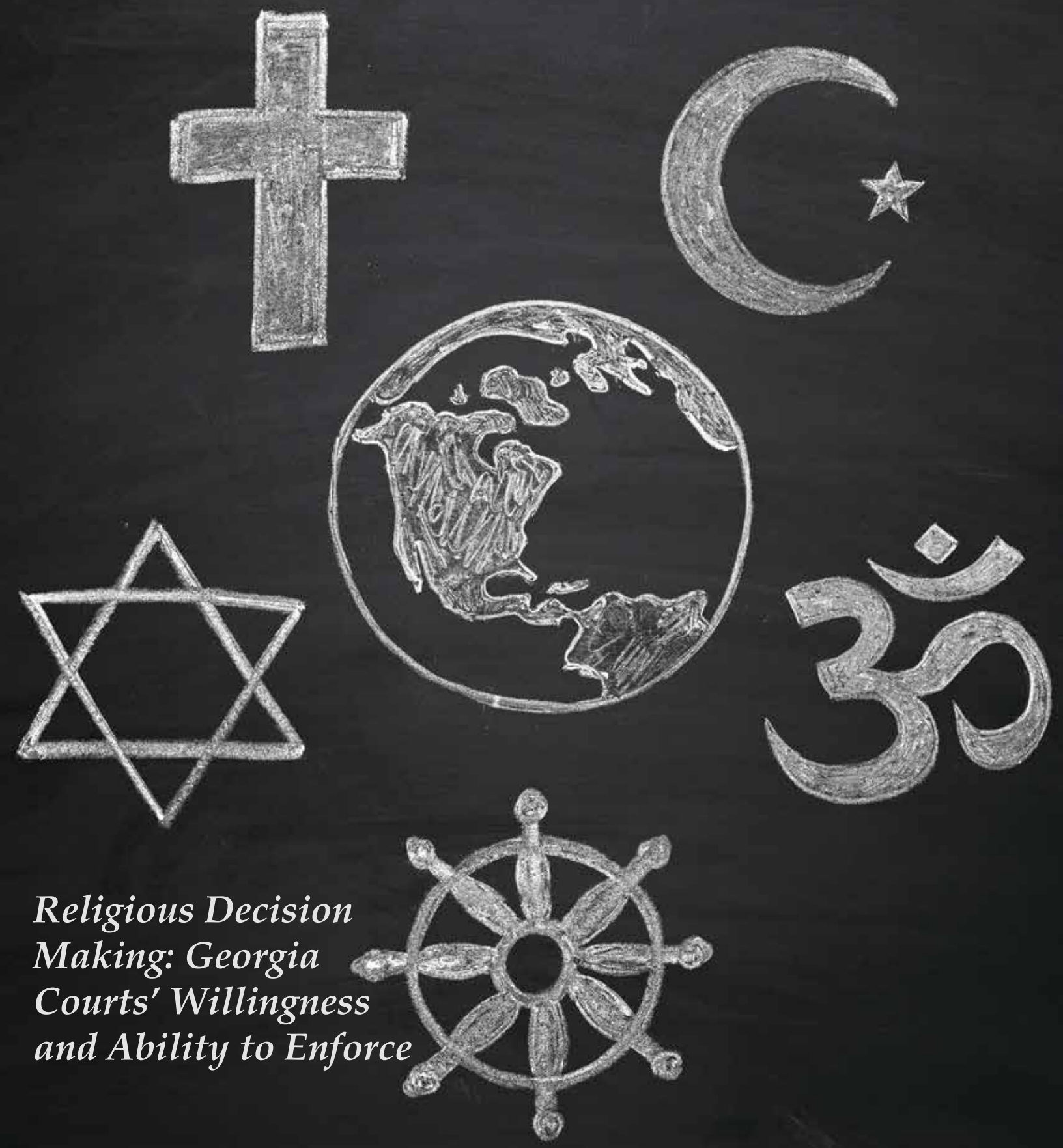
The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia – Spring 2017



Religious Decision Making: Georgia Courts' Willingness and Ability to Enforce

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Editors' Corner

By Kelley O'Neill-Boswell
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This issue of the Family Law Journal is full of information on many substantive family law issues. The recent changes to military benefits awards are highlighted. You can also expect two follow up articles in our next publications on military benefits awards. The article on recent developments regarding religious decision making is a good recent case law reminder. I think you will find the article on child abduction extremely informative and the legislative update is a quick reference to the legislative changes which we all need to keep in mind. As always, the Case Law Update article is vital to all of our practices. Thanks to all of the contributors for the quality content of this edition. See you all in Amelia.* ***FLR***

** Make sure you read the article on the Institute!*

Editor Emeritus

By Randy Kessler
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It is unbelievable how fast time moves. Here we are at the brink of the 2017 Family Law Institute. I look forward to seeing old and new friends and sharing new experiences. I hope you are enjoying this issue of the Family Law Review. As we continue to try to offer the latest in Family Law updates, please continue to provide suggestions, photos and articles. Thank you for continuing to let me serve this Section in my capacity as Editor Emeritus. It is truly an honor. ***FLR***

***The Family Law Review* is looking for authors of new content for publication.**

If you would like to contribute an article or have an idea for content, please contact Kelley O'Neill-Boswell at kboswell@watsonspence.com

Inside This Issue

From the Chair

By Marvin Solomiany
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This will be the last edition prior to the upcoming 2017 Family Law Institute that Gary Graham has planned. While the Family Law Institute is the event that receives the most attention from our Section, it is important to note that it is only one of many events that our Section has planned and participated in during the last year.

Our Section is arguably the most active Section of the State Bar of Georgia.

This past year, our Section has planned and participated in the following events:

1. Planned the Family Law Institute at Jekyll Island (marking the biggest CLE event that was hosted in the State of Georgia in 2016)
2. Planned two "Nuts and Bolts" seminars attended by over 100 people each in Atlanta and Savannah
3. Co-Sponsored the American Academy of Matrimonial Lawyers Georgia Chapter December Seminar
4. Planned and Sponsored the John Mayoue Family & Trial Law Convocation on Professionalism Seminar
5. Managed the Child Support Worksheet Hotline
6. Planned and Sponsored the Family Law Issues For the Modern Family Seminar
7. Actively engaged with our legislators to promote and support important legislation concerning Family Law
8. Planned a Community Service Project by improving Whittier Mill Park for the Park Pride organization
9. Planned a Roundtable Discussion entitled Building A Bridge: Our Families and the New Order
10. Planned with our Young Lawyers Division the 2017 Supreme Cork benefitting AVLF
11. Planned and Sponsored A View From the Bench Seminar during the State Bar's mid-year meeting
12. Planned and Sponsored the upcoming Jury Trial for Family Law Cases Seminar taking place in August 2017
13. Volunteered with Catholic Charities of Atlanta to assist unaccompanied alien children who came into the United States without their parents; and
14. Published 4 Family Law Review Newsletters.

We should all be proud to belong to such an active Section. Through our participation in these endeavors, not only are we giving back to the Community, but also ensuring that our members are able to receive substantial benefits. As always, I encourage each and every one of you to not only take advantage of these opportunities, but also to become as active as possible in our Section. Thanks for your continued support. ***FLR***

2017 Family Law Institute

by Gary Graham

The theme for this year's Institute is "Anatomy of a Divorce and Family Law Case from Start to Finish . . . Basic and Advanced". We start with Getting the Phone to Ring and end with the Frontier of Family Law, and have everything else pertaining to a divorce and family law case in between.

The primary intent behind the theme and program content is for family law attorneys of all experience levels to learn and benefit from the program material. The agenda is devoted to presenting basic and advanced topics in the presentations. Furthermore, we will have two separate sessions on Friday morning; specifically, one session is for advanced divorce issues and the other is for basic divorce issues. There will be a few minutes in between each presentation at both sessions, so you can attend some presentations in the advanced and some in the basic breakout sessions.

We have a great selection of Judges from all across the state participating in the Institute. The rationale for the selection of the Judges and assigning them to the presentations was to provide you a "metro" and "non-metro" perspective on the presentation topics. I am also very excited about our presenters, who are among the best family law attorneys and litigators in the state. In that regard, I relied heavily on members of the Georgia Chapter of the American Academy of Matrimonial Lawyers in selecting the presenters.

We will have our usual First Timers Breakfast, Golf and Tennis Tournaments and receptions on Thursday and Friday nights. New additions to the agenda are our first ever One Mile Fun Run/Walk on Friday morning on the beautiful Amelia Island beach (to help burn off some of the adult beverages that will be consumed), and families will enjoy the child-friendly recreation activities we have planned to coincide with our Section Reception on Friday night. This will allow parents to network and catch up with their colleagues while their children have a chance to enjoy lawn games and other activities.

I look forward to seeing everyone in Amelia, and having another great turnout and Institute. Please do not hesitate to contact me if you have any questions.

See you at the beach soon! ***FLR***

11th Annual Supreme Cork

by Jonathan Brezel

The YLD Family Law Committee hosted their 11th Annual Supreme Cork fundraiser on Feb. 16, at the 5 Seasons Brewing Company in West Midtown. The fundraiser featured a beer & wine tasting with a silent auction. The event raised money for the Atlanta Volunteer Lawyers Foundation's (AVLF) Guardian ad Litem Program and Domestic Violence Program. The service and dedication of YLD Family Law Committee and staff members at AVLF played a major role in mobilizing the legal community to support this worthy cause. It is worth mentioning that this event would not be possible without the contributions of the sponsors, the merchants who provided items for the silent auction, and the family law community as a whole. The YLD Family Law Committee and AVLF specifically extend their gratitude to all of this year's generous sponsors, especially the Platinum and Gold Level Sponsors:

Platinum Level:

Boyd Collar Nolen & Tuggle, LLC; IAG Forensics; Nedra Wick, ESQ., LLC; Dr. Allison Hill, J.D., Ph.D.; and Stern & Edlin, P.C.

Gold Level:

Hedgepeth, Heredia & Rieder and Ordway Law Group, LLC

This year marks the fifth time that AVLF has been named as the beneficiary of the Supreme Cork. This program provides free legal and safety planning assistance to survivors of sexual assault, domestic violence, dating violence, and stalking. This program also trains and places volunteer attorneys to represent survivors of domestic violence at hearings regarding temporary protective orders. ***FLR***

Fixing the Frozen Benefit Award, Part 1

by Mark E. Sullivan

What's All the Hubbub, Bub?

The National Defense Authorization Act for Fiscal Year 2017 (NDAA 17) contained a major revision of how military pension division orders are written and will operate. Instead of allowing the states to decide how to divide military retired pay and what formula or methodology to use, Congress imposed a single uniform method of pension division on all the states, a hypothetical scenario in which the military member retires on the date of divorce. Despite the fact that more than forty states employ the "time rule" to divide a defined benefit plan, all states – as of December 23, 2016, the date the law was enacted – will have to use this new method for dividing a military pension.

The new rule applies to those still serving – the servicemember (SM) who goes through divorce and property division while still on active duty in the uniformed services (Army, Navy, Air Force, Marine Corps and Coast Guard, plus the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration). It also applies to those in the National Guard and Reserves who are not yet receiving retired pay. It has no impact on those who obtain a divorce and property division after retirement.

