The Family Law Review

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Dissipation: Should Timing Be a Factor?

by Brian Blitz
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A recurring issue in many domestic relations cases is when dissipation occurs. Dissipation is defined as the use of marital money for a non-marital purpose during or after the time a marriage is irretrievably broken down. Although many states recognize dissipation, or a similar concept, some place a time limit of when dissipation can occur. For example, the Illinois Supreme Court found that dissipation may only occur while the marriage is undergoing an *irretrievable breakdown*[1]. The fact that dissipation may only occur within this window of time raises several questions.

First, what constitutes an irretrievable breakdown of a marriage? Do both parties need to accept that their marriage is over? Can one party's behavior be indicative that a marriage has broken down? What if that behavior is something that the other spouse has accepted and condoned over the years?

As with many issues in family law, trial courts have substantial discretion in determining answers to these questions. Although picking an actual point in time that the dissipation meter starts running can be difficult, courts have established some loose guidelines to determine when a marriage is irretrievably broken. Thus, where there is evidence that one party no longer desires to be married to the other, a court will find that irreconcilable differences have arisen which has caused an irretrievable breakdown of their marriage.[2] Although this guideline is helpful, it does not offer assistance to an innocent party in a case where their spouse has spent marital money inappropriately for an extended period of time, unbeknownst to that innocent spouse. Common expenditures include gambling, drinking and having an extended affair. These actions are hidden from one spouse who, presumably, if made aware of the conduct, would want a divorce.

The law in Illinois puts this innocent party at a disadvantage, while rewarding the guilty spouse for successfully manipulating the innocent spouse while hiding the dissipation. Although courts in Illinois have stated that since adultery is grounds for dissolution of marriage itself, the legitimate objects of matrimony have been destroyed if one spouse is guilty of committing adultery.[3] There has not been an opinion in Illinois that specifically provides that all money spent on a boyfriend/girlfriend during a secret affair would be considered dissipation.

Other states provide greater protection to an innocent party, by affording a spouse the opportunity to fully recover money spent by their spouse for a non-marital purpose throughout a marriage, not just after the marriage is broken.

In California and Texas, courts treat dissipation differently than Illinois, and their cases are instructive. As opposed to a timing requirement, California and Texas courts permit a monetary award from a party's share of community property if there has been a deliberate misappropriation or constructive fraud, regardless of timing. In the California case of *In re Marriage of Czapar*, the Court found substantial evidence supported a finding that the husband abused his management right by using a community corporation for personal expenditures and ordered a reimbursement to the community for the inappropriate use of money, including the payment of a salary to his girlfriend for a job that she was clearly not qualified to perform. [4]

In Texas, a presumption of constructive fraud arises where one spouse disposes of the other spouse's one-half interest in community property without the other's knowledge or consent. In the Texas case *Zieba v. Martin*, the Court found the community estate was entitled to reimbursement for money the husband spent on girlfriends and money withdrawn from bank accounts without his wife's consent.[5] Texas courts have gone further and held that a spouse must be innocent and unknowing for the constructive fraud to have occurred. In *Spruill v. Spruill*, the Court affirmed a lower court ruling that Husband had committed constructive fraud by spending a substantial portion of community property money on his girlfriend

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Editor's Corner

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Well, here we are, Spring 2009. This decade is flying by. I hope you enjoy this issue, and I hope you have fun in Amelia Island at our Family Law Institute. After the institute, please feel free to submit pictures of the good times you have at the institute for possible inclusion in the next edition of the Family Law Review.

I want to take this opportunity to remind you of our upcoming "Nuts and Bolts" family law seminar. The presentation in Savannah will be held on August 20, 2009, while the Atlanta presentation will be held on September 17, 2009. These will both be excellent programs, which will cover the basics of family law, as well as updates in important areas. As the economy continues to affect our clients and our practices, we must be willing to consider new business practices. We are all wondering how to work smarter, more efficiently and more cost effectively. Those of you who have figured out how to do this, please consider submitting articles or suggestions to the Family Law Review for inclusion in our fall issue.

Once again, thanks to all of our wonderful contributors. The submissions from members of our own bar and from bars across the country continue to make the Family Law Review interesting, and I again encourage you to contribute an article about any aspect of family law, of your practice, or of your community. I want to specifically acknowledge Vic Valmus, who does a tremendous job on our case law update for each issue. If you see him, please tell him thanks for keeping us all on the cutting edge of family law.

See you at the beach!

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without showing that it was done with his wife's consent.[6]

Court's in states that have timely requirement when

determining dissipation should do more to protect an innocent party who truly does not know of their spouse's illicit expenditures, especially if those expenditures were ongoing for years. As opposed to arbitrarily choosing a point in time that a marriage is irretrievably broken, courts should establish a rebuttable presumption test which would operate as follows: If a spouse shows that a behavior was unknown from a specific point in time and that behavior resulted in the use of marital money for a non-marital purpose, there should be a presumption that the marriage was irretrievably broken at that point in time. The meter quantifying dissipation should start running at the time the behavior commenced.

However, in several cases, spouses know of their partner's actions and resulting spending, but choose to ignore or condone it. In many cases, it is obvious that the party has knowledge that their spouse has a gambling problem, drinking problem or is having an affair. Then, the question becomes: "What has that spouse done with that knowledge?" If the answer is that they accepted that behavior and chose to stay married irrespective of their spouse's misappropriation of money, the "breakdown" presumption is rebutted. A guilty spouse should not be punished for behavior that was historically accepted and condoned by a "not so innocent" spouse.

In the practice area of family law, we learn a great deal about people. After spending years with the same person, sometimes a spouse will simply accept their partner's various flaws, including spending money for something unrelated to the marriage. Some spouses accept gambling, drinking and extra-marital affairs casually, similar to accepting snoring, sloppiness or other character traits that may be annoying, but are simply part of a marriage. It becomes part of that specific relationship. In other relationships, one spouse may be completely unaware of their spouse's illicit behavior and not only do they become heartbroken, but they also suffer financial consequences when they realize the amount of money used by their spouse for a non-marital purpose.

Laws should be written so innocent parties are protected. As long as certain states define dissipation as the "expenditure of marital money for a non-marital purpose after the irretrievable breakdown of the marriage," it should be made clear that, often times, a marriage is over long before one spouse may actually know it. The law should protect that spouse. ***FLR***

(Endnotes)

1 In re Marriage of O'Neill, 138 Ill.2d. 487, 563 N.E.2d 494 (1990).
2 In re Marriage of Smoller, 578 N.E.2d 256 (1st Dist. 1991).
3 In re Marriage of Bates, 490 N.E.2d 1014, 1016(2nd Dist. 1986).
4 In re Marriage of Czapar, 285 Cal.Rptr. 479, 232 Cal.App.3d 1308 (App. 4 Dist. 1991).
5 Zieba v. Martin, 928 S.W.2d 782 (Tex.App.-Houston [14 Dist.], 1996).
6 Spruill v. Spruill, 624 S.W.2d 694 (Tex. App.1981).

Brian J. Blitz represents clients in family and matrimonial law, dispute resolution and litigation. He is also the author of several articles on the financial aspects of divorce. Blitz is a member of the American Bar Association, the Illinois State Bar Association and the Chicago Bar Association.

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Case Law Update: Recent Decisions

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ATTORNEY'S FEES

Fort v. Rucker - Fort, A09A0679 (March 25, 2009)

In March 2003, the parties were divorced by a Settlement Agreement incorporated into a Final Decree of Divorce. The Husband was obligated to pay alimony, purchase a new home for the Wife and pay $1,000 in attorney's fees. In June 2005, the Husband filed a Chapter 7 Bankruptcy Petition, and under that Petition, creditors were enjoined from pursuing contempt actions against the Husband to collect a debt. In 2006, a dispute arose between the parties for the Husband's failure to pay alimony and other obligations under the Divorce Decree and Settlement Agreement. In January 2006, the Court issued an order holding the Husband in contempt, but due to the Sherriff's inaction, the Husband was not arrested. In May 2006, the Wife filed another contempt action and requested that the Sheriff comply with the earlier order and at the same time, the Husband successfully moved the bankruptcy court to reopen the Chapter 7 case so that he could pursue a contempt action against the Wife for violating the bankruptcy court's injunction.

Prior to the adjudication of the contempt actions, the parties reached an accord and satisfaction settling all issues between them arising out of the divorce decree. Pursuant to the agreement, the Husband paid $60,000 to the Wife in two installments. The Wife became obligated on all payments related to the former marital residence and the Husband quitclaimed the remaining half of his interest in the marital home to the Wife. This agreement was memorialized in an order issued by the Court in October 2006, which stated in pertinent part that "the payment of the funds herein shall forever satisfy all obligations of the Husband to the Wife pursuant to any Order, Decree or Agreement antecedent to this Order."

In May 2007, the Wife learned that the IRS had filed a $120,000 tax lien on the marital home based on Federal taxes owed by the Husband. The Wife moved to set aside the accord and satisfaction. During the interim, attorneys for the Wife were able to negotiate with the IRS and resolved the tax lien issue. As a result, the Wife amended her Motion to Set Aside and requested that the Husband be ordered to pay $10,863.38 in attorney's fees that the Wife had incurred in her effort to resolve the tax lien issue. In June 2008, the Court issued a one-page order requiring the Husband to reimburse the Wife for $10,863.38 in attorney's fees that she had incurred. The Husband filed a Motion for New Trial and Motion for Entry of Finding of Fact and Conclusions of Law. After a hearing in August 2008, the Court issued an order stating that it appeared that the accord and satisfaction was valid; therefore, it superseded the divorce decree. Nevertheless, the Court held that it would enforce the attorney's fees provision in the decree by evoking its equity power and ordered the Husband to reimburse the Wife for her attorney's fees. The Husband appeals and the Court of Appeals reverses.

Generally, an award of attorney's fees is not available unless supported by statute or contract. In absence of statutory authority, a court of equity cannot under ordinary circumstances, in an adversarial proceeding, allow attorney's fees to the prevailing party. The generally recognized exception to this rule is that a court of equity may allow attorney's fees to a party, who at his own expense, maintained a successful suit for the protection or increase of common property or a common fund. In the instant case, the Court used no statutory basis for its award of attorney's fees and the Wife has not argued that such a basis exists. The Wife argued that she should be awarded attorney's fees under the divorce decree and settlement agreement but the court had held in light of the parties' accord and satisfaction that the decree was not enforceable at law. However, the trial court still awarded attorney's fees even though there is no statutory basis nor is there a common fund exception applied to the instant case. Reversed.

CHILD SUPPORT

Hampton v. Nesmith,* A08A1887 *(Nov. 13, 2008)

The parties were never married and had an 8-year-old daughter. The original child support order entered in 2004 required that the father pay $525 per month in support for the minor child. In March 2006, the father filed a petition for joint physical and legal custody and downward modification of child support. The mother filed an answer and counterclaim seeking $3,600 in unpaid child support and an upward modification. In July 2007, the trial court ordered joint legal custody, primary custody to the mother and visitation rights to the father. The court also awarded $2,383 in attorney's fees and found the father in contempt and ordered him to pay $3,990 in past due child support. The court further ordered that the father repay the arrearage at $300 per month beginning in October 2007. Additionally, the court found that the father's income had increased and thus ordered an increase in child support payments from $525 to $800 per month. The court also ordered that increase to be delayed until Oct. 1, 2008 to allow the father to first pay off the arrearage. The mother appeals and the Court of Appeals reverses.

