial court erred in concluding that it lost jurisdiction. ***FLR***

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Federal Tax Law Changes for Businesses — The Impact on Family Law

By Dan Branch

THE TIMES THEY ARE A-CHANGIN'

Actually, the times have already changed when it comes to federal taxes. If you read my previous article in the Winter Edition of *The Family Law Review*,[1] you are aware that Congress enacted sweeping tax changes with the passing of the bill known as the Tax Cuts and Jobs Act ("TCJA"), which went into effect January 1, 2018.

IMPACT ON FAMILY LAW MATTERS

The changes to the federal tax laws for businesses can impact family law matters in a few ways. For one, a significant impact may be seen in incomes for small business owners as well as the related values of those pass-through entities ("PTE"), though the impact depends on the type and the profit level of the business. Other changes will likely be seen mostly in high net worth cases where parties own interests in C-corporations (the impact due mostly to changes in C-corporation tax rates) or where parties have significant estate planning issues (the impact due to estate and gift exclusion changes).

PASS-THROUGH ENTITIES

Per the Brookings Institute, 95 percent of U.S. businesses are PTEs (not C-corporations). And, from my experience, these tend to be the majority of the business interests that need to be considered when dividing assets in a divorce (excluding ownership of C-corporations via investment accounts).

Through the TCJA, a new tax structure was introduced allowing many PTE owners to deduct up to 20 percent of the taxable income from a qualified business. The 20 percent deduction is subject to certain rules, limitations, and is very fact specific. Although the deduction originates at the entity level, the rules and limitations apply at the individual-business-owner level (which is typically the level considered for divorce related business valuations), rather than at the "entity" level, creating a potential speed bump that could slow family law attorneys as they try to speed to a resolution. This poses difficulty in the valuation of PTEs where a controlling interest is being valued.[2] This also poses difficulty in the valuation of non-controlling interests due to the differences that each individual owner could experience based on their personal tax situation.

Under previous tax law, sole proprietorships, S-corporations, and partnerships enjoyed tax advantages over C-corporations, due to the double taxation on C-corporation owners. As will be discussed later, TCJA dropped the tiered C-corporation tax rate structure (with a high rate of 35 percent) to a flat 21 percent (see Table 2 if you want to jump ahead). This drop would have potentially eliminated the desired tax advantages for small businesses—and Congressmen wanted to maintain those tax advantages due to the large number of businesses that are small businesses (and owned by constituents). To maintain those tax advantages, the TCJA provides owners of PTE's a 20 percent deduction on certain business income (referred to as the Qualified Business Income, or QBI, deduction). This QBI deduction helps maintain a tax-favorable status for most PTEs. The QBI deduction allows owners of PTEs (i.e., business owners of sole proprietorships, S-corporations, or partnerships) to deduct up to 20 percent of the income from a qualified business. However, not every small business is a qualified business and not all of the 20 percent deduction is necessarily available to all owners. After all, the government does like to keep tax laws complicated (and CPAs employed)!

As mentioned, not every small business is a qualified business. In fact, many service businesses are not considered "qualified businesses."[3] Specified service businesses that are not considered "qualified businesses" include any trade or business involved in the performance of services in the fields of law, accounting, actuarial science, health, performing arts, financial services, brokerage services, consulting, athletics, or any trade or business where the principal asset of such trade or business is the reputation or skill of one or more of its employees. Engineering and architectural firms, it should be noted (especially if your divorce clients are in these industries), are specifically exempted and are considered "qualified businesses." Sometimes it helps to have good industry lobbyists.

However, under TCJA, even owners of the specified service businesses that are not considered "qualified businesses" may be able to benefit from the 20 percent QBI deduction if the owner's income meets certain threshold amounts. These threshold amounts are called "phase-out thresholds."

QBI Phase-Out Thresholds

The QBI includes a phase-out of the 20 percent deduction for qualified and non-qualified businesses; however, the amount of the phase-out depends on the owner's personal taxable income. The range of the income thresholds and the impact on the treatment of the QBI deduction is shown in Table 1.

