



# The Family Law Review

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## Premarital Agreements and the Young Couple

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A premarital agreement is a legally binding contract between two people who intend to marry that determines the property rights of the surviving spouse upon the death of the first spouse and that may also determine property and support rights if the marriage ends in divorce.

Not so long ago the typical person considering a premarital agreement was older, had been widowed or divorced and had children from a prior marriage whom he or she wanted to provide for at death. A premarital agreement remains a useful planning tool for such individuals. When there is a significant disparity in property and income the economically better off partner may wish to limit his or her financial obligations, especially in the event the marriage ends in divorce. Even when such persons are in comparable economic circumstances, they may each wish to preserve their own assets and to avoid disputes with each other if the marriage ends in divorce or with the other heirs of the deceased spouse if the marriage ends in death. Often, because of their ages, there is no expectation that the couple will have children together.

As premarital agreements have gained favor as a means to resolve financial rights in advance, younger couples entering into first marriages are seeking them with increasing frequency. There are no reliable statistics documenting this trend, or the reasons for it, but the experience of the author, coupled with an informal and unscientific survey of colleagues, suggests that the trend is real. There appear to be several reasons for it:

- Today's young adults will be the beneficiaries of the tremendous wealth built by their grandparents or great-grandparents, the frugal children of the depression and the post-World War II period, and their own successful parents. Sometimes the wealth coming from the older generation is in the form of a family business that the bride or groom is, or expects to become, active in. Parents, wishing to preserve their wealth in the family, urge their children toward a premarital agreement. The reality of this factor is

borne out by the frequency with which the longtime attorney for the parents of the bride or groom is called upon to draft and negotiate the agreement.

- Many of today's young adults had a front row seat at their parents' divorce and are seeking an alternative to the sometimes bitter fighting that sapped energy and resources from the family. Some of these young adults witnessed the tensions that can arise over disposition of property after the death of a parent or grandparent who was married several times and did not plan for allocation of property among the widow or widower and the children and stepchildren.
- Many young adults are delaying marriage until their early 30s. Some of these more mature young people have become established in a career and have built up some assets, often have acquired a home and retirement benefits, or have become wealthy as entrepreneurs. A premarital agreement is one way for such persons to protect that premarital wealth as a separate asset.
- Premarital agreements have gained much wider acceptance generally. The notion that a premarital agreement is a token of lack of faith in the future of the marriage has begun to fade. More persons getting married are able to consider whether a premarital agreement is appropriate for them – and it is not for everyone – while still holding on to their belief in romantic love.

When the couple is young, they, and the attorneys who represent them, must recognize that the approach to formulating the specific terms of the agreement should not necessarily be the same as if the couple were over 50 with independent assets and the means of supporting themselves. There are several key factors that parties and their attorneys should take into account:

- The couple may have children together. Children change everything. Even if the couple assumes they

*See Premarital Agreements on page 4*

# Editor's Corner

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**T**ime sure does fly. It seems just yesterday I wrote about the birth of my daughter and how that affected me as a Family Law Attorney. She is now two and now I really see how fast time flies by. I hope we all take time to appreciate the things we enjoy and the people we love. We have had many section members and friends of the section suffer illnesses and losses in 2008 and I urge all of us to reach out to them in support. And as attorneys handling one of the most difficult areas of the law, helping and supporting each other is crucial. Our Family Law Section is bigger than ever, but let's always remember and maintain the camaraderie, without which, the practice of family law would be unbearable (at least for me).

This year's annual Family Law Institute is shaping up very nicely. Be sure to make your reservations and register for learning and fun in the sun this Memorial Day Weekend. Tina has planned a very special program.

I hope you enjoy this first issue of the year. We continue to receive wonderful contributions from across the state and across the country. Please continue to contribute ideas, articles and photos. Your contributions are what make the FLR great! I hope to see you all at the end of May at the Amelia Island Plantation in Amelia Island, Fla. [FLR](#)



*Jolie & Valerie Kessler*

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# A Note from the Chair

by Edward J. Coleman III, chair  
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I want to take this opportunity to wish all the members of the Family Law Section a Happy New Year. I was going to say “happy and prosperous”, but in today’s economic climate, that may be an unrealistic wish. You have probably read the same articles I have in recent weeks discussing the notion that couples cannot afford to get divorced so they stay together; sometimes the parties divorce but keep living together, at least long enough to sell the jointly owned house. On the other hand, poor management of family finances, or simply the inability to discuss money matters, is one of the leading causes of divorce. So, economic hard times cuts both ways. I think it behooves all of us to be particularly sensitive to the financial impact that divorce and separation can have on our clients and their children. A good divorce lawyer always inquires with clients about how hard the couple has tried to preserve the marriage. What is the real cause of the separation? In the proper cases, let’s help our clients understand that money problems are universal and that divorce usually makes that worse. By the way, according to [divorcelawyersource.com](http://divorcelawyersource.com), January is the top month for divorce. Maybe we should all take a long vacation right now.

We have had two changes in the leadership of the section. Our Legislative Liaison, Catherine Knight, has stepped down from that role to devote time to her new practice in her Roswell office where she will concentrate on mediation, collaborative law, and guardian ad litem work. On behalf of the Executive Committee, I express our deep gratitude to Catherine for many years of hard work on behalf of the Family Law Section. We will continue to seek Catherine’s advice on matters of interest to the section. John L. Collar, Jr. of Boyd Collar, LLC has accepted my invitation to replace Catherine as our Legislative Liaison, and I invite all of our members to communicate with John regarding any legislative developments that may be of interest or concern to you. A number of pre-filed bills will be closely watched in Georgia this legislative session, including

HB 24 (introduced by Wendall Willard), which is a sweeping overhaul of the evidence code. Representative Kevin Levitas (Georgia House District 82) has pre-filed HB 16 which would make unlawful the use of electronic tracking devices to track the movements or location of another person; his bill includes an important exception: “This code section shall not apply when the registered owner, lessor, or lessee of a vehicle has consented to the use of the electronic tracking device with respect to that vehicle.” I am not sure if this bill is intended to prohibit the practice or just tell you how to do it.

I am also excited about our upcoming Family Law Institute, chaired by Tina Shadix Roddenbery, to be held at Amelia Island Plantation. This year’s program will include topics of interest to all practitioners. Please watch for announcements from I.C.L.E. and register early. This year Randy Kessler, as incoming Secretary of the Section, will be organizing our traditional Nuts & Bolts of Family Law Seminars to be held in August and September. If you would like to see a particular subject covered in the seminar, please contact Randy Kessler.

In my last column for this newsletter, I invited members from areas outside of Atlanta to express their interest in serving as informal liaisons to the section, so that the executive committee can be aware of developments in all parts of the state. According to the State Bar of Georgia website, there are 87 local and circuit bar associations in Georgia [see, “Directories” link at [gabar.org](http://gabar.org)]. To each of these organizations, I reiterate my invitation to designate one or more of your members as a point of contact for our section. One of my goals on behalf of the section is to develop additional resources for practitioners through links to our website. If any member would like to suggest helpful resources, links, publications, or seminars that would be of interest to our members, please let me or another member of the executive committee know. Thanks again to all of those who support the Family Law Section. Have a great year. [FLR](#)

will both continue to work fulltime, their plans may prove unworkable. A child may be disabled or otherwise require an unusual level of parental attention. The couple may discover after a child is born that having a parent at home suits both of them. Or, the couple may realize that it is in their common economic interest that one career take a backseat.

- The younger the couple, the longer the timeline that must be taken into account. A 30-year old couple getting married today may still be together in 60 years. The number of unknowns in their lives is virtually impossible to contemplate and plan for in a contract. Younger couples tend to focus on the possibility the marriage may end in 5 or 10 years and on terms that may appropriate if that occurs. They have much greater difficulty contemplating a 60-year marriage that ends in death and the terms that would be appropriate and fair after so many years.
- A corollary to the above is that any provision of the agreement that fixes the rights of the economically disadvantaged party at some predetermined level will likely prove to be grossly unfair to that party if the marriage ends, whether by death or divorce, after 20 or 30 years. He or she may develop health problems and be unable to work. Inflation may erode the value of a fixed cash payment. There are also risks for the wealthier party in fixing an obligation at a predetermined level. If that party loses his or her wealth as a result of business reverses or bad investments he or she will remain liable to meet the financial obligations established under the agreement.

There are a number of options younger couples and their counsel may wish to consider in formulating the terms of a premarital agreement that will meet their objectives and still stand the test of time:

- The agreement could provide that each party retains the right to seek spousal support in the event of divorce, or that the economically weaker party retains such a right while the wealthier party waives his or her claim. Of course, in the event of divorce that party would still have to prove the need for support. There are variations on this theme. For example, parties who wish to avoid court could agree to binding arbitration of a spousal support claim. Or, the agreement could provide for a limited duration support waiver; for example, a waiver that stays in effect until a child is born or the fifth anniversary of the marriage with the right to seek support reinstated thereafter. Such a provision would provide some security

for an economically weaker party who may leave fulltime work to be a homemaker.

- The agreement could provide that in the event of divorce each party would retain exclusive rights to his or her premarital assets and any assets received by gift or inheritance while also providing for the parties to share the fruits of their common labor. For parties whose primary objective is to protect their right to inherited assets, and who will be working during the marriage and creating shared assets, such an agreement can work well for both parties. It would allow both to build some financial security through savings and investment during the marriage while allowing each to decide how they wish to deal with their inherited assets. Over time some may wish to contribute more of their separate assets to the household, but a party who wants to keep his or her inheritance separate would have the right to do so.
- A variation on the above is an agreement that singles out a specific asset for special treatment in the event of divorce. Often the asset is an ownership interest in an existing business or a professional services practice, such as a law or CPA firm. A premarital business that appreciates in value as a result of the efforts of either or both parties during the marriage could be subject to an equitable distribution claim. An agreement could preclude such a claim, and the costly litigation that goes along with it, while retaining the non-owner spouse's right to share in retirement benefits and other assets acquired with the compensation received by the owner-spouse for working in the business.
- When a wealthier party wishes to retain his or her exclusive right to property in his or her name, the agreement could include some compensating features to provide financial security to the other spouse. For example, the agreement could provide that the wealthier party would transfer specific property, such as a home, into the joint names of the parties. It could provide that the wealthier party would make a specified cash gift to the other party upon marriage, or on a specified schedule thereafter, to enable him or her to build up an investment portfolio for future financial security. There are a variety of ways such an obligation could be structured, limited only by the desires and the imaginations of the parties and their counsel.
- To address the death scenario, one option is the parties could simply retain their rights under state law in the event of death. This means that the surviving spouse would be entitled to survivor benefits under a private, qualified retirement plan and under most governmental retirement plans just as he or she would if there were no agreement. It

would mean he or she would have the same right to a spouse's share of the deceased spouse's estate as would be in effect if the parties did not have an agreement.