There is no explicit language in the child support statute which precludes the trial court's authority to order a complete delay of an upward modification of child support. However, we find it persuasive that the only subsection in the statute that discusses the timing or implementation of a modification contains no language that would support the type of complete delay ordered by the trial court in this matter. Pursuant to O.C.G.A. § 19-6-15, the trial court may delay full implementation of modification via phase in and it must provide for some amount (not less than 25 percent of the new award) to take effect immediately. Here, the upward modification is more than 50 percent of the original child support award, but there was no phase in modification and the trial court ordered that it did not take effect at all for 15 months. Therefore, the portion of the order delaying the upward modification of the child support obligation is vacated.

CUSTODY

Galtieri v. O'Dell et. al.,* A08A1822 *(Jan. 30, 2009)

The parties were never married and had a child in October 2000. Since the birth of the child, the child has lived in Georgia with the mother and/or O'Dell (her maternal grandparent). The father is of and currently resides in Kentucky. Although the father was under no child support order, he sporadically made payments of support for the child during this time. The mother entered a rehabilitation center in New York for alcohol treatment and relinquished custody of the child to O'Dell during her treatment. The father then petitioned the court for legitimation and filed an emergency motion seeking custody of his daughter. The court granted the father's legitimation petition in March 2007, and allowed O'Dell to intervene in the custody proceeding. After a hearing, the court granted custody to O'Dell and in its order, stated that the court was impressed with the father and the parents of the father, but nonetheless concluded that the personal experience of the court, it would be detrimental for the child to move from Georgia to Kentucky. The court made no other findings of facts relative to the father's fitness as a parent or his relationship with the child. The father appeals and the Court of Appeals reverses and remands.

Custody disputes between a biological parent and a relative third party are controlled by O.C.G.A. § 19-7-1 (b.1). There is a rebuttal presumption that is in the best interest of the child to award custody to the parent of a child. The three presumptions are implicitly in the statute: 1) a parent is the fit person entitled to custody; 2) a fit parent acts in the best interests of his/her child; and 3) the child's best interest is to be in the custody of a parent. The presumption can nonetheless be overcome by a third party relative showing by clear and convincing evidence that parental custody would harm the child. It is further defined by the Supreme Court that harm in this context is either physical harm or significant long-term emotional harm, not merely social or economic disadvantages. If the third party overcomes the presumption, then that third party relative must prove that an award of custody to him/her would best promote the child's health, welfare and happiness.

It is clear that the trial court failed to apply the proper legal analysis for determined whether custody should be awarded to O'Dell rather than to the father. The trial court failed to make any factual findings that the father was unfit as a parent or that the child will suffer physical or long term emotional harm in the custody of the father. Therefore, the case is remanded to a court where O'Dell must come forward with clear and convincing evidence that the move will cause physical or long term emotional harm to the child under the specific circumstances of this case.

CUSTODY

Rembert v. Rembert,* S08F1582 *(March 23, 2009)

The parties were married in 1998. There were two children born as issue of the marriage; one in 2000, the other in 2003. In July 2006, the Wife filed for divorce and after a hearing, the Court issued a Final Judgment and Decree of Divorce, ordering, among other things, that Husband and Wife had joint legal custody of the children, with the Husband named as the primary custodial parent with final decision making authority over all matters involving the children. The Wife appeals stating that the Court abused its discretion in that it granted to the Husband full decision making authority and awarding the Husband primary physical custody of the children. The Supreme Court affirms.

Pursuant to O.C.G.A. § 19-9-6 (2), joint legal custody means that both parents have equal rights and responsibilities for major decisions concerning the children

and that the Judge may designate one parent to have sole power to make certain decisions while both parents retain equal rights and responsibilities for other decisions. Therefore, the language of the statute clearly vests in the trial court discretion to decide which parent should be in power to make the final decision where the parents are unable to agree.

The Wife also contends that the trial court erred by awarding the Husband as primary physical custodial parent because she is at least equally fit to serve in that role. In the instant case, the trial court heard testimony regarding the Wife's romantic involvement with a married man prior to the time that she filed for divorce. In addition, she intended to spend the next 18 months as a full time student to secure a bachelor's decree and then attend law school at the University of Georgia. Also after they separated, she borrowed $43,000 to buy an automobile. Also, the Husband testified that he intended to remain at the marital home and was seeking a transfer from his position as a commercial airline pilot to a position of flight training department with a more regular schedule. Therefore, if there is any evidence to support the decision of the trial court, this court will not substitute its judgment for that of the trial court. Judgment affirmed.

LACHES

Amerson v. Vandiver*, S08A1707 *(Jan. 26, 2009)

The parties were divorced in March of 2004. As a part of the final settlement agreement, the mother would have sole and permanent custody of the parties' two children. The father agreed to termination of parental rights and would have no obligation for child support and that such termination was in the best interests of the children. In March 2008, the father moved to set aside the divorce decree on the grounds that the superior court lacked subject matter jurisdiction to terminate his parental rights. Although the court found that the agreement was voluntarily entered and is effective as a contract between the parties, the superior court set aside much of the final agreement as may be construed to terminate the husband's parental rights. The superior court then transferred the case to juvenile court for final disposition of all issues regarding the termination of parental rights, custody, visitation, child support and all matters necessary in the entry of the final judgment. Wife appeals. Supreme Court reverses.

Except in connection with an adoption proceeding, the juvenile court is the sole court for initiating actions involving any proceeding for the termination of parental rights. Therefore, the superior court judge does not have jurisdiction to terminate parental rights. Parties cannot confer subject matter jurisdiction to a court by agreement or waive the defense by failing to raise it in the initial trial court. However, under limited circumstances, the defense of laches and estoppel may prevent a party from complaining of the court's lack of subject matter jurisdiction. Laches can be a defense of an action attacking the validity of a divorce decree. The stability of family and society demands that one who intends to attack an apparently valid decree of divorce should proceed with the utmost promptness. Here, the father firmly evoked the jurisdiction of the superior court for the purpose of obtaining a divorce and consented to the court's incorporation of settlement agreement and then failed to file a motion to set aside for four years. The acts and admissions of the father prior to the divorce decree coupled with his failure to proceed promptly following the decree are sufficient to constitute an affirmative course of conduct which, when relied upon by the mother, stops him from attacking the divorce decree as void. Therefore, the trial court erred in setting aside the portion of the final divorce decree which terminated the father's parental rights. Judgment reversed. Judges Hunstein and Chief Justice Sears concur.

RES JUDICATA

Stone v. Stone*, A08A2020 *(Jan. 29, 2009)

The parties separated in August 2005 and the Husband filed for divorce the following month. While the divorce was pending, the Wife obtained five cash advances totaling $21,750 from an equity line of credit secured by the couple's marital residence. She deposited the money into her individual bank account and used it for personal expenses. The Husband found out about the advances during her deposition in March 2006. The parties negotiated a divorce settlement and announced their terms of agreement at a hearing in April 2006. The Husband received the martial residence and agreed that he would be responsible for all marital debts incurred prior to the Aug. 28, 2005 separation, and that the Wife would pay her personal credit cards and other bills that she incurred since Aug. 28, 2005. The parties could not formalize the Settlement Agreement in writing. Therefore, the trial court made the transcript of the April 2006 hearing part of the Final Decree of Divorce. There was also a hold harmless clause in the agreement that the Wife shall indemnify the Husband and hold him harmless for any loss or expenses arising out of any claims, demands, actions or proceedings that may be made or instituted against him for liability arising from such debts.

In November 2006, the Court entered a Final Decree and the Wife quitclaimed her interested in the marital residence to the Husband. One month later, the Husband was concerned that the Wife's equity line cash withdrawals had encumbered the home and he sued her for indemnification as well as breach of fiduciary duty and fraud. The Wife moves to dismiss his actions claiming Res Judicata. The trial court dismisses citing Res Judicata. Husband appeals. Court of appeals affirms in parts and reverses in part.

Res Judicata bars a subsequent suit if the following requirements are met: (1) The first action must have involved an adjudication by a court of competent

jurisdiction; (2) the two actions must have identity of parties and subject matter; (3) the party against whom the doctrine of Res Judicata is raised must have had a full and fair opportunity to litigate the issues in the first action. However, the Husband could not have litigated his indemnity claim in the divorce decree, and therefore Res Judicata does not apply. Here, the Husband might be able to enforce indemnity provision through the divorce action, but Georgia law permits a separate contract suit where a settlement agreement is incorporated into a final decree of divorce. A suit seeking damages for violations of terms may not be initiated solely upon the decree, but an action called ex contractu may be maintained due to a breach of the settlement agreement.

The Husband also complains that the Wife breached her fiduciary duty and committed fraud by withdrawing the money from the equity line of credit. However, the Husband focused solely on his contract indemnity claim and therefore the court considers this part of the appeal abandoned.

RETIREMENT BENEFITS

***Smith v. Smith*, S08F1706 (*Jan. 12, 2009*)**

The parties have been married to each other twice. They were first married in 1979 and divorced in 1988. They remarried in 1999 and divorced again in 2008. The parties' children were emancipated and the court found that awarding alimony to either party would impose an undue hardship on the other. The trial court awarded the marital home and furnishings, a timeshare, a car and $1,300 in the Wife's 401(k) to the Husband. The trial court also awarded the Wife 1/3 of the Husband's 401(k) account balance and $275 per month from his military retirement pay. The Husband appeals and the Supreme Court reverses.

The record shows the parties were divorced in 1988 and he retired in 1995. The parties did not remarry until 1999. Therefore, his military retirement pay was non-marital property from the second marriage and was not subject to equitable distribution. There was no indication in the record that the Wife was awarded any interest in the Husband's military retirement account following their first divorce. It is undisputed that no contributions were made to the military retirement account during the second marriage. Therefore, the trial court erred in awarding any part of the Husband's military retirement to the Wife as division of marital property.

SELF EXECUTING CHANGE PROVISION

***Rumley–Miawama v. Miawama*, S08F1541 (*Jan. 12, 2009*)**

After a bench trial, the court entered a final judgment and decree of divorce awarding joint legal custody of the parties' minor child, with primary physical custody awarded to the Husband and secondary custody to the Wife. If the Wife continues to reside in Georgia, she was required to pay child support and is entitled to visitation on alternating weekends so that both parents spend equal amounts of time with the child. If the Wife moves out of the state of Georgia, she will be entitled to visitation on three day federal holiday weekends and for two months during the summer. The Wife filed a motion for new trial and was denied. The Wife appeals. Supreme Court affirms in part and reverses in part.

The Wife contends that the trial court erred by failing to apply a discretionary deviation from the Child Support Guidelines based on equal parenting time. Pursuant to said guidelines, the court does not need to include any explanation if no deviation is applied and the court does not need to explain how it reached that decision. In addition, when the trail court made its alternative visitation award, the trial court specifically exercised its discretion by means of deviating for travel expenses.

