The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia – Spring 2026

Editor's Corner

By Kem A. Eyo

If your weather preferences are anything like mine, you are also looking forward to the upcoming changes in temperature. One of the best things about the upcoming Spring, at least for many family law practitioners, is the upcoming Family Law Institute. I hope that you will be joining us in Amelia Island May 29 - 31, 2026 for what is likely to be an informative, and fun, "reunion" of your fellow practitioners.

This year's Mid-Year Meeting also provided a great opportunity to better understand the recent changes to O.C.G.A. §19-6-15 (Georgia's child support statute). Not only were the presenters phenomenal, this year was also one of the section's most well-attended Mid-Year Meeting to date. Enclosed herewith are a few photos from the event.

Also enclosed are articles addressing issues within a wide range of topics affecting the practice of family law – namely: Artificial Intelligence, social media, the collaborative practice, child elections, division of the marital estate, and irrevocable trusts. Finally, as always, you will find an update on recent appellate cases.

Whether you find the Family Law Review to be a useful tool or a waste of print, you can help improve it. The Executive Committee is always soliciting articles. If you don't have the time or means to write something, then consider either interviewing someone related to the practice (a judge or unique expert) or just sending topic ideas. Either way, if you have something to contribute, please send it to me at kem@rbafamilylaw.com. (Please feel free to submit articles even if you have missed an announced deadline.)

Editor's Emeritus

By Randall Kessler

What's new? Well, I guess I'm not. Which reminds me that there are a lot of old-time family law attorneys who really helped build this section in this area of the law. It was so heartwarming to see Rob Wellon receive the Jack Turner award at last year's Institute, especially since Rob began his career working for Jack. I have the honor of co-teaching with Rob at Emory, and I can tell you he is certainly a very deserving recipient. But I also want to take a moment to remember so many of our colleagues who are no longer with us or who have retired. I saw Jeff Bogart at the event honoring Judge Barwick, hosted by the Atlanta Bar Association recently, and it reminded me of all the great lawyers who have come before us. I remember when that event started. It was nice to see a packed room, but it also reminds me of all the people we miss. I would list them, but I'm afraid I'd accidentally omit somebody and that would be terrible. The other thing is, it would make us all too sad but certainly, certainly, certainly, there are so many former leaders in our field who are no longer with this that it requires us to honor and appreciate and enjoy and respect each day we all have together. Clients and cases will fade into the past. But we will always have our memories of how we treated each other. And as I have said often, I feel so lucky to practice in this field where doing a good job can truly make a difference in a family's life. And how we do it matters as much as the results we achieve. We set the stage for future family interactions, and I know we're all trying to do it with honor and dignity. So here's to you, the lawyers and judges of the Family Law Section of the State Bar of Georgia. Keep up the great work and let's make many more good memories and continue having a great, positive impact on Georgia families.

Inside This Issue

From the Chair

By Jeremy Abernathy

Please join us at this year's Family Law Institute at the Omni Amelia Island, from Friday, May 29, through Sunday, May 31, 2026. This annual gathering promises to be informative, engaging, and genuinely collegial—an opportunity to sharpen your skills while reconnecting with the community that makes our profession meaningful. As one of our colleagues aptly put it, "The law is a demanding craft, but it is best practiced in the company of others committed to excellence." This Institute is designed with that very spirit in mind: to learn together, grow together, and serve our clients better because of it.

First, let me extend sincere thanks to our Executive Committee Vice Chair, Jamie Perez, who has worked tirelessly to assemble an outstanding group of speakers. Jamie began this process early and has brought together some of the most knowledgeable and dynamic presenters from across the state. The proposed topics are refreshing, practical, and immediately useful to your daily practice. Attendees can expect robust discussions on legislative updates, case law developments, and thoughtful panel conversations addressing the issues we are facing right now in Georgia family law. As one seasoned practitioner reminds us, "Good lawyers know the law; great lawyers stay ahead of it." The Institute is also an ideal opportunity to satisfy your CLE requirements with programming that truly enhances your effectiveness as an advocate.

In addition to the educational value, the setting itself makes this event special. The Omni Amelia Island is an exceptional venue that consistently provides a perfect balance of comfort and beauty. After each day of CLE sessions, you can unwind by the pool, enjoy the spa, walk along the beach, or take advantage of world-class golf and tennis. The surrounding area offers excellent restaurants, nearby state parks, and a local history museum just minutes away. It is the kind of place where, as one traveler observed, "Rest is not a luxury; it is a necessary companion to meaningful work." You will leave not only more knowledgeable, but refreshed and reenergized.

Finally, the Institute stands out as a truly collegial event. It offers the rare chance to put faces to names of attorneys you correspond with regularly, to speak with members of the judiciary in an informal setting, and to reconnect with friends and colleagues. The evening gatherings are designed to foster those relationships that sustain us, even when we find ourselves on opposite sides of the courtroom advocating for our respective clients. In the words of a respected jurist, "Professional courtesy and personal connection are the quiet strengths of effective advocacy." This Institute embodies that principle.

If you have not yet made plans to attend, please stop what you are doing and make arrangements now. We look forward to seeing you at Amelia Island for a weekend of learning, fellowship, and renewal.

The Georgia Chapter of AFCC: Strengthening Our Statewide Response to Families in Conflict

By Dan Bloom, Esq. and Dawn Smith, Esq***

The Association of Family and Conciliation Courts (AFCC) is an international organization dedicated to improving the lives of children and families through the resolution of family conflict. AFCC brings together judicial officers, attorneys, mental-health professionals, guardians ad litem, mediators, researchers, and policymakers to share research, develop best practices, and promote interdisciplinary collaboration. Many of us have traveled to national conferences, attended trainings, or relied on the cutting-edge research of AFCC members to guide our work with families. Yet Georgia has never had an AFCC chapter of its own—no statewide structure for training, collaboration, or cross-disciplinary problem-solving tailored to the unique challenges of our courts and the families with whom we work.

That is now changing. In April 2025, a coordinating committee of Georgia judges, attorneys, and mental-health professionals submitted a Letter of Intent to AFCC National requesting approval to form a Georgia chapter. The request was approved, and Georgia has now been granted provisional chapter status, marking the beginning of an important development for our family law community.

Georgia is a large and diverse state—158 counties, each with its own approach to domestic relations cases. While there is excellent work being done in every region, there is no unified statewide forum for cross-disciplinary training, dissemination of current research, discussion of emerging trends, or collaboration among courts, lawyers, evaluators, mediators, and mental-health providers.

A Georgia chapter of AFCC will fill that void. The chapter's goal is simple: to bring judges, lawyers, mediators, guardians ad litem, court personnel, and mental-health professionals together to improve outcomes for Georgia's children and families. Members will have access to bi-annual trainings, statewide workshops, region-specific programming, and an international network of colleagues doing similar work and facing similar challenges. In addition to trainings and other programing, the chapter will provide the most up-to-date information and research for its members on the most difficult issues facing families in conflict. This is an exciting development for Georgia and one that will elevate our ability to assist families, especially as it relates to children involved in high conflict custody disputes.

On March 24, 2026, at 12 p.m. the Georgia Chapter will host a free statewide webinar featuring Dr. Robin Deutsch, one of the nation's leading experts on parent-child contact problems. Her presentation will explore the dynamics that lead children to resist or refuse contact, principles for effective intervention, and best practices for courts and professionals when working with these families. Be on the lookout for an announcement or go to afccga.org to register.

In October 2026, the Georgia Chapter will host its first annual full-day seminar dedicated to child-custody issues. The program will include interdisciplinary panels, sessions for GALs, evaluators, and judges, and discussions of Georgia-specific needs and statutory developments. To ensure the maximum reach, the seminar will occur both in Atlanta as well as south Georgia.

Membership is open to judges, attorneys, guardians ad litem, custody evaluators, psychologists, therapists, mediators, researchers, court personnel, and students — or anyone who works with families experiencing conflict.

Please consider joining or maintaining your membership in AFCC national at afccnet.org. Then, select the Georgia chapter in your AFCC member portal. Chapter dues range from $25 - $65 per year, with reduced rates for students and public-interest professionals.

We are extremely excited that AFCC is finally coming to Georgia and look forward seeing everyone at our upcoming events.

For more information, please reach out to Dan Bloom at dan@bloomlineslaw.com or Dawn Smith at dsmith@evolvefamilylawga.com.

**Daniel Bloom is a Member of the law firm Bloom Lines LLC in Atlanta, where he practices exclusively in the area of family law. In addition to his litigation and collaborative practice, he is a mediator and arbitrator in family law cases, serves as a Guardian ad Litem in Superior Courts throughout the State, and is often retained to consult on high conflict custody matters in Georgia and throughout the country.*

***Dawn Smith is the founder of Evolve Family Law where she practices exclusively in family law. She serves as Chair of the Family Law Section of the Atlanta Bar Association; serves on the Judicial Selection and Tenure Committee of the Atlanta Bar; is the Co-Chair of the Racial, Ethnicity and Religious Considerations in Family Law Committee of the American Academy of Matrimonial Lawyers; served on the Board of the Greater Georgia Chapter of the Autism Society of America; and was on the Advisory Board of Emmaus House.*

Supervising AI Like a Junior Associate: A Practical Model for Family Law Lawyers

*By Erica F. Byrd**

Generative artificial intelligence is no longer emerging in legal practice — it is here. Family law lawyers are using GenAI for a wide variety of work-related functions, including drafting motions, summarizing financial records, outlining arguments, and refining client correspondence. Increasingly, clients experiment with it before consultations, and courts are confronting it in filings. The presence of GenAI in daily practice will only expand as these tools become more sophisticated and more embedded in the everyday work of lawyers.

For family law practitioners managing urgent deadlines and emotionally charged disputes, the efficiency is appealing. GenAI cannot be a substitute for professional judgment, however.

A useful framework is this: generative AI functions like a junior associate: capable of producing draft work quickly, but lacking judgment, experience, and ethical responsibility. When approached as such, AI can be an asset. When treated as autonomous, it risks harm not only to attorneys, but to clients and to the integrity of the judicial process. In family law, where court filings can shape children's lives, financial stability, and personal safety, that distinction has real and lasting consequences.

AI Drafts. Lawyers Decide.

Georgia Rule of Professional Conduct 1.1 requires lawyers to provide competent representation, including the requisite knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. As generative AI becomes integrated into practice, competence includes understanding what these tools can, and cannot, do. An attorney who relies on AI-generated content without independent review risks falling short of that obligation.

Generative AI systems do not engage in legal reasoning. They generate text based on statistical probability, not

legal analysis. They cannot evaluate credibility, assess the safety implications of parenting-time provisions, appreciate local practice norms, or anticipate how a particular judge may respond to an argument. Most importantly, they do not recognize when they are wrong.

Courts have already demonstrated that they will not excuse lapses in supervision. In a recent divorce appeal, the Georgia Court of Appeals penalized an attorney after finding that numerous cases cited in her filings did not exist and appeared to be "hallucinations" generated by AI. The court both vacated the underlying order and sanctioned the attorney, underscoring that responsibility for the filing rested with counsel, not the technology used to produce it.

The lesson is not merely that AI can fabricate authority. It is that professional responsibility cannot be delegated. Georgia Rule of Professional Conduct 3.3 requires candor toward the tribunal. A lawyer's signature certifies that the filing is accurate, regardless of how the draft was produced. AI may generate text, but the lawyer must determine whether it is correct, appropriate, and fit for submission.

Supervision Requires Verification and Refinement.

If AI is treated like a junior associate, supervision becomes the governing principle.

First, verify every authority. Generative tools have demonstrated a capacity to produce plausible but nonexistent cases and to misstate legal standards. Independent confirmation through traditional research remains essential.