- Another option for providing for the death of a spouse is for the wealthier spouse to agree to create a trust funded at a specified level, or with specified assets, that provides for the survivor to have the income, and, if necessary, to invade the principal. However, as discussed above, parties and their counsel should consider the possibility that the death may occur very far into the future and that the terms will be either inadequate for the survivor or unreasonably burdensome for the decedent's estate.
- Parties may also wish to consider provisions for life insurance. Again, as discussed above, an amount that may seem entirely adequate today may be wholly inadequate 20 years from now. Moreover, if the spouse obligated to maintain insurance opts for term insurance, which will be very inexpensive when the parties are young, he or she may discover that the cost of maintaining it is prohibitively expensive in the later years. For some couples, a life insurance product that builds cash value may be a better option.
- An option parties may wish to consider to provide financial security for the economically weaker spouse under either the death or divorce scenario is an obligation on the part of the wealthier spouse to pay the premiums on a policy of long-term care insurance. Such a policy will provide for at least some of the cost of nursing home care for a spouse who needs such care.
- Finally, parties may wish to consider a provision that automatically terminates the agreement in its entirety after a specified number of years, often called a sunset provision. When an agreement terminates under a sunset clause, the parties are restored to the rights under state and federal law they would have at the end of the marriage, whether by death or divorce, if they had never had a premarital agreement. A variation on this theme is an agreement under which certain provisions terminate after a specified number of years. For example, an alimony waiver could terminate after a certain number of years or the birth of a child. Similarly, a waiver of spousal rights at death under

state law could terminate after a specified number of years without terminating the agreement as a whole.

A good premarital agreement will be tailored to meet the specific desires and circumstances of the parties. The solutions suggested above to achieve such an agreement are by no means the only options available nor are they mutually exclusive.

**A good premarital agreement will be tailored to meet the specific desires and circumstances of the parties.**

Ideally, a party who wishes to have a premarital agreement will broach the subject and begin negotiations well before the wedding date. The proposed agreement will be drafted and given to the other party in sufficient time to get meaningful legal advice about whether to sign it as is or seek modifications. When the couple is young, it is even more important that the discussions and drafting begin far in advance of the wedding. Many couples decide to get married, pick a date, and start making financial commitments for a venue, caterer, and other vendors.

Only then do they focus on a premarital agreement. Negotiations that take place in the midst of wedding plans with invitations about to go out can be extremely stressful for both and too often unfair to one of them. Ideally, the couple would decide to get married, start the discussion about a premarital agreement, resolve any disagreements, and only then start making deposits for catering and invitations. [FLR](#)



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*Relations Manual for the District of Columbia (LexisNexis 2002) (with co-author, Hon. Diane Brenneman), and with Pasternak & Fidis partner Marcia C. Fidis, Premarital and Domestic Partnership Agreements in Maryland, Virginia and the District of Columbia (Maryland Institute for Continuing Professional Education of Lawyers (MICPEL), expected publication October 2008). In June 2005 Washingtonian magazine called her "one of the nation's leading specialists" in premarital agreements.*

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# Case Law Update: Recent Decisions

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## ADOPTION/JURISDICTION

*Sastre, et al. v. McDaniel, et al.*, A08A1485  
(Sept. 23, 2008)

The adopted child's birth was on March 1, 2006. The Sastres were recognized by her biological parents as the child's godparents. The biological mother coped with substance abuse problems and in January of 2007, the Juvenile Court issued a written order that the child was deprived and was removed from the biological mother and father and placed in DFCS custody. In August of 2007, the child remained in the custody of the Department, and the biological parents executed a separate surrender of their parental rights in favor of the Sastres. The Sastres filed a petition in the Superior Court on Sept. 17, 2007, and DFCS filed an objection to the petition stating that they were trying to thwart any court order terminating the biological parents' parental rights. On Nov. 5, 2007, DFCS filed a petition for the termination of parental rights in the Juvenile Court and the Sastres moved to intervene in the termination proceeding. In addition, the child's foster parents (potential adoptive parents) also filed an answer and defenses to the motion to intervene and to dismiss in the Superior Court petition. The Superior Court dismissed the Sastres' complaint pursuant to O.C.G.A. §19-8-3 (a) (3) finding that the Sastres were nonresidents of Georgia and all other issues pending in connection with the adoption action were moot.

The Sastres appealed and the Court of Appeals reverses. The adoption statute pursuant to O.C.G.A. §19-8-1 et seq., fails to define the words "bona fide residents", and the Sastres argue that the word "residents" should be defined as it is in O.C.G.A. §19-5-2. The Sastres filed a verified pleading that they were residents of the state of Georgia since 2002 and have moved to Tennessee in November 2007 to permit the husband to attend seminary education, but plan to return to Georgia after

he has completed his study. Therefore, we conclude that the term used in Chapter 8 of Title 19 that "bona fide resident" has the same definition or requirement as divorce jurisdiction for the purposes of determining eligibility to adopt, which requires a showing of the status as a Georgia domicile for at least 6 months immediately before the filing for petition for adoption. A domicile refers to a single fixed place of abode with the intention of remaining there indefinitely or a single fixed place of abode where a person intends to return, even though that person may in fact, be residing elsewhere.

## CHILD SUPPORT

*Johnson v. Johnson*, S08F1251 (Sept. 22, 2008)

The Final Judgment and Decree of Divorce was entered in November of 2007, which awarded the wife primary custody of the two minor children. Child support was set at \$935.31 per month, with an extra \$100 per month to be applied towards the arrearage pursuant to the temporary order. The child support calculation did not include the children's private school tuition or any findings of fact why such was not included. The wife appeals and the Supreme Court affirms.

Extraordinary educational expenses may be factored in as a deviation to the presumptive amount of child support but are not required to be factored into the child support calculation. A trial court is only required to make findings of fact if a deviation is applied deviating from the presumptive amount of child support. Here, the trial court adhered to the child support obligation table and enforced the presumptive amount of child support and therefore is not required to make any findings or explanations in its decision to forego applying the children's private school tuition to the child support calculation.

## CONTEMPT/ARREST ORDER

*Hall v. Doyle-Hall*, S08A0980 (Sept. 22, 2008)

The ex-wife filed a motion for contempt for the ex-husband's failure to pay funds awarded as alimony, child support and property division. The Superior Court found the husband in willful contempt and ordered him to purge himself of the contempt by paying, among other things, \$18,383.81 of arrearage. In addition, the contempt order also provided that in the event the husband failed to pay the arrearage as specified, upon affidavit of noncompliance executed by counsel for the wife, an order would issue directing that the husband be incarcerated until such time as he purges himself of contempt by paying the arrearage. The husband appeals and the Supreme Court reverses.

The fact that an incarceration order for failing to pay ordered support arrearages is self-executing is not, in and of itself, problematic. Therefore, ordering incarceration at a later time unless payment of a support arrearage has been made is not violative of due process. In *Moccia*, a similar type of contempt order was issued that allowed the arrest order to take effect upon affidavit of the mother. It was held in *Moccia* that this was erroneous because it placed the keys to the jail in the mother's hands and there was no mechanism providing whereby an officer of the court would possess objective information as to whether the order at issue had been complied with. In other words, the incarceration of the contemptuous party being dependent upon merely the averment of an interested party is erroneous. In the present case, incarceration does not depend upon the averment of the ex-wife as to noncompliance, but rather upon the affidavit executed by her attorney. However, the ex-wife's attorney is an interested party. Therefore, to be a valid arrest order, the affidavit containing such information must come from a neutral and disinterested court official or other officer based upon objective information. In as much as the present provision fails to provide a mechanism by which such an officer of the court would provide an affidavit regarding the ex-husband's noncompliance with the directives at issue, it must be stricken from the judgment.

#### **CONTINUANCE/ CHILD SUPPORT/ ATTORNEY'S FEES**

##### ***Appling v. Tatum*, A08A0886 (Oct. 23, 2008)**

In 2006, the father filed a petition for legitimation. The mother filed an answer and a counterclaim to establish custody, visitation and child support. The father filed a motion for continuance which was denied and a bench trial was held without the father's presence. The court awarded joint legal custody to the parents and child support in the amount of \$2,200.00 per month to the mother and visitation rights to the father. In addition, the trial court awarded the mother \$10,000 in attorney's fees pursuant to O.C.G.A. §19-6-2. Among other things, the father appeals the denial of his motion for continuance, child support and attorney's fees. The Court of Appeals affirms in part and reverses in part.

Prior to the hearing, the father filed a motion for continuance, which included a letter from a physician stating that he had extensive maxillofacial surgery on Aug. 15, 2007, and could not be available for trial until Nov. 6, 2007. The father's attorney appeared and said it was necessary for the father to appear to explain his income and how it might be affected by the outcome of surgery. In support, counsel for the father argued and relied on O.C.G.A. §9-10-154, that if either party is prevented from attending the trial of the case, then counsel for the absent party will state in his place that he cannot go safely to trial without the presence of the absent party, the case shall be continued, provided that the continuance of the party has not been exhausted. In this case, there have been 5 continuances that were filed on behalf of the father. In addition, the court noted that the hearing date had been set in consideration of the father's surgery and there had been several continuances due to his illness. Therefore, the trial court did not abuse its discretion in denying the continuance.

The father argues that the trial court was in error in including his K-1 schedule (or pass through partnership income) in its calculation of child support. Testimony by the father's accountant stated that the father's original 2005 tax return showing the K-1 income was at \$900,000. The amended 2005 tax return showed K-1 income of \$400,000. Even the father's accountant conceded that the K-1 income is treated as ordinary income by the IRS. Furthermore, O.C.G.A. §19-6-5 (f) (2) outlines those items that are excluded from gross income and income reflected on a K-1 is not included on that list. Partnerships are not separately taxable entities, and partnerships incomes and expenses pass through to the individual partners. Therefore, the trial court was correct in including the father's K-1 income in the calculation of child support.

The father also argues that the Court did not take into consideration his present diminished earning capacity from the illness while establishing the child support obligation. There was no documentation evidence other than the Domestic Relations Financial Affidavit and 2005 tax return. There was no oral testimony or any other evidence that would show the father's present earning capacity. However, there was evidence that the father built a \$1,000,000 home on Lake Lanier in 2007 and there was no mortgage owed on the house and that his Feb. 27, 2007, Domestic Relations Financial Affidavit showed monthly income of \$94,308.

The husband also argues that the trial court erred in awarding attorney's fees without any findings of fact as to the parties' present financial status and without a hearing. However, the award is reversed on different reasons. The trial court premised the award of attorney's fees upon O.C.G.A. §19-6-2, which governs the grant and enforcement of attorney's fees in alimony and divorce cases. Here, this is a case regarding legitimation, and therefore, the award of attorney's fees is not applicable and is reversed.

## DECLARATORY JUDGMENT

*Acevedo v. Kim*, S08A0798 (Nov. 3, 2008)

The parties were divorced in 1996 and there were two minor children born as issue of the marriage. Child support was established at \$1,000.00 per month per child from Oct. 1, 1996, through May 31, 1997, and \$750.00 per month per child from June 1, 1997, through Jan. 31, 1998. There was a formula that was to be applied in even-numbered years where the child support would increase at the same rate as the father's income increased. Even though the formula seemed straightforward, it proved to be very difficult in application. Child support was paid as agreed through the summer of 2004 when a serious dispute arose regarding the application of the formula. By the husband's calculation, he had actually overpaid almost \$5,000.00 over the last eight years. By the wife's calculation, he had underpaid by approximately \$35,000.