How the Frozen Benefit Rule Works

The new military pension division rule is a "rewrite" of the terms for military pension division found in the Uniformed Services Former Spouses' Protection Act, or USFSPA.[1] The rewrite requires that the military retired pay to be divided will be that attributable to the rank and years of service of the military member at the time of the parties' divorce.[2] This is so even though the servicemember may rise in rank and years of service afterwards, resulting in a larger pension to be divided, which would then be discounted by using the "marital fraction" to apply pension division to only the benefit which was acquired during the marriage. The only adjustment will be cost-of-living adjustments that occur under 10 U.S.C. § 1401a (b) between the time of the court order and the time of retirement.[3]

The NDAA 17 rewrite makes no exceptions for the parties' agreement to vary from the new federal rule. Everyone must do it one way, regardless of what the husband and wife decide they want the settlement to say.

How Hard Can This Be?

"Frozen benefit division" is known as a *hypothetical clause* at the retired pay centers.[4] It is the most difficult to draft of the pension division clauses available. A government lawyer familiar with the processing of military pension orders put it this way: "… over 90 percent of the hypothetical orders we receive now are ambiguously written and consequently rejected. Attorneys who do not regularly practice military family law do not understand military pension division or the nature of … military retired pay. This legislative change will geometrically compound the problem."

But now everyone will have to know how to do it. Since few lawyers know how to write such an order without a handful of Excedrin, this means the cost of military divorce will go up once again, with rivers of rejection letters flowing back to attorneys who submit their pension orders to the retired pay center in the hope of approval.[5]

Then it's back to the drawing board for another attempt, or else the local attorney will have to farm it out to some expert who can do it properly – if there's enough information available to figure it out. The required data include the servicemember's rank and years of creditable service, as well as his or her "High Three" figure (i.e., the average of the highest 36 months of continuous compensation). An expert will need to be located, assuming there is enough money is left to pay this draftsman for the work.

Past Efforts, Future Promotions

Most courts already give consideration to how the efforts of the SM and the spouse during the marriage should be apportioned in regard to future promotions. The *time rule* is based on the "marital foundation theory," which recognizes that the individual's final retired pay is based on a foundation of marital effort (e.g., a servicemember would never have attained the rank of sergeant major, with 30 years of service, if it hadn't been for the efforts expended during the marriage up to the rank of sergeant first class over 20 years, when the parties divorced).[6] That's one reason why a large majority of states have adopted the time rule for dividing every type of pension – it provides the fairest approach to division of this asset, whether the pension is state or federal, private or public. And it accounts for the postponement of the benefit (i.e., the spouse's inability to obtain immediate payments in most states) by allowing for the growth in the pension over time.

That approach goes out the window under this new NDAA 17 rule. The share of the former spouse (FS) is *artificially fixed*, frozen like a fly in amber. And then the payments are postponed until the SM chooses to put in for retirement, so a second shrinkage is imposed on the pension share of the FS.

Since the new frozen benefit rule was written by Congress, which knows next to nothing about the division of property and pensions in divorce, there will be plenty of problems applying it in most state courts. And the harmful impact won't be limited to spouses; members and retirees will feel the pain as well. Consider this example:

- Husband and Wife agree to divide the husband's retired pay exactly according to the frozen benefit rule. At the time Husband is a major in the Marine Corps with over 16 years of service.
- Their property settlement language tracks the new statute by stating that the disposable retired pay to be divided by court order is that of Husband, based on his years of service and rank at the time of the court order, that is, "major over 16." It even calculates the hypothetical retired pay.
- Both sign it, and they have their signatures notarized.
- They do not, however get divorced immediately. Due to a deployment and an overseas assignment for Husband, filing for divorce does not take top priority for him. As for Wife, she needs to maintain medical coverage as a dependent spouse so she is not eager to pursue the dissolution either. Five years pass before one of them files. By that time Husband is a *lieutenant colonel over 20*, not a "major over 16."
- When the divorce is granted, with the settlement incorporated into it, it is submitted to the retired pay center. And the center rejects it, since the rank and years of service *at the time of the divorce* is not "major over 16" but "lieutenant colonel over 20." The latter is what must be divided, not the agreed terms.[7]

Breathing Room and Time to Adjust

How much time was allowed for states to revise their laws to accommodate this new rule? None. There was no "breathing room" for the states, no decent interval set out to allow the majority of the states to write up, propose and enact laws consistent with the "new rule." Counsel for the FS will need to alert the court to this problem and show that a warped formula will occur if the denominator of the marital fraction is not revised, to avoid imposition of a *double discount* on the FS.

Here's how the double discount works: First of all, the benefit to be divided with the FS is frozen at the rank, years of service and retired pay base at the date of divorce. In addition, since state laws have not been rewritten to revise the "marital fraction," the fraction will still be calculated in 90 percent of the states based on years of marital pension service divided by total pension service years (marital service years ÷ total service years), rather than years of marital pension service years divided by service years *up to the date of the order*.

It is essential to stop the clock for the denominator at divorce since the benefit is also fixed at that date. Anything else would doubly dilute the pension benefit granted to the spouse. This is illustrated in a 2014 Texas case, *Douglas v. Douglas*,[8] which held that the denominator in a "hypothetical clause" is the months of creditable service during marriage *up to the date of divorce*, rather than the date of retirement. The Texas Court of Appeals stated that accepting the husband's proposition – that the denominator should be total years of service – would impermissibly dilute the ex-wife's share acquired during the parties' marriage.

The new law is effective and binding on the states upon enactment (i.e., 12/23/2016). Although the method of dividing pensions, as well as the date of valuation and classification of marital or community property,[9] has always been a matter of state law, that will change in the military case. Since no time has been allowed for state legislatures to adjust to the change and rewrite state laws, lawyers will need to make adjustments "on the fly" to deal with military pension division cases which are presently on the docket or which come to trial before the state legislature can act.

Setting up the Example

An illustration may help to paint the problems and suggest solutions more clearly. We'll use in these examples a divorce case involving the civilian former spouse, John Doe, and his ex-wife, Navy Commander Mary Doe. They are litigating in a *time rule* state, one which has not made any changes regarding the marital fraction used in dividing a military pension.

Strategy for the Servicemember

There's no easy day for attorneys handling either side of the pension division case under these new rules. But the SM's lawyer will always have the less difficult task. The new law was tailor-made for the servicemember, by freezing his or her retirement benefit. In addition, the SM has control over all the evidence and testimony needed for court or in settlement.

The active-duty SM needs to provide her attorney with proof of the "High Three" figure (i.e., the average of her highest 36 months of continuous compensation) at the time of the divorce.[10] That will usually be the most recent three years. The *High Three* amount can be calculated from Mary's pay records. The document showing her pay is called the LES, or Leave and Earnings Statement. She can get help in obtaining the data through her finance office, and she should be able to retrieve about a year's worth of LES's from the Defense Finance and Accounting service (DFAS) secure pay portal (https://mypay.dfas.mil).[11] Mary can also obtain a pay transcript from DFAS summarizing the last three years of base pay.

Mary's attorney will place the numbers for these 36 months of base pay on a spreadsheet, and Mary will authenticate the LES's in her trial testimony. The spreadsheet should be offered to the court as a summary of the written records which have been verified by Mary, and Mary must also be able to testify that the spreadsheet is indeed an accurate transcription of her pay records, even if she did not prepare the spreadsheet. If the records were obtained from the pay center (DFAS in this case), then Mary may need to obtain a declaration from the business records custodian.[12]

Once the evidence has been admitted, the court will require a court order for dividing the pension. The attorney for the prevailing party is often tagged with the task of

preparing the military pension division order, or MPDO, unless all the necessary language is placed in the divorce decree, or in a property settlement incorporated into the decree.[13] If "outside assistance" from a lawyer experienced in writing such pension orders is needed, this should be done as early as possible, most likely at the start of the case.

Whenever possible, the SM needs to request bifurcation of the divorce from the claim for equitable distribution or division of community property.[14] The earlier that the SM gets the court to pronounce the dissolution of the marriage, the lower his or her "High Three" figure base will be, which means the lower the dollar amount for pension division with the spouse. ***FLR***

[Part 2 of this article will cover the strategy for a former spouse in obtaining a full "time rule share" of the military member's retired pay.]

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(Endnotes)

1 10 U.S.C. § 1408.

2 Although the statutory language refers to "the time of the order," the Defense Finance and Accounting Service has interpreted this as the date of the decree of divorce, dissolution, annulment or legal separation, as explained below. See https://www.dfas.mil/garnishment/usfspa/NDAA--17-Court-Order-Requirements.html.

3 Found at Sec. 641 of NDAA 17, here is the revised wording for 10 U.S.C. § 1408 (a)(4) [wording changes in **bold**]:
(A) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled **(as determined pursuant to subparagraph (B))** less amounts which –
(i) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;
(ii) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;
(iii) in the case of a member entitled to retired pay under chapter 61 of this title [10 USC § 1201 et seq.], are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or
(iv) are deducted because of an election under chapter 73 of this title [10 USC § 1431 et seq.] to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.
(B) For purposes of subparagraph (A), the total monthly retired pay to which a member is entitled shall be—
(i) the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order, as increased by
(ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member's retirement using the adjustment provisions under that section applicable to the member upon retirement.
[Note the error in the language at (B)(i) above. It says that, for purposes of this section, a member's retired pay is his or her basic pay according to pay grade and years of service at the time of the court order. In reality, retired pay is never one's basic pay; by law it is his "High Three" pay (average of highest three years of continuous compensation) times years of creditable service times 2.5 percent . Presumably this will be corrected in a forthcoming amendment.]

4 For the Army, Navy, Air Force and Marine Corps, the retired pay center is DFAS (Defense Finance and Accounting Service) in Cleveland, Ohio. Pension garnishments for the Coast Guard and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration are handled by the Coast Guard Pay and Personnel Center in Topeka, Kansas.

5 A guide for attorneys on how to write acceptable military pension clauses may be found at the Silent Partner, "Guidance for Lawyers: Military Pension Division," and it includes the necessary elements and language for a proper hypothetical clause.

6 The majority rule provides for a fair share by dividing the *actual* retired pay of the member/retiree, not some hypothetical number, and then it reduces it to give the member/retiree credit for the final years of military service after the divorce.

7 The same result would obtain if the parties didn't specify exactly the components required for a hypothetical clause, including the years of creditable service, rank, and retired pay base of the member based on his "High Three" years of pay (see text below); the order would be rejected by the center, which would withhold acceptance until the proper information was inserted.

8 Douglas v. Douglas, 2014 Tex. App. LEXIS 12398, citing Berry v. Berry, 647 S.W.2d 945, 946-47 (Tex. 1983). *See also* Dziamko v. Chuhaj, 193 Md. App. 98, 996 A.2d 893, 903 (2010) (explanation of results from denominator of marital fraction which ends upon divorce vs. one which ends upon retirement).

9 For example, in New York, the valuation and classification date is the date of commencement of the divorce case. In California, a spouse's share of community property stops accruing at the "final separation." *See, e.g.*, In re Marriage of Bergman, 168 Cal. App. 3d 742, 214 Cal. Rptr. 661(Cal. Ct. App. 1985). The date of final separation is also the classification and valuation date in North Carolina. N.C. Gen. Stat. § 50-20 (b)(1). In Nevada, community property stops accruing on the divorce date. *See, e.g.*, Forrest v. Forrest, 99 Nev. 602, 668 P.2d 275 (1983). In other states it may be the date of divorce, the date of irretrievable breakdown of the marriage, or a date in the discretion of the judge.

10 The other element for determination of retired pay is the "retired pay multiplier," which is 2.5 percent times years of creditable service (in an active-duty case). In a Reserve or National Guard case, the court order must also provide the applicable number of retirement points.