For example, an attorney who is an owner in a law firm has taxable income of $300,000[4]; therefore, the attorney is under the $315,000 threshold and can take the full 20 percent QBI deduction. If the same attorney's taxable

TABLE 1

Income Limitations	QBI Deduction Treatment
Taxable income of $157,000 (individuals) or $315,000 (married/filing jointly) or less	20% deduction available (including specified service businesses)
$157,501 to $207,500 (I) or $315,001 to $415,000 (M/FJ)	20% deduction available to non-service businesses subject to wage and other limitations; deduction begins to be phased out for specified service businesses
Over $207,500 (I) or $415,000 (M/FJ)	No deduction for specified service business. Other businesses can qualify for a deduction up to 20% of qualified business income (but subject to wage and other limitations)

income is $350,000, the attorney is between the lower and upper threshold amounts ($315,000 and $415,000, respectively); therefore, the attorney must calculate the QBI deduction based on formulas dictated in the TCJA (which will take into account the total wages paid or a combination of wages paid and unadjusted basis of property held by the business—doesn't this make you want to get your CPA, too?). And if that same attorney's taxable income is $450,000, the attorney is over the upper threshold and does not get to take any QBI deduction. Given all of this, the impact of the QBI deduction on your clients will be very fact specific and is not a simple calculation. After the current tax season, we should get a better sense of how the QBI deduction will impact most businesses, which should make determining the impact in future years easier.

Reasonable Compensation

The calculation for the 20 percent QBI deduction under the TCJA includes limitations; and one of the key components to those limitations is owner's compensation. As such, small business owners will likely have greater scrutiny on their compensation[5] by the IRS, with the focus on whether the amounts meet requirements for proper, reasonable compensation.[6] It is helpful to note that in a business valuation context, adjustments to owners compensation (typically through a reasonable compensation adjustment to the cash flows) will likely continue as they have in the past.

Bonus Depreciation

The TCJA increased the first-year bonus depreciation percentage to 100 percent, which allows businesses to deduct 100 percent of the cost of qualified property (e.g., equipment) purchases during the first year of service (instead of expensing the cost over the life of the equipment). The result is typically higher income from the business as the business can "artificially" reduce earnings, thereby paying lower taxes. This change applies to both new and used qualified property, but sunsets for property placed in service after 2022 (or 2023, depending on the type of property).

CHANGES TO C-CORPORATION TAXES

For C-corporations, the most significant single change under the TCJA was the reduction of tax rates. The rate change went into effect Jan. 1, 2018, and the change is permanent.[7] As can be seen in Table 2, the C-corporation tax scheme was significantly simplified, with the expectation that it would make the U.S. more competitive on a global basis.[8]

This could impact your family law cases if your clients' income includes a large portion of distributions from C-corporations (typically seen in high net worth cases). With lower taxes, earnings from C-corporations should increase. However, with the increase in available cash (the result of paying less taxes), C-corporations may feel the need to use that cash to increase capital expenditures (to increase their product offerings in a highly competitive global market), increase employee compensation (in order to maintain skilled workers), or decrease their margins (in an effort to remain cost competitive), all of which would put a downward pressure on the expected increase in earnings. Therefore, the full impact on earnings (and, thus, your clients' income) is yet to be seen.

CHANGES TO TRUSTS/ESTATES/GIFTS TAXES

TCJA introduced changes to the taxes for trusts, estates, and gifts, which will impact your high net worth cases. The most significant change is related to the exemption amount for estate, gift and generation-skipping taxes. Under previous tax law, such exemptions were limited to $5.45 million per individual (adjusted for inflation to $5.6 million). Additionally, annual gifts were limited to $14,000 per donee.

Under TCJA, the exemption was increased to $11.2 million per individual (also adjusted annually for inflation). This implies that married couples with less than $22.4 million in net worth will likely escape the federal estate tax. Also, the annual gift limit was increased to $15,000 per donee (as a result of indexing for inflation, not necessarily a separate adjustment created by the TCJA). Note, the exemption change is not permanent but will sunset after 2025, whereby the exemption will revert back to $5.6 million. These changes will likely only impact high net worth cases, where estate planning plays a significant part in negotiations.