The husband filed a Complaint for Declaratory Judgment that the method of calculation of automatic increases needed judicial construction, such that the intention of the parties may be given full effect. The wife filed an answer which was later amended to add a counterclaim for back child support in the amount of \$56,153.66. In August 2007, the Court entered Declaratory Judgment ordering the father to pay the mother \$54,464.48 without interest at the rate of \$1,000.00 per month until the debt was paid in full. The father appeals and the Supreme Court affirms.

It is well established in Georgia law that a declaratory judgment action is the proper method for determining one's rights and obligations under a divorce decree that is unclear. In addition, declaratory judgment shall be available notwithstanding the fact that the complaining party has any other adequate legal or equitable remedy or remedies. Therefore, the husband's complaint for declaratory judgment seeking a determination in the amount due for past due child support payments stated a claim upon which relief could be granted.

As the petition confers jurisdiction of the trial court in a declaratory judgment, did the trial court exceed the jurisdiction by granting the wife affirmative relief of past due child support? The opinion cites *Allstate Insurance Company v. Talbert*, 198 Ga. App. 190 (1990), which, by the majority, appears that it can. Justice Hunstein, Benham, and Hines dissent.

## GARNISHMENT

*Stoker v. Severin*, A08A1070 (July 23, 2008)

The mother filed a garnishment action in the state court that the father was indebted to her in the principal amount of \$8,886.21 which represented the husband's arrearage pursuant to the 1999 Divorce Decree as modified in a 2002 Consent Order. Of the alleged indebtedness, one month or \$2,350.00 was attributed to past one month's past due

period child support and the \$6,536.21 was attributed to the husband's share of health care expenses and extracurricular activity costs. At the time of the hearing, the father had paid the child support arrearage amount and therefore, there was no remaining unpaid periodic child support. The trial court grants the husband's traverse and dismisses the garnishment action. The wife appeals and the Court of Appeals affirms.

Under Georgia law, a judgment for periodic child support that fixes the amount of the installments and when they are due, is a money judgment subject to collection by post-judgment garnishment. This is because the court can determine the amount due from the terms of the decree and with no more than a mathematical computation. The Georgia debtor and creditor code expansively provides for the collection of debts through the process of garnishment and all cases where the money judgment shall have been obtained in a court of this state. The remaining \$6,536.21, which the wife identified as representing the husband's share of the health care expenses and extra curricular activities, have not been reduced to a money judgment against the husband, and therefore the mother's attempt to garnish the husband's property for this amount is governed by the prejudgment garnishment procedure at O.C.G.A. §18-4-40 et seq.

The law regarding prejudgment garnishment proceedings must be strictly construed to permit garnishment for the collection of a debt which has not been reduced to a money judgment only where the action is pending against the Defendant and the court finds one of the other conditions specified in O.C.G.A. §18-4-40 which would be: 1) when the Defendant resides outside the limits of the state; 2) when the Defendant is actually removing, or about to remove, outside the limits of the county; 3) when the Defendant is causing his property to be removed beyond the limits of the state; 4) when the Defendant has transferred, has threatened to transfer, or is about to transfer property to defraud or delay his creditor; or 5) when the Defendant is insolvent.

Here, the mother failed to show that any of the conditions precedent to a prejudgment garnishment exists, including that an action must be pending against the Defendant. Therefore, because the wife's claim against the husband for healthcare and extracurricular activities expenses has not been reduced to a money judgment and the wife has failed to show that she is entitled to the process of prejudgment garnishment under O.C.G.A. §18-4-40 et seq., the trial court was required to grant the husband's traverse to the extent of the amount claimed for those expenses.

## JURISDICTION/CONTEMPT

*Brochin v. Brochin*, A08A1138 (Oct. 24, 2008)

A divorce decree was entered in 2002 in the Superior Court of Fulton County which set out the custody

arrangement for the parties' children. Subsequently, the mother moved to Dekalb County and the father filed an action in the Superior Court of Dekalb County to modify child custody provisions. In 2005, the Dekalb court issued an Order in the father's action, among other things, granting the father's sole physical and legal custody of the children, set forth the mother's visitation rights and prohibited the mother from personally, or through others, encouraging the minor children to contact legal counsel for the purpose of custody modification or facilitating contact between the children and counsel. Even though one of the children at the time was 14 years of age and wished to live with the mother, the Court found that the mother was not a fit and proper person for the purposes of any election by the older child to live with her.

During the mother's visitation with the children in early July of 2007, she filed a custody modification action in the Superior Court of Fulton County, the county of the father's residence. This time, both children were 14 years of age and attached affidavits of election to the mother's petition. The mother did not return the children to the father at the end

of her summer visitation. Later in July of 2007, the father filed a contempt petition in Dekalb County that the mother had violated the court's ruling. In the father's petition for contempt, he also asked that the mother's visitation rights with the children be modified as a result of the contempt. The mother filed a limited appearance in Dekalb County arguing that jurisdiction should be in Fulton County, therefore, the father's later filed contempt action was barred.

At the hearing, the mother admitted to taking the children to an attorney in June of 2007 to sign the election affidavits and also admitted not returning the children as scheduled at the end of the summer visitation period. The mother moved the court to stay the contempt hearing until a resolution in the Fulton County case was reached, but Dekalb County denied the motion and found the mother in willful contempt for violating the 2005 order. The court suspended her overnight visitation rights with the children for six months, ordered her to serve 72 hours in jail and to pay the father's attorney's fees in connection with the contempt proceeding. The mother appeals, and the Court of Appeals affirms.

## Past Family Law Section Chairs

Kurt Kegel .....2007-08  
 Shiel Edlin.....2006-07  
 Stephen C. Steele .....2005-06  
 Richard M. Nolen.....2004-05  
 Thomas F. Allgood Jr. ....2003-04  
 Emily S. Bair .....2002-03  
 Elizabeth Green Lindsey .....2001-02  
 Robert D. Boyd .....2000-01  
 H. William Sams .....1999-00  
 Anne Jarrett ..... 1998-99  
 Carl S. Pedigo..... 1997-98  
 Joseph T. Tuggle .....1996-97  
 Nancy F. Lawler .....1995-96  
 Richard W. Schiffman Jr.....1994-95  
 Hon. Martha C. Christian .....1993-94

John C. Mayoue .....1992-93  
 H. Martin Huddleston..... 1991-92  
 Christopher D. Olmstead .....1990-91  
 Hon. Elizabeth Glazebrook. 1989-90  
 Edward E. Bates Jr. .... 1987-88  
 Carl Westmoreland ..... 1986-87  
 Lawrence B. Custer ..... 1985-86  
 Hon. John E. Girardeau..... 1984-85  
 C. Wilbur Warner Jr. .... 1983-84  
 M.T. Simmons Jr..... 1982-83  
 Kice H. Stone..... 1981-82  
 Paul V. Kilpatrick Jr. ....1980-81  
 Hon. G. Conley Ingram..... 1979-80  
 Bob Reinhardt..... 1978-79  
 Jack P. Turner ..... 1977-78

With regards to attorney's fees, where a finding of contempt is authorized, an award of attorney's fees pursuant to O.C.G.A. §19-6-2 is also authorized. With regards to jurisdiction, a contempt action generally must be filed in the allegedly offended court. The mother argues that the father could have filed a contempt petition in the form of a counterclaim to the mother's pending modification action. However, the father could not have filed a petition for contempt as a counterclaim to the Fulton modification action because he included in his prayer a modification of visitation rights premises upon the mother's alleged contempt. Therefore, O.C.G.A. §19-9-23 (b) precludes a party from bringing a request for modification of visitation rights as a counterclaim to a modification action. Therefore, separate action had to be filed in Dekalb County, where the mother resided.

The mother also contends that the provisions barring her from facilitating contact between her children and legal counsel was unenforceable on the grounds that it effectively denied the children their right to access to the courts to seek a change in their custodial parent under the predecessor to O.C.G.A. §19-9-3 (a)(5). However, the mother did not raise this challenge below and thus the trial court did not rule on it and therefore the mother waived this argument on appeal.

## MODIFICATION

### *Pineres v. George, S08A0773 (Oct. 27, 2008)*

Among other things, the wife filed a petition for modification of the psychological expenses. However, the wife had filed a previous contempt and child support modification action less than two years earlier. It is beyond dispute that medical expenses constitute a form of child support and therefore, the wife's complaint constituted a petition for modification of child support and was barred pursuant to O.C.G.A. §19-6-19 (a). Based upon the wife's improper filing of the petition to modify, the trial court awarded attorney's fees pursuant to O.C.G.A. §19-15-14. Here, the record establishes that the husband introduced evidence regarding attorney's fees incurred in response to the improper modification petition was admitted without objection and was neither challenged nor rebutted by the wife. Therefore, the award of attorney's fees under either section (a) or (b) of O.C.G.A. §19-15-14 was warranted.

With regards to the contempt action, the trial court changed the final decision making authority regarding their minor son's health care to their co-parenting counselor. Therefore, the trial court's contempt judgment to the extent that grants final decision making authority to the parenting counselor is reversed. The trial court improperly modified the parties' divorce decree by shifting the decision making authority.

## MONEY HAD AND RECEIVED

### *McGonigal v. McGonigal, A08A0944 (Nov. 7, 2008)*

The parties were divorced and pursuant to the parties' settlement agreement, the husband alleged that he over paid the wife by mistake. The husband filed an action against the wife for money had and received based upon the mistaken payments made under the divorce settlement agreement in State Court. After the Complaint was filed, the wife filed an Answer, and after discovery was completed, the wife moved for Summary Judgment. After hearing on the motion, the State Court agreed and dismissed the husband's action, holding that an action for contempt was the appropriate remedy. The husband appeals and the Court of Appeals reverses.

The State Court relied on *Baghdady* in that the theory of money had and received applies only when there is no actual legal contract. What *Baghdady* stands for is the proposition that a party may not resort to the theory of money had and received to alter the terms of their contract. In other words, if there was a provision relating to the return of money paid by mistake or any other provision that would govern the situation, then an action for money had and received would not be appropriate. Under the common law doctrine of money had and received, recovery is authorized against one who holds unspecified sums of money of another which he ought, in equity and good conscience, to refund. Here, the husband alleged an overpayment and demanded repayment, but the wife refused.

In addition, the husband claims that even though he relies on the settlement agreement to prove that his payment was mistaken, the money had and received was the only remedy. Because in absence of the plain unmistakable language in the agreement, the husband had no grounds for contempt. As reviewed, there are no provisions in the settlement agreement that govern the return of overpayment of money, and the wife has not identified any provisions, and the Court has not found any. Therefore, the trial court erred by dismissing the husband's complaint for money had and received.

## NOTICE

### *Arkwright v. Arkwright, S08F1399 (Oct. 27, 2008)*

In January, 2007, the wife filed for divorce in the Superior Court of Dekalb County. A bench trial was set on Oct. 10, 2007, at which the husband and his attorney failed to appear. The superior trial court awarded the wife alimony, title to the marital residence, ownership of the Italian condo, 50% of the husband's retirement account and attorney's fees. Husband moved to set aside the judgment, but the trial court denied the motion. Husband appeals and the Supreme Court affirms.