11 Members of the Army, Navy, Air Force and Marine Corps have access to the DFAS secure website mentioned above; Coast Guard members have access to the USCG on-line pay portal, "Global Pay."

12 Under federal law, notary seals are not required for instruments which must be verified for federal purposes; instead, the federal government uses an unsworn declaration, made under penalty of perjury. 28 U.S.C. § 1746.

13 For the necessary terms for the MPDO, see the Silent Partner, "Getting Military Pension Orders Honored by the Retired Pay Center." *See* Note 5 *supra* for guidance on how to write the specific pension division clause.

14 *See* Brett R. Turner, Equitable Distribution of Property (3rd Ed. & 2016-2017 Supp.), Sec. 3.2. In those states which have adopted the Federal Rules of Civil Procedure, the issue of separate trials under Rule 42 (b) deals with bifurcation of claims into separate hearings.

Business Valuations - Understanding Normalizing Adjustments

by Dwight A. Ensley

In divorce cases, one of the more difficult assets to divide in property division is an ownership interest in a closely held business. A professional business valuation should be obtained to value the subject company for equitable division purposes. A business valuation report can be lengthy and confusing. One section of a business valuation report that is extremely important, and frequently confusing to family lawyers and judges, is Normalizing Adjustments. This article will define and explain the Normalizing Adjustments found in a business valuation report.

Normalizing Adjustments

Normalization adjustments are required to adjust the historical financial statements of the business, so the statements are representative of a normal condition of the subject company as of the business valuation date. Normalizing adjustments are also applied to eliminate various one-time charges and other abnormalities. Normalizing adjustments deserve much attention in a divorce property division case because these adjustments can greatly affect the value of the subject company. Following are the most common normalizing adjustments made by business valuators:

Officer Compensation

Owners of small, closely held businesses take money out of the business in a variety of ways, generally to minimize taxes. The form of the business entity will have a large effect on this issue.

For example, a business organized as a corporation under chapter C may deduct the salary and employee taxes paid to shareholders, but may not deduct dividends paid to shareholders. Further, dividends are taxed to the shareholder as income. The corporation and the shareholder are both taxed for the dividend resulting in double taxation. Thus, owners of closely held C corporations generally bucket-out money through the payment of salaries, bonuses, and benefits.

Alternatively, a business organized as an S-corporation, LLC, or partnership passes through all income to the members who are liable for income taxes. Salaries and bonuses are subject to employment taxes, but income distributions are not subject to employment taxes. Thus, members may pay themselves a minimal, or no salary to avoid employment taxes and bucket-out money through distributions.

The business valuator will generally adjust the owners' and officers' salaries to market rates to normalize the financial statements. I prefer to look at the situation as if I were buying the subject company and I ask "what would I have to pay employees to replace the owners and officers"? The US Bureau of Labor Statistics and other benchmarking databases maintain current and historical compensation statistics by occupation and region, which is useful in adjusting compensation to market rates.

In divorce property division cases, the attorney or judge must be alert to the danger of "double-dipping." Double-dipping occurs where spousal support is based on the business owner's actual income, but property division is based on the value of the subject company after the owner's salary has been normalized. For example, a business owner pays himself a salary of $400,000 per year. The business valuator determines that the appropriate salary for the position is $250,000 per year and normalizes the business's financial statements by adding back $150,000 to the income of the business. This will increase the value of the business for property division purposes and increase the amount awarded to the dependent spouse. The double dip occurs if spousal support is awarded based on the business owner's income of $400,000, of which $150,000 was added back to the value of the business and distributed to the dependent spouse in the property division award. The result is that the dependent spouse receives an inflated amount of combined spousal support and property division. Whether the issue of double-dipping is a factor in a spousal support and property division case depends on the particular state law.

In Georgia, the Supreme Court of Georgia held in Miller that "with the separate bases for the alimony award and the property division clearly acknowledged before the court..., we find no double dipping here." *Miller v. Miller* (Ga., 2010).

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Depreciation

Depreciation is an income deduction that allows a taxpayer to recover the cost or other basis of certain property. It is an annual allowance for the wear and tear, deterioration, or obsolescence of the property.[1] The Internal Revenue Code allows various forms of accelerated depreciation that permits a business to deduct the cost of an asset over a period that is shorter than the useful life of the asset. This can result in the financial statements reflecting varying depreciation expenses in certain years that may understate or overstate the actual income of the subject company.

The depreciation of assets may also be calculated under Generally Accepted Accounting Principles (GAAP).[2] Under GAAP, the assets are generally depreciated using the straight-line method of depreciation which allows an annual deduction equal to the cost of the asset divided by the useful life of the asset.

A business valuation report, whether a "Conclusion of Value" or "Calculation of Value," that is prepared from the business's tax returns, or financial statements prepared on a "tax basis", should normalize depreciation expense on the income statement and accumulated depreciation on the balance sheet by converting the depreciation from "Tax to GAAP." By converting the "Tax" depreciation to "GAAP" depreciation, the financial statements are normalized to be representative of a normal condition of the subject company as of the business valuation date. Failure to normalize depreciation can result in an inaccurate value of the subject company.

Rent

Owners of small, closely held businesses sometimes set up arrangements where the property occupied by the subject company, or certain equipment used by the subject company, is leased from the owner or a related entity. A business owner may use this arrangement to bucket-out cash from the subject company as an expense, or to boost earnings of the subject company by reducing rent expense.

A business valuation report should normalize rent expense to related parties by adjusting the rent expense to the market rate for similar properties or equipment. By adjusting the rent to market rates, the financial statements are normalized to be representative of a normal condition of the subject company as of the business valuation date. Failure to normalize rent expense can result in an inaccurate value of the subject company.

Shareholder Discretionary Spending

Owners of small, closely held businesses may direct the subject company to purchase and/or maintain certain assets that are for the quasi-personal use and benefit of the owner. These expenditures are referred to as owner or shareholder discretionary expenditures. The most common examples are luxury automobiles, private aircraft, boats, and vacation properties.

A business valuation report should normalize shareholder discretionary expenditures by eliminating these expenditures as expenses on the financial statements. This will increase the earnings and the value of the subject company. By adjusting the shareholder discretionary expenditures, the financial statements are normalized to be representative of a normal condition of the subject company as of the business valuation date. Failure to normalize discretionary expenditures can result in an inaccurate value of the subject company.

Pension and Retirement Contributions

Owners of small, closely held businesses may set up pension or retirement plans for the benefit of the owners only. These plans are generally not tax deductible and are a form of an owner's discretionary spending.

A business valuation report should normalize these owner benefits by eliminating these expenditures as expenses on the financial statements. This will increase the earnings and the value of the subject company. By adjusting these owner benefits, the financial statements are normalized to be representative of a normal condition of the subject company as of the business valuation date. Failure to normalize discretionary expenditures can result in an inaccurate value of the subject company.

Meals and Entertainment Expense

Most small, closely held businesses incur expenses for business meals and entertainment. The Internal Revenue Code allows only 50 percent of these expenses to be deducted for tax purposes.[3] Thus, if the business valuation is being prepared from the tax returns, or financial statements prepared on a "tax basis" of the subject company, the meals and entertainment expense will be 50 percent of the actual expenses incurred.

A business valuation report should normalize the meals and entertainment expense from the tax returns by increasing the expense for the 50 percent that is disallowed on the tax returns. On the other hand, if the meals and entertainment expense is inflated by the business owner's personal expenditures, then the business valuation report should normalize the meals and entertainment expense by eliminating these expenditures

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as expenses on the financial statements. Failure to normalize meals and entertainment expense can result in an inaccurate value of the subject company.

One-time Charges and Other Abnormalities

One-time charges and abnormalities include income and expenses that are outside the subject company's normal course of business. Examples of one-time charges and abnormalities include the following: 1) the sale of an asset, 2) a one-time contract for a service or product that the subject company normally does not provide, 3) a gain or loss on investments, 4) a lawsuit settlement, 5) employee embezzlement or theft, 6) uninsured losses, 7) regulatory fines and compliance costs, and 8) etc. … you get the idea. A business valuation report should normalize these one-time charges and abnormalities by eliminating these incomes and expenses on the financial statements. Failure to normalize one-time charges and abnormalities can result in an inaccurate value of the subject company.

Conclusion

The family law judge and practitioner should have a basic understanding of the valuation of a closely held business for property division. If it is determined that an interest in a closely held business is part of the marital estate, the family law practitioner should advise the client of the importance to obtain the services of a professional business valuator to appraise the value of the interest. A business valuation report can be lengthy and confusing. One section of a business valuation report that is extremely important, and frequently confusing to family lawyers and judges is Normalizing Adjustments. Normalizing adjustments deserve much attention in a divorce property division case because these adjustments can greatly affect the value of the subject company. Thus, an understanding of Normalizing Adjustments is important to prevent an "unequitable" division of property. ***FLR***

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(Endnotes)

1 IRS Small Businesses & Self Employed, A Brief Overview of Depreciation, 2017, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/A-Brief-Overview-of-Depreciation.

2 Federal Accounting Standards Board, FASAB Handbook of Federal Accounting Standards and Other Pronouncements, as Amended, June 30, 2016.

3 I.R.C. § 274 (2014).

Past Family Law Section Chairs

Regina M. Quick	2015-16
Rebecca Crumrine Reider	2014-15
Jonathan J. Tuggle	2013-14
Kelly Anne Miles	2012-13
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Tina Shadix Roddenbery	2009-10
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Stephen C. Steele	2005-06
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Thomas F. Allgood Jr.	2003-04
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Elizabeth Green Lindsey	2001-02
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H. William Sams	1999-00
Anne Jarrett	1998-99
Carl S. Pedigo	1997-98
Joseph T. Tuggle	1996-97
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Hon. Martha C. Christian	1993-94
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H. Martin Huddleston	1991-92
Christopher D. Olmstead	1990-91
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Edward E. Bates Jr.	1987-88
Carl Westmoreland	1986-87
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Kice H. Stone	1981-82
Paul V. Kilpatrick Jr.	1980-81
Hon. G. Conley Ingram	1979-80
Bob Reinhardt	1978-79
Jack P. Turner	1977-78

Interview with Hon. Christopher S. Brasher

by Katie Kiihnl Leonard

Those of us who regularly practice in Fulton County know that every few years, we see some new faces on the Family Division bench. The four judges who serve in the Family Division are either "drafted" to serve, or they volunteer to spend the next two years presiding over only domestic relations matters. Judge Chris Brasher knew that to have a well-rounded career as a Superior Court Judge, he needed to gain experience handling one of the court's busiest dockets—domestic relations. On Jan. 1, 2017, after 10 years of service as a Superior Court Judge, Brasher signed on for a two-year term in the Fulton County Family Division, replacing Judge Todd Markle.

Q: What made you want to volunteer to serve in the Family Division?

My colleagues said, "If you want to do everything a Superior Court Judge does, you need to handle family law cases." I had ascended to a level of seniority in the Fulton County judiciary where it was unlikely I would be drafted to serve. It is appropriate for Superior Court Judges to be well-rounded, and I wanted some different experiences as a judge. In my time on the bench, I have only presided over general civil cases and felony criminal cases, including two death penalty trials in the last three years. It was time for something different.

Q: Tell me a little bit about your background and legal experience prior to becoming a judge.