Second, evaluate tone and precision. Family law advocacy often requires measured, fact-specific presentation. AI-generated drafts may rely on sweeping or conclusory language that undermines credibility in sensitive proceedings.

Third, tailor the document to the family at issue. Parenting plans, financial proposals, and settlement language cannot be reduced to generic templates. Effective advocacy in family court depends on individualized analysis informed by experience and strategic judgment.

Fourth, protect confidentiality. Georgia Rule of Professional Conduct 1.6 requires lawyers to maintain the confidentiality of information relating to the representation of a client, and that obligation applies regardless of the technology used in practice. Family law matters frequently involve highly sensitive personal, financial, and medical information. Before entering any client information into a generative AI platform, lawyers must understand how the system stores, processes, and protects data. A lawyer should not input confidential information into any AI tool that lacks adequate security protections or clear data-use limitations.

The supervisory principles reflected in Georgia Rule of Professional Conduct 5.3, requiring oversight of nonlawyer assistance, offer a helpful parallel. AI should be treated as one would treat a new associate: its work reviewed, its outputs checked, and its access to sensitive information carefully controlled. Whether the assistant is human or technological, the lawyer remains ultimately responsible for ensuring compliance with professional obligations.

Efficiency Without Abdication.

AI can offer meaningful efficiencies. It may assist with organization, generate preliminary drafts, or suggest alternative phrasing. Used thoughtfully, it can reduce time spent on routine tasks and allow attorneys to devote greater attention to strategy, client counseling, and case analysis.

But efficiency must not become abdication.

Family law practice demands assessment of risk, evaluation of credibility, anticipation of emotional dynamics, and careful consideration of long-term consequences for children and families. These functions require judgment grounded in training, experience, and ethical responsibility. They cannot be automated.

A Practical Supervisory Framework.

Before relying on AI-generated work, attorneys might ask:

- Would I file this if a first-year associate prepared it?
- Have I independently verified every legal authority?
- Does the tone reflect appropriate restraint and credibility?

- Is this document tailored to this family's specific circumstances?
- Have I preserved client confidentiality?
- Does the final product reflect my professional judgment?

If the answer to any question is no, further supervision is required.

Generative AI is now a routine feature of legal practice, and its influence will only deepen. Lawyers may delegate tasks, but they may not delegate responsibility. When AI is treated as a junior associate (useful but necessarily supervised) the profession's core commitments to competence, candor, and client protection remain intact.

Erica F. Byrd is a professor at Georgia State University College of Law and a former family law practitioner. She writes and teaches on legal writing and advocacy, professional identity, and the ethical integration of generative AI into modern legal practice.

Text Threads and TikTok: Preserving, Presenting, and Persuading in the age of Electronically Stored Information

*By Elizabeth Schneider, Esq.**

I. Welcome to the Era of Electronically Stored Information (ESI)

In an era where conversations unfold in DMs, parenting disputes surface on Instagram, and TikTok videos go viral overnight, family law practitioners must be adept at handling digital evidence. Whether it is a text thread showing a co-parent's disparaging remarks, a Snapchat revealing a parent's substance use, or a social media post undermining a custody claim, the courtroom is no longer insulated from the digital world. Thus, the ability to identify, preserve, and present Electronically Stored Information (ESI) is critical to effective representation.

II. What Is ESI and Where is it Hiding?

"Electronically Stored Information" (ESI) refers to any data created, manipulated, communicated, stored, or used in digital format. In the family law context, this includes but is not limited to text messages and call logs, emails and instant messages, social media posts and DMs, location data from mobile apps, digital photos, videos, and voice memos, files stored in cloud services such as Google Drive or iCloud, fitness tracker data or smart home device logs. Each of these may contain evidence relevant to custody, parenting time, finances, or allegations of misconduct.

Common sources of ESI in domestic cases include smartphones, tablets, and laptops, messaging apps such as WhatsApp, Signal, and iMessage, social platforms like Facebook, Instagram, Snapchat, TikTok, and X (formerly Twitter), cloud storage providers (Google Drive, iCloud, Dropbox), smart home systems and fitness tracking devices, and/or bank and digital payment accounts (e.g., Venmo, PayPal).

Clients may not initially recognize that these sources contain relevant evidence. It is counsel's responsibility to ask targeted questions during intake and discovery to identify these data sources. Remember the difference between Interrogatories and Requests for Production in this regard: are you asking whether the data exists or are you asking for the production of the data? Also remember to request the production of the devices, especially those that contain the data like a fitness tracker, cell phone or computer, in the event that the same needs to be imaged.

III. Preserve It or Lose ESI: The Spoliation Letter

Once litigation is anticipated, both parties have a duty to preserve relevant ESI. This includes disabling auto-delete features on messaging apps (make sure your client has gone to the Settings on their phone and reset this feature) and cloud accounts. Attorneys must ensure clients understand that even deleted data may be retrievable and subject to discovery. The failure to preserve evidence can lead to dire consequences per the Federal and Georgia rules: Federal Rule 37(e) provides that sanctions may be imposed for loss of ESI due to failure to preserve. Georgia's Civil Practice Act,

particularly O.C.G.A. §§ 9-11-26 to 9-11-37, aligns closely with the FRCP. When a party fails to preserve relevant ESI, courts may impose sanctions under O.C.G.A. § 9-11-37. Sanctions may include adverse inference instructions, exclusion of certain evidence, monetary penalties, and in extreme cases findings of contempt or the striking of pleadings. Attorneys should document their preservation efforts carefully and act quickly upon learning of potential spoliation.

Key Steps to preserve ESI:

a. Instruct your client on their preservation obligations in writing and be sure that the client affirmatively acknowledges receipt of a preservation letter.

b. Send preservation demands to opposing counsel or the opposing party at the initiation of your representation and, if necessary, to third-party custodians such as employers or cloud service providers. Also remember that you can send the individual custodian a spoliation notice and a copy of the Standing Order to enforce their duty to preserve testimony.

c. An effective litigation hold letter will identify the specific types of ESI that must be preserved, such as text messages, social media posts, emails, cloud-stored documents, and digital financial records. Example: "You are required to preserve all text messages, call logs, emails, social media content (including deleted posts), and any documents stored on cloud accounts or electronic devices relating to parenting, financial transactions, or communication between the parties from January 1, 2024 to present."

IV. Getting ESI: Strategy and Specificity

Per Federal Rule of Civil Procedure 34 and Georgia Code § 9-11-34 ESI is discoverable and may be requested in native format. When requesting this information, practitioners should remember that overly broad requests can lead to objections or judicial disapproval. Family law attorneys should be specific in defining date ranges, accounts, and types of data requested. Some judges have disallowed broad requests for production, requiring the production of only specific ranges of time, or limiting subpoenas to specific numbers. Make sure the document requests identify specific communication threads (e.g., "all messages between Opposing Party and Paramour between January and March 2024"). When possible, seek native file formats when metadata is needed (e.g., for documents or photos). Remember that social media discovery deserves particular attention. While platforms like Facebook and Instagram permit users to download archives (and please look through your request to make sure that the instructions provided actually download this data), they are unlikely to respond to subpoenas absent a court order. Instead, discovery should focus on compelling the opposing party to produce their own data and your requests should give clear and correct instructions on how to do so. Think about asking for all text messages between parties from a defined period, full social media archives, including posts, messages, and comments, cloud storage documents related to finances, parenting, or relocation, call logs, photos, or videos tied to alleged misconduct, and even GPS or app-based location data. Additionally, remember with social media posts, videos or posts may be deleted quickly, so monitor and save posts quickly. This is especially true of TikTok and Snapchat which must be downloaded and recorded before they disappear.

V. Using ESI at Trial: Relevance, Authentication, and Admissibility

A. Authentication: O.C.G.A. § 24-9-901: Authentication is often the most contested hurdle. Georgia law requires a showing "sufficient to support a finding" that the item is what the proponent claims it to be. See Brewner v. State, 302 Ga. 6, 16 (2017). With digital evidence, this often involves: Testimony from a witness with knowledge (e.g., "I received this text."), metadata or file properties, screenshots with contextual details (dates, names, profile pictures), confirmation via subpoena to the platform provider, or admission by the party opponent. Courts are wary of manipulated screenshots or spoofed messages. Proper foundation can often be laid with device extraction, testimony, or circumstantial evidence (e.g., message style, emojis, timestamps). If in doubt about how to get one on the stand to identify or admit to their ESI, think about the following lines of questioning:

a. Witness Testimony with Knowledge: Asking questions that would elicit testimony confirming the text or screenshot from the party's phone or device.

b. Distinctive Characteristics (O.C.G.A. § 24-9-901(b)(4)): Ask about the specific message content, use of nicknames, emojis, or slang unique to the sender.

c. Metadata and Digital Footprints: Think about how to incorporate asking about the use of tools to show file creation dates, IP addresses, account IDs.

d. Device Extraction Reports: Consider hiring an expert to present forensically acquired data from phones using tools like Cellebrite or Oxygen Forensics. Most providers like Snapchat, Instagram, Facebook, and the like will not provide documents or data without a Court Order or subpoena from law enforcement.

e. Admissions by a Party Opponent: Do not forget that an opposing party's statement acknowledging authorship or presence in the ESI can make the ESI admissible.

B. Relevance: O.C.G.A. § 24-4-401: As with any evidence, the first step is relevance. Does the social media post or text thread make a fact of consequence in the case more or less probable? Is a mother's Instagram reel showing the child present at a party with alcohol relevant to parenting judgment? Most likely, yes. Is a TikTok trend the parent participated in relevant to parental judgment? Probably not unless it relates to parenting or financial stability.

C. Hearsay and Exceptions: O.C.G.A. § 24-8-801 et seq.: Even if authenticated, digital communications must still satisfy hearsay rules. A text message sent by a party-opponent is admissible under O.C.G.A. § 24-8-801(d)(2). Posts by third parties, however, often require exceptions such as:

- Party-Opponent Admissions: O.C.G.A. § 24-8-801(d)(2): Messages sent by the opposing party are non-hearsay and fully admissible. Additionally, posts made on opposing party's own account are typically admissible with proper authentication.
- Present Sense Impression, Excited Utterance or Current Mental State: O.C.G.A. § 24-8-803 sections 1 through 3: A Facebook post made in the moment of a heated custody exchange may qualify. Further, a tweet or post could be used to show the party's mental or emotional state at the time of the statement. Additionally posts or messages expressing emotional distress, intent to flee, or depression may be relevant in custody disputes.
- Statements Against Interest: O.C.G.A. § 24-8-804(b)(3): A recorded message admitting neglect or illegal conduct may fall here.

D. Case law: In terms of whether the ESI you spent time discovering will be considered by the finder of fact, recent Georgia cases, especially those in the criminal law arena, have clarified that ESI can be admitted and considered by the finder of fact. In Nicholson v. Nichols, 307 Ga. 466 (837 S.E.2d 362) (2019), the Supreme Court of Georgia reaffirmed that circumstantial evidence — such as profile pictures, usernames, and language patterns — can support authentication. Nicholson affirms: "Under O.C.G.A. § 24-9-901 (a), authentication of evidence may be achieved through any of a variety of means affording 'evidence sufficient to support a finding that the matter in question is what its proponent claims.'" citing Brewner v. State, 302 Ga. 6, 16 (2017), Nicholson, at 21. Nicholson also clarifies that "[d]ocuments from electronic sources are subject to the same rules of authentication as other more traditional documentary evidence and may be authenticated through circumstantial evidence," which may include the "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics [of the documents], taken in conjunction with circumstances." citing Hawkins v. State, 304 Ga. 299, 304 (2018),OCGA § 24-9-901 (b) (4). See also Pierce v. State, 302 Ga. 389, 395-396 (2017) [internal citations removed]. Id. Finally, the proper procedure per Nicholson is that "the party seeking to authenticate evidence presents a prima facie case that the evidence is what it purports to be, the evidence is properly admitted, leaving the ultimate question of authenticity to be decided by the jury." See also McCammon v. State, 306 Ga. 516, 523 (832 SE2d 396) (2019); Johnson v. State, 348 Ga. App. 667, 675-677 (824 SE2d 561) (2019). Id. at 22.