Husband contends that the trial court was in error in denying his motion to set aside because he did not have notice of the final trial date. However, the husband concedes that his attorney had actual notice of the trial date but simply failed to notify him about the date of trial. Therefore, neither the husband nor his counsel appeared

at the trial. Even though the husband's attorney failed to appear at the hearing because he was under the mistaken impression that the wife was going to seek a continuance, the failure of a party to appear in consequence of a misunderstanding between him and/or counsel, does not afford a meretricious reason for granting a motion to set aside a judgment. The award of attorney's fees and alimony was upheld.

## SETTLEMENT AGREEMENT

### *Ford v. Hanna, A08A1177 (Sept. 18, 2008)*

In June of 2005, the parties were divorced. The mother had physical custody of the parties' two minor children with visitation, child support and other obligations established. In July 2007, one of the children reached the age of 14 and expressed a desire to live with the father. The father filed a petition and sought physical custody of the 14 year old. The mother filed a pro se response and counterclaim seeking an order requiring the father to make certain payments due under the divorce decree. Both parties appeared in September, 2008 for hearing on the petition and both were accompanied by an attorney. The case was called, the mother's attorney made an oral statement of appearance along with the father's attorney. Both asked and received permission to meet before the hearing to determine if the parties could reach a settlement agreement. About two and a half hours later, they jointly announced to the court that they had reached a settlement agreement on all issues and that the wife's attorney would prepare an order for the court incorporating the settlement agreement. There was no evidence presented at the hearing.

After no settlement agreement was presented to the trial court, the court signed an order setting the petition for another hearing in October, 2007. On or about the same day, the attorney who appeared for the mother at the hearing petitioned the court to withdraw from the case as her attorney and that the mother is seeking other counsel. The mother hired another attorney to represent her at the subsequent hearing. At the hearing, the mother's attorney filed a motion for continuance and a motion to dismiss the petition. The father countered with a motion to enforce the settlement agreement previously announced to the court. The trial court denied the request for continuance and the motion to dismiss. The attorney who appeared with the mother at the first hearing testified to what the parties had orally agreed. With the mother express permission, the attorney announced to the court that the case was settled and he would prepare the order. The wife's first attorney had to withdraw because the wife would not authorize him to release the settlement agreement to the husband or to court.

On the evidence presented, the trial court entered an order enforcing and incorporating all of the provisions in the agreement between the parties. The trial court also found the mother was required to pay the husband's

attorney's fees that he incurred to enforce settlement agreement in the amount of \$1,000 because the mother unreasonably extended litigation by denying she was represented by her former attorney and refusing to acknowledge the attorney's authority to enter into a settlement agreement. The mother appeals, the Court of Appeals affirms in part and reverses in part.

The mother does not contest the existence of the terms of the agreement, rather she contends that the attorney who appeared for her at the first hearing date and was with her during the settlement negotiations, did not have the authority to bind her to the announced agreement. The mother raised Uniform Superior Court Rule (USCR) 4.2 which provides that no attorney shall appear in a capacity before a superior court until the attorney has entered an appearance by filing a signed entry of appearance form or by filing a signed pleading in the pending action. The rule further provides that within 48 hours of being retained, an attorney shall mail to the court and opposing counsel or file with the court an entry of appearance in the pending matter, and that failure to timely file shall not prohibit the appearance and representation by said counsel. Contrary to the mother's position, we find the evidence was sufficient to show that the attorney who announced his appearance at her first hearing had the attorney client relationship with her, acted as her agent and was within the scope of his authority when he and the mother met with the father and his attorney and agreed to the settlement of the issues and announced a settlement to the court with the mother's express permission. Under these circumstances, we find that the mother's attorney complied with the substance of USCR 4.2 and became the attorney of record by making the oral appearance for her in open court. Accordingly, the mother's attorney at the initial hearing had apparent authority to enter into a settlement agreement that was enforceable against the mother by the father.

The agreement also settled the issue of child support, including health insurance and medical expenses. The parties simply agreed because each party had physical custody of one child, neither party owed child support to the other. Even though the parties may enter into an enforceable agreement concerning the modification of child support, a trial court has an obligation to consider whether the agreed upon support is sufficient in light of the requirements contained in the statutory Child Support Guidelines. Therefore, the trial court erred by entering an order ratifying and incorporating the parties' agreement with respect to modification of child support (including medical expenses and health insurance for the children) without reviewing the agreement in light of the requirements in the Child Support Guidelines. Therefore, this part of the order is vacated and remanded for consideration of the agreement in light of the Child Support Guidelines.

The mother also raises contention that the trial court

erred by denying her motion to dismiss the modification petition on the basis that she was not properly served. The record shows that the mother filed a timely response to modification petition without raising the service issue and appeared at the hearing on the petition represented by counsel without raising this issue. Therefore, she waived any claim as to service.

The mother also contends that trial court erred by awarding attorney's fees pursuant to O.C.G.A. §9-15-14, however, in the trial court's order, it awarded attorney's fees to father because it found that mother unnecessarily expanded the litigation without justification by denying she was represented by an attorney who accompanied her to the initial hearing and announced the settlement agreement and by refusing on this basis to recognize the agreement. Therefore, because the trial court set forth finding clearly sufficient to support the award, attorney's fees awarded pursuant to O.C.G.A. §9-15-14 are affirmed.

## WAIVER

### *Young v. Stump, A08A1381 (Sept. 19, 2008)*

The appellant, Young, divorced her husband, Rowland, in 2000. The settlement agreement, which was incorporated into the final judgment and decree of divorce, contained a section governing retirement, IRAs, profit sharing plans and so forth. Section IX (b) provided that the husband shall have all right, title and equity in and to any retirement accounts which are presently titled in his name or which were established for his benefit including, but not limited to IRAs, retirement accounts, etc... The wife shall make no claim to or against any such account as herein specified and waives and relinquishes any and all claims which she may have to the same. Section IX (c) is identical to Section IX (b), except the wife replaces husband as the pronoun.

During the marriage, Rowland maintained the IRA accounts in his name and designated Young as the beneficiary. Rowland died in November of 2006, without changing the beneficiary. In February of 2007, Young sent the IRA fund manager a letter of instruction requesting that the funds in Rowland's IRA be transferred into an account in her name. The funds totaling approximately \$34,838.29 were transferred into three funds all on Feb. 27, 2007. The executor of Rowland's estate, Stump, demanded that Young pay the proceeds of the IRA to Rowland's estate, but Young refused. Stump filed a motion for partial summary judgment to all legal claims and Young moved for summary judgment on all claims. Following the hearing, the trial court granted Stump's motion and denied Young's. Young appeals and the Court of Appeals affirms.

Young argues that the agreement was ambiguous and that Section IX (c) creates the ambiguity which cannot be resolved with application of the rules of contract construction, and because Rowland designated her as

the beneficiary, Rowland's IRA was established for her benefit so that she is entitled to all rights, title and equity in and to that retirement account. All contracts must be interpreted to give the greatest effect possible to all provisions rather than leave any part of the contract unreasonable or having no effect. Here the phrase "established for her benefit" in Section IX (c) of the Agreement is ambiguous. An IRA may be established for the benefit of a beneficiary, thus the first sentence of Section IX (c) could be interpreted to mean that by designating Young as the beneficiary, Rowland established his IRA for her benefit entitling her the proceeds thereof. But, this interpretation of Section IX (c) would render the wavier clause of Section IX (b) meaningless. As stated earlier, the court should uphold a contract in whole and in every part and the whole contract should be looked to in arriving at the construction of any part. Under the construction urged by Young, she would receive the proceeds of Rowland's IRA even though she agreed to make no claim to it, in Section IX(b). That is not a reasonable interpretation of the agreement. Therefore, construing subsections (b) and (c) of Section IX together as such to give a reasonable meaning and effect to each part, we find that Young intended to disclaim any and all interests in Rowland's retirement accounts.

Young further argues that the ambiguity in the retirement provision should be constructed against Rowland because his attorney drafted the agreement. While the general rule is an ambiguity is construed against the drafter, the rule does not apply in this case. The agreement contained a clause which provides "because this Settlement Agreement is a joint effort of the parties, it should be construed with fairness as between the parties and not more strictly enforced against one or the other party." Therefore, public policy is in favor of enforcing contracts as written and agreed upon.

Young also argues that the trial court erred in ruling that the settlement agreement encompasses her expectancy interests in Rowland's IRA. The Supreme Court in *Kruse* held that the release language at issue in that case was broad enough to include the former wife's expectancy interests in her former husband's IRA. Therefore, following *Kruse*, the former wife's expectancy interests were extinguished by the release language in the parties settlement agreement. The language "the wife shall make no claim to Rowland's IRA and herewith specifically waives and relinquishes any and all claims which she may have to the same" is sufficiently broad to release her expectancy interest in the IRA. [FLR](#)

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# Bankruptcy & Domestic Support Obligations: Where the Rubber Meets the Road

by Penny Douglass Furr  
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**Y**ou've just nursed your starving client for several weeks until you could get her to court for temporary child support and alimony; you've won a nice interlocutory award and the telephone rings again: "My husband just filed bankruptcy; he says the children and I can forget about collecting the payments you won for us in Superior Court!" Unwelcome news like this frustrates many family law attorneys almost as much as it terrifies our clients.

The worsening economic situation virtually guarantees that those of us who practice family law need to understand the legal interplay between the federal bankruptcy forum and the state domestic relations court. Whether we represent the obligor who is seeking bankruptcy relief from the added financial pressure of domestic support debts, or whether we are engaged by the support recipient whose family income flow has just been "turned off at the street" by the spouse's bankruptcy filing, family law attorneys need to understand how to use the entirety of bankruptcy law to achieve their clients' objectives.

Most practitioners of family law rarely set foot into the United States Bankruptcy Courts; we know that body of law exists, like patents or admiralty, but most of us lack a versatile familiarity with its substance and procedure. Before your opponent's bankruptcy filing sends you into a pluperfect dither and you run headlong to settle your client's divorce case, you should take a few minutes to consult with a colleague who can help you use bankruptcy law to enforce (or to limit the enforcement) of domestic support obligations. Depending on how you handle post-bankruptcy maneuvers, your client may very well be placed in a better position after the bankruptcy is filed.

Nothing I experienced in law school made me desire to labor in the seemingly arcane

vineyard of the bankruptcy court. Later, in state court family law practice, I was forced to "earn my passport" to bankruptcy court when my clients' spouses filed for bankruptcy either during or after the divorce. I began researching, studying, conferring and writing on bankruptcy-divorce issues so that I could fully understand the impact of bankruptcy on my clients.

We should be guided by one fundamental axiom: domestic support obligations are not dischargeable in bankruptcy court. We may have to perform additional work to collect them, but our opponents can not, evade the responsibility to satisfy them. On the "distaff" side, we may assist a client in the overall reorganization of his financial life through the bankruptcy process and gain some temporary relief from the disruptive immediacy that often comes when the divorce court pronounces the amount of his support obligations.

When we draft settlement agreements, it is important to remember that if the payments are found to be for domestic support obligations, the obligor spouse cannot later discharge them in bankruptcy court. We cannot be saved by labels. Using the term equitable division of property does not mean that this can be discharged. The bankruptcy court will look at many factors and make the determination of whether the item is used for support. If it is it will not be discharged.

