Finding Hidden Income and Secreted Assets in Divorce
Editors’ Corner

by Gary Graham
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I have the privilege of being the Section’s incoming Secretary and as such, this edition will be my last as editor of the Family Law Review. It has been an honor to serve as editor. I thank and acknowledge my editorial board (Randy Kessler, who will continue as Editor Emeritus, Kelly Miles, Kelly O’Neill-Boswell, David Marple and William Sams Jr.) for their hard work and contributions. We truly hope that you have enjoyed and learned from the FLR during our tenure. I am excited that Scot Kraeuter will be taking over as the editor of the FLR. I am confident that Scot will do a great job, and continue the excellence of the FLR. I wish you all a successful and healthy last half of 2015. FLR

Editor Emeritus

by Randy Kessler
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Change often moves us forward and once again the Family Law Review has moved forward. Scot Kraeuter has come on board, full of energy, and he is advancing the Family Law Review as the new editor. This issue has many submissions, particularly from financial experts across the country that will help all of us elevate our practice and become even more knowledgeable on matters that are becoming increasingly important as we litigate complex and confusing divorce cases. We also continue to appreciate the Case Law Update so well done by Vic Valmus. It remains my pleasure to continue to serve as Editor Emeritus and I am looking forward to next year’s Family Law Institute in Jekyll Island to be chaired by Marvin Solomiany, who has more energy and drive than any lawyer I know. Thank you for continuing to read and appreciate the Family Law Review and allowing me to continue to serve. FLR

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

If you would like to contribute an article or have an idea for content, please contact Scot Kraeuter at scot@jdklawfirm.com
What a great year we had! It has been my pleasure to serve as Chair of the Section, and with an incredible Executive Committee as well as fantastic lawyers and judges across the state! Working under the call of 2014-15 State Bar President Patrise M. Perkins-Hooker to increase our pro-bono service and access to justice for indigent and marginally employed citizens, many of you took on pro-bono representation throughout the year, and I thank you for your service.

I am most proud of the State wide initiative we took this year to assist Georgians in need. Under the leadership of Katie Connell along with Executive Committee members Leigh Cummings and Tera Reese-Beisbier, and with the assistance of Mike Monahan, director of the Pro Bono Project of the State Bar, we launched a Statewide Helpline to assist low income Georgia citizens with the Child Support Worksheet. The Helpline provides one-time assistance for unrepresented low and moderate-income Georgians who need help with Georgia’s mandated Child Support Worksheets. Volunteer lawyers from the Section will assist callers with the calculator in preparing the required worksheets. Please volunteer! See the flyer in this issue about volunteering or contact Katie directly at kconnell@bcntlaw.com. We are grateful to Georgia Legal Services Program, serving 154 counties outside Metro Atlanta, for partnering with the Section to launch the Helpline. This is an opportunity for Section members to give back to Georgians in need of legal services who cannot afford it – the very mission of Perkins-Hooker. I look forward to seeing this initiative blossom and to obtaining hundreds of volunteers!

With the recent Supreme Court ruling on same-sex marriage, the Legislative Committee will have lots of work in the upcoming Session. I am confident that Regina Quick, section chair, who also serves in the Georgia House of Representatives as the District 117 Representative, and newly named Legislative Liaison, Pilar Prinz, will navigate our Section through the needed revisions to the Georgia Code in light of the Supreme Court ruling.

As recognized at the Family Law Institute (FLI), I thank John L. Collar for his years of service to the Section as an At-Large member and Legislative Liaison. He gave countless hours to the membership and was a known entity at the Capitol during the Session. Thank you, John!

Our Diversity Subcommittee, under the leadership of Ivory Brown has been instrumental in expanding the subcommittee to serve the bench and bar across the state. The subcommittee has associated with judges throughout Georgia to identify and aid diversity on a statewide level.

We had a fantastic FLI with a record attendance of more than 625 participants. Regina outdid herself with “The Art of Love and War.” We look forward to 2016 FLI in Jekyll Island under the leadership of Marvin Solomiany. Make your reservations early as it is set to be the best FLI ever! The dates are May 19-21, 2016. And, don’t forget to make plans to attend the Nuts & Bolts of Family Law in Savannah and/or Atlanta under the leadership of Gary Graham.

The has just seen a glimpse of the tremendous work of the Executive Committee which earned the Section a State Bar of Georgia Section Award of Achievement for the 2014-15 year, awarded at the Annual Meeting in Stone Mountain. I look forward to the continued momentum of service under the leadership of Regina Quick and her officers, Marvin Solomiany, chair-elect and Gary Graham, secretary as well as the other members of the Executive Committee listed on the back cover of this issue. I also welcome the two new members, Lane Fitzpatrick and Bert Guy as well as returning member Kelly O’Neill Boswell.

Again, I thank you for the confidence you had in me to serve as your Chair! Here’s to a great 2015-16!
Finding Hidden Income and Secreted Assets in Divorce

by Miles Mason Sr.

Finding hidden assets and hidden income in a divorce case requires a team—a forensic accountant, a lawyer, and the client. Let’s agree to refer to both a spouse who owns a business and the business itself as the collective “target” of the team’s efforts to uncover hidden assets and income.

Even though divorces require both parties to identify, classify (as marital property vs. separate property), and value assets and debts, not all parties in divorce cases are forthcoming with all financial information, and this calls on the team to be thorough, persistent, and even imaginative in chasing down critical financial information.

Accountants with a broad knowledge of forensic accounting will have this persistence and imagination when it comes to where to look. They will know through experience that taxpayers are highly motivated to report the lowest possible income on tax returns, so many targets are glad to hand over tax returns in divorce cases as the sole determinative information about income. Other sources of income and wealth—present and future—bear searching for, however, because they can possibly mean hundreds of thousands of dollars more for a client in years to come.

Here are the steps to a typical hidden income and hidden assets divorce case:

Step 1: The lawyer must recommend the client hire an experienced and credentialed forensic accountant.

Lawyers should get CPAs involved as early as possible in engagements. Getting started early can mean the difference between success and failure. Not all accountants are forensic accountants, not all forensic accountants are business valuation experts, and not all business valuation experts are accountants. It is thus very important to teach lawyers to distinguish among various accountants’ credentials.

Forensic accountants most commonly sport the credentials “CFF” (Certified in Financial Forensics), which is an AICPA certification, or “CFFA” (Certified Forensic Financial Analyst), which is a National Association of Certified Valuators and Analysts (NACVA) certification.

Lawyers should look for forensic CPAs who are in the Forensic and Valuation Services Section of the AICPA and/or NACVA. These are the CPAs who most frequently serve as experts in divorce cases. Their experience in asset and income investigations, preparing reports, and testifying is very important. Being active on the forensic side of accounting, attending conferences, publishing in the field, and speaking at conferences indicate a commitment to this highly specialized and technically demanding arena. Lawyers should interview more than one forensic CPA before making the final recommendation to clients.

After conflict checks are cleared, candidates should be asked for their curriculum vitae, references from other attorneys, and rates and required retainers. Keep in mind, though, that the most expensive forensic accountant will not necessarily be the best fit for a particular case.

Experienced family lawyers will have forensic accountants with whom they have worked in the past. Up and coming family lawyers may not. The best lawyers often look to work with a diverse set of experts. It’s better practice to not work with the exact same expert witnesses case after case. Furthermore, accountants breaking into the profession need to let as many family lawyers as possible know they are available. Some clients’ budgets are very tight. Many times, it can make sense for family lawyers to work with a CPA looking to break into this very competitive field at a significantly lower hourly rate than the CPA with 25 years’ experience in the field.

Experience can bring gravitas to performance. Gravitas can be very important in the courtroom. Many CPAs have the education, training, and general accounting experience
to do the work, which may simply comprise wading through all the financial evidence. In addition, having the CPA credential alone can mean having the education, training, and experience sufficient to support designation by a judge as an expert witness. As an expert witness, the CPA can rely on hearsay. This means the mounds of paperwork relied upon can be made admissible into evidence regardless of how old the CPA may be or how long the CPA has practiced forensic accounting. For all lawyers and all cases, this can be very valuable.