The Wife also contends that the trial court erred by imposing visitation provisions which would excessively penalize her in the event that she moves out of the state. Here, the visitation schedule which automatically takes effect whenever the Wife moves out of Georgia, constitutes a self executing change of visitation provision. Generally, a self executing change of visitation provision violates the state's public policy founded on the best interest of the child unless there is 1) evidence brought before the court that one or both parties have committed to a given course of action that will be implemented at a given time; 2) the court has heard evidence how the course of action will impact upon the best interests of the child; and 3) the provision is carefully crafted to address the effects of the given course of action. Such provisions are the exception and not the rule and should be narrowly drafted so as not to impact adversely upon the child's best interests.

Here, the event is the Wife's move outside of the state. The transcript reveals that the Wife was considering a move to Texas for a new professional position and discussed what type of house she would be acquiring and what salary she would make. However, nothing in the transcript reflects that the Wife had committed to this course of action. Instead, this was referred to as a potential move. In addition, the automatic change of visitation provision contains no language limiting its allocation at or near the time of divorce. In fact, the provision lacks any expiration date at all. Here, the event of the Wife's move to a residence outside the state has only a tangential connection with the child's best interest.

The self executing provision improperly authorizes an open-ended automatic material change in visitation without providing for a determination as to whether the visitation change is in the best interests of the parties' child and without connecting the event to the child's best interests. Therefore, the trial court erred in including the self executing change of visitation provision in the parties' divorce decree and therefore the courts should strike the self executing provision from the decree.

UCCJEA

Hall v. Wellborn*, A08A1800 *(Feb. 10, 2009)

In December 2003, the divorce proceeding between Hall (Mother) and her former Husband in the Superior Court of Bibb County awarded temporary custody of JH to the Mother and ordered paternity testing. In May of 2004, an order was modified relieving the ex-husband of an obligation to JH because the child's biological father was determined to be Jack Wellborn who was neither a party to nor was he served in the prior custody proceeding. Prior to the May 2004 order, the child moved to Walton County, Fla. where Wellborn was living. In July 2006, Wellborn filed a paternity action in the circuit court of Walton County, Fla., seeking sole custody of JH. Hall answered and in December 2006, a hearing was held. Both parents appeared and were heard and the Florida court awarded the Father primary custody and the Mother visitation rights. In October 2007, Hall moved the Florida court to abate its December order challenging Florida's jurisdiction in light of the initial Bibb County custody award. In January 2008, the Florida court denied Hall's motion and Hall filed the instant action in the Superior Court of Stewart County, seeking the enforcement of the original Bibb County order awarding her custody as to the ex-husband (not JH's father). The Stewart County Superior Court ruled that it lacked jurisdiction due to the Florida court's prior exclusive continuing jurisdiction. Hall appeals. The Court of Appeals affirms.

Hall contends the Florida court lacked jurisdiction because the original Bibb County order that awarded her custody of JH was an initial child custody determination vesting the court with exclusive continuing jurisdiction over the custody of JH pursuant to the UCCJEA. However, because the Florida court determined that both parents and the child reside in Florida; Georgia lost exclusive continuing jurisdiction. Under the UCCJEA, if a Georgia court makes an initial child custody determination, generally it will have exclusive continuing jurisdiction over custody matters. However, there are exceptions to the exclusive continuing jurisdiction: where (1) a court of this state determines neither the child nor the child's parents has a significant connection with the state and that substantial evidence is no longer available in this state concerning the child's care, protection, training and personal relationships; or (2) a court of this state or a court of another state determines that neither the child nor the child's parents or any person acting as a parent presenting resides in the state.

In the Florida action, both parties admitted that they and the child resided in Florida and the Florida court determined that it had jurisdiction over the matter even. Hall states she never stopped residing in Georgia, but the Florida court rejected that argument after receiving evidence and argument on the issue. Because the court of another state determined that neither the child nor the child's parents presently reside in Georgia, the Bibb County Court lost continuing exclusive jurisdiction. Judgment affirmed.

UIFSA

Kean v. Marshall*, A08A0828 *(Nov. 10, 2008)

The parties were never married but had one child together. In November 1997, an Alabama court entered an order requiring the Father to pay child support. In April 2006, the Mother filed an action under the Uniform Interstate Family Support Act (UIFSA) to modify the Alabama order by increasing the amount of child support. The Father moved to dismiss the action for lack of jurisdiction, but the trial court denied his motion and entered an order modifying child support upward and awarded the Mother attorney's fees. The Father appeals and the Court of Appeals reverses.

The Father's testimony was that he was born in Alabama, attended school in Alabama, was enlisted in the Army in Alabama, registered to vote in Alabama, and always paid income taxes in Alabama, had an Alabama driver's license and cares for his elderly father in Alabama. In the two tours of duty, the Father was stationed in Missouri, Texas and Hawaii but always considered himself domiciled in Alabama. While stationed in Hawaii, he requested a compassionate change of station so he could be near and take care of his father who was ill. The closest station where he could perform his specialty was at Fort Gillem, located south of Atlanta. He signed a 6 month lease for an apartment in Stockbridge for when he had to work overtime and weekends. He received mail at the apartment. The Father testified that he never intended to move to Georgia and he intends to remain in the state of Alabama as his domicile. The trial court concluded that the father intended to remain at the Stockbridge residence and therefore was subject to the jurisdiction and venue of Georgia. The trial court concluded to exercise its jurisdiction over the father in the case, the court would have to find that all parties resided in Georgia and that the child does not live in the issuing state of Alabama.

Even though the UIFSA does not define the term "reside" for the purpose of the Act, the trial court concluded that "reside" means "domiciled". Here, the terms "domicile" and "residence" are not synonymous and a person could have several residences but only one place of domicile. The trial court's focus on the Father's actions regarding his apartment in Henry County and whether he was commuting from Alabama to Fort Gillem is misplaced. The proper focus is whether the record contains any evidence that the father took any action to change his domicile from Alabama to Georgia and the record is devoid of any evidence showing any such action. Therefore, the trial court is reversed and directed to dismiss the modification action. In addition, the mother was not entitled to attorney's fees for the modification action. The trial court is directed to vacate that award. ***FLR***

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Procedural Changes for Grandparent Caregivers

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Changes in our society have caused us to rethink our common definition of family. The notion of the traditional family structure has expanded to include single parent households, same-sex parented households and grandparents as primary caregivers. Not surprisingly, when legal issues arise in these family situations, the law has often struggled to adequately address the needs of all the family members. In particular, many feel that the law has historically failed to sufficiently deal with the rights and needs of grandparents in the position of caring for their grandchildren.

AARP estimates that 98,773 children in Georgia are living in households headed by grandparents or another relative without a parent present. [1] As the economic times force more and more families to alter their living situations and challenge their ability to care for their children, we can certainly expect this number to rise. Inevitably, these transitions can increase the amount of stress on any family. In situations where a grandparent cares for a grandchild without the presence of a parent, the situation can be complicated by a lack of legal rights to properly care for the child. Often, grandparents face problems when trying to enroll a grandchild in a local school, seek medical attention for the child or add a grandchild to their insurance plan. Previously, in order to have the proper legal authority to handle these issues, grandparents had to appeal to the court system to establish guardianship or custody of the minor child.

However, in an attempt to address the legal issues created by grandparents as caregivers, last year the Georgia legislature passed the "Power of Attorney for the Care of a Minor Child Act."[2] The Act allows parents and grandparents to establish the legal authority to make decisions and provide for the minor child in situations in which a parent cannot to do so. It gives grandparents the legal authority to provide for minor children in their care without the expense of legal fees or court costs.

Under O.C.G.A. §19-9-122, a parent may authorize any grandparent residing in Georgia care giving authority for a minor child when hardship prevents the parent from properly caring for the child. This delegation of authority does not need the approval of the court if the parent executes a written power of attorney that conforms to the requirements of the Act. Hardship is defined as including but not limited to the death of the other parent, serious or terminal illness, the physical or mental condition of the parent or the child such that proper care and supervision cannot be provided, incarceration of a parent, the loss of a home due to natural disaster or active military duty exceeding 24 months.[3]

The Act specifically states that hardship does not include an investigation by the Department of Human Resources and thus prohibits the use of a power of attorney to merely subvert an investigation by DFACS.[4]

The power of attorney provided for by the Act allows a parent to authorize a grandparent to enroll the child in school and provides access to school records in order to accomplish that goal.[5] Additionally, the grandparent is authorized to arrange and consent to any medical, dental or mental health treatment and enroll the child in any health program offered to the grandparent.[6] In a more general nature, the Act authorizes a grandparent to provide for the child's food and housing along with any recreation or travel.[7] Finally, the Act allows the parent to add any additional powers necessary for the care of the child.[8]

If a grandparent is assuming the authority the Act provides, it is understandable that the corresponding potential for liability accompanies that authority. O.C.G.A. § 19-9-124 requires that the designated grandparent act in the best interests of the child. However, assuming the grandparent does so, he or she will not be held liable for good faith decisions regarding consenting or refusing to consent to any medical treatment. [9] Additionally, this section of the Act states that the grandparent has the right to enroll the child in the school district in which the grandparent resides. The grandparent is required to provide the customary residency proof to the school district and the school district may request reasonable evidence of the parent's hardship. [10] As the grandparent will have no liability if acting in the best interests of the child, likewise, the school who acts in good faith reliance on a power of attorney will not be liable for acting upon that reliance.[11] As a safeguard against school district shopping, a parent must certify that the power of attorney is not for the primary purpose of enrolling a child in academic or athletic programs provided by the grandparent's school district.[12]

In general, both parents are required to execute the power of attorney. The requirement applies if both parents are alive and have joint legal custody. Reasonably, a parent with sole permanent legal custody has the authority to grant to the power of attorney without the consent or signature of the other parent. [13]The power of attorney must be executed and notarized and the executing parent must send written notification to a noncustodial parent via certified mail or statutory overnight delivery within five days of execution.

The authority granted under the Power of Attorney for the Care of a Minor Child Act is subject to revocation and termination under O.C.G.A.§ 19-9-128. The grandparent has the continuing authority to act on behalf of the child until each parent who executes the power of attorney revokes it in writing and provides notice of the revocation to the grandparent.[14] The revoking parent has the responsibility to inform all involved schools and health care providers of the revocation. However, upon a revocation of authority, the grandparent has the responsibility to notify a school when a change of circumstances lasting longer than six weeks results in a change of address outside of the grandparent's school district.[15] As to be expected, an agent grandparent has the right to resign and a court of competent jurisdiction always has the power to terminate the power of attorney.[16]

Finally, the Act provides a standard form by which parents and grandparents can easily exercise the power of attorney option.

GEORGIA POWER OF ATTORNEY FOR THE CARE OF A MINOR CHILD

NOTICE:

(1) THE PURPOSE OF THIS POWER OF ATTORNEY IS TO GIVE THE GRANDPARENT THAT YOU DESIGNATE (THE AGENT GRANDPARENT) POWERS TO CARE FOR YOUR MINOR CHILD, INCLUDING THE POWER TO: ENROLL THE CHILD IN SCHOOL AND IN EXTRACURRICULAR SCHOOL ACTIVITIES; HAVE ACCESS TO SCHOOL RECORDS AND DISCLOSE THE CONTENTS TO OTHERS; ARRANGE FOR AND CONSENT TO MEDICAL, DENTAL, AND MENTAL HEALTH TREATMENT FOR THE CHILD; HAVE ACCESS TO SUCH RECORDS RELATED TO TREATMENT OF THE CHILD AND DISCLOSE THE CONTENTS OF THOSE RECORDS TO OTHERS; PROVIDE FOR THE CHILD'S FOOD, LODGING, RECREATION, AND TRAVEL; AND HAVE ANY ADDITIONAL POWERS AS SPECIFIED BY THE PARENT.