There is a very good chance that when your client's ex-spouse files for bankruptcy relief, you can then maneuver, to your client's advantage. If your opponent has other debts, they will most likely be placed in a lower priority than the domestic support obligations. If you move timely and correctly, your client could be paid first. Pursuant to the recent bankruptcy "reform" legislation, child support obligations must be paid in full before a

repayment plan can be approved. Many courts are ignoring this. We need to be aware that we can object to the plan's approval if our client is owed support.

Therefore, it is important for your client to be represented by experienced counsel in bankruptcy court and file objections if the former spouse is filing a plan pursuant to Chapter 13, Chapter 11 or Chapter 7. You will need to make the bankruptcy court aware that you are opposed to the confirmation of any plan unless and until those support obligations are paid.

In practice, if no one objects, the person filing for bankruptcy will get arrearages placed in his/her five year plan and even though they should not be discharged if no one is looking they may very well be discharged. Do not just wait for the bankruptcy to go away. Contact your colleague who does bankruptcy and get involved! Failure to do so could place your client at a horrendous disadvantage. Sleeping on your rights could very well force you to lose them.

If your opponent has filed for bankruptcy, you should associate a bankruptcy attorney who will normally file a "motion to lift stay" on behalf of your client. The filing for relief in bankruptcy automatically imposes a stay on all state court collection proceedings, but bankruptcy legal precedent uniformly holds that for collection of domestic support obligations the motion to lift stay must be liberally granted.

This having been said, unless you are pro-active and vocal in your bankruptcy court motion practice, that principle of bankruptcy law may be completely ignored in favor of the overall policy of giving the debtor a "fresh start" by freeing him from the virulent persistency of the demands of his creditors. The bankruptcy statutory scheme and the case law interpreting it can be used to get many advantages for your client. You must zealously pursue them, as your client's rights will not be given due consideration in the absence of the specialized motions that you should file.

Normally, family law attorneys who are merely collecting child support can fill out forms to prove the nature and extent of our client's domestic support claim, even if they are not admitted to practice in federal court. Members of the bar in a federal judicial district can move for admission *pro hac vice* in the relevant bankruptcy court. Given that the rules and procedures in bankruptcy are often both unfamiliar and non-intuitive, it is advisable to consult with or even to refer the case to a colleague who is familiar with these highly specialized courts and their unique procedures. The consequences of proceeding otherwise can be substantial.

In one case where the author was retained at the appellate stage, a well-meaning family court attorney got sucked into bankruptcy court in an attempt to "help" her client collect domestic support. She had recently assisted her client and the state court in the enforcement of contempt proceedings for unpaid child support. The child

support obligor, who had been held in contempt of this state court before, did not appear. After taking evidence, the state court judge entered an oral order holding him in contempt and ordering incarceration. The child support recipient left court and took no further action.

After the hearing but before his arrest, the contemnor filed for bankruptcy protection. Neither the family law attorney nor her client were served noticed of his bankruptcy filing. The state court judge also was not aware of the bankruptcy filing so he blithely signed and entered the order on the contempt proceedings. The contemnor—now in bankruptcy though his domestic support creditor did not know it—was jailed for contempt.

His bankruptcy lawyer arranged for his release and then successfully prosecuted adversarial proceedings in federal bankruptcy court against the unsuspecting mother whose only goal was to collect past due child support. Only after the rendition of a federal court judgment big enough to choke a horse did the family law attorney and her client call for specialized help. They learned, to their dismay, that the window of time for filing an appeal from an bankruptcy court decision is a narrow one, indeed.

On the debtor's side, the bankruptcy attorney should take the precaution to make a "Notice of Bankruptcy" filing with the clerk of the state domestic relations court. In addition to serving opposing family law counsel, it is good practice to copy the state court judge's office. To do so helps to insulate the client from arrests, garnishments and attachments. It informs state court judges and opposing family law counsel of the automatic stay provisions of federal bankruptcy law

and enhances the environment of professionalism within which these highly emotional issues should be resolved.

The interplay between the enforcement of state court domestic support orders and the automatic stay of bankruptcy can be lively and, at times, contradictory. While some courts have held that such enforcement proceedings are unimpaired by a bankruptcy filing and may continue unabated, other districts have, with power and determination, expressed the contrary view. The involvement of a bankruptcy specialist may become imperative, and not merely advisable. It is important for state court domestic attorneys to be aware that the state court judge and the bankruptcy judge have concurrent jurisdiction to determine whether state court enforcement amounts to a violation of the bankruptcy stay. As many state court judges are reflexively unwilling to act in any capacity once learning that a litigant has filed in bankruptcy court, your role may be to educate them as to the breadth and capacity of the coequal parts of their jurisdiction.

Contact a bankruptcy attorney and prepare a brief for the state court. If the state court then determines that the automatic stay does not apply, you may then benefit from the *res judicata* effect of the state judge's ruling. It is certainly worth the time and effort, as you are competing with many creditors in bankruptcy court and only one opponent in the state forum.

If you prefer the enforcement and collection of domestic support in state courts by means of contempt, you should make sure to learn the jurisprudential difference between civil and criminal contempt. If your state court judge enforces by means of a finding of criminal contempt, there is no violation of the bankruptcy stay. However, if the state court enters a civil contempt it could possibly be considered a violation depending on the type of bankruptcy action that is filed by the debtor.

As a general rule, if the order requires incarceration for a specific

number of days based on the debtor's violation of that court's orders, then the contempt is criminal. If the debtor is to be jailed indefinitely until he pays a "purge amount", then it is civil contempt and the debtor is likely protected by bankruptcy's automatic stay.

In the unfortunate example recited earlier, the child support creditor ultimately got hammered with an adversarial complaint and judgment in bankruptcy court. The bankruptcy court held a hearing on the issue of whether the presentation of the state contempt order amounted to a stay violation--on the telephone with the unsuspecting family law attorney listening in. By the time she realized that she was in fact participating in a trial for damages and attorney fees in federal court, it was too late for her and her client to do anything but seek bankruptcy counsel and pray for an appellate remedy.

The moral of this sad fable is that you can be in "over your head" and see state court victory quickly turned into federal court defeat. Whether the family law attorney and client directly engage the services of bankruptcy counsel or seek a merely less formal consultation may be dictated by the facts of each situation. But whenever one of the domestic litigants files for bankruptcy, the family law attorney would be well advised to consult a colleague with specialized experience in the bankruptcy arena. [FLR](#)



Penny Douglass Furr is a graduate of the University of Miami Law School. She is a sole practitioner who specializes in Family Law, Bankruptcy and general litigation. She has appeared on several different television programs.

# Interview with Hon. David Barrett

by Kelly Anne Miles  
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On Dec. 31, I interviewed Chief Judge David Barrett of the Enotah Judicial Circuit. Judge Barrett currently serves as Chair of the Pattern Jury Charge Committee and serves on the Rules Committee.

**Miles:** How long have you been sitting as Superior Court Judge for the Enotah Circuit?

**Judge Barrett:** Almost 16 1/2 years.

**Miles:** What counties are included within the Circuit?

**Judge Barrett:** Towns, Union, White and Lumpkin counties.

**Miles:** How often are you normally in each county per month?

**Judge Barrett:** It varies. During a typical month, I will spend about two days in Towns County, a week in White County, a little more than one week in Lumpkin County and approximately four days in Union County. I also have one day a month to work in my office and spend the remaining day where I am needed based on trials. Next year is really

cut up hard because of the number of weeks of jury trials that are scheduled.

**Miles:** One day per month for office work is not very much.

**Judge Barrett:** No, it's not, and right now there is only one law clerk for all three of the Circuit's Superior Court judges to share.

**Miles:** When do you leave your home in the morning and usually get back there at night?

**Judge Barrett:** I normally leave my house in Young Harris between 7:00 and 7:15 a.m. It is an hour and fifteen minute drive to Dahlonega plus time for stopping and dropping off work. My secretary works in Blairsville and I usually end my day there where I'll pick up the work she's done, proof read it, make corrections, make adjustments, do whatever I need to do and get home around 7:30 or 8:00 p.m. If it's my night to cook dinner, everybody eats late and if not, I eat when I get home.

**Miles:** That's a lot longer day for you than most people think a judge has.

**Judge Barrett:** Yes, I think so.

**Miles:** How long were you in private practice prior to becoming a Superior Court Judge?

**Judge Barrett:** A little over 12 years. The first year I was in practice was exclusively in real estate. I practiced in Athens for four years before I moved home to Hiawassee. While in Athens I did civil litigation, except for being appointed in some criminal cases. Then I was in private practice in Hiawassee,



*The Hon. David Barrett*

where I did a hodgepodge of everything. In my first week of practice in Hiawasse, I was appointed to two child molestation cases and a burglary case.

**Miles:** You were thrown right into the fire weren't you?

**Judge Barrett:** Yeah, into the fire and put gasoline on it. You did a little of everything but that's what you had to do to make a practice in a small town.

**Miles:** How many children do you have?

**Judge Barrett:** I have a daughter who is 24 and a son who is 22.

**Miles:** What made you want to be a judge?

**Judge Barrett:** I had this idea originally that I was going to be able to make a difference and I think that sometimes you do and sometimes you don't. Sometimes it's almost impossible to figure out how to make a difference in people's attitudes towards others.

**Miles:** What do you like most about being a judge?

**Judge Barrett:** I think my drug court. We take a photograph of each person who starts drug court and usually they look like the devil and then two to two and half years later, they graduate and they have un-aged five to eight years. One lady un-aged fifteen years in front of my very eyes. Every Wednesday when I have drug court it makes me jump out of bed and run to work.

**Miles:** What's the biggest disadvantage of being a judge?

**Judge Barrett:** Isolation. You are generally withdrawn from your fellow lawyers. You can't get real close to other lawyers. Doctors distrust you. I have one good doctor friend who is an optometrist, but other than that, my friends who are doctors I have known since private practice pretty well pulled back. So you don't have many professional friends and the result is that most of your friends are at different educational levels, different interest levels, so you have to develop interests in other areas than those you had prior to becoming a judge.

**Miles:** You currently serve as chair of the Pattern Jury Charge Committee. How long have you served on this Committee?

**Judge Barrett:** I have served 15 ½ years. I asked to join the Committee when I first started because I knew that would be a place to learn.

**Miles:** That's interesting. How often does that Committee normally meet?

**Judge Barrett:** Probably three to five times a year.

**Miles:** What was the Committee's biggest challenge in making their revisions in the charges to reflect the changes in child support that we have had since 2007?

**Judge Barrett:** To make them concise. The bill was so overwhelming. We had to try to make them a correct

statement of law; To try to make them understandable to a lay juror so that the jury can in fact be fair to the parties and be true to that statute. The income shares model can be a very fair, very well adjusted program if the lawyers are very good in explaining it. I haven't seen a jury trial yet because nobody has tried a jury trial in front of me with child support as an issue. But I do have bench trials where we have really good lawyers trying a case against a really poor lawyer. It's very frustrating.

