

$$K_n^{(r)}(\mathbf{x}, \mathbf{y}) = K_n(\mathbf{x}, \mathbf{y}) + \sum_{k=0}^r [V_k^+ Q_{n+k}(\mathbf{x})]^T V_k^+ Q_{n+k}(\mathbf{y}),$$

The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia – Summer 2014

$(\pi/2)(S_1 + S_2)$
 $\rho^p > \sum_{j=0, j \neq p}^n A_j \rho^j,$
 $\Delta_L \arg f(z) = (\pi/2)(S_1 + S_2)$

$(\lambda - \lambda_0) \left(\frac{\partial \Phi}{\partial \lambda} \right)_0 + (\mu - \mu_0) \left(\frac{\partial \Phi}{\partial \mu} \right)_0 = 0$
 $K_n^{(r)}(\mathbf{x}, \mathbf{y}) = \sum_{k=0}^r \frac{S_{n+k,i}(\mathbf{x}, \mathbf{y}) - S_{n+k,i}(\mathbf{y}, \mathbf{x})}{x_i - y_i}$

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Editors' Corner

by Marvin Solomiany and Randall M. Kessler
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We hope everyone had a wonderful summer after a fantastic Family Law Institute chaired by Rebecca Crumrine Rieder. We unfortunately once again remember those in our profession whom we have lost and that certainly serves as a reminder of how precious life is.



We continue to enjoy bringing you the Family Law Review and hope that you will continue to give us your feedback and contributions and keep this newsletter fulfilling its role in educating our members on timely family law issues, decisions and trends. The executive committee has been working tirelessly and as you can see from the note from our chair the section is in good shape and moving forward.

Enjoy this *Family Law Review* and have a good rest of 2014.

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 Marvin L. Solomiany, msolomiany@ksfamilylaw.com.

The opinions expressed within *The Family Law Review* are those of the authors and do not necessarily reflect the opinions of the State Bar of Georgia, the Family Law Section, the Section's executive committee or the editor of *The Family Law Review*.

Inside This Issue

CHAIR'S COMMENTS	3
TIPS AND HIGHLIGHTS FROM THE 2014 GEORGIA FAMILY LAW INSTITUTE	4
MEDIATION IN 3D.....	7
GUARD AND RESERVE PENSIONS ON THE DAY OF DIVORCE: PART TWO.....	8
PAST FAMILY LAW SECTION CHAIRS	13
CASELAW UPDATE	14
NEW SYSTEM SUSPENDS DRIVER'S LICENSES OF PARENTS' DELINQUENT ON CHILD SUPPORT	20
MICHAEL WEINSTOCK	21
GEORGE S. STERN	21
ATTORNEYS' FEES UNDER O.C.G.A. § 19-6-2: DON'T OVERLOOK THE TIMING OF THE HEARING DURING YOUR ANALYSIS. ...	22
2014-15 FAMILY LAW SECTION EXECUTIVE COMMITTEE.....	24

Chair's Comments

by Rebecca Crumrine Rieder
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It is with great excitement and anticipation that I enter my year as chair of the Family Law Section. I look forward to a year of greater involvement by Section members, as well as increased volunteering in our local legal communities. Coincidentally,

Patrise M. Perkins-Hooker, president of the State Bar of Georgia, called Bar membership to “make a difference.” Perkins-Hooker asks each section to promote pro bono service that provides access to justice for indigent and marginally employed citizens so “[t]hese people. . . see and believe that our legal system is of value to them personally, and that we as lawyers care about ensuring that everyone has access to legal services.” Think of the impact our Section could make if each of the 1700+ members volunteer this year, either within the Saturday Project or on one of the opportunities described below. If you don’t see anything that interests you, and have an idea, please let me know. Feel free to email me (rieder@hhcmfamilylaw.com).

Saturday Child Support Project. With the continued deluge of family law cases in courts throughout the state, our services to those who are indigent or marginally employed are greatly needed. And, our courts and judges need us also, to assist community members to traverse the legal system in a family law matter. To that end, I have asked Kathleen “Katie” B. Connell along with executive committee members Leigh Cummings and Tera Reese-Beisbier to spearhead a statewide program to assist citizens with child support worksheet computation and compilation of paperwork for child support actions through a public information session provided on Saturdays. We need volunteers to help develop and implement this program. If you are interested, please contact Katie (kconnell@bcntlaw.com), Leigh (lcummings@wbmfamilylaw.com) or Tera (tera@rbafamilylaw.com). This is a large endeavor, and I would like the first Saturday Project to take place before the end of January. There is plenty of room for volunteers, so please consider giving of your time and talent!

In addition to the Saturday Child Support Project, we have a variety of subcommittees within the Family Law Section that provide pathways to get involved with the Section and the State Bar. One of my goals is to have our subcommittees become much more active, so please consider volunteering to take on an active role!

Military and Federal Employees Committee. John Collar is the Executive Committee member heading this subcommittee. John Camp and Steve Shewmaker have assisted greatly with this committee in the past and hopefully will continue to do so.

Technology/Social Media Committee. Scot Kraeuter is heading this subcommittee with the assistance of Jamie Perez, Jonathan Dunn and Kevin Rubin. This committee is working on updating our web presence and providing updates on the involvement of our Section statewide.

Community Service Committee. Thanks to the leadership of Jonathan Tuggle last year, the Section was instrumental in raising funds for the Atlanta Legal Aid Campaign to assist with the costs of the new facilities for the family law division of Atlanta Legal Aid, which assists families across the State. We continue this campaign as we are within \$3,100 of reaching our fundraising goal. We issued a challenge to the other State Bar sections to raise money for Atlanta Legal Aid’s building campaign and we pledged to raise \$15,000 from Section members. Please consider giving. Mail donations directly to Jonathan Tuggle, Boyd Collar Nolen & Tuggle, 3330 Cumberland Blvd, Suite 999, Atlanta, GA 30339. Dan Bloom is spearheading additional projects, and we look forward to expanding our community service this year! Please email Dan if you are interested in serving and expanding our community outreach.

Practicing Outside the Perimeter (POP) Committee. Regina Quick and Tera Reese-Beisbier are leading this committee. Please contact them if you are interested in joining in participating.

Ethics and Professionalism Committee. Gary Graham has agreed to assist with this committee which was formed to promote ethics and professionalism in our Section. Please contact him if you are interested in working with this committee.

Diversity. Ivory Brown, Marvin Solomiany and Michelle Jordan continue to lead this committee. This committee conducted a diversity survey last year, the results of which are helping us better serve the membership. Ivory is also spearheading Section socials, so please contact her to assist in diversity and/or socials.

In addition to all of the above, please consider contributing to *The Family Law Review* (FLR). Randy Kessler has worked tirelessly for years to turn our Section newsletter into a work of art. Our Section is forever indebted to him for the countless hours he invested into the FLR. This issue is Randy and Marvin’s last as co-editors. Marvin transitioned into his position as secretary and Randy is transitioning into the position of FLR Editor Emeritus. Gary Graham has agreed to take on the herculean task of being the editor of the FLR. I am thrilled for Gary and look forward to the continued quality FLR has had under the watchful eyes of Randy and Marvin.

Continued on page 17

Tips and Highlights from the 2014 Georgia Family Law Institute

by **Kem Eyo**

If you were not among the over 600 attendees of the 33rd Annual Georgia Family Law Institute, you missed a wealth of useful and practice-enhancing information. The following are some of the tips and highlights conveyed by this year's presenters.

10 Tips on Ethics

1. If a grievance is filed against you, RESPOND TO IT.
2. Stay competent. Do not give advice on things that you do not know about.
3. Pay attention to conflicts and potential conflicts.
4. Social Media: a) Advise clients about how to use, or not use, social media during a case. b) Be careful when responding to your own online criticism, and make sure to maintain your client's confidences and secrets.
5. Familiarize yourself with the additional disclaimers required under the new advertising rules (Rule 7.2) (e.g. include the lawyer's full name and full address.)
6. Familiarize yourself with the new IOLTA Account rules (not yet approved by Court). Escrow accounts will have to be at banks that agree to pay interest at rates equivalent to other similar accounts. (A list of approved banks will be available.)
7. When dealing with pro se opponents, just Be Careful. (Remember, the only advice you can give is for them to get a lawyer.)
8. Do not sleep with your clients.
9. If you really want to sleep with your client, get them another lawyer.
10. If you get a "Japan email" ("my spouse lives in your area and owes under a cooperative agreement"), IT IS A SCAM!

Judicial Panel Highlights

There were three judicial panels. The judges provided the following helpful information:

Issuing Ex-Parte Orders: Ex-Parte Orders create an issue of notice (especially when a non-violent spouse is removed from the home). To obtain an order, there must be a showing of an emergency or near emergency (such as child safety and welfare concerns, imminent financial disaster, or issues of fiscal control), and a hearing must be scheduled in the immediate future.

Canceling Insurance: Insurance should stay in place until there has been a judicial determination of responsibility. There may be a hole in some counties'

Standing Orders. If your county's standing order doesn't provide for maintaining insurance, you should consider including insurance in a temporary order.

Attorney's Fee Awards: Awards of temporary attorney's fees are appropriate in divorce actions to level the playing field when there is a disparity in income. Some judges believe that the award will slow down litigation. When requesting fees, you must present the financial affidavits of the parties, an announcement of how much each side has paid in fees, an explanation of the basis of need for fees, an explanation of what is being fought over, and any resources each side has access to (e.g. family assistance, credit, loans, etc.). Finally, make sure the trial judge follows the proper steps in supporting the foundation for awarding fees. They should identify the statute and follow procedure. [Note: Judges are inclined to keep the issues of temporary alimony and temporary attorney's fees separate from one another.]

Trial Tips from Experienced Judges:

- State the issues during your opening arguments.
- Bring the new spouse to testify.
- Give the judge his/her own copy of your exhibits.
- Do not be excessively repetitive.
- Speak clearly. Do not walk and talk.
- Be prepared before you start.
- Read new cases daily (i.e. stay current on issues related to your practice / cases).
- Be careful what you ask for.
- Counsel your client to be (or at least seem to be) open, honest, and reasonable.
- Maintain your professionalism (don't drink your client's Kool-Aid).
- When children are involved, talk about the children (not just about the parents).

TIPS FROM WARHORSE JUDGES:

- It all begins at the temporary hearing. Keep it brief, keep it relevant, and get to the point.
- Pay actual attention to the content of your client's DRFA – take the time to personally review the information with your client before they take the stand and make sure the information is accurate.
- Make sure affidavits (witness, etc.) are done correctly, contain useful information, and are filed timely.
- Keep in mind that the court order is not necessarily

the end of the case. Whatever you do now will be reflected in their lives (or cases) in the future.