For example, the prima facie showing required

to admit printouts from a Facebook account may be established by circumstantial evidence of distinctive characteristics of the account that identify its owner. See Hawkins v. State, 304 Ga. 299, 304 (2018). More specifically, in Cotton v. State, the Court held that a Facebook account was properly authenticated by a witness who knew the defendant's nickname, "Bucky Raw," that was associated with the account and recognized that the defendant's friends and family were listed in the friend's list of the account. 297 Ga. 257, 260 (2015). Further, in Burgess v. State, the Court held that a Myspace account was properly authenticated by an investigator who testified that the defendant's nickname was associated with the account and identified the defendant's biographical information on the account. 292 Ga. 821, 823-824 (2013). Moreover, in Glispie v. State, the Supreme Court found that text messages were properly authenticated by an investigator who, among other things, testified that the sender referred to himself by name in the messages. Reversed in part on other grounds, 300 Ga. 128 (2016).

VI. Ethics and Legality of Accessing ESI

Attorneys must advise clients on lawful and ethical collection of digital evidence. Even though Georgia is a one-party consent state for audio recordings under O.C.G.A. § 16-11-62, clients may not realize that accessing an opposing party's accounts without consent—even if a password is known—may violate state or federal statutes such as the Computer Fraud and Abuse Act at Section 16-9-93 et. seq. Illegally obtained evidence may be excluded and could expose both client and counsel to civil liability. Georgia Rule of Professional Conduct 3.4(a) prohibits attorneys from unlawfully obstructing another party's access to evidence which means that advising clients to "clean up their Facebook" or to delete any texts or social media posts may cross this line.

VII. Using--and Challenging ESI--at Trial

When opposing counsel presents questionable digital content, challenge it using these strategies (and tips on how to make sure you do not fall prey to these objections):

a. Irrelevant: "The post has nothing to do with custody, which is the focus of today's hearing." Present a focused, organized case tailored to the issues at hand. Object citing O.C.G.A. § 24-4-401.

b. Lack of authentication: "There's no proof my client wrote that." Consider requesting metadata or testimony to challenge authorship. Make sure that the entire conversation/thread is recorded with timestamps. Also, be sure to have the ESI include the sender and recipient names with phone numbers when possible. Object citing O.C.G.A. § 24-9-901.

c. Manipulation: "The screenshot was doctored; the metadata doesn't match." Be sure to back up the ESI with testimony, phone records, or screenshots from both sender and receiver. Object citing O.C.G.A. § 24-9-901(a) for the ESI not being properly authenticated.

d. Hearsay: "It's a statement from an unknown third party." Posts by third parties, screenshots of group messages without party statements cannot be admitted unless you bring in the witness. Object citing O.C.G.A. § 24-8-801 et seq.

e. Prejudice vs. probative value: "The inflammatory post does not relate to custody and is more prejudicial than probative." Avoid cherry picking or paraphrasing messages or using extreme or "gotcha" examples from the ESI. Object citing O.C.G.A. § 24-4-403.

f. Content may be too inflammatory, confusing, or misleading: "This text does not accurately present the facts." If possible, include the entire conversation as a snippet of an argument may not provide enough context for the Court. Object to relevance citing O.C.G.A. § 24-4-401, confusion citing O.C.G.A. § 24-4-403, or lack of completeness citing O.C.G.A. § 24-8-822.

g. Cumulative: "This is the seventh text showing the same issue." If opposing

counsel presents multiple ESI on the same topic tending to prove the same fact, object on the basis of O.C.G.A. § 24-4-403, as the ESI is wasting the Court's time and is the needless presentation of cumulative evidence. Make sure to present a tight, tailored case.

h. Privacy and Illegally Obtained Evidence: Georgia is a one-party consent state for audio recordings (O.C.G.A. § 16-11-62) — but beware of third-party recordings or hacks. Make sure that you lay adequate foundation to show who was recording the conversation, and the data or metadata that would prove your claim.

Cross examination, expert testimony, and demonstrative exhibits (e.g., phone extraction logs) can all help cast doubt on ESI.

VIII. Conclusion

Family law practitioners must be prepared to preserve, present, and, when necessary, challenge ESI throughout litigation. Understanding how to lawfully obtain digital evidence, navigate the rules governing its admissibility, and use it persuasively in court is now an essential part of competent practice.

As client lives become more intertwined with technology, lawyers must become more fluent in it. The attorney who masters ESI will be better positioned to protect their client's interests and deliver a complete, credible narrative in the courtroom.

**Elizabeth Schneider, Esq. is a family law trial attorney and the founder of Court-Confidence, a litigation consulting service dedicated to empowering attorneys and clients for court. She is based in Atlanta and regularly advises on trial strategy, digital evidence, and custody litigation. She can be reached at elizabeth@court-*

Past Section Chairs

Jonathan Dunn.....2024-25
Karine Burney.....2023-24
Theodore Eittreim.....2022-23
Leigh Cummings.....2021-22
Kyla Lines.....2020-21
Ivory Brown 2019-20
Scott Kraeuter.....2018-19
Gary Patrick Graham.....2017-18
Marvin Solomiany.....2016-17
Regina M. Quick.....2015-16
Rebecca Crumrine Rieder.....2014-15
Jonathan J. Tuggle.....2013-14
Kelly Anne Miles.....2012-13
Randall Mark Kessler.....2011-12
Kenneth Paul Johnson.....2010-11
Tina Shadix Roddenbery.....2009-10
Edward Coleman.....2008-09
Kurt Kegel.....2007-08
Shiel Edlin.....2006-07
Stephen C. Steele.....2005-06
Richard M. Nolen.....2004-05
Thomas F. Allgood, Jr.....2003-04
Emily S. Bair 2002-03
Elizabeth Green Lindsey.....2001-02
Robert D. Boyd.....2000-01
H. William Sams.....1999-00
Anne Jarrett.....1998-99
Carl S. Pedigo.....1997-98
Joseph T. Tuggle.....1996-97
Nancy F. Lawler.....1995-96

42nd Annual Family Law Institute Sponsors

As of March 12, 2026

Platinum: Happily Ever After Sponsorship
Rubin Family Law LLC
Hawk Professional Investigations, Inc.

Diamond: The Fairytale Sponsor
SOBERLINK
Johnson Kraeuter Sanders LLC
Boyd Collar Nolen Tuggle & Roddenbery, LLC

Hotel Key Sponsorship
Forrestall CPAs, LLC
Abernathy, Ditzel, Hendrick LLC

Gold: The Once Upon a Time Sponsor
Oliver Maner LLP
Stern Edlin Graham
Caldwell Carlson Elliott DeLoach LLP

Snack, Coffee, or Mimosa Bar Sponsorship
Heineck & Company

Silver: The Royal Court Sponsor
Warner Bates McGinnis & Anthony, PC
Levine Smith Coburn & Koslin, LLC
Snider & Snider Family Law PC
American Academy of Matrimonial Lawyers (AAML)
Georgia Chapter
Tori White Legal Group
AllianceBernstein LP
Jonathan V. Dunn, P.C.
Harrison LLP

On-site Registration Table Sponsorship
Connell Cummings, LLC

Bronze: The Fairy Godparent Sponsorship
OurFamilyWizard
LexisNexis
Zagoria Neely Injury Attorneys
DS Murphy and Associates
ADAP-Atlanta Divorce and Parent
Southern First Bank
Law Office of Casey Tuggle
Reese Beisbier & Associates, PC
Callaway & Company, LLC

Copper: The Storybook Sponsor
Matthew Lundy Law--QDRO Law
The Gleklen Law Firm
Lake Mediation
The Grant Group
Naggiar & Sarif Family Law
Shewmaker & Lewis, LLC
Somerstein Mediation
Bloom Lines
Georgia Lord Law
Hedgepeth Heredia
Gaslowitz Frankel LLC

Friend: The Glass Slipper Sponsor
Robert G Wellon
Moore, Ingram, Johnson & Steele
Law Firm GC, LLC
Rahman Family Law
The Law Office of TMG, P.C.
DE KLERK LAW & MEDIATION
Flink ADR

The Family Law Section would like to extend a special thanks to our first sponsors for the 42nd Annual Family Law Institute, happening May 29-31, 2026 at the Omni Amelia Island Resort. We are still looking for sponsors to make this year's FLI possible. If you are interested in sponsoring, please reach out to our sponsorship Chair, Megan Wyss, at megan@bcntrlaw.com.

Two Dollars for the Price of One: The Perils of Buying Out Equity in a Marital Home with Retirement Assets

*By John R. Bampfield**

Paying income tax on the sale or exchange of an asset is no different than paying off a mortgage when real estate is sold; in both cases, the owner's resulting net cash in hand on a sale or exchange is less than the sale price of that asset, and that cost should be accounted for when balancing marital assets. Just as the equity in a home takes into account a mortgage balance, accounting for tax implications on pre-tax retirement assets should also be considered.

In this paper, the author builds a hypothetical fact pattern to explain this issue and provides suggestions on how to navigate it. Though fictional, the general fact pattern reflects a common occurrence in divorce settlements: trading pre-tax retirement account funds for equity in the marital house.

Any time a party accepts a dollar-to-dollar exchange of pre-tax retirement account proceeds for another tax-neutral asset, such as home equity, one party is being gravely disserved. The purpose of this article is to flag the issue for practitioners, to help ensure they acknowledge it when negotiating marital property division and, if the value and potential consequences warrant, explicitly recommend that clients in this circumstance seek further tax advice before proceeding.

The Fact Pattern

Wife and Husband are in a divorce proceeding. The parties were married for more than 10 years. Each party earns $165,000 each year, is 40 years old and a Georgia resident. All transactions, unless otherwise stated, occur in 2025.

Wife wants to keep the marital home, which the parties purchased 10 years ago for $500,000. They agree that 1) the current value of the home is $600,000 and 2) the mortgage balance is $164,000, meaning their marital equity in the home is $436,000. After accounting for a realtor commission of 6% ($36,000), the net equity is stipulated to be $400,000.

Wife proposes that she transfer $200,000 from her 401(k) to Husband to "buy out" his share of the equity in the house.

Is this a good deal for the Husband?

--

On its face, "buying out" the Husband with 401(k) funds seems like a reasonable solution: Husband's share of the home equity is $200,000, which he gives up for $200,000 of 401(k) funds. $200,000 equals $200,000, right?.

The problem, however, is that these are pre-tax values, and each asset is subject to remarkably different tax treatment.

Wife's Outcome

Suppose Wife sells the home the day after Husband quitclaims his interest to her for $600,000. After paying the mortgage balance ($176,000) and the realtor fees ($36,000), Wife receives $400,000 in cash.

- Some portion of those proceeds are allocable to the parties' basis, or what they paid for the house. In this case, they bought the house for $500,000 and Wife sold it for $600,000, meaning only $100,000 of the $600,000 could be a taxable gain. The $100,000 potential gain is further reduced by the $36,000 realtor commission, resulting in a total *potential* gain of $64,000.
- To the extent Wife recognizes a gain on the sale of the house, Internal Revenue Code section 121 excludes the gain (up to $250,000) from the sale of a primary residence from taxable income if the house was used as a primary residence for at least five years.
- As Georgia's income tax is calculated using federal adjusted gross income, the sale of primary residence exclusion means Wife will pay no Georgia income tax on the sale of the house.