(2) THE AGENT GRANDPARENT IS REQUIRED TO EXERCISE DUE CARE TO ACT IN THE CHILD'S BEST INTEREST AND IN ACCORDANCE WITH THE GRANT OF AUTHORITY SPECIFIED IN THIS FORM.

(3) A COURT OF COMPETENT JURISDICTION MAY REVOKE THE POWERS OF THE AGENT GRANDPARENT IF IT FINDS THAT THE AGENT GRANDPARENT IS NOT ACTING PROPERLY.

(4) THE AGENT GRANDPARENT MAY EXERCISE THE POWERS GIVEN IN THIS POWER OF ATTORNEY FOR THE CARE OF A MINOR CHILD THROUGHOUT THE CHILD'S MINORITY UNLESS THE PARENT REVOKES THIS POWER OF ATTORNEY AND PROVIDES NOTICE OF THE REVOCATION TO THE AGENT GRANDPARENT OR UNTIL A COURT OF COMPETENT JURISDICTION TERMINATES THIS POWER.

(5) THE AGENT GRANDPARENT MAY RESIGN AS AGENT AND MUST IMMEDIATELY COMMUNICATE SUCH RESIGNATION TO THE PARENT, AND IF COMMUNICATION WITH SUCH PARENT IS NOT POSSIBLE, THE AGENT GRANDPARENT SHALL NOTIFY CHILD PROTECTIVE SERVICES OR SUCH GOVERNMENT AUTHORITY THAT IS CHARGED WITH ASSURING PROPER CARE OF SUCH MINOR CHILD.

(6) THIS POWER OF ATTORNEY MAY BE REVOKED IN WRITING BY ANY AUTHORIZING PARENT. IF THE POWER OF ATTORNEY IS REVOKED, THE REVOKING PARENT SHALL NOTIFY THE AGENT GRANDPARENT, SCHOOL, HEALTH CARE PROVIDERS, AND OTHERS KNOWN TO THE PARENT TO HAVE RELIED UPON SUCH POWER OF ATTORNEY.

(7) IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

POWER OF ATTORNEY FOR THE CARE OF A MINOR CHILD

made this___day of _____,_____.

(1) (A) I, (insert name and address of parent or parents), hereby appoint (insert name and address of grandparent to be named as agent) as attorney in fact (the agent grandparent) for my child (insert name of child) to act for me and in my name in any way that I could act in person.

(B) I hereby certify that the agent grandparent named herein is the (place a check mark beside the appropriate description):

Biological grandparent;

Stepgrandparent;

Biological great-grandparent; or

Stepgreat-grandparent.

(2) The agent grandparent may:

(A) Enroll the child in school and in extracurricular activities, have access to school records, and may disclose the contents to others;

(B) Arrange for and consent to medical, dental, and mental health treatment of the child, have access to such records related to treatment of the child, and disclose the contents of such records to others;

(C) Provide for the child's food, lodging, recreation, and travel; and

(D) Carry out any additional powers specified by the parent as follows:

(3) The powers granted above shall not include the following powers or shall be subject to the following rules or limitations (here you may include any specific limitations that you deem appropriate):

(4) This power of attorney for the care of a minor child is being executed because of the following hardship (initial all that apply):

(A) The death, serious illness, or terminal illness of a parent;

(B) The physical or mental condition of the parent or the child such that proper care and supervision of the child cannot be provided by the parent;

(C) The loss or uninhabitability of the child's home as the result of a natural disaster;

(D) The incarceration of a parent; or

(E) A period of active military duty of a parent.

(5) (Optional) If a guardian of my minor child is to be appointed, I nominate the following person to serve as such guardian: (insert name and address of person nominated to be guardian of the minor child).

(6) I am fully informed as to all of the contents of this form and I understand the full import of this grant of powers to the agent grandparent.

(7) I certify that the minor child is not emancipated, and, if the minor child becomes emancipated, this power of attorney shall no longer be valid.

(8) Except as may be permitted by the federal No Child Left Behind Act, 20 U.S.C.A. Section 6301, et seq. and Section 7801, et seq., I hereby certify that this power of attorney is not executed for the primary purpose of unlawfully enrolling the child in a school so that the child may participate in the academic or interscholastic athletic programs provided by that school.

(9) I certify that, to my knowledge, the minor child's welfare is not the subject of an investigation by the Department of Human Resources.

(10) I declare under penalty of perjury under the laws of the State of Georgia that the foregoing is true and correct.

Parent Signature:

Printed name:

Parent Signature:

Printed name:

Signed and sealed in the presence of:

Notary public

My commission expires

(c) The following notice shall be attached to the power of attorney:

"ADDITIONAL INFORMATION:

To the grandparent designated as attorney in fact:

(1) If a change in circumstances results in the child not living with you for more than six weeks during a school term and such change is not due to hospitalization, vacation, study abroad, or some reason otherwise acceptable to the school, you should notify in writing the school in which you have enrolled the child and to which you have given this power of attorney form.

(2) You have the authority to act on behalf of the minor child until each parent who executed the power of attorney for the care of the minor child revokes the power of attorney in writing and provides notice of revocation to

you as provided in O.C.G.A. Section 19-9-128.

(3) If you are made aware of the death of the parent who executed the power of attorney, you must notify the surviving parent as soon as practicable. With the consent of the surviving parent, or if the whereabouts of the surviving parent are unknown, the power of attorney may continue for up to six months so that the child may receive consistent care until more permanent custody arrangements are made.

(4) You may resign as agent by notifying each parent in writing by certified mail or statutory overnight delivery, return receipt requested, and if you become unable to care for the child, you shall cause such resignation to be communicated to the parent. If communication with such parent is not possible, you must notify child protective services or such government authority that is charged with assuring proper care of such minor child.

To school officials:

(1) Except as provided in the policies and regulations of the county school board and the federal No Child Left Behind Act, 20 U.S.C.A. Section 6301, et seq. and Section 7801, et seq., this power of attorney, properly completed and notarized, authorizes the agent grandparent named herein to enroll the child named herein in school in the district in which the agent grandparent resides. That agent grandparent is authorized to provide consent in all school related matters and to obtain from the school district educational and behavioral information about the child. Furthermore, this power of attorney shall not prohibit the parent of the child from having access to all school records pertinent to the child.

(2) The school district may require such residency documentation as is customary in that school district.

(3) No school official who acts in good faith reliance on a power of attorney for the care of a minor child shall be subject to criminal or civil liability or professional disciplinary action for such reliance.

To health care providers:

(1) No health care provider who acts in good faith reliance on a power of attorney for the care of a minor child shall be subject to criminal or civil liability or professional disciplinary action for such reliance.

(2) The parent continues to have the right to all medical, dental, and mental health records pertaining to the minor child.

The legislature should be applauded for providing support to families where it had previously been lacking. Of course, as grandparents avail themselves of the Power of Attorney for the Care of a Minor Child Act, we will have the opportunity to gauge its effectiveness and whether it is used, not abused. ***FLR***

Elyse Aussenberg represents individuals in matters involving divorce, custody, child support, paternity, legitimation, adoption, prenuptial agreements and modification or enforcement of court orders. She currently serves on the Board of Directors of the North Fulton Bar Association and the Collaborative Law Institute of Georgia. Aussenberb can be reached at eaussenberg@awlawyers.com

Dana Floyd practices exclusively in family law, including divorce and all issues associated with child custody and visitation. She currently serves as a guardian ad litem in contested custody matters and has represented indigent clients in juvenile court proceedings. She can be reached at dfloyd@awlawyers.com.

(Endnotes)

1 AARP fact sheet, www.grandfactsheets.org September 2007 – US Census Bureau Table DP-2, Profile Selected Social Characteristics 2000
2 O.C.G.A. §19-9-120
3 O.C.G.A. §19-9-122
4 O.C.G.A. §19-9-122(c)
5 O.C.G.A.§ 19-9-123 (1) and (3)
6 O.C.G.A.§ 19-9-123 (2) and (5)
7 O.C.G.A.§ 19-9-123 (6)
8 O.C.G.A.§ 19-9-123 (7)
9 O.C.G.A.§ 19-9-124 (a)
10 O.C.G.A.§ 19-9-124 (b) (3) and (4)
11 O.C.G.A.§ 19-9-125
12 O.C.G.A.§ 19-9-127(a)
13 O.C.G.A.§ 19-9-127(b)(1)
14 O.C.G.A.§ 19-9-128(a)(1)
15 O.C.G.A.§ 19-9-128(c)(1)
16 O.C.G.A.§ 19-9-128(b) and (c)(2)

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.

2009 Legislative Update

by John L. Collar Jr.
Boyd Collar, LLC

The 2009 Legislative Session has come to an end. There was great anticipation and debate during the session over House Bill 24, which was drafted to revise, supersede and conform the Georgia rules of evidence to the federal rules of evidence. HB 24 was pre-filed, went through two readings and was favorably reported upon by the Judiciary Committee before being held over to the 2010 session. The State Bar of Georgia supported the revision of the evidence code.

The following is an overview of family law related legislation that might impact your practice and which has been submitted to Gov. Sonny Purdue for consideration and enactment into law. The topics are:

House Bill 145 – Child support revisions

House Bill 29 – Electronic service of pleadings after the filing of an original complaint

House Bill 126 – Electronic transactions including electronic signatures

House Bill 254 – Third part adoption and home study as a pre-requisite to adoption

House Bill 388 – Option To Adoption Act

Senate Bill 207 – Allowance of the public to attend certain hearings in juvenile court

House Bill 145 –

House Bill 145 proposes amending OCGA §19-6-15(a)(17), the child support guidelines, by clarifying that "Parenting Time Deviation" means a deviation **allowed for** the noncustodial parent based upon the noncustodial parent's court ordered visitation with the child.

House Bill 145 amends OCGA §19-6-15(b)(8) to include "life insurance" as a deviation that is subtracted from or increased to the presumptive amount of child support which is included on Child Support Schedule E. HB 145 also proposes amending OCGA §19-6-15(c)(4) to require that the child support worksheet and any applicable deviations must as set forth on Child Support Schedule E be attached to the final order or judgment entered in a case.

House Bill 145 completely revised OCGA §19-6-15(i)(2)(B) which defines "Low Income", one of the specific deviations. The new language does not define low income as a parent whose gross annual income is at or below $1,850 per month. Instead, the party seeking a deviation based upon low income must demonstrate no earning capacity or that his or her pro rata share of the presumptive child support amount creates an extreme economic hardship for the payment. Presumptively, if the noncustodial parent's sole source of income is supplemental security income under Title XVI of the federal Social Security Act, they shall be considered to have no earning capacity. OCGA §19-6-15(i)(2)(B)(i).