- Your reputation matters with the judges – they know who comes prepared and can be trusted. Be Honest; Be Professional; Be Responsible; Be Prepared.
- Know your judge. Before the hearing, talk to other attorneys and/or the judge’s chambers. After the case is over, go to the judge and ask about your performance (get tips for improving).
- Make the judge an effective listener. Tell them what the issues are and then give them some solutions.
- Use the correct version of the Child Support Worksheet. Old versions do not account for changes in cost of living and therefore do not comply with the law. [Note: The current version as of June 29, 2014 is version 8.8.]
- Get settlements written down; don’t read them into the record. Bring a laptop and thumb drive to court.
- Do not attack the opposing counsel; it makes the judge distrust you.
- Whose case is it anyway? Do not get too caught up with opposing counsel or allow your ego to take over. Your client is your #1 obligation.

Moving the Ball Forward

Our job can be easier when we work well with our colleagues. Five tips on doing so:

1. Be careful/mindful of what you say in public discussions about opposing counsel.
2. Grant reasonable requests for extensions.



3. Do not publicize off-the-record conversations with opposing counsel.
4. When speaking to clients about opposing counsel, keep your comments reasonable – they may be repeated.
5. Be reasonable in responding to requests for temporary attorney’s fees.

A View from the Gold Dome

Georgia Legislatures are working hard to enact laws for the betterment of our state, but they would appreciate our help. “Please come down to the Capitol. When someone there knows more than us, it improves the quality of our work.” - Mary Margaret Oliver (Georgia General Assembly). “We can all do a better job of engaging in the political process. If you are voicing your opinion, better to do so before the bill passes. Engage with your representative and senator. Be a resource. Build relationships. Get to know who represents you at the Capitol.” - Hon. David Ralston (Georgia House of Representatives).

Child Support: The Commission on Child Support is moving to remove childcare from the support calculation.

The Pill Mill Bill: When Florida passed its pain clinic laws, a number of sellers moved to Georgia. Georgia legislature has made great strides to close some loopholes. The Pill Mill Bill has decreased the use of “oxy”, but has increased the use of heroin. The next step will be to follow the model of Kentucky’s program (which has also been successful in North Carolina).

Sex Trafficking: There is an increased effort to start treating children in sex trafficking cases as victims instead of criminals. For more information on this topic, visit www.GANotBuyingIt.org.

Child Support Deviations

A few judicial tips when you are requesting discretionary deviations:

- Parenting Time Deviations: Come with detailed facts, but be brief.
- Private School: If the parties agreed to it, chances are the judges will enforce it. If it wasn’t agreed to or addressed at all, then come with detailed but relevant facts.
- Other Qualified Children: The deviation is discretionary, and often based on a substantial hardship to the parent.

Appellate Practice

An appeal is won or lost at the trial. So even if you do not have an appellate practice, you need to keep in mind that the standard of review on appeal is abuse of discretion. Look at your cases through that standard. The following are tips for the appellate practitioner:

- The most important step is trying to decide if you should file an appeal (sitting down with your client and reviewing the facts of the case). There are three categories of potential cases: 1) Good chance of success; 2) You shouldn't do this, but I'll take your money; or 3) I won't take your money because it might damage my reputation. (Keep in mind... Reputation does matter!)
- When filing an appeal, provide as much information as possible in your initial application. If the trial transcript is not available during time for filing a discretionary application, press the court reporter to give it to you as soon as possible and then supplement your application immediately upon receipt.
- Lay out your legal argument for the judge at the onset. Then lay out your arguments again in conjunction with the set of facts.
- When an appeal is filed, mark all deadlines. (Keep in mind that a Motion for Reconsideration does not toll appellate time but a Motion for New Trial does.)

ADDITIONAL PRACTICE TIPS:

- Your employment agreement should specify that representation ends when the final order is filed, and a new agreement is needed for appeals or follow-up cases.
- Put in your final order that, in the event of an appeal, the final order becomes a temporary order during the pendency of the appeal, superseding all prior temporary or final relief to the contrary. (See *Franklin v Franklin*, 294 Ga. 204.)
- During appeal, a temporary order can be enforced and modified. Get a temporary order, even if at the same time as the final.

Child Custody Decisions

The custody decision is supposed to be about the child, not the parties. You can reach a child-appropriate decision while still representing your client's interests:

- Use the child's name at least once every 45 minutes.
- Adapt your evidence to fit the custody factors. If a fact or exhibit does not fit the factors, leave it out.
- Be careful in asking for morals clauses when parties are unmarried. About 50 percent of all births in Georgia are from unmarried couples.
- Ask yourself and your client the questions the judge is likely to ask before you make certain requests. Two examples: Drug Testing: Did the parties do it together? How recently? What is proven versus suspected? Why should there be testing? Custody Supervision: Who will supervise? How?

Same Sex Marriage Issues

There are same-sex couples (openly identified) in every

county of the state. So how do you handle their coupling and de-coupling, and their custody issues? This issue is rapidly evolving. There is a lawsuit currently pending in almost every state of the union related to same-sex-marriage issues. [Note: In Georgia, same-sex marriage is neither invalid nor void.]

Alimony

The granting of alimony is discretionary in Georgia. Three tips when seeking an award:

1. Show a snapshot of the predicted future.
2. Give the rationale for granting the award. and
3. Explain the efforts of the non-working spouse to keep his/her skills current.

Juvenile Code

The issuance of the new code, effective as of Jan. 1, 2014, was the first time the code had been changed in over 40 years. The new emphasis is on preserving and strengthening the family (and on the child's best interest). A child can be removed from the home only when removal is essential.

Pursuant to 15-1-9.1, the Juvenile Court can try the entire divorce case. The Juvenile Court gives free guardian-ad-litem in custody cases. If you are considering transferring between Superior and Juvenile Court, or bifurcating your case, know your county and your judge.

Misc. Issues

Reproductive Property: A biology lesson (not state specific): A woman's egg is non-marital but a man's sperm is marital. The resulting fetus is the woman's non-marital property unless the man cares for the woman during her pregnancy.

ISSUING SUBPOENAS:

- You cannot issue subpoenas without notifying the opposing counsel / party. You cannot subpoena documents to your office without a hearing or deposition.
- You cannot give permission to send documents in lieu of appearing at a deposition without the other party agreeing. In doing so you are depriving the other side of their right to cross-examine.

INTERNATIONAL MATTERS:

- If your case involves multiple countries, you must retain local counsel.
- You are allowed to forum shop.
- To find off-shore accounts, you must hire an international search and recovery firm.
- For useful information in cases with international custody concerns, visit <http://travel.state.gov/content/childabduction/english/country.html> *FLR*

Mediation in 3D

by Andy Flink

If only I could start every mediation wearing a pair of 3D glasses that would allow me to view each parties' position in layers, where I knew the issues behind the issues and the depth of what was and was not important. About the best I can do before I walk in the room to begin is make sure I have everything from a charged laptop to the most updated version of the child support worksheet. That, along with my pens, pencils, highlighters, a calculator, legal pads and a clear head. Once the session starts my once copious notes can seemingly become "herding cats" at a moment's notice. They move every which way, different directions that require focus and attention to every detail. Lose a negotiation point along the way and one parties' idea of an agreement becomes a deal breaker issue as we prepare to sign.

We talk in great detail about what it takes for you to prepare your client. However, due to the nature of domestic mediation and where each of the parties are emotionally it stands to reason that one side is inherently more prepared than the other. This isn't necessarily the benchmark as to whether or not agreement is reached or for that matter, how long a session will last. But I see this as one of the layers: determining where each side is and their apparent willingness to consider a version of settlement (full, partial, temporary). What if it is simply too early in the case and both sides don't have the necessary information needed in order to reach agreement? Can this be overcome if I can get each side to consider some semblance of common ground? The short answer is of course we can – we can get creative and innovative to get us moving towards agreement.

As the session continues to morph, change and evolve as the day wears on I am taking my "3D glasses" on and off. I bounce from room to room working the "deal" in my head, weighing options and positions (as I grab a glass of water) all the while thinking on the multilevel plane. I must always be aware that one component may have an effect on another and that just because the issue is settled for now that it might change later. Parties' ever so slight alterations in positions can make a pronounced and dramatic change to the other side.

Mediations are not linear. They can be brick-shaped, nonlinear, cubic, boxlike, placoid, platelike, cuboid, coplanar, cuboidal, isometric and even blocky. We never work in a straight line; rather we move around all over the place, from custody to IRA splits, to holiday schedules and about a few dozen other stops along the way. We negotiate

one point against another, we take away from one bucket and we distribute a little into another and then perhaps yet one more.

Fortunately it's not always this complicated. But knowing that it can be should remind each of us to always be thinking about how we can work together to be problem solvers in a multi-level "environment." One aspect of mediation that I've found to be fairly straightforward is that most of the time we must first resolve custody before we can even start to parse out and delineate the financial piece. This step can get complicated though when one

side feels they are making significant concessions regarding custody and the other side isn't making any financial compromises. Another multi-layer consideration: does one side feel that no progress is being made since nothing has been resolved that they came to talk about? Understanding how the underlying emotions play into their position must be considered and acknowledged by the

mediator. Deals, like it or not, can be driven somewhat by fact and mostly by emotion.

Finally, when you reach an agreement and reduce these comprehensive facts to writing you must be sure to have captured all of the facts and figures accurately. I've often joked that a mediator is allowed one omission for every three hours of mediation, but even when this happens someone else in the session notices and mentions the oversight. We take all of our hard work and reduce all of the layers and dimensions to get a straightforward one dimensional agreement. In the end though, it doesn't really matter how we got there, but simply that we did. *FLR*



Andy Flink is a trainer mediator and roster member of 17 area Superior Court ADR programs including Fulton, DeKalb, Forsyth and Cherokee County. Familiar with the aspects of divorce from both a personal and professional perspective, Flink is experienced in business and divorce cases and has an understanding of cases with and without attorneys.

Flink is founder of Flink Consulting, LLC, a full service organization specializing in business and domestic mediation and consulting. He mediates both private and court connected cases and has specific expertise in family-owned businesses. He is a registered mediator in the state of Georgia for both civil and domestic matters.

Guard and Reserve Pensions on the Day of Divorce: Part Two

by Mark E. Sullivan

In the first part of this article, we learned of the dilemma facing Sam Green, the soon-to-be-ex of Janet Green, a Navy Reservist. Visiting his lawyer, Sam was expressing his frustration and confusion in the attempts he had made to find out about what her benefits would be, what she would receive in retired pay, how much was his share, and what he'd receive if she died before him. The first part explained what is required for a Reserve Component (RC) or "non-regular" retirement, that is, one involving the National Guard or Reserves. It covered how retirement points are acquired, what a "points statement" looks like, and how one's retired pay will be calculated.

RC Pensions and Divorce

The Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, provides the rules for military retired pay and its division upon divorce. It applies to RC and regular retirements.¹

There are two key considerations in dividing RC retirement rights. First, since RC SMs (servicemembers) usually do not begin to get paid until age 60 (regardless of when they stop drilling and apply for transfer to retired status), this deferral of payment must be taken into account in the negotiations and in any present value calculations. There will almost always be a "gap" between applying for retirement and "pay status" for the military member.