**Miles:** Do you like the new child support law with the income sharing standard?

**Judge Barrett:** I think that it ultimately gives a fair share; however, it makes it more difficult for the judge to effectuate a decision in family violence matters on ex parte cases where immediate relief is needed because the abused party is leaving and trying desperately to get away; but they don't have records, they don't have information, particularly when the spouse is self-employed. In these situations, is very difficult to apply the standard. If you have a well tried case, then it's helpful, but if not, it is very difficult. The old system was the same way.

**Miles:** Do you find yourself using the child support deviations very much?

**Judge Barrett:** I do find myself trying to use the deviations if the lawyers have given me adequate information because, all too often, there are a lot of things that are not just there that you have to look at. I had one case in Blairsville where nobody brought up the fact that the medical bills for a child were just astronomical. As it turned out, it was because the child had bad asthma. But nobody mentioned it. I'm asked myself, when I looked at the financial affidavit, "How do you spend \$700 per month for medical bills for this little girl." When I asked, I was then told that she had to have steroids and she must do this and that. That's something that somebody should have hinted at as it should have affected the amount of money that was going to be paid as child support.

**Miles:** What would be your suggestion to practitioners on how to do a better job presenting and arguing the child support deviations and the child support law?

**Judge Barrett:** First thing is to prepare your client to know what questions you are going to ask them because they need to know what the issues are going to be. What are you spending your money for your child on? What kind of things do you do? Do you have an asthmatic child? Do you take them to baseball, soccer, etc.? How much time do they actually spend with you? Because if some child is spending 43 percent of the time with the other parent, that's a big chunk of time and it is not only food, it's going to be wear and tear on this, that and the other. Let them know what the questions are going to be and then prepare the closing argument so that these two dovetail almost like the gears in a clock. It is very hard to try and figure out where you are going if you haven't figured how to get there.

**Miles:** Do you think it would be helpful to make any changes in the financial affidavit so that the section on the monthly expenses for children is broken down so that the form, to use your words, dovetails better with Schedule E off of the child support worksheet?

**Judge Barrett:** If the lawyers would actually use it, absolutely. The problem is that a lot of times you look at those things and they haven't actually done any planning. Preparation is almost everything. Somebody asked me one time, how did you do this and I said because I was prepared. Good imaginative lawyering requires that you actually go and find those good little bits and pieces of evidence that you have which will help your client.

**Miles:** Good advice. Is the Committee contemplating making any more changes or modifications to the charges on child support in the immediate future?

**Judge Barrett:** I don't know of any right now. There may be some to look at some but I don't know of any that have been proposed and there are not any on the sidebar that I know of.

**Miles:** Has your Committee prepared any pattern charge incorporating the Lerch case?

**Judge Barrett:** We have not. I had three cases where that has been an issue and I have drawn up a proposal. It would be a fairly short additional charge to the effect that if you take this property it becomes this property if you do this. That is pretty much what the case holds but we have not done this. I have put out a notice to the judges for that. That ruling surprised me quite frankly.

**Miles:** I think it has panicked a lot of lawyers. What's the best explanation you have seen an attorney give of the Thomas case to a jury?

**Judge Barrett:** Probably the best explanation I have seen was with the use of a chart. The lawyer took the major assets and traced them. Here is how it was, here it started and they followed it through. No one on the jury could have failed to figure out where each asset flowed. I mean it was like a river by the time the lawyer got finished. That was the best explanation because it was in conjunction with the evidence they had and the closing argument. The lawyer's job was to explain the facts and then let the judge tell the jury what the law is. You just tell what the facts are.

**Miles:** Do you recall any comments the jurors have made specifically in the area of family law? Good or bad.

**Judge Barrett:** Comments are mainly about the charges. One of the jurors who signed her name was a college professor and foreperson said that no matter how hard you worked, it was almost impossible to explain all those things because it was an equitable division case. The wife was claiming alimony as well as equitable division and the juror's observation was that the lawyer who had put the evidence up on charts and said this is what we are looking for, here is what we want, did a much better job.

**Miles:** Do you find that the award of alimony is disappearing in today's world?

**Judge Barrett:** Yes, very much. You see that as a weapon sometimes. You see a lot less alimony awarded to women under the age 45 who have been working. Men almost never ask for it and never get it. You see some rehabilitative alimony. Quite honestly, if one has been working, the other one can get up and work, too.

**Miles:** I think that is the attitude of society now.

**Judge Barrett:** It is not "Ozzie and Harriett" anymore.

**Miles:** What is your main pet peeve in the courtroom?

**Judge Barrett:** My main pet peeves are: Inconsideration by lawyers to other lawyers; Unprepared lawyers; Lawyers who refuse to follow the rules; Lack of manners and Lawyers not acting like adults. These are things my mama would have beat my bottom for.

**Miles:** You also serve on the Rules Committee. What is that committee charged with doing?

**Judge Barrett:** The committee is charged with: trying to keep up with Uniform Superior Court Rules; trying to keep up with TPO forms; and trying to keep up with the rules that we talked about...the rules about financial affidavits and such.

**Miles:** Do you see any changes coming up in the rules for family law?

**Judge Barrett:** I think we are going to have to change some of the rules for TPOs. I know there is some fighting concerning the domestic relations financial paperwork because the lawyers don't want to have to produce those records quickly. However, the sooner we can get the information the better we can make good decisions.

**Miles:** Do you see there being revisions to Uniform Superior Court Rule 24.2 regarding the filing requirements of the financial affidavit?

**Judge Barrett:** I think we will try to make these more uniform for compliance issues. Maybe require that they be filed within 30 days after the answer or something along that line. There is an argument among the bar, the lawyers and the Supreme Court so we will have to make a decision so that it will not result in an unfair advantage to one side or other. But if you are going to file and you want a temporary hearing, I think we need to have that clearly set up.

**Miles:** Do you find that most of the litigants revise their financial affidavits and worksheets that they filed with the Complaint before they come up at a temporary hearing?

**Judge Barrett:** Not most, but probably 40 percent. Generally the good lawyers do that because they want to make sure that they revise in accordance with the discovery they've come up with to be honest with the court.

**Miles:** Have you issued any sanctions for failure to follow the requirements of Rule 24.2?

**Judge Barrett:** Two different times. I have ordered that the lawyer not complete the matter and one lawyer got fined. He showed up the third time without having the paperwork, so I fined him \$100 and told him if he came back again to bring his toothbrush because he was going to find a new place to spend the night.

**Miles:** Have you issued any sanctions for failure to file the financial affidavit at the time the Complaint for divorce was filed?

**Judge Barrett:** No, not yet.

**Miles:** As you long as you have it for the hearing, is that really the first time you are going to look at it?

**Judge Barrett:** That will be the first time I look at it.

**Miles:** Do you have many requests to seal the financial affidavits and do you normally grant this type of request?

**Judge Barrett:** I don't have a lot. I have some and I almost always grant those because there are some divorces where there is too much stuff that could be used unfairly.

**Miles:** What is the most helpful thing to you as the Court in determining the income of the self-employed for purposes of child support?

**Judge Barrett:** Three things...one is good lawyering; two is checkbooks to show how much they spend; and the third thing is to find out all the monies they've been paid if you can find out. Mainly it's the lawyer's hard work and what you spend money on. We had a divorce in Towns County where the guy had an El Dorado, a Mercedes, a big F-250 pickup truck, a speed boat, a house that I could put my house in and rattle around like a pea, and he claimed he only made \$12,000 a year! I mean give me a break.

**Miles:** Do you find yourself using the parenting time deviation very much?

**Judge Barrett:** Yes. In probably anything more than 10 percent of what we would consider standard, I consider that as part of the issue. I don't want to deprive the non-custodial parent of the financial ability to be able to do things with the child. Also there is always some psychological resentment if that parent can't afford to take the child to the park, or can't afford to take the child to McDonalds or those types of things. However, I also don't want to deprive the other parent of being able to put shoes on the child's feet.

**Miles:** Do you see more of a shift towards more equal sharing of time with the children than you used to?

**Judge Barrett:** Oh, much more than when I started out because I used to practice before Superior Court Judges who would look at you and say I'm sorry, he gets visitation two times per month come hell or high water and that's it. The man would get no custody no matter what the wife did - she could have been a drug running prostitute and the man was the pope - but he wouldn't get custody. The problem is that as society moves it is hard to keep people in

one location for school purposes.

**Miles:** What do you see as the biggest challenge in sitting as a judge in a domestic relations cases?

**Judge Barrett:** Trying to ascertain, like almost every case, what is the fair and just disposition of the case. Sometimes you are fighting the urge to try to figure out what really is going on when you have unequal representation but you ultimately want to make sure that there is a fair and just disposition of that case so that the child, if there is a child involved, is well taken care of. When you talk about money - nickels, dimes and quarters - that's just the way life is, but if you deal with children, that just wears on you.

**Miles:** What are the new areas or trends in family law that you are seeing or anticipating having to deal with?

**Judge Barrett:** I went to the family marriage seminar that Chief Justice Sears had and I was compelled with the quasi parent concept where somebody who had acted as a parent for two years in a parenting relationship would then be able to argue that they would have visitation rights out of that parent's rights. That bothered me greatly. I don't have any young children anymore so it doesn't really matter to me but if, in fact, my former wife and I had young children and then we married/lived with somebody else for two or three years and then broke up, the thought that this other person would be able to sue me or my former wife for rights to visit with the children and take it from our time with the children just blows my mind. It seems hard on the children. Who is my parent? What if she gets another one? What if he goes and gets another one? Pretty soon nobody sees anybody ever again. Grandparents don't have those kinds of rights. Why should some biological stranger?

**Miles:** How would a reader submit comments or suggestions to the Committees?

**Judge Barrett:** For the Pattern Jury Charge Committee, they would contact me in writing or can email me at [debarrett55@yahoo.com](mailto:debarrett55@yahoo.com). The new Rules Chair is the Honorable Louisa Abbott in Savannah.

**Miles:** How can I get a copy of the pattern jury charges?

**Judge Barrett:** Carl Vinson Institute at the University of Georgia sells those. [FLR](#)

*Kelly Anne Miles is skilled in all aspects of family law and is committed to giving clients the support they need in resolving legal issues related to families and the break-up or separation of family members. Miles has effectively represented clients for over 20 years in complex divorce cases involving the sensitive area of child custody, the division of financial assets (including the use of forensic accounting when necessary), tax implications, and all other areas concerning divorce. Miles also handles modification of child support, alimony and custody cases.*

# The Domino Effect of the Current Economic Crisis

by Sue K. Varon, Esq. and Martin S. Varon, CPA, CVA, JD  
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The deepening recession, increased unemployment and a stalled housing market have negatively impacted most of our clients' financial situations. Many clients' homes have been devalued. Other divorcing couples who are fortunate enough to have equity in their home can not sell their house. Combine that with the plummeting values of retirement accounts and we are looking at marital asset balance sheets that are nothing less than bleak.

Historically, divorce rates tend to rise during a bad economy and divorce practitioners nationwide have noticed a change in their practices. Experts attribute the decline in divorce filings to the severity of the economic downturn. Typically, a recession results in decreased divorce rates for couples with limited financial resources. The prospect of incurring expenses for two households seems overwhelming for those with limited resources. On the other hand, high net-worth clients may seek to take advantage of the diminished value of their homes, stock and investment portfolios and businesses to decrease their overall financial liability to their soon-to-be ex-spouse.