Step 2. Interview the client.

Once they have been hired, CPAs must interview the client. Ask not only what the client knows but also what he or she suspects. Who can help the target underreport income or hide assets? A business accountant? A CPA? A shady golfing buddy/financial advisor?

The client may say that the target has bragged about underreporting income on tax returns, has removed cash at work, has “fudged” on loan applications, or is generally secretive concerning personal and business finances. Has the target been complaining recently but uncharacteristically about how bad business is? A drop in earnings could signal that the target has started deferring income or deflecting it into an offshore account.

A client may be able to come up with leads about a target’s unusual trips to Las Vegas (to put cash on account at a casino?) or to countries that are tax havens with relaxed banking laws. Even if the client has bought into explanations for such trips, these red flags bear looking into.

Step 3. Round up all the documents you can.

A critical early step is rounding up all immediately available documents wherever they are—in a filing cabinet, a computer, or boxes in the attic. “Documents” refers to hard copies and electronic versions alike. Mailed bank statements are also generally available on the Web. The rule of thumb is to get both hard copies and electronic files if possible. Assemble all these low-lying fruit first.

The client should not wait until all documents are gathered before getting them to the lawyer. In addition, no team member should decide on the importance of any one document right off the bat. A seemingly innocuous transaction listing an amount or date on one among thousands of pages could end up being very important if it validates the client’s testimony or contradicts that of the target.

Search for financial statements, stock options, brokerage account statements, and other investment information, including pension/retirement plans. Income tax returns, attachments, and supporting schedules also warrant scrutiny. Pay statements and employment agreements should not be overlooked. Bank account information, business ownership records, and business and personal credit card statements should be scoured. Insurance asset schedules, real estate and mortgage information, and wills and estate planning documents also bear looking into.

The team will need as many records as possible in the divorce process—there’s no such thing as too many or too soon. One document often leads to another. It’s like following a trail of breadcrumbs.


In civil litigation, parties have a right to discovery. Discovery is a series of legal processes by which information is gleaned from others, including adversaries. Common examples of discovery include interrogatories, document production requests, depositions, and subpoenas.

In many states’ laws, income determination and the existence of assets affect property division, alimony, and child support. Income-generating investments are almost always included as income for the calculation of child support.

Interrogatories require written responses to specific questions under oath and subject to perjury laws. Requests for documents must also be specific, but their production may not be under oath.

The target’s documents can be just as important as those the client gathers, so the team has to be very thorough and specific in what it requests. This may require issuing subpoenas to credit facilities, CPAs, financial advisors, and others.

Personal and business financial statements submitted to banks and other lenders by the target should be subpoenaed when possible. The target has a financial incentive to report higher net worth, assets, and income to lenders in order to secure greater borrowing limits and lower interest rates. These statements could lead to the discovery of assets, investments, and valuations that don’t show up in tax returns.

A forensic accountant will know what documents to ask for in addition to the obvious tax returns, financial statements, and loan applications. One very important document can be general ledgers. They can contain details such as strange transactions, unusual journal entries, questionable loans, and personal rather than business expenses. Family lawyers might not understand the importance of a general ledger, but an experienced forensic accountant will be able to delve into it and possibly come up with hidden income and assets.

Also, issue a subpoena to the target’s CPA. If the business’ CPA also prepares the tax return of the parties, the client can ask for the personal tax returns and certain supporting records without a subpoena. Business bookkeepers, key members of management, shady financial advisors, and others in a position to assist a target can be deposed.

Depositions typically take place after the review of business and personal financial records is pretty much completed. The investigation frequently generates a long list of important follow-up questions that can only be answered by the deponent.

If a target lied when answering interrogatories or didn’t produce an important requested document, the client’s
lawyer can impeach the target. If a lie is uncovered after a settlement, the spouse can use that evidence to reopen the divorce. Because interrogatories can be of such importance, it's critical that the right questions be asked. Answers under oath can be critical. Contradictions between statements and documents must be explored.

Step 5. Let the forensic accountant apply methodology and techniques.

Forensic accountants apply a different methodology and various techniques to attack problems, not a one-size-fits-all approach. Most will first review the documents and load a spreadsheet with key financial information. The CPA may list assets, debts, income, and expenses over the last five to seven years and look for trends. What happened over time? Do the numbers match known information from the client and from research into industry trends?

The forensic accountant may want more background and will bring his or her expertise to bear on rounding up more information through Internet searches, local business journals and public records research into lawsuits, bankruptcies, and filings with the respective secretary of state’s office.

Forensic accountants will tell you, however, there’s never enough budget or time to do everything that can be done. That’s where their professional judgment will help them determine the most important tasks to perform.

Forensic accountants will perform detailed transaction analyses, reconcile tax returns and financial statements, determine cash holdings, review Quicken/QuickBooks files, perform horizontal and vertical analyses and ratio analyses, and conduct transaction sampling and testing.³

Horizontal analysis involves comparing key account information over multiple time periods. Accounts typically analyzed include gross sales, officer compensation, travel and entertainment, and so on. Accountants will also be on the lookout for unexplained increases in nonoperating assets. These can include a houseboat or a leased car for a new, young attractive employee who actually never shows up to work. An increase in such assets just before divorce is a big red flag.

In vertical analysis, each expense item in an income statement in a given period is divided by net sales and may rise or fall over multiple periods. The accountant here is looking for trends that don’t correlate with business trends or other known information.

The forensic accountant should have a healthy skepticism of all information provided by the target but should also apply that same skepticism to the client, the primary beneficiary of the accountant’s services. Forensic accountants must always try to uncover the truth and confirm the traceable. Without that skepticism, even towards the client’s information, the expert’s independence could be questioned, and the expert could be at risk of having his or her opinions discounted. This is similar to auditors confirming a client’s claimed accounts receivable balance. The AICPA’s Code of Professional Conduct applies to forensic accountants too when it requires independence (Rule 101) and integrity and objectivity (Rule 102), in addition to professional competence, due professional care, planning and supervision, and sufficient relevant data (Rule 201).

Lawyers don’t necessarily understand journal entries and the relationships among assets and debts and income and expenses, but experienced accountants are the perfect hunters of hidden income and secreted assets—they understand the metaphorical zen-like balance of debits and credits. Operational assets help generate income, while the acquisition of assets (raw material, buildings, equipment) create expenses. Cash or receivables from sales can result in a greater acquisition of assets.

Lawyers and judges often do not have a comprehensive understanding of what constitutes a “tax return,” but forensic accountants will. The forensic accountant will make sure that all forms, schedules, and attachments are included with income tax returns. This includes those not attached to tax returns but held for support in the event of an audit. They can compare financial statements to tax returns and come up with intuitive and enlightening deposition questions.

Forensic accountants are exceptionally gifted “smellers.” They know what tax returns should look like for people of all income levels and net worth. Most forensic accountants have reviewed thousands of brokerage account statements, capital gains transactions, 401(k) statements, and so on. They will know what spending levels and deductions should be and will spot overstated debt, underinvested cash, or manipulated income reports. If something fails a forensic accountant’s smell test, he or she will be in a great position to determine what additional information is necessary. It is this professional judgment that makes CPAs special. Forensic accounting, much like the field of law, is part science and part art.

Step 6. Look for assets, especially those that are hard to find.

At times, marital assets can be hard to spot or locate. The forensic accountant should look for assets not reflected in discovery but that show up in old depreciation schedules. All financial transactions should be traced to the
bitter end. Where exactly did that $50,000 transfer end up? Tax returns and schedules, sub-schedules, and attachments may list fully depreciated assets that still may have real economic value in a divorce.

Tax returns and financial statements may also provide leads for important intellectual property, such as patents, trademarks, or copyrights, that have not been capitalized but have significant value.

Some targets may try to hide money through deferred compensation, retained earnings, contributions to children’s college funds, bonus packages, and unexercised stock options, whether “in” or “out” of the money. There may be a valuation of assets on schedules associated with life insurance policies. Evaluating pensions is complex. That process should start early, not on the date of negotiations. Hundreds of thousands of future dollars could be at stake.