Second, the "marital fraction" should usually be computed twice – once using marital years of service over total years of service, and then again using marital retirement points over total retirement points -- to determine which computation will best benefit the client. When dealing with RC retirements, be sure to get a copy of the SM's most recent statement from the Retirement Points Accounting System (RPAS), also known as the "points statement." This will show how many total points have been acquired and how many were earned during the marriage.

Computations – An Example

An example will help illustrate what a difference this might make. Major Bill Smith has four years of active duty and 16 years of service in the Army Reserve. He married when he left active duty.

To calculate the marital fraction using points, we start by counting the points he acquired during active duty by multiplying 4 times 365 to get 1460 points. Then we count his Reserve points. During his time as a Reservist, assume that he acquired 73 points a year – 15 each year for membership, 44 points for 11 months of weekend drill, and 14 points for two weeks of annual training. This totals 1168

points for 16 years. Thus his total points at 20 years are 2628 (1460 plus 1168), of which 1168 (or about 44 percent) are marital. This should mean that 44 percent of his retired pay is marital, assuming retirement and date of separation both occur at year 20.

Now let's use years in calculating the marital fraction. He was married for 16 years out of the 20 years of creditable service. Note the result: if we use years in applying the marital fraction to his retirement pay, then the marital share of his pension is 16 divided by 20. This means that it is 80 percent marital.

What a difference! Recognition of these two ways of calculating the marital benefit, and the difference when Major Smith's pension is calculated, is essential to competent representation in the Guard/Reserve pension case.

The issue is complicated by the interplay between federal and state law. How to divide a pension, in general, is the province of state cases and statutes. Some states recognize the use of points for pension division, while others will only allow a "time rule" for the marital fraction.² Nothing in USFSPA says how to divide a Guard/Reserve pension or how to calculate the marital fraction, whether Guard/Reserve or active-duty. It is completely silent on this.

The retired pay center, which is usually Defense Finance and Accounting Center (DFAS), will not honor a formula clause in an RC pension division order which contains a marital fraction using months or years and the RC member is still drilling.³ There are two reasons for this.

First, in practical terms, one cannot speak of RC service in terms of months or years. The Defense Department doesn't keep track of RC service in terms of time, since RC points are the method of computing retired pay at DFAS.

In addition, the regulation which DFAS uses requires that a formula clause containing a marital fraction must be written in terms of retirement points, not years or months:

For members qualifying for a reserve (i.e., non-regular service) retirement, retiring from Reserve duty, the numerator expressed in terms of Reserve retirement points earned during the marriage must be provided in the court order. If the numerator is not provided in the court order, then either the court will have to clarify the award or the parties will have to agree on the numerator and provide it to the designated agent in a notarized statement signed by both parties.⁴

What can the family law practitioner do if the time calculation is more favorable to the client? There is no alternative formula clause which is acceptable to DFAS

when the RC member is still drilling. If, however, the member has stopped drilling and applied for retirement status, or is already in pay status, then one can use any of the four available pension share clauses which DFAS will accept: set dollar amount, percentage, formula clause (using years or points) and hypothetical clause.⁵

Thus a probable approach to pension division in the above case, assuming the RC member is not still drilling, is to use a percentage clause, not a formula clause. This is also the case when state law “fixes” the spousal interest at the date of divorce or separation, as is the case in Florida, Texas, Tennessee, Kentucky and Oklahoma. It is a simple matter to convert the marital formula into a percentage since all of the terms – spouse’s share (usually 50 percent), numerator and denominator of the marital fraction, and benefit to be divided – are known. A court order containing a percentage or a hypothetical award will be honored by DFAS if it leaves nothing out (other than data available to DFAS).

DFAS will also accept a set dollar amount that is specified in a military pension division order. However, the amount will not be adjusted annually for COLAs (cost of living allowance) for the non-military partner.⁶ Such an award might state: “Sam Green will receive \$400 a month from Janet Green’s Naval Reserve retired pay.”

Practice Tip

These days, with the high number of Guard/Reserve mobilizations, it is increasingly possible for an RC member of the Reserve Components (RC) to accumulate enough years to consider “hanging on” for active-duty retirement after completion of 20 years of creditable service. What happens if Janet Green has 8 creditable years of RC service, four initial years of active duty, and now 4 years of mobilized active-duty service in support of Operation Brass Key in the Duchy of Grand Fenwick? Involved in a pending divorce, what should Sam Green do when he is confronted with the almost equal possibility of her retirement from the “active side” or the “Reserve side,” in terms of an order for present pension division?



In addition to the court’s reserving jurisdiction until a final decision is made, the court could enter an order which provided for one of the two retirements, with the parties’ property settlement agreement containing the following clauses:

During 153 months of the parties’ marriage, the defendant-wife has served both on active duty and as a member of the United States Naval Reserve. She either will become eligible to apply for Reserve retired status after serving 20 qualifying years of Reserve service in 2018, with Reserve military retirement payable at about age 60, or will become eligible for active duty retirement after 20 creditable years of active duty service. The parties recognize the plaintiff’s rights to a percentage of whichever of these two retirements that the defendant ultimately receives.

Due to the complexity of the military retirement system and in the interest of affording plaintiff an equitable share, a formula should be used in order to divide the pension. This will cover the contingencies of defendant’s continued Reserve service or a return to active duty, as well as her continued advancement in grade and time in service. Any retirement paid to plaintiff under either retirement plan is referred to as “Military Retired Pay.” In either of these situations, the SBP (Survivor Benefit Plan) premium for former-spouse coverage for plaintiff will be deducted from total retired pay to arrive at Military Retired Pay.

The parties will cooperate in the drafting and entry in the District Court for Coriander County, East Virginia, of an order dividing defendant’s Military Retired Pay, so that plaintiff shall receive a portion of either monthly benefit payment according to the formula set forth below. The order shall be drafted as an order dividing active duty retired pay, but shall specifically state that the parties reserve the right to enter a “clarifying order” in the event that defendant-wife retires as a Reservist. In this latter event, the parties will cooperate in the drafting and entry of a clarifying order, and the parties will equally divide the cost of drafting the clarifying order.

If defendant-wife retires from active duty, the plaintiff’s share of the monthly pension benefit will be governed by the time rule and will be computed according to the following formula: 50 percent of the monthly benefit multiplied by a fraction, the numerator of which shall be the number of months the parties were married (153) up to the separation, and the denominator of which shall be the number of creditable months served by the defendant-wife earning the Military Retired Pay.

If defendant retires as a Reservist, the order dividing Military Retired Pay will be entered as soon as reasonably practicable after defendant’s application for Reserve retirement. The plaintiff’s share of the monthly pension benefit will be governed by the acquisition of Reserve retirement points and will be computed

according to the formula: 50 percent of the monthly benefit multiplied by a fraction, the numerator of which will be the number of Reserve retirement points acquired during the marriage up to the separation, which is 2,345 points, and the denominator of which will be the total number of Reserve retirement points at the date of defendant's Reserve retirement orders.

Where to Send the Court Order

The Military Pension Division Order (MPDO) is sent to the appropriate "designated agent" for payments. See DoDFMR (Department of Defense Finance Management Regulation), 7 Vol. 7B, ch. 29, § 290403 for the names and addresses of the designated agents for each branch of service. Note that the order is not called a Qualified Domestic Relations Order (QDRO) because military retirement is a statutory governmental program, not a "qualified plan" divided by a QDRO.

Which Military Retirement Plan?

Military personnel get a monthly Leave and Earnings Statement (LES). The Active Duty LES contains blocks reading RETPLAN and DIEMS, while the Reserve and Guard LES may lack these blocks. The RETPLAN block tells which retirement plan the member will retire under: Final Basic Pay, High-3, or REDUX. That plan is in turn determined by the Date of Initial Entry into Military Service (DIEMS). As explained in Part One of this article, DIEMS before Sept. 1, 1980, means Final Basic Pay. DIEMS between 1980 – 88 means High-3. Finally, DIEMS after 1988 means CSB/REDUX. DIEMS is determined by the first date of military service. It is unaffected by a break in service and so can differ from Pay Entry Base Date, or PEBD.⁸

Other Requirements for Direct Pay of the Pension Share

The MPDO can only be used for direct payments if, pursuant to 10 U.S.C. 1408(c)(4), there is court jurisdiction because the SM –

- is domiciled in the state in which the suit for the divorce or property division occurs; or
- resides in the state in which the lawsuit occurs (other than because of military assignment); or
- consents to the jurisdiction of the court in which the lawsuit occurs.⁹

If the order states that jurisdiction is based on one of the above grounds, it must also state the basis for the finding (i.e., member's residence, member's domicile or member's consent).¹⁰

Most former spouses want to receive monthly payments from the retired pay center, not from the military retiree. Pension garnishments (as property division, as opposed to alimony or child support) require the parties have been married for at least 10 years while the military member performed at least 10 years of creditable service; this is known as "the 10/10 Rule."¹¹

Note that the "ten-year rule" is not a jurisdictional requirement for dividing military pensions. There is no limitation on the number of years of marriage overlapping military service as a requirement for military pension division, although this is a widely held misconception in the civilian bar. A military pension may be divided by court order whether the spouse has 30 years of marriage to the SM or 30 days of marriage. Rather, this time requirement is a prerequisite to enforcement through DFAS. The payment mechanism of a garnishment of the member's retired pay is not available unless this test is met.¹²

Note that some states don't use the term "garnishment" for support payments. But that is the terminology used in 42 U.S.C. § 659 and 5 C.F.R. Part 581, and that term should be employed when dealing with any federal pension, whether military or civilian.

When there are ten years of combined Guard/Reserve and active service, DFAS will aggregate them to allow the ten-year rule to be met.¹³ It should be noted that being in the Guard or Reserves for 10 years is not necessarily the same thing as "having ten good years" which are creditable toward retirement. A "good year" is one in which the Guard/Reserve SM has accumulated at least 50 points. A year with fewer points means that the year is not creditable toward retirement (a minimum of 20 good years) although the points in that year still count in calculating retired pay.

The order must also provide for payment from military retired pay in an acceptable clause.¹⁴ The court order must be authenticated or certified within the 90 days immediately before its service on DFAS, and it must state the eligibility of the spouse or former spouse under the "10/10 rule" stated above. The right information must be in the order (e.g., names, addresses, jurisdictional facts), and the amount for the former spouse must be within the maximum limits (i.e., 50 percent of disposable retired pay) for most orders). The SM remains liable for any amount still owing. In cases where there is an application for the direct payment of court-ordered division of military retired pay and a garnishment issued pursuant to 42 U.S.C. § 659 (child or spousal support), DFAS is authorized to deduct higher maximum amounts.¹⁵ The parties have taxes deducted from their respective shares before the checks are sent.