I graduated law school from Georgia State in 1991. After law school, I immediately went into the public sector. I worked as an Assistant District Attorney in the Alcovy Judicial Circuit doing child support enforcement. After two years, I transferred to felony prosecution within that same office. In 1995, I moved to the state Attorney General's office where I handled capital felony appeals and habeas cases. I spent the rest of my time in that office with the public safety section, where I supervised a team of attorneys who work with state-level public safety agencies (such as Department of Corrections, GBI, and the State Patrol). One case I worked on was the Tri-State Crematory case in North Georgia. Additionally, I handled a lot of mandamus cases, federal court cases regarding the Parole Board and death penalty cases, and civil prosecution of peace officers with the Georgia POST Council. In 2006, I was appointed to the Superior Court by Governor Sonny Perdue. I was re-elected in 2006, 2010, and 2014.

Q: So your experience has included a lot of criminal cases and death penalty cases. How has this impacted the way you handle your cases in the Family Division?

It gives me a lot of perspective on the relative importance of a problem. It's hard to phase me anymore. That is not to say I do not have empathy and understand the human dimension of the cases I am deciding. Sometimes these issues are emotional and difficult, but my job is to make the decision. The most difficult cases are those where people become so focused on the fight with one another that they lose perspective on what's important. They abdicate their ability to make responsible decisions and lose sight of how it impacts their children. I look at my job as trying to stop the conflict that is hurting the children. I focus on how I can get them back on the right track and help them move forward.

Q: What kind of personal family experience do you bring with you to the bench?

My wife, Jennifer, and I have been married for 28 years. She is an actuary with Aon, and she is a Fellow in the Society of Actuaries. My son is 21, and is a senior at Georgia Tech. He will be starting his career in finance when he graduates. My daughter is a senior in high school and will be starting at Georgia College and State University this Fall.

Q: Sounds like you had a busy household. How did you and your wife manage your household duties while both running successful careers?

It was "all hands on deck." Jennifer supported me while I was in law school. When we graduated, we both worked. When we had children, we both helped, we both took off work when they were sick. It also helped that we have family in town.

Q: How has your real-life experience as a father impacted your experience as a judge in making child custody decisions?

It allows me to "reality-test" what I hear. I hear testimony and I think, "What were my kids like at that age? How did they react to things like this? What kinds of things were their friends doing?" I have a boy and a girl, and I have raised them through all stages. I have seen it all, so it gives me some frame of reference. It is helpful to understand the dynamic of raising children, what does it take, and what priorities you have to have. It also helps with patience.

Q: I know you are most familiar with criminal lawyers and general civil litigation lawyers. What have you observed of the family law bar so far?

I have been very impressed with the family law bar. They do a good job of getting cases resolved. It shows me that when a case comes to me, it needs to be there. Even if the lawyers are just narrowing issues, they are helping cases get resolved. The level of preparation has also been very good. I read everything the lawyers write before I walk out on the bench, so I expect them to know more about the case than I do. If everyone does their part to prepare, we can make the best use of the time we have.

Q: Are you seeing more lawyers or *pro se* litigants right now?

Most of the cases that I see are with lawyers. While our docket is about 70 percent pro se, my Judicial Officer is doing a great job of giving them hands-on attention early. Intervention from a good Judicial Officer is crucial in this system.

Q: Who is your Judicial Officer?

Carole Powell. She is doing a great job. Her assistance lets me devote my time to the cases that need the judge's attention.

Q: What is the most complicated issue you have seen so far?

Unwinding the complicated financial transactions has been the most challenging. I have heard a lot of cases with tracing and separate property issues. Figuring out the separate property after tracing, determining the nature of business interests and how that impacts the marital estate. That has been the most challenging.

Q: When it comes to some of the more complicated subject matter, what can lawyers do to make your job a little easier?

Having experts helps, but it is difficult when they completely disagree. If they are on opposite sides of the spectrum, it does not help me. I prefer it when the experts are good and straightforward, they acknowledge the weaknesses in their position and give an objective point-of-view. If I hear advocacy instead of objectivity, I may discount what they are saying. I have listened to experts testify hundreds of times, and I have benchmarks that I listen for. I prefer neutral experts. It is helpful when the parties agree to an expert who presents a global view of the issue and can give a solid recommendation.

Q: How much do you rely on experts, especially neutrals in child custody cases?

I rely on their ability to have knowledge and expertise that I do not have. I may not agree with their recommendation, but I want to know what they learned, what they observed, and what they considered in reaching their conclusion. I may ultimately disagree with them, but I want to know how they got there.

Q: Do you think you have any preferences about child custody schedules?

I want to hear why each party wants the schedule they are proposing and why they think it is best for the children. I do think joint custody (50/50) for kids old enough to understand what is going on can be disruptive. When a child is school age, there is some disruption in moving back and forth. Even if both parents are paragons of co-parenting, there will still be some disruption. However, that is not to say I won't order it. I am willing to listen about why joint custody works or why it does not work for a family. I would like to hear a psychologist tell me how it can work in a given situation. I will listen and seriously consider it.

Q: You spoke about your experience with attorney's fees at the State Bar's mid-year meeting, especially your experience with motions for attorney's fees under O.C.G.A. §9-15-14. Do you ever consider the conduct of attorneys in making fee awards?

I like to think I can look past that. Family law cases are a little different—there is not necessarily a "winner" and a "loser." In civil cases, I saw a lot of 9-15-14 fees requests because there is a definite winner. That is not always the case here—there is a lot more "leveling the playing field." I have seen some 9-15-14 fees requests in family law cases, and some cases where attorneys argue for attorney's fees under multiple statutes. 9-15-14 is much harder in this area of the law. It has to be fleshed out—for example, how did the filing of this motion cause this fee? You have to find the nexus between the fees and the causation.

Q: What are your biggest "pet peeves" for lawyers?

1. *Lack of preparation*
2. *Substituting emotion for effective argument. If you are not prepared, the argument can come off as emotional (i.e. "what's fair") versus what is legal and what the law will permit.*
3. *Failing to honor the duty of candor to the court. I take credibility very seriously. I have to be able to take what a lawyer says at face value. Judges do not always remember lawyers who do a good job, but we always remember the ones who did not tell the truth.*

Judge Brasher will continue to serve on the Fulton County Family Division bench until Dec. 31, 2019. He is up for re-election in May of 2018. ***FLR***

Interview with Hon. Robert W. "Bert" Guy Jr.

by B. Lane Fitzpatrick

Judge Guy, you have been very active in politics for years, beginning in college. Knowing that judges are apolitical, what experiences in the political realm, if any, prepared you for being a judge?

I spent 20 years working to get people elected. That experience did help prepare me to be a judge. First, I ran for an open seat so it helped me put a plan in place and have an idea about how I should run my own campaign. Second, most successful candidates are able to relate to and talk to the public. It is important to feel like you belong to the community that you serve in elected office. That connection helps as a judge because when you hear the evidence of a case you are not in a vacuum. You understand life and therefore it makes you a better judge.

You practiced family law and served on the Executive Committee of the Family Law Section before ascending to the bench. Do you draw on your time as a private practitioner when you make decisions in family law cases?

Yes. Hearing family law cases is a big part of the work I do as a judge. Since the majority of my private practice was in the family law arena it has provided a great foundation. Having a good understanding of the law allows me to focus on the relevant facts and evidence presented in a hearing. I think that it also allows me to get to the heart of the matter quicker.

Other than the usual "be prepared," what do you expect of lawyers who come before you in family law cases?

It is great to preside over a case when the lawyers are well prepared. The hearings are more efficient and it does not evolve into a discovery deposition. There are a couple of small things that lawyers can do which can help in the presentation of their position of the case. First, specifically list the issues in dispute or requested relief. This can be done in the opening statement or some lawyers opt to present the court with a one page list of their requested relief. Review the statues for the factors that the court should consider relative to the relief requested before the hearing and present evident relevant to those factors. Many times lawyers focus the presentation of their case on what his/her client wants to talk about instead of what is most important to decide the case.

Is there an age of a child at which you will talk to them in chambers, or do you not speak with a child at all?

I do talk to children in chambers. Generally I would not talk to a child in chambers under 10 unless the parties agree that the child is very mature for his/her age.

Have you developed any "pet peeves" about lawyers in family cases?

Don't over use affidavits in temporary hearings and read the affidavits before you file them. Sometimes lawyers give clients the affidavit forms and it becomes a contest to see how many they can get instead of focusing on a few good ones. Most of them are full of hearsay and other inadmissible or irrelevant facts. They can be a useful tool, but often they are not. Talk to all witnesses before you call them. I know this sounds like common sense, but it happens.

In making decisions on child custody and visitation, what are the factors you look for to guide your decision?

I review the statutory factors to discern who is best suited to have the majority time with the children and if there a safety concern with either parent. It is important to not only see which parent looks best on paper, but also which parent has the closest emotional bond with the children. I also like to know who makes the children a priority over everything else and who is there when it is convenient? Who has the support system in place for the children to have the best chance at success? Who takes off work when the children are sick and schedules medical appointments? Who is the coach of the children's sports teams, and attends teacher conferences? The answers to these questions also help in deciding who gets tiebreaker authority.

When a non-custodial parent who is behind in child support appears before you, do you have any "out of the box" techniques you use to collect child support or motivate the parent to pay?

If the non-paying party is employed, but has a tendency to quit jobs when IDOs get entered or is self-employed, I may continue the hearing for 90 to 120 days with the instruction that I am giving them a chance to show me that they can pay the support on a regular basis. He/she will know that when he/she comes back to court if I feel like the support was not paid as ordered then be prepared to be incarcerated for contempt. I believe that if you can get him/her started on regular payments then it is more likely to continue. Ordering his/her incarceration immediately with a purge amount or giving him/her 10 days to pay a purge amount or report to jail can also motivate him/her to comply with the order. ***FLR***

Interview with Hon. Eric W. Norris

by B. Lane Fitzpatrick

Judge Norris, as a former family law practitioner and a past chair of the Family Law Section of the Western Judicial Circuit, how does your experience impact your decisions on family law issues?

First, I recognize how difficult practicing domestic law can be both for the practitioners and the litigants. Second, I recognize how fluid each case is and how applying the facts of a particular case and the nuances of each case affect the decision made by the Court. I always start with the idea that the attorney's know what is most important to the client and that they will direct me to the most salient issues for the Court to address. The past domestic experience has been extremely valuable because approximately 50% of our civil cases tend to fall within the domestic arena.

Having graduated from North Georgia College and commissioned as an officer from the Corp of Cadets, and now having served in the Georgia Army National Guard for 31 years, rising to the rank of Lieutenant Colonel, how has your military service prepared you for making decisions in family law cases?

The military teaches you to both lead and follow. Both are important and each position requires clear decision making. In a leadership position, you must make decisions, both hard and easy. Indecision is a decision that helps no-one. I always try to take into account a 360 degree view of a case, but I also realize that at some point you have to make a decision and it is better to give a clear, concise decision that people can understand. I usually try to give a ruling from the bench so the litigants can understand the basis for the decision. Even when ruling against a party I attempt to give the legal and logical basis for the decision. It may not be a decision agreed upon, but they can be assured that I listened to the case and there was a finding based on fact and law.

Do you approach family law cases hoping to bring litigants to the conclusion they should work out their differences through mediation, or do you simply allow the parties to make their respective cases and then make a decision on the issues presented to you?

My approach is more of a hybrid. I let the litigants know that it is their case and ultimately that they have the ability to reach a solution and I encourage that process, especially when children are involved and the parties will be parenting with each other in some form for years to come. With that in mind, I believe every person should be able to have their day in court. To ensure litigants can have access to the Court on a timely basis, I set aside one day each week for short hearings (45 minutes). I find that if people can get a timely court date and have a Judge available many issues can be resolved early and it helps to focus on the "big issues" of the case.