The self support reserve calculation is eliminated in the new statute in all respects. HB 145 proposes if a party seeks a specific deviation for "low income", the court or jury is to examine all attributable and excluded sources of income, assets and benefits to the custodial parent and all reasonable monthly expenses paid by the noncustodial parent to ensure they are actually paid and are justified expenses. OCGA §19-6-15(i)(2)(B)(ii). The court or jury must also evaluate the income, net worth and expenses of both parties, the hardship a reduction in child support based upon the deviation will have on the custodial parent and his/her household, the needs of each parent, the needs of the child and the ability of noncustodial parent to pay the child support. OCGA §19-6-15(i)(2)(B)(iii).

If a low income deviation applies, the minimum amount a noncustodial parent shall pay for one (1) child is not less than $100 per month and the amount shall be increased by at least $50 for each additional child for the same case. OCGA §19-6-15(i)(2)(B)(v).

HB 145 amends OCGA §19-6-15(i)(2)(K)(ii) to provide that if a court or jury determines a parenting time deviation is applicable, the deviation is to be included with all other deviations and treated as a deduction. The old language provided the deviation is applied to the noncustodial parent's basic child support obligation.

HB 145 regarding the revisions to OCGA §19-6-15 goes into effect September 1, 2009.

House Bill 29 –

House Bill 29 amends the Civil Practice Act to provide for electronic service of pleadings after the filing of an original complaint, provides presumptions regarding service of pleadings by e-mail on an attorney and provides a stay of discovery when a motion to dismiss is filed.

HB 29 proposes amendment to OCGA §9-11-5(b), relating to service and filing of pleadings subsequent to the original complaint and other papers. This bill provides that service of pleadings to the attorney or party "shall be made by delivering a copy to the person to be served or by mailing it to the person to be served at the person's last known address or, if the address is not known, by leaving it with the clerk of court." Id. "(D)elivery of a copy" means by hand delivery to the person to be served or leaving at the person to be served's office with a person in charge or, if the office is closed, at the person to be served's dwelling house or usual place of abode with a person of suitable age and discretion residing therein. Id. "Delivery of a copy" was also defined to mean transmitting a copy by e-mail in portable document format (PDF) to the person to be served ***using all e-mail addresses for the person*** as set forth in OCGA Section 9-11-5(f) and showing the following words in capital letters in the subject line "STATUTORY ELECTRONIC SERVICE". Id.

The following is a sample STATUTORY ELECTRONIC CERTIFICATE OF SERVICE -

"Statutory Electronic Certificate Of Service – By affixing this statutory electronic certificate of service to Defendant's Answer and Counterclaim For Divorce (insert name of pleading) and attaching my electronic signature hereon, I do hereby swear or affirm that I have this date served the opposing party with a copy of this pleading by e-mail or placing a copy in regular mail with sufficient postage thereon to the following address:

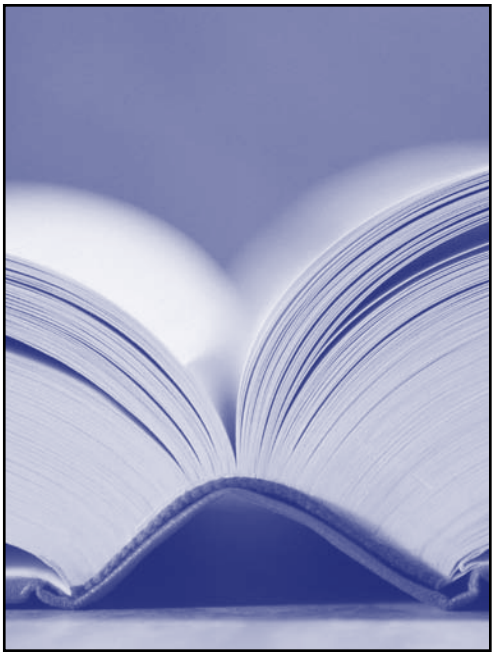
(set forth address of opposing party).

Date:_____ Electronic Signature:_____

HB 29 also proposes amending OCGA §9-11-5 by adding new subsection (f) relating to commencement of an action and service. This new subsection allows a person to consent to being served with a pleading electronically. To do this, the person must:

File a notice of consent to electronic service and include their e-mail address or addresses; OCGA §9-11-5(f)(1)(A); or.

Include the person to be served's e-mail address or address in or below the signature block of the complaint or answer, as applicable; OCGA §9-11-5(f)(1)(B).



A person may rescind their election to be served electronically and has to file a notice of such rescission: OCGA §9-11-5(f)(2).

A person who has agreed to being served electronically bears the responsibility of keeping the court apprised of any changes in his or her e-mail addresses; OCGA §9-11-5(f)(3).

If electronic service is made upon a person and he or she certifies to the court that he/she did not receive the pleading, it is presumed that the pleading was not received unless the serving party disputes the issue of non-service in which case the court shall decide the issue of whether electronic service was perfected; OCGA §9-11-5(f)(4).

HB 29 proposes amending OCGA §9-11-6(e), to include that whenever a party "has the right or required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper, other than process, upon him or her, and the notice or paper is served upon him by mail ***or e-mail***, three days shall be added to the prescribed period."

HB 29 also proposes amending OCGA §9-11-12 relating to answers, defense and objections in civil actions. This code is amended to include provisions to stay discovery for a period of ninety (90) days if a party files a motion to dismiss before or at the time of filing an answer. OCGA §9-11-12(j)(1). The court is to decide the motion to dismiss within the ninety (90) day stay period. Id. The discovery period and all discovery deadlines are extended for a period equal to the duration of the stay imposed by the section. OCGA §9-11-12(j)(2). The court on its own motion or a motion from a party may terminate or modify the initial ninety (90) day stay but may **not** extend the stay period. OCGA 9-11-12(j)(3). If a motion to dismiss raises defenses as set forth in paragraph (2), (3), (5) or (7) of 9-11-12(b) or if any party needs discovery to identify persons who may be joined as parties, limited discovery shall be permitted until the court rules on the motion to dismiss. OCGA §9-11-12(j)(4). This law will become effective on July 1, 2009 and shall apply to motions to dismiss filed after July 1, 2009.

House Bill 126 –

A substantive piece of legislation is House Bill 126, titled the Uniform Electronic Transactions Act. Generally, Chapter 12 of Title 10 of the Code was amended relating to electronic records and signatures. HB 126 applies to any agreement reached and transmitted through electronic means. This conceptually means this legislation

applies to temporary and permanent orders, settlement agreements, qualified domestic relations orders, final judgment and decrees, etc.

OCGA §10-12-2(1) defines an "Agreement" as the "bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations and procedures, given the effect of agreements under the laws otherwise applicable to a particular transaction"…While there are many definitions in this revised Chapter, a few are worth noting are.

"Contract" is defined as the total legal obligation resulting from the parties' agreement as affected by this chapter and other applicable law. OCGA §10-12-2(4).

"Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means. OCGA §10-12-2(7).

"Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. OCGA §10-12-2(8).

OCGA §10-12-3(a) states it is applicable to electronic records and electronic signatures to a transaction. This chapter does not apply to a transaction to the extent it is governed by:

(1) the creation and execution of wills, codicils or testamentary trusts;

(2) Title 11 other than Codes §11-1-107 and §11-1-206, Article 2 and Article 2A; or

(3) The Uniform Computer Information Transactions Act. OCGA §10-2-3(b).

A transaction subject to the Chapter is subject to applicable substantive law. OCGA §10-2-3(d). This possibly means that if an agreement or the terms of an order is reached electronically (i.e., by e-mail), the substantive law supporting enforcement of the agreement or the terms of the order is applicable.

The Electronic Transactions Act applies only to transactions between the parties in which each has agreed to conduct transactions by electronic means. OCGA §10-12-5(b). If not specifically agreed upon, the issue of whether the parties have agreed to conduct a transaction by electronic means is determined by the context and surrounding circumstances, including their conduct. Id. A party that agreed to conduct a transaction electronically may refuse to conduct further transactions electronically. OCGA §10-12-5(c). Whether an electronic record or signature has legal consequences is determined by the provisions of OCGA §10-12, *et seq.* OCGA §10-12-5(e).

A record or signature will not be "denied legal effect" simply because it is in electronic form. OCGA §10-12-7(a). Likewise, a contract shall not be "denied legal effect" because it is agreed upon through electronic means. OCGA §10-12-5(b). If a law requires a record to be in writing, an electronic record is satisfactory. OCGA §10-12-7(c). Last, if a law requires a signature, an electronic signature is sufficient. OCGA §10-12-7(d).

An electronic record or signature is attributable to a person if the record or signature was the act of the person. OCGA §10-12-9(a). A person's electronic record or signature can be proven in any manner including "a showing of efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable." Id. An electronic record or signature is attributable to a person based upon the context and surrounding circumstances at the time of creation, or adoption, including the parties' agreement, if any, and otherwise as provided by law. OCGA §10-12-9(b).

It is imperative for every practitioner and firm to create internal policies regarding electronic communications and what constitutes an electronic signature because of the ease in which an attorney's electronic signature can bind a party to an agreement.

OCGA §10-12-11 provides if a law requires a signature or record to be notarized, acknowledged, verified or made under oath, this requirement is deemed to have been satisfied if the electronic signature of the person authorized to perform those acts, together with all the information required to be included by other applicable law, is attached to or logically associated with the signature or record.

OCGA §10-12-15 establishes the rules to determine if an electronic record has been sent and/or received. *See,* OCGA §10-12-15(a) and (b). An electronic record may be deemed received under the terms of OCGA §10-12-15(b) even if no individual is aware of its receipt. OCGA §10-12-15(e).

Receipt of an electronic acknowledgment from an information processing system, as defined in OCGA §10-12-15(b), establishes that an electronic record was received but, "by itself, does not establish that the content sent corresponds to the content received." OCGA §10-12-15(f). This apparently means that simply because you have an electronic acknowledgment that an electronic record has been received, the acknowledgment itself does not establish that the content sent was actually received.

OCGA §10-12-4 provides the chapter applies to electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after July 1, 2009.

House Bill 254 –

House Bill 254 added a new subsection to adoptions relating to surrender or termination of parental or guardian's rights where the child is to be adopted by a third party. The new subsection provides that no third-party adoption shall occur prior to a home study of the prospective family conducted by the Department of Human Resources or a child-placing agency. The home study must be conducted in conformity with the

regulations of the Department of Human Resources. OCGA §19-8-5(j.1). This subsection is not applicable to stepparent or relative adoptions. Id.

House Bill 388 –

House Bill 388 amends Adoption, Chapter 8 of Title 19 of the Code to enact Article 2, titled "Option of Adoption Act". This Article provides statutory authority for a legal embryo custodian to relinquish rights to the embryo to another, the procedures for relinquishing rights to the embryo to another and establishes that once the embryo is relinquished, any child born is the legal child of the recipient. The legal embryo custodian is defined to be the person or persons holding legal rights and responsibilities for a human embryo and who relinquishes the embryo to another person or persons. OCGA §19-8-40(4). An embryo relinquishment is the legal transfer of the rights and responsibilities to an embryo by the legal embryo custodian and the acceptance of such rights and responsibilities by a recipient intended parent. OCGA §19-8-40(2).

The transfer and relinquishment of the human embryo must be done by written contract between the legal embryo custodian and recipient intended parent prior to the transfer of the embryo as well as any child born from the transfer. OCGA §19-8-41(a). If the embryo was created from donor gametes, the donors irrevocably relinquished their rights to in vitro fertilization and the donors are not entitled to notice of the transfer and their consent is not required. OCGA §19-8-41(c).