As well, don’t overlook grossly undervalued personal property, such as a timeshare, a Chippendale writing desk, a Rolex watch, a coin collection, or a classic Chris-Craft boat, buried among “business” assets.

**Step 7. Look for hidden income.**

In most states, child and spousal support are based on untaxed as well as taxed income. Income from trusts, municipal bonds, and undistributed corporate income that doesn’t show up on individual tax returns can be considered. Most states’ child support guidelines define income in a much broader way than the IRS does, so courts there can consider more than just income reflected on individual tax returns. In many states, depreciation may be excluded as a deduction for business-owner parents for income determination.

In addition, because people readily list all income, as well as other assets, on them, loan applications can be a great source of information. A target’s business CPA could be a treasure trove of information that someone who owns a business might not want a spouse to know.

Some targets may overpay taxes (with plans to recoup the benefit in future years) and make contributions to IRAs after a tax year. An accountant’s research, however, can uncover differences between tax returns and financial statements. Other targets who gamble might be tempted to park money “on account” at a casino. If a target has been complaining about business being bad, this could be a sign of SIDS, “Sudden Income Deficit Syndrome.” SIDS commonly affects many targets who are self-employed just before and after a divorce is filed.

**Step 8. Get the forensic accountant’s report done.**

An expert’s report documents work performed, limiting conditions, and opinions formed. A thorough forensic accountant’s report could possibly take the wind out of the sails of a target and be a catalyst for a favorable settlement. This report can also be used at divorce mediations or serve as a roadmap for final depositions. Although the report itself may technically be hearsay (and not admissible in court), the report can be a critical tool in divorce settlement negotiations. Waiting until negotiations fail before preparing a report may result in a missed opportunity.

**Step 9. Testimony.**

In the event the forensic accountant’s report does not effect a settlement, the accountant can be deposed prior to trial. This is a time when he or she can weigh in, explaining complicated financial situations calmly and professionally. A forensic accountant describes the work performed, the assumptions made, the limiting conditions, and the basis for his or her opinions. Experienced forensic accountants won’t be rattled by tough deposition questions.

At trial, direct examination requires forensic accountants to establish their credentials as experts to have their opinions accepted as evidence. CPAs are trusted, and their testimony, consequently, can carry great weight. Their education, training, experience, and independence often take centerstage in the courtroom. On direct examination, forensic accountants will describe the scope of the engagement, the documents reviewed, the forensic accounting methodologies and techniques employed, and the problems they faced. Effective direct examination tells an interesting and helpful story. The expert witness’ opinion helps the court make tough findings of fact and conclusions of law.

Cross-examination can be a challenging experience for expert witnesses. Professionalism and thoroughness are especially important if the forensic accountant is faced with claimed contradictory opinion testimony from the target’s forensic accountant. But armed with solid methodology and conservative analysis, the well prepared expert can handle cross-examination like a walk in the park.

“Winning” a hidden-asset or a hidden-income divorce requires a serious commitment by a forensic accountant dedicated to the craft. A team working together can have a positive impact on the client’s life for years to come. Very few things in professional life are more exhilarating than proving a business owner sought to hide assets and underreport income. Victory is very sweet. FLR

Miles Mason, Sr., JD, CPA practices family law exclusively and is founder of the MILES MASON FAMILY LAW GROUP, PLC, in Memphis, Tenn. Miles is the author of four books including The Forensic Accounting Deskbook, published by the American Bar Association in 2011. All are available on Amazon. Learn more about Miles Mason’s practice at MemphiDivorce.com.

(Endnotes)
In any divorce that involves an active financial lifestyle acquiring assets or substantial debts, the equitable division of how we allocate these items can be an overwhelming prospect. Even in the simplest of cases, coming up with a fair and reasonable way to get the parties and attorneys to agree can be a time consuming and arduous task. With a fair amount of distrust already in the mediation room, we combine that aspect with figures that are always a “moving target.” Even when I have financial experts representing each side we can spend hours debating what each of the values should or should not be. Keeping these facts in mind, here are 10 of the most common areas of debate with suggestions as to how we can best agree on each of the components that we typically deal with. Our goal is to arrive at a single sheet of paper that settles every line item, each with its own monetary valuation that both sides will agree on.

The House Value

Are we selling the home or is one of the parties keeping the home? Valuing the house should be simple, and I suggest that if one of the parties is planning to stay, they complete an appraisal prior to mediation. Coming into the session without this piece means we have to rely on a third party valuation whether it be Zillow, assessed tax value or what the neighbor just sold their “exact same home” for. These alternative valuations have a tendency to work against the exiting party, who now might also have to wait until the remaining party has had time to refinance before they are compensated for their share of the property.

Terms of sale, whether from one party to the other or in the open market, do not need to be positional; we are simply dealing with an asset and its value (perhaps the net value when sold or cost of repairs if necessary), not a convoluted formula to the benefit of one party and to the detriment of the other. Two other considerations: if we cannot agree on who will keep the home, will the court ultimately decide that the home should be sold? And having nothing to do with the monetary aspect of a deal, what is in the best interest of the children? Sometimes the best conclusion is figuring a way for one of the parties to stay to allow as little disruption to the children as possible. It is a factor we should always discuss in settling the issue of the home in mediation.

The Retirement Accounts

Cash accounts have a value of 100 cents on the dollar. Retirement accounts do not. Varying complications exist with the valuation and potential transfer of any retirement based account, whether it be an IRA or 401K. However, we can use these assets to the advantage of both parties. If the tax rate of a receiving party is lower than the person who currently owns the account, the receiving party’s dollar-for-dollar valuation is higher. Second, concurrent to a divorce, the receiving party may be able to utilize a one-time withdrawal without any penalty (but with tax ramifications pursuant to their bracket). This function allows us room to be creative to allow a win/win for both husband and wife. Be sure in each and every case to review this information with a financial expert prior to agreeing to the division of the retirement accounts.

The Credit Card Debt

Equitably dividing this debt should be simple, but the incomes of the parties and positions as to who accumulated this liability can shift the percentages significantly. The most common obstacle I see in mediation when we discuss debt is each side’s perception of what should and should not be considered marital. A creative solution is to ask direct questions about each card to understand the history of the account(s), how the current amounts are accrued and how the parties paid (or did not pay) the balances due. Sizeable debt can also be consolidated, which may be used as a strategy to “take on” more debt only to then request more assets as the equalizer. Regardless, how debt is divided and subsequently disposed of in a divorce is merely another aspect of the division. Who is willing to take which debt is where we need to be, irrespective of the parties’ plans after divorce.

The Bankruptcy

Post-divorce a party may be considering a bankruptcy filing. Since the focus on #3 above should be on merely determining how debt is to be divided, one party may have no choice over the long term other than to file for bankruptcy protection. Provided there is no effect on the other party, this may be the only alternative that remains in a scenario where the unsecured debt is insurmountable. I find that it is always a good idea to ask
and retain as confidential information should the parties make such a request.

The Indemnification

Indemnifying one individual from a tax, credit or mortgage liability within a final agreement is only as good as the performance of the responsible party, but does add an additional layer of protection. Should the person responsible for the secured debt be in default, you can be guaranteed that the creditor will go after the other party for payment. This topic is important to share when we are dividing any debt responsibility, and can be an issue pertaining to past items such as prior years’ tax filings, especially when there is a substantial difference in the parties’ incomes.

The Personal Property

I usually break this down into four categories: pots and pans, my stuff vs. your stuff, a houseful of stuff, and items of significant value. The debate over pots and pans should never be a debate. My stuff vs. your stuff, if it is what we each own (clothing, personal items, etc.), should also not be a time consuming process in mediation. But . . . the houseful of stuff, if not divided or discussed prior to the session, can be problematic and cause a disagreement in value. This is especially true when one party is staying in the home. The person leaving behind years of purchased furniture, appliances, electronics, etc. may attach a stratospheric value as a balance sheet line item and will seek an equalizer in another area. If there is debate on this issue, have each side prepare a list and work on it when you are in caucus with the other side. Items of significant value should be treated like any other large asset (e.g. the marital home). As part of valuing the marital assets, there needs to be supporting documentation to verify the amount in question. If not, we are merely guessing, and you can be assured that each side’s assessment of the values will vary drastically.