When the marital residence or small business is the most significant marital asset, the party who is able to retain the house or business may reap a significant benefit down the road, rather than the one who is compensated by cash or other assets, because the value of the house or business is likely to increase once the economy recovers.

The credit crisis has impacted us as well. How many times have you heard from a client that their credit card is maxed out and he/she can not replenish their retainer? Discovery has been completed but there is no more money to fund the litigation. Where does that leave us?

Instead of thinking of ways to get out of the case; we should begin to think of ways to resolve the case in a more cost-effective manner. We are all familiar with mediation and late case evaluation. Arbitration is another alternative when an impasse has created a standstill. A three person arbitration panel, comprised of

a family law expert, a financial expert and a mental health professional, may provide an insightful resolution that is more productive than going to court. Bringing additional professionals into the picture may bring difficult issues into focus.

If the main problems are financial in nature, involving marital asset division or support alternatives, introducing a financial neutral to work with the parties may move things in the right direction. One thing many of us have not considered is the value that a financial neutral would contribute to helping the case settle in mediation. The presence of the financial expert at the mediation, working in conjunction with the mediator, would provide answers to many of the financial issues that impede the settlement process. Issues such as the tax savings associated with different support options, the variations in pension values caused by using different interest rate assumptions and the after tax versus before tax values of various assets could be resolved right on the spot. When the primary sticking points center on custody issues, the assistance of a parent coordinator or child specialist could prove invaluable.

Today's economy requires us to assemble a team that will serve our clients in a cost-effective manner. Although we know that some cases are destined to go to litigation, we should attempt to utilize alternative methods of resolution prior to taking this leap. Mediation, arbitration and a form of the collaborative law model are just a few possibilities. We are fortunate to live in a community replete with knowledgeable and experienced experts who can provide our clients with wonderful resources. It is up to us to inform our clients of the availability of those options. *FLR*



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# The Best Supreme Cork Yet

by Katie Connell  
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The Family Law Committee of the Young Lawyers Division announced the 3rd annual Supreme Cork was a huge success. This wine tasting and silent auction event raised more than \$21,000 for The Bridge and sold over 190 tickets. These numbers made this Supreme Cork the best yet.

The continued relationship with The Bridge is a source of pride for the committee. Since 1970, The Bridge has been dedicated to helping severely abused adolescents in the foster care system achieve independence by providing a residential facility, solution-oriented therapy, family counseling and an on-campus school that emphasizes vocational readiness and community involvement. "It continues to be a pleasure to have the support of the Family Law Committee of the Young Lawyers Division for the work we do at The Bridge. Through the annual Supreme Cork Event, the young lawyers demonstrate continued community commitment to those in need as well hosting a fun evening." Tom Russell, CEO of The Bridge.

The Family Law Committee would like to thank our sponsors for their support: **Platinum**-Davis, Matthews & Quigley; and Warner, Mayoue, Bates & Nolen, PC. **Gold**-Abbott & Richardson, CPAs, PC; Bennett-Thrasher, PC; Derrick Black of Professional Document Services; Boyd Collar Knight, LLC; Browning & Smith, LLC; Donovan Reporting; Dr. Andrew Gothard & Dr. Jamie Fox of Atlanta Psychological Services; Jeffrey D. Hamby, PC of Huff, Woods & Hamby; James E. (Jim) Holmes; Investigative Accounting Group; Kirbo, Kendrick & Bell; Oxford Properties, LLC; Pachman Richardson, LLC; M.T. Simmons, Jr. LLC; and Donald A. Weissman, PC. **Silver**-Brown & Gallo; FamilyLaw Matters, Nancy Grossman; Diane Woods of Huff, Woods & Hamby; Kessler, Schwarz & Solomiany, PC; Lawler, Green, Givelber & Prinz, LLC; Stern & Edlin, P.C.; Thurman Financial Consulting; and Weinstock & Scavo. **Bronze**-Brightpath Mortgage; Callaway Company; Capstone Financial Partners; Geiger & Associates, LLC; Howick, Westfall, McBryan & Kaplan, LLP; H. Elizabeth King, Ph.D., PC; Levine & Smith, LLC; Moore Ingram Johnson & Steele, LLP; Todd A. Orston, LLC; Schulten Ward &

Turner, LLP; Shriver & Gordon; Smith, Gilliam, Williams, & Miles, PA; Stearns-Montgomery & Associates; and Robert G. Wellon.

With silent auction items ranging from tickets to professional sporting events, weekend getaways to the beach, signed guitars, teeth whitening, wine baskets and jewelry the auction component of The Supreme Cork was particularly spirited this year. The bidding had a healthy level of competition keeping everyone on their toes to the end. Of course, the two original works of art hand made by students at The Bridge were again two of the most popular items.

Our Section's YLD committee continues to grow and so does the popularity and success of this event. The committee is grateful to those who supported this event where, and of course those who joined us to sample the wine and enjoy the view of Atlanta's skyline from charming JCT Kitchen's outdoor bar.

The Family Law Committee looks forward to hosting the Family Law Section for the annual reception at The 2009 Family Law Institute. Thanks for supporting the Section's young lawyers. **FLR**



The host committee was (L-R) Kelly Webb, Suzanne Prescott, Traci Weiss, John Lovett, Whitney Mauck, Leigh Cummings, Katie Connell, Payal Kapur, Tracy Reese, Gillian O'Nan and Tyler Browning.

# Confessions of a Guardian Ad Litem

by M. Debra Gold  
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Uniform Superior Court Rule 24.8 provides that the superior courts of Georgia “may” establish court mandated programs “to educate the parties to domestic relations actions in regard to the effects of divorce on minor children of the marriage.” Many courts in Georgia require, with a few exceptions, attendance at the seminar for parties involved in divorce, separate maintenance, paternity, legitimation, visitation, change of custody or other actions involving the custody of minor children. We, as family law attorneys, regularly advise our clients as to what to expect at these seminars. But how many of us have actually attended one? My confession for this issue is that after almost 20 years of practicing in the area of family law, I never attended the seminar until I finally took the opportunity to do so just a few weeks ago. I also confess that to my pleasant surprise, it was truly a valuable experience. And, at the risk of incurring the wrath of my colleagues who don’t want to be bothered by more requirements to attend seminars, I think that this seminar is one that *every* family law practitioner should be required to attend.

Thanks to the vision and hard work of Nancy Parkhouse, the first divorcing parents seminar in Georgia was held in Cobb County in 1988. At that time, Georgia had one of the only programs in the country. Today, most, if not all of the states have programs similar to the one created in Cobb County. Parkhouse went on to work with Justice P. Harris Hines (then a superior court judge in Cobb County) to draft the basis for what is now USCR 24.8.

USCR 24.8 provides that each county may construct and administer their own program using qualified personnel with professional and educational expertise in children and families. Thus, while the content of the seminars follow the same general guidelines provided for in the rule, the production may be somewhat different from county to county. The rule further provides that the superior

courts may make reciprocal agreements with other counties so that parties may attend seminars outside of the county in which their case is pending. Since all of the superior courts do not require seminar attendance, I recommend that attorneys familiarize themselves with

the local rules so that they can properly advise their clients.

Regardless of whether attendance at the seminar is court-ordered or not, I recommend that every litigant in a custody case attend the seminar not once, but at least twice. Yes, I said “at least twice”! Most people go to the seminar at the onset of their custody action. This, of course, is an important time because the stress and conflict involved in a custody action can cause even the best parents to lose sight of the forest for the trees. They should nip their issues in the bud as soon as possible. The things they learn at the seminar and the tools they are given are invaluable to help them get through their case without involving and hurting their children. I say “at least twice” because I believe that over time, particularly during litigation, the way the parties filter information changes. Each

“I recommend that every litigant in a custody case attend the seminar not once, but at least twice. Yes, I said ‘at least twice’!”

time they take the seminar, they will likely come away with more information and different perspectives. Even the best parents have more to learn about how to better parent their children. Just as attorneys are required to have continuing legal education, parents should be required to have “continuing parenting education”!

I attended the seminar in DeKalb County. I was impressed not only with the quality of the information provided, but also with the level of attention and interest of the participants. My expectation was that most people went to the seminar only because they were required to do so by court order. My observation was that most of the people were also there to learn. They asked thoughtful questions and otherwise participated to a degree that surprised me. Apparently, my expectations and observations were right on target. The coordinators of some of the metropolitan Atlanta programs report that many people complain prior to the seminar that they do not want to take the time or spend the money for something the court is “forcing” them to do. They report, however, that a substantial majority of the post-seminar evaluation forms contain positive feedback and comments about the seminar and that most of the participants report that they are glad they attended.

Pursuant to Subsection (C) of USCR 24.8, the seminars “focus on the effects of divorce on children.” Specifically, the rule provides that the seminars shall educate parents as to how their actions, both before and after separation, may impact their children. Further, the rule directs the seminars to cover the different developmental stages of children in order to provide a better understanding as to how to effectively deal with children of divorce on an age appropriate level. Finally, Subsection (C) provides that special attention should be given to the economic effects


of divorce on children. The various programs in Georgia follow these general guidelines. Other topics addressed in the seminars include, but are not limited to:

- The changing parental and marital roles and the positive effects of cooperative co-parenting
- The grief process as it is experienced from both the parents’ and child’s perspectives
- Identifying stress indicators in children with suggestions on how to reduce stress and how to encourage a sense of good character and positive self-esteem.
- Proper, age-appropriate and effective communication skills with examples of how to answer children’s questions
- Parenting plans and custody and visitation schedules which will enhance the children’s relationships with both parents
- Conflict management and dispute resolution
- Financial obligations of child rearing
- Realistic expectations about step families

Our clients have so much to learn by attending this seminar. As attorneys, we should not present the seminar to the client as a court-ordered requirement that they must attend. This sets them up to dread the seminar as a pain in the neck and to attend it begrudgingly. Rather we should present it positively and encourage them to attend the seminar with an open mind so that they can get the most possible out of it. And maybe we should set a good example for our clients by attending the seminar ourselves. It’s just a suggestion. *FLR*

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](mailto:rkessler@kssfamilylaw.com).

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Be sure and register for the 2009 Family Law Institute by visiting [www.iclega.org](http://www.iclega.org) and downloading the registration brochure.

The Institute will be May 21 - 23 at the Amelia Island Plantation in Amelia Island, Fla.

# Stock Redemption Agreements- The Potential Problems in the Event of a Divorce

by Martin S. Varon, CPA, CVA, JD &  
Sue Kisner Varon, Esq.

The problems associated with stock redemption agreements in the context of divorce was the subject of a recent case. The judgment relating to premarital and marital property is of particular interest.

## FACTS OF THE CASE

Husband, owner of a "C" corporation, valued at \$1,000,000 died in 1990. Under the terms of his will, the corporation was bequeathed to his heirs as follows:

Wife #2 (Step-Mom)	60 shares or 60 percent
Son #1	20 shares or 20 percent
Son #2	20 shares or 20 percent

In 1992, Son #1 married Mrs. Client.