OCGA §19-8-42(a) provides for an expedited order of adoption or parentage. The written contract between the legal embryo custodian and recipient intended parent is acceptable in lieu of a surrender of rights. Id. The final order of adoption or parentage terminates any future parental rights and responsibilities of any past legal embryo custodian or gamete donor regarding a child born from the embryo transfer and those legal rights vest in the recipient intended parent. OCGA §19-8-43.

HB 388 proposed revisions to OCGA §19-8-26(c) to include new language regarding the Surrender Of Rights; Final Release For Adoption; Notice To Parent Or Guardian by a parent or guardian of a child. The Surrender is substantively the same and seems to make the Surrender contemplated by this code applicable to Article 1 of the adoption code, as opposed to the Option of Adoption Act, which is now Article 2 of the adoption code.

Senate Bill 207 –

Senate Bill 207 amended OCGA §15-11-78 relating to the exclusion of the public from hearings in juvenile proceedings to allow the general public to attend certain types of hearings before the juvenile court. *See*, OCGA §15-11-78(b)(1)-(6). SB 207 also includes the process in which the juvenile court can close deprivation hearings. A deprivation hearing can be closed only if the court makes a finding on the record and issues a signed order stating the reason(s) for closing the hearing in compliance with OCGA §15-11-78(c) and stating that:

The proceeding involves an act which, if done by an adult, would constitute a criminal sexual offense. OCGA§15-11-78(c)(A); or

It is in the child's best interest to close the hearing. The court has to consider the age of the child, the allegations involved, the effect the open hearing will have on reunification the family unit; whether closing the hearing is necessary to protect the child's privacy, the foster parent or caretaker of the child or the victim of domestic violence. OCGA §15-11-78(c)(B).

SB 207 also gives the juvenile court the authority to close the hearing or exclude persons from the hearing on its own motion or upon the motion of a party, the child, the child's attorney or the guardian ad litem. OCGA §15-11-78(d).

Only the parties, counsel, witnesses, persons accompanying a party for assistance and other persons with a proper interest before the court may be admitted to hearings in which the public is excluded. OCGA §15-11-78(e). The court may refuse to allow a person to attend a hearing provided a finding is made on the record and an order is entered that (1) it is detrimental to the best interest of a child who is a party to the hearing; (2) it will impair the fact-finding process; or (3) be otherwise contrary to the interest of justice. OCGA §15-11-78(f).

The juvenile court judge may prohibit the media by order from not releasing identifying information regarding a child or family members, foster parents or caretaker of the child involved in hearings open to the pubic. OCGA §15-11-78(i). Last, the general public is not allowed to attend juvenile court proceedings unless the hearing is specified as on the public can attend as itemized in OCGA §15-11-78(b)(1) –(6).

While there is a great deal more legislation submitted to Gov. Purdue for enactment into law, the above seems to be primarily related to the practice of family law. Before implementing the above into your daily practice, you should carefully review the entirety of the new statutes and the date they will become effective. ***FLR***

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Interview with Chief Judge Cynthia J. Becker, DeKalb County Superior Court

by Rebecca Crumrine
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Judge Becker recently became Chief Judge of the DeKalb County Superior Court. I sat down with her recently and discussed her career and her community involvement.

Judge Becker wanted to be a lawyer all of her life. She wanted a profession that she could ensure would care for her and any dependents that no one could take away unless it was deserved. She wanted to make a change. She was well on her way to her dream when she entered Georgia State University College of Law. By the time she graduated in 1987, Judge Becker wanted to be a trial lawyer; she wanted to make partner. After graduation, she began her law career as second counsel for Home Depot. While a fantastic experience, the job did not entail a lot of courtroom time. She began at Chambers, Mabry, McClelland and Brooks as a trial lawyer and eventually made partner. Thank goodness, when she went to Walter McClelland and told him that he should wanted to run for a DeKalb County Superior Court Judge position, he told her to stop fussing about it and run. And she ran. And she won. Now, in her 9 year on the bench, she is the Chief Judge of the Dekalb County Superior Court.

When Judge Becker resolved to enter the campaign for a seat on the DeKalb County Superior bench, honor continued to be her first priority, as it had been in her practice– and not just in her campaign, but also in her position as Judge. She sees Judge's conduct as strictly construed. She states, "You can be the world's greatest judge, but if people don't believe that you as a judge are being just then it is damaging to the system and damaging to the faith in the process." Judge Becker concentrates on providing justice, and assuring the people of DeKalb that she sets high standards to meet because it is not the judicial process, but the faith of the judicial process that depends on her diligence, honor and respect. She explains, "If I am an "A" judge, then 10 percent of the time I'm not meeting someone's expectations. That percent, even if its just 1percent of the time, has been an injustice." She goes on to state that that is a hard standard to meet. "We are human, but we have to strive for 100 percent. Like a lawyer, we have to meet the needs of the client, but also meet the professional standards."

The Hon. Cynthia J. Becker

We, as members of the bench and bar, have a responsibility

not only in the courtroom, but also in the community, and Judge Becker's example is one to emulate. She founded and implemented "Challenges Facing the Single Parent," a judicial outreach program to help teenagers understand the reality of being a single parent. She uses the courtroom as a classroom, opening her child support calendar to community school children, predominately middle school age girls. Her philosophy is if you can keep one child in high school and not pregnant, if the child happens to be a girl and then that one child may go to college. Judge Becker sends out a notice to all of the schools in DeKalb County inviting them to schedule a date to come to her courtroom to observe her child support calendar. The students sit in the galley of the courtroom while Judge Becker presides over child support enforcement and contempt hearings, watching her issue bench warrants for failure to appear, sentence jail time for failure to pay and hear sordid excuses for failing to pay child support.

After the calendar, the Judge meets with the students in the courtroom to discuss what they observed and to answer questions. She explains what they just witnesses: people appearing before Judge Becker who failed to remit court ordered child support, and have been summoned to appear before her. The students often are amazed by the past due amounts owed.

Once Judge Becker finishes explaining what the students witnessed, and answering their many questions, she hands each student an index card to keep. She requests each student write a response to life goal questions that she asks—questions such as: What do you want to be doing in five years?; How much money do you want to earn?; What kind of car do you want to drive?; What kind of education or training are you going to need to make your dream possible? After the students respond to the questions on their index cards, Judge Becker explains that the index card holds the student's dreams, and that each student may obtain the dream with hard work and diligence.

Finally, Judge Becker asks questions and provides comments and inputs, regarding what costs are associated with having a baby and the consequences of having a baby. Judge Becker's message is clear. Every student holds his or her future—his or her dreams—in his or her hands, and every choice is his or her own. Directing her efforts towards middle school students, she hopes to impact how important the choices as a teenager are, and how those choices impact the future.

Judge Becker stats she enjoys this community outreach, and sees it as one of the most important things she does as a judge. As previously stated, Judge Becker's position is not just in the courtroom, but to serve as a representative of the judiciary and the judicial process to the community. Yet another avenue by which she may positively affect the community, and be a part of the judiciary serving the community, is the creation and implementation of the DeKalb County Drug Court. In drug court, the offender has the opportunity to receive treatment and rehabilitate. If the offender completes the drug court program, he or she becomes an active positive participant in the community—paying child support, paying taxes, and hopefully actively engaged in his or her child's life. The rehabilitated offender sets an example, and the whole family learns. The family is part of the treatment. It breaks the cycle. Judge Becker is truly an outreach judge, concentrating on her influence in the courtroom and outside the courtroom.

The largest disadvantage to being a judge is the fear she's made the wrong decision. She states that people don't believe that judges worry about the wrong decision. She has to wear a poker face, but worries for days, weeks, months and years about the decisions that she makes, especially in family law custody cases. She has approximately 1,600 new cases each year. In those cases that come to trial, the parties are coming to trial for resolution. To have a resolution she has to make a decision. She tries to make the right decision. But when she's the fact finder, she's limited to the evidence that is provided at trial. She encourages people to try to mediate, to try to take control of their own lives and own resolution.

Although Judge Becker has never calculated the percentage of her docket that is family law, when taking into consideration adoptions and name changes and temporary protective orders she estimates that a minimum of 60 percent of her cases are family law. And of that percentage, easily 65-70 percent are pro se litigants. As for the new child support and custody laws, she follows them.

Judge Becker meets high standards, and expects the same from the lawyers that come before her. Lawyers need to be prepared. Lawyers need to return telephone calls from the opposing attorney, and from the client. Lawyers are advocates for their clients, and need to be attentive to the clients. A lack of doing such is failure to meet the client's needs, to meet the expectations of the bar, and to meet the expectations of the bench. As members of the Bar, we all need to police better.

Her two tips for lawyers coming before her are: (1) always talk to the other side right up to coming in the courtroom. If you haven't, she's going to insist that you do so; and (2) be prepared. We all heard it in law school. Don't just come into court and just throw things up and see where they stick.

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How to Structure Mortgage Payments for the Former Marital Residence

by Sue K. Varon, Esq. and Martin S. Varon, CPA, CVA, JD
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In an economy when houses are not selling; the outstanding debt on the marital residence is greater than the fair market value; and selling the marital residence and splitting the proceeds is not a viable option; a common question arises: What should we do with the marital residence? What happens when a spouse or former spouse continues to make payments attributable to the marital residence?

Can these payments be classified as alimony or is there another alternative? IRS Publication 504 provides guidance in determining whether the payments are alimony. The key is how the house is titled.

If the house is titled in the payer's name (let's assume Husband) but the spouse or former spouse (Wife) lives rent-free in that house, since Husband is obligated to pay the mortgage, real estate taxes, insurance, repairs and utilities on the house he owns, the payments for mortgage, real estate taxes, insurance and repairs are not alimony, nor is the value of Wife's use of the house. However, the payments for utilities may qualify as alimony.

When the house is jointly owned, if Husband is required to pay all the mortgage payments, then he can deduct and Wife must include as alimony half the total payments. In addition, Husband may be able to claim as an itemized deduction half of the interest as an interest expense and Wife may be able to deduct the other half of the interest. The real estate taxes and home insurance are neither deductible nor includable as alimony if the house is jointly owned. Husband can itemize all of the real estate taxes (none of the home insurance).

For the payment to be considered alimony, the IRS requires that the spouses do not file a joint return, the divorce agreement does not designate the payment as alimony, the spouses are not members of the same household when the payments are made, there is no liability to make any payment after recipient's death and the payment is not treated as child support.

Instead of maintaining joint title to the house, waiting to sell the residence at some indefinite future time when the market picks up, what happens if the house is distributed to the Wife in the settlement agreement? Assuming she can refinance, title will be transferred to her and the mortgage will now be in her name. With interest rates at all-time

lows, refinancing may be an affordable option for Wife. She may be able to "buy out" Husband's share of the equity in the equitable division (offsetting the division with other assets) and, with the monthly payment being affordable, Husband may be able to make monthly payments to Wife to cover the new mortgage payments. Husband would prefer the payments to be termed alimony rather than just receiving a mortgage interest deduction if the house had remained jointly titled. The monthly payments to Wife are fully deductible by him as alimony and includable to Wife as income; the Wife is able to deduct the portion of the payment representing mortgage interest. The portion of the payment representing a principal reduction is not deductible. The alimony deduction is taken above the important AGI (adjusted gross income) line on his tax return, in contrast to the mortgage interest deduction which is below the AGI line. Such "below the line" or itemized deductions are subject to being limited (or reduced) if Husband generates approximately $160,000 in adjusted gross income. An added benefit to Husband is that his credit score may improve when his name is removed from the mortgage.