The Miles

There is usually a cost to dividing miles, and since (using Delta miles as an example) each mile is worth $.01, the expense associated with dividing these miles can outweigh the mere division itself. A party that has a million miles essentially owns an asset worth $10,000.00. But, the individual that has 100,000 miles owns an asset worth only $1,000.00. Be aware of the cost to transfer miles or points when debating this issue. One solution that seems to work well is to provide access to these miles for future use by each/either party, thus avoiding the cost of transferring miles altogether.

The Alimony Equalizer

Alimony can be utilized as a terrific alternative to assist in equalizing the balance sheet. This is especially true, again, where there is a significant difference in the incomes of the parties. Since the paying party is not responsible for taxes on alimony paid (assuming that the terms are compliant and not subject to recapture) they are by definition in a higher tax bracket than the recipient. The net dollars paid are of greater value to the recipient, and can be a good way to bring the overall division to an equitable split. To some parties in mediation, however, the mere concept of alimony, regardless of the advantages, will be viewed as an emotional non-starter.

The Tax Ramifications

Be wary of how taxes may or may not affect the net balancing of any division. If the assets in play are significant enough for the parties to consider enlisting the input of a tax advisor, we would be foolish not to perform an overall evaluation in the division. While this is sometimes impossible to implement during a mediation, if we discover that the dollars involved are of significant exposure to tax, we should pause and reconvene after a thorough calculation. Taxes can be one of the most misunderstood aspects of any division and should always be carefully analyzed.

The Moving Parts

As each of the issues herein should be assessed and carefully reviewed, be mindful that the components of each have a propensity to play into one another. Since we are constantly moving the pieces around to make them fit and satisfy everyone, each aspect is yet another moving part and may be shifted around and re-evaluated several times during the mediation. This maneuvering helps us achieve a final result, and if we do it effectively to the satisfaction of all involved, we may finally arrive at our goal which is that “one sheet of paper.”

Not all equitable divisions are complicated, but others can be quite involved. My hope is that the ideas and suggestions that are explained herein can be used to help us achieve a reasonable and fair end result. The numbers are not emotional; but the people dealing with the numbers, especially the parties, can be very emotional. Minimizing the emotions by helping the parties see the overall picture, by using spreadsheets and simple calculations, can help them “get there.” No two equitable divisions are ever the same, but of the hundreds and hundreds of mediations I have conducted, one fact remains a constant: the Husband ALWAYS retains the Big Green Egg. 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.
According to the Nation Postsecondary Student Aid Study, 69 percent of college graduates in 2013 had student loan debt. The average debt load for these students approached $30,000. As the percentage of college students obtaining student loans and the average debt load increase, so does the likelihood that this will be an issue in many future divorce negotiations.

It is typically viewed that divorcing parties should simply pay for the portion of student loans associated with their respective educations. However, it is often not quite that simple. Increasingly, loans are taken out in excess of the typical college costs for other living expenses. This is especially common with students working on graduate degrees who can borrow up to the full cost of attendance which includes living expenses. Total student loans amounts exceeding $75,000 are not uncommon. The question, then, becomes what portion of these loans benefited the marriage and should be considered “marital debts.” Arriving at a conclusion to this question will require obtaining documents from the school showing the loan amounts disbursed alongside the portion of those loans applied to actual schooling costs. The reality is that while some folks truly used student loans to subsidize living costs while one or both attended school, others were taken recklessly to finance very poor spending habits.

Numerous scenarios involving loan repayment and even debt forgiveness further complicate the issue. Even if the parties agree that a certain portion of the student loans were marital, coming up with a plan as to how to share the payments can be challenging.

- Student loans cannot be refinanced into another’s name.
- Repayment plans may range from 10 to 25 years.
- Payments could be set based upon income and can re-adjust every year.

- Those serving in certain areas of the public sector may be eligible for loan forgiveness. Likewise those making income based payments for 20 to 25 years may be eligible for loan forgiveness of any remaining balance. In these scenarios, loan forgiveness will result in a 1099 being issued for the amount of the loan forgiveness. All of these contingencies must be addressed and thought through if the parties are contemplating some level of joint responsibility for the loans.
- Private student loans have more limited repayment and forgiveness options.
- Given that these are government programs, any of these provisions could be subject to change.

Even if the loans are viewed as the sole responsibility of the party incurring the debt, the presence of sizable loan balances could present an issue regarding the ability to pay various levels of support. While many debts may be dischargeable in bankruptcy, very limited bankruptcy relief is available for student loans.

In summary, attorneys should be aware that they will increasingly deal with the issue of student loans and that the issue may present numerous complications in equitable division of debts and paying support. Accordingly, the issue should be approached with care. If this is a large financial issue, the risk of litigation could become greater as the Court and/or a jury may not be aware of all the intricacies discussed above.

Where possible, keeping responsibility for the loan with the person in whose name it was incurred is the cleanest and results in the fewest unintended consequences. Certain tradeoffs in other parts of the financial negotiation may be necessary in order to arrive at this outcome. Attorneys may also benefit from retaining a financial expert to assist in reviewing the documents to support or challenge claims that these student loans have a “marital component” and in assessing alternatives and alerting counsel to some of the potential pitfalls of various settlement options.

Timothy Keim is a CERTIFIED FINANCIAL PLANNER. He is an active divorce mediator and has an independent fee only financial planning practice in Newnan, GA. He is regularly retained as a financial expert on numerous financial issues arising in domestic litigation.
Transmutation Update*
by Kelley O’Neill-Boswell

Since the Supreme Court of Georgia decision of Lerch v. Lerch 278 Ga. 885 in January of 2005 there has been much discussion regarding the status of the Source of Funds rule outlined in Thomas v. Thomas 259 Ga. 73 (1989), Lerch, Grissom v. Grissom 282 Ga 267 (2007), Coe v. Coe 285 Ga. 863 (2009) and Miller v. Miller 288 Ga. 274 (2010) all set forth the Court decisions regarding the transmutation or transformation of non-marital property into marital property which is subject to equitable division based upon the manner in which the property is titled and issues such as the comingling of marital and non-marital funds or assets. These decisions established that the parties can transform separate property into marital property by gift, retitling separate property into joint names of both parties or comingling separate property. Since Miller in 2010 the following cases have been instrumental in further defining the Court’s position on transmutation.

Shaw v. Shaw 290 Ga. 354 (2012) echoes the definition of marital property found in Lerch. The Supreme Court relied upon whether there was “manifested intent” by the recipient spouse to transfer the non-marital property to the other spouse, even if the property was originally gifted to only one spouse. The Court found the property in question to be marital property subject to equitable division.

During the marriage, Shaw inherited money and land in Florida from his mother. Immediately upon his receipt of the money from his mother, he established two investment accounts in the names of himself and his wife jointly as tenants with right of survivorship. Regarding the Florida property, he directed that the land be deeded jointly to the husband and wife as tenants in common giving each of them an undivided one half interest in the property. The Supreme Court found that his intent was to transform the property from separate non-marital property to marital property subject to equitable division. It is important to note that in Shaw the Supreme Court relied upon the manner in which the property and the investment accounts were titled. Interestingly, the Supreme Court ignored the husband’s arguments that the wife did not contribute to the appreciation in value of the real property or investment accounts, and that the investment accounts were never comingled with other assets. Therefore, Shaw illustrates the Court’s focus on the spouse’s intent rather than the value contribution through the comingling of funds.