Do you think of yourself as a "mother's judge" in custody issues, or do you make a conscious effort to consider both parents as equals in making a decision on what is in the best interest of a child?

No, I think myself a "Children's Judge". When I first started practicing I took the position that both the Father and Mother should start off with a 50/50 basis and I think the law supports and encourages that principle, although it is not always practical or best for children. I like to look at the phases of the child's life when making parenting time decisions. I think the phases for children fall within a range of ages of 1-4; 5-9; 10-13/14; 14/15-18. When children are 1-4 and not in school there is more flexibility because there are no school requirements and of course when children are 15-18, you are lucky if they will give you a conversation other than when is supper ready, money, or gas for the car. The hardest decisions are between 5-14. That phase is so developmentally important and the requirements of school, activities, etc. for both the children and parents requires some innovative approaches to parenting time. I believe that both parents should have quality time with children. I often tell litigants at the beginning of a custody case that if they would not accept the proposed custody or parenting plan that they have offered to the opposing party, then it probably is not the best plan.

What has surprised you the most thus far in family law cases?

That after nearly a decade of the "best interests standard" that litigants and sometimes attorney's still think that a purely every other weekend and two weeks a summer plan is appropriate. I think we have progressed in the past decade but we as family law practitioners should be consistently thinking out of the box as it

relates to what make a child happiest, healthy and well adjusted despite divorce. The other noticeable issue is that after almost a decade attorney's still fail to properly address presumptive child support, how deviations work and the need for appropriate findings and completing the necessary documents to have a divorce finalized.

Do you go strictly "by the book" on the Child Support Worksheet, or do you consider deviations under Schedule E?

In our circuit we do see proposed worksheets with deviations and many times the deviations are very appropriate. So, I do not just rely on presumptive. I do keep in mind that there is "never enough money", so I look to needs of the children but also to needs of the parents as they work through child support amounts.

In making decisions on custody, what are the facts you look for?

Well we all know 19-9-3 is the basis for our custody decisions and the factors enumerated, but remember that it is not a finite list and there are "other factors" not enumerated which a Court can consider. I try to gauge a parents willingness to have the other parent involved and working towards co-parenting. When I hear immovable non-realistic parenting plans or reasons for a parent to be limited as to contact with children I become concerned. If we analyze a divorce case compared to a DFACS deprivation action, the interesting issue becomes that with even the worst of circumstances a deprivation plan seeks reunification of parent and child. Many times I see divorce cases where a party want to exclude the other parent as much as possible. Realistic parenting time is very important to the Court and it is in the best interest of a child.

In making decisions on equitable division of property, what are the facts you look for?

In practice I would counsel my clients that if you go to a jury trial you should start with the concept that jurors will typically start at 50/50 and then deviate on a variety of factors. For the Court, I think it helps when the attorney's clearly present the marital assets and non-marital assets and then chart out why an exception should be applied or why the issue of alimony is otherwise appropriate.

What do you want attorneys to present to you at a temporary hearing on custody and visitation?

I like an outline of what the attorney's want me to make a decision on. Additionally, a proposed Order with a realistic parenting plan and a correct child support worksheet and DRFA helps me sift the issues that are argued. Many times, arguing a case by exception is the most effective way present the case.

What do you want attorneys to present to you at a temporary hearing on property issues?

I want to know what are the assets that need preservation and what are the limitations that affect the preservation of assets until a final decree is reached. The excesses of life and pleasure will be greatly reduced in a divorce and a clear perspective of what assets are most important for preservation help the Court on a temporary basis.

What I have found serving on the bench are few good practice rules that help me and I think many other judges:

1. *KISS- Keep it Simple Stupid (the stupid is for us not the attorney's). A simple clear concise outline of what is to be decided, why it should be decided based on the law and the effect of that decision. It keeps me focused on what is most important.*
2. *BLUF. Bottom Line Up Front. Tell me what you want to prove, show me the proof and tell me how you proved the fact.*
3. *Congeniality and professionalism. We are a profession and we should treat each other graciously even when we disagree. Your demeanor and the way you treat opposing counsel has a great impact on the Court and the litigants.*
4. *Don't Hide the Ball. If there is a problem in the case, address it, distinguish it and then prove the other parts of your case.*
5. *The Family Law Section and the Family Law Conference. If you are new, old or in the middle of practicing domestic relations, be involved and most importantly do not hesitate to call someone you hold in high esteem and ask for advice if you do not know. Older attorney's love to give advice and war stories, they teach through experience. Young attorney's should seek out advice from Sages who have practiced for years. For the middle of the road practitioners you are unique because you can do both, ask for advice and give advice.*

As my old mentor Jim Hudson said (and it was probably said by many others) Youth and Skill are no match for Old Age and Treachery. I like to replace Treachery with Experience. See you at the Family Law Conference. ***FLR***

Religious Decision Making: Georgia Courts' Willingness and Ability to Enforce

by A. Latrese Cooper

Marriage and divorce between those of differing religious backgrounds is more common, because our Nation and our State have enjoyed an increase in cultural diversity. When divorce or other child custody disputes arise between those of diverse religious backgrounds, questions often arise, such as: "Whose religion should the children practice?" and "How can such a determination be practically enforced?" The issue of religion is deeply personal. For that reason, parties should seek agreement regarding the religious upbringing of their children. If such agreement is not possible, Georgia case law provides some indication on how this issue may be resolved by a court. Once determined, whether by agreement or court order, recent case law reveals that Georgia courts not only have the ability to enforce their orders regarding religious decision making, but they are willing to take the steps necessary to do so.

Unless otherwise ordered by the court, in all actions involving the determination of child custody, a parenting plan shall include "an allocation of decision-making authority to one or both of the parents with regard to the child's education, health, extracurricular activities, and religious upbringing, and if the parents agree the matters should be jointly decided, how to resolve a situation in which the parents disagree on resolution[…]." O.C.G.A. § 19-9-1(b)(2)(E); O.C.G.A. § 19-9-3 (a)(8). In cases where the parties are in agreement on the issue of religious upbringing, or cases where the parties share the same religion, there is often little to no conflict about which parent will be awarded the authority to make decisions as to the children's religious upbringing. But, in matters where the parties disagree, especially in matters where the parties espouse different faiths, this issue can be fraught with conflict, thus necessitating determination by a court.

Although pursuant to O.C.G.A. § 19-9-3(a)(2) judges are required to analyze the specific facts of each case to determine which physical and legal custodial arrangement would best serve the interests of the children involved, a 1981 Georgia Court of Appeals decision indicates that Georgia courts are hesitant to award religious decision making authority to non-custodial parents. In *Applebaum v. Hames*, 159 Ga. App. 552 (1981), Mother was awarded primary physical custody of the parties' younger son, and Father was awarded primary physical custody of the older son upon the parties' divorce. *Id*. at 552. One year later, on Mother's petition for modification of custody, the trial court awarded Father custody of both minor children. *Id*. Four months later, Mother again petitioned the court for a modification of child custody. Specifically, Mother sought custody of both children due to Father's failure to provide them with adequate Jewish religious instruction. *Id*. The trial court denied Mother's petition, and the Georgia Court of Appeals affirmed holding: "[s]ince the boys were not brought up in the Jewish faith, [Father's] failure to educate them presently in that religion is not a changed condition upon which a modification of the custody award could be based, but a preexisting condition." *Id*. at 553. The Georgia Court of Appeals went on to note that:

"[i]n the absence of an agreement to the contrary, it is up to the custodial parent to determine the religious training the children receive. Once custody has been awarded, courts should be loath to interfere with the religious training sanctioned by the custodian, since no end of difficulties would arise if judges sought to prescribe or proscribe the selection of a religious faith made by a custodial parent."

Id. at 553-554. This dictum suggests that if contested, custodial parents should be endowed with the authority to determine religious training.

But, what is to stop a non-custodial parent from seeking to undermine the religious decision making authority of a custodial parent by exposing the children to alternative beliefs systems or indoctrinating the children against the custodial parent's chosen religion? In *Greene v. Greene*, 306 Ga. App. 296 (2010), the Court of Appeals of Georgia provides some guidance. In *Greene*, the Mother, who espoused the Jewish faith, was named final decision maker as to the minor child's religion upon the parties' divorce. *Id*. at 297. On the Mother's petition for contempt, Judge Robert Walker of the Gwinnett County Superior Court found that during his parenting time, Father exposed the children to the Christian faith in such a way that indoctrinated the child against the Jewish faith, caused the child emotional trauma, and in so doing violated the trial court's order as to legal custody. *Id*. at 297-298. As such, Judge Walker found Father in contempt and ordered Father to take certain actions, or refrain from certain conduct in order to abide by the trial court's decision. Specifically, Judge Walker ordered the following:

(a) Mr. Greene may not indoctrinate the child in a manner which promotes the child's alienation from Judaism. (b) Mr. Greene shall not take the child to church (whether to church services or Sunday School or church education programs); nor engage the child in prayer or Bible study if it promotes rejection rather than acceptance,

of the child's . . . Jewish [299] self-identity. (c) Mr. Greene shall not share his religious beliefs with the child if those beliefs cause the child emotional distress or worry about the child's mother or the child herself. Thus, for example, Mr. Greene may have pictures of Jesus Christ hanging on the walls of his residence. But, Mr. Greene may not take the child to religious services where they receive the message that adults or children who do not accept Jesus Christ as their Lord and Savior are destined to burn in hell. Further, he may not pray Christian prayers with the child, play Christian songs with the child present, read the Bible to the child or in any way attempt to indoctrinate the child into the Christian Faith. (d) Neither party is to talk negatively or derogatory about the other party's religion in the presence of the child, and there shall be no derogatory comments that could be construed as anti-Semitic of any nature, meaning Mr. Greene shall no longer refer to Ms. Greene's parents, who are Jewish, by any numbers or anything similar to that. Mr. Greene shall ensure that these rules are followed by persons whom he allows the child to be in the presence of or have contact with. No secondary person shall teach or read the Bible to the child, or pray any Christian prayers, or otherwise attempt to indoctrinate the child into the Christian faith.

Id. at 298-299. Father appealed, and Judge Walker's order was upheld on appeal. In affirming the trial court's citation of contempt against Father, and the mandates placed on Father by the trial court, the Georgia Court of Appeals affirmed a trial court's ability to enforce an award of final decision making authority as to the issue of religion. *Id*. at 299.

Not only may a court proscribe certain conduct to enforce its order regarding an award of religious decision making authority, but a court may also take more drastic steps, such as modifying physical custody, due to a party's failure to respect the court's order on legal custody. A recent Georgia Court of Appeals decision specifically supports this assertion. In *Lowry v. Winenger*, A16A2133 (decided February 23, 2017), the judgment of the Forsyth County Superior Court modifying custody in favor of Father, based in part on Mother's refusal to respect Father's religious decision making authority, was affirmed by the Georgia Court of Appeals. In *Lowry*, Mother and Father were awarded joint physical custody upon their divorce in 2013. *Id*. at 1. Although Mother was named primary physical custodian, the parties shared approximately equal parenting time. *Id*. at 1-2. With regard to legal custody, Father was awarded final decision making authority as to the child's religious upbringing. *Id*. at 2. Shortly after the divorce, Mother remarried, converted to the Mormon faith, changed residence on several occasions, and ultimately settled in Hall County, approximately an hour away from Father's residence. *Id*.