Wife immediately liquidating the marital home bears no tax consequence at all. Thus, she receives $400,000 tax-free.[1]

Husband's Outcome

Now, assume Husband cashes out the 401(k) proceeds immediately after Wife transfers the proceeds. As a 40-year-old individual making $165,000 a year, this has profound tax consequences.

- All $200,000 is taxed at ordinary federal income tax rates. Before cashing out the proceeds, Husband was in the 24% federal income tax bracket; cashing out the proceeds pushes him through the 32% bracket and into the 35% tax bracket. His total federal income tax hit will be about $63,000.
- As a 40-year-old, he must also pay a 10% penalty of $20,000 for early withdrawal of the retirement funds under Internal Revenue Code section 72(t), assuming no applicable exception applies.
- The Georgia income tax rate of 5.29% will mean another $10,580 gone.

All told, almost half (nearly $94,000) of the $200,000 of 401(k) proceeds will go to the federal and state governments if Husband immediately cashes out.

Outcomes Compared

	Wife (Home Equity)	Husband (401(k))
Value of Marital Asset	$ 200,000.00	$ 200,000.00
Federal Income Tax	$ -	$ (63,200.25.00)
10% Early Withdrawal Penalty	$ -	$ (20,000.00)
Georgia Income Tax	$ -	$ (10,580.00)
Post-Tax Value on Immediate Liquidation	**$ 200,000.00**	**$ 106.219.75.00**

We see a profound disparity of value to each party assuming immediate liquidation of the relevant assets. To truly equalize the assets, Wife would have to "buy out" Husband's $200,000 of equity in the marital home with over $388,000 of 401(k) proceeds; $200,000 of post-tax 401(k) funds equals more than $380,000 of 401(k) pre-tax funds in this case.

	Wife (Home Equity)	Husband (401(k))
Value of Marital Asset	$ 200,000.00	$ 388,654.70
Federal Income Tax	$ -	$ (129,229.40)
10% Early Withdrawal Penalty	$ -	$ (38,865.47)
Georgia Income Tax	$ -	$ (20,559.83)
Post-Tax Value on Immediate Liquidation	**$ 200,000.00**	**$ 200,000.00**

Note that in this case, Wife would need to withdraw the same amount from her 401(k) to pay Husband $200,000 cash for his portion of the equity because both parties are identically situated[2].

While we see a profound difference when assuming an immediate liquidation, this assumption will almost never be determinative. Neither party is likely to liquidate the relevant assets immediately. If they were, it would make far more sense to leave the 401(k) accounts alone and sell the house, splitting the proceeds, which results in no tax consequences to either party.

However, even assuming the parties retain the respective assets for some time does not mean the disparity in value should be disregarded; the disparity may lessen over time, but it will never completely disappear. If Husband waits 20 years until he is eligible to withdraw from his retirement accounts without a penalty, the

1 Even had the parties owned the house for less than five years, any gain would be taxed at long-term capital gains rates if they had owned the house for at least a year. The long-term capital gains rate is currently 15% for someone making $165,000. 15% of $64,000 is $9,600. Georgia income tax would be $3,386, resulting in a total tax of about $13,000. Half this amount (the parties only exchanged $200,000 worth of assets; half the equity was already credited to her before the exchange) is about $6,500, which is (as we will see) about 1/14th of the tax Husband faces for an immediate cash-out of $200,000 of retirement assets. She could also simply wait until the 5th anniversary of buying the house to sell it income tax free.

2 In most real-world situations, however, there is likely to be meaningful differences between the parties (more on this later).

withdrawals will still be subject to state and federal income tax. While it is impossible to predict future tax rates or how much Husband will withdraw from his retirement accounts each year, it is highly unlikely that he will withdraw the 401(k) proceeds and the earnings thereon on an income-tax-free basis. Wife, on the other hand, will always be able to sell the house tax-free so long as it remains her primary residence.

What to Do?

While there is no single correct answer that applies in all cases, there are a few guiding principles that will help resolve these issues.

Don't take the solution off the table. First, it is not realistic to simply tell clients not to trade retirement account funds for equity in the marital house. It is frequently the case that one spouse keeping the marital house is in the best interest of the children, for example, and many clients will not have any other readily transferable asset. While it is conceivable that the spouse may borrow the funds to buy out the equity in the marital home, either through a second mortgage or borrowing from the retirement account, practically, the payments may be too much for many clients to afford.

Understand what the parties' plans are. A good understanding of what the parties intend to do with the respective assets is important. In the fact pattern above, does Husband intend to hold the 401(k) funds until he is at least 59 ½ years old? Cash out the 401(k) proceeds immediately? If cashing out, what does he plan to do with the proceeds? Conversely, does Wife currently plan to reside in the marital home until the kids graduate from high school in ten years, or does she just want to get through the current school year until she sells the house?

Understand the post-divorce tax situations of both parties. This will help determine how to proceed. In the fact pattern here, the parties are similarly financially situated, but that will not always be the case. One spouse may earn more than the other. One spouse may have significant health challenges. One spouse may have a substantial debt to the IRS.

Negotiate and compromise. Given the uncertainty of future events, it is impossible to arrive at a point where the values of pre-tax retirement funds and post-tax assets like home equity will match precisely. Dealing with this issue amicably will be a function of a reasonable, compromised resolution as opposed to arriving at some sort of mathematical certainty.

How do these principles help guide a client to an ideal outcome?

Expanded Fact Pattern

As stated above, the parties are unlikely to liquidate each of the respective assets in the near term. Wife is likely to live in the house for at least a few more years; Husband is likely to save retirement assets until he is retired.

Assume Husband plans to move to Florida, where he grew up (and which has no income tax), in a few years and remain there for the rest of his life. To meet his living expenses in retirement, he intends to withdraw less than $100,000[3] per year from his retirement account, beginning when he is in his mid-60s. In 2025, $100,000 of adjusted gross income would generate a federal income tax of $10,310, which is a 10.3%[4] federal income tax rate. Since he plans to live in a state with no income tax, and he will be old enough to avoid the section 72(t) penalty, federal income tax is the only thing he will pay for each distribution in retirement.

By assuming an overall tax rate of 10.3% in this scenario, there is a basis to calculate the pre-tax value of $200,000 of 401(k) proceeds.

401(k) Proceeds	$	222,965.44
10.3% federal tax	$	22,965.44
Net Cash	$	200,000.00

Thus, we see that $222,965.44 of Wife's pre-tax 401(k) proceeds equals $200,000 of tax-free home equity proceeds under this set of assumptions.

Without a comparably specific set of retirement plans, the parties should probably start by assuming current income tax rates in the current state of residency after

3 This figure can either be from a robust retirement plan or utilizing assumed retirement account values compared to actuarial data. Alternatively, the Internal Revenue Code requires distributions of a certain amount once the retirement account holder reaches a certain age. In any case, $100,000 of annual distributions for a retiree is on the high side.

4 This assumption is in 2025 dollars. If we assume Husband retires in 30 years at 70, the annual distribution would be $100,000 adjusted for inflation. Given that the standard deduction and tax rate threshold are also adjusted for inflation each year, the percentages should, in theory, remain constant.

59 ½, with retirement account withdrawals and social security to be about 50-60% of current income.

Alternate Fact Pattern

Now that we have looked at a likely outcome, let's imagine a scenario where a little tax planning can save a lot of money without necessarily having to wait until one of the parties is old enough to retire.

Instead of both parties each earning $165,000 a year, suppose Wife earns $330,000 each year and Husband stayed home to care for the kids for the last six years of the marriage, earning no income. Although he earned a decent salary while employed outside the home, he now needs a graduate degree to re-enter to the corporate workforce quickly. In addition to the child support Wife will pay to Husband (and probably some alimony for a while), Husband plans to cash out the 401(k) proceeds to pay for school tuition and other necessary qualified educational expenses. He plans to attend graduate school beginning August 2025 and to matriculate in May of 2027.

Given the earning differential between the parties, decisions can be made now to minimize tax issues in the future. If Husband were to cashout the $200,000 by taking distributions to pay qualified educational expenses in 2025, 2026 and 2027 in the amounts of $70,000, $65,000 and $65,000[5], respectively, assuming no other income in these years[6], his tax liability would total about $20,500[7] for all three years, or 10.27% effectively.

	Federal[8]	Georgia[9]	Total
2025	$ 4,561.50	$ 2,909.50	$ 7,471.00
2026	$ 3,961.50	$ 2,595.00	$ 5,556.50
2027	$ 3,961.50	$ 2,545.00	$ 6,506.50
	$ 12,484.50[10]	$ 8,049.50	**$ 20,535.00**

Note that because Husband is using the 401(k) distributions for higher education expenses, he would not be subject to the section 72(t) penalty of ten percent, thereby saving $20,000.

401(k) Proceeds	$	222,890.89
Federal tax	$	22,890.89
Net Cash	$	200,000.00

In this case, the parties can equalize the post-tax values of the assets by asking Wife to transfer $222,890.89 of her 401(k) proceeds, which will yield $200,000 in cash to Husband under these assumptions.

Unlike the original fact pattern, transferring the 401(k) funds to Husband yields a better result than Wife taking the distributions and then transferring the cash to Husband. Wife is already in the highest federal tax bracket, meaning any distribution will trigger income tax of 35% and Georgia income tax about 5.29%. Additionally, since she would be taking distributions for qualified educational expenses of an ex-spouse, she would not be excepted from the section 72(t) penalty of ten percent since she does not qualify for the exception herself. All told, one could anticipate Wife, under this fact pattern, paying more than 50% of the distribution in taxes, whether she takes a single distribution with a post-tax value of $200,000 or takes multiple distributions over years. She would have to take about $400,000 of 401(k) distributions to pay $200,000 cash to Husband.

401(k) Proceeds	$	402,333.53
Federal tax	$	140,816.74
72(t) Penalty	$	40,233.35
Georgia Income Tax	$	21,283.44
Net Cash	$	200,000.00

5 There would likely be some money remaining in the account due to the earnings on the funds sitting there for preceding years.

6 Neither child support nor alimony are currently taxable under federal or Georgia law.

7 With the income differential between the parties in this fact pattern, Husband's tax liability for 2025 if he cashed out the 401(k) proceeds in 2025 would be $43,433.50 ($33,647 federal and $9,786.50 Georgia). While not as bad as the original fact pattern, this is much worse result than spreading the distributions over three years. This assumes that he will use the distribution for education purposes that qualifies for the section 72(t) exception. The amount climbs to $63,433.50 if he does not use the distribution for a defined exception.

8 Federal amounts for 2026 and 2027 will likely be slightly less because the standard deduction and tax rates will be adjusted for inflation.

9 Georgia tax rates are falling each year, assuming certain targets. Should these targets be missed, 2026 and 2027 will be slightly higher.

10 Note the effective federal income tax rate is only 6.24%, not that much more than the Georgia rate.

By simply transferring the 401(k) proceeds to Husband and letting him control the distributions, rather than having Wife pay $200,000 of post-tax cash out of her 401(k), Wife will save more than $180,000 of her 401(k), leaving Husband identically situated whether he takes $222,890.89 of retirement proceeds or $200,000 of cash.

Conclusion

As shown in this article, after-tax considerations can profoundly affect the value of an asset that triggers a tax when liquidated. The after-tax considerations should be considered when balancing marital assets. Still there are a wide variety of circumstances that the parties could face that will control how much tax is triggered. Hopefully, the general principles listed herein will be helpful in guiding negotiations to an amicable resolution.