WRAP UP

As this article and my previous article show, the TCJA instituted broad, sweeping changes to the U.S. federal tax code, impacting both individuals and businesses. In this article, I have pointed to the changes in the federal tax law related to businesses that impact family law matters;

TABLE 2

For Corporate Income Tax:							
Previous Law							New Law
Bracket	If Taxable Income is Between:		The Tax was:			Of Amount Over:	
A	$ -	$ 50,000		15%	$ -		Flat rate of 21%
B	$ 50,001	$ 75,000	$ 7,500	+	25%	$ 50,000	
C	$ 75,001	$ 100,000	$ 13,750	+	34%	$ 75,000	
D	$ 100,001	$ 335,000	$ 22,250	+	39%	$ 100,000	
E	$ 335,001	$ 10,000,000	$ 113,900	+	34%	$ 335,000	
F	$ 10,000,001	$ 15,000,000	$ 3,400,000	+	35%	$ 10,000,000	
G	$ 15,000,001	$ 18,333,333	$ 5,150,000	+	38%	$ 15,000,000	
H	$ 18,333,334 and above			flat	35%		

however, please note there are several other changes that were not covered here but may be of interest to your clients or you personally.[9]

The lasting impact of the business tax changes are yet to be fully seen. Call me patriotic, but I'm hopeful that the law will be true to its intent (i.e., create U.S. jobs). Understanding how the federal tax changes will impact your clients will allow you to best represent them during a major life upheaval. ***FLR***

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Endnotes

[1] Please see The Family Law Review Winter 2019 Edition for a discussion of the changes to the federal tax laws for individuals and how those changes impact family law matters. This article focuses on the changes to the federal tax laws for businesses and trusts and estates. UPDATE TO WINTER 2019 ARTICLE: In that article, I wrote, "Interest on home equity lines of credit is no longer deductible, which may limit your client's plans to use such debt going forward." After submission for publication, additional guidance clarified the rules for deducting interest on home equity lines of credit (HELOC). According to the new guidance, interest on HELOCs is no longer deductible unless the HELOC funds are used to buy, build or substantially improve the taxpayer's home that secures the loan. This means that the HELOC interest deduction can be taken if the HELOC funds are used for home purchase/improvements; the HELOC interest deduction cannot be taken if the funds are used for something else (e.g., Susie's/Jonny's college tuition).

[2] This could be especially true under the fair market value standard that is generally accepted as best practice in Georgia.

[3] Note, the term of art in the TCJA is "specified service business" in case you want to peruse the actual law. I will use this term throughout the remainder of this article.

[4] Assumes taxes are based on being married and filing jointly; and note her/his ownership is in a specified service business. Reminder: the $300,000 income would include the income from the attorney's spouse.

[5] Here, compensation is the "wage" the owner is paid for their services; this does not include distributions from the business profits that the owner may take.

[5] For business owners to maximize the new QBI deduction, a balancing act will need to be struck between reasonable compensation and the other variables that affect (or limit) the deduction under TCJA. Business owners will have the continuing desire to reduce compensation (in order to minimize self-employment taxes) and, thus, likely increasing the QBI deduction. However, the changes under TCJA introduce a "competing" desire to increase compensation, thereby reducing the QBI deduction. At this time, it is uncertain how much emphasis the IRS will place on owner's compensation during its reviews; however, guidance from a tax professional on such issues could help ameliorate thorny tax issues going forward.

[7] As I discussed in The Family Law Review Winter Edition article, the changes to the individual tax rates are temporary and set to expire after 2025.

[8] Other changes to the tax law removed the double taxation of foreign profits, which incentivized U.S.-based multinational corporations to hold their profits and move their legal headquarters off-shore. This made the U.S. tax system more akin to the "territorial tax systems" used by other leading nations. The reduction of the C-corporate tax rate and the change to a territorial tax system was seen as a move to incentivize investment and production in the U.S. This reduction is expected to make the U.S. globally competitive tax-wise. Though this may not impact your family law matter directly, you'll sound impressive at your next dinner party.

[9] Other items that were not addressed here because of the indirect impact to family law matters include:

- Deductions related to meals, entertainment, amusement, or recreation
- Corporate research and development
- Corporate AMT
- State and local tax (SALT) limitations for estates
- Changes to international taxes.

A Tribute to M.T. Simmons, Jr.

By Carol Walker

August 17, 1936 - January 15, 2019

Marvin T. Simmons, Jr. (known generally as M.T.), was, as described by Barry McGough, "… a lawyer's lawyer, and blessed with the unique ability to tell you he disagreed with you and make you like him because of it." He was a man of many talents who gave freely of his time and sage advice to countless people. There were four things that were at M.T.'s very core: country, family, friends and the legal profession.