In 2012 the Supreme Court issued the Pina v. Pina opinion at 290 Ga. 878 (2012) upholding the trial client’s decision. The parties here were able to agree on the equitable division of the marital estate with the exception of a single piece of real estate purchased by the wife prior to the parties’ marriage. During the marriage, Wife transferred ownership of the property into the Gomes Family Trust for the benefit of her three children, two of whom were fathered by Husband. The final divorce decree entered by the trial court determined that Husband had an equitable interest in the real property, but that his interest was negligible. The court summarized from the evidence that the real property was the Wife’s separate non-marital property, but that Husband had an equitable interest in the property because the mortgage payments, repairs, and improvements on the property were made with marital funds and Husband worked on the property during the marriage. Ultimately, the court found that “because the wife brought the house to the marriage, only the subsequent increase in the net equity attributable to marital contributions is a marital asset” and subject to equitable division. See Wright v. Wright, 277 Ga. 133-134 (2003).

The evidence produced in the record showed that Husband made repairs to the property and often times purchased the materials he needed to make the repairs. However, Wife testified that she paid Husband for the repairs he made to the property and further that she reimbursed his expenses for the purchased materials. Wife also testified that, during the course of the marriage, she used the income received from renting the property to help pay for the mortgage on the property, help support her family, pay Husband to make repairs, and cover other expenses as it related to the upkeep and maintenance of the property. Indeed, the evidence also showed that the parties lived in the property for several years during the course of their marriage and that Husband occupied a portion of the property to run his business, a commercial recording studio. Some of the rental income derived from the real property was used as a down payment on the parties’ subsequent marital home. Despite Husband’s contention that the property was always meant to be jointly owned, the evidence did not show that any interest in the property was conveyed by Wife to Husband. In fact, the funds received by Wife as rental payments on the property were maintained in a separate bank account titled in Wife’s name only.

Relying on the Supreme Court’s holding in Newman v. Patton, the Husband argued on appeal that the trial court erred in awarding the real property to Wife without obtaining evidence of the value of the property. Newman v. Patton, 286 Ga. 805, 806 (2010)(holding “property is subject to equitable division if it is acquired as a direct result of the labor and investments of the parties during the marriage...”). Although Husband had the property appraised to ascertain its current value, the trial court determined it was impossible to determine the appreciated value of the property, or net increase in equity during the marriage, because the parties did not have evidence of the value of the property at the time of their marriage. Notwithstanding the lack of evidence of value, the trial court attempted to ascertain the increased value of the property based on the contributions made by the Husband and the expenditures of marital funds on the property during the course of the marriage. Ultimately, this proved to be a futile
effort for the court because the Husband was unable to produce documentation as to the value of the maintenance work he performed on the property. As such, and based on the evidence presented by the Wife as to the Husband’s rent-free use of the property for his business, the trial court held that any increased value in the property attributable to the Husband was nominal, and therefore a calculation of the property was not needed.

The Jones-Shaw v. Shaw, 291 Ga. 252 (June 18, 2012) decision then followed. After approximately 1 year and 4 months of marriage, the parties separated. Subsequently, a divorce action was initiated and the Wife sought equitable division of the marital assets. The parties did not have children together and each maintained their finances independently of the other spouse. According to Wife, the primary asset subject to equitable division was a closely-held non-profit corporation that was started by the Husband approximately 9 years prior to the marriage. The Superior Court’s final judgment and divorce decree held that Wife failed to prove the non-profit corporation started by Husband was subject to equitable division or that any appreciation of the non-profit entity, if any during the 16-month period the parties were together, was the result of Wife’s efforts. As such, the court ordered that each party retain their personal property and further that each was responsible for the payment of his or her own personal debts.

The determination of whether an item of property can legally constitute a marital asset is within the purview of a judge. Bass v. Bass, 264 Ga. 506, 507 (1994); Curran v. Scharpf, 290 Ga. 780 (2012). However, the trier of fact, based upon a thorough review of the evidence, is responsible for determining whether a particular item of property actually constitutes a marital asset. Id. In Miller v. Miller, the Georgia Supreme Court held that a closely-held corporation may be a marital asset subject to equitable division in a divorce. 288 Ga. 274 (2010). Prior to the Miller decision, in 2003, the Georgia Supreme Court held that a business which was started as the result of separate pre-marital funds may be subject to equitable division if there is an appreciation in the value of the business during the years of the marriage due to the spouses’ individual or joint efforts. See Wright v. Wright, 277 Ga. 133 (2003). However, if the appreciation in the value of the business is solely the result of changes in the naturally occurring market forces the resulting growth does not alone render the asset a marital one subject to equitable division. Armour v. Holcombe, 288 Ga. 50, 51-51 (2010). Thus, in Jones-Shaw the Court found that there are two key factors to consider in making a determination of whether the appreciation in the value of a closely-held business should be subject to equitable division: (1) what is the increase in value, if any, during the course of the marriage, and (2) was the increase/gain the result of spousal effort, either separately or in conjunction with each other. The Court further stated that it must be presented with evidence of the value of the asset at the time of the marriage as well as its value at the time of the divorce in order to make a determination of whether a particular asset has appreciated in value during the course of the marriage. Ultimately, the Supreme Court affirmed the ruling of the trial court because Mrs. Shaw was unable to present competent evidence of the non-profit corporation’s value at the time of marriage as compared to its value at the time of the parties divorce.

In Zekser v. Zekser, 293 Ga. 366 (June 17, 2013) the Wife challenged the equitable division of marital assets and debts. The primary issue in this case involved the Wife’s law school student loan debt, which totaled approximately $130,000.00. The trial court ordered that the Wife was solely responsible for repaying her indebtedness on the student loans. Dissatisfied with the trial court’s ruling, the Wife appealed and alleged the trial court erred because her husband “had been cruel to her” and, therefore, he should share in the obligation to repay her student loans. The trial court’s review of the evidence found that the Husband did not want his Wife to attend law school due to the financial strain it placed on the family. The evidence further showed that the Wife was distracted from her familial obligations, was away from home for extended periods of time, and ultimately was involved in extramarital affairs with classmates. Ultimately, the trial court determined that the Wife’s attending law school “did not advance the family unit but [would] advance her and the children in the future.” The Supreme Court declined to challenge the trial court’s assessment of the evidence as it pertained to the Wife’s claims of cruel treatment from her Husband. Indeed, the Supreme Court held that the trial court must be given deference to assess witness credibility and, in the absence of abuse of discretion, the trial court’s decision to equitably divide the marital assets and debts was proper.

Next, Sullivan v. Sullivan, 295 Ga. 24 (March 28, 2014) dealt with Mr. Sullivan’s premarital purchase of 150 shares of stock from the environmental services company he was employed with, which was a closely-held Subchapter S corporation. To purchase the shares of stock, Mr. Sullivan used money that was gifted to him by his mother. On top of the amount he paid per share of stock, Mr. Sullivan also invested $35,000 as a capital contribution. Three years after he purchased the stock, Mr. and Mrs. Sullivan were married on September 29, 2001. After the parties were married, Mr. Sullivan sold 50 shares of stock but retained the remaining 100 shares. When the parties divorced, Mrs. Sullivan claimed she was entitled to an equitable division of the appreciation in value of Mr. Sullivan’s remaining 100 shares of stock, from the date of the parties’ marriage to the date of their divorce. Mr. Sullivan argued that Mrs. Sullivan was not entitled to an equitable division of the asset because 1) he obtained the shares of stock prior to the parties’ marriage and 2) any appreciation in the value of the stock was the direct result of naturally occurring forces in the market. According to Mrs. Sullivan’s expert witness, the value of the 100 remaining shares of stock at the time of trial was approximately $780,000. In support of his conclusion as to valuation of the remaining shares of stock, Mrs. Sullivan’s expert relied upon the earnings of the S corp from 2005-2011. At the time that he purchased the stock, Mr. Sullivan only paid $1 per share. Neither party presented evidence of the value of the stock at the time of the parties’ marriage.
In reliance upon the Court’s prior ruling in *Jones-Shaw v. Shaw*, 291 Ga. 252 (2012), this decision reiterates that a “spouse’s interest in a closely-held corporation may be a marital asset subject to equitable division in a divorce; this is so even when the business interest was started as the result of separate pre-marital funds.” *Id.* at 253. The key is whether the appreciation in the value of the business interest during the course of the marriage is the result of the spouses individual or joint efforts and whether or not, the appreciation is solely the result of market forces. *Id.*

It seems from these cases that transmutation is alive and well. Regarding the *Pina* decision, although the wife maintained her pre-marital property in a trust in which husband had no interest and the funds generated by such property in a separate bank account titled in only her name, the Court did examine whether the appreciation in the non-marital property during the marriage was at all subject to equitable division. Likewise, in *Jones – Shaw* the Court recognized the equitable division of the increased value of the premarital non-profit corporation which remained titled in the husband’s name alone. Clearly the Court found that the appreciation in value of a premarital asset regardless of how the property was titled, would still be subject to equitable division if the proper evidence were presented in order to compare premarital value with the value at the time of the divorce. The Zekser opinion is an interesting examination of the equitable division of marital debt which remained in the wife’s name during the entire marriage. Although the Court found that the wife was solely responsible for her student loans incurred during the course of the marriage, we are left to ask whether the analysis would have been the same had the parties refinanced those student loans into a jointly titled debt. Could the arguments regarding transmutation of the manner in which the assets are titled be applied to the manner in which the debts are titled?