The Hypothetical Clause

There are, in general, four acceptable methods of dividing military retired pay. The set dollar amount, percentage and formula clause have been covered above. The fourth is a hypothetical clause, which is an award based on a pay grade or term of years of service that is different from what exists when the SM actually retires. This is usually used when the parties' interests are fixed as of some specific valuation date. For example, if the parties divorced while the wife was a Navy chief petty officer with 18 years of creditable military service, the hypothetical clause might state:

Husband is granted ___ percent of what a chief petty officer (E-7) would earn if she were to retire with 18 years of military service with a retired pay base of \$_____.

A hypothetical clause in a military pension division order for a still-serving RC member might be worded as follows:

Husband is awarded ___ percent of the disposable military retired pay that wife would have received had she become eligible to receive military retired pay with a retired pay base of \$_____ and with _____ Reserve retirement points on (date).

If the wording isn't right, DFAS will return it for entry of a "clarifying order" by the court. Since there is no pre-signing review of draft MPDOs available at DFAS, counsel must get it right the first time. The "Attorney Instructions" and the sample military retired pay division order explain how to word the clauses.¹⁶

The Servicemembers Civil Relief Act

There must be a statement in the pension division order that "the member's rights under the Servicemember Civil Relief Act (50 U.S.C. App. 501 et seq.) were observed."¹⁷ The Servicemembers Civil Relief Act (SCRA) offers protection for military members who are on active duty at the time of the property division or divorce; it does not apply to retirees, but it would be a better practice to include such wording in all military pension division orders.

What protections for Janet Green are involved? A checklist for SCRA protections would include at least the following:

SCRA Checklist for Servicemember Pension Division Protections

___ 1. If the SM, Janet Green, has not entered an appearance in the divorce case, or the pension or property division lawsuit, a stay (continuance) must be granted for at least 90 days if –



- ___ a. the judge determines that there may be a defense to the action, and such defense cannot be presented in the SM's absence, or
- ___ b. with the exercise of due diligence, counsel has been unable to contact the SM (or otherwise determine if a meritorious defense exists). 50 U.S.C. App. § 521(d).
- ___ 2. If Janet has actual notice of the lawsuit, a similar mandatory 90-day stay (minimum) of proceedings applies if she requests it properly. 50 U.S.C. App. § 522.
- ___ 3. She may ask for an additional stay at the time of the original request or later. 50 U.S.C. App. § 522 (d)(2). If the judge will not grant an additional stay, then counsel must be appointed to represent her in the action. 50 U.S.C. App. § 522(d)(2).
- ___ 4. The stay request does not constitute an appearance for jurisdictional purposes in the lawsuit, and it does not constitute a waiver of any substantive or procedural defense (including a defense as to lack of personal jurisdiction). 50 U.S.C. App. § 522(c)
- ___ 5. If Janet has been served but has not entered an appearance by filing an answer or otherwise, her husband may not obtain a default judgment under 50 U.S.C. App. § 521 unless the court first determines whether she is in military service. This means that Sam Green must file an affidavit stating "whether or not the defendant is in military service and showing necessary facts in support of the affidavit." 50 U.S.C. App. § 521(c).
- ___ 6. If Sam Green states in the affidavit that Janet is a member of the armed forces, no default may be taken until the court has appointed an attorney for Janet in the pension division case.
- ___ 7. If the appointed attorney cannot locate Janet, actions by the attorney may not waive any defense she has or otherwise bind her in the pension action. 50 U.S.C. App. § 521(b)(2).
- ___ 8. If a default decree is entered against Janet during active duty or within 60 days thereafter and she has not received notice of the proceeding, she may move to reopen it so long as -
 - ___ a. She does so while on active duty or within 90 days thereafter. 50 U.S.C. App. § 521(g); and
 - ___ b. She can prove that, at the time the judgment was rendered, she was prejudiced in her ability to defend herself due to military service; and
 - ___ c. She has a meritorious or legal defense to the initial claim.

If, at a minimum, these rights have been honored, then the court order for pension division could truthfully state that Janet Green's rights under the SCRA had been observed. Such a statement would read:

The court has complied with the rights of the defendant, Janet Green, under the Servicemember Civil Relief Act (50 U.S.C. App. 501 et seq.).

Other Terms for Consideration

A well-written MPDO will protect Sam by stating terms for indemnification if Janet later is determined to be disabled. Disability payments received after retirement can reduce the amount which Sam Green should be receiving. An indemnification clause might read:

If Janet Green does anything that reduces the amount or share of retired pay to which Sam Green is entitled, such as the receipt of disability pay, then she will promptly make direct payments to Sam Green to indemnify him and hold him harmless from any reduction, costs or damages which he may incur.

Starting the Process

The spouse or former spouse usually starts the process of division of the military pension by notifying DFAS by facsimile or electronic submission, by mail, or by personal service; service is effective when a complete application is received by DFAS. The notification form is DD Form 2293 ("Request for Former Spouse Payments From Retired Pay").¹⁸

Payments are made once a month, starting no earlier than 90 days after service of the decree on DFAS or the start of retired pay, whichever is later. The payments end no later than the death of the member or spouse, whichever occurs first.¹⁹ Payments are prospective only; no arrears are allowed. USFSPA does not provide for garnishment of payments missed prior to the approval of the application by DFAS.

Survivor Benefit Plan

In regard to Sam Green's questions about the death of Janet before him, the answers about continued payments lie in the Survivor Benefit Plan (SBP), which is a joint and survivor annuity available to active-duty and RC retirees to ensure the continuation of payments after the SM/retiree dies. The surviving spouse or ex-spouse, when this is chosen, receives 55 percent of the selected base amount for the rest of his life, so long as he does not remarry before age 55. This should always be considered in a settlement or trial judgment when one represents the former spouse.²⁰

When Janet got her "20-year letter," also known as the NOE (Notice of Eligibility), she also received a form for making a decision as to SBP. Shown on DD Form 2656-5 were these options:

- Option A – defer the decision until "pay status," which is usually age 60.
- Option B – elect coverage, but defer the payments until the SM would have attained pay status, usually at age 60.
- Option C – immediate coverage, which means that the survivor receives payments starting when the SM dies.

Any choice except Option C requires the consent of one's spouse. If the executed form is not returned within 90 days of receipt by the SM, he or she is defaulted into Option C.

To review the form, it will be necessary to have Janet produce a copy in discovery. If that doesn't work, then Sam must obtain a court order or a subpoena signed by a judge, for a copy of Janet's DD Form 2656-5. The subpoena or order is sent to the address under Instructions if Janet is not yet in pay status; it is sent to DFAS in Indianapolis if she is receiving retired pay. It usually takes a month or two to obtain delivery.

There is one hitch in coverage for Sam, however. He will lose his "spouse coverage" upon divorce. If he decides to request SBP coverage, he needs to obtain a court order requiring Janet to elect "former spouse" coverage for him. His submission of such an order, along with the divorce decree and his "deemed election" (on DD Form 2656-10) within one year of the order, ensures that he will be covered. If Janet submits an election for his coverage, it must be done within one year of the divorce decree. *FLR*



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(Endnotes)

- 1 See Captain Karen A. MacIntyre, "Division of U.S. Army Reserve and National Guard Pay upon Divorce," 102 Mil. L. Rev. 23 (1983).
- 2 For cases holding that classification of the marital part of a Reserve Component (Guard/ Reserve) pension may be based on "marital points" divided by "total points," see *Faulkner v. Goldfuss*, 46 P.3d 993 (Alaska 2002), *Hasselback v. Hasselback*, 2007 Ohio 762, 2007 Ohio App. Lexis 644 (2007), *Woodson v. Saldana*, 165 Md. App. 480, 885 A.2d 907 (2005), *Bloomer v. Bloomer*, 927 S.W.2d 118 (Tex. App. 1996), *In re Beckman*, 800 P.2d 1376 (Colo. Ct. App. 1990) and *In re Poppe*, 97 Cal. App. 3d 1, 158 Cal. Rptr. 500 (1979), and. Some states, on the other hand, require calculation of the marital fraction based on time, not "points" or some other factor. See, e.g., N.C. Gen. Stat. § 50-20.1(d), which states, "The award shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the vested pension, retirement, or deferred compensation benefit, to the total amount of time of employment." In Virginia, where the division of a pension is according to years instead of points, the Court of Appeals upheld a time-rule division as



- within the trial court’s discretion. *Jordan v. Jordan*, 2004 Va. App. LEXIS 285 (June 22, 2004).
- 3 The pay center, or “designated agent,” for most USFSPA pension division orders is DFAS, since it handles orders for the Army, Navy, Air Force and Marine Corps; thus that abbreviation is used throughout this article. In fact, the Coast Guard, PHS, and NOAA pay centers are separate entities. See DoDFMR (Department of Defense Finance Management Regulation), Vol. 7B, ch. 29, § 290403 for names and addresses of the designated agents for each branch of service.
 - 4 DoDFMR, Vol. 7B, ch. 29, § 290607.B. Acceptable formula award language is contained in the “Military Retired Pay Division Order” at Appendix A in the chapter.
 - 5 See DoDFMR, Vol. 7B, ch. 29, § 290608 for the specific DFAS rules regarding permissible and required terms in the “hypothetical retired pay award.”
 - 6 DoDFMR, Vol. 7B, ch. 29, § 290601.C and 290902.
 - 7 The DoDFMR can be found at <http://comptroller.defense.gov/fmr>
 - 8 Service Academy (e.g., West Point) time as a Cadet or Midshipman, while not creditable for retirement or pay, impacts DIEMS. The date the member swore into the Academy as a Cadet or Midshipman fixes DIEMS even if the member didn’t graduate from the Academy. Service Academy dropouts who later re-enter military service should ensure their Academy discharge is recorded in their military record and that their Academy service is reflected in their Retirement Point Accounting System (RPAS) statements. The non-serving spouse of such a servicemember with a break in service around 1980 or 1988 will want to ensure that Academy service qualifying for the earlier retirement plan is entered into the RPAS.
 - 9 DoDFMR, Vol. 7B, ch. 29, § 290604.A. See also 10 U.S.C. § 1408(c)(4).
 - 10 DoDFMR, Vol. 7B, ch. 29, § 290605.
 - 11 DoDFMR, Vol. 7B, ch. 29, § 290604.B. See also 10 U.S.C. § 1408(d)(2).
 - 12 See, e.g., *Carranza v. Carranza*, 765 S.W. 2d 32 (Ky. App. 1989).
 - 13 E-mail, Phoenix attorney Michael McCarthy, to the author, subject: 10/10 issues for your book/question re: requirements for member to delete SBP (September 2, 2004) (on file with the author).
 - 14 10 U.S.C. 1408(a)(2)(C).
 - 15 DoDFMR, Vol. 7B, ch. 29, § 290901.
 - 16 The Attorney Instructions may be found at www.dfas.mil > Garnishment Information > Former Spouses’ Protection Act > Attorney Guidance. Also at the “Former Spouses’ Protection Act” tab are notes on “Legal Overview,” how to apply for payments from DFAS, the “maximum amount” rules, receipt of payments (including taxes and direct deposit information), and Frequently Asked Questions.
 - 17 DoDFMR, Vol. 7B, ch. 29, § 290602.B; see also 10 U.S.C. § 1408(b)(1)(D).
 - 18 This can be found by typing “DD Form 2293” at Google, Yahoo or any other search engine.
 - 19 DoDFMR, Vol. 7B, ch. 29, § 291102.A.
 - 20 A full explanation of how this works is found at the www.nclamp.gov > Silent Partner > Military Pension Division: The Spouse’s Strategy.