M.T. never lost sight of his small-town roots in Donalsonville, Georgia. He was the quarterback of his state champion football team and excelled in academics. He graduated University of Georgia 1959 with a BBA in accounting followed by a J.D. degree in 1960. An avid history buff, he was genuinely interested in our country, and how his southwestern Georgia heritage fit into the formation of our country, past and future. M.T. was always looking for family information about his grandfather's Fifteenth Alabama regiment wherever they may have been in the Civil War, and he was so happy to have made a trip to Gettysburg several years ago with family to pass that information on to future generations. During every trip M.T. made to Europe (and there were a lot of them), he always sought out the local American cemetery to pay respects to those who fought and died for our country. He was a true patriot and a true American. While M.T. and I generally sat on different sides of the political spectrum, for some reason he had the good fortune of surrounding himself with articulate women who had a different political slant to keep him balanced, including his daughter Teri Simmons.

Family was so important to M.T. His daughter Teri went with him every Saturday morning to the law office when she was young, where I am certain she got the "law bug". Later in life, M.T. was exceedingly proud of Teri's accomplishments as a renowned partner at Arnall Golden Gregory. He would be certain to tell you not only about her latest feats, but also about the accomplishments of his two grandchildren, Damian and Caroline. And, in the last 25 years of his life, he was lucky to have shared his life with his beloved wife Jennie, an accomplished business woman and great traveling companion. M.T. was always quick to tell you how fortunate he was to have the woman he called "my Jennie" in his life.

Over his long legal career, M.T. had the quality of making you feel that he was your best friend and you were his. He cared about people and taking care of people. Whether it was just calling to check on you or going by to see a sick friend, M.T. made time to reach out and make inquiry about you. When M.T. called me, he would always start the conversation in a jovial and booming voice "Carol, this is M.T.!"—those words always brought a smile to my face and in recounting this anecdote, I have been told by many others they felt the same. Often those words would be followed with an invitation to lunch or for a chat and, when the meeting occurred, you always felt like you had his undivided attention.

M.T. was a mentor to countless attorneys and true friend to many. After his death, I had numerous attorneys tell me how good a friend they considered him. M.T. had the knack for making every person he came into contact with feel special. Every human being, whether multimillionaire or yeoman, was given the same reception and the same courteous treatment. He graciously lent his time to brainstorm issues and was very helpful in deftly advising others in times of great personal difficulty.

His storytelling ability was amazing. Throughout his legal career, M.T. practiced in the Decatur area. He was fortunate to partner with many fine lawyers, including Joseph Szczecko, Wesley Warren and Bill McFee. From 1974, he served as the Senior and Managing Partner of the firm. He was recognized for decades in Best Lawyers in America, including the designation of Atlanta Lawyer of the Year for Family Law. He served as President of the Decatur-Dekalb Bar. A formidable courtroom presence and skillful advocate, M.T.'s skills were recognized by his peers through his professional affiliations. A member of the prestigious American Academy of Matrimonial Lawyers since 1981, he served as vice-chair of the Georgia Chapter from 1984 to 1985. He was invited to join the American College of Trial Lawyers in 2001. A true believer in the importance of lawyer's comradery, he was an active member of the Lawyers Club of Atlanta, a President of the Advocates Club, and a President of the Old War Horse Lawyers Club. And, as many lawyers who appeared against him will attest, he managed to charm every jury with the magic of common-sense persuasion and warmth.

M.T. prided himself in never having made a business card. He relied fully on personal relationships which he developed throughout his lifetime and grew a tremendous business without any of the marketing so common to small and large firms today. He also believed fully in the power of the flip phone as the business tool of choice. Believing and practicing the professionalism of service to others by example, M.T. gave selflessly of his time and talents. He served on the Board of Governors of the State Bar of Georgia from 1975 to 2005. He chaired the Georgia State Bar Disciplinary Board from 1978 to 1979, was the Chair of the State Bar Lawyers Assistance Program from 2000 to 2001 and served on the Georgia Board of Bar Examiners from 2005 to 2010, completing his term as Chair of that body.

A driving force in the creation of the Family Law Section of the State Bar, M.T. served as the Chair of the first Family Law Institute in March 1983, as well as Chair of the fledgling Family Law Section from 1982 to 1983. While today's young attorneys might find this hard to believe, at that time the Family Law Institute was held at Sea Palms on St. Simon's Island and fifty in attendance was a big crowd. John Lyndon credits M.T. with the inspirational thought that the Institute receptions needed to be improved to something better than beer and bags of potato chips, and M.T. made it happen. Since that time, the Institute has become the undisputed best source of training for several generations of Georgia family lawyers with attendance records each year.