As a result, Father filed a petition to modify custody such that he would be deemed primary physical custodian. *Id*. A guardian at litem was appointed, and the matter was ultimately heard by Judge Dickinson. *Id*. Based on the evidence presented and the report of the guardian ad litem, Judge Dickinson found that the child had been negatively impacted due to Mother's behavior. *Id*. at 4. Most notably, the evidence revealed that Mother took the child to a Mormon church and encouraged the child to participate in church related activities, without the consent of Father. *Id*. at 2. Further, in her report, the guardian ad litem recommended an award of primary physical custody to Father due to Mother's refusal to respect Father's authority regarding religious decision making. *Id*. at 4. Among other things, the trial court found that "by taking the child to activities at her church, the mother had not respected the father's final decision-making authority with regard to the child's religious upbringing, in contravention of the divorce decree, and that this decision created confusion for the child." *Id*. at 5. Consequently, the trial court found Mother in contempt, and also found a sufficient and material change in circumstance had occurred necessitating modification of custody in favor of Father. *Id*. Mother appealed. The Court of Appeals affirmed the trial court's ruling and found that:

> *"the record reflects sufficient evidence of both material changes in the child's circumstances and adverse affects due to such changes. The record reflects numerous changes in the child's living, extracurricular, and school arrangements since the parties' divorce. As to the impact of those changes on the child, the father's statements regarding the child's apathy toward schoolwork are evidence of an adverse effect on the child. Likewise, the father presented evidence as to difference between the father's church and the Mormon church attended by the mother and the confusion that the child suffered as a result of his exposure to both systems of belief."*

Id. at 7-8. (Internal citations omitted). Therefore, the Court held that "it was sufficient for the trial court to determine that a material change in circumstance adversely affecting the child had occurred." *Id*. at 8.

It is important to note that in *Lowry*, unlike in *Greene* and *Applebaum*, the non-custodial parent was authorized to make final decisions as to the child's religious upbringing. Nonetheless, the trial court still took steps to enforce its order regarding legal custody, because the court found such steps necessary to benefit the best interest of the child. Therefore, read together, *Lowry*, *Greene* and *Applebaum* enforce the notion that above all else, Georgia courts will look to what best promotes the health, welfare and emotional wellbeing of children, not the desires of parents, when issuing orders; and if appropriate, courts can and will take the necessary steps to enforce their orders. ***FLR***

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Best Strategies to Prevent Potential Child Abduction Under the UAE Laws

by Hassan Elhais

Introduction:

If the father is resident in the UAE and the mother is based in another jurisdiction, the mother often fears that if the child travels to the UAE with the father, then the child will not be returned to the mother's jurisdiction as the UAE is not a signatory to the Hague Convention.

The purpose of this article is to outline what the potential remedies are for the mother to deal with this situation should it arise.

So, if we assume that it has already happened, the wife could take the following course of action in the UAE:

First option – Filing custody case before the UAE Courts

The wife has the right to file a case against the father to get the child returned to her through the family courts. The case has to go through the reconciliation committee to seek an amicable separation prior to proceeding to a court hearing. If the parties reach an amicable agreement to separate, an agreement is executed by both parties, which may determine any other relevant matter in relation to the divorce. Once the agreement is executed, the judge will sign and stamp the agreement. In the event that the parties don't agree to an amicable divorce, the parties may be given a no-objection letter to refer the matter to the family courts in the UAE. This is a procedural step that the parties have to go through prior to court hearings.

In accordance with Article 16 of the Personal Status Law*:*

1. The lawsuit is not accepted by the court in matters of personal status except after showing it to the commission of family guidance except the matters of wills and inheritance and temporal and immediate lawsuits, and temporal and immediate orders of alimony, custody, guardianship, and hopeless cases such as that of marriage and divorce.
2. If a settlement had been reached between the parties before the family guidance, this would have been proved in the peace process-verbal signed by the parties, and the competent member of committee and this record would have been signed by the competent judge, who would have the authority of execution, and it is not allowed to appeal against it by any way of appealing except it violated the provisions of law.
3. The Minister of Justice, Islamic Affairs, and endowments issues the executive list which organizes the role of family guidance commission"

Filing of a case in the UAE Courts

According to Article 42 of the Civil Procedures Law and its amendment issued in 2015, a case is filed in the UAE when it is registered by filing a statement of claim.

Article 42 of the Civil Procedures Law reads as follows:

The action is filed before the court according to the claimant request with a declaration deposited at the court clerks' department. The declaration shall include the following data:

1. Name, surname, profession or job, domicile, and the workplace of the claimant and the name, surname, profession or job, domicile, and the workplace of his representative.
2. Name, surname, profession or job, domicile, and the workplace of the defendant and the name, surname, profession or job, domicile, and the workplace of his representative if he works for the others. If the defendant or his representative has no domicile or known workplace, his last domicile, residence or workplace shall be considered.
3. Determining a selected domicile for the claimant in the state if he has no domicile therein.
4. Action merit, requests, and its supports.
5. The date of submitting the declaration to the court.

First potential problem:

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Even if the mother could obtain custody from the local courts or could get the child returned, she might not be able to locate the child because the father put a travel ban in place. The legal reference for such applications is as follows:

a. As per the Personal Status Law of UAE, the guardian of a child (usually the father) has the right to place a travel ban on the child's passport to ensure that the child is not taken out of the country while the issue of custody is still being finalised;

b. Such rights are defined in Articles 151 and 149 of the Personal Status Law which states that the custodian or guardian may place a travel ban on the child, in which case neither party will be allowed to travel outside the UAE with the child without the other party's consent;

c. It needs to be noted that in the case that the custodian of the children (the mother usually) wants to travel, she can do so only after getting a temporary travel permission from the court. Such temporary permits are usually provided for a period 1-2 months only and the court might require that she produce a guarantor with his passport prior to issuing such a permit.

The solution:

Such rights could be waived if the father gives his prior written consent to not apply for a travel ban and not to keep the children's passports. It is common practice that any agreement signed between the couple includes such a waiver.

Second potential problem

The father might claim custody locally in a counter-claim to this claim, on the ground that the mother is based in a different country. Specifically, in accordance with Article No. 151 of the Personal Status Law, the child has to be with the father in the same country.

The solution:

Prior written consent has to be obtained from the father before the child comes to the UAE.

Second Option - Legal Action

If the mother has a custody court order from the local courts or from an international court, she can file a criminal case for child abduction before the UAE Judicial Authority.

In the event that the father does not return the child to the country where they belong and there is a foreign judgment rendered in favor of the mother – the mother has the right to file a child abduction case against the father in the UAE. As per Article 328 of the Criminal Penal Code Law No. 3 of 1987:

> *"…whoever is the guardian of a child and abstains from delivering the child to a person of who he is a legal claimant in pursuance of a judgment or order from a judicial authority, shall be punished by detention or by a fine".*

It should be noted that the wording of the above clause is not specific to a local judgment or court order; therefore hypothetically a foreign court order or judgment could be used to invoke a criminal complaint about child abduction in the UAE.

One major disadvantage of this route is the fact that the judge may order detention, a jail sentence or a fine against the father, which may not be in the best interest of both parties. In the situation, the deportation of the accused is not mandatory.

Third Option - Legal Action

Child abduction case in another jurisdiction

In the event that the father does not comply with the foreign court order, the mother has following options:

Our local laws require initiating a criminal action for child abduction. Such application may be followed by an INTERPOL/extradition application against the father.

Interpol Red Notice application to the UAE:

UAE laws require having an Interpol Red Notice which shall be filed on the basis of a criminal complaint or judgment from another jurisdiction. This Interpol Red Notice is the required letter for the extradition case to be initiated in the UAE.

Potential problem the wife might face

There are some cases where the extradition requests sent to the UAE courts from a foreign court cannot be accepted, such as if the UAE courts have jurisdiction to decide on the same case, even if a criminal procedure has not been initiated as per Article No.8 (2) of Extradition Law.

Also, the UAE courts could issue a criminal judgment for child abduction (as per Article 328 of the Criminal Penal Code Law No. 3 of 1987). In this case, the extradition request could be at risk.

Other technical problems which could put the request for extradition in jeopardy

The father could give his son a residence visa in the UAE, as it is his right as a guardian to do so which automatically gives the local courts jurisdiction in accordance with Article No. 6.4 of Personal Status Law No. 28 of 2005. If he did this and receives judgment in absentia, that could be used as one of his legal arguments to suspend the extradition procedures.

Other potential risks

The local courts could have jurisdiction if the father filed a claim in the court in absentia against the wife claiming that her location is unknown. In this case, the court could accept jurisdiction in accordance with Article 6.5 of Personal Status Law No. 28 of 2005.

In such situations, the wife will have to file an appeal within 30 days of the date she obtained knowledge of the judgment. Such appeals shall fall under the Appeal judge's discretionary power.

Fourth Option - Legal Action
Enforcement of a foreign custody court order in the UAE courts (Mirror Order):

Article 235 of the UAE Civil Procedure prescribes conditions for the enforcement of foreign judgments in the UAE through the Dubai Courts, (the following is an unofficial English translation):

1. Judgments and orders issued in a foreign country may be ordered to be enforced in the UAE on the same conditions as prescribed in the laws of that country for the enforcement of similar judgments and orders issued in the UAE.
2. An enforcement order shall be applied for under the normal litigation procedure in the court of the first instance within whose jurisdiction the enforcement is required. Enforcement may not be ordered until the following has been verified:
    a. That the UAE courts do not have jurisdiction in the dispute in which the judgment has been given or the order made, and that the foreign courts which issued it have jurisdiction therein under the international rules for legal jurisdiction prescribed in their laws.
    b. That the judgment or order has been issued by a court having jurisdiction under the law of the country in which it was issued.
    c. That the opposing parties in the case in which the judgment was given were summoned to appear and duly appeared.
    d. That the judgment or order has become final under the law of the court which issued it.
    e. That it does not conflict with a judgment or order previously issued by a court in the UAE and contains nothing in breach of public morals or order in the UAE.

If the local courts accept jurisdiction to issue a judgment on the basis of children's residence visa or if the husband claims (untruthfully) that the wife's location is unknown, then the application for enforcement of foreign order could be seriously at risk.

Best legal solution to deal with the matter in advance

In such cases, the client is always advised to enter into a settlement agreement before the local courts in the UAE, where the husband has to attend personally and the wife could be represented by a lawyer. This will enable the parties to agree on the period of the child visitations, to agree that the father will never claim the child's passport, that he will never put a travel ban in place and to agree to a date of returning the child.

The advantages of taking such measures are as follows:

1. Executing a settlement agreement offers no risk to the parties. The applicability or enforceability of the agreement is similar to a final local court order. Furthermore, it is unlikely that the settlement agreement will be in conflict with the public order. Hence the process would be quick and efficient.
2. Time frame to execute a settlement agreement will be much faster then applying to enforce a foreign order in the UAE.
3. This process allows both parties to secure the terms and conditions that they want in advance, prior to bringing the child to the UAE.