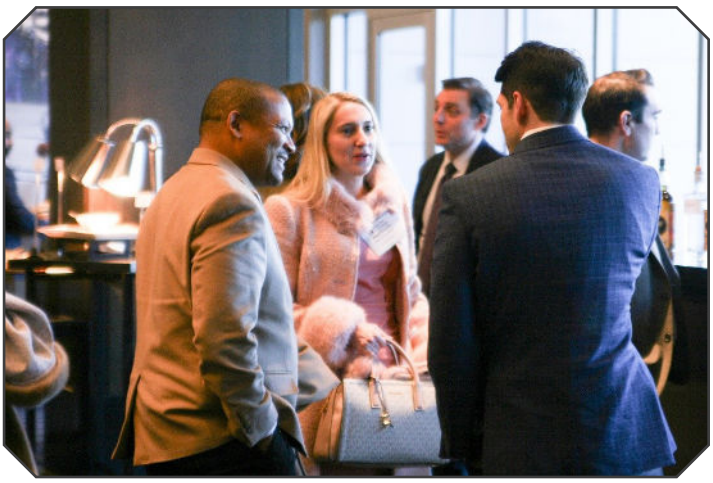
**Randy Bampfield spent his first ten years after law school as a litigator for the Office of Chief Counsel, Internal Revenue Service. After leaving Chief Counsel in 2015, Randy joined the Ornstein-Schuler Companies where he manages partnership and corporate compliance with federal and state tax laws, as well as overseeing audits and compliance inquiries.*

Photos from the 2026 Midyear Meeting







Change is Overdue to Georgia's Child Election Law

*By Alan H. Meincke**

As family law practitioners, few issues cause more stress and anxiety amongst our clients than custody. A custody case – whether in tandem with a divorce or a pure modification action – is a grueling exercise for parents, children, and the attorneys and the guardians ad litem who walk them through this process. Children today face a myriad of other challenges as parents struggle to reign in rampant use of social media, comparison, and the anxiety that travels alongside a typical teenager in the last several years.[1] We would be remiss to ignore these issues as advocates and counselors for their parents.

Imagine this familiar scenario: a potential client enters the office [in person or virtually] and explains her children, ages 15 and 12, are caught amid a tug-of-war between the parents. A post-divorce custody modification action is coming, and the client wants to know how her children's thoughts and feelings will be considered.

Georgia's child-election framework is more concrete than her neighbors by mandating the courts to honor a child's choice beginning at age 14. O.C.G.A. § 19-9-3(a)(5) outlines the procedure for a child over age 14 in Georgia to select the parent with whom he or she desires to live.

> In all custody cases in which the child has reached the age of 14 years, the child shall have the right to select the parent with whom he or she desires to live. The child's selection for purposes of custody shall be presumptive unless the parent so selected is determined not to be in the best interests of the child. The parental selection by a child who has reached the age of 14 may, in and of itself, constitute a material change of condition or circumstance in any action seeking a modification or change in the custody of that child; provided, however, that such selection may only be made once within a period of two years from the date of the previous selection and the best interests of the child standard shall apply.

This provision was last updated in House Bill 369 in 2007 at the same time the legislature specifically itemized the "best interest factors" contained in subsection (a)(3). Previously, a child's ability to select his or her primary parent at age 14 was controlling unless the selected parent was determined not to be "a fit and proper person to have custody of the child".

O.C.G.A. § 19-9-3(a)(6) outlines the procedure for a child over age 11 and not yet age 14 in Georgia which requires the court to consider the child's desires as to the parent with whom he or she desires to live.

> In all custody cases in which the child has reached the age of 11 but not 14 years, the judge shall consider the desires and educational needs of the child in determining which parent shall have custody. The judge shall have complete discretion in making this determination, and the child's desires shall not be controlling. The judge shall further have broad discretion as to how the child's desires are to be considered, including through the report of a guardian ad litem. The best interests of the child standard shall be controlling. The parental selection of a child who has reached the age of 11 but not 14 years shall not, in and of itself, constitute a material change of condition or circumstance in any action seeking a modification or change in the custody of that child. The judge may issue an order granting temporary custody to the selected parent for a trial period not to exceed six months regarding the custody of a child who has reached the age of 11 but not 14 years where the judge hearing the case determines such a temporary order is appropriate.

1 https://www.apa.org/monitor/2023/01/trends-improving-youth-mental-health.

This permissive provision for younger children was amended in the same bill in 2007 to provide the additional considerations outlined after the first sentence.

In practice, family law attorneys have resorted to advising their clients to bring a child to the parent attorney's office to sign an "affidavit of election". Besides the psychological and emotional toll of bringing a teenager to his or her parent's attorney's office, the party opposing such an election is left to castigate (and sometimes rightly so) opposing counsel for potentially participating in the manufacture of a document signed under duress or more subtle coercion. Otherwise, a parent's attorney can facilitate a meeting between a child and a third-party attorney to meet with the child and procure an affidavit of election. Again, this methodology can be impractical and scrutinized because even a third-party lawyer is hired for the sole purpose of obtaining a preordained result of an affidavit in favor of one parent. The third-party lawyer's fee is then paid by the parent (or his or her counsel) who is also expecting the affidavit to be procured.

Children may also be brought to court to testify directly about their preferences after proper motion is made under Uniform Superior Court Rule 24.5(B). However, from this practitioner's standpoint, it is rarely in a child's best interest to be forced to appear in court and testify against a parent (even if it is done so in chambers). Many judges are reluctant to involve children directly, absent allegations of abuse by a parent.

Finally, despite a child's right to choose a parent with whom he or she desires to live, trial courts are authorized to invalidate an election where a child requests joint legal and physical custody. Sharpe v. Perkins, 284 Ga. App. 376 (2007) (decided under the prior version of O.C.G.A. § 19-9-3(a)(4), discussed supra). The binary effect of the Court's ruling in Sharpe curtails a child's ability to select their actual preference as to custody.

As is the case with any complex issue, the problems are readily apparent, but the solutions are less so. Nationally, as shared parenting legislation continues to make headway, the concept of a child's selection may be rendered moot.[2]

Despite an apparent lack of legislative success, the idea of shared parenting appears to be making headway, which would inevitably have some effect on a child's preference.

In Georgia, House Bill 1140, which died in the house judiciary committee in 2020, sought to revise the presumptions regarding child custody completely. Rather than a framework for child preference based on age, the best interest factors contained in O.C.G.A. § 19-9-3 were made subservient to a rebuttable presumption that equal parenting time is in a child's best interest absent clear and convincing evidence to the contrary. In so doing, the bill eliminated a child's selection completely, listing a child's desires as a best interest factor for the court to consider. That bill appears to have not reappeared in the last four legislative sessions.

When looking to Georgia's sister states, Florida, Alabama, Virginia, South Carolina, and North Carolina, do not have an explicit child election law at all. Rather, a child's preferences are generally considered a factor for the court's consideration based upon the child's age and maturity.[3] In Tennessee, child custody laws direct courts to consider the child's "reasonable preference" at age 12 and older, with greater weight to older children.[4] Neither the American Bar Association or the American Association of Matrimonial Lawyers appear to have model statutes on child preferences in custody cases.

One solution to ensure a child's preferences are heard would be for a court to automatically appoint a guardian ad litem to do a limited investigation (absent consent of both parents to conduct a more in-depth investigation) regarding the children's desires, in consideration of their age and maturity. By avoiding a bright-line age-based rule, which appears to be in the minority of Georgia's sister states, such a methodology could insulate children from litigation and give them an opportunity to discuss their questions and assumptions with a neutral third party. On the other hand, cost concerns and delays for a such an investigation could create barriers to litigants with limited resources.

---

2 Wikipedia contains a list of shared parenting reforms nationally, which shows as of February 4, 2025, that Kentucky alone passed legislation presuming equal (50/50) parenting time, rebuttable by a preponderance of the evidence, is best for child custody. Arizona, Missouri, Oregon, Virginia, and Wisconsin have passed reforms moving in that direction, but they have stopped short of a legal presumption for equal parenting time.https://en.wikipedia.org/wiki/List_of_shared_parenting_legislation.

3 See Fla. Stat. § 61.13(3)(i); Code of Ala. § 30-3-169.3(a)(6); Va. Code Ann. § 20-124.3(8); S.C. Code Ann. § 63-15-30; In re Custody of Peal, 305 N.C. 640 (1982).

4 Tenn. Code Ann. § 36-6-106.

Alternatively, as many practitioners have surely seen, once a child reaches age 16, most judges are reluctant to force a parenting time schedule against an older teenager's will. So, changing the current age 14+ statutory framework to age 16 could provide reasonable middle ground. Of course, this would not undo the gamesmanship played by unscrupulous parents who promise their children air pods, the latest shoes or electronics, their first car, or whatever is the "must have" du jour in exchange for loyalty.

Perhaps a less earthshattering modification to the current child election framework would be to require a party using an election affidavit to file it within 30 days of initiating a custody action. This time limitation could limit last-minute sandbagging in custody cases whereby one party is presented with a child's affidavit of election at mediation or on the eve of trial. On the other hand, an arbitrary deadline could conceivably undermine the Court's ability to determine custody and parenting time based on the child's best interest (at least absent the appointment of a guardian ad litem), particularly if circumstances warranted a change in the child's position as the litigation developed.

While a statutory presumption in favor of 50/50 physical custody may be a non-starter in Georgia, more judges appear to recognize the changing parental roles in families with two full-time working parents. As such, the legislature should consider how these changing trends – and the delayed milestones and mental health crisis facing adolescents today[5] – may lend itself towards a revision of Georgia's child election statute.

**Alan H. Meincke is a complex divorce and child custody lawyer in Alpharetta, Georgia with over 13 years' experience. He is an owner and co-founder of his boutique law firm, Meincke Houston Family Law, LLC. Mr. Meincke is a father of two and know-it-all husband to his wife, Tara.*

5 https://www.forbes.com/sites/jackkelly/2025/01/07/gen-zs-are-stressed-burned-out-and-face-mental-health-issues/.

Kyle Gallenstein Elected to SAFE Shelter Board of Directors

Savannah-based attorney and Family Law Section member Kyle Gallenstein has been elected to SAFE Shelter's Board of Directors for a three-year term beginning January 2026. SAFE Shelter Center for Domestic Violence Services is one of the largest emergency domestic violence shelters in the state and a leading nonprofit organization certified through the Georgia Criminal Justice Coordinating Council. The Board of Directors is a voluntary organization supporting the administration of SAFE Shelter and its mission to stop domestic violence and provide crucial services to survivors in Chatham County.

Kyle brings over a decade of public service experience to the Board with a strong civil litigation background representing survivors of DV and other crimes. Kyle joined Georgia Legal Services Program (GLSP) in 2019. He is a supervising attorney in GLSP's Savannah Regional Office with much of his focus on domestic relations, consumer matters, and elder law. Kyle serves on multiple family violence task forces in Coastal and Middle Georgia. This is his first term on the SAFE Shelter Board.

If you know of a Family Law attorney whose recent accolades warrants a public announcement, please feel free to submit the announcement to the FLR Editor (Kem A. Eyo, at rbafamilylaw.com).

Collaborative Divorce in Georgia: Why Is It Disappearing?

*By Lauren Mescon**

Musings from The Family Law Institute 2025: A Call to Reclaim the Process That Works

By all accounts, collaborative divorce was designed to be the antidote to the chaos and cruelty that so often characterizes contested family law litigation. So why has it all but disappeared from practice in Georgia?