M.T. was the recipient of the Family Law Section's Joseph P. Tuggle, Jr. Award for professionalism in 1998, which recognizes those who exemplify the aspirational qualities of professionalism. He was the 1994 recipient of the Section's Jack P. Turner Award, which honors lawyers who represent the pinnacle of what all family lawyers should strive to achieve: service, ethical conduct and professionalism. He served as the Associate Editor of the Family Law Section newsletter from 1996 to 1997.

In later years until his death, M.T. used his extensive legal knowledge and interpersonal skills, including his engaging personality, acting as a mediator of family law disputes. Many difficult cases were resolved after long hours with his assistance. M.T. had a presence about him which put people of all types at ease and he had the obvious intellect to persuade litigants that they should pay heed to what he had to say about their potential future. And yes, the story about M.T. walking the dog during a mediation is true – it allowed the lawyers and their clients to work things out while he was walking that Jack Russell terrier.

I had the good fortune to meet M.T. as opposing counsel in a case and as a result, to have forged a long-term mentor/friend relationship which continued for many years until his death. As I sit at my desk writing this, I look across my desk and smile when I see the briefcase that he gave me when he retired from the active practice of law that I use today and the book in my bookcase he gave me as a joke titled "100 Reasons Why You Should Elect a Democrat", which consisted of 100 blank pages following the title page. I know that there are many other family lawyers who have equally poignant memories of this larger than life man who touched us all in such a positive way. I know for the rest of my professional life I will always ask myself "What would M.T. do?" when faced with difficult or trying situations, and, as best I can, govern myself accordingly. We lost a giant of a man when he passed. ***FLR***

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Trial Outline: Active Duty Service and Military Pension Division (Part 1)

By Mark E. Sullivan

INTRODUCTION

Jake Baker was mad. He'd spent thousands of dollars on his lawyer for settlement negotiations in his divorce case, and now he was facing a trial, which meant more money for the lawyer. Jake told his lawyer that, if he was going to spend all that money, he needed to get an overview of what he could expect, and he wanted to know the questions and answers he would see in the trial. This article is a summary of what his lawyer outlined for him.

Although most divorce matters which involve military pension division are resolved through a negotiated settlement, sometimes a case goes to trial. Not much has been written about contested trials regarding military retirement benefits. The reader will find below issues of fact and of law, sample questions, proposed answers, and the arguments which one would expect to see in such a case.

The case takes place in the state of East Carolina. Jake is the petitioner in the lawsuit and his wife, Ellen Baker, is the respondent. She is a master sergeant currently serving in the Air Force. The parties have not been able to arrive at a settlement concerning her retired pay, the Survivor Benefit Plan[1] and other military benefit and retirement issues.

EXPECTED QUESTIONS FOR THE SERVICE MEMBER

The respondent, Ellen Baker, will want to set out the facts for the court regarding her military service. She will hope to establish her credibility with the judge as well, since she may be asked further questions on cross-examination or on redirect. She should aim to get into evidence her present rank, her date of entry into military service, and her creditable years of service. She will need to explain any breaks in service which would have an impact on her total years of service.

Ellen Baker may also aim to set out for the court what her retired pay would be if she were to retire on the date of dissolution, as will be explained below. Her testimony may also cover her Thrift Savings Plan (TSP) account and the accrued leave; these are shown below primarily to demonstrate to the judge that she's being candid and straightforward in the disclosures of all marital property. If it were up to Ellen Baker, she'd prefer to "take a pass" on these issues; that might mean that the assets would be ignored or omitted in the final order.

Last but not least, someone — perhaps both lawyers — will need to outline for the court what the military pension is and how it's divided.[2] Pension division trials are rare, and those involving military retirement benefits are rare indeed. The judge will probably not be familiar with the rules, the statutes and the terms employed. In a well-tried case, the lawyers will collaborate so that the judge can "hit the ground running." If the court does not understand the means of division, the limitations imposed by Congress, the tax aspects of pension division, how to allocate survivor annuity coverage through the SBP (Survivor Benefit Plan), the rules which are enforced by the retired pay center, and a myriad of other issues, then the resulting order will likely be flawed. In some cases, the aggrieved party may appeal the result. Even if the order is not appealed, the parties will spend plenty of their lawyers' time (and their money) in trying to implement the flawed decree.

Jake and Ellen don't have a lot of money to spread around with their lawyers. Both of them will benefit from a joint effort by the attorneys to bring the judge into the picture about dividing the pension, valuing the Thrift Savings Plan account, election of the Survivor Benefit Plan for the former spouse and other issues.