Finally, the March 2014 decision in *Sullivan* also deals with the appreciation in value of a clearly non-marital asset during the course of the marriage. This case reiterates that although title to the pre-marital asset remained separately in the Husband, the appreciation of the separately titled non-marital asset during the course of the marriage is still an issue regarding which the appropriate evidence as to values and the factors causing appreciation in value are still going to be the Court’s primary focus with regard to the equitable division of the increased value of such a non-marital asset.

*This article was written before the Mallard v. Mallard decision was published. See the Caselaw Update for a summary of the Mallard decision.*

| Kelley O'Neill-Boswell’s expertise is in family law and personal injury litigation. Over the past 20 years, she has represented husbands and wives in divorces and in post-divorce modification issues, such as child support, custody determinations, property division issues, protecting parental relationships and preserving marital assets. She also handles both domestic and international adoptions. |
Isn’t there something with the military and a Ten-Year rule?” an attorney asks me. Another attorney calls and confidently tells me that my client is not entitled to any of her husband’s military pension “because they don’t have ten years.”

The law is filled to the brim with hard-and-fast deadlines. None seem to be any more widely misunderstood than the military’s mysterious “Ten Year Rule.” Here it is, made so simple that even I, a 21st Century Caveman, can understand it.

The general rule of the U.S. Constitution’s “Supremacy Clause” holds that where federal law - in whatever form - conflicts with state law, federal law prevails. Put another way, federal law trumps (or “preempts”) state law where the two conflict.

In domestic law, the general rule has become: Where federal benefits are concerned, there must be specific intent by Congress to grant state courts the authority to address such benefits. Otherwise, they are off limits.

More specifically, with regard to military pensions, the U.S. Supreme Court held in 1981 that Congress declined to address state court authority to divide military pensions incident to divorce; therefore, the state law was preempted (barred) by federal law from dividing a military pension. A year later, Congress reacted by passing the “Uniformed Services Former Spouse Protection Act” (USFPA) which granted state courts the authority to divide military pensions earned during a marriage “in accordance with the law of the jurisdiction of such court.” (10 U.S.C. 1408(c)(1))

Of course, the well-settled law in Georgia is that any property acquired by the parties in a marriage “as a direct result of the labor and investments of the parties during the marriage is subject to equitable division.”

But it is not that simple when it comes to military pensions. Section (d) of USFSPA also states that the parties must have been married for not less than ten years overlapping not less than ten years of military service in order for such payments to be made by the service.

This is not to say that a ten year overlap under subsection (d) swallows the general rule of pension divisibility under subsection (c) of the USFSPA. In practice, meeting the ten year requirement under subsection (d) confers upon the state court the authority of that court to direct the service to make direct payments to the servicemember’s former spouse. If the parties are married less than ten years overlapping ten years of service, nothing stops the state court from ordering the retiree to pay the former spouse a portion of the military pension directly.

Now, there is a bit of variation among the states in how (or even whether) they divide pensions incident to divorce. In particular, our neighbor to the west, Alabama, adds to the confusion surrounding the Ten Year Rule. Ironically, the Yellowhammer State has a statute that prohibits award of a portion of any pension earned during the marriage unless the parties are married ten or more years during which the pension was accumulated. No other state has such a statute, but in this instance it takes only one to confuse the situation even more.

In summary:

(1) Congress grants state courts the authority to divide so much of a military pension as the court sees fit, under the laws of the state.

(2) If there is at least ten years of marriage overlapping ten years of military service, USFSPA also allows the state court to direct the service to make direct payments to the former spouse.

(3) The preceding sentence (2) is the “Ten Year Rule”.

(4) If you happen to find yourself in Alabama, Ala. Code 30-2-51 adds a second 10 year rule. Alabama’s Ten Year Rule has nothing whatsoever to do with the USFSPA Ten Year Rule.

Now, so easy even a caveman can do it!
Don’t forget to renew your section dues when you pay your 2015-16 Bar dues.
Section Members Recognized for Service to Veterans

by James E. Holmes

Family Law Section members have been three of the recipients of the Marshall-Tuttle Award given annually by the State Bar. Those members (in order of year recognized) are Cary S. King (2013); Wm. John Camp (2014); and Patricia D. Shewmaker (2015).

The Marshall-Tuttle Award was established by the State Bar of Georgia in 2010 to recognize attorneys who have gone “beyond the call of duty” in service to veterans of the U.S. Armed Forces. The Award is named in honor of and in memory of Army Corporal Evan Andrew Marshall and in memory of U.S. Circuit Judge Elbert Tuttle. Corporal Marshall was killed in action in Iraq in 2008 and was the son of Andrew H. Marshall, an attorney in Athens. Judge Tuttle served in the US Army for 30 years, was a founding partner of the Atlanta law firm Sutherland Asbill where he also provided many with pro bono services, and then served on the Federal Bench for 43 years. The State Bar determined that each of these men contributed significantly to Georgia and to the nation and to the ideal of service and sacrifice for the public good.

All three of the recipients highlighted here give extensively of their time providing pro bono or fee-reduced services to veterans; also, all three are members of various military organizations.

In 2012 Cary King – a Vietnam veteran and recipient of the Purple Heart among his many military awards and now Senior Attorney with Jacobs & King LLC in Atlanta – received the Award in recognition of his outstanding support of the Bar’s Military Legal Assistance Program. Cary was particularly cited for his over 12 years of providing legal services to veterans at the VA Medical Center in Decatur.

Then in 2013 Wm. John Camp – a retired Air Force JAG Colonel and now a partner at Westmoreland Patterson Moseley & Hinson in Macon – was recognized for his extraordinary legal services and contributions to three notable pieces of Georgia Legislation; those are: the definition of “military compensation” and “income” for the Child Support Guidelines; the Military Parents Rights Act; and the proposed Uniform Deployed Parents and Custody and Visitation Act.

In 2015 Patricia (Patty) Dee Shewmaker – a graduate of the U.S. Military Academy at WestPoint and veteran of service in Operation Iraqi Freedom and of Operation Enduring Freedom in Afghanistan and now a partner at the Atlanta firm of Shewmaker & Shewmaker – received the Award for her founding (along with husband Steve) the Georgia State Legal Clinic; this clinic links volunteer mentor attorneys with Georgia State law students to assist over students-veterans at Georgia State. She was also recognized for her leadership as Director of the CLE Programs for the Military and Veterans Law Section which provided training and accreditation for over 350 Georgia attorneys.