At the Family Law Institute 2025 (and 2024), there was an unmistakable undercurrent of fatigue among judges, GALs, custody evaluators, and practitioners—exhaustion from toxic email exchanges, emergency hearings, escalating costs, and mounting mental health concerns for both clients and professionals. Ironically, nearly every "pain point" raised at this year's panels could be addressed—if not eliminated—by a well-executed collaborative divorce process.

Where Did Civility Go?

Many judges echoed the same refrain: email has eroded professionalism. Attorneys fire off inflammatory messages they'd never dare say in person. Justice LaGrua insists that lawyers meet in person before she'll even entertain a hearing—because talking works. Collaborative divorce was built on that premise.

When did we decide that scorched-earth tactics were preferable to face-to-face conversations?

Collaborative is built around meetings, not motions. Around shared goals, not surprise hearings. Around mental health support from day one, not tacked on by court order months into the process. And yet, despite its promise, collaborative divorce has all but vanished from routine practice in Georgia.

Follow the Money?

Let's not ignore the elephant in the courtroom. The current litigation model benefits from conflict. With every added player or move—GALs, custody evaluators, parent coordinators, emergency motions, discovery fights—the fees increase. Collaborative, by contrast, streamlines the professionals and aligns them from the outset.

In collaborative, you decide together if a custody evaluation is needed. You choose the right therapist together. You don't bounce a family from evaluator to evaluator, racking up bills and trauma along the way.

Is the adversarial model more profitable? Perhaps. But is it better for families, for mental health, or for the courts? Absolutely not.

The Court Wants What Collaborative Offers

At the Institute, judges spoke of the aspirational values they hope to see in their courtrooms—integrity, civility, transparency. Collaborative requires those values. It trains professionals to work as a team, to be aware of their own biases, and to educate rather than inflame. This isn't intuitive work; it requires training, humility, and the willingness to make a paradigm shift.

Judges also lamented how vital information sometimes never reaches them because a key question wasn't asked in court. In collaborative, there are no ambushes. The team lays everything on the table, in full transparency, to help the family—not just to win a case.

The Mental Health Crisis in the Legal Field

The State Bar of Georgia's "Use Your 6" campaign acknowledges a grim truth: the practice of law is harming its practitioners. Depression, anxiety, substance abuse — these are not distant concerns. They're here, in every courtroom.

Collaborative divorce offers a saner, more sustainable way to practice. It's built to reduce trauma, not exploit it. Lawyers who practice collaboratively don't burn out at the same rate because they're not stuck in endless conflict cycles.

Is Collaborative for You?

It's not for everyone. The most successful collaborative attorneys believe in the process. They inherently want something better for their clients. Are you willing to follow the structure, embrace a team approach, and shift from "position-taking" to "problem-solving." For those who do, collaborative can be transformative.

Collaborative Solves the Problems We Keep Complaining About

- **Aggressive tactics and surprise**

hearings? Collaborative replaces them with planned meetings.

- **Judges overwhelmed by 100-page reports?** Collaborative distills what matters and educates the parties throughout the process.
- **GALs and PCs called in piecemeal?** In collaborative, the mental health professionals are involved from the beginning.
- **Mental health experts unqualified for custody questions?** Collaborative involves licensed, agreed-upon professionals for the right role, not the loudest opinion.

In rural areas, where experts are limited, collaborative offers a practical, community-based alternative. In metro areas, it offers a desperately needed reset from the arms race of litigation.

A Final Word

We say we want civility, clarity, and compassion. Collaborative divorce offers all of that. So why aren't we using it? Maybe it's time to stop asking why collaborative disappeared—and start asking what it will take to bring it back.

In 2024, two new groups were trained: the Coastal Georgia Collaborative Divorce Alliance in Savannah and Collaborative Divorce Georgia, in Atlanta, serving the Hispanic community as well. Both are now up and running.

More well-trained, committed collaborative divorce professionals are needed. Hopefully, for the profession and the clients we all serve, it will come back.

**Lauren Mescon (Alexander) worked as a family law attorney in Atlanta for over 20 years. She served as a GAL, mediator and a judicial officer in the Fulton Family Court. She started the Legitimation Station, providing pro bono legal access for father's of children born out of wedlock in Muscogee County. Lauren gave up litigation to handle collaborative divorce cases exclusively and taught the Collaborative Divorce process nationally before moving to Europe in 2014. On her return to Georgia, she again began training Collaborative Divorce to multi-disciplinary groups.*

Case Law Update

*By Vic Valmus**

CHILD SUPPORT/EQUITABLE CREDIT

Dixon v. Miller; **A25A1502** (September 19, 2025)

Dixon (the mother) and Miller (the father) were divorced in 2007 and had two children. The father was to pay the mother child support pursuant to the divorce decree. At some point, the father fell behind on his payments. An Order was filed in May 2023 by the Department of Human Services finding Miller was in arrears of $29,697.70. Although Miller was not ordered to pay any current child support pursuant to the May 2023 Order, he was ordered to pay $1,000.00 to purge himself of contempt and $300.00 per month towards the arrearage, and the Court entered an Income Deduction Order.

In April 2024, the father filed a Complaint for Termination of Child Support in which he asserted his younger son had lived with him since the age of 15 and asked the Court to terminate his child support and the income deduction order. The mother filed a Motion to Dismiss asserting the $300.00 per month went towards Miller's arrearage, not the current child support obligation. In August 2024, a final hearing was held and both the father and their son testified. There was undisputed evidence that the child was 15 years of age when he moved in with his father, the father paid for all of the child's expenses thereafter, and the mother provided almost no support. The father also submitted documentation indicating he paid over $20,000.00 since the child began living with him. After the hearing, the Trial Court entered an Order terminating Miller's child support obligation for their now adult child and finding Dixon owed no further arrearage. The mother appealed and the Court of Appeals reverses and remands.

The mother contends the Trial Court erred by not dismissing Miller's complaint because the May 2023 Order was *res judicata* as to issues of Millers child support arrearage. Although the mother asserted at the hearing that the father's complaint was barred by *res judicata*, the Trial Court did not explicitly rule on this issue. However, the Trial Court lacks the authority to forgive or reduce past amounts owed under a valid child support order.

In a related argument, the mother contends the Trial Court erred in excusing the father's non-payment

of child support. As a general rule, parties to a child support order cannot by private agreement modify the terms of an order. However, in *Daniel v. Daniel*, and *Brown v. Georgia Department of Human Resources,* certain circumstances giving rise to a credit against child support obligations is possible. Circumstances that give rise for the credit include: 1) where the payee consents to the payors voluntary expenditures as an alternative to the payors child support obligations, and 2) where the payor has substantially complied with the spirit and intent of the child support order by discontinuing child support payments while the payor has care and custody of the child and has supported the child at the payee's request. The mother argues the father could not claim the child support credit because he failed to allege she consented to or agreed to the son living with him, and the father's support of their son was merely a voluntary expenditure. Here, the evidence was undisputed that the son began living with Miller in November 2019. The son continued to live there until he graduated from high school in February 2023. The mother was aware of the child's living situation and she provided almost no support for their son during this period. Moreover, the father testified that he calculated that he paid the mother $23,825.00 in support between December 2019 and August 2024. As explained in the previous paragraph, the Trial Court is without authority to retroactively modify the father's child support obligation. However, to the extent the Trial Court wished to credit Miller for the payments made to Dixon for any then-current obligation while he had custody of their son, pursuant to *Brown and Daniel*, the Trial Court should clarify it's reasoning on remand.

CONTEMPT/DECLARATOY JUDGMENT

Keese v. Keese; **A25A1412** (September 30, 2025)

The parties divorced in 2011 and were both *pro se*. Pursuant to the Settlement Agreement, the wife was awarded the party's marital residence in White, Georgia. The husband agreed to transfer title of the property to the wife and the wife was to pay off or refinance the loan on the property. However, the Settlement Agreement contained no deadlines for the transfer of title or refinancing. At the time of divorce, the house was worth approximately $150,000.00 and the mortgage balance was $158,000.00.

In 2024, the wife filed a contempt action asserted the husband had failed to transfer title of the marital residence to her. The husband answered and stated that he had been living in the house since 2014 and paying the mortgage and other related expenses, and the wife had failed to refinance or pay off the mortgage. Thus, the husband moved for a declaratory judgment to award him sole possession of the property. The wife filed a Motion for Summary Judgment on the contempt action asserting she had established that the husband was in contempt because he had failed to execute the Deed conveying his interest in the property to her.

At the final hearing, the wife testified that she had been a traveling nurse, the husband had been living in the house since 2014 and, that he paid the mortgage on the house in lieu of rent. However, the husband testified that there was no discussion of him renting the property; rather, he testified that in 2013 the wife told him she didn't want the house and she was going to file for bankruptcy and let it go. He testified that told the wife that he would take the house and that he had been making the mortgage payments and maintaining the property ever since. At the time of the hearing, the fair market value was approximately $320,000.00 and the mortgage balances was approximately $91,000.00. At the end of the hearing, the Trial Court did not find the husband in contempt because the agreement provided no deadline for him to transfer title and thus was ambiguous. As such, the Trial Court denied the wife's action for contempt and her Motion for Summary Judgment. The Trial Court noted the husband paid the mortgage and made investments on the property since the divorce, the property had substantially increased in value, and the husband had relied on an oral statement by the wife that he should take the property. The Court concluded the parties had modified their agreement and, as a result, the husband was the rightful owner of the property and granted the husbands declaratory judgment. The wife appeals and the Court of Appeals confirms in part and reverses in part.

The wife contends the Trial Court erred by refusing to hold the husband in contempt. Before a person may be held in contempt for violating a court order, the order should inform him or her in definite terms as to the duties thereby imposed on him or her, and the command must therefore be expressed rather than implied. Here, the Trial Court found that the Settlement Agreement contained no deadline or definite terms with regards to when and how the husband was to transfer title to the wife. The Trial Court therefore determined that it could not find the husband in willful contempt. The Court of Appeals found no gross abuse of discretion in the Trial

Court's finding that Carl was not in willful contempt in light of the failure of the settlement agreement to set a deadline for the transfer of title and the parties' behavior in the years since the divorce.

The wife also argues that the Trial Court erred in refusing to allow her to argue her motion for summary judgment. Although the wife requested an oral hearing on her summary judgment motion, at the subsequent hearing, the wife's counsel stated that she had no issues just moving past the Motion for Summary Judgment and deciding the merits of the wife's motion and husband's counterclaims "right here, right now." The wife cannot complain on appeal when she acquiesced to the Trial Courts moving past the Motion for Summary Judgment.

The wife also contends the Trial Court erred by improperly modifying the divorce decree when awarding the husband the marital residence by declaratory judgment. Declaratory judgments are means by which the Superior Court simply declares the rights of the parties or expresses its opinion on a question of law, without ordering anything to be done. They are not intended to be used to set aside, modify, or interpret judicial decrees or judgments. Nor do they authorize a petitioner to brush aside previous judgements of the same court. The only exception to this rule is where a Petitioner seeks to ascertain one's rights and duties under a judgment that contains unclear or ambiguous language. Furthermore, although the Trial Court has broad discretion to determine whether a decree has been violated and has the authority to interpret and clarify the decree, it does not have the power in a contempt proceeding to modify the terms of the decree. The final divorce decree explicitly awarded the marital residence to the wife and ordered the husband to transfer title to her. In light of the clear language awarding the property to the wife and the absence of any written modification of the Settlement Agreement, the Trial Court erred in finding that, based upon the parties' subsequent actions, the husband was the rightful owner of the residence that had been awarded to the wife. Thus, the portion of the Trial Courts Order awarding the marital residence to the husband is reversed and the case is remanded for further proceedings to assist with this opinion.