As to the documents needed to illustrate testimony and pin down numbers and values, Jake should be able to get these from Ellen, which would simplify the issue of authentication. This might occur by voluntary discovery or through his taking a snapshot of them at the home with his smartphone before the parties separated. It might occur through discovery and document requests.

A court order or subpoena signed by a judge will, given time, result in the production of the appropriate documents from the U.S. government.[3] When a party requests documents from the government which are to be introduced in trial, it is usually necessary to request an affidavit concerning business records from the records custodian or a public records affidavit from the agency or office responding to the request. In regard to obtaining authenticated documents and a records affidavit, "One size fits all" is not the rule. There are no standard affidavits which are used by all federal agencies. Usually the applicant's attorney will need to draft the affidavit, which is then reviewed and revised by the legal office in the agency. It is also important to remember that all agencies need a reasonable amount of time to respond to document requests. Sometimes several weeks or months may be needed to obtain the requested papers, affidavits and records.

INITIAL QUESTIONS—BASIC INFORMATION

The questions below are directed to Master Sergeant (MSG) Ellen Baker by her attorney. They could also be asked of her by petitioner's counsel if she is called as an adverse witness. And they could also be asked—with different phrasing—of Jake Baker, the petitioner, if he has knowledge of the answers or has authenticated documents to support his responses.

Q: [by the respondent's attorney] Please state your name.

A: Ellen W. Baker.

Q: Are you married to the respondent, Jake Baker?

A: Yes—we married in July, 2005.

Q: What is your rank in the Air Force?

A: I am a master sergeant.

Q: You're stationed at Franklin Air Force Base here in East Carolina?[4]

A: Yes, that's right.

Q: When did you begin serving in the Air Force?[5]

A: I enlisted on June 3, 2000.

Q: What's your pay grade and years of service at present?

A: "E-7 over 18."

Q: Please explain what that means.

A: When you look up my pay on the military pay tables published by DFAS, you'll find my current pay. It is shown on the pay table for this year under the rank of E-7, and it is also "over 18," since I have been serving for over 18 years. Pay increases occur every two years.

Q: What is "DFAS?"

A: The Defense Finance and Accounting Service. It's the pay center for the Air Force.

QUESTIONS ABOUT MILITARY SERVICE

Q: Do you have your initial enlistment contract here?

A: No, I don't. I thought I had it at my office, which is where I keep important Air Force documents. But I've looked and looked, and I can't find it.

Q: How about getting a copy of the enlistment contract from the Air Force?

A: Good idea—but no good. I tried. I phoned to obtain a copy, but that was only a week ago—as soon as I heard that this case was "first up" on the calendar this week. They told me that they could not provide a copy with that affidavit you mentioned on such short notice. "Records affidavit" I think it's called.

Q: Well, Ellen, what can we do to support this statement of yours? How can you verify that you entered the Air Force on June 3, 2000? Is there another means of proving this to the judge?

A: Well, we could use my LES, I guess.[6]

Q: Your "LES"? What's an LES?

A: Oh, excuse me – it's my leave and earnings statement. It's called "LES" for short.

Q: Well, how would that help us with the start of your military career?

A: At the box labelled "Pay Date" at the top of my LES you will find the date when I entered active duty. In this case it shows 000602, which is years, then month, then day. So it's 00 for 2000. And then 06 for June and 02 for the second day of the month.

Q: Were there any breaks in your military service between then and now?[7]

A: No. I've had no breaks in service. I have served about eighteen years as of now, and I can retire at any time after I hit twenty years.

QUESTIONS—BASIS FOR RETIRED PAY

Q: At your retirement date, will your retired pay be based on the final active duty pay you will be receiving at that point?

A: No, it will not. That's because I entered the Air Force after September 1980.

Q: Would you explain how your retired pay will be calculated since you entered military service after September 1980.

A: My retired pay will be based on what's called my "High-3" pay.

Q: Please explain what you mean by your "High-3" pay.[8]

A: When I retire, the government takes the pay I got in my highest three years of service, and it uses that 36-month average to calculate my retired pay.

Q: All right. So if you were able to retire today, which will be the date of your divorce judgment, tell us what would be your "High-3."[9]

A: It would be $4,500.

Q: How did you figure that?

A. I ran the calculations myself last week. I took the last 36 months of LES's and averaged only the base pay shown on them. The last 36 months is the highest pay that I have received while in service.