With respect to Wife, although she must include in her income the alimony payments received from Husband, she will obtain the benefit of the mortgage interest deduction. Further, she is not out of pocket for the monthly mortgage payments (receiving the amount as support from Husband) as long as he abides by the settlement agreement. However, if she is relying on the alimony to make the mortgage payment, the most significant risk to Wife comes if he stops paying her.

A summary of the tax treatment is charted below:

Title on Home	Payor	Joint (each liable)	Payee
Can Payor Deduct Payments on Alimony	No	50 percent	Yes
Can Payor Deduct Interest on Mortgage	Yes	50 percent	No
Can Payee Deduct Interest on Mortgage	No	50 percent	Yes
Must Payee Include Such Amounts as Alimony	N/A	50 percent	Yes

Whether representing Husband or Wife, in determining what to do with the marital residence, note should be made that when dividing up appreciated property in a divorce settlement, the value of the property may be overstated if it does not take into consideration potential taxes that would be due on the built-in gain if the property is subsequently sold. (At the present time, after the divorce, if only one of spouses remains the owner of the house, that spouse is entitled to an exclusion of only $250,000, as opposed to a full exclusion of $500,000 if both spouses remained owners of the residence.) The spouse receiving the property should consider having the settlement agreement provide for reimbursement when the property is actually sold or have the equitable division take into consideration the potential taxes, if any. Further, the value of the house may be overstated if there is no consideration taken for all the necessary repairs that need to be made to the property. Prior to setting a value on the property, an inspection and appraisal should be done to quantify the amount necessary for any repairs or diminished value. ***FLR***

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Confessions of a Guardian Ad Litem — The Golden Rules of Co-Parenting

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The American Heritage Dictionary defines "co-parenting" as "an arrangement in a divorce or separation by which parents share legal and physical custody of a child or children." Co-parenting is a conscious decision by both parents to prioritize the children and their sense of security and to put their own personal needs and troubles on the back burner. It is the ultimate example of teamwork. A truly successful co-parenting arrangement is something all parents should aspire to as studies show that children adjust to divorce best if they have parents who cooperate with and support one another. That being said, a successful co-parenting relationship can also be difficult for many parents. Those parents who can rise above the difficulties and put their own needs aside in favor of their children's needs have a fighting chance for a successful co-parenting relationship. My confession for this issue is that I have great admiration for parents who are able to do this.

> *"Co-parenting is a conscious decision by both parents to prioritize the children and their sense of security and to put their own personal needs and troubles on the back burner."*

We, as family law practitioners, should encourage parents to work together for the benefit of their children. I invite you to share with your clients the following basic guidelines for building successful co-parenting relationships. Please note that I refer to these as the "Golden Rules of Co-Parenting" because the main premise behind co-parenting incorporates the same Golden Rule that we learned as children: Do unto others as you would have them do unto you. It's that simple.

Heal yourself

Depression, hurt, anger and bitterness are not conducive to a co-parenting relationship. Redirect your energies away from dwelling on your negative feelings about the other parent to the positive relationship you can have with your child. Seek counseling, join support groups and read books to help you get through this difficult period in your life. Until you take care of yourself and heal your negative feelings about the other parent, you cannot effectively care for your children in a positive, cooperative co-parenting manner.

Maintain appropriate boundaries

Don't interfere with or try to control what goes on in the other parent's home. The truth is that unless your children are being subjected to emotional, mental or physical harm, what happens in the other home is simply none of your business. Things may be done differently in the other household, but that does not necessarily mean that they are done wrong. Accept that it might even be good for your children to be exposed to different ways of doing things.

Treat each other with respect and consideration

Keep sarcasm, criticism and defensiveness out of your conversations. Refrain from making moral judgments about the other parent's lifestyle, friends, values, successes and failures. Don't impose on the other parent's time by showing up late for exchanges or

by waiting until the last minute to make changes to the schedule. Integrity and maturity are key.

Strive for consistency in household rules and routines

Consistency will facilitate the children's transitions between the two homes. Consistency also helps children to build good habits, values and principles. Generally, it is best if both parents present a united front with regard to such things as bedtimes, homework, chores, discipline and mealtimes. However, there will be differences. Parents must recognize that while consistency is optimal, it may not always be practical, and that differences are acceptable.

Learn how and when to compromise

It goes without saying that you and the children's other parent will not always agree on things. Compromise requires an open mind to the possibility that there are alternatives to the way you think things should be done. It also requires an objectivity that allows you separate your own needs from your children's needs. If necessary, use a mediator or parent coordinator to help facilitate a compromise.

Keep your children out of the middle

Never argue in front of the children. When disagreements arise, don't discuss them at custody exchanges or other occasions when the children are present. Instead, wait until the children are not around. If that is not possible, work through the issue using positive conflict resolution techniques, thereby demonstrating to your children that it is possible to solve problems responsibly. Never use the child as a messenger or a go-between. Any special plans or changes in schedules should be arranged directly with the other parent, not through the children.

Be flexible

While a set custody schedule should be adhered to so as to give the children certainty as to where they will be from day to day, there are always exceptions to the rule. Your daughter should not be denied the opportunity to attend the Father-Daughter dance at school simply because it does not fall on one of his custodial days. Your son should not be denied to chance to spend time with out-of-town visiting relatives because they didn't schedule their visit on the other parent's custodial time. The only ones who suffer from such rigidity are the children.

Maintain a reasonable balance of parenting responsibilities

Co-parenting, by definition, means shared parenting and shared responsibilities. Capitalize on each parent's strengths and divide responsibilities accordingly. Both parents should have "fun time" and "work time" with the children so that neither parent is perceived by the children as the "Disneyland parent" or the "slave driver."

Communicate, communicate, communicate

Keeping the lines of communication open is vital to a successful co-parenting relationship. Parents should keep each other informed about all issues affecting the children. In order to avoid any misunderstandings, communications should be open, honest and regular. Be clear with one another and don't make assumptions. Many parents find it useful to set aside a time every week to discuss issues. ***FLR***

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The Golden Rules of Co-Parenting

Heal yourself
Maintain appropriate boundaries
Treat each other with respect and consideration
Strive for consistency in household rules and routines
Learn how and when to compromise
Keep your children out of the middle
Be flexible
Maintain a reasonable balance of parenting responsibilities
Communicate, communicate, communicate

Introducing New Child Support Calculator Enhancements and Legislative Changes

by Jill Radwin
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A collective groan was heard around the state when it was announced that the Child Support Commission was releasing a new set of child support calculators and worksheets. Please do not despair. We believe all of the revisions, or as we like to phrase it- "enhancements," will be to your liking. After all, many of the enhancements came from suggestions generated by members of the Family Law Section.

Background.

Over a year ago, the Child Support Commission, chaired by Sen. Seth Harp (R- Midland), member of the Family Law Section, created a 20 member task force to review the child support electronic calculators or worksheets. The Commission tasked the group with the responsibility of making recommendations for revisions to the calculators. Those involved with the design and development of the electronic calculators felt this would be a systematic and organized method for the revisions. Previously, the Office of Child Support Services (OCSS), who was hosting the various forms of the electronic calculators, found themselves bombarded with suggestions to make revisions. In trying to be compliant, OCSS was making constant changes and receiving hefty invoices from their outside vendor. In only two years of existence, the calculators have been revised six times.

The task force included the following representatives from the Family Law Section: Ed Coleman, Katie Connell, Rebecca Crumrine, Dennis Dozier, Paul Johnson, Deborah Johnson, Johanna Kiehl, Vicky Kimbrell, Jeff Morrow, Regina Quick and Shirley Champa. The task force met on several occasions and communicated via e-mail. The group, chaired by Paul Johnson of Savannah, came up with a list of recommendations. All of which were adopted and accepted by the Child Support Commission.

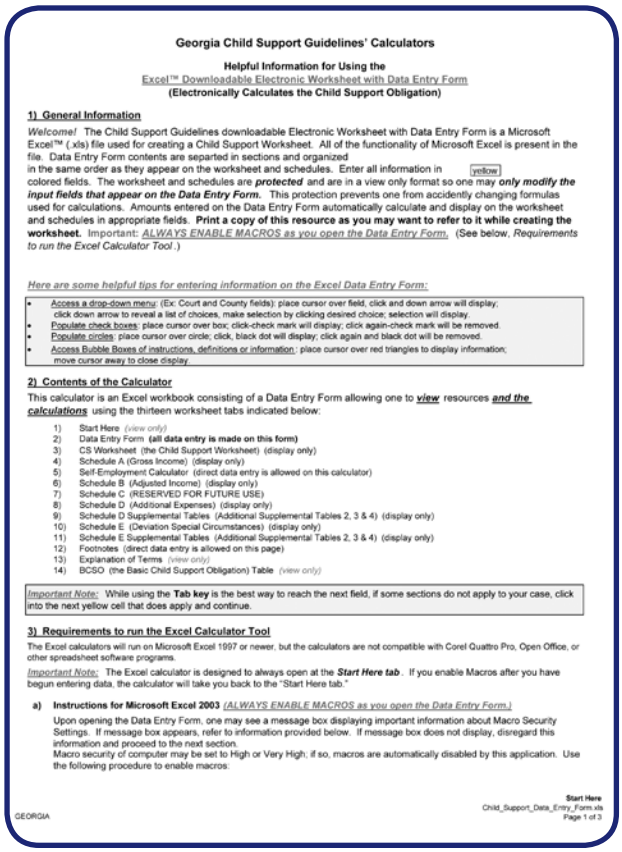
While the staff of the Child Support Commission, housed at the Administrative Office of the Courts, was provided a one-time allocation of funding from the Georgia legislature to enhance the calculators, this money would not be enough to make all of the revisions needed and maintain both the Excel™ and web-based calculator versions. After much thought and discussion with the OCSS, a joint decision was made to phase out the web-based calculators. Effective June 2, 2009, users will no longer be able to initiate one of the web-based versions (the guided, attorneys' or judges version of the web based calculators.) However, if one has saved their worksheet and has their confirmation number, one can still make changes and re-save their worksheet until June 1, 2010. Judges will also be able to retrieve a submitted web-based worksheet until June 1, 2010. Following that date, no one will be able to retrieve or submit any worksheets calculated using the web-based calculators.

Enhancements to the Calculator

The calculators employing the Excel™ software will still be available, boasting a number of new features—"the enhancements,": including:
Data Entry Form—Substituting for the web-based guided version of the calculator, this enhancement provides a second form that one may use to calculate child support. This form will be available in addition to the Standard Excel™ form. The Data Entry form consists of one continuous page for the entry of all case and calculation related information. Information entered on the Data Entry Form will automatically populate the worksheet and applicable schedules with calculations and other appropriate information. Information cannot be entered on the worksheet or schedules if the user chooses to use the Data Entry Form.