CONTEMPT/MODIFICATION

Nash v. Nash; **A25A1289** (October 14, 2025)

The parties divorced in 2001 and are the parents, guardians and conservator of an adult ward, J. H. N. The parties agreed the father would pay support to the mother for the care of JHN until he was financially independent, but acknowledged that it could be beyond the age of 30. Subsequently, the mother approached the father regarding construction a home that the mother would use to operate a bed and breakfast (B&B). Although the parties contemplated that it would be a substitute for some of the father's support payments, they did not put their agreement in writing and now disagree as to the nature of the agreement. The mother petitioned for contempt alleging the father was in arrears of his child support obligation. At the hearing, the father pointed out that the Settlement Agreement provided that no modification or waiver of any terms shall be valid unless it is set forth in writing and signed by both parties. After the construction was finished on the mother's Airbnb in March 2022, the father presented the mother with a Memorandum of Understanding (MOU). The mother testified that she only signed the MOU because the father was withholding the certificate of occupancy. The MOU provided that the parties had agreed that in lieu of the fee for building the house, no further monetary support would be provided by the father for JHN. Following the evidentiary hearing, the Trial Court determined that the MOU modified the father's support obligation by eliminating the bi-weekly support as of the day it was signed. The Trial Court further found the father was in contempt for being $27,325.00 in arrears for child support he owed until the MOU was executed in March 2022. The mother appeals and the Court of Appeals reverses.

The mother argues that the Trial Court erred in relying on the MOU to modify the father's support obligation in a contempt proceeding. Even though JHN is now an adult, the agreement of the parties, which was incorporated in and made a part of the divorce decree, is enforceable after the majority of the child. This case arises in the mother's petition for contempt not from a modification action filed by the father. The father argues the parties were permitted and did privately modify the support award pursuant to the language of the Settlement Agreement, which provides that no modification or waiver of any of the terms of this agreement shall be valid unless it is set forth in writing and signed by both parties. Here, the father is correct that the Supreme Court has recognized certain circumstances where the parties may enter into a contractual agreement regarding modifications of child support as long as the agreement is specific, does

not contravene a statute, or violate public policy. The Supreme Court recognizes that a case of an agreement to provide additional support as the child grows up does not contravene the public policy and it furthers the state interest. The father has pointed to no cases to allow the parties to contractually reduce a support obligation, particularly when the agreement contains no specificity as to what would trigger a reduction or how it would be calculated. The Settlement Agreement incorporated in the final decree did not authorize the parties to privately modify the support award, and the execution of the MOU, whatever the circumstances, did not alter the father's support obligation. Therefore, the Trial Courts order eliminating the child support obligation at the signing of the MOU was an unauthorized modification in the context of a contempt action.

CUSTODY MODIFICATION/MATERIAl CHANGE OF CONDITION

Kimbrough v. Warren; **A25A1348** (October 23, 2025)

The Court of Appeals previously vacated the Trial Court's custody order modifying primary custody from joint custody between the mother (Kimbrough) and the father (Warren) and awarding primary physical custody to the father. The case was remanded for the Trial Court to make findings on the threshold issue of a material change of circumstances warranting a change of custody. In vacating the Order and remanding the case, this Court observed that the Trial Court's mere statement in its Order that it reviewed the Guardian ad Litem's report did not amount to a fining that there had been a material change of circumstances authorizing a modification of the prior joint custody arrangement.

Subsequent to the remand and without holding a new hearing, the Trial Court issued a new Final Order explicitly finding a material change of circumstances justifying the change in custody, namely, that there was a complete and total breakdown of the mother and father's ability to co-parent and that this breakdown materially affected the welfare of the children because the conflict of the parties has escalated to a physical altercation involving a weapon in the presence of the children. The evidence and testimony illustrate the parents are not capable of co-parenting. In addition, the mother now has to report to work in the State of Oregon each month. The mother appeals and the Court of Appeals affirms.

The mother contends the Trial Court erred by modifying custody of the children without any evidence of a material change of circumstances and that the parent's hostile relationship does not constitute a material change of circumstances. Evidence of divorced parties' hostile relationship continuing and ongoing since the divorce is not a new or material change of circumstances. Rather than ongoing, the evidence at the hearing portrayed an escalating conflict between the parties that began after their divorce and negatively impacted their ability to co-parent. The Trial Court further found that the conflict between the parties had escalated to physical violence, the parties were not capable of the mutual cooperation and flexibility needed for a joint physical custody arrangement, and the mother's new job requiring her to report to Oregon for several days each month only compounded the lack of stability for the children. Here, the evidence suffices to establish a material change of circumstances.

The mother also characterizes the Trial Court erred by granting custody to the father and asserts that the Trial Court's decision was not in the best interest of the children. The mother notes there was significant testimony evidence that primary custody with the father is not in the best interest of the children. She cites evidence of his domestic violence history, job instability and inability to properly handle the health and educational needs of the children. Where there is any evidence to support the Trial Courts ruling, a reviewing court cannot say there was an abuse of discretion. Here, contrary to the mother's assertion, there was evidence about the father's domestic violence history, employment and parenting ability presented at the hearing and the Guardian Ad Litem report. A Trial Court is required if requested to not only recite findings of facts, but also to explain how those facts supported its conclusions regarding the best interests of the children. Here, the mother did not make such a timely request for findings of facts. Therefore, deferring to the Trial Court's factual determination based on the evidence in the record, this Court finds that the Trial Court appropriately considered all relevant factors in its decision making.

The mother also contends that the Trial Court erred by failing to consider the father's history of domestic violence, suicidal tendencies and criminal conduct prior to awarding primary physical custody. The mother states the Trial Court and the Guardian ad Litem were under the erroneous legal assumption they could not consider conduct that occurred prior to the divorce. At

the temporary hearing, the Trial Court stated that the only thing that is relevant going forward is anything that has occurred since the entry of the Parenting Plan that addressed custody and visitation. The mother asserts that it was legal error in that evidence of family violence, sexual, mental or physical child abuse or criminal history of either parent are factors in determining the best interests of the children. She also argues that O.C.G.A.§19-9-3(a)(4)(B) requires the Judge to consider the perpetrator's history of causing physical harm, bodily injury, assault, or causing reasonable fear of physical harm, bodily injury, or assault to another person. Here, within the context of determining the threshold finding of the material change of circumstances, the Trial Court's statement is correct, in that it must determine whether there has been a material change of circumstances affecting the welfare of the children since the last custody award. To that end, circumstances existing at the time of the last custody award are not factors in determining whether there has been a material change of circumstance. Moreover, upon Appellate review, this Court presumes the Trial Court properly considered all evidence before it. As a fact finder, it was the Trial Court's duty to reconcile seemingly conflicting evidence and to weigh the credibility of the witnesses.

EXTRACURRICULAR ACTIVITIES/SELF-EXECUTING CHANGE OF VISITATION/ATTORNEY'S FEES

Graham v. Graham; **A25A1938** (September 24, 2025)

In 2019, Carla and Lisa Graham were divorced in South Carolina. In January 2024, Lisa filed a Petition in Hall County to domesticate a foreign judgment and to modify child support, custody, and visitation of their 9-year-old daughter. After the final hearing, the Court granted Lisa sole legal and physical custody of the child, gave detailed visitation revisions, and awarded Lisa child support, numerous expenses and attorney's fees. Carla does not appeal the actual custody ruling, but appeals various provisions of the Final Order. The Court of Appeals reverses and remands.

Carla asserts the Trial Court erred by requiring her to pay half of the child's extracurricular activities without making necessary findings of facts. The Supreme Court has explained, extracurricular expenses are normally included in the presumptive amount of child support. Therefore, in ordering Carla to pay half of the child's extracurricular expenses, the Trial Court made no findings of facts to support a deviation from the amount of the presumptive child support and did not include a schedule E as part of the child support worksheets that was incorporated in the Order. Therefore, this part of the Order was reversed and remanded.

Carla next argues that the Trial Court erred by awarding Lisa an impermissible self-executing order for an automatic change of visitation. The self-executing provision challenged here is prohibited under Georgia Law because it suffers from two critical flaws; 1) it relies on a third party's future exercise of discretion which essentially delegates the Trial Court's judgment to that third party; and leaves to future counselors numerous decisions about what therapeutic endeavors Carla must undergo if she begins a reunification process with the child and what necessary steps in a reunification process must be accomplished before visitation can be increased; and 2) it executes at some uncertain date well into the future and does not assure that the disposition at a future date would serve the best interest of the child. This open-ended provision is conditioned upon the occurrence of some future event that may never take place and the Trial Court cannot know whether the best interests of the child would be served at a future date. In addition, it gives Lisa the ultimate decision of whether Carla's visitation may be increased. Therefore, the self-executing provision in the Trial Courts Order constitutes an abuse of discretion and should be stricken.

Carla also argues the Trial Court erred in awarding attorney's fees under O.C.G.A.§9-15-14(b). When awarding attorney's fees under O.C.G.A.§9-15-14(b), the Trial Court must limit the fee award to those fees that were incurred because of the sanctionable conduct. At the final hearing, Lisa's attorney tendered an affidavit listing roughly $35,000.00 in attorney's fees, and in the Final Judgment, the Court awarded Lisa $16,535.00 in attorney's fees under O.C.G.A.§9-15-14(b). Here, the Trial Courts Order not only tracked the statutory language, but included specific findings supporting its conclusion. The Trial Courts Order shows that it under took the complex decision-making process involved in reaching its dollar figure, specifically noting that it excluded costs associated with non-sanctionable conduct in only awarding $16,535.00 of the $35,000.00 in total attorney's fees. Although, we recognize that a party does not have to prevail to recover O.C.G.A.§9-15-14(b) attorney's fees, given our reversal on a number of different grounds in this case, the attorney's

fees awarded is vacated and remanded to the Court to reconsider its award and determine whether any of the grounds for reversal impacts its award.

FINDINGS OF FACTS

Mobley v. Williams **A25A1196** (September 18, 2025)

Mobley (the father) filed a legitimation action against Williams (the mother). The legitimation hearing took place on November 18, 2024. The same day, the father filed a written request for findings of facts and conclusions of law pursuant to O.C.G.A.§9-11-52(a). On December 4, 2024, the Trial Court entered its Final Order which declared the child to be legitimate, awarded joint legal custody, incorporated a parenting and visitation plan, imputed the party's income, and established a child support obligation. The father appeals and the Court of Appeals reverses and remands.

The father contends the Trial Court erred by failing to provide findings of facts and conclusion of law notwithstanding his timely request. Specifically, the father argues the Trial Court's failure to provide findings of facts and/or conclusion of law deprived him of his right to appeal the ruling on the merits. Although O.C.G.A.§9-11-15(a) does not apply to cases involving uncontested divorces, alimony, or custody of minors, it does apply to legitimation cases. Findings of facts and conclusions of law are instructive to the parties and enable them to complain on appeal from the judgments rendered. Although the Trial Court's Order contained numerous legal rulings, it does not contain factual findings. And because the father made his request for findings of facts and conclusions of law before the Trial Court entered its judgment, his request was timely. Accordingly, the Trial Court was required to state findings of facts specially and state separately its conclusions of law, but failed to do so. Therefore, the judgment is vacated and remanded.

INTERLOCUTORY APPEAL

Womack v. Womack; **A25D0043** (September 11, 2025)

The wife sued the husband for divorce and the parties participated in mediation. After which, the wife filed a Motion to Enforce the alleged Settlement Agreement. At the hearing on the Motion to Enforce, the Trial Court denied the Motion ruling that no enforceable agreement had been reached. The wife files a discretionary view and the Court of Appeals dismisses.