QUESTIONS FOR THE PLAINTIFF—OTHER BENEFITS

Q: What about the Thrift Savings Plan, MSG Baker? Do you have an account was started during the marriage?

A: Yes, I do.

Q: And what is the current balance?

A: As of the first day of this month, the account balance was $12,500.

Q: Are there any loans against it?

A: Yes – I decided to build a workshop next to the house where I could store my carpentry tools and other things. I got a loan from the TSP for $7,000. About $2,000 has been paid back, so about $5,000 remains as an outstanding TSP debt balance.

Q: Is that debt balance already reflected in the net $12,500 figure which you stated a few minutes ago?

A: Yes, it is.

[At this point, the respondent's attorney should mark and introduce the current TSP account statement into evidence.]

Q: Do you have an accrued leave balance?[10]

A: Yes. As of the first of this month, I had 60 days of accrued leave on the books. It's right there on my LES.

Q: Do you have a current LES here in court?

A: Yes.

Q: Show it to me, please.

A: Here it is.

Q: Your honor, I am marking this current LES from MSG Ellen Baker as Respondent's Exhibit B, right after Exhibit A, the TSP statement. [When appropriate, move for admission of this exhibit] No further questions.

At this point, Ellen Baker's case is finished. This is the end of the necessary testimony for her. She has given to the court the minimum information needed for the judge to assemble a military pension division order (the armed services equivalent of a QDRO, or qualified domestic relations order), a Retirement Benefits Court Order (RBCO) for the TSP, and a valuation and setoff for the accrued leave. If the testimony ended here, the court would have enough data to make these decisions.

[Part 2 of this article will cover cross-examination of the military member, direct examination of the nonmilitary spouse, the Survivor Benefit Plan, indemnification and accrued leave, as well as legal issues which should be saved for briefing and argument instead of brought out in testimony.] ***FLR***

Mark Sullivan is a retired Army JAG colonel and author of "The Military Divorce Handbook." He practices family law with Sullivan & Tanner, P.A. in Raleigh, N.C. and works with attorneys nationwide as a consultant on military divorce issues and in drafting military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com (alternate 919-306-3015, law.mark.sullivan@gmail.com).

Endnotes

1 The Survivor Benefit Plan is a survivor annuity that is available to those in the armed forces who are retirement-eligible. This means those who have over 20 years' creditable service in the Army, Navy, Air Force, Marine Corps or Coast Guard. The benefit paid to the designated beneficiary is 55% of the selected base amount. 10 U.S.C. § 1451 (a)(1)(A)-(B). The base may be anywhere between $300 per month and full retired pay. The latter is the default if no other amount is chosen. The cost is 6.5% of the base for regular retirements (i.e., those from active duty) and about 10% for non-regular retirements (that is, those from the National Guard or Reserves). SBP coverage for a former spouse is suspended if the beneficiary remarries before age 55. The statutes covering the Survivor Benefit Plan and the Reserve Component Survivor Benefit Plan are found at 10 U.S.C. §§ 1447-1455.

2 The lawyers should explain to the court that a military pension is not a "qualified plan." It is a program established by federal law (Title 10, U.S. Code) to allow members of the armed forces to receive retired pay. Military retired pay is divisible pursuant to the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408. No QDRO (qualified domestic relations order) is filed to divide the retired pay, there is no plan administrator, and there is no Annual Benefit Statement for what an individual accrues in pension benefits during a particular year. The servicemember does not receive a Summary Plan Description stating what she will receive upon retirement and how the plan works. Many of the aspects of military pension division and SBP allocation may be found at the Silent Partner series of infoletters published by the North Carolina State Bar's military committee, located at www.nclamp.gov > For Lawyers.

3 See the Silent Partner info-letter, "Docs for Division," for a listing of most of the papers and forms which may be needed in a military pension division case. It may be found at the website of the North Carolina State Bar's military committee, identified above at note 2.

4 Although Ellen Baker is being questioned on direct examination, most state rules of evidence allow the use of leading questions on direct for preliminary matters or issues which are uncontested.

5 At this point, an enlisted airman such as MSG Baker would answer the question by discussing her initial enlistment. An officer, on the other hand, might talk about gaining her commission through ROTC (the Reserve Officer Training Corps), or one of the service academies (e.g., the Air Force Academy). There are several documents which would verify the initial military status of an officer, such as her signed commission, her initial military orders appointing her as a second lieutenant in the Air Force, or her leave-and-earnings statement (LES), as will be explained below. There are similar documents which would prove the initial entry on military duty for an enlisted member (e.g., her enlistment contract, her initial orders or her LES).