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Caselaw Update

by Vic Valmus

DEVIATION

McCarthy v. Ashment-McCarthy, S14F0265 (May 5, 2014)

At the time of the parties' final divorce, both were represented by counsel. Contested issues were argued and resolved at a pretrial hearing that was not transcribed. After the pretrial hearing, the final agreement reached by the parties was read into the record along with the Trial Court's decision on any remaining contested issues regarding custody. Husband and Wife stated under oath that they were in agreement with all the financial decisions and the Husband did not object to the Court's ruling on custody. At that time, both parties agreed to file Letter Briefs to submit the issue of attorney's fees to the Trial Court's discretion. Prior to the Court entering the Final Decree, the Husband fired his attorney and argued to the Court that the parties had not reached an agreement. The Wife filed a Motion to Enforce Agreement and contempt and the Trial Court granted the Motion to Enforce the Agreement. Husband filed several pro se motions for new trial and set aside the first motion contained no grounds at all and the second motion contended the parties never reached a valid agreement and the Wife misrepresented her finances. Neither motion argues the Trial Court failed to follow the requirements of O.C.G.A. §19-6-15 regarding deviations. As part of the Final Decree, the Husband was required to pay a non-specific upward deviation of child support in the amount of \$288. The Husband's motions were denied, the Husband appeals and the Supreme Court affirms in part but reverses and remands the attorney fee award.

O.C.G.A. §19-6-15 mandates that certain findings must be made in writing by the Trial Court prior to any deviation in the statutory child support. Here, the Husband did not raise the issue of the Court's compliance with 19-6-15 in either of his motions or at any other subsequent hearing. The issue was raised the first time by the Husband on appeal. Therefore, the Husband has waived the Court's review of this issue. This result must be contrasted from cases in which the issue of the Trial Court's compliance with 19-6-15 was brought to the Trial Court's attention by the parties prior to the filing a notice of appeal.

The Husband also argues that the Trial Court erred in awarding attorney's fees and challenges two awards of attorney's fees. The first was the Trial Court's award of \$2,550 to the Wife for the cost of the motion to enforce. The second was the Trial Court's award of \$12,580 to the Wife for attorney's fees incurred in her main divorce proceeding. The Court specified the award of \$2,550 was made pursuant to O.C.G.A. §9-15-14 as the Husband lacked substantial justification and refused to honor the prior agreement that the parties had reached in open Court and therefore the Husband's argument lacked merit. With regards to \$12,580 in attorney's fees on the divorce case, the

record shows the parties agreed to submit the issue of these fees to the Trial Court by a letter brief. The Wife originally requested fees pursuant to O.C.G.A. §19-6-2. Here, the Trial Court did not indicate the basis of its authority for awarding the attorney's fees and stated it was awarding the fees based upon the ruling in *Haley v. Haley*. In *Haley*, the attorney's fees were part of the parties' contract and allowed the Trial Court to exercise discretion to consider whatever factors it found to be relevant to determine if one party was entitled to attorney's fees. The parties in this case had no attorney's fees clause in a separation agreement on which the Trial Court could rely. Here, there was no agreement to leave the issue of attorney's fees to unfettered discretion of the Trial Court. Therefore, the \$12,580 must be vacated and remanded to the Court for the proper findings of fact.

ELECTION

Driver v. Sene, A14A0303 (May 6, 2014)

The parties had three minor children, ages 17, 15 and 12. Driver (Father) petitioned the Court to modify child support and visitation of all three children based upon the election of the 17 and 15 year old. Several hearings were held and interim orders were issued. A Guardian Ad Litem was appointed and recommended it was in the 15-year-old's best interest to remain with the Mother. After hearing all of the evidence and talking with the children, the Trial Court agreed with the Guardian's assessment and determined that primary custody of the 15 and 12 year old would remain with the Mother and 17 year old would be with the Father. Father was ordered to pay \$5,000 in Mother's attorney's fees. The Father appeals and the Court of Appeals affirms and reverse and remands the attorney fee award.



The Father argues that the Superior Court erred by failing to grant custody of his 15 year old son based upon his election. Under the current version of the statute, the election of a child 14 or older to live with one parent over the other is presumptive. The Superior Court may override the election if it determines that placing the child in the custody of the selected parent is not in the child's best interest. Here, the 15 year old was diagnosed at a young age with a developmental disorder that is treated with a complicated regimen of medication, specialized education, therapy, and counseling and the parents disagreed on certain aspects of his care. The Trial Court also noted in its Final Order that neither party requested to make findings of facts and therefore simply concluded that it was in the 15-year-old best interest that the Mother be awarded primary physical custody of the child. Since the Father did not make a request for findings of fact, he therefore cannot object to any omission in the Final Order.

A Trial Court faced with a Petition for Modification of Child Custody is charged with exercising its discretion to determine what is in the child's best interest. In this case, there was some evidence that the 15-year-old's election was not sincere. At the Court's interview of all three children, they all almost said the exact words in each interview. Therefore, based on the evidence at hearing and the Trial Court's consideration of the child's best interest and no request for findings of fact, we cannot say the Trial Court abused its discretion denying the Father's Petition to Change Custody of the 15 year old despite the election to live with his Father.

The Father also argues the issue of who carries the burden of proof of a material change in condition. O.C.G.A. § 19-9-3(a)(5) does provide that the parental selection of a child 14 or older may constitute a material change warranting modification, but the statute does not provide that the election mandates a custody change. The child's election is a factor to be considered, but not the only factor.

LIFE INSURANCE

White v. Howard, S14F0106 (May 19, 2014)

The parties were divorced in 2007 and, among other things, the Final Decree required the Husband to obtain a term life insurance policy in the amount of \$100,000, naming the Wife as the beneficiary, and to keep the policy in effect for 12 years. The Decree also recited that neither party was entitled to alimony and that the "transfers contained herein are intended to constitute such an equitable division of property and such transfers are not alimony." In 2011, the Wife remarried and the Husband filed a Motion for Modification of Alimony contending that the life insurance was a form of alimony. The Wife filed a Motion to Dismiss, which the Trial Court granted and awarded her \$5,000 in attorney's fees. The Trial Court concluded that, among other things, the life insurance policy was an equitable division of property rather than alimony and the life insurance requirement was a fixed obligation.

The Supreme Court remand, in part, finding that the life insurance award was not property division, because

the amount and duration were indefinite. Likewise, the life insurance obligation is not lump sum alimony because the Husband's life span is indeterminable. The divorce decree does not impose an exact number and amount on the payments without any other limitations or conditions. The Wife also argued the life insurance obligation cannot be characterized as periodic alimony because the divorce decree states unequivocally that neither the Plaintiff nor the Defendant shall pay or receive alimony and that the life insurance requirement was not alimony. However, a court "will ascertain the nature of the awards as a matter of law on the basis of substance rather than on labels." Here, the amount the Husband would have to pay depends on how long the Husband will live and therefore life insurance is considered periodic alimony. The Husband's obligation terminated upon the Wife's remarriage and because the divorce decree did not expressly provide otherwise.

MATERIAL CHANGE OF CONDITION

Blue v. Hemmans, A14A0326 (May 23, 2014)

The parties were divorced in 2002 in Camden County with the Mother (Hemmans) having primary custody of the parties' two children and the Father paying child support of \$865 per month. In 2009, Father petitioned to modify based upon the Wife's move to Hawaii. The Court awarded custody of the son to the Father but left with the Mother the daughter who was then 14 years of age and able to make an election. In 2012, the Mother and the daughter moved from Hawaii to Washington State. In 2013, the Mother filed a petition to change custody in the Superior Court of Camden County seeking to have the Trial Court transfer sole custody of the son back to her. The Mother alleged that she and her daughter had been denied visitation and contact with the son and that the denial was a material change of condition affecting the son's welfare. A temporary hearing was held where the parties agreed to an in-camera interview with the son.

A Temporary Order was entered granting the Mother visitation with the son in Washington state. After the final hearing, the Trial Court concluded that the Father had wilfully acted to withhold the Mother's visitation and has continually denied the Mother overnight visitation with the son since entry of the 2010 Order. The Trial Court further concluded that the Father had failed to provide the son's school with notice of Mother's joint status thereby denying the Mother's right to participate in the son's school activities and that there had been a material change in conditions justifying a change of custody of the son. The Court also concluded that, based on what was said by the son during the first in-camera interview, the Court could give no weight to the son's affidavit that had been filed in the case. The Court also found no evidence was presented on which it could make a determination regarding modification of child support and the Court would require the Father to pay the Mother the amount of child support ordered in the 2002 decree which was \$865 per month. The Father appeals and the Court of Appeals reversed.

The Father contends the Trial Court abused its discretion because several material factual findings upon which the Trial Court relied in reaching its decision were unsupported by the evidence. It established that repeated denial of the non-custodial parent's visitation rights can constitute a material change in condition. However, the denial of visitation rights on a single occasion, without more, does not rise to the level of a material change in condition justifying a change of custody. Here, the Trial Court clearly erred in several of its factual findings that were material to its decision to change custody. The Trial Court found the Father had denied the Mother visitation with the son on multiple occasions and had continually denied the Mother's overnight visitation with the son. However, the evidence only showed that she was denied visitation with her son on one occasion, in the summer of 2011. The Mother had not testified to any other instances in which she sought to exercise her visitation rights that were afforded by the Father. Therefore, the Trial Court's findings regarding the extent to which the Mother had been denied visitation by the Father are unsupported by the record.

The Trial Court also relied on the findings that the Father had wilfully withheld from the son's school the fact that the Mother had joint legal custody. The only evidence presented at the hearing regarding school was the Wife's testimony about what the school officials told her during an April 12 trip to Camden County. The Father correctly objected to the testimony on hearsay grounds. Therefore, the Mother's hearsay testimony should have been disregarded by the Trial Court as inadmissible hearsay in light of the Father's objection. Therefore the Trial Court's finding that the Father interfered with the Mother's right to participate in school activities and to have access to school records was unsupported by competent evidence.