In 1994, Son #1 and Son #2, CEO and COO respectively, concluded it was prudent to buy-out Step-Mom's interest as a result of her actions which impeded the company's growth during the last four years. After meeting with their financial planner and corporate counsel, Sons #1 and #2 decided to implement a stock redemption agreement to acquire Step-Mom's ownership interest. Pursuant to the agreement, the corporation would redeem Step-Mom's 60 shares for \$600,000, the estimated value of her 60 percent interest. (Minority interest discounts and majority premiums were not considered.) Corporation funded the redemption partially with cash with a note paid for the balance. In addition, corporation purchased life insurance on Step-Mom's life in the amount of \$600,000. Step-mom was the insured; corporation was the owner and beneficiary of the policy.

In 1996, after Step-Mom died, the proceeds of the \$600,000 life insurance policy were paid to the corporation. The corporation paid off the balance of the notes payable to Step-Mom's estate.

Immediately after the stock redemption, Son #1 owned 20 shares of the total 40

outstanding shares or 50 percent of the corporation. Son #2 also owned 20 shares of the total 40 outstanding shares, or 50 percent of the corporation.

Son #1's initial 20 shares/20 percent interest is clearly pre-marital as a result of his inheritance from his father prior to his marriage to Mrs. Client. As a result of the stock redemption, Son #1's interest in the company increased from a 20 percent ownership interest to a 50 percent ownership interest.

Since the stock redemption agreement was entered into after his marriage, the issue is whether his 30 percent increase in stock ownership (50 percent less initial 20 percent) is pre-marital or marital property.

## DISCUSSION

The Court in *Halpern v. Halpern*, 256Ga.639, 352 S.E.2d753 noted the now accepted principle that property acquired during the marriage by either party by gift, inheritance, bequest or devise remains the separate property of the party who acquired it, and is not subject to equitable division. Where the appreciation in the husband's family business, managed by the husband prior to and during the marriage, was attributable to outside market forces, the appreciation was not subject to equitable distribution. On the other hand, where the husband left his job to devote his energies to full-time management of his holdings, the court held that appreciation to his holdings was due to his active management rather than random market fluctuations, and, thus, the appreciation could be considered a product of the marital partnership.

In the instant case, opposing counsel argued that the increase in Son #1's percentage ownership resulted from an acquisition of stock by the corporation. Son #1 did not acquire any additional shares directly and thus his increased interest was a result of something that occurred beyond his direct involvement.

He also argued that before the redemption Son #1's 20 percent interest in a \$1,000,000 corporation represented approximately \$200,000 value. When the corporation bought out step-mom's 60 percent interest with a note, this created a liability on behalf of the corporation and the value of the corporation was now \$1,000,000 less a \$600,000 liability or \$400,000. After the redemption, Son #1 owned 20 of the total 40 outstanding or 50 percent. 50 percent of the \$400,000 total value of the corporation is still \$200,000. Thus after the stock redemption, Son #1 owns a larger percentage interest in the corporation. However, it is a larger interest in a smaller entity and his total value has not changed.

The argument asserted in support of Son #1's position was that the stock redemption was implemented as a direct result of Son #1's active involvement in negotiating the buy out. Further, the value of entity temporarily increased by \$600,000 with the receipt of the life insurance proceeds. Using the insurance proceeds for the stock redemption resulted in an immediate reduction by the same \$600,000, causing the company to be worth \$1,000,000. Son #1's increased ownership interest from 20 percent to 50 percent resulted in an increase in value to Son #1. Prior to the stock redemption, Son #1 owned 20 percent of a \$1,000,000 corporation or \$200,000. Immediately after the redemption, Son #1 owned 50 percent of a \$1,000,000 entity or \$500,000. Since Son #1 initiated and negotiated the stock redemption agreement in his capacity as CEO, the substance of the transaction should govern over the form; his increased ownership in the company was due to his efforts. Accordingly the increased 30 percent ownership interest should be marital property.

Since the case settled prior to trial, there is no definitive Georgia case law on this issue. However, there is persuasive authority on point in a 2008 Kentucky case, citing to decisions in North Carolina, West Virginia and Missouri. Each of these cases involves a shareholder's

increased interest in a family owned business as a result of a post-marital stock redemption agreement. In each case, the shareholder owned the stock prior to the marriage. The Courts in the Kentucky, North Carolina and West Virginia cases held that the increased interest would be marital property subject to an equitable division; in contrast, the Missouri court held that the increased stock ownership interest remained pre-marital property.

## OTHER ISSUES

This case presents problems inherent with a stock redemption agreement. Let's assume Shareholder A and Shareholder B each own 50 percent of a C corporation. The corporation is valued at \$1,000,000. Corporate counsel drafts a stock redemption agreement and corporation purchases two \$500,000 life insurance policies on the lives of A and B.

Policy #	1	2
Insured	A	B
Owner of Policy	Corporation	Corporation
Beneficiary	Corporation	Corporation
Death Benefit	\$500,000	\$500,000

When A dies, the life insurance company pays the \$500,000 death benefit to the Corporation. Under terms of the stock redemption agreement, the Corporation pays the \$500,000 proceeds to A's family in exchange for A's shares in Corporation. The stock redemption agreement has served its purpose and is in effect terminated because a corporation cannot subsequently redeem the shares from B who is now the only shareholder/ If the Company continues to maintain the policy on B's life, when B dies two years later the life insurance company pays \$500,000 proceeds to the Corporation. Since the redemption agreement is no longer in effect, the Corporation keeps the proceeds.

The problems with a stock redemption agreement are as follows:

- Proceeds paid into a C corporation represent a preference item which may unnecessarily trigger an alternative minimum tax.
- After A's death, B's cost basis in Corporation remains the same. If B decides to subsequently sell the Corporation to Mr. D, B will have a larger capital gain.
- Unequal results

What is the meaning of "unequal results"? A and B each owned 50 percent of the Corporation. When A and B die, A's family ends up with \$500,000. B's family ends up



with a corporation valued at \$1,000,000 and an additional \$500,000.

Unequal results could have been avoided if the Corporation entered into a cross purchase agreement whereby each shareholder owns a life insurance policy on the other shareholder's life.

Policy #	1	2
Insured	A	B
Owner of Policy	B	A
Beneficiary	B	A
Death Benefit	\$500,000	\$500,000

If A dies first, the life insurance company pays B the life insurance proceeds in the amount of \$500,000. Under terms of the cross purchase agreement, B is required to pay the \$500,000 to A's family in exchange for A's shares in the corporation. B receives the insurance proceeds income tax free, and receives a step up in basis for A's shares purchased with the insurance proceeds. If B subsequently sells the corporation to Mr. D, B reduces his capital gains.

If B continues to run the corporation, A's family inherits

the policy on B's life under A's will and continues to pay the premiums. If B dies two years later, A's family receives the proceeds on B's life upon B's death. Because no proceeds were paid into the Corporation, there is no alternative minimum tax. The final result is more equitable. A's family ends up with \$1,000,000 (\$500,000 received from B to buy out A's shares plus \$500,000 received from the insurance policy on B's life). B's family ends up with a corporation valued at \$1,000,000.

Note, there are situations where a stock redemption agreement would be beneficial. For example, where there are numerous shareholders, it would be cost prohibitive to purchase a life insurance policy on each of the many shareholders. In that situation, a stock redemption agreement could be the best option. It is always advisable to check with your own tax advisor regarding your specific unique fact situation. [FLR](#)



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**M**artin Huddleston received the Jack P. Turner Award at the 26<sup>th</sup> Family Law Institute in Sandestin, Fla. in May 2008. The award recognizes lifetime achievements of the recipient in the practice of law. More specifically, the Turner Award acknowledges the honoree's commitment to principles of ethics and professionalism and overall competence in the zealous representation of clients in family law cases.

Huddleston is a graduate of Emory University School of Law, receiving his J.D. in 1967, the same year in which he began his legal practice with the Atlanta Legal Aid Society.

After serving in the Navy, Huddleston returned to the full-time practice of law, first with the Office of Economic Opportunity and later in private practice. From 1973 - 99, he was a partner in the Decatur firm of Huddleston & Medori. From 1999 - 2007, he was a partner in the Atlanta firm of McGough, Huddleston & Medori. At present, he is a solo practitioner as he winds down his active representation of clients.

Huddleston is a fellow of the American Academy of Matrimonial Lawyers, a Master in the Charles Longstreet Weltner Georgia Family Law America Inn of Court and has held several positions with the State Bar of Georgia, including chairman of the Family Law Section and member of the investigative panel of the State Bar Disciplinary Board.

Huddleston is listed in Who's Who in American Law, The Best Lawyers in America, Georgia Super Lawyers and in other publications acknowledging lawyers of excellence. In 2003, he was the recipient of the Joseph T. Tuggle, Jr. Professionalism Award.

To his credit, for a long time practitioner of family law, Huddleston has been married only once to Gai, a recently retired teacher in the DeKalb County public schools. He has two adult children, a grandson, and is the happily expectant grandparent of a granddaughter due in February 2009. [FLR](#)



*Former FLS Chair Barry B. McGough  
presents former FLS Chair Martin  
Huddleston with the Jack P. Turner Award .*

# 2009 Family Law Institute Update

by Tina Shadix Roddenbery  
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It is time to make your plans to attend the 2009 Family Law Institute to be held at Amelia Island Plantation May 21-23, 2009. With travel and CLE budgets tight, the theme of our program is aimed at making this weekend well worth your while - "Issues family law practitioners are facing during the worst economic downturn since the Great Depression." This is your chance to meet attorneys and judges who will share their experience, expertise and creative solutions to help you and your practice. Judges Louisa Abbott of Savannah, Warren Davis of Lawrenceville, Steven Jones of Athens, and Cynthia Wright of Atlanta have confirmed their attendance as speakers. Several superior court judges will be joining us also, and, we expect to have several members of the Georgia Supreme Court in attendance as well. John Mayoue will speak on "Equitable Division of Unusual Assets: Finding Assets to Divide in These Challenging Economic Times." Bob Boyd, John Collar and Judge Wright will talk about empirically measuring contributions to a shrinking marital estate so as to get your client more than the usual 50 percent. Gwenn Holland will share her knowledge on diminishing value in assets,

negative equity, debt division and unique problems with dividing retirement accounts. Geoff Frost, marketing director for Bondurant Mixon & Elmore LLP, will speak on marketing strategies for family law practitioners in these tough economic times. And internationally-known trial attorney Roger Dodd of Valdosta, who has graciously waived his honorarium to speak at the Institute for the section, will present a program entitled "Cross Examination: Dark Energy." We will also have our annual presentation on case law updates and recent developments in family law. And, lest you think it is all work and no play, there will be plenty of socializing, including two receptions, golf tournaments, tennis and a special event for first-time attendees to welcome them and put them in touch with mentors attending the Institute.

Not only will you get to attend an exciting and informative program, but you'll be able to spend time in the beautiful setting of Amelia Island Plantation. Our room block includes rooms as low as \$169 per night, plus resort fees and taxes, with one-bedroom suites and one-, two- and three-bedroom villas also available. Look for e-mails and brochures from ICLE for registration information. See you there! [FLR](#)



*The Amelia Island Resort as viewed from the boardwalk.*



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