Conclusion

In case of lack of an aforementioned signed and executed settlement agreement, the other two methods – namely enforcement of a foreign court order and an extradition application – may fall under the remit of the local courts' absolute discretionary power which may not only be time-consuming, but it may result in arguments before the local courts, making the whole process unnecessarily long-winded. Also, assuming the local courts do not obtain jurisdiction under the two scenarios mentioned above (father provides a residence visa to the child and files a case based on the child's UAE visa, or the father files a case in the UAE courts by not truthfully disclosing mother's location) the execution of a settlement agreement may be the recommended option. ***FLR***

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2017 Legislative Update

by Pilar Prinz

The 2017 Georgia General Assembly Legislative Session, which began January 9, 2017 and concluded on March 30, 2017, was an eventful session that sought to address a multitude of pressing issues currently facing the State of Georgia. As is often the case, many of the bills proposed this year intended to impact the legal community; some being minor tweaks, and others more substantial changes. Several bills this session also focused on topics germane to the practice of family law in Georgia. This year, the Legislative Committee of the Family Law Section monitored the bills that could potentially impact the practice of family law in Georgia, with some members even taking the time to travel to the gold dome to testify on those bills in their individual capacity as family law practitioners.

The following bills, monitored by the Legislative Committee for their potential impact on family law in Georgia, passed both chambers of the state legislature before the end of the fortieth legislative day:

1. HB 279 – Creates a separate process for a name change request made by an individual alleging to be a victim of family violence whereby the petitioner could file the name change petition under seal, and the judge would have the necessary autonomy to waive certain notice and publication requirements related to the petition.
2. HB 359 – Titled the "Supporting and Strengthening Families Act"; it repeals the "Power of Attorney for the Care of a Minor Child Act" and provides for the creation, authorization, procedure, revocation, rescission, and termination of a power of attorney from a parent to an agent for the temporary delegation of certain powers and authority for the care and custody of the parent's child. This bill would allow a parent to transfer caregiving authority of their child to another individual (being certain relatives and approved agents) for up to a year without the necessity of court oversight via a power of attorney.
3. SB 132 – Removes the statutory civil case filing and disposition forms—including the statutory Domestic Relations Case Filing Information Form—so as to allow the Judicial Council of Georgia to promulgate such forms.
4. SB 137 – Enacts multiple provisions recommended by the Georgia Child Support Commission relating to child support and the enforcement of child support orders. This includes, among other things, changing and clarifying provisions related to payment and collection of child support, changing provisions related to parenting time, changing provisions related to income deduction orders and work related child care costs, and providing for the use of multiple worksheets in an order of child support in certain circumstances.

For the third consecutive legislative session, the State Bar of Georgia-sponsored bill revising the requirements for antenuptial agreements—this year being designated as HB 190—was unable to pass. Among other things, the bill sought to require that antenuptial agreements be attested by at least two witnesses. The House Judiciary Committee favorably reported a substitute version of the bill, but it was ultimately withdrawn and recommitted to the Committee. The Family Law Section as well as Rep. Megan Hanson, the bill's sponsor and a family law practitioner herself, remain committed to seeking the passage of HB 190 during next year's legislative session.

Another bill to keep an eye out for in 2018 is HB 159. Sponsored by Rep. Bert Reeves and a product of over a year of commission study, the bill sought to amend the O.C.G.A. so as to substantially revise the general provisions applicable to adoptions including, among other things, to change the requirements for adopting children, to provide for adoption of foreign-born children, and to provide for the annulment of adoption under certain circumstances. After passing the House, the Senate Judiciary Committee favorably reported the bill by substitute, only for it to be later recommitted. On the final legislative day, and in a final attempt to secure its passage, the text from HB 159 was added to SB 130, another State Bar-sponsored bill supported by the Child Protection and Advocacy Section. The bill passed the House, but failed to gain passage in the Senate.

As this is the first year of the 2017 – 2018 Georgia Legislative Session, all of the bills that did not pass this year will have another opportunity to do so in 2018 before they are officially dead and must be re-introduced the following session.

The Family Law Section Legislative Committee welcomes feedback and participation from any individuals interested in becoming more involved in the legislative process. It remains very important for lawmakers to hear from members of the Family Law Section, as practitioners provide valuable insight into the practical application and affect that certain legislation may have with respect to family law. ***FLR***

Pilar J. Prinz is a founding member of Lawler Green Prinz. She specializes in family law matters including divorce, family violence proceedings, custody, child support, post-divorce matters, prenuptial agreements, legitimation and paternity. She graduated from Florida State University, cum laude, in 1995 with a degree in Business Management, and earned her J.D. and MBA from Emory University in 2000.

Caselaw Update

by Vic Valmus

BIRTH CERTIFICATE

Denney vs. Denney, S16F1670 (Feb. 27, 2017)

The parties were married on Aug. 21, 2010, but separated 6 days later. The mother filed a complaint for divorce on Dec. 28, 2010, and a minor child was born on Feb. 22, 2011. The mother did not list the father on the birth certificate and listed the child's surname as Godfrey, the mother's maiden name. The parties reached a settlement agreement except for the issue of the name change of the minor child. The trial court entered a final judgement and decree of divorce and later issued a separate order finding that pursuant to OCGA § 31-10-9, the child's birth certificate was issued in error, in that the father is the legal and biological father of the child and that the name of the child was not in error, but the court was without legal authority to change the name of the minor child because the parties have not consented to the name change. The father appeals and the Supreme Court reverses.

Pursuant to OCGA § 31-10-9, the surname of a child shall be entered on the certificate of birth in accordance with the finding and order of the court. Under the plain language of this subsection, the court had authority to make a finding with regards to the child's surname upon determining the paternity of the child. The trial court should consider the best interest of the child when making a finding with regards to the minor child's surname pursuant OCGA § 31-10-9. Therefore, the trial court erred in concluding it had no authority to make a finding with regard to the child's surname.

CONTEMPT

Albritton v. Kopp, S16A1665 (Feb. 6, 2017)

The parties were divorced and had one minor child, and pursuant to the Settlement Agreement, the Husband agreed to pay child support while their daughter was a full-time high school student and that child support would continue to the age of 18 unless she is enrolled and registered as a full-time high school student for the regular high school year. When the daughter turned 18, she was enrolled as a senior in high school. Due to learning disabilities and medical issues, the daughter was a few credits shy of being able to graduate. Accordingly, she was enrolled as a fifth-year senior and was registered in advanced mathematics and economics for the Fall semester. Around the same time, the Husband ceased paying a child support claiming the daughter was not enrolled in enough classes to qualify as a full-time student as required the divorce decree and related documents. The Wife filed a motion for contempt. The Trial Court found the child was not enrolled in a secondary school on a full-time basis and the Husband was not in willful contempt of the Court Order. The Wife appeals and the Supreme Court reverses.

The Husband's child support obligation for the adult daughter arose solely from the agreement between the parties. Here, the Settlement Agreement does not define a full-time student. This Court has construed the phrase to mean continuous attendance during the normal school year. The Husband argues that there is evidence in the record to establish that the parties intended to adopt the school's definition of a full-time student being a student who is scheduled into seven instructional segments per day, but this definition was not incorporated into the parties' agreement nor was there any evidence that both contracting parties intended the school's definition to be a full-time student to control. The Trial Court in effect, modified the Settlement Agreement concerning the Husband's child support obligation. The parties' daughter was in fact attending school full-time as contemplated by the Settlement Agreement.

HABEAS CORPUS

Markle vs. Dass, S16A1750 (March 6, 2017)

In 2010, Dass (mother) had a child with Markel (father). The plaintiffs were never married and the father did not attempt to legitimate the child. After the child's birth, the father relocated to New Mexico and the child continued to live in Georgia with the mother. The child went back and forth from New Mexico to Georgia over the next several years. On Jan. 26, 2016, the father filed in New Mexico a verified petition seeking to establish paternity, primary custody and child support for the minor child. The New Mexico court entered a temporary order providing the child would not be removed from New Mexico without the consent of both parties. Then on Feb. 16, 2016, the mother filed a petition in the Superior Court of Cobb County for Writ of Habeas Corpus. It is undisputed that from late July of 2015, until the filing on Feb. 16, 2016, the child lived continuously in New Mexico with the father. After the hearing, the Georgia Court entered an order finding Georgia was the home state of the child and ordered the child be returned to the mother. The father appeals and the Supreme Court reverses.

Under the UCCJEA, Superior Court's subject matter jurisdiction to make an initial child custody determination is heavily dependent upon the question of whether this state is the home state of the child. It is undisputed that when the mother filed her Writ of Habeas Corpus petition on the Feb. 16, 2016, and the child lived with the father in New Mexico six months prior to that. The trial court determined that the child's presence in New Mexico was temporary and did not affect the child's residential status in Georgia and declared Georgia to be the child's home state. It appears the trial court based its findings that, prior to August 2015, the child and mother's residence was in Georgia and therefore the child's presence in

New Mexico was a temporary absence from the state. However, that is not an analysis that the statutory definition of home state permits. Home state is in terms of the current child's presence and is not synonymous with residence or domicile of a parent having legal custody. If the general assembly had intended that jurisdiction be based upon legal residence or domicile, it would have undoubtedly used these technical terms. Home state is in terms of current presence and declares a time frame for the presence to have the necessary legal effect, i.e., six months. Therefore, New Mexico and not Georgia meets the definition of home state.

JUDGMENTAL IMMUNITY

Engelman v. Kessler, et al, S161A1871, 72 (Feb. 16, 2017)

Prior to the marriage, Engelman, signed a Prenuptial Agreement. Afterwards, she suspected that her husband was seeking a divorce and retained Kessler's firm (KSS) and signed a one-page legal employment agreement. Engelman gave KSS a check for $20,000 to begin representation. The hourly rates for each attorney in the firm was listed in the legal service employment agreement along with a caveat that the rates were subject to increases. The day after Engelman retained KSS, an interoffice email was sent stating that the attorney's hourly rates would be increasing. KSS requested that clients be informed of the rate change, but Engelman denied receiving this memo. KSS advised they could hire a business evaluation expert and get an opinion whether the former husband's new business could be considered marital property and thus exempt from the Prenuptial Agreement. Shortly after, a settlement offer was sent to KSS and was forwarded to Engelman. KSS analyzed the potential enforcement of the Prenuptial Agreement. Afterwards, Engelman sent KSS an email detailing a counteroffer that she wanted them to make immediately to her former husband's attorney. KSS replied to Engelman stating that we should look at this and talk and a counter-offer could remove the offer from the table and maybe we should mediate the case. Later, Engelman sent another email to KSS and attached a another proposed counter-offer. KSS suggested Engelman meet with her former husband and the attorney in person to negotiate a better deal. Engelman responded that she wanted the attorneys to please send the counter-offer. The husband's offer was better than the terms of the Prenup and a counter-offer was prepared for which Engelman said it was perfect and please send it out ASAP. Engelman stressed that she needed to finalize the Settlement Agreement because she needed to close on a house.

The statements that Engelman received from KSS reflected the attorney's rates were raised during her case. Engelman requested refund and KSS issued a refund. Afterwards, she filed suit arguing that the attorneys at KSS committed legal malpractice by failing to explain the terms of the Prenuptial Agreement and by not reviewing any of her former husband's financial documents prior to advising her to consider the proposed settlement offer. The Trial Court granted summary judgment to KSS on the claim

for legal malpractice. The Trial Court denied both parties' motion for summary judgment on Engelman's claim for breach of fiduciary duty/fraud. The Court of Appeals affirms the grant of summary judgment to KSS on Engelman's claim for legal malpractice and vacate the Trial Court's denial of summary judgment on the breach of fiduciary duty/fraud claim and remans.