However, the Mother testified she was continually denied telephone contact with the son by the Father and that the Father blocked her number for a year, causing her to be unable to communicate with her son for months at a time. Therefore, the Mother's testimony was sufficient to support the Trial Court's factual finding regarding telephone contact. In total, the Trial Court clearly erred in some but not all of the factual findings it relied upon to support its conclusion that there was a material change of condition authorizing a modification in custody. If the Trial Court clearly errs in a material factual finding, the Trial Court's exercise of discretion can be affirmed only if the appellate court can conclude that, had the Trial Court used the correct facts and legal analysis it would have had no discretion to reach a different judgment. While the facts as stated above would be sufficient to sustain a finding of material change in condition in the present case, the Court would not say that those facts would absolutely demand such a finding by the Trial Court. Therefore, the case was remanded for the Trial Court to exercise its discretion under the corrected findings of fact.

MOTION FOR NEW TRIAL

Hoover v. Hoover, S14F0236 (April 22, 2014)

The Wife filed for divorce and requested a jury trial. The Court bifurcated the proceeding with the first hearing on child custody in a bench trial and reserving the issues of equitable division of property, alimony, and child support for the jury. After the bench trial in the child custody issue, the Trial Court issued a Court Ordered Parenting Plan which granted joint physical custody and legal custody of the minor children on June 15, 2012. An Amended Parenting Plan was entered on June 26, 2012 which was titled Second Order Amending June 15, 2012 Parenting Plan. Prior to the jury trial, a Settlement Agreement resolving all of the financial issues in the case was reached and the Trial Court entered a Final Judgment and Decree of Divorce on February 14, 2013. In addition to referencing the Settlement Agreement, the Final Judgment referenced the three Orders relating to the Parenting Plan and stated these Orders are incorporated herein and made part of this Final Judgment and Decree of Divorce. The Wife filed a Motion for New Trial on the custody issues on March 14, 2013 within 30 days of the day the Final Order and Decree was entered. The Trial Court granted the Husband's Motion to Dismiss the Wife's Motion for New Trial because the Court Ordered Parenting Plan was entered on June 15, 2012 and thus was untimely. The Wife appeals and the Supreme Court reverses.

Pursuant to O.C.G.A. §5-5-40(a), a Motion for New Trial must be made within 30 days of entry of the Final Judgment, unless otherwise provided by law. When more than 1 claim for relief is presented in an action, the Court may direct the entry of a Final Judgment as to one or more but fewer than all of the claims, only upon an express determination that there is no just reason for delay and upon an express direction for the entry of Judgment. In absence of such determination and direction, any order



or other form of the decision however designated, which adjudicates fewer than all the claims, shall not terminate the action as to any of the claims. In this case, neither the original Court Ordered Parenting Plan nor the two subsequent Orders amending the Parenting Plan include an express determination and direction making it a Final Judgment. The original Parenting Plan was not a final judgment as illustrated by the fact that the Trial Court twice amended it.

As in this case, child custody issues are ancillary to the divorce action and the determination of child custody does not transfer the case into a child custody case. The underlying subject matter is still the divorce action and its resulting Final Decree so the appropriate method for appeal is by the application for discretionary appeal. The fact that an order entered in a divorce action makes a determination as to child custody does not, without more, make the order a final judgment for the purposes of determining the time in which a motion for a new trial must be filed. Determination of child custody in this case became final at the time the Final Judgment and Decree of Divorce was entered. Even though the Wife's Motion for New Trial obviously referred to the bench trial on child custody issues it was timely filed within 30 days of the date of the Final Judgment in the case.

PARENTING PLAN/TRANSPORTATION

Williams v. Williams, S14A0510 (April 22, 2014)

After the parties' divorce, the Husband filed two motions, one to modify custody and reduce child support and the other to hold the Wife in contempt. Both cases were consolidated into one hearing. In the Court's order regarding visitation, the Trial Court stated the stepmother shall provide transportation for the minor child to school on Mondays but if the stepmother commits any driving offenses, then the transportation agreement will cease and the stepmother shall not be allowed to transport the minor child. The Court awarded \$2,000 in attorney's fees to the Wife as part of the child custody action. The Husband appeals and the case is affirmed in part, reversed in part, and remanded with direction.

The Trial Court's limitation of the ability of the Husband's new wife to drive the parties' child appears to be abuse of discretion. The Wife testifies that she heard that the Husband's new wife was taking medication and was worried about her ability to drive, but this testimony was speculation. None of the testimony constitutes actual evidence supporting the Trial Court's decision. In addition, although the Trial Court indicated its desire to limit the interaction between the Wife and the Husband's new wife, this concern has no bearing on the propriety of allowing the Husband's new wife to drive the parties' child around town when there would be no interaction with the Wife.

The Husband contends the Trial Court's Order modifying visitation failed to include a Parenting Plan. However, the Trial Court's Order explicitly states that all the terms and conditions of the original Parenting Plan

Chair's Comments from 3

The Legislative Liaison for our Section continues to be John Collar. There are numerous times throughout the legislative session that we need members input. Please contact John with any suggestions or if you are interested in becoming more involved in this aspect of our Section. As a Section, we are bound by the State Bar rules as to supporting or commenting on legislation. It is very important to follow the rules and regulations of the Bar when acting in an official capacity on behalf of the Section. This year, the Section has proposed to the State Bar, an amendment to O.C.G.A. §19-3-62(a), Attestation of Execution of Antenuptial Agreements, to require an instrument be in writing and attested by at least 2 witnesses, one of whom may be a notary public, eliminating the 2 witness rule in addition to a notary public.

As you may surmise, we have a lot of opportunity for Section involvement! I challenge you to get involved this year like never before!

In other fronts, the year is already well under way. Regina Quick is finishing up the planning for 2015 Family Law Institute. If you are interested in being a sponsor, or know someone who is, please let us know! Marvin Solomiany chaired a fantastic Nuts & Bolts in Savannah Aug. 22. Please consider attending Nuts & Bolts in Atlanta on Oct. 3. Bill Sams chairs the Augusta Family Law Seminar at Savannah Rapids on Oct. 17. His agenda is a show stopper as well! To sign up for either of these CLE opportunities, please go to www.iclega.org. And, don't forget to attend the YLD Family Law Section 9th annual Supreme Cork wine tasting and silent auction benefiting the Guardian ad Litem Program and the Safe Families Office of the Atlanta Volunteer Lawyers Foundation on Oct. 16, at 5 Seasons Brewing Company Westside. More information may be found at www.thesupremecork.org.

Finally, we bid some farewells and a welcome to the Executive Committee. After 5 years of dedicated service on the Executive Committee we bid farewell to Kelley O'Neill-Boswell. Kelley provided a great impact to the Executive Committee and will be missed but I am sure she will continue to be a great presence in the Section – and will volunteer! Kelly Miles completes her many years of service to the Executive Committee after her final year as Immediate Past Chair. I will miss her and look forward to continuing to work with Kelly, as I am sure she too will volunteer her time and talent! And, we welcome Kyla Lines. I am sure she will provide new insight and energy to our group!

There's a lot to do, so let's get started! *FLR*

entered in the underlying divorce action not modified herein shall remain in full force and effect unless same conflicts with this Order. Therefore, the Trial Court's ruling in this case does in fact contain a Parenting Plan.

The Husband also argues the Trial Court admitted from its Final Order a change in the weekend visitation mutually agreed upon by the parties. This contention is supported by the transcript. In fact, both Husband and Wife testified that they were already following the Friday through Monday schedule and both parties wished to continue it. In addition the Trial Court's Order indicates the stepmother may drive the child to school on Monday mornings. Therefore, the provision makes little sense if the Trial Court was not contemplating the Husband retain custody through Monday morning. Therefore, to the extent the Order reflected the Husband's visitation would end on Sunday night it was not a valid exercise of the Trial Court's discretion but a mistake in reciting a matter agreed upon by the parties.

The Husband also contends the Trial Court erred in awarding \$2,000 in attorney's fees to the Wife as part of the child custody action. The Order states Husband and Wife had made a motion for attorney's fees and that it is hereby ordered that the Wife recover \$2,000 of attorney's fees from the Husband. There is no statutory basis given, no statutory language used and no findings of fact are presented. As a result, there is no way to be certain whether the Trial Court awarded fees based on O.C.G.A. §19-9-3(g) or some other statute. Therefore, the award of fees is vacated or remanded for statements of statutory basis of fee as well as any other required supporting facts.

PASSPORTS

Ansell v. Ansell, A14A0308, A14A0309 (July 10, 2014)

The parties were divorced in 2007 and had one child, with the Mother awarded primary physical custody. In 2011, the Father filed contempt and a Complaint for Modification of Custody, seeking, among other things, an order limiting the child's travel outside of the United States until the child obtained a valid U.S. passport (the old passport had expired). The Trial Court found the Mother in contempt and ordered her to pay a fine, denied the Father's claim for attorney's fees, increased the Father's visitation and required the Father to cooperate with the Mother in executing the necessary documents to obtain a passport for the child. Both parties appealed and the Court of Appeals affirmed in part, vacated in part, and remanded.

At the hearing, the Mother informed the Court that the child's passport expired and she sought to renew it so the child could travel internationally. The Father testified he knew the Mother was from Russia and that the child had previously traveled to Russia. However, the Father testified he objected to renewing the child's passport and that he would not cooperate in renewing it. Neither party presented to the Court any legislative authority either permitting or prohibiting the Court from granting the Mother's request regarding the passport.

The Father correctly argued on appeal that because he has joint legal custody of the child, federal regulations governing the issuance of a passport to minors requires his consent to the issuance of the child's passport. However, under the Federal regulation of 22 CFR §51.28(a)(3)(ii)(E) authorizes a Trial Court to issue an order permitting the Mother to obtain a passport for the minor child without the Father's written consent. Here, neither party reviewed or discussed the Federal regulations with the Court. The intent could have been carried out by expressly authorizing the Mother to obtain a passport for the child without the consent of the Father. Issuance of passports to a minor child is a matter governed by Federal law. The record in this case does not reflect that a Trial Court consider the Federal regulations expressly recognized in a Court's order as means by which a person may obtain a passport for a minor child if the parent is unable to obtain a notarized written statement or affidavit of consent by the other joint custodial parent. Therefore, that part of the trial order is vacated and remanded for the Trial Court to reconsider a grant of relief to the Mother in accordance with the Federal regulations.

RECUSAL

Murphy v. Murphy, S13G1651 (June 30, 2014)

The parties were divorced in 2006. In 2012, the Father filed an action seeking to modify child custody and, after the case was assigned to Judge Baldwin, Ms. Murphy (Mother) moved to disqualify Judge Baldwin. Judge Baldwin denied the Motion and Ms. Murphy filed a notice of appeal. The Court of Appeals dismissed Ms. Murphy's appeal for lack of jurisdiction and the Supreme Court granted certiorari from the Court of Appeals.