6 The leave-and-earnings statement provides information on the

pay grade of Ellen, her date of initial entry into service, her current pay, her Social Security number and other data which will help in preparation of a military pension division order. The specifics which the LES gives include the following:
1) NAME: The member's name in last, first, middle initial format.
2) SOC. SEC. NO.: The last four digits of the member's Social Security Number.
3) GRADE: The member's current pay grade.
4) PAY DATE: The date the member entered active duty for pay purposes in YYMMDD format. This is synonymous with the Pay Entry Base Date (PEBD).
5) YRS SVC: In two digits, the actual years of creditable service.
6) ETS: The Expiration Term of Service in YYMMDD format. This is synonymous with the Expiration of Active Obligated Service (EAOS).
The LES is issued electronically twice a month to active military personnel. DFAS publishes the LES to the servicemember's account on the secure website, https://mypay.dfas.mil. The first LES shows all pay and entitlements for the month. The second LES of the month will not have all required information; if the servicemember (SM) elects to be paid twice a month, the second LES will only show the amount paid along with the basic information.

7 Breaks in service can result in a shorter period of time for the "marital pension service" portion of the marital fraction. The numerator of the fraction is the period of time during the marriage when the servicemember was serving. A shorter period means a smaller numerator, and thus a smaller total fraction which will be divided between the parties. It is vital to know the correct number for the months of marital pension service.

8 When a SM entered military service between September 8, 1980, and July 31, 1986, the "High-3" formula is used to compute retired pay. 10 U.S.C. §§ 1407(a), 1409(b)(2). Unless the SM has chosen a retirement bonus known as CSB/REDUX, available to those who entered military service after July 31, 1986, her retired pay after 1/31/86 will also be based on the "High-3" formula. CSB/REDUX was eliminated as of 12/31/2017.

9 This line of questioning, asking the servicemember to take a "snapshot" of her retired pay as if she were to retire on the date of dissolution, applies as a matter of state law in a handful of jurisdictions (e.g., Texas, Florida, Oklahoma, Tennessee and Kentucky). In those states, statutes or case law requires that the court fix the benefit to be divided as of the date of divorce. This is multiplied by a truncated marital fraction, namely, pension service between marriage and divorce, divided by total pension service until the divorce. The result is a fictitious pension figure, sometimes called a "hypothetical award." This approach would not apply in most states, which use the "time rule" to divide military pay. This means that the court applies the marital or community fraction (months of marriage overlapping pension service divided by total pension service) times the individual's actual retired pay.

Section 641 of the National Defense Authorization Act for 2017, changed the rules for defining "disposable retired pay" that can be divided at divorce, specifying a "frozen benefit" that is based on the military member's hypothetical retired pay at the time of divorce. 10 US.C §1408(A)(4)(B). Several Silent Partner info-letters contain further information on the Frozen Benefit Rule, the data points which must be presented to the court, the issue of double dilution and the denominator of the marital/community property fraction, and work-arounds. These are found at www.nclamp.gov > For Lawyers. The fixing of the retired pay as of divorce is the approach which MSG Ellen Baker will pursue, asking the court to "freeze" her pension benefit to that which theoretically would exist if she retired when the divorce was granted.

10 It is important for the non-military party to consider accrued leave of the SM in property division when state law allows the classification of vacation time and leave as marital property. Each servicemember accrues 30 days of paid leave each year, regardless of rank. This leave is worth what its equivalent would be at the monthly pay rate of the SM, and one can calculate this easily by using the pay tables available at the DFAS website, www.dfas.mil. If MSG Baker's gross retired pay is presently $4,600 a month, then two months of leave is worth $9,200, which represents gross pay before tax and other withholdings. Counsel for the husband should advocate use of the gross pay figure, while MSG Baker's lawyer should use after-tax computations for the pay and eliminate any non-pay entitlements. If state law forbids such treatment, so be it. If, on the other hand, the law or cases within one's state is favorable or undecided, then overlooking this asset means depriving the non-military spouse of a substantial amount of money when all that the practitioner needs to do is obtain the SM's LES for the applicable date (under state law) for determining and valuing marital or community property.

Family Law Section
State Bar of Georgia
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2018-19 Family Law Section Executive Committee