Engelman contends the Trial Court erred by granting summary judgment to KSS on the legal malpractice claim. In order to prevail on a claim for legal malpractice, the client has the burden to establish three elements; (1) employment of the Defendant's attorney; (2) failure of the attorney to exercise ordinary care, skill, and diligence, and (3) that such negligence was approximate cost of the damage to the Plaintiff. Under the Georgia doctrine of judgmental immunity, there can be no liability for acts or omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment. Otherwise, every losing litigant would be able to sue his attorneys if he could find another attorney who is willing to second guess the decision of the first attorney with the advantage of hindsight. The record clearly indicates that the attorneys at KSS analyzed the terms of Engelman's Prenuptial Agreement and advised her as to the strengths and weaknesses regarding the enforceability of the agreement. Three weeks after receiving the first settlement offer, Engelman had a counter-offer ready that she wished the attorneys to present to Engelman's former husband's attorney, despite the concerns from KSS about the counter-offer. The record clearly indicates that the KSS assessed the strengths and weaknesses of the Plaintiff's claims and exercise their best efforts. In addition, Engelman failed to establish KSS actions were the proximate cause of her alleged damages.

Engelman also contends the Trial Court erred in denying her motion for summary judgment for her claim for breach of fiduciary duty/fraud. The Trial Court held that a genuine issue of material facts existed as to the breach and damage elements of Engelman's claim for breach of fiduciary duty. The Trial Court found that both parties' experts disagreed as to whether KSS' legal services employment agreement violated the Georgia Rules of Professional Conduct and formal advisory opinions. The question of whether a lawyer's retainer agreement violates public policy is a question of law, and it was improper for the Trial Court to rely upon the parties' experts' opinions. Therefore, the case is remanded to the Trial Court to consider whether a genuine issue of material fact exists with respect to Engelman's breach of fiduciary duty and fraud claims without reference to expert opinions.

LONG ARM STATUTE

Sullivan v. Bunnell, et al., A16A1619 (February 21, 2017)

The parties were divorced after 23 years of marriage and during the divorce proceedings, the Husband moved to California where his adult daughter Bunnell resided. Thereafter, the Husband hired counsel in Georgia to represent him and Bunnell assisted him with emails and telephone conversations to his counsel. The parties finally reached a final settlement agreement in which the Husband would send his Teacher's Retirement System of Georgia payments to Sullivan (Wife). After the divorce, the Husband executed a power of attorney which he appointed his daughter Bunnell to act as his agent because he was under the care and supervision for dementia and was deemed unable to make sound financial and medical decisions on his own. Three years later in a letter from counsel by and through Bunnell acting on behalf of the Father's power of attorney, the Wife was informed that the Husband could no longer send his TRS payments because he was incapacitated by Alzheimer's and needed those payments to maintain his assisted living facility. The Wife responded in a letter demanding compliance with the terms of the agreement. The Wife filed a Motion for Contempt and then amended her motion to add Bunnell individually in her capacity as a fiduciary for the Husband and was personally served by substitute service in California. Counsel for Bunnell filed a limited answer and special appearance to contest personal and subject matter jurisdiction. The Court granted the motion to dismiss after finding it lacked both personal and subject matter jurisdiction over Bunnell. The Wife appeals and the Court of Appeals reverses.

The Wife argues that the Trial Court erred that it lacked personal jurisdiction over Bunnell. The person who files a motion to dismiss for lack of personal jurisdiction has the burden of proving the same. In determining personal jurisdiction, this Court looks to the Georgia Long Arm Statute which allows jurisdiction over non-resident Defendant if the person or through an agent he or she transacts any business with this state. This Court has also explained that nothing in the Long Arm Statute requires physical presence of a non-resident in Georgia or minimizes the import of a non-resident's intangible contacts with the state. Georgia can assert Long Arm jurisdiction over non-resident Defendants based on business contacts through postal, telephonic and internet contacts. The analysis is determined whether the Defendant has established minimum contacts with the State, and that the contact does not result solely from random, fortuitous or attenuated contacts. Here, Bunnell was intimately aware of the details and contents of the Settlement Agreement, hired Georgia counsel and actively engaged in negotiations of the settlement terms prior to the entry of the Final Decree and had several exchanges with Georgia counsel, after the final divorce decree about the Wife's claims of the Husband's non-compliance. These post-divorce allegations significantly allege that Bunnell has done some act or consummated some transaction in this state. The Supreme Court has concluded that the status of an individual Defendant as employees or officers does not insulate them from jurisdiction. It has been alleged that Bunnell has been a primary participant of the non-payment of the TRS payments in violation of the divorce decree and the Wife's contempt unquestionably arises from these activities. Therefore, the assertion of personal jurisdiction over an individual who has acted as a power of attorney does not offend the traditional notions

of fair play and substantial justice when as an attorney in fact took advantage of the laws of the state of Georgia to exercise control over her father's assets and purposely directed her activities toward a Georgia resident.

Bunnell also argued that she could not be held in contempt of a divorce decree for which she was not a party in Georgia. However, the violation of a Court order by one who is not a party to the proceeding can be punished by contempt if it is alleged or proved that the contemptor had actual notice of the order for disobedience of which she is sought to be punished. Therefore, one who acts as a representative of another with actual notice of an order that has allegedly been violated may be held in contempt. Therefore, Bunnell acting as the Husband's power of attorney with knowledge of the relevant order, aided in implementing the non-payment of the TRS funds to the Wife in violation of the former couple's divorce decree. Therefore, the Wife has asserted sufficient facts to withstand a motion to dismiss for failure to state a claim upon which relief can be granted.

MOTION TO ENFORCE

Rasheed vs. Sarwat, S17F0168 (February 27, 2017)

Sarwat (the wife) filed a complaint for divorce against Rasheed (husband). The parties attended mediation and resolved some issues but not all. The parties continued negotiating through their attorneys. Later, the parties believed they reached a full agreement and corresponded with the trial court to announce a settlement. Wife's council was to draw up the settlement agreement for the parties. However, disagreement arose and the parties argued and no settlement agreement was ever signed. The wife filed a motion to enforce the agreement and the trial court agreed and entered a two-page order setting forth the terms of the settlement agreement which were incorporated in the final decree of divorce. The husband appeals and the Supreme Court reverses.

The husband argues that the terms of the settlement agreement found by the trial court are incomplete and do not address all required aspects of the divorce. The word custody never appears in the order. In addition, the order setting forth the settlement agreement does not contain a permanent parenting plan and is also incomplete in regards to property holdings. At best, it requires a great deal of inferences from unspecified sources to determine who actually owns what, what must be sold, and how the proceeds should be split between the parties. A trial court errs when it seeks to enforce what amounts to a settlement agreement containing incomplete terms of divorce. The order did not identify nor incorporate any other documents containing additional terms and therefore was not complete and failed to set forth all the material terms.

SUPERSEDEAS

Rollins v. Rollins, S16A1449 (Feb. 6, 2017)

The parties were divorced in 2013 and agreed to submit to binding arbitration with respect to furniture and furnishings in the marital residence. The arbitrator rendered an award and the Husband promptly moved for a judicial confirmation. The Trial Court ordered the Wife to account for the furniture and furnishings that the arbitrator had awarded to the Husband that were missing. After the Wife did not produce the items, the Husband filed for contempt and the Trial Court found the Wife in willful contempt and entered a show cause order why she should not be incarcerated. The Wife sought appellate review of the initial contempt order by filing both an initial application for discretionary review and by filing a notice of direct appeal. In May of 2015, this Court denied the application for discretionary review. However, transmission of the record and direct appeal took some time and the direct appeal was not docketed in this Court until November of 2015. On Dec. 3, 2015, this Court dismiss the direct appeal explaining the appeal of a contempt order had to come by application and we have already denied the application for discretionary review. Meanwhile, the Trial Court held a final hearing on the motion for contempt and entered a final order on contempt on Nov. 24, 2015. The Trial Court found the Wife in contempt for 34 separate instances and awarded attorney's fees to the Husband. The Wife appeals and Supreme Court reverses.

The Wife argues the Trial Court was without authority to enter a final contempt order while her direct appeal from the initial contempt order was still pending. By filing notice of appeal from initial contempt order, the Wife triggered the automatic supersedeas of that order. In his final contempt order, the Trial Court rejected the notion that the pending, but jurisdictionally flawed, direct appeal from the initial contempt order worked as a supersedeas because an appeal from orders entered in this domestic relations case were required to come by application. However, until the Appellate Court has acted, the Trial Court cannot just ignore the supersedeas. The Appellate Court is the sole authority in determining whether a filed notice of appeal or discretionary application is sufficient to invoke the jurisdiction. Until the Appellate Court has issued a remittitur and the remittitur has been received and filed by the Clerk of the Trial Court, only then does the Trial Court regain jurisdiction to take further action with respect to the judgment appeal. Even though the Wife's course was ill chosen and improper, the notice of appeal acted as a supersedeas and deprived the Trial Court of the power to affect the judgment appeal. As a result, the final contempt order was null and void.

WAVIER

Eversole v. Eversole, S16A1517 (Feb. 27, 2017)

In January 2015, the wife filed a divorce action against the husband seeking alimony, child custody and child support. The wife alleged the husband had left the martial home in Georgia less than six months prior to the filing of the complaint and was currently living in South Carolina. The wife claimed the husband was subject to jurisdiction of this court pursuant to the Georgia Long Arm Statute, but the wife was unable to perfect service upon the husband. The court granted her motion for service by publication and the husband failed to file a timely answer. A hearing was held on

July 13, 2015, which the husband did not appear. After the hearing, but before the trial court entered an order granting the divorce, the husband filed a late answer which admitted jurisdiction, admitted the marriage irretrievably broken, sought custody of the party's minor child along with the award of child support, but raised no objection to sufficiency of service. Notwithstanding the filing, the trial court entered a final judgement and decree of divorce on Aug. 24, 2015, at *Nunc pro tunc* July 13, 2015. The husband filed a motion to set aside the judgement based on two grounds; 1) he never received personal service or service by mail, and 2) the trial court lacked personal jurisdiction because he was a resident of South Carolina. Trial court granted the husband's motion and set aside the award of alimony, child support and attorney's fees because it found that it lacked personal jurisdiction over the husband. However, the trial court did not set aside the grant of divorce and division of personal property located in Georgia. Wife appeals and the Supreme Court reverses.

The wife asserts a trial court erred when it concluded it lacked jurisdiction over the husband pursuant to the Long Arm Statute. Trial court erroneously concluded that service by publication would not confer personal jurisdiction over the husband. Here, the trial court ignored the expressed provisions of subsection 5 of the Long Arm Statute which states that if the husband maintained a matrimonial domical in the state at the time of the commencement of the action or resided in Georgia proceeding the commencement of action whether cohabitating during the time or not, would confer long arm jurisdiction. It is undisputed the husband met these requirements.

The husband argues he was never personally served or received a mailed copy of the publication notice, but here, the husband waived his objection to insufficiency of service. The husband made an appearance in this case when he filed an untimely answer in which he not only failed to rise an objection to personal jurisdiction or service, but he actually admitted personal jurisdiction and sought relief in his favor. Even though the order was *Nunc pro tunc* to a date prior to the filing of his answer, such an order does not permit the court to ignore admissions or waivers, at least jurisdictional ones made in a pleading filed by a party to an action prior to the actual date the final order was executed. Insuffiency of process is a defense that must be asserted in the parties first responsive pleading or motion made at the time the responsive pleading is filed, even if untimely. An answer that admits jurisdiction and waives sufficiency of service of process serves to waive these defenses. Therefore, the husband was bound by his admissions of jurisdiction and waiver of defense of insuffiency of service. ***FLR***

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