The Court of Appeals implicitly determined that the order at issue was directly appealable when the action was



filed, when the order was entered and when the appeal was filed; but, by the time the Court of Appeals reviewed the appeal in July, 2013, it was constrained to apply the 2013 legislative narrowing of O.C.G.A. §5-6-34(a)(11) and to dismiss the appeal. This was a flawed “retroactivity analysis” as all salient dates occurred prior to the effective date of the amendment. However, even under the prior version of O.C.G.A. §5-6-34(a)(11) there was no right of a direct appeal from a recusal order. Subsection (a)(11) provides for direct appeals only from “[a]ll judgments or orders in child custody cases awarding, refusing the change, or modifying child custody of holding or declining to hold persons in contempt of such custody judgments or orders.” Clearly, the recusal ruling is not such an order and therefore the dismissal of Ms. Murphy’s appeal was warranted under both the current and prior versions of O.C.G.A. §5-6-34.

RELOCATION

Gunderson vs. Sandy, S14A0759 (June 30, 2014)

The parties were divorced in 2010 with both parents having equal physical custodial time with their children. In pertinent part, the settlement stated that neither party shall permanently relocate his or her primary residence beyond 15 road miles from the marital home awarded to the Wife for so long as their children is a minor or still attending high school full time. The Mother remarried and moved and the Father filed a contempt action alleging that she resided 45 miles from the marital residence and the parties still had a minor child. The Trial Court granted the Father’s Motion for Contempt and ordered the Mother to move back into the school district in which the Father lives and in which the parties’ minor child attends school. The Mother appeals and the Supreme Court reverses and remands.

Here, it appears undisputed that the Mother move more than once without giving required notice and at the time the contempt motion was filed had moved more than 48 road miles from the marital residence referenced in the agreement. The Trial Court did not err in finding the Mother in contempt, but the portion of the contempt order that addresses the relocation agreement impermissibly modifies the divorce decree. The original decree required the Wife to live no more than 15 road miles from the home in which she resided at the time of the decree. The contempt order however, requires her to move into the school district where the minor child is enrolled in school. The Mother points out that it would be possible for her to reside within the geographical limitations imposed by the decree and still live outside the school district. The Trial Court’s order requiring the Mother to move back into the school district in which the minor child is enrolled in school amounts to an unauthorized modification of the decree. Therefore, it is reversed and remanded.

TPO

Chatman v. Palmer, A14A0596 (July 11, 2014)

The Father legitimated the child in 2003; and, in 2007, a

final custody order awarded joint custody, with the Mother being the primary physical custodian. In 2009, the Mother filed for a Protective Order alleging the Father had pushed her, grabbed her by the throat and choked her. An ex parte protective order was issued and, following the hearing, the Court entered a 12-month TPO which only allowed the Father supervised visits with the child. In November 2010, the Mother requested a hearing for a permanent Protective Order and the Court entered a 3-year Protective Order, ordering the Father could have no visits with the child until a therapist states, in writing, that the child can visit without fear of physical or mental injury. In 2012, the Mother filed a Motion for Contempt and the Father filed his own Motion for Contempt. The Court entered another custodial order granting the Father transitional supervised visitation and the remaining visitation to be unsupervised at the Father’s home. In September of 2012, the Mother filed an emergency ex parte motion for suspension on modification of visitation in that the child’s psychiatrist’s opinion was that it was not in the best interests of the child to have unsupervised visitation with the Father. The Court denied the emergency hearing, but held a hearing in October where several witnesses testified. In November 2012, the Trial Court entered a Temporary Order granting the Father full temporary custody of the child and prohibited the Mother from having any visitation with the child pending the entry of the Final Order. In December, the Court entered a Final Order awarding joint custody to the parties with the Father having primary custody with the Court stating that the Mother seeks every opportunity to purposely interfere with the relationship between the Father and the son. The Mother appeals and the Court of Appeals reversed in part, vacated in part, and remanded.

The Mother asserted that the Trial Court erred by changing custody in the Protective Order. For a change of the primary physical custody, the Father was required to file an action in the county where the custodial parent resided. Pursuant to O.C.G.A. §19-9-23(a), after a Court has determined who is the legal custodian of a child, any complaint seeking to obtain a change of legal custody of the child shall be brought a separate action in the county of residence of the legal custodian of the child. Here, the Father did not file a separate action for custody. The Trial Court found that the Mother waived any defense of lack of jurisdiction or improper venue. Even assuming that the Father properly asserted change of custody in that the Mother waived defense of lack of jurisdiction and proper venue, the Trial Court was without authority to make a change in permanent custody in his Temporary Protective Order action. The Family Violence Act cannot be a vehicle used to modify custody.

The Trial Court did have discretion to modify a permanent Protective Order or to terminate an order, returning the parties to the status quo of 2007 Final Order of custody. While the Court may have correctly concluded there was evidence of a material change in condition affecting the welfare of the child, the Court simply cannot grant a change in permanent custody based on that factual finding, but must rather exercise its broad discretion

pursuant to the permanent Protective Order. If the Father still desires a change in permanent custody then he must file a separate action in DeKalb County.

VOLUNTARY DISMISSAL

Reed v. Reed, S14F0321 (July 11, 2014)

In 2011, the Husband filed a pro se Complaint for Divorce from the Wife. The Wife responded to the Complaint and filed a Counterclaim for Divorce. In February of 2002, the Husband filed a voluntary dismissal of his Complaint pursuant to O.C.G.A. §9-11-41(a)(1). The Wife filed a notice of hearing on her Counterclaim and the Husband filed a motion seeking a dismissal or continuance explaining that he had already voluntarily dismissed the case and that the Trial Court did not have jurisdiction over the Counterclaim. The Court denied the Husband's motion for dismissal or continuance. After the hearing, the Court entered a Temporary Order awarding the Wife one-half of the Husband's military retirement pay and attorney's fees. The Court continued to refuse to dismiss the Husband's Complaint and entered a Final Order granting a divorce in April, 2013. The Husband appeals and the Supreme Court affirms.

Although merely filing a Counterclaim is itself insufficient to prevent the dismissal of the Plaintiff's Complaint and Counterclaim, and a Defendant must object to the Plaintiff's voluntary dismissal, thereby providing notice to the Plaintiff that he intends to pursue his Counterclaim. If the Counterclaim can remain pending for independent adjudication, then the Trial Court may dismiss the Plaintiff's Complaint and proceed with the case on the Defendant's Counterclaim. On the other hand, if the Counterclaim cannot remain pending for independent adjudication, then the Court may not dismiss the Plaintiff's Complaint over the Defendant's objection.

In this case, the Wife did not file a formal objection. However, a defendant may sometimes preserve his Counterclaim through action short of the formal objection to a voluntary dismissal of the main claim. Here, the Husband filed a notice of dismissal, then the Wife filed notice of hearing, putting the Husband on notice that she intended to pursue her Counterclaim and did not consent to or acquiesce in having her Counterclaim dismissed. In addition, the Wife's Counterclaim was a complete claim which could then be adjudicated without regard to the Husband's Complaint and, therefore, the Trial Court should have dismissed the Husband's claim. Even though the Trial Court erred by not dismissing the Husband's Complaint, it is of no consequence because both the Husband's Complaint and the Wife's Counterclaim sought a divorce and equitable division of property. *FLR*



Vic Valmus graduated from the University of Georgia School of Law in 2001 and is a partner with Moore Ingram Johnson & Steele, LLP. His primary focus area is family law with his office located in Marietta. He can be reached at vpvalmus@mijs.com.

New System Suspends Driver's Licenses of Parents' Delinquent on Child Support

by Michael D. Deeb
mdeeb@ksfamilylaw.com

On Aug. 20, 2014, a new, automated system went into effect in Georgia linking the Department of Human Services to the Department of Driver Services. The system operates to transmit the information of any parents who are delinquent on their child support obligations to the state's Department of Driver Services database, which then automatically suspends said parents' driver's licenses without any human intervention. The far reaching consequences of this new system are sure to result in many local family law attorneys receiving phone calls from affected parents, which will likely require multiple phone calls and the development of a payment plan with the Child Support Division of the Department of Human Services to rectify the situation. *FLR*



Michael Weinstock

March 19, 1951 – July 5, 2014

by Adam M. Gleklen

On July 5, 2014 Michael Weinstock passed and the Atlanta legal community lost the finest trial lawyer I have ever seen. Michael was born and raised in Pittsburgh, Penn., and he grew up in a not so nice area of town. Michael learned to fight – physically and verbally – at a young age and he maintained his feisty spirit throughout his long legal career. I had the incredible great fortune to work alongside Michael for 15 years from the day I graduated law school and he became my mentor – and my friend.

Anyone who ever had a case with Michael will surely have a story about their encounter. There is no question Michael was often difficult for opposing counsel to deal with during litigation. After stepping away from the practice of

law, I believe Michael looked back and realized there were times he may have pushed too hard. But, Michael pushed so hard because he truly was so passionate about his case, the job he was doing for his client and the profession he loved.

For those who undertake an honest appraisal of their dealings

with Michael, they will be forced to acknowledge Michael's passion for the law, his zealous advocacy for his clients, his creative mind and his brilliance in the courtroom. Michael gave the most powerful closing argument I have ever seen when he defended a white woman against race discrimination charges in Federal Court in Birmingham, Alabama before an African American Judge, and got a defense verdict from the mostly African American jury in about 2 hours. You should consider yourself lucky if you ever had the opportunity to watch Michael cross-examine a party - especially on financial issues and especially in front of a jury. He really was a master in the art of the cross. One lawyer (now a sitting Judge) said it best about Michael's cross-examination skills: Michael would ask a question of a witness at the beginning of his cross that nobody knew why, but by the end of the cross, his point was clear and he would leave the witness tied up in knots.

Not everybody had the good fortune to get to know Michael the way I did – on a personal level outside the practice of law. What I learned about Michael that I truly wish all of my fellow family lawyers had gotten to know: Michael had a heart of gold, he would give you the shirt off his back and he would do absolutely anything for family. Michael was a loving, dedicated and devoted husband and father and family man. For his law partners and associates, they were family, too. Michael was a pivotal person in my life who made me a better lawyer, a better father and a better man. He will be missed.