Ordinarily, appeals of judgments or orders in divorce, alimony or other domestic relation cases must be brought by application for discretionary appeal. However, the order that the wife seeks to appeal is interlocutory as no final judgment has been entered. Therefore, the wife was required to file the interlocutory appeal procedures as set forth in O.C.G.A. §5-6-32(b). When both discretionary and interlocutory appeal procedures apply, the applicant must follow the interlocutory appeal procedures and obtain a timely certificate of immediate review from the Trial Court before filing an application. The wife argues *Stookey v. Stookey* in which the Supreme Court granted a discretionary application from a denial of Motion to Enforce a divorce settlement agreement for the proposition that a discretionary application is permissible. However, it is not clear from the *Stookey* opinion whether the case remained pending in a Trial Court when the application was filed. Either way, the opinion did not discuss appellate jurisdiction, so no binding precedent was established. In this case, the Order to be appealed is unquestionably interlocutory and all settled precedents dictates interlocutory application is required to be obtained for Appellate review. Therefore, the wife's failure to file an interlocutory appeal procedure deprives this Court of jurisdiction and is dismissed.

SAME SEX MARRIAGE/PATERNAL RIGHTS

Bolton v. Bolton; **A25A1264** (September 24, 2025)

Both women were lawfully married in 2018. Tiffany and Jennifer authorized and consented to the use of artificial insemination (AI). Jennifer underwent intrauterine insemination in 2021 and as a result, Jennifer gave birth to a minor child, SB. Both parties are listed as parents on the birth certificate. In 2024, Tiffany filed for divorce and alleged that SB was born as issue of the marriage. Jennifer answered the petition and admitted that SB was born in 2021 via intrauterine insemination with a donor sperm, but noted that Tiffany had not sought stepparent adoption of the minor child, and she denied the child was born as issue of the marriage. Jennifer counterclaimed for, among other things, full custody of SB. In August 2024, the parties appeared for a temporary hearing where Jennifer argued custody was not properly before the Court because Tiffany is neither a biological or legitimate parent of SB, that the presumption of legitimacy for children born in wedlock is inapplicable to couples in same sex marriages, and that Tiffany does not meet the definition of legal mother in the Georgia Adoption Code. In the Court's

temporary order, the Court declined to rule on Tiffany's constitutional challenge because it lacked detailed analysis and because she did not serve the Attorney General as required under O.C.G.A. §9-4-7.2. The Trial Court rejected Tiffany's statutory interpretation, finding that because O.C.G.A. §19-7-21 was passed in 1964, the legislature could have only contemplated the term "spouse" to refer to a man and a woman, not married person in same sex couples; and refused to recognize the legitimation of Tiffany's parental relationship to the minor child through AI. Tiffany appeals and the Court of Appeals reverses.

Tiffany argues the Trial Courts construction of O.C.G.A. §19-7-20(a) and §19-7-21 to exclude her as a legitimate parent of SB on the basis of her gender is erroneous as a matter of statutory interpretation. Pursuant to O.C.G.A. §19-7-20(a), all children born in wedlock or within usual period of gestation thereafter are legitimate. Under O. C.G.A. §19-7-21, all children born within wedlock or the usual gestation period thereafter who have been conceived by artificial insemination are irrebuttably presumed legitimate if both spouses consented in writing to the use and administration of artificial insemination. Tiffany argues the Court ignored the plain meaning of the statutes when it interpreted them to include that she had no parental rights of SB or rights to have custody. The artificial insemination statute speaks in gender neutral terms, noting that a child is to be considered legitimate when both spouses have consented in writing to the use of artificial insemination during the marriage. It is undisputed the parties were married at the time SB was born, that SB was born through artificial insemination, and the parties consented for the child to born through that method during the marriage. Therefore, under O.C.G. A. §19-7-21, SB is irrebuttably presumed legitimate.

Jennifer argues that the words "spouse" in O.C.G.A. §19-7-21 is ambiguous and thus claims the word cannot be read to include same sex couples by virtue of the statute's enactment in 1964. But the plain meaning of spouse has not changed since the statute was enacted, which has referred to a person who is married.

Jennifer further argues that this Court cannot read O.C.G.A. §19-7-20 and §19-7-21 as providing Tiffany parental rights over SB because legitimation is a process that is only available for men to obtain or validate parental rights over children. It is true that O.C.G.A. §19-7-22 clearly states that only fathers may file a petition to legitimate a child; but O.C.G.A. §19-7-20 and §19-7-21 do not speak in terms of gender, nor do they define legitimacy as only describing a relationship between a father and a child. This Court has been very clear on many occasions that the public policy of this state favoring the institution of marriage and legitimacy of children born during marriages is the strongest public policy recognized by law. Wherefore, under Georgia Law and the particular facts of this case, Tiffany is SBs parent and entitled to be treated the same as any other parent when the Trial Court makes the child custody determination.

SEPERATION AGREEMENT/JURY TRIAL

Crossman v. Crossman; **A25A1266** (October 8, 2025)

The parties were married in November 2002 and separated in October in 2022. In September 2022, in contemplation of divorce, the parties entered a Separation Agreement where the husband would reside in the marital residence, but was required to sell the home at fair market value on or before June 1, 2023 and after deducting expenses, the wife would receive 60% and the husband would receive 40% of the sales proceeds. The Agreement also provided that the husband would retain possession of his Ford 500; the wife would retain possession of a Volkswagen Beetle; neither party would be responsible for any debts incurred by the other going forward; any future settlements made to the husband by the Veteran's Administration would be split with the wife, as well as any future stipend granted them; and the husband would pay the wife $872.00 per month until another agreement was reached or she died or remarried. Both parties signed the agreement.

In March 2023, the husband filed a Complaint for Divorce, and the wife filed a Motion to Enforce the Separation Agreement in May 2023. The husband filed a Motion to Set Aside the Separation Agreement arguing, among other things, that the agreement was incomplete and unenforceable because there was no method of sale of the marital residence or of determining the fair market value; nor did it set forth whether the property should be sold for cash or owner financing, or what expenses would be paid at closing by seller. In addition, it was impossible to sell the home by the June 1, 2023 deadline. The husband also argued that the purported award to the wife of an unidentified portion of his disability benefits was part of his separate property.

In November 2023, the Trial Court granted the Motion

to Enforce; but the Court concluded that the only unclear issue was in regards to the husband's disability benefits, and ordered parties to go to mediation. In April 2024, the husband filed a demand for Jury Trial and the wife filed a separate Motion to Enforce the Settlement Agreement. The Trial Court entered an Order granting the wife's second Motion to Enforce and also granted a Final Decree of Divorce incorporating the Separation Agreement. The Court noted that there were no contestable issues between the parties and that a jury trial was not necessary because the wife withdrew her claim for the husband's disability benefits and thus the Separation Agreement addressed all issues. The Trial Court established the method by which the husband was to sell the marital property and the method to determine the price of the property. The husband appeals and the Court of Appeals reverses.

The husband argues that the Separation Agreement was unenforceable because it is incomplete in that it did not contain a method to determine the fair market value of the residence or the method of sale. Separation Agreements in divorce cases are construed in the same manner as all other contractual agreements. Here, the Separation Agreement provided, in part, that the martial residence was to be sold at fair market value and it delineated how the proceeds were to be divided. But the Agreement does not contain a method to establish fair market value of the residence, which should have been included because the Agreement required the husband to sell the home for a particular value which is, therefore, a substantive term of the Agreement. Settlement Agreements in divorce actions that require real property to be transferred for a specific value are incomplete and unenforceable if the agreement did not obtain a method of appraising or determining the value of the property, and a contract involving the sale of real property must either state the price to be paid for the property or set forth criteria by which it may be calculated. While in proper circumstances, parties may reach partial settlement agreements as to their divorce. However, in this case, the terms set forth in the Order enforcing the Separation Agreement are presented as a full settlement and not partial. Because the provisions pertaining the sale of the marital residence was incomplete, the Trial Court erred by enforcing the Separation Agreement.

The husband also argues the Trial Court abused its discretion by denying his timely request for a jury trial. O.C.G.A. §19-5-1 states, "unless an issuable defense is filed as provided by law and a jury trial is demanded in writing by either party on or before the call of the case for trial, in all petitions for divorce and permanent alimony, the Judge shall hear and determine all issues of law and fact in any other issues raised in the pleadings." Parties, by their voluntarily actions, can waive a demand for jury trial. But "a trial court presiding over a divorce action must comply with a demand for jury trial unless, after reviewing all of the pleadings, it determines that there is not any factual dispute remaining as to any issue raised by the complaint or any counterclaim. If there is an issue of fact, either party is entitled to a jury trial." Here, despite the fact the husband filed a written demand for jury trial in April 2024, the Trial Court proceeded to enter a Final Decree of Divorce in December 2024. There is nothing in the record indicating the husband expressly or impliedly waived or withdrew his request for a jury trial. Because there was no valid Separation Agreement, and in the absence of evidence to show that the husband expressly or impliedly waived his right to a jury trial, the Trial Court abused its discretion by entering a Final Judgment and Decree of Divorce without first holding a jury trial.

*Vic Valmus graduated from the University of Georgia School of Law in 2001 and manages Valmus Law Firm located in Marietta. His primary focus areas are family law and criminal defense. Vic can be reached at vic@valmuslaw.com.

SERVE THE BAR

EARN CLE CREDIT

State Bar of Georgia

6 ***GEORGIA BAR JOURNAL* LEGAL ARTICLES**

Earn up to six CLE credits for having your legal article published in the *Journal*. Contact jenniferm@gabar.org for more information.

3 **HIGH SCHOOL MOCK TRIAL**

Coach a team or judge a trial for the High School Mock Trial program and receive up to three hours of CLE credit. Contact richardh@gabar.org for opportunities.

2 **GEORGIA LAWYERS HELPING LAWYERS**

Volunteer and complete online training to be a peer in the Georgia Lawyers Helping Lawyers program and earn up to two CLE hours during your training. Visit www.georgiaLHL.org for more information.

Family Law Section
State Bar of Georgia
Kem Eyo, Editor
104 Marietta St., NW, Suite 100
Atlanta, GA 30303

Presorted
Standard Mail
U.S. Postage Paid
Atlanta, GA
Permit No. 1447

Family Law Section
STATE BAR OF GEORGIA

2025-26 Family Law Section Executive Committee

Jeremy Abernathy, *Chair*
jeremy@adhbfamilymatters.com

Jamie Perez, *Vice Chair*
jamie@familylawga.com

Jonathan V. Dunn, *Immediate Past Chair*
jonathan@jvdattorney.com

Roslyn Holcomb, *Secretary*
thegrantgrouplaw@gmail.com

Erik Chambers, *Legislative Liaison*
Erik@segfamilylaw.com

Kem A. Eyo, *Editor*
kem@rbafamilylaw.com

Emily Long, *YLD Representative*
emily@hsfamilylaw.com

Megan Pownall Wyss, *Sponsorship Chair*
megan@bcntrlaw.com

Kevin Rubin, *Member-at-Large/Social Media*
kevin@familylawga.com

Nilufar Abdi-Tabari, *Member-at-Large/ Diversity Chair*
Nabdi-tabari@atlantalegalaid.org

Drew Wilkes, *Member-at-Large*
dwilkes@olivermaner.com

Katie Connell, *Member-at-Large*
connell@connellcummings.com

Alex R. Cutler, *Member-at-Large*
acutler@emcfamilylaw.com

William A. Alexander, *Member-at-Large*
william@familylawga.com

Sean Ditzel, *Member-at-Large*
sean@adhbfamilylaw.com

Cherese Clark-Wilson, *Member-at-Large*
cherese@cllfamilylaw.com