The Family Law Section extends its heartiest congratulations to these Section members and applauds them for their service to those who served us. FLR

The Family Law Review
ATTORNEY CONTEMPT

Murphy v. Murphy, A14A1137 (Nov. 17, 2014)

On Aug. 23, 2013, the Court entered and order that denied the Husband’s Motion for Temporary Change of Physical Custody of the parties’ children, directed the parties not to discuss the case with the children and to cooperate with the custody evaluator. Six days after the Order, Husband filed a Motion seeking to hold the Wife in contempt for violating its visitation provisions. Mother filed affidavits from the children testifying that the Motion for Contempt had been read to them in the presence of their Mother, that the Mother had not interfered with the Father’s visitation, and that they were extremely angry at their Father for not telling the truth to the Court. The Father then amended his Motion for Contempt alleging that the Wife and her lawyers were in contempt of the Order provision prohibiting the parties from discussing the case with the children, that she neither cooperated with nor completed the paperwork for the custody evaluator. A hearing was held in October of 2013. The Wife, Farmer (Wife’s attorneys) did not appear but King (Wife’s other attorney) appeared on behalf of the Wife. After the hearing, the Court found the Wife, Farmer, and King to be in contempt. The Trial Court found Farmer in contempt for discussing the case with the children, found the Mother in contempt for refusing to cooperate with the custody evaluation and found King and Farmer in contempt because the Mother’s failure to appear at the contempt hearing. The Wife, Farmer, and King appeal. The Court of Appeals affirms in part and reverses in part.

The Court held Farmer in contempt for discussing the issues, allegations, and claims in the case with the children. Farmer appeals, that the contempt must be reversed because the evidence does not support the finding. The standard of view was dictated by the nature of the contempt as either criminal or civil. Since Farmer was ordered incarcerated in jail for a period of 20 days, or until he paid $1,000 to the Court, he was sentenced to imprisonment for specific unconditional period, making his contempt criminal. Therefore, the standard, viewing the evidence in light most favorable to the prosecution, is whether any rationale trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Here, Farmer signed a Brief to which the affidavits reflecting the children’s knowledge of the case was attached. Also attached to the Brief is an affidavit of Farmer himself, notarized on the same day by the same notary of the children’s affidavits. Farmer also argues that he cannot be held in contempt for violating a provision directed at the parties rather than himself. A violation of a Court’s Order by one who is not a party to the proceedings can be punished for contempt if the contemnor had actual notice of the Order and is privy with, aided and abetted, or acted in concert with the named party in acts constituting a violation of the Order. It is undisputed that Farmer had actual notice of the Order and acted as Wife’s representative when obtaining the affidavits from the children.

Both of the Wife’s attorneys appeal the Court is holding contempt because their client did not appear at the contempt hearing. A party may choose not to be present at trial and to be represented solely by counsel and there is a long established principal that there is full power on the part of counsel to represent a client as if the client were there in person. Because the Wife was not required to appear in person, Farmer and King could not be held in contempt for her failure to appear.

With regards to the Wife’s contempt and incarceration for not cooperating with the custody evaluation, her contempt is civil. And the standard is that, if there is any evidence which the Court could have concluded that its Order had been violated, the ruling will be upheld. This is a civil contempt since the Mother was incarcerated until she complied with the August Order by signing documents previously submitted to her by the custody evaluator’s office.

CHILD SUPPORT MODIFICATION


Neal (Father) was divorced from Hibbard (first Wife) in January of 2000 and had one child where the parties shared 50/50 custody, with Neal ordered to pay child support of $660. Neal divorced his second wife (Wife) in October of 2006, remarried in 2009, and divorced again in 2010. Neal also had 50/50 custody and was paying $1,000 per month in child support. In 2011, a sexual incident occurred with Neal’s then Wife and their 18 year old babysitter for which Neal was charged with Rape and other crimes. The rape charge was dismissed but he was sentenced for possession of marijuana and furnishing alcohol to an underage person. Neal was a personal injury attorney in Augusta and relocated to the Atlanta area to restore his practice. Both Hibbard and Wife sought modification of child custody and support and filed in Atlanta. Both cases were consolidated and the Court awarded Hibbard and Wife both primary physical custody with Neal receiving alternating weekends and modified Neal’s child support to $2,000 to Wife and $1,774 to Hibbard. Neal appeals and the Supreme Court affirms in part and reverses in part.

Neal appeals, arguing among other things, that the modification of child support was unwarranted contending that Hibbard did not request a modification of support; however, such a request was in her original Complaint, and a modification of support is justified given the change of custody. The Court also entered a Temporary Order of child support of $2,000 per month but did not append a child support worksheet to the Temporary Order. There is no indication that the Court used the guidelines in determining the amount of child support in its Temporary Order and the Order shows on its face that the guidelines were not used. If a modification of temporary child support was appropriate, then the Court was required to use the Child Support Guidelines to calculate the new amount. The fact that the Temporary

Caselaw Update

by Vic Valmus

Summer 2015
Order was superseded by the Final Judgment for child support
does not render it moot and the obligation thereunder was
improperly imposed. Therefore, that part of the Court's Order
was reversed and remanded.

Neal also argues the Child Support Worksheet failed to
reflect the pre-existing order to the companion case concerning
his support obligation for his daughter with Wife. However,
the Order modifying child support to the Neal's daughter with
Wife on Nov. 14, 2013, entered before the Nov. 21, 2013, Final
Order modifying the Hibbard's son, did not meet the definition
of pre-existing order. Pre-existing order is from the date and
time of filing with the Clerk of Court of the initial order
for each such case. The initial child support order in the Neal's
first case was filed in January of 2000 and the date of the initial
order in his second wife's case was in July of 2010. Thus, the
Wife's order cannot be a pre-existing order, even though it was
modified before his first Hibbard's modification.

Neal also argues that the Court did not make findings of
facts when they adjusted Hibbard's income under theoretical
child support order. The Court can take into account the cost of
maintaining a child living in a parent's home other than a child
who is the subject of the child support order that the Court
is considering. Whether to apply a theoretical child support
order is in the Court's discretion and based upon consideration
of the best interests of the child. After this, the Court derives at
a presumptive amount of child support. It is at this point that
a deviation from the presumptive amount of child support
could be applied. Any consideration for a theoretical child
support order for a qualified child is accounted for in the
presumptive child support calculation and is not a deviation.
The Court's Final Order must include a written finding setting
forth how the best interests of the child who is subject to the
child support determination is served deviation from the
presumptive amount, however, there is no requirement for the
theoretical child support adjustment and written findings are
not required.

EQUITABLE DIVISION

Mallard v. Mallard, S15F0401 (June 1, 2015)

In 2009, the Wife acquired a house in her sole name. The
parties were married in 2010 and divorced in 2011 and the
house was not mentioned in the final decree. After their first
divorce, the parties resumed their relationship and lived
together. In April, 2011, the Wife executed a Quitclaim Deed
transferring ownership of the property to herself and her
husband as joint tenants with the right of survivorship. The
property was not refinanced to put the Husband’s name on
the mortgage. The parties remarried in January, 2012. In April,
2012, the Husband paid off with separate estate funds the
debt of $268,314. In January, 2013, the Wife filed for divorce
and asked for 50 percent of the equity in the residence. An
appraisal of the property in September, 2013 showed a fair
market value of $252,000. The Court entered a Decree denying
the Wife's request to partition the property or to give her any
share of it; awarding the property entirely to the Husband.
The Trial Court determined that, at the time of the parties’
remarriage, there was no equity in the property and the
balance on the outstanding loan of the property was paid off
by the Husband’s separate funds, which was more than the
fair market value of the property a year after the payoff. In
addition, there was no evidence that the Husband intended
to make the payment of the debt a gift to the Wife or to the
marital unit. The Court applied the source of the funds rule
pursuant to Maddox v. Maddox, and determined there was no
marital investment in the property. The Wife appeals and the
Supreme Court reverses and remands.

The evidence supports a finding that the initial property
was considered to be the separate property of the Wife
but by her own hand, she made it joint property, as joint
tenants with the right of survivorship and, therefore, each
party held an interest in the property. If the non-marital
property appreciates in value during the marriage, and such
appreciation results from the efforts of either of the spouses,
the appreciation becomes a marital asset subject to equitable
division. In this case, there is no evidence of the property's
fair market value during the parties’ subsequent marriage.
Thus, the appreciation of the fair market value of the property
fails to provide a basis for the application of any method of
equitable division, including the source of the funds rule.
But, the Husband paid off the entire indebtedness on the
property during the parties’ second marriage. Here, the
Court made an express finding that the Husband's payment of
the debt was not a gift to the Wife or to the marital estate.
However, the Husband's undisputed testimony was that he
paid off the debt in order for him and the Wife to live a debt
free life as a married couple and it was his intent that they
would both have the benefit of those funds. Therefore, there
is a manifest intent to make the payment of the debt a gift
to the marital unit. Moreover, in circumstances involving
conveyances of real property or the payment of certain funds
between spouses, there has been a presumption in Georgia
law that a conveyance or payment is a gift and has a status of
marital property. Even if the Court discounted the Husband’s
uncontroverted testimony which was against the Husband’s
own interest, such a presumption remained. Therefore, the
Court erred in finding that the Husband’s payment of the debt
was not a gift to the marital estate.

Although the Court has wide discretion as the trier of fact
to determine equitable division of property, the Court solely
awarded the property to the Husband upon unsupported
factual finding that the payment of the debt on the property
was not a gift to the marital unit.

MODIFICATION/COHABITATION

Gordon vs. Abrahams, A14A1453 (March 2, 2015)

The parties were never married and were the parents
of a 10 year old son. Gordon (father) legitimated the child
and entered in a Settlement Agreement, in June 2011, with
Abrahams (mother) being awarded primary physical custody.
In August 2011, the father petitioned for a change of custody
seeking primary physical custody of the child and a morality
clause to prevent the mother from having overnight guests.
The mother's boyfriend had ticked the child and a DFACS
investigation followed for which no case was ever opened.
In addition, the mother's boyfriend had been convicted in
California in 1998 of unlawful sexual intercourse with a minor
more than 3 years younger than him. However, there are no allegations that the mother’s boyfriend had sexually abused or acted improperly toward the child or the mother’s teenage daughter from another relationship. The mother’s boyfriend does not live with her but stays at her home approximately two weekends per month and spends the night during those visits. At the time, the mother’s boyfriend was married to another woman and was in the middle of a divorce. The Guardian Ad Litem expressed concern over the mother that she was involved with a married man and somewhat financially unstable, but recommended that the mother retain primary physical custody of the child. After the hearing, the Court found no material change in circumstances. The father appeals and the Court of Appeals affirms.

The father argues that the Court erred in finding no change of circumstances. The father argues the Court erroneously considered only the change in circumstances that occurred during the two months period between entry of the final Settlement Agreement and filing of the petition. However, it is clear from the record that the Court considered all of the evidence before it including facts that it existed before the first custody order as well as the events that occurred before and after the father filing his petition. The Court found that the father knew about the mother’s relationship with the boyfriend well before the parties entered into the Settlement Agreement. The Court determined that, although the father’s home was more peaceful and pleasant, and the father was more financially stable, he had not shown a material change of circumstances.

The father also argues that the mother was living with her boyfriend constituted a change in circumstances. However, a parent’s cohabitation is not the basis for a change of custody absent some evidence of harm to the child. Here, the evidence does not show that the mother’s boyfriend lived with her and even if the mother and her boyfriend were cohabitating, there is no evidence that the relationship was a material change of condition having an adverse effect on the child.

**PUBLICATION**


The husband filed a Complaint for Divorce alleging the wife was a non-resident of Georgia and her last known address was in Barnesville, Ga. The husband petitioned the wife to be served by publication pursuant to O.C.G.A. § 9-11-4(f)(1). The husband filed an affidavit affirming the facts and the Court issued an Order for Service by Publication. He then filed a Judgment on the Pleadings and served her at her last known address in Barnesville. Several months later, the wife, pro se, filed a verified Motion to Set Aside the Final Judgment and Decree contending the husband did not practice due diligence required for service by publication and that the husband committed fraud upon the Court by alleging the wife was a non-resident. The husband filed a pro se response in which he stated the wife was located mostly in Jones County and her non-resident status in his affidavit was a typo. The husband’s Certificate of Service accompanying his response shows he served the wife in Forsyth, Ga. The wife filed a Motion to Suppress the husband’s statements, and asked the Court to strike the statement that her being a non-resident was a typographical error. The Court denied her Motion to Set Aside. Wife appeals and the Supreme Court reverses.

The wife argues the Court erred because the husband’s affidavit did not meet the standards for service by publication. She contends that no service was ever perfected on her and she did not receive actual knowledge of the divorce. Here, it is the duty of the courts to determine whether the movant has exercised due diligence in pursuing every reasonable available channel of information. The record shows there were obvious channels of information available to the husband for locating the wife. The husband knew the wife was living with her boyfriend. In addition, a few days before the Court issued an Order requiring service by publication, the wife was charged with criminal damage to the husband’s property at an address in Forsyth, Ga. The wife also contends that there were three individuals one of which one was the wife’s daughter who had contact with both the wife and husband and was aware of the wife’s address.

The record indicates that the husband did not make an honest and well directed effort to use this information. O.C.G.A. § 9-11-4(f)(1)(a) sets out requirements for the service by publication. The husband’s affidavit in support of service by publication pursuant to the statute was insufficient. The husband failed to state the wife resided outside of Georgia at a previous time and in a certain place; that this certain place was the last place where the wife resided outside of Georgia at a previous time and in a certain place; that this certain place was the last place where the wife resided outside of Georgia at a previous time and in a certain place; that he did not know where the wife presently resided or could be found; and that he did not know and never had been informed and had no reason to believe that the wife now resided in Georgia. The husband’s insufficient affidavit is further proof that he did not exercise due diligence.

**RENEWAL**

*Gottschalk v. Woods, et al., A14A0975* (Nov. 18, 2014)

Gottschalk and his ex-wife had two children and divorced in March of 2005. In 2006, his ex-wife filed a Petition to Modify Custody and Visitation rights and, in 2008 the Superior Court entered a Final Order modifying visitation granting that the father only have supervised visitation with the children. In 2009, Father filed a Pro Se Complaint in the U.S. District Court for the Northern District of Georgia against 38 individuals and entities for their alleged misconduct relating to the modification proceeding. Complaints were brought pursuant to 42 USC § 1983 and 1985 which alleged numerous additional federal Constitutional and statutory claims as well as state law claims for intentional emotional distress, unauthorized disclosure of confidential medical information, slander, libel, and invasion of privacy. In 2010, the District Court dismissed Gottschalk’s federal constitutional and statutory claims on several grounds and then declined to exercise supplemental jurisdiction over the pendent state law claims, dismissing them without prejudice. Gottschalk appealed the federal constitutional claims to the U.S. Court of Appeals 11th Circuit. The 11th Circuit affirmed the District Court in an unpublished opinion on June 16, 2011. The mandate from the 11th Circuit Court of Appeals was issued on July 19, 2011.
On Dec. 20, 2011, Gottschalk, through counsel, filed the present action in the Superior Court against several of the same Defendants who had been named in the Federal lawsuit. The Complaint alleged the misconduct had occurred from April of 2006 to April of 2009 and claimed that the State lawsuit was a proper renewal action timely brought pursuant to O.C.G.A. § 9-2-61(a) because it was filed within 6 months from the date the mandate issued from the 11th Circuit Court of Appeals. Defendant’s answer raised several affirmative defenses. The Superior Court entered an Order granting the Motion to Dismiss and for Summary Judgment in that Gottschalk’s claims in the state lawsuit were time barred. Gottschalk appeals and the Court of Appeals affirms.

Gottschalk contends the Superior Court erred by finding his complaint was not timely filed within a six month window for the renewal statute. Georgia’s renewal statute provides that where a plaintiff’s state law claims are dismissed without prejudice for lack of subject matter jurisdiction by federal court, and the original limitation period on these claims have expired, a plaintiff may refile his claims within six months after the dismissal. Gottschalk argues that the renewal period began when the mandate was issued. The Federal Court’s mandate is the same as the State Court’s remittitur and the six month window for the renewal statute has to be commenced within six months of the date of affirmation and not when the mandate was issued.

**SELF-EXECUTING PROVISION**


In November of 2004, there was a Consent Order whereby the Mother had primary custody of one child. In 2011, the Father filed the instant action for a change of custