The Family Law Review

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A "Supreme" Family Law Institute Program

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The presentation of a mock trial is nothing new to Family Law Institute (FLI) programs. Seeing experienced trial lawyers demonstrate rather than talk about their techniques and tools of the trade has always been a popular and effective seminar format. This year, however, attendees at the FLI in Amelia Island, Fla., were treated to a first-ever FLI event, thanks to the efforts of Program Chair Kurt Kegel, who arranged for the attendance of all of the Supreme Court of Georgia justices at the seminar.

The justices were kind enough to participate in a mock oral argument, where Barry McGough, on behalf of the husband/appellant, and Rick Schiffman, on behalf of the wife/appellee, argued an intriguing issue which, if it were actually decided by the Court today, could have major implications. The justices read the briefs and thoroughly questioned the attorneys, but stopped short of rendering a decision. The program was an excellent primer for any attorney who has yet to undergo that terrifying, humbling, yet nevertheless thrilling, experience of appearing before the Supreme Court of Georgia, and it also shed some light on the justices' general approach to family law cases under the Pilot Project. And, for the judicial soothsayers among us, there were a few tantalizing clues as to what a decision might be in such a case.

The Issue

The issue before the Court involved the circumstances under which separate property can be transmuted to marital property, or even to the separate property of the other spouse, during the course of the marriage.

The Facts

Mr. and Mrs. Smith, who had been married for 20 years, had separated as a result of the wife's extra-marital relationship with the husband's sister. Funds in two brokerage accounts were in issue. Account number one consisted of funds solely from the husband's premarital inheritance from his parents, which had not been commingled during the marriage. For estate planning purposes, however, the husband had placed his wife's name on the account as a joint tenant but without right of survivorship. Account number two also contained monies that were inherited by the husband from his parents prior to the parties' marriage. These funds had not been commingled but had, again, been placed in their joint names solely for estate planning purposes.

The husband was corporate counsel for an evangelical church and had been out of the country for approximately one year prior to the divorce. During that time the wife withdrew funds from the second account and transferred these monies into a revocable trust of which she was the trustee as well as the beneficiary. The husband was unaware of this transaction. The wife, as trustee, then transferred the monies from the trust to herself, opening up a separate account in her own name.

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Editor's Corner

By Randall M. Kessler
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Well done Kurt! All of the Supreme Court of Georgia Justices hearing a mock oral argument at the Ritz-Carlton before 450 family law attorneys. That will be hard to top (not to mention the great weather Kurt arranged).

The section is obviously very alive and very well. After the record attendance at the Institute, CLE programs are in the works again all leading up to next year's Institute in SanDestin, which Ed Coleman is guaranteeing to be enjoyable. The Nuts and Bolts Seminar will again be held in Atlanta on Sept. 24.

We owe thanks again to the many contributors, especially Kelly Miles for an excellent interview with Judge Kathlene Gosselin, who currently chairs the Uniform Superior Court Rules Committee. If you have an idea for an article, please "go for it." New ideas and new contributors are welcome and will help keep *The FLR* fresh and interesting. Please also submit your photos, even if it is simply a photo of a section member and family on vacation and add a two- sentence caption. Everyone loves photos. Look for the next issue of *The FLR* in December or January 2008. **FLR**

Inside This Issue

If you would like to contribute to *The Family Law Review*, or have any ideas or suggestions for future issues, please contact Editor Randall M. Kessler at 404-688-8810 or rkessler@kssfamilylaw.com.

Note from the Chair

By Kurt A. Kegel
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Greetings! It has been with great pleasure that I have been a member of the Executive Committee for the Family Law Section for more than seven years now and I am excited about continuing to serve the members of our Section as chair for the next year.

As we have all seen over the past several years, this is an every changing time for the family law practitioner. The Pilot Project with the Supreme Court shows no sign of slowing down, which is providing helpful guidance to the practitioner through appellate decisions we have been looking for and the Legislature is giving us new law, first with the changes in the Child Support Guidelines and most recently with House Bill 369, which is going to again provide us with a number of changes. As with the Child Support Guidelines, I and the other members of the Executive Committee, are committed to keeping you informed of these changes. To do this, we will continue to bring you *The Family Law Review* on a regular basis and provide you with case law and legislative updates in the newsletter. Also, we will continue to organize seminars to address the issues that all family law practitioners need to know.

This past May, as one of my last duties as vice-chair, I was very fortunate to organize the 25th Anniversary of the Family Law Institute in Amelia Island, Fla. While at times it seemed to be a daunting task to organize three days of material that would be educational, interesting and entertaining, I was lucky enough to have past chairs, past Executive Committee members and current Executive Committee members to turn to for advice and insight. However, anytime I was really concerned about it all "coming together," I would pick up the phone and call Steve Harper with I.C.L.E. and he would always assure me that it would all "come together." And it did. By all accounts, everyone in attendance thoroughly enjoyed the program as a whole and thoroughly enjoyed all the presentations. I would like to offer a special thanks to all who participated and to Steve Harper for making it all "come together!" And, I would like to again offer a very special thanks to the entire Supreme Court of Georgia for turning out in full force and making the 2007 Institute truly one to remember.

I am looking forward to the year ahead and continuing to work with a great group of people on the Executive Committee. If any of you have any issues that you would like to address or questions concerning the section, please feel free to drop any of us an e-mail. (For a list of Executive Committee members, please see page 32.) **FLR**

Supreme Institute

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The wife claimed that the funds in account number one were marital property and that the funds in account number two were her separate property.

In the trial court, both parties moved for partial summary judgment and the trial court denied the husband's motion and granted the wife's motion, ruling that the funds in account number one were marital property and the funds that had been in account number two were now the separate property of the wife. The husband appealed, asking the Supreme Court to find that the trial court erred in its ruling as to both accounts and to direct the trial court to award both accounts to him.

Argument of Appellant

McGough, on behalf of the husband, argued that there was no dispute that the assets were separate, non-marital property at the time of the marriage, that there was no commingling of the assets during the marriage, and there was no contribution by the marital unit to the assets during the marriage. The placing of these funds in joint accounts was purely for estate planning purposes, to allow the maximum benefit from the estate tax deduction by spreading the assets between the spouses.

A sampling of the justices' questions and Mr. McGough's responses follow.

Justice Thompson: Is it the lesson here that you give to your spouse now in order not to give to the government later?

McGough responded by denying that a gift had been made and contending that there was no evidence that there was an intent by the husband to make a gift to the wife, and no evidence that any of the money was spent for any marital purpose whatsoever.

> **Justice Hines:** Mr. McGough, you could argue that there has certainly been a gift in this case, could you not? You could have something come in and gift it. You have absolute control over it.

McGough responded that the issue was one of first impression and the Court could determine that there was a gift, but that there were very good reasons why the Court should not decide that there was a gift such that it would transmute the character of the property from separate to marital. McGough cited O.C.G.A. § 7-1-812, which provides, "A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." McGough argued that the statute creates a presumption that the party funding a joint account does not intend to make an *inter vivos* gift, although the presumption is rebuttable by clear and convincing evidence to the contrary, which did not exist in this case.

> **Justice Hunstein:** "Any evidence" is the standard, but the trial court found as a matter of law and we can review whether or not that was correct based on the facts.

McGough acknowledged that the standard is "any evidence," but that "the case is on review from summary judgment, so if there is a question of fact, then summary judgment would have been improvidently granted. In this case, there are questions of fact as to the intent of the husband at the time of the transfer, and that is one of the reasons why the decision of the trial court should be reversed."

> **Justice Benham:** Are you asking us to reverse it and send it back to the court below for a jury to make some findings of fact as to whether it was a gift or not? Is that what you're asking?

McGough agreed that that was one requested outcome but stated it was not the preferred outcome, which was that the Court determine as a matter of law that the property is the separate, non-marital property of the husband.

> **Justice Hines:** Mr. McGough, facially it appears to be a gift, does it not?

McGough, once again called upon to address the gift issue, conceded that it does appear to be a gift, "but if the Court were to rule that it were a gift, that ruling would fly in the face of the rules of equitable division; that is, that only property acquired as a direct result of the labor and investments of the parties during the marriage is subject to equitable division."

> **Justice Carley:** With regard to the equitable division order, what is the significance of the judge's including in the order the fact that the court found that the extra-marital relationship was the cause of the separation? What is the significance of that, since this is only equitable division?

McGough responded that if it were determined by the Court that some portion of these assets were in fact marital property, then the extra-marital relationship would be relevant to the issue of what would be a fair division of those marital assets.

Justice Benham: When you had this case in the court below, I assume you were traveling on a presumption at that time that was in your favor, and that presumption had to be overcome, that presumption being that the asset in question had its origin in being separate property and it remains separate property until the presumption is overcome. Did you not have that presumption in your favor?

McGough agreed that he was traveling under that presumption but somehow the court below was convinced that that presumption had in fact been overcome. "However, this case presents a question of law and that is, In what ways is this state going to allow separate property to become marital? We have the decision of *Lerch v. Lerch*, 278 Ga. 885, 608 S.E.2d 223 (2005), in which the Court held that by transferring pre-marital assets by deed of gift by the husband to himself and his wife as tenants-in-common with the right of survivorship, that that act manifested an intent to transform the separate property into marital property." McGough added that, in the case at bar, there was no right of survivorship in the accounts and that this was an issue the Court could focus on in its deliberations if it chooses to do so. In addition, he cited O.C.G.A. § 7-1-812, which provides that depositing funds into a joint account does not create a presumption of a gift.

Justice Melton: Your argument appears to be that when the transfer went to the joint account, it was obviously for the benefit of holding the funds in a joint account with the IRS or any other governmental entity. So, on the one hand, your client wants the benefits of the joint account but when it works against him, he wants it to be separate. Can he have it both ways?

McGough responded (wryly) that this is frequently the case in marriages and he would hope that it is the case here.

Justice Benham: What are we going to do with *Avera*? You haven't mentioned *Avera*. Does it stand as a roadblock in your way, aberration, or just completely inapplicable here?

[Referring to *Avera v. Avera*, 268 Ga. 4 (1997), holding that the transfer of property by a trustee of a trust, who is authorized to make such a transfer, is considered to be a valid transfer, and the corpus of such a transfer becomes a gift, and therefore, the separate property of the recipient.]

McGough: Fraud is an act that the law should address. The wife stole the heritage (inheritance) of my client's family, his inheritance, stole his bloodline, his sister, and now wants to complete the trifecta by taking his money. Those actions should not be recognized by any court of equity.

Justice Melton: The trial court specifically found that there was no fraud in this case. You are not asking us to revisit that, are you?

McGough responded that he is asking the Court to find that as a matter of law the trial court could not reach the conclusion that it did. So, in effect, he is asking that the Court address the issue of fraud, although not whether the facts added up to fraud.

McGough concluded by entreating the Court to recall the purposes of Georgia's equitable division rules, and argued that to encourage spouses to be suspect of one another in their financial dealings is not a doctrine that will promote marriage. "You ought to be able to use the assets you have when you are married in a way without fearing that you must protect yourself against losing some right that you otherwise would have. That's why there should be clear and convincing evidence of the intent to make a gift. In the instant case, there is only the intent to make a gift when somebody dies." The question before the Court, in McGough's opinion, was not whether there was a gift but whether the gift was such as to meet the requirements of law and change the character of what was clearly separate property. "That's a question of policy and a question peculiarly in the domain of this Court."

Argument of Appellee

Schiffman argued that, "What we have here is a situation that was created by the actions of Mr. Smith. He transferred the accounts into joint names, and it was the intentional decision of Mr. Smith. Everything that flows from that action only came about through the actions of Mr. Smith."

Justice Hunstein: So your position is that it was

intended to be a gift at the time the accounts were created?

Schiffman: Absolutely. Here the gift was created by transferring the funds into a joint account. We don't know whether or not the fact that the account did not have a right of survivorship is a real key issue.

Justine Hines: If it is a gift, could it not be revoked?

Schiffman responded that there were no actions taken to revoke it.

Justice Hines: Mr. McGough would suggest that there actions taken to revoke it.

Schiffman: The criteria for a gift were met. There's a presumption between the spouses and the donative intent was there. There was absolute delivery and there was acceptance by Mrs. Smith.

Justice Carley: With regard to those transfers, we couldn't, but a jury could find that your client was found to be deceitful and greedy, and things like that. Would you say that she was less greedy and less deceitful because she could have done the same thing with account one as she did with account two?

Schiffman: She was protective of her interests, but she had the right to take all the actions that she took. Mr. Smith could have created an account that required both signatures and the funds could not have been transferred out, but he elected not to do that. The actions of the parties can change the nature of the assets and this Court has held that. In *Lerch*, the parties made a change in the name of the title and it made a difference. This Court held in *Lerch* that the gift of the whole was to the marital unit, not just half. In order for this Court to rule otherwise, you would have to overturn the decision in *Lerch*. Mr. Smith finds distasteful the results of applying the law that existed at the times of these transfers.

Justice Melton: How do you address in your argument that Code Section 7-1-812 does not give rise to a presumption of a gift by creating a joint account?

Schiffman: That statute is designed to apply to third parties. If you were to interpret that code section as applying to marital couples in every case where there is a joint account, one party would say that he or she was the source of the funds and therefore under that statute the one who puts the money in the account has the right to take it out in proportion to his or her contribution. If you did that in the marital context, the breadwinner would be the one to receive every asset.

Justice Sears: That's very different, because in this case we are talking about money that he inherited, not his salary or his earnings, which would be marital property. But that's very different from money that you inherit from your family, don't you think?

Schiffman: Under 7-1-812, it doesn't make any difference. It's purely a question of who put the money in, not the source of those funds. If you apply that statute in domestic cases, you are going to put the spouse who may have been the homemaker at a severe disadvantage. That statute is designed for people who are not married. When two unmarried people have made contributions to an account, and there is a later dispute, they are entitled to receive those funds in proportion to their contribution.

Justine Hines: It appears to me that your argument is that he created this situation and now he wants to back out. Is the equitable argument that that is not equitable?

Schiffman: He made his own bed. In this case the law is clear and we can't fault trial judges for following the law. *Avera* lays out very specific points. A trust is a separate entity and if a trust makes a transfer to a spouse in this case, it is a transfer from a third party, and therefore becomes separate property.

Justice Hunstein: So your basic position is that the court does not have the right to go back before the trust, before she created the trust and took all the funds out. The court does not have the right to go back and look at the joint Merrill Lynch account and where those funds came from?

Schiffman: That's correct. There were two *Avera* cases. In the first case [*Avera v. Avera*, 253 Ga. 16, 315 S.E.2d 883 (1984)], the husband transferred funds to a trust and the Court held that the trust was a separate entity and the funds in that trust were not subject to equitable division even though the husband was the trustee and the beneficiary of the trust. In the second *Avera* case, Mr. Avera had remarried and transferred a house out of the trust into the name of his wife. He then took the position that the trust was not a third party such that it would become her separate property. The Court held, no, it was a transfer from a third party to her, was a gift to her from a third party, and was therefore not marital property but her separate property. There is therefore precedent for following through with this, and that's what the trial court relied upon.

Justice Benham: Help me with this. When we established the Pilot Project, we were trying to continue the development of the common law, and in the area of domestic relations provide some certainty, some predictability and stability, so that you wouldn't have decisions all over the map. With these three cases we have involved here—*Lerch*, *Thomas* and *Avera*– I know you place great reliance on *Avera*, and *Avera* was a 7-0 decision. When you look at it from a standpoint of equity, an argument can be made that it seems to be unfair to the husband, since both of these accounts had their origin in his family. But I am more concerned about this court's role in producing some stability and predictability in domestic relations. Tell us how affirming the case for you would add to that predictability and stability.

Schiffman: There is a dichotomy in the law between title and equitable principles. If you look at *Thomas* and source of funds, that's an equitable type of approach. If you look at *Lerch*, it's a more technical type of approach. *Stokes* in 1980 said title no longer controls and we therefore did not need resulting trusts and other such theories in order to divide property. *Lerch* brought title clearly back into the front. There are going to be differences and there are going to be conflicts. The reason affirming this decision protects the law better is because you will find that there cannot be a hard and fast rule. The appellate courts have to rely on the trial courts to hear the evidence, make rulings and exercise discretion. It is the same reason we don't have any decisions that say equitable division means 50-50. It means what is fair.

Justice Sears: With that being said, just to dovetail onto that question, are these cases inconsistent or are they driven by different facts or partly inconsistent and partly different?

Schiffman: Candidly, it's hard to tell, if you are in the lawyer's shoes, trying these cases. In *Lerch* there was a gift deed. Is that different from the transfer of an account to a joint account with a tenancy in common, whether there is a right of survivorship or not? Probably there is a conflict in the law, and I'm sure you can resolve it where equitable principles and certain legal principles are going to meet. And in some cases you are going to have a myriad of facts and you are not going to be able predict all of them and they are going to run head on into each other and that's why you have to ultimately rely on the fact-finder to sort through the facts in an individual case.

Schiffman, in conclusion: There was no fraud in this case because there was no deception. Did my client act with high standards in the actions that she took? You could argue, perhaps not, but she violated no law, no statute, or any other expectation. Mr. Smith, when all the dust settles, is really saying that when he placed the funds in the joint accounts and joint names from which he would derive a tax benefit from an estate planning standpoint, it came around to bite him. That may be unfortunate, but he has no one to blame but himself. **FLR**

John Lyndon is an attorney in Athens, Ga., practicing exclusively in family law. He has been a member of the executive committee of the Family Law Section since 2000. He can be reached at jlyndon@lawlyndon.com.

Marry Me—But Sign Here First

By Thomas J. Browning and Brandy James Daswani

Imagine the following scenario: Prince Charming kneeling before Princess Innocence with fountain pen in hand pleading with passionate aspirations "will you sign this" and then follows with "let's get married."

With the advent of *Scherer v. Scherer* in 1982, Georgia entered into a new realm of domestic relations law—prenuptial agreements in contemplation of divorce. The Prince Charming proposal to Princess Innocence now seems more reality than fantasy. Prior to the Court's holding in *Scherer*, public policy mandated any premarital spousal agreements contemplating divorce to be null and void. This is in sharp contrast to the basic tenant (which predates the founding of our country) of premarital spousal agreements in contemplation of marriage (known as O.C.G.A. § 19-3-63) and is recognized in common law.

History demonstrates that the legislature believed that women needed extra protection because they lacked basic rights, such as the right to contract, the right to vote and the right to own property. O.C.G.A. § 19-3-60 et. seq. recognized the societal importance of protecting property, particularly the property of a woman entering into a marital relationship. This gave parents assurances that their new son-in-law would not squander their generous gift, and that the property would be used to benefit future generations.

Establishing O.C.G.A. § 19-3-63 et seq., the legislature set in place formalities concerning contracts in contemplation of marriage. It is of historical significance that contracts in contemplation of marriage had to comport to the same legal requirements as real property transferred by deed. Not only were contracts in contemplation of marriage required to be notarized by two witnesses, but O.C.G.A. § 19-3-67 mandated the agreements be recorded with the clerk of the Superior Court within three months of their execution. These requirements were essential, as agreements in contemplation of marriage generally entailed the disposition of real property, and these steps would put potential bona fide purchasers on notice of ownership.

Now fast forward to 1982 and the Georgia Supreme Court's decision in *Scherer v. Scherer*, 292 S.E.2d 662 (1982). The *Scherer* case signaled the advent of prenuptial agreements and changed centuries of public policy. The *Scherer* holding created a new class of documents now known as prenuptial agreements in contemplation of divorce. The Court recognized the cultural change in society brought about by elevated divorce rates and the shifting dynamics of the relationship of men and women in the workplace, society and family when it stated "The incidence of divorce is increasing, and more persons with families and wealth are in a position to consider the possibility of a marriage later in life. Public policy is not violated by permitting these persons. . .to anticipate divorce and establish their rights by contract." *Scherer* not only provided for the disposition of any premarital property upon divorce, but also property accumulated during the marriage that is disposed of during a divorce by the premarital agreement.

Unlike contracts in contemplation of marriage codified under the Marriage Articles, the *Scherer* decision made no specific requirements for any formalities of prenuptial agreements in contemplation of divorce. As such, a premarital agreement is governed under the same rules as any other contractual agreement under the contracts code.

A review of O.C.G.A. § 19-3-63 shows there are no cases in Georgia dealing with post *Scherer* agreements in contemplation of divorce. Case law that exists prior to the *Scherer* holding deal with O.C.G.A. § 13-8-2, which handles contracts that are void as against public policy. Prior to 1982, contracts in contemplation of divorce were per se null and void as against public policy. However this is no longer the case after the *Scherer* decision.

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Case Notes from the Bench

Hon. Robert V. Rodatus
Judge, Gwinnett Cicuit-Juvenile Court

Child Support—Healthcare

It is improper to order the father to reimburse the mother for "health service expenses" and attorney's fees for the child's attendance at a residential long-term treatment facility. Even if it could be considered a medical expense within the contemplation of the parties settlement agreement the husband was not consulted prior to incurring these expenses as required by that agreement. She admitted that she did not consult him for months when she was compiling information about such facilities or at any other time before enrolling the child in this particular program. Finally, there was no emergency that would relieve her of the obligation to consult with the father. *Page v. Baylard* 07FCDR260 (02/05/07).

Child Support—Settlement Agreement

The trial court found that the father's obligation under the settlement agreement was to pay the son's college expenses for eleven semesters. However the settlement agreement obligated him to pay "the expenses of a college education" only limited to the extent of the tuition for an in-state student at UGA. Also, he should not have been given credit for monies withdrawn from a Uniform Transfer to Minors account established by the father's parents. This has been raised in a prior untimely application for discretionary review and was res judicata. *Norris v. Norris* 07FCDR262 (02/05/07).

Divorce—Child Support/Alimony

This appeal arises from a denial of the husband's motion for new trial following the entry of a final divorce decree. Subsequent to the court hearing in which it was determined the marriage was irretrievably broken the parties co-habited and allegedly reconciled. This did not divest the trial court of its' jurisdiction since evidence at the time of the final hearing supported this determination. *McCoy v. McCoy* 07FCDR265 (02/05/07).

Marital Property—Appraisal

In this case the trial court grafted on its own language requiring an appraisal and acceptance of any offer within five percent of the appraised value. The divorce decree did not require the ex-husband to sell the marital home or specify time for him to pay $15,000 to the ex-wife in consideration of her relinquishment of her interest in that home. In fact the agreement provided that this home was his exclusive property and debt and there were alternative sources for payment of the $15,000. *Roquemore v. Burgess* 07FCDR267 (02/05/07).

Appeal—Deprivation

In this case the great grandparents attempted to appeal an order denying their motion to intervene in a deprivation action. They did not follow the provisions governing interlocutory appeals. Affirmed. *In the Interest of H.E.M.* 07FCDR293 (01/31/07).

Appeal—Jurisdiction

In this case the appellants did not file an appeal of a dismissal of the deprivation action within timely fashion. The underlying deprivation was placed custody in the department after the parents refused to allow treatment of life threatening injuries with blood transfusions. Thereafter they filed a motion to rescind the dismissal and asked that it be re-entered so that they could appeal it. This was denied and affirmed. *In the Interest of S.C.* 07FCDR293 (02/01/07).

Child Support—Attorney's Fees

The award of attorney's fees in this contempt action regarding child support was reversed based on the failure of the trial court to specify which statutory basis, which covered the award. The burden will be on the mother upon remand to show the attorney's fees and the reasonableness thereof. However the order holding the father willful contempt is affirmed as the

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Confessions of a *Guardian ad Litem*

By M. Debra Gold
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In the last issue of *The Family Law Review* I set out the Parents' 10 Commandments of Working with the *guardian ad litem* (GAL). At that time, I realized that I should take those commandments to another level, so I went to work on developing a set of commandments for the practitioner. My confession for this issue is that I cannot help but dream of how much more smoothly custody disputes would go if everybody abided by all of these commandments. So, in an attempt to make our custody cases and our practice of law better, I've set out the Family Law Attorney's 10 Commandments of Working with the GAL.

1. Thou shalt read and understand Uniform Superior Court Rule 24.9.

USCR 24.9, enacted in 2005, sets out the rules and regulations regarding the appointment, qualification and role of the GAL. It surprises me, more than two years after these rules were adopted, how many attorneys are still unaware of their existence. Before the rules, there was little to no uniformity in the various courts as to role and responsibilities of the GAL. Now, with the rules in place, we all have much better direction, and less struggle with issues such as the release of the GAL report, or the role of the GAL in the courtroom. I would suggest that every time you have a GAL appointed in one of your cases, you pull out the rules and read them again.

2. Thou shalt remember that we are dealing with families and children.

Destroying the other party is not the goal. These people are human beings. While I recognize that your job is to do what it takes to represent your clients' interests, I hope you recognize that it is not in your clients' interests to perpetuate nastiness and acrimony that inevitably trickles its way down to the children. We all need to remain aware of how damaging the "fight" can be for the children, and work toward avoiding such a horrible situation for them.

3. Thou shalt not think of thy GAL's investigation and report as a substitute for preparing and proving thy own case.

The court will review the GAL's report and listen to what the GAL has to say on the witness stand. However, the court will not base its ultimate judgment in the case solely on the GAL's report and recommendation. It is your job to prove your client's case. It is your job to call witnesses, submit evidence and argue your client's case. If you rely on the GAL to do all of the work, then you will be doing your client a disservice, because the judge may very well see everything differently than the GAL. Do not make the mistake of assuming that the judge will automatically take the GAL's recommendation. That does not always happen.

4. Thou shalt help and guide thy client when it comes to working with thy GAL, but not do all of the work for thy client.

Although your client has the right to ask you to attend all meetings with the GAL and to draft responses to questionnaires and other requests for documents, this may not be the wisest way to present your client to the GAL. The GAL wants to get a good picture of your client, not a good picture of you. Of course, if your client is a loose cannon, you may think it is necessary to protect his or her interests and speak on his or her behalf. Don't think that the GAL does not see through this tactic. Yes, you should advise your client on to how to deal with the GAL. And there is nothing wrong with reviewing and editing their responses to questionnaires, et cetera. But don't do all of the work and speaking for your client because it will only make the GAL's work harder to find out who your client really is.

5. Thou shalt help thy GAL identify issues and areas which thy GAL should investigate.

Work with, not against, the GAL. Don't be afraid to point out something that you think the GAL may have missed in his investigation. Don't expect to gain points by attacking the GAL on cross examination about something he may have missed, if you never bothered to bring the issue to his attention. If you have brought it to his attention, and it is something truly relevant that the GAL disregarded, then have at it.

6. Thou shalt remember to serve thy GAL with pleadings, and to copy thy GAL on all correspondence related to the custody issues.

If the GAL is not kept up to date on all custody related pleadings and correspondence, then the GAL cannot effectively do her job. Make sure that you add the GAL's name to your Certificate of Service. It is counterproductive for the GAL to have to scramble around to get all of the information herself. Recently, I had been trying to contact an attorney in one of my cases for weeks, only to find out that she had withdrawn from the case a month before. Had I been served with her Motion for Withdrawal and the Order, I would not have wasted so much time in trying to reach her.

7. Thou shalt always keep thy GAL posted of any important dates, including trials, hearings, depositions and mediations.

USCR 24.9.4 provides that the GAL is entitled to "participate in all hearings, trials, investigations, depositions, settlement negotiations, or other proceedings concerning the child." USCR 24.9.8(c) further provides that it is counsel's responsibility to provide timely notice for any such proceedings to the GAL. Don't forget about the GAL. I cannot tell you how many times I've had to rearrange my schedule because I was the last person to find out about depositions, mediations or trials that were scheduled weeks and even months before.

8. Thou shalt not allow thy GAL's report or any of the contents of thy GAL's file to be disseminated to anyone other than those authorized by the rules.

USCR 24.9.6(d) provides for sanctions for violating this rule. Read it carefully as you are subject to sanctions just as your client is. In order to avoid the unauthorized dissemination of the GAL's report and file by your clients, I usually recommend that you not release copies to them from your file. Of course, your client is entitled to read and review the report. However, putting a copy in their hands can be dangerous. Nobody wants the report or any part of the file to make its way to the children, or to the neighborhood gossip. The parties need to understand that one of the main purposes of this rule is to protect the children. Explain to them that to further protect the children, pursuant to USCR 24.9.6(e), the GAL's report will be sealed by the Court.

9. Thou shalt treat thy GAL with respect.

You may not like what the GAL says or agree with his position. That does not give you the right to speak to the GAL in a condescending, rude or inappropriate manner. The GAL is doing his job to the best of his ability. He is not the enemy and should not be treated as one. Of course, this goes both ways as the GAL should always treat the parties and counsel with all due respect. Professionalism rules.

10. Thou shalt go easy on thy GAL during cross-examination if the case should be tried.

This is not just a self-serving commandment. An attack on the GAL will generally not help you gain points with the judge. In fact, it can do more damage to your client's case than good. For some good pointers on approaching the GAL on the witness stand, go back to the February 2007 Family Law Review and read Vic Brown Hill's article on obtaining discovery from the GAL.

These, of course, are only the top 10 commandments. If these commandments, as well as the commandments to the parents in the last issue are observed, then things will surely go a lot smoother in your custody cases. And, of course, my dream of a better world for everybody involved in a custody dispute may even come true! **FLR**

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Tax Considerations of Divorce Settlements

By Martin S. Varon
www. armvaluations.com

The three major issues that are commonly addressed in settlement agreements associated with a divorce are alimony, child support and property settlement. Let's examine each one from a different perspective.

Alimony and Child Support

With the introduction of the new Child Support Law effective Jan. 1, 2007, many of us thought that there would be reduced flexibility on the amount of child support obligations. One item we learned at the 2007 Family Law Institute was the interests of the child remains an overriding concern and will lead to deviations from the child support worksheet calculations.

If you represent the spouse who will be paying alimony and child support and you are negotiating the amounts your client will be paying in each category, your initial impulse might be to allocate more to alimony (because it is deductible) and less to child support (because it is not deductible). However, tax benefits should not be the overriding concern. Each case is unique and should be examined closely.

For example, one thing to consider is the age of the children, i.e. if the children are all teenagers, the child support obligation will soon terminate. In addition, if the marriage was long term, there is a better possibility that the alimony obligation may be for a greater number of years. On the other hand, if the marriage was short term and the children are young, the alimony obligation will probably be for a shorter period of time and the child support obligation will last for many more years.

Property Settlement

It is important to remember that two different assets (net of debt or mortgage) approximately equal in value will not necessarily be equitable upon the ultimate distribution. You should always consider the long term consequences if an asset is ultimately liquidated or converted to cash. Some judges south of the city automatically reduce the value of a residence by 10 percent because of ultimate commissions, refinancing costs or other closing costs.

A primary residence will have no tax incurred on the first $250,000 of capital gains. On the other hand, funds distributed from a qualified retirement plan (such as an IRA or a 401(k) plan) will be taxed at the recipient's tax bracket and potentially incur a 10 percent penalty.

Finally it is critical to ascertain the cost basis of the asset being transferred to the parties. Let's assume your client has 200 shares of Google stock that was bought in 100 share lots at two different times. It is easy to assume that the two lots are of equal value since they are both 100 shares. However, one lot may have been acquired many months ago when Google stock was trading for a much lower cost basis, and the second lot may have been acquired recently. If your client received the first lot in the distribution and tries to sell the stock, he/she will be facing a large capital gains tax and will end up with a lot less after tax funds than their ex-spouse. Remember that equal is not always equitable! **FLR**

Martin S. Varon is a CPA, CVA, JD and CEBS. He works with domestic relations attorneys helping their clients attain equitable distributions in their settlements.

YLD Hosts Second Annual Supreme Cork Benefit

By Pilar Jolie Prinz
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The Family Law Committee of the Young Lawyers Division will host the second annual "Supreme Cork" on Sept. 20 at JCT Kitchen in Atlanta. This event—a combination wine tasting and silent auction—will raise money to support The Bridge.

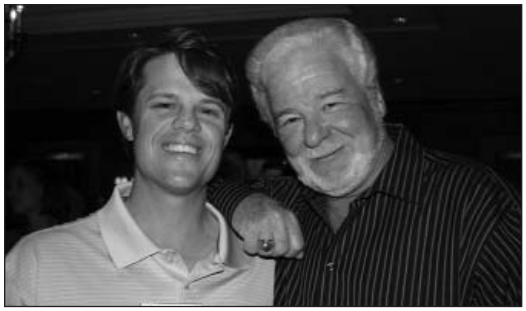
Since 1970, The Bridge has helped adolescents and families suffering from abuse achieve independence by offering on-campus education focusing on solution-oriented therapy, vocational readiness, family counseling, and community-based activities. The National Association of State Alcohol and Substance Abuse Directors and the Center for Substance Abuse Prevention have recognized The Bridge as an exemplary substance abuse prevention program. In 1996, the U.S. Department of Justice awarded The Bridge the Gould-Wysinger Award for exceptional achievement in juvenile justice.

During a tour of The Bridge's campus, committee members were impressed by the unique approach The Bridge takes to helping its children and families re-build trust and self-esteem, and helping them reconnect with the community. Residents at The Bridge volunteer weekly at organizations like Project Open Hand/Atlanta, the Atlanta Community Food Bank and the Furniture Bank of Metro Atlanta.

Through its partnership with Cirque de Soleil, The Bridge uses circus arts like juggling, flying on a trapeze, and walking a tightrope to teach adolescents personal development skills needed to reconnect with the community. Seem unusual? According to The Bridge, a lesson in juggling teaches patience and anger management; a tightrope walk teaches trust, self-confidence, perseverance and concentration.

While you likely will not see a tightrope or trapeze artist at Supreme Cork, you will have an opportunity to purchase artwork created by students at The Bridge, and all profits will go to this great cause. We look forward to seeing you on Sept. 20! **FLR**

2007 Family Law Institute



Above: Jane Thompson, Justice Hugh Thompson, Helen Hines and Justice Harris Hines
Upper left: Jonathan Tuggle and Stephen Clifford
Far left: Bill Sams and Avarita Hanson
Left: Jill Radwin and Ginger Wills
Look for more photos in an upcoming *FLR!*

Case Law Update: Recent Georgia Decisions

By Victor P. Valmus
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Attorney Fees/Gross Income

Padilla v. Padilla
S07F0463 (June 4, 2007)

The parties were married in Florida in 1984 and separated in October 1998. In March, 1999, the father remained in Florida and the wife moved with the three children to Lawrenceville, Ga. The couple made attempts to reconcile in Georgia, but were unsuccessful. In 2000, the wife filed for divorce in Gwinnett County. The case was ultimately dismissed in January 2001 for lack of jurisdiction. The wife had approximately $3,500 in attorney fees pursuing the Gwinnett County divorce. In 2003, the parties were still separated and the wife's income was being garnished pursuant to an IRS tax garnishment because of underpayment of taxes by the husband. The wife retained counsel to receive innocent spouse protection. The wife received innocent spouse protection, and the garnishment was lifted from her wages. The approximate attorney fees for the innocent spouse protection services was $3,700.

In May 2005, the wife filed for divorce in Cherokee County, Ga. A non-jury final was held on June 7, 2006, where the trial court awarded the wife $8,500 in attorney fees paid to the wife's attorney who represented her in the proceedings, and awarded the wife additional $7,200 in attorney fees, which represented the proceedings before the IRS in an effort to procure innocent spouse protection and $3,500 in attorney fees in her representation her in the Gwinnett County case that was dismissed in 2001. The court also awarded the wife $2,500 for an automobile that was considered her separate property and was sold during the marriage and established the gross income of the father for child support purposes at $12,250 per month. The Supreme Court affirms in part, reverses in part, and remands with direction.

With regards to the issue of attorney fees, the general award of attorney fees is not available unless supported by statute or contract. The wife argues that O.C.G.A. § 19-6-2 may include attorney fees incurred in proceedings prior and independent of the underlying divorce action. However, the plain language for the purpose of O.C.G.A. § 19-6-2 for the purpose of insuring that adequate representation of the respective needs of both spouses in divorce supports the inclusion of fees from separate litigations and the fee award under O.C.G.A. § 19-6-2(a). Therefore, the award of $8,500 of attorney fees in the instant case are affirmed and the award of $7,200 in fees for the prior divorce action and for the innocent spouse protection prior to filing of the Georgia divorce are reversed.

With regards to the gross income of the husband, the trial court considered in the husband's gross income for moving expenses and job-related relocation which appeared on the husband's W-2 statements as taxable income. Under the former O.C.G.A. Section 19-6-15(b)(2), gross income shall include one hundred percent of wage and salary income and other compensation for personal services. The trial court erred by including the husband's moving expenses reimbursement, even though it was included as taxable income, because the reimbursement of moving expenses does not improve the obligor's financial position but merely maintains the status quo from before the job-related move, offsetting the unusual and often significant costs incurred therein. With regards to the automobile, the Supreme Court affirms the trial court's ruling as to the value established.

Attorney Fees

Cothran v. Mehosky A07A1746 (July 16, 2007)

The parties were divorced on July 15, 1997, and in the final decree, the father acknowledged paternity of two children born during the marriage and was ordered to pay child support. On Nov. 30, 2005, the father filed an action to set aside paternity and to modify the child support award claiming that he was not the biological father of one of the children. The trial court ordered the mother to submit to DNA paternity testing and she refused to comply. Prior to the court's ruling at the Dec. 5, 2006, contempt hearing, the parties entered into an agreement, which the mother conceded that the father was not the biological father of the son and child support was modified. The only issue remaining was a request for attorney fees. The trial court awarded part of the father's attorney fees pursuant to O.C.G.A. § 19-6-2 for counsel's work in preparation for the contempt hearing. The trial court reasoned that O.C.G.A. § 19-6-2(a) authorized attorney fees in alimony, divorce and alimony, or contempt proceedings. The Court of Appeals reverses.

When an action seeks to solely modify alimony or a divorce decree and does not contain any contempt allegations for failure to comply with the original alimony or divorce decree, it falls outside the parameters of O.C.G.A. § 19-6-2. The present action was not for alimony or divorce, which had been settled approximately eight and half years earlier. The instant action was to set aside paternity and to decrease child support obligations and therefore, was an action for modification of the original divorce decree even though the contempt proceedings arose when the mother later failed to comply with the Court's Order for DNA testing, but these proceedings did not arise out of the original divorce case as required by O.C.G.A. § 19-6-2, but instead arose out of the paternity and modification action.

Haley v. Haley S07A0241 (June 25, 2007)

The mother filed a petition for modification in which the parties entered into a settlement agreement in which the father agreed to increase his child support payments from $750 per month for two children to $2,700 per month for one child. However, the parties were unable to resolve the issue for reimbursement of the wife's attorney fees in the amount of $40,848. The agreement stated "the issue of Ms. Haley's claim for expenses and attorney fees will be submitted to the trial judge by brief for a decision by the court. Mr. Haley will not seek from Ms. Haley expenses of litigation or attorney fees." The Trial Court determined the mother prevailed on her child support modification action and awarded her $16,150 in attorney fees. The Supreme Court affirms.

The father contends that the mother's claim for attorney fees is controlled by O.C.G.A. § 19-6-19(b), however, the Supreme Court concludes that the mother's claim for attorney fees does not rest on § 19-6-19, but rather on the parties' contract. The settlement agreement makes no reference to § 19-6-19(b), thereby the parties agreeing to submit the attorney fee issues to the trial court for resolution, authorized the trial court to exercise discretion against what factors are found to be relevant to determine if the mother was entitled to attorney fees including whether she was the prevailing party in the litigation. Therefore, by contract, the parties authorized the trial court to award attorney fees in the amount the Court found to be appropriate and reasonable under the circumstances. Justice Carley concurs in judgment only. Justice Hunstein concurs. Justice Melton dissents.

Contempt/Notice

Chatfield v. Adkins-Chatfield S07F0197 (June 4, 2007)

The parties were married in 1998 and a complaint for divorce was filed on March 21, 2003. A temporary order was entered in July 2003, requiring the husband to provide the wife with a 1999 Ford Expedition titled in the wife's name free and clear of all liens. After multiple contempt hearings, the husband delivered to the wife the Expedition but did not provide the wife with the title, proof of insurance or proof of ownership, which prevented the wife from obtaining her own license tag. On Jan. 4, 2004, the vehicle was totaled and the husband received proceeds in the amount of $14,593 paid to him. The husband did not provide the wife with substitute transportation nor provide her any of the funds received from insurance proceeds. A jury trial was held and testimony was given with regards to the disbursement of $14,593, but the jury was instructed that any issues involving the Expedition and insurance proceeds were outside the purview of the jury and it was a matter for the Court's determination.

At the conclusion of the trial on Aug. 5, 2005, the jury made an award to the wife, but not the Expedition or insurance proceeds. The Court then issued an oral order stating that the husband owed the wife $14,593 in insurance proceeds and it was to be paid no later than Aug. 10, 2005. The husband did not pay and the Court commanded him to appear on Aug. 11, 2005, to show cause why he was not in contempt. On Aug. 11, 2005, the Court ordered orally that beginning that day, in addition to the $14,593 the husband was to pay the wife, the husband was to pay the additional sum of $1,500 for each day that passed until he paid the $14,593 plus attorney fees of $1,500. The Court subsequently entered a written order on Aug. 16, 2005, *nunc pro tunc* to Aug. 12, 2005. The Supreme Court affirms.

The husband contends that the evidence was insufficient to support being found in contempt by the Aug. 16, 2005, order (an oral order) and was ineffective as a matter of law. However, the husband disregards the existence of an early written Consent Order obligating him to provide his wife with the 1999 Ford Expedition and its title. Therefore, the contempt was authorized.

The husband also argues that the Court ordered payment of $1,500 per day (late fee) is contrary to O.C.G.A. §15-6-8(5), which provides that the Superior Courts have the authority to punish contemptuous behavior by imposing fines not to exceed $500. However, this monetary limitation addresses circumstances of criminal contempt and is not applicable to sanctions imposed for civil contempt. The husband also argues that the $1,500 per day was coercive and excessive under the circumstances. However, the trial court was all too familiar with the husband's pattern of misconduct. In fact, the punishment by imprisonment had not worked to make him comply with the Court's orders, therefore, the $1,500 a day cannot result in a windfall for the wife when its sole aim was remedial to implement what was legally awarded to the wife.

The husband also contends that the trial court violated his constitutional rights of due process and that he had no notice that the issue of contempt for failing to pay $14,593 would be before the Court during the trial of the divorce and that O.C.G.A. § 9-11-60 mandates that he be afforded reasonable notice on all motions. It appears that the husband's failure to pay such money was not by a motion of the wife, rather it was raised sua sponte by the Court. The trial court may sua sponte raise an issue of contempt.

The husband is not appealing the Dec. 4, 2003 order requiring him to provide the wife with suitable transportation and title; but he argues that it and related orders are void as a matter of law and that the requirement that he transfer to the wife the 1999 Ford Expedition free and clear of all liens and with good title was an equitable distribution of property which should not have occurred at a temporary hearing. However, he consented to provide the vehicle in order to resolve the contempt proceeding. Justice Benham dissents.

Contempt/Venue

Jacob v. Koslow S07A0517 (May 14, 2007)

The parties were divorced in Fulton County in 1993. Sometime thereafter, both the husband and wife moved to Cherokee County. In September 2005, the wife filed a petition in Cherokee County to have the husband held in contempt of the Fulton County divorce decree. The husband answered the complaint and raised various defenses of lack of jurisdiction and venue and moved for judgment on the pleadings or in the alternative, to transfer the case to Fulton County. The trial court denied the motion but certified its ruling for immediate review. The Supreme Court reverses.

The Supreme Court now holds that where a Superior Court, other than the Superior Court rendering the original divorce decree, acquires jurisdiction and venue to modify a decree, said court likewise possesses the jurisdiction and venue to entertain a counterclaim for contempt of the original decree. The Court of Appeals also extended this rule in *Corbett v. Corbett* where the parties were divorced in Macon County, but the husband filed a modification petition and motion for contempt in Carroll County where the wife currently resided. The trial court refused to modify the divorce decree, but did hold the wife in contempt. The Court of Appeals reasoned, in part, that inasmuch as the Carroll County court acquired jurisdiction to modify the original decree, it had the power to hold the wife in contempt of that decree.

The instant case has different facts in that the wife did not seek to modify the original decree, she simply filed a petition to hold the husband in contempt in Cherokee County and not where the original decree was entered in Fulton County not withstanding that both parties currently live in Cherokee County. Even though there has been established a flexible approach to contempt jurisdiction in divorce cases, it is not intended to expand jurisdiction generally to allow a husband or a wife to be punished for contempt of an order or decree which was rendered in another county.

Final / Interlocutory Appeal

Miller v. Miller S07D1339 (June 11, 2007)

The trial court entered an order in the parties underlying divorce action. The order was titled "Final Judgment and Decree of Divorce." However, the court reserved in paragraphs 12 and 13 of its order, the right to review the parties' submissions regarding eligibility

for a reimbursement of certain government benefits allegedly obtained improperly. The wife appeals as a final order and not an interlocutory order. The Supreme Court dismisses.

The Supreme Court clearly has subject matter jurisdiction over the appeal because it was taken from a judgment of decree of divorce. However, paragraph 13 provided 90 days for action by the parties, the propriety of which would be open to review by the trial court. As such, the appeal would be interlocutory in nature. Therefore, the applicant was required to follow the interlocutory appeal procedures as set out in O.C.G.A. § 5-6-34(b). Justice Hunstein, Carley and Melton dissent.

Motion to Set Aside

Arnold v. Arnold S07F0763 (June 25, 2007)

The parties were divorced by court order on Oct. 31, 2006. Prior to the entry of that order, there was a settlement agreement executed resolving all issues in the divorce. The agreement was submitted to the Court for approval and incorporated into the final judgment and decree. However, before the entry of the final decree, the husband filed a motion to set aside the agreement contending that it disproportionately distributed his military retirement income and that child support had been incorrectly calculated. The motion was also later amended to include allegations of newly discovered evidence of the wife's adultery during the marriage, nondisclosure of assets and repudiation of the agreement based upon her failure to comply with the agreement. The trial court denied the motion to set aside. The Supreme Court affirms.

The trial court may exercise its discretion to approve or disapprove in whole or in part an agreement notwithstanding the binding effect of the agreement as to the parties themselves. Both parties testified that the husband signed the agreement voluntarily and he read and understood the effect of the provisions. There is no evidence the wife misrepresented the parties' assets or that the agreement was obtained by other fraudulent means. Even though the wife may be subject to contempt for her alleged failure to pay a debt as required under the agreement, her non-compliance did not constitute a repudiation of the agreement or otherwise divest the trial court of its discretion to accept or reject the settlement agreement before incorporating into the final decree.

Scott v. Scott S07A0246 (May 14, 2007)

On June 30, 2003, the parties entered into a separation agreement. On Aug. 6, 2003, the trial court entered a final judgment and decree of divorce incorporating the settlement agreement as requested. The Court entered an income deduction order and neither party objected to the divorce decree or the income deduction order. On Sept. 22, 2005, the husband filed a motion pursuant to O.C.G.A. § 9-11-60(d)(3) to set aside the divorce decree as to child support contending that the final decree provisions regarding child support were non-amendable defects on the face of the record and pleadings. More specifically, the husband contended that the decree set forth child support as only a percentage of the husband's income without setting forth the specific baseline dollar amount to be paid. On July 31, 2006, the trial court granted the motion setting aside the final decree with regards only to the issue of child support. The Supreme Court reversed.

The Supreme Court clarified that in considering a motion to set aside under O.C.G.A. § 9-11-60(d)(3), as opposed to (d)(2), negligence or fault on the part of the movant is not a bar to the movant's claims. Therefore, despite the fact that the husband may have been negligent in this case for not attacking the divorce decree by direct appeal, he retained the right to seek a motion to set aside under Section 9-11-60(d)(3) for the existence of a non-amendable defect on the face of the record. In the instant case, the husband failed to show any part of the consented to settlement agreement and divorce decree, as void or otherwise contains any non-amendable defect.

The husband also contends that the trial court was correct in setting aside the decree because the decree fails to set forth a specific baseline dollar amount of child support as required by O.C.G.A. § 19-5-12. However, the decree did give dollar ranges at 23 percent was equal to $3,359.92 and 28 percent was equal to $4,090.33 of the husband's gross income. Although certain paragraphs contained only percentages, the trial court set forth at least the minimum dollar amount these percentages represent.

Partnership Property/Separate Estate

Bloomfield v. Bloomfield S07F0096 (June 4, 2007)

The parties were divorced after a bench trial in which a final judgment and decree of divorce was entered on May 1, 2006. The husband appeals. The Supreme Court reverses in part and affirms in part. The husband first argues the trial court inappropriately awarded ownership interest in a home in Ponte Vedra, Fla., through separate trust for the benefit of each of the parties' children. The wife's father originally purchased the home and placed it into a family limited partnership as the partnership's sole asset. The wife's father then gifted the limited partnership interest to the wife, the wife's siblings, and trust for the benefit of the parties' three children. Thereafter, the wife's father gifted 1 percent controlling interest as a general partnership to the husband. Later, in 1998, the

husband and wife bought out the limited partnership interest of the wife's siblings, but not the interest of their children's trust. In 2001, the husband, as general partner, deeded the property from the partnership to himself and the wife as joint tenant without providing any compensation to the children's trust.

The trial court ruled that since the children's trust has never been satisfied, the children's trust maintain the current ownership interest in the property itself and, upon the future sale of the property, the trust would be compensated in an amount equal to their original percentage ownership in the property as limited partners. Pursuant to the parties' agreement and to statutory law pursuant to O.C.G.A. § 14-9-65, the children are not presently entitled to an ownership interest in the property, which the limited partnership no longer owns. The children's trust are, however, presently entitled to cash compensation, including interest, for the value of their limited partnership interest in the property which should have been distributed at the time the husband deeded the property away from the partnership. Therefore, the trial court erred in concluding the children's trust were entitled to a current ownership interest in the property rather than present compensation. That issue is remanded for determination of the value of the interest of the children's trust.

The husband also contends the trial court erred by finding certain security bank accounts contained funds that were the wife's separate property and not subject to equitable division. The account in question was originally established by the wife's grandfather and father for the benefit of the wife prior to the marriage of the parties. Even though the husband claims to have managed the property, he did not increase the value of the account. The husband additionally argues that the trial court erred by determining that a total gift of $10,000 the wife received from her father was separate property. Husband argues that this sum became marital property because it was placed into a joint account with the husband.

The trial court found that at the time the wife received the gift, the husband would not allow her to hold an individual account and she had no other account in which to place the funds.

All other rulings by the trial court regarding dividing certificates of deposit, child support and that the trial court did not unduly focused on his extra-marital affair are affirmed.

Prenuptial Agreement

Grissom v. Grissom S07F0132 (June 4, 2007)

Prior to the parties' marriage in July 2000, the parties executed a prenuptial agreement, which listed their respective separate property in Exhibits A and B, and included various provisions addressing the disposition of property in the event of termination of the parties' marriage. There were two properties at issue; the first being the home located on Fiddler Ridge valued at $2,000,000 and the second was a Merrill Lynch brokerage account valued at $4,000,000. The wife filed for divorce in May 2005 and the final judgment and decree was entered in January 2006. The trial court found, pursuant to the terms of the prenuptial agreement, that the wife waived any interest in the Fiddler Ridge property or to the Merrill Lynch brokerage account. Neither party challenges the court's finding that the prenuptial agreement is enforceable. The Supreme Court reverses and remands.

The husband argues that the wife waived her right to appeal by accepting the benefits of the final judgment and decree, to wit: payment of $150,000 in lieu of alimony or equitable division of property pursuant to paragraph 14 of the prenuptial agreement; 50 percent interest in four parcels of real property; 50 percent of an income tax return; and monthly child support payments. The general rule is that an appellant cannot accept the benefits of a judgment and then seek to have it set aside. However, public policy requires divorce to be treated differently because of the unique and important issues involved. Therefore, under *Curtis v. Curtis* and other cases that can be read to hold that the acceptance of any benefit under a final judgment and decree of divorce results in automatic waiver/estoppel of the right to appeal any aspect of the judgment, are overruled.

In regards to the Fiddler Ridge property and brokerage account, it was refinanced and conveyed to the parties as joint tenants with the right of survivorship. When the American Express account was opened (former Merrill Lynch account), the wife was shown as co-account holder. The wife claims these changes entitle her to ownership interest to the properties relying on the language in paragraph 11 of the prenuptial agreement providing that "the ownership of any real property or personal property acquired by the parties in the future shall be determined in reference to the legal title to said property." Because the revisions only apply to the properties acquired in the future, the Fiddler Ridge property and the predecessor of the American Express brokerage account were acquired prior to the marriage and were established by the inclusion on Exhibit "B" of the prenuptial agreement and therefore, this language does not afford the wife an ownership interest in these assets.

The wife continues to argue pursuant to paragraph 15 of the prenuptial agreement, that "notwithstanding any other provision of the agreement, each party has a right to transfer, give or convey to any other property

or interest therein and that any property so transferred shall become the separate property of the recipient." The wife argues pursuant to Lerch v. Lerch ,in which the parties had a prenuptial agreement, that the wife promised not to make any claims against the husband's property in event of divorce. Although the marital home had been purchased by the husband prior to the marriage, this Court held that the husband manifested an intent to transfer his own separate property into the marital property by transferring ownership of the home during the marriage to both himself and the wife as tenants in common. However, in the instant case, the husband claims that the change of ownership in the Fiddler Ridge property and the brokerage account occurred without his knowledge and he did not intend to convey any interest to the wife.

The trial court expressly declined to reach the husband's claims of accident, mistake and fraud before rendering its ruling. Without findings of facts regarding the circumstances surrounded changes at issue, it is not clear that the conveyances were legitimate. Reversed and remanded.

Justice Thompson concurs and Justices Carley and Hunstein dissent. Justice Carley states that overruling the estoppel rule is a plurality opinion, and pursuant to Supreme Court Rule 58, the plurality opinion is not controlling authority and states that the bench and the bar should be apprised that *Curtis* and all of the other cases which apply estoppel under the circumstances of this case remain controlling authority for the present and that the holding in those cases should be followed as accurate statements of applicable law of Georgia.

Visitation

Taylor v. Taylor S07F0358 (June 4, 2007)

The parties were married in 2001, and during the marriage, the husband adopted the wife's minor child who was born in 1996. The wife filed for divorce in April 2005. The case was tried without a jury and in the final decree, the court awarded the marital home, other property and sole custody of the child to the wife. The court denied the husband any visitation and awarded attorney fees to the wife but did not award her any child support. The Supreme Court affirms.

With regards to visitation, the express policy of this state is to allow visitation rights to divorce parents who have demonstrated the ability to act in their minor children's best interests. Therefore, only under exceptional circumstances should the non-custodial parent be denied the right of access to his child. However, in the present case, the trial court made extensive findings regarding conduct of the husband related to his fitness as a parent. Among other things, the husband and members of his family had a history of chronic use of illegal drugs sometimes in the presence of children; complete lack of parenting skills exemplified by having the children spend the night with him in an apartment he shared with an unmarried man who brought home intoxicated women who spent the night; abuse of religion to defame the wife and frighten the children; and recommendations of the child's therapist and *guardian ad litem* that the child have no contact with the husband. Since the trial court's finding regarding the husband's fitness as a parent was supported by some evidence, the Supreme Court concludes that denial of visitation rights to the husband was not abuse of discretion. Other issues regarding contempt and attorney fees are affirmed. Justice Sears and Hunstein dissent.

Year's Support

Booker v. Booker A07A0110 (June 20, 2007)

The husband filed a complaint for divorce. The parties reached a settlement agreement in contemplation of its incorporation into a final decree of divorce. Under the agreement, the wife, among other things, released all of her right, title, and interest she may have in the husband's estate. Prior to the entry of the final decree, the husband died and the wife petitioned the Probate Court for year's support. The Probate Court granted the petition without objection upon notice and publication service as required by law. The husband's mother appealed the ruling to the Superior Court. The Superior Court dismissed the mother's appeal finding she has no standing to object to the award of year's support since she has no property right claim or interest in or against the estate of her son. The Court of Appeals affirms.

The mother contends that the probate court's award of year's support to Ms. Brooker was foreclosed in light of the settlement agreement by which the wife had released all interest in the husband's estate. The trial court was correct in that the mother had no standing to make such a claim. An appeal from a decision in the probate court under O.C.G.A. § 5-3-2 must be taken by the party plaintiff or the party defendant. The mother was not a party in the probate court despite publication of notice and service and, therefore, lacks standing to appeal its decision. **FLR**

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Case Notes

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evidence showed that he owned a watch valued in excess of eight thousand dollars ($8,000) and a home in which he had an equity of more than $7,000 and transferred to his girlfriend a one-half interest in her one million dollar home, which she had quit claimed to him when they began co-habiting. *Webb v. Watkins* 07FCDR294 (02/01/07).

Custody—Visitation

This case involved a petition for change in visitation rights brought by the father. The trial court erred in denying his motion to dismiss the mother's counterclaim for change of custody. Complaints for change of custody cannot be brought by counterclaim and the father did not waive that right to when he asked for it to be dismissed or transferred to Fulton County where the couple's son resided. The mother claimed that she properly pursued the change of custody through her counterclaim after a Fulton County court dismissed her separate action for change of custody. This argument was rejected as she had failed to appeal the Fulton County's order dismissing her separate action. *Bailey v. Bailey* 07FCDR306 (01/31/07).

Termination—Evidence

The evidence supporting the termination of this mother's rights to her two children was her chronic drug abuse, failure to provide care and support for the children and failure to complete her case plan goals. The trial court also found that it was in the children's best interest to put them in the permanent custody of DFCS for the purpose of adoption since they were in stable foster homes with foster parents who were ready, willing and able to adopt them. *In the Interest of K.W.* 07FCDR309 (02/01/07).

This termination of parental rights was reversed. In regard to the father, he had completed everything required in his re-unification plan except in regard to child support. After being released from prison, he went to work, bought and renovated a trailer, completed a parenting class and provided health insurance for his children. He only missed visitation due to work or his incarceration (20 percent). The party's youngest son was terminally ill and during that time was his one and only positive drug screen. The mother likewise had completed her case plan including parenting classes and visited regularly except during the end of her pregnancy due to transportation issues ,and toward the end of the youngest child's life when she spent time near where he lived. The mother did not maintain steady employment but did seek and obtain three different jobs. Although she did not maintain a stable residence, she had spent the majority of two months at her mother's home so she could be close to her terminally ill child. *In the Interest of A.F.* 07FCDR352 (02/08/07).

The evidence supported a termination in this case since the child had lived with mother's aunt since birth. The aunt had a temporary guardianship and intended to adopt the child. The mom was incarcerated for four different cocaine possessions and had only seen the child once when it was three months old. Of importance is the court re-affirming there is no constitutional right to personally appear at a termination hearing or participate by telephone. The mother did not avail herself of the opportunity to present testimony by affidavit or through her counsel. *In the Interest of S.R.M.* 07FCDR356 (02/06/07).

The evidence in this case was clear and convincing that the mother had failed to protect her child from her boyfriends sexual abuse or to believe her accounts of this abuse. Additionally she failed to provide for her child's housing and medical needs. This termination was in the child's best interest. *In the Interest of B.S.* 07FCDR603 (02/23/07).

The evidence in this case clearly and convincingly supported a termination of the parental rights of the mother. The mother had a verifiable deficiency in her mental and emotional health, which rendered her unable to provide adequately for her child's needs. In addition to substance abuse she had personality defects. One of these defects was blaming everyone else for her problems. Although she on occasions left the child with people who had no relationship with it, she had twice absconded across state lines with the child, once leading police in a high speed chase while driving under the influence of alcohol. There was evidence concerning the detrimental effect of prolonged foster care that supported a finding that termination was in the child's best interest. *In the Interest of J.F.* 07FCDR605 (02/28/07).

The termination of the parents' rights of three children was based on clear and convincing evidence that both parents had failed to meet the reunification case plan goals. The children needed permanence and their foster families wished to adopt them leading to a conclusion that this termination was in the children's best interest. The parents contended there was error in that the department had failed to present a new re-unification plan after the court's order Jan. 13 implementing its ruling from July of 2004, however this ignores the fact that there had been a re-unification plan in effect since December 2001 in which both parent's had failed to comply with the case plan goals. I*n the Interest of T.W.O.* 07FCDR608 (02/28/07).

The termination of parental rights was affirmed

based on evidence that the parents were indicted and subsequently convicted of murdering this child's sibling and did not appeal the juvenile court's prior findings of deprivation. *In the Interest of M.J.L.* 07FCDR848 (03/13/07).

In addition to the evidence that clearly and convincingly supported termination in this case, the mother argued that the court allowed in hearsay evidence concerning that the children's wish to be adopted and that they had never asked about their parents. This was found to be harmless since other evidence supported the juvenile courts findings and conclusions. *In the Interest of M.A.S.* 07FCDR715 (03/09/07).

Termination—Best Interest

The trial court found that the paternal grandparents petition to terminate the father's parental rights was not in the child's best interest. The father had thought he was acting in the child's best interest when he voluntarily placed her in the grandparents custody and ceased visits to avoid exposing her to confrontations between himself and the grandparents. He testified that he wanted to be a part of the child's life, he hoped that time would heal all wounds between himself and the grandparents and he testified they were great people. Even if the child was deprived there was insufficient evidence that the continued deprivation would harm her. *In the Interest of K.C.R.* 07FCDR412 (02/15/07).

Adoption Same Sex

Certiorari was denied in this case regarding a petition to set aside an adoption of a minor child by the natural mother's same-sex partner. Justice Carley wrote a dissent to this since no appellate opinion had addressed this issue in Georgia. The trial court found that the partner had no valid claim for adoption under controlling state law, since the trial court granted the adoption based on the mother's consent, but the mother expressly refused to relinquish or surrender her parental rights. *Wheeler v. Wheeler* 07FCDR473 (02/26/07).

Divorce—Standing

The trial court should not have dismissed the plaintiff's divorce complaint in finding the plaintiff's immigration status precluded him from establishing residence in Georgia for the purpose of obtaining a dissolution of his marriage. *Padron v. Padron* 07FCDR476 (02/26/07).

Marital Property—Meaning

The evidence supported the trial court's interpretation of the divorce decree to clarify that "marital home" meant the parties' mobile home, which consisted entirely of personal property, because the mobile home was not permanently attached to real property. *Johnston v. Johnston* 07FCDR478 (02/26/07).

Deprivation—Evidence

The evidence supported a finding of deprivation in the case since the mother was standing in her front yard screaming and acting erratically while the child was in the house alone. The mother explained that she was attacked by spirits and was attempting to fight them off. Surprisingly enough she admitted she was diagnosed with a schizoaffective disorder and that she often attempted to control her condition without medication. Meanwhile dad, also schizophrenic, but one who takes his medication, admitted that he left the child in the mother's care knowing she was experiencing delusions. *In the Interest of M.D.* 07FCDR600 (03/01/07).

The Appellate Court found there was not clear and convincing evidence to find this child was without proper care for his emotional health. There had been one episode in which the stepfather had criticized the child directly. There was no other evidence of abusive behavior directed toward the child. Further the evidence would not have supported a finding of deprivation against the mother since on this one occasion she removed the child from the situation and was complying with her case plan and testified she was learning from her parenting classes and implementing these techniques at home. *In the Interest of D.S.* 07FCDR601 (02/28/07).

Parental Rights—Notice of Hearing

The mother had filed a motion for new trial. This was denied and affirmed. Following a surrender of her rights to all three children the juvenile court had placed them with their fathers. The Juvenile Court was correct in finding that she was not entitled to notice of these hearings pursuant to the juvenile. She no longer had been considered a party to the proceedings and there could be no expiration of the surrenders since these were not surrenders for the purpose of adoption. *In the Interest of A.C.* 07FCDR613 (02/27/07).

Termination—Legitimation

The Juvenile Court had repeatedly informed the biological father of his responsibility to legitimate his children. Even so he had failed to file a legitimation petition and notify the Juvenile Court of such filing within thirty days of receipt of the termination petition, which included advisory language of his need to file for legitimation. The father claimed that the trial court erred because it did not require the county to pay for legal services to enable him to legitimate the children.

See Case Notes on page 25

Carl S. Pedigo Receives 2007 Jack P. Turner Award

By K. Paul Johnson
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At this year's Family Law Institute, Savannah attorney Carl S. Pedigo received the 2007 Jack P. Turner Award. Initiated in 1992 to recognize outstanding contributions and achievements in the area of family law, the award receives its name from Jack P. Turner, the award's first recipient, who is recognized for elevating the practice of family law in Georgia; for creating and editing the first family law newsletter and serving as its editor from 1976 to 2001; the first chair of the Family Law Section of the State Bar; the first chair of the Family Law Section of the Atlanta Bar Association; and founding member of the Georgia Chapter of the American Academy of Matrimonial Lawyers.

The award recognizes a career devoted to the practice of family law with substantial and significant contributions to improve and advance the practice of family law in Georgia. It also includes recognition by the recipient's peers as an outstanding lawyer, a record of integrity and fairness, a commitment to assist other members of the Bar and the practice of family law and by taking the practice of family law to a higher level of increased respectability and recognition.

The award was presented by George M. "Terry" Hubbard III of Savannah. In his presentation of the award, Hubbard noted Pedigo's years of service to the practice of family law including numerous speeches to the domestic bar and his service as chairman of the Family Law Section in 1997-98.

Hubbard also noted that, in the decades that he had practiced against Pedigo, he had always displayed an exemplary level of professionalism. **FLR**

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Custody Law Legislation

By Daryl G. LeCroy
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Since my oldest daughter was two years old, she was allowed to visit with me on the first and third weekend of each month. This was over the recommendation of the *guardian ad litem* who recommended that I have custody. But alas, I was not her mother.

After my daughter's 14th birthday, she and I went to Florida for spring break. I used the occasion to present my very best invitation for her to come live with me and the rest of our family. She gave my invitation her serious consideration for two months. Her main concern was her mother and she ultimately declined. I told her the door was always open and I did not ask her again. To my surprise, the following year, when she was 15, she announced that she was coming and she wanted her room ready. Six years later she was part of an intervention in which she and her mother's older son and daughter forced their mother to relocate out of her daughter's home or be institutionalized for her alcoholism. This was when I first learned about her mother's addiction to alcohol. Obviously my daughter had concluded at the age of 14 that her mother needed her, and, at age 15, that she should leave the environment of her mother's home.

With our new custody law, HB369, Act 264, going into effect Jan. 1, 2008, my daughter almost certainly would not have succeeded in leaving that situation. The "mother presumption" of the new law would have kept her with her mother.

During the Family Law Institute in May we were told that the "fathers groups" had instituted the House Shared Custody Study Group last year. Whenever these "fathers groups" are mentioned by our Family Law Section, they seem to be referred to as being out of the mainstream and as having unrealistic objectives. These "fathers groups" have historically sought equal custody and reasonable or fair child support. On the other hand, "mothers groups" are rarely mentioned. These mothers groups, (MGs), generally want custody to always go to the mother, for mothers to make child-related decisions, for dads to have minimum parenting time, and for fathers to pay maximum child support. I don't know who started the Shared Custody Study Group but I found their name to be encouraging.

During the seminar the speaker told us with great pride how the leaders of our Family Law Section had "hi-jacked" the Shared Parenting Study Group and had steered it toward the "right kind" of legislation.

The first bill proposed by the MGs would have eliminated the 14 year election in its entirety. The next version allowed 14 year old children to opt out of visitation. So with an early version of the bill a 14 year old could opt to never see dad again by opting out of visitation, but he could no longer freely opt to go live with dad. What's wrong with this picture? The bill was ultimately revised to allow the 14 year election, but to also allow the judge to override the child's decision in the child's "best interest." The Family Law Section seems to have become the unofficial lobbying arm of the MGs. Is it possible they are leading us in the wrong direction?

Several years ago Judge Franzen of Gwinnet County spoke at one of the family law breakfasts and said the following:

> Because Judge Rodatus and I alternate weeks with hearing divorce cases one week and juvenile cases the next week, we are in a unique position to observe what causes serious problems with children. It is not whether parents have sole or joint custody but whether the parents are in continual conflict. Those are the cases that have children coming back to us through the Juvenile Court System with serious problems.

Mary Margaret Oliver, a leading child advocate in the legislature, was quoted as saying she was in favor of the 14 year election because it usually stopped the conflict.

But what does the new law provide? The MGs have given us a law which says the conflict doesn't have to be over if the child elects to live with dad at age 14. The fight can go on for much longer and cost higher fees for both sides. The custodial parent will have the opportunity to take that 14 year old child through yet another ordeal in open court with psychologists, teachers, friends, neighbors, guardians and social workers debating about whether living with the other parent (typically dad) is really is in the child's "best interest". And best of all, as we heard at the institute, if the mother wins, she can be awarded attorney fees.

And what else did the MGs give us in the new custody bill? We now have a list of "criteria" to determine the "best interest of the child". Take a close look at the list of "criteria" and consider how many of them would automatically go into the mother's column simply because she may be the custodial parent at the time.

The 14 year election as it exists today provides that the child's election is binding on the judge unless the custodial parent can show that the elected parent is unfit. This is as it should be. Finding the elected parent to be unfit has been a significant challenge for the custodial parent, usually the mother. Defeating the child's election was clearly the aim of this legislation.

Mothers are traditionally awarded temporary and permanent custody. The new "criteria" for determining the "best interest of the child" contain references to "The importance of continuity in the child's life and the length of time the child has lived (in such environment) and the desirability of maintaining continuity…etc." Such is a clear effort to frustrate the child's election and to keep the child with the mother. Were this legislation to prevail it would neuter the child's election, and, to get a change of custody, the selected parent would likely have to show the custodial parent to be unfit. The drafters of this legislation would have the judge value "continuity" over the child's election.

The value to the child of his or her relationship with the selected parent cannot be so easily quantified. When a child reaches the age of 14, breaking the old continuity is sometimes exactly what is best for his or her continuing maturation and development. It is the child's attempt to share a portion of their lives which should have been shared all along. It is certainly what the child has elected to change. It is a safe "coming of age" decision for many children.

The desire of mothers to maintain the flow of child support and their reluctance to provide child support cannot be overlooked. In my 35 years of practicing family law I have heard no mention of any problems for the children who have made such elections, and, to quote baseball great Dizzy Dean, "If it ain't broke, don't fix it."

The MGs have set up a "best interest" custody fight for every 14 year election, stacked the deck with criteria for determination in any custody action, and have set dad up to pay for the battle—all under the guise of the child's best interest. Some would say this has nothing to do with "the best interest of children." We should probably call this legislation exactly what it appears to be: a further attempt by the MGs to deprive fathers of custody time with their children while maximizing the mother's financial support.

When an officer of our section addresses a legislative study group, they convey the impression that they represent you and me. Do they really? Are you OK with our section giving the MGs carte blanche to draft family law? I don't blame our legislature. I sincerely believe that Representatives Rice, Lindsey, Ehrhart, Manning and Butler have done the best they could with the information they received from the leadership of our section. Were you ever asked or advised of what our leadership was advocating? Would you have approved?

We should be leaders in concepts of fairness especially in light of the fact that most ordinary citizens only interface with the legal system through our activities.

It comes as no surprise to anyone that children of divorce are children at risk. Children living without their fathers are at greater risk. According to the Center for Disease Control, Department of Justice, Department of Health and Human Services and the Bureau of the Census, the 30 percent of children who live apart from their fathers will account for 63 percent of teen suicides, 70 percent of juveniles in state-operated institutions, 71 percent of high-school dropouts, 75 percent of children in chemical-abuse centers, 80 percent of rapists, 85 percent of youths in prison, 85 percent of children who exhibit behavioral disorders, and 90 percent of homeless and runaway children.

The bottom line questions are: Should we be working to reduce these problems, or, should we exacerbate them? Put another way, are we being part of these problems, or part of the solution?

A proper shared parenting bill should include a rebuttable presumption that it is in the child's best interest to spend relatively equal amounts of time with each parent.

According to Dr. Wade Horn of the National Fatherhood Initiative:

> Our culture needs to replace the idea of the superfluous father with a more compelling understanding of the critical role fathers play in the lives of their children, not just as 'paychecks' but as disciplinarians, teachers and moral guides. And fathers

must be physically present in the home. They can't simply show up on the weekends or for pre-arranged "quality time."

The Family Law Section should be viewed by the public as problem solvers with only the best intentions for society.

Georgia has probably never had such a radical change in family law in just a two year period. If you would like to see some corrections or refinements to the recently passed legislation, I urge you to answer the following questions and forward your answers first to your senator and representative, and then to Seth Harp (sethharp@aol.com), Earl Ehrhart (each@facility-group.com), Tom Rice (TQGRICE@AOL.COM), and to me at daryl@lecroylaw.com. You can find your senator and representative at www.legis.state.ga.us.

With regard to the new Custody Law, would you:

Change the 14 year election back to the way it has been in the past? Yes____ No____

Leave the 14 year election as it is in the new law, (allowing the judge to determine if it is in the child's best interest)? Yes ____No____

Provide that a judge may consider a 14 year old's thoughts regarding visitation with the non-custodial parent but provide that visitation shall not be reduced to less than once a month unless the judge makes written findings as to why such would be in the child's best interest? Yes ____No_____

Delete any references to "continuity" in the new "Criteria for best interest of the child"? Yes__ No_

Add a provision that there is a rebuttable presumption that it is in a child's best interest to be in the custody of each parent for relatively equal periods of time based upon the practicalities of the particular case? Yes____ No____

My name is:_____

My Bar Number is: _____

I am a family lawyer, judge, other_____ (circle).

If our legislators hear from enough of us requesting these refinements and improvements, the law can be modified next year. With so little review of such major legislation by those of us who will have to use them, adjustments such as these are not only appropriate, but they are normal and should be expected.

If you were not asked your opinion before, this is your opportunity. You can expect that the MGs will respond to this because they are organized and they talk to each other. They also appear to have the full backing of at least some of the leadership of our section. Thank you for your opinions and your participation. **FLR**

Case Notes

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However he had appointed counsel to represent him five days after the filing of the termination petition and neither he nor his attorney made any effort to file a legitimation petition, request funds or were denied funds for that purpose. *In the Interest of S.M.G.* 07FCDR713 (03/07/07).

Termination—Endorsement

The trial court substantially complied or impliedly satisfied the endorsement requirements for termination petitions. Before the petition was filed the court entered orders finding the child was deprived and granting temporary custody to DHR and found that there was a failure to work on their re-unification plan. *In the Interest of V.D.S.* 07FCDR714 (03/07/07).

Child Support—Modification

The trial court modified the father's obligation as to his three children to increase his obligations 28.5 percent of his income and required him to pay that amount until the youngest child reached majority or was otherwise emancipated. This would result in an award above the level mandated by the guidelines when the party's oldest child reached majority. There were no findings of special circumstances. Additionally the trial court did not consider that the original decree provided for reduction of child support upon the oldest child's majority and extended the period required to pay his support for all three children. *Eubanks v. Rabon* 07FCDR800 (03/19/07).

Deprivation—Evidence

The deprivation finding in this case was supported by evidence of one child suffering from un-explained abuse and another was molested while the mother was asleep and that the mother had left the children with an aunt after agreeing that that aunt was unsuitable to supervise them. *In the Interest of S.Y.* 07FCDR847 (03/14/07).

Delinquency—*Brady*

The evidence supported an adjudication of battery upon a schoolmate. There was no violation of Brady by failing to produce a school bus videotape recorded on the day of the incident. The tape was not in the state's possession, the state did not intend to admit the tape at trial and a review of the tape showed that they had no evidentiary value. It showed only snow and had no audio. *In the Interest of E.J.* 07FCDR439 (02/09/07). **FLR**

Interview with Uniform Superior Court Rules Committee Chair Hon. Kathlene Gosselin

Conducted by Kelly A. Miles
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On July 6, 2007, I interviewed Northeastern Judicial Circuit Judge Kathlene Gosselin in her chambers in Gainesville, Ga. Judge Gosselin currently serves as chair of the Uniform Superior Court Rules Committee.

Kelly: How long have you been sitting as a Superior Court judge for the Northeastern Judicial Circuit?

Judge Gosselin: Nine years.

Kelly: Before becoming a Superior Court judge, you served as our State Court Judge. How long did you serve on that bench?

Judge Gosselin: 12 years.

Kelly: I didn't realize it had been that long. Gosh, time flies. I've been practicing law for 23 years and you have been on the bench almost the entire time. I remember when you were in private practice.

Judge Gosselin: I was in a two person firm.

Kelly: What areas of law did you practice?

Judge Gosselin: Domestic relations, Juvenile Court, particularly as a *guardian ad litem* and criminal defense.

Kelly: Did that help you a lot with being a judge in domestic cases?

Judge Gosselin: It did.

Kelly: What is the thing you like the most about being a judge?

Judge Gosselin: There are a couple of things. One is that you can actually make a difference in somebody's life whether that being in the criminal arena, mental health court, working hard to help those that really don't need to be in court, or in domestic relations cases if you get an opportunity to try to smooth waters for people that need a little bit of that, whether you make an effort to set some parameters for them so they can begin to heal, try to make custody decisions, make decisions that are forward-thinking for their financial resources as opposed to only what they have before them. Try to touch lives.

Kelly: What is the biggest drawback of being a judge?

Judge Gosselin: In order to do the work that I want to do, you have to stay open to what is going on around you. Which means, you end up, for lack of a better word, sort of sucking in all of the emotion around you in court, which is exhausting. So it is draining to do that, to listen, to be careful about what you say, be thoughtful about what you are doing. I dislike having to be a politician when you have to do that. I hate that. And we really are not in the position to defend ourselves when we are attacked. That can be frustrating.

Kelly: A lot of those things, we as lawyers don't even think about. Are you from this area?

Judge Gosselin: No, I'm from Chicago.

Kelly: Where did you attend law school?

Judge Gosselin: University of Chicago.

Kelly: How did you end up in Gainesville, Ga.?

Judge Gosselin: My former husband and I met in law school and he was from Gainesville. So we were in Atlanta for a year, then we came here and started a practice.

Kelly: You currently serve as the chair of the Uniform Rules Committee for Superior Court, the committee that revised the Superior Court Uniform Rules this year. How long have you served on that committee?

Judge Gosselin: About six years I think.

Kelly: How often do you meet?

Judge Gosselin: We meet regularly twice a year, right before the Superior Court judges' meetings. But in the last year, we met more often with small subgroups two other times, and will again meet by conference call this year before our judges' meeting.

Kelly: What was the committee's biggest area of concern in making their revisions?

Judge Gosselin: We started from scratch. We had to re-write Rule 24 completely. We had a small group that got together including a domestic relations attorney, two judges, and we got input from the some of the places that have a domestic relations special docket when we did this initially. Then, of course, we went to the Rules Committee with that and there was a lot of input there. We got input from various sources when it was sent out in the bar, from the Family Law Section, from the family violence folks, and from a lot of people. Most of us felt that we didn't want to overhaul the changes we recently made until people had worked with the rule and the new worksheets and affidavits long enough to really understand the issues. It takes a while working with something before you understand the process and procedure and can really make good calls. We expect to come back with an overhaul this summer again.

Kelly: Are you meeting with subcommittees now?

Judge Gosselin: We are having a subcommittee meeting next week about the parenting plan this year. That is House Bill 369. The law is written such that it doesn't require a sample parenting plan but what I understand is that the legislators expected that and so we are going to be talking Wednesday about whether we are going to do it and, if we are, what format we will use. We are working from the Tennessee example, although we have a number of states' example plans. We will probably wait to talk about Rule 24.2 on the issues of the financial affidavit until we have the Rules meeting in July.

Kelly: Do you think the committee will establish a uniform time when a parenting plan will have to be submitted by each side?

Judge Gosselin: I doubt it because the law seems to say that the judge can decide when it will be submitted. This is the kind of thing that is very hard to reach a conscientious about. So, if we don't have to, we probably won't. At some point later if we see there is a problem with it, then it would come back to us. But it is rare that we take anything up that we don't see is needed. There are already plenty of rules out there.

Kelly: Let me jump back to the financial affidavit. What was the committee's thoughts in requiring that the financial affidavit be filed at the same time as the complaint for divorce?

Judge Gosselin: There was discussion about the existing 24.2 and that Rule said that every action for temporary or permanent child support, etc. shall be accompanied by an affidavit specifying the parties' financial situation. Later it talked about a time period, five days prior to the interlocutory hearing, so it seemed confusing and we wanted to clear up the confusion. We also felt like a bright line might be a good thing to have. There was a lot of discussion about how this computation was going to need more time to digest. So why not file, if you have all of your information, why not file at the time of filing the divorce. We did have input from attorneys on that so it wasn't just a judicial thought.

Kelly: Have you had any complaints from the attorneys that this new revision is not being followed?

Judge Gosselin: I haven't had any attorneys complain to me. We dealt with the issue that some clerk's offices weren't filing the divorce if the work sheet and financial affidavits weren't filed at the same time. The Supreme Court came to us and said what's up with that? They were viewing it as an amendable defect and we agreed so we encouraged the District Court Administrators to go back to their clerks and say this is not really an issue for clerks to deal with.

Kelly: Did the committee intend that the financial affidavit be filed by the defendant when they filed their counterclaim for divorce since a counterclaim would stand alone as an action for divorce?

Judge Gosselin: I think we did intend for that to be the case.

Kelly: What was the committee's thoughts behind requiring that the child support worksheet also be filed with the complaint?

Judge Gosselin: We felt like you would have all of your information. We knew you wouldn't be able to fill in the other side unless you had the W-2, or paycheck, so you could fill in those numbers. It was a way to start the ball rolling. We felt like if we didn't do it, people would just wait and wait. We felt like the issue was so much more complicated than what was there before, that everybody needed more time.

Kelly: Can you give us any insight on the issues you anticipate that the Uniform Rules Committee will be discussing at it's next meeting?

Judge Gosselin: We have several issues that don't have anything to do with domestic relations but the domestic relations things will be the parenting plan, the financial affidavit and rule 24.2 and what changes, if any, we will make to 24.2 as well as changing the TPO forms. There hasn't been a revision in TPO forms for some time and they need to be revised to deal with the child support guidelines and the new child support law and we didn't do that last year because we could only take on one huge thing at a time.

Kelly: Have you, as a member of the committee and chair of the committee, received any comments from attorneys or litigants about the revisions to the Uniform Rules?

Judge Gosselin: We did from Shiel Edlin and from Georgia Legal Services and Atlanta Legal Aid. We have from Judge Wright in Fulton County who has brought us her views as well as litigants and attorneys from Fulton County.

Kelly: So that's good. Would more input be helpful?

Judge Gosselin: Sure, we invite people to come to the meetings. The meetings are open. Last year, Judge Wright came and she is now on the Committee so she will be coming again. We invited Mr. Edlin to come last year. He did not attend. We have Deborah Johnson, with Atlanta Legal Aid, who has developed all of their domestic relations forms and she came and gave input.

Kelly: Do you believe the Committee would consider looking at a uniform rule change that would allow the financial affidavit and work sheets to be sealed at the time of filing and a procedure to do this?

Judge Gosselin: There was a discussion about that… I can't remember how it turned out but I think some of the thoughts were that there is already a process for sealing documents and that you don't want to add another process. My thought would be if sealing is covered somewhere else, then we probably won't do a specific rule for those documents but would be open to listen to requests.

Kelly: What has been your experience in using the new child support law?

Judge Gosselin: You know, it's not as bad in actual practice as the worry was ahead of time but, because it is so complicated and because I can't do it while I'm listening—I'm used to being able to do everything while I'm listening to a hearing—I can't do this and listen. I completely lose track of what I'm trying to do in the courtroom. Maybe that will get better with practice. So for me, it has been frustrating that I haven't been able to get faster. I have taken almost all of my cases under advisement and I say that I will have to go through and do the worksheet. What I will do is take the worksheets from both sides and then do them. I know judges that are probably much better at the computer or more comfortable with it and seem to be able to handle it during the hearing. I just don't know how to do that and it is very frustrating. It drags out a case. I really don't like to hold on a decision. I like to tell people what I'm going to do.

Kelly: Because you usually rule at the end of the hearing.

Judge Gosselin: I do. It is rare for me not to unless it is a complicated financial situation. Mostly, I like to be able to say right then to the people what I'm going to do. I think that is fair and that spares the attorneys from having to tell them what the Judge ruled.

Kelly: Do you prefer the web or the Excel version of the worksheet?

Judge Gosselin: When we started out, I liked the web version better because it was easier to fill out and it was bigger print. But the Excel version seems like it is going to be easier for us just because that's what we get in. Most of the attorneys use the Excel version, so it's just easier.

Kelly: What suggestions would you make to the lawyers to help the court in dealing with the new child support law?

Judge Gosselin: First of all, know that number that you get when you do a form on the web. If you want me to look it up online, know that number and give it to me right at the beginning. If you put a deviation in there, tell me what it is and why. That Schedule E is small print and you have to play with word processing issues to be able to put things there. Tell me what it is and why so I can go right to it.

Kelly: In the divorce cases or even modification cases, if there is more than one child involved, are you requiring separate work sheets as support ends for each child?

Judge Gosselin: I have not required that yet. I know that there is a recent decision about that and judges have been talking about it on our side bar. I haven't had it come up yet.

Kelly: What is most helpful to you, as the court, in determining the income of the self employed?

Judge Gosselin: Any paperwork. Usually, all we have are the two parties saying he makes nine dollars a hour, no he makes $11 a hour. So anything that shows income: paycheck stubs, bank account records. We had a recent issue where they had bank account records where it showed a pretty consistent amount going into

this bank account. The worst problem of course is when people use their business account for all of their activities. But any paperwork and any summaries that a lawyer wants to prepare would be helpful. The self-employment income and overtime income are very difficult to determine. Charts, summaries, and other visual aids are helpful.

Kelly: Do you find that you are using the deviations very much?

Judge Gosselin: Yes. People are using deviations because there are very few cookie cutter divorces. Ranging from issues of shared time to particularly low income or paying off debt. In a recent case of mine, somebody had a disability that they weren't receiving disability payment for; yet, but both sides recognized that it was causing the income to be lower than normal.

Kelly: Good. Can you see the lawyers utilizing the deviations.?

Judge Gosselin: Yes, I use it and the lawyers use it. We are educating some lawyers about where to put it on the form.

Kelly: Have you had any jury trials yet involving the new child support law?

Judge Gosselin: No, I haven't had a jury trial in a domestic relations case in three years.

Kelly: How do you think the new custody law will affect your custody decisions if any?

Judge Gosselin: It won't. Except that it will affect my written order possibly. It may be that I will have to use the factors that are listed as part of the form order and check off things. But there is nothing in that list that we don't already consider. I don't know any judges that don't already consider all those things.

Kelly: Were you surprised at the compromise that was made on the 14 year old election?

Judge Gosselin: Yes, because it went back and forth and it kept getting discussions about whether it was going to be gone. I think the majority of the Superior Court judges don't like the 14 year old election because we see too many kids that are not really in the position to know what's best for them and they choose to go with the parent who either buys their love or does not have any rules.

Kelly: Do you think that the change on the 14 year old election will affect your ruling when a child is 14?

Judge Gosselin: It gives me more tools to do what I want if it is necessary in the best interests of the child. It was rare that you could find a parent unfit.

Kelly: Do you typically utilize *guardian ad litems* in your custody cases?

Judge Gosselin: No, not typically. But I do use them when it is a particularly contentious case, when I have facts that I don't feel like I'm getting, when I hear lots of contentions or if it is a case that I feel like is down a wrong path.

Kelly: What is the most helpful tool to you in making the difficult custody decisions where you have two good parents?

Judge Gosselin: I think it's the efforts that they've made to compromise. The worst cases are cases where the parents don't live close and you have to make a decision; those are heartbreaking. But information from teachers, counselors, *guardian ad litem,* if you have one, third parties (not family but outside sources) about where the child is comfortable and has structure and is supported. If people live close to each other, then I look to see who's made more effort to get a long..

Kelly: Do you typically favor equal time with each parent if they are both good parents?

Judge Gosselin: I came in strong, nine or 10 years ago and really did start out trying to do equal time. I had a couple of cases that really gave me pause about that and so I'm not as dogmatic about that as I was when I started. I try really hard to listen to what the parties' schedule is and what seems to be their pattern of behavior to see how they are going to handle this in the future. I think it is important for both parents to spend time with children and I think that it is important that children not go for long stretches of time, unless they have to, before spending time with each parent. I am not as focused on making sure that the time is just so as I used to be.

Kelly: One of the best things you do on your custody cases is try to ensure that each child has an opportunity to spend separate quality time with each parent.

Judge Gosselin: I tried to do that over the years and that's from my own divorce. That was really a good thing to happen and I try to at least suggest it if I don't

order it and say this is something you might want to think about. Your children would really appreciate this.

Kelly: In the cases I've had, it's worked really well. The people don't normally think about that when they are going through a divorce.

Judge Gosselin: Particularly in a divorce situation where kids may be feeling that they are not getting attention, getting that one on one time, and making parents focus on that child as opposed to ignoring, not really paying attention to, them being there. If there is just one child, then the focus of the attention should be on the child.

Kelly: Do you see more e-mails and electronic evidence being introduced into divorce proceedings?

Judge Gosselin: I do and that is a very interesting area that I would love to see more law about, because it is a constant struggle to know when you can let things in and when you can't. In the last several years, I see these type of things in almost every case.

Kelly: What are the typical problems you see in getting electronic evidence admitted under the rules of evidence?

Judge Gosselin: Well, this whole issue of e-mail and that it could have come from anyone. We've had a few seminars on that, but I think attorneys need to be aware of that. I've seen too many attorneys that assume because it is an e-mail, it can come in. There are a lot of ways that people can make up an e-mail.

Kelly: Have you had many requests for people to have computer hard-drives imaged?

Judge Gosselin: I've only had a few.

Kelly: Since the four judges in our circuit implemented the requirement that domestic cases be mediated within 90 days of service of the complaint, have you seen a difference in your case load?

Judge Gosselin: Yes.

Kelly: With the new custody bill, arbitration will now be an option for issues of custody. Do you think this will be a good option for litigants?

Judge Gosselin: I am not really a big fan of this. We have mediation already and mediation is a great option. Arbitration of course is binding. I think there were no standards set up or I don't know what the standards are going to be. There might be an arbitrator who is used to only handling business issues and who just sticks a shingle out there to be a custody arbitrator. People don't know what they're getting into…not that judges are the most trained in human behavior and child development, but most of us make an effort and try….so I'm concerned in that parties won't really understand what they've gotten themselves into and then we will be expected to fix the mess.

Kelly: What percentage of your domestic relations cases involve pro se litigants?

Judge Gosselin: In Hall County, more than 40 percent are both pro se. I don't have a percentage where one side is pro se although there is a fair number of them where one side is pro se. There is a large percentage.

Kelly: How are you handling all the pro se cases with the new child support law, the new work sheets, etcetera?

Judge Gosselin: We are so fortunate in this circuit to have a family law information center. Now we have a lawyer and two non-lawyers who work on helping folks with pro se forms that were developed. Our lawyer meets with folks that have questions but they have to be eligible, they have to be indigent. She will meet with those folks to help them with questions and we also have a computer that they let people use to work on their child support worksheets.

Kelly: And that's worked well?

Judge Gosselin: Worked very well.

Kelly: What percentage of your time would you estimate is spent on domestic relations cases versus other types of cases that you hear?

Judge Gosselin: When I started, I would have said 55 percent was spent for domestic relations. Since we did the mediation order and because of the case load, it's now about 40 percent on domestic relations cases.

Kelly: What is the biggest mistake you see attorneys make in domestic relations area?

Judge Gosselin: One of the things is that attorneys will adopt the attitude of their client. Instead of giving the client the benefit of their wisdom, their advice, their years of experience, they come in and spout their client's anger, misery or whatever it happens to be, instead of thinking things through. Some of the little things that happen because of that I think are because they assume custody is some sort of prize to be awarded to a parent who deserves it, which is a hot button with me. Custody is not a "deserved" kind of thing. It's truly about the best interests of the child and I've heard whole custody cases without ever hearing the child's name or anything about that child. They're always talking about what a sorry so-and-so the other side is, which is a true mistake in a custody case. A thing in trial that I see attorneys do is that they want to beat up on a witness—they keep on them, they catch them in a lie, they want to spend 10 minutes making them admit that they lied when it's not really important that they admit it. You've got the lie, now save it for closing argument and in 99 percent of the cases, the judge heard that, they got it, they were paying atten-

tion and the 1 percent that might have been signing a probation warrant and didn't hear it, bring it up at closing argument and you don't have to spend 10 minutes beating a witness into submission.

Kelly: What is the best advice you can give the litigants?

Judge Gosselin: Listen to your lawyer. Be realistic. Think through the specifics of what you want. If you are getting into a financial area with stock and personal property, make sure you understand what you want so when you are on the witness stand you will know. Take all the classes you can about divorce so that you don't spend your time using that area of the case to get back at your spouse. And that's another bit to lawyers: be specific. I want to know specifically what you think your client should have and why and how to do that. It's better than saying they're bad, they're good, do something.

Kelly: What are the new areas of family law that you see in our future?

Judge Gosselin: Clearly that whole arbitration and custody thing is one. The collaborative law movement is a very interesting and a useful idea for a number of cases and particularly in cases where you have people with some assets and are willing to go through the process and want it to be less of a war. I think there will probably be more specialized dockets…there was a push for that some years ago and then it kind of didn't happen. It happened in Fulton County, but didn't really catch on. I think it will catch on where judges specialize.

Kelly: Do you see our circuit having a family law court?

Judge Gosselin: No, it's too small and all the judges like doing a variety of work.

Kelly: If anyone reading this interview wants to submit their comments or suggestions to the Uniform Rules Committee, what do they need to do?

Judge Gosselin: Send something to me (P.O. Box 1778, Gainesville, Georgia 30503 or kgosselin@hallcounty.org) or to Lorraine Hoffman Polk (Counsel of Superior Court Judges, Suite 108, 18 Capitol Square, Atlanta, Georgia 30334), the staff attorney in charge of our circuit. **FLR**

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Marry Me

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In *Chubbuck v. Lake*, 635 S.E.2d 764 (2006), the Supreme Court recently observed the question of the legal requirements for agreements in contemplation of divorce and O.C.G.A. § 19-3-63. Although the Court did not rule on the merits, the Court stated "We have been unable to find a case in which an antenuptial agreement made in contemplation of divorce has been ruled void and unenforceable for a reason other than a failure to live up to the criteria set out by this Court in *Scherer*." This furthers the point that no cases dealing with agreements in contemplation of divorce have required the criteria set out in O.C.G.A. § 19-3-63, i.e.—the need of two notarized witnesses. This observation is axiomatic as *Scherer* created a new breed of agreements known as "contracts in contemplation of divorce" while the existing law only dealt with agreements in contemplation of "marriage".

Though the trial court in *Chubbuck v. Lake* ruled that the agreement in contemplation of divorce falls under the criteria of O.C.G.A. § 19-3-63 (dealing only with contracts in contemplation of marriage), the Supreme Court notes specifically that it can only rule upon the effect of the trial court's legal ruling, not the merits.

The question of whether a contract in contemplation of divorce falls under the requirements of O.C.G.A. § 19-3-63 (two notarized witnesses, recordation in the Superior Court within three months, etc). remains to be entertained by the Supreme Court. Nevertheless, considering the statutory history and court rulings based on public policy, one could easily conclude that agreements in contemplation of divorce under *Scherer* are not envisioned to be governed by O.C.G.A. § 19-3-63, which deals with contracts in contemplation of marriage. To imagine otherwise would mean the Scherer agreements would impose upon individuals a new class of agreements neither contemplated in common law, nor in the enactment of the Marriage Articles of 1863 that still exist today. **FLR**

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