Opt in/Opt out Box for the Low Income Deviation—Because the current low income deviation formula is so complex, the electronic calculators currently automatically calculate whether one qualifies or not for a low income deviation. While this has been helpful to litigants, it has also provided a false appearance that this calculation was automatic rather than discretionary. To resolve this, a design change was added as an enhancement to allow the noncustodial parent to opt- in or out for the deviation utilizing a check box. If the court or the parties fail to check this box, the low income deviation amount will not be included in the total deviation amount, possibly affecting the final child support obligation amount found on the worksheet. The judge or one of the parties may also select an opt-out feature that will counter the checked box to disallow the deviation.

Addition of a Comment Box to the Worksheet—A box has been added to the top of the Worksheet on the Excel™ calculators allowing for an explanatory comment. When printed, the comment will appear on the face of the worksheet and will provide helpful comments to either the opposing counsel or the court. This section is not meant for ex parte communications but simple guidance, such as "the mother's initial worksheet," etc. The Data Entry form will also have a place for the comment box to populate the worksheet.



Georgia Child Support Guidelines' Calculators

Helpful Information for Using the
Excel™ Downloadable Electronic Worksheet with Data Entry Form
(Electronically Calculates the Child Support Obligation)

1) General Information

Welcome! The Child Support Guidelines downloadable Electronic Worksheet with Data Entry Form is a Microsoft Excel™ (.xls) file used for creating a Child Support Worksheet. All of the functionality of Microsoft Excel is present in the file. Data Entry Form contents are separted in sections and organized in the same order as they appear on the worksheet and schedules. Enter all information in yellow colored fields. The worksheet and schedules are ***protected*** and are in a view only format so one may ***only modify the input fields that appear on the Data Entry Form.*** This protection prevents one from accidently changing formulas used for calculations. Amounts entered on the Data Entry Form automatically calculate and display on the worksheet and schedules in appropriate fields. **Print a copy of this resource as you may want to refer to it while creating the worksheet.** Important: *ALWAYS ENABLE MACROS as you open the Data Entry Form.* (See below, *Requirements to run the Excel Calculator Tool.*)

Here are some helpful tips for entering information on the Excel Data Entry Form:

- Access a drop-down menu: (Ex: Court and County fields): place cursor over field, click and down arrow will display; click down arrow to reveal a list of choices, make selection by clicking desired choice; selection will display.
- Populate check boxes: place cursor over box; click-check mark will display; click again-check mark will be removed.
- Populate circles: place cursor over circle; click, black dot will display; click again and black dot will be removed.
- Access Bubble Boxes of instructions, definitions or information: place cursor over red triangles to display information; move cursor away to close display.

2) Contents of the Calculator

This calculator is an Excel workbook consisting of a Data Entry Form allowing one to ***view*** resources ***and the calculations*** using the thirteen worksheet tabs indicated below:

1) Start Here *(view only)*
2) Data Entry Form **(all data entry is made on this form)**
3) CS Worksheet (the Child Support Worksheet) (display only)
4) Schedule A (Gross Income) (display only)
5) Self-Employment Calculator (direct data entry is allowed on this calculator)
6) Schedule B (Adjusted Income) (display only)
7) Schedule C (RESERVED FOR FUTURE USE)
8) Schedule D (Additional Expenses) (display only)
9) Schedule D Supplemental Tables (Additional Supplemental Tables 2, 3 & 4) (display only)
10) Schedule E (Deviation Special Circumstances) (display only)
11) Schedule E Supplemental Tables (Additional Supplemental Tables 2, 3 & 4) (display only)
12) Footnotes (direct data entry is allowed on this page)
13) Explanation of Terms *(view only)*
14) BCSO (the Basic Child Support Obligation) Table *(view only)*

Important Note: While using the **Tab key** is the best way to reach the next field, if some sections do not apply to your case, click into the next yellow cell that does apply and continue.

3) Requirements to run the Excel Calculator Tool

The Excel calculators will run on Microsoft Excel 1997 or newer, but the calculators are not compatible with Corel Quattro Pro, Open Office, or other spreadsheet software programs.

Important Note: The Excel calculator is designed to always open at the ***Start Here tab***. If you enable Macros after you have begun entering data, the calculator will take you back to the "Start Here tab."

a) **Instructions for Microsoft Excel 2003** *(ALWAYS ENABLE MACROS as you open the Data Entry Form.)*

Upon opening the Data Entry Form, one may see a message box displaying important information about Macro Security Settings. If message box appears, refer to information provided below. If message box does not display, disregard this information and proceed to the next section.
Macro security of computer may be set to High or Very High; if so, macros are automatically disabled by this application. Use the following procedure to enable macros:

GEORGIA

Start Here
Child_Support_Data_Entry_Form.xls
Page 1 of 3

Footnotes to the Worksheet-In addition, both Excel™ worksheets will include a spreadsheet page or space to write explanatory footnotes about a particular line or piece of information entered on either version of the worksheets and schedules. Again, the Task Force recommended this enhancement to provide guidance to the court or opposing counsel as to why certain information or sums were entered.

Specify Type of Deviation on Line 10 of the Worksheet—The type of deviations selected on Schedule E will now be identified under the instructions on line 10 of the worksheet. Line 10 of the worksheet displays whether deviations, coming over from Schedule E, are added or subtracted from the presumptive amount of child support. For example, the parties select a low income deviation and extraordinary educational expenses as desired deviations. Line 10 will specify that the deviations chosen are "low income deviation" and "extraordinary educational expenses." This will provide the court with a quick view of the deviations being requested by the parties.

Bubble Boxes to Provide Instructions or Information throughout the Excel™ Worksheet, Schedules and Data Entry Form—Pop up bubble boxes, a feature available with Excel™ software will be accessible in designated locations throughout the worksheet, schedules and data entry form by the user when pointing the computer's mouse at a red triangular shape located in the top right corner of a data field. The boxes will open to display information, helpful hints, definitions and/or instructions that relate to that data field.

Self-Employment Calculator—Many self-employed litigants are not clear on how to calculate one's self-employment income pursuant to the statute. To allow ease of calculation, a self-employment calculator was created. After entering data on the self-employment calculator, the resulting self-employment income will populate in the self-employment income field on Schedule A or the Data Entry form. If one chooses not to use the calculator, the user has the option of just entering the self-employment income directly on Schedule A or Data Entry form.

Parenting Time Deviation Calculates with the Other Deviations on Schedule E—The parenting time deviation which used to adjust line 5 of the worksheet (the noncustodial parent's basic child support obligation), will now calculate on Schedule E or with all of the other deviations on the Data Entry form. As a result, there is no longer a need for lines 9a and 9b regarding the presumptive amount of child support with and/or without a parenting time deviation. Line 9 of the worksheet now replaces former Lines 9a and 9b and reflects the presumptive amount of child support.

Other enhancements also reduce the verbiage throughout the worksheet and schedules to decrease the number of printed pages; revise and clarify instructions; allow the Excel™ calculator to be compatible with versions of Excel 97 and later; round off the final child support obligation amount to an even dollar amount (i.e., an obligation amount of $501.25 is rounded off to $501.00); and, add DHR, ex rel if applicable to reflect that DHR has filed the action on behalf of the children.

The revised calculators became available late-April and the new versions (Version 7) can be accessed from the following website: www.georgiacourts.org/csc. At this Child Support Commission web page, one will click the link that will take them to the download page. Also, on the download page, one will find available the two new paper and pen versions of the worksheets. There is an existing paper version of the worksheet and schedules that has been edited to provide more user friendly instructions and to reduce the number of printed pages, which is specifically designed and tailored to allow a user to manually calculate child support. Moreover, there is now a new EZ form available. The EZ form set comes with definitions and a table for calculation purposes. The EZ was specifically created for emergency situations, such as with Temporary Protective Orders, when there is a need for child support without lengthy calculations. The EZ form consists of two pages and does not provide space for adjusted child support (self-employment taxes, preexisting orders and qualified children) and deviations. Both paper versions of the worksheet/schedules and the EZ form are available now for downloading.

Even though the electronic calculators and the paper versions can be downloaded to one's hard drive, it is recommended that users return to the Child Support Commission website periodically to check for new versions of the calculators and worksheets. In particular, new versions of the electronic calculator and paper worksheet will be available Sept. 1, 2009. New legislative changes to the guidelines are expected to go into effect on that date.

New Legislative Changes

The 2009 Legislature passed House Bill 145 which contained revisions to child support guidelines, §19-6-15. Revisions or clean up language in the bill pertain to the worksheet subsection, parenting time and inclusion of the life insurance deviation under subsection (b) of the guidelines. The language regarding the worksheet clarified that if there are no deviations requested, then Schedule E need not be attached to the worksheet and final order. This will be especially pertinent if one is using the EZ form which does not include schedules. The parenting time revision clarifies that when calculating the deviation, this downward deviation shall be added with all other deviations granted by the court or jury. Also, subsection b of the guidelines, which provides a road map to the child support calculation, left out any reference to a possible deviation when the parties have life insurance and the child is the beneficiary. It is already listed as a possible deviation under the deviation subsection (subsection i). The bill provides for that correction.

Besides these clean up provisions, HB 145, sponsored by Child Support Commission member and Rep. Edward Lindsey (R-Atlanta), included a substantive change to the low income deviation. The formula which had an income requirement and self support reserve was removed. In its place, the court at its discretion may determine the deviation amount, using the following as guidance: "[f] or the purpose of calculating a low income deviation, the noncustodial parent's minimum child support for one child shall be not less than $100 per month, and such amount shall be increased by at least $50 for each additional child…" While the new low income deviation would be at court's discretion, the provision guides the court or jury in examining the noncustodial parent's attributable and excluded sources of income. The court or jury shall also review the custodial parent's economic situation. After a review of the noncustodial parent's gross income and expenses, and "taking into account each parent's adjusted child support obligation and the relative hardships on the parents and the child, the court or jury may consider a downward deviation to attain an appropriate award of child support which is consistent with the best interest of the child."

This completely redrafted low income deviation is the result of another Child Support Commission task force. Judge Louisa Abbot, Chatham County Superior Court, and the Guidelines' Statute Review Subcommittee chair assigned a Study Committee to review problems with the current low income deviation provision. She appointed Commission member and Court of Appeals of Georgia Judge Debra Bernes to chair the Study Committee. The Study Committee included Superior Court Judges Cindy Morris, Joe Bishop, Thomas Hodges, Quillian Baldwin and Sheryl Jolly, as well as Family Law Section member and private attorney Regina Quick, representatives from Atlanta Legal Aid and Georgia Legal Services, Commission on Family Violence, and the OCSS. The Committee met and discussed the issue for 6 months prior to submitting a recommendation to the Child Support Commission. The Commission's final recommendations became House Bill 145. It passed the General Assembly in March and is expected that the Governor will sign the bill shortly. However, the bill will not go into effect until Sept. 1, 2009.

If you have any further questions or comments about the changes to the calculators and the legislation passed during the 2009 Legislative Session, please contact Jill Radwin, at radwinj@gaaoc.us. ***FLR***

Jill Radwin works for the Georgia Administrative Office of the Courts, where she serves as the Staff Attorney to the Child Support Commission and is the Executive Director of the Georgia Supreme Court Committee on Civil Justice. She is a graduate of the University of Alabama School of Law, and is a member of the Family Law Section. She can be contacted at radwinj@gaaoc.us.

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