May he rest in peace . . . *FLR*



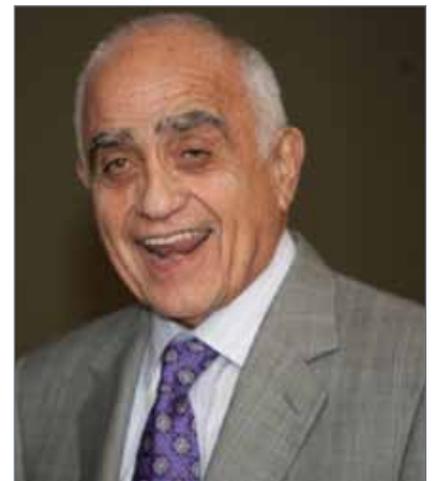
George S. Stern

Feb. 16, 1937 – July 2, 2014

by Gary Graham

We note with sadness the passing, on July 2, of George S. Stern. George practiced family law for approximately 40 years, and was a pillar in the family law community. One of his many accomplishments was receiving the Jack P. Turner award from the Family Law Section of the State Bar of Georgia in 2012, which recognized his career and devotion to the practice of family law with substantial and significant contributions to improve and advance the practice of family law in the State of Georgia. It also recognized George as an outstanding lawyer, a record of integrity and fairness, a commitment to assist other members of the Bar and the practice of family law, and by taking the practice of family law to a higher level of increased respectability and recognition.

George will be remembered for his upbeat style, courtroom charisma and contributions to the family law community. George was a special lawyer, and an even better father, husband, friend, and mentor. George will be sorely missed by all of us. *FLR*



Attorneys' Fees Under O.C.G.A. § 19-6-2:

Don't overlook the timing of the hearing during your analysis.

by Brandon T. Guinn

An award of attorney's fees in Georgia must generally be specifically authorized by statute or contract.¹ Georgia Code Section 19-6-2 provides essentially the only² basis for an award of attorney's fees in a divorce where neither party's conduct rises to the level of litigating in bad-faith. Section 19-6-2 provides a basis for an attorney to assure clients who lack access to funds, marital or otherwise, that fee awards are available and likely to be awarded. Even if this advice is correct at the time it is given, however, it may change over the course of the litigation. Applying the standard set forth in the cases interpreting section 19-6-2, it may be critical that a prayer for attorney's fees be heard before equitable division and support are determined.

Section 19-6-2 provides, in relevant part, that "[t]he grant of attorney's fees...made at any time during the...litigation... shall be...[w]ithin the sound discretion of the court, except that the court shall consider the financial circumstances of both parties as a part of its determination of the amount of attorney's fees, if any, to be allowed against either party..." O.C.G.A. § 19-6-2(a). The plain reading of the statute casts the impression that so long as financial circumstances are a part of the court's consideration, fees may be awarded at the discretion of the judge. This simplified reading has led many of us to misapply this standard - believing that settlement positions, litigation tactics and the reasonableness of fees are to be considered hand-in-hand with financial circumstances.

On the contrary, the court must make a determination that, based upon the relative financial circumstances of

the parties, a fee award is necessary to ensure the recipient spouse is able to afford representation before it considers settlement positions, trial results, the amount of fees incurred, or other "fee drivers".³ The trial court in *Jackson v. Jackson*⁴ received evidence of the parties' financial positions during the final hearing and gave wife's attorney a deadline for submitting an affidavit regarding the wife's fees. Prior to expiration of this deadline, however, the court denied the wife's fee request. The Georgia Supreme Court upheld the trial court's decision, as the court was not required to look at the actual fees incurred when the first level of inquiry, i.e. financial disparity, was not satisfied. *See also Findley v. Findley*, 629 S.E.2d 222, 230, 280 Ga. 454 (2006) ("the record must contain evidence the parties' financial circumstances were such that the...attorney fee award was to ensure that the [litigant] could afford effective representation)."

The important point to take from this is that the factors at the forefront of most practitioners' minds when analyzing the probability of fee awards (settlement positions, litigation tactics, hours billed, amounts billed, etc.) are only relevant to the amount of fees awarded. These facts and circumstances have no bearing as to whether a party is entitled to fees in the first instance.⁵ In other words, these factors are not relevant to the initial determination of whether disparate financial circumstances exist so as to authorize a fee award. In *Weaver v. Weaver*⁶ the Georgia Supreme Court reversed a fee award which the trial court had based upon a litigant's reasonableness. In doing so the Court stated that "evidence of a spouse's willingness to reach a settlement may be relevant to the issue of the amount of attorney fees awarded [but] whether a party is at 'fault' for a refusal to settle is wholly irrelevant to the inquiry whether attorney fees should be awarded in the first instance."⁷ *See also Jackson v. Jackson*, 651 S.E.2d 92, 282 Ga. 459 (2007) ("Husband's alleged unwillingness to settle...was irrelevant to the inquiry whether attorney's fees should be awarded.").

The inquiry into the parties' financial circumstances is all encompassing.⁸ In fact, a cursory or superficial inquiry and bare-bones finding will not suffice. In *Moon v. Moon*⁹, the Georgia Supreme Court vacated a trial court's award of fees based on section 19-6-2 "because the only evidence of the parties' financial circumstances" were the parties' respective gross monthly incomes. The inquiry into "financial circumstances" includes marital and separate assets, marital and separate debts, as well as the parties' age, physical condition, current, past and present income and income potential.¹⁰ Expanding perhaps beyond simply another alimony litmus test, the inquiry includes financial assistance received from family members,¹¹ prior fee awards,¹² and "other equitable factors."¹³ Most importantly, if the review is being conducted post-judgment, the assets,



debs, alimony and child support awarded to or against each spouse must be taken into account.¹⁴

Since carrying the burden of showing disparate financial circumstances is necessary, it is prudent to both analyze the parties' current financial circumstances and project the likely financial circumstances after equitable division, alimony and child support have been determined. The resulting "equitable" financial positions of the parties after division and support determinations may well foreclose many attorneys' fees claims that would have been viable only months earlier. If, on the other hand, one party is incurring significant debt in paying for representation while the other party is utilizing marital funds, a fee award may become more likely.

Before a final disposition, liquid accounts may be entirely in one spouse's name, likely that of the "breadwinner" or sole income earner. Without income and without access to liquid funds, the non-earning spouse likely meets the initial burden of showing disparate financial circumstances. After equitable division and any alimony or child support award, however, the spouse without access to funds may well be placed on equal or nearly equal financial footing. Even having a significant income disparity after disposition may not, alone, meet the burden of disparate financial circumstances.¹⁵ Likewise the burden may not be met by isolated showings of disproportionate earning potential, separate property or financial assistance from others.

In some instances, financial circumstances may become more disparate after a final hearing and thus enhance a party's claim for fees. Additionally, the source by which the parties are financing the litigation may enhance or diminish financial disparities. For example, the wife in *Jarvis*¹⁶ borrowed funds from her mother to pay attorney's fee while the husband received gratuitous support from his mother. Both parties in *Patel v. Patel*¹⁷ paid for their respective representation from marital funds. The payment of fees themselves expanded the financial disparities in *Jarvis* while disparity was reduced in *Patel*, thus playing a significant role in the finding of financial disparity (*Jarvis*) or not (*Patel*).

The burden of showing financial disparity can also provide a valuable defense to attorney's fees. Without a showing of disparate financial circumstances, a court should not consider a stubbornly litigious stance, settlement offers far from a final outcome, excessive discovery, the reasonableness of fees incurred, or any of the other fee factors that weigh in our minds. Moreover, the purpose of an award under section 19-6-2 is to "ensure effective representation of both spouses so that all issues can be fully and fairly resolved."¹⁸ If the case has been resolved and equitable division, alimony and child support were within the realm of a normal outcome, then the fee award cannot serve its mandated purpose. *See also dicta* from *Weaver v. Weaver*, 428 S.E.2d 79, 263 Ga. 56 (1993) ("Attorney fees are awarded to a spouse for the purpose of enabling that spouse to contest the issues raised in *pending* proceedings.") (emphasis added).

Prior to weighing any other factor, a court considering a fee request under Georgia Code Section 19-6-2 must find a financial disparity between the parties so as to render a fee award necessary to secure representation for the recipient party. As financial circumstances between husband and wife may shift significantly from the filing of an action to the resolution of an action it becomes prudent, if not necessary, to consider both the timing of the fee hearing and the potential changes in the parties' financial landscape. Understanding and utilizing the initial burden of showing financial disparity can help reap and defend fee awards under O.C.G.A. § 19-6-2. *FLR*



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(Endnotes)

- 1 *Moon v. Moon*, 277 Ga. 375, 589 S.E.2d 76 (2003).
- 2 O.C.G.A. § 9-15-14 authorizes attorney's fees only for abusive litigation. O.C.G.A. §§ 19-6-18, 19-6-15(k)(5), 19-6-19(d), 19-6-22 all authorize fees only in context of support *modification*. O.C.G.A. § 19-9-3(g) authorizes fees in custody matters "[e]xcept as provided in Code Section 19-6-2." (emphasis added).
- 3 *See Patel v. Patel*, 677 S.E.2d 114, 117, 285 Ga. 391 (2009) ("O.C.G.A. § 19-6-2(a)(1) authorizes a trial court, *after* considering the financial circumstances of the parties, to exercise its discretion to award attorney fees...") (emphasis added); *Gomes v. Gomes*, 278 Ga. 568, 604 S.E.2d 486 (2004) and *Jones-Shaw v. Shaw*, 291 Ga. 252, 728 S.E.2d 646 (2012) (Trial courts in both cases affirmed in not awarding fees where no disparity of financial circumstances was shown).
- 4 651 S.E.2d 92, 282 Ga. 459.
- 5 *Jackson v. Jackson*, 651 S.E.2d 92, 94, 282 Ga. 459, 461 (2007), *Weaver v. Weaver*, 428 S.E.2d 79, 80, 263 Ga. 56 (1993).
- 6 428 S.E.2d 79, 263 Ga. 56 (1993).
- 7 *Id.* at 56.
- 8 *Jarvis v. Jarvis*, 291 Ga. 818, 733 S.E.2d 747, 750 (2012) (Stating "there is no statutory limitation on the type of evidence of 'financial circumstances' a trial court may consider when [making] a fee award under O.C.G.A. § 19-6-2...").
- 9 277 Ga. 375, 379, 589 S.E.2d 76 (2003)
- 10 *Jarvis; Mixon v. Mixon*, 278 Ga. 446, 603 S.E.2d 287 (2004) (Fee award upheld where trial court considered age, health and ability to work and financial circumstances); *Wood v. Wood*, 655 S.E.2d 611, 283 Ga. 8, 9 (2008) ("both parties' employment, assets, debts, income streams, and potential for future earning" as well as wife's separate property and wife's pension considered in financial circumstances).
- 11 *Jarvis*.
- 12 *Miller v. Miller*, 288 Ga. 274, 705 S.E.2d 839 (2010).
- 13 *Id.*
- 14 *Jarvis*.
- 15 *See Moon*, 277 Ga. 375, 380, 589 S.E.2d 76, 81 (2003) (award not authorized merely because disparity in income).
- 16 291 Ga. 818, 733 S.E.2d 747, 750 (2012)
- 17 677 S.E.2d 114, 117, 285 Ga. 391 (2009)
- 18 *Wood v. Wood*, 283 Ga. 8, 11, 655 S.E.2d 611 (2008), *Johnson v. Johnson*, 260 Ga. 443, 396 S.E.2d 234 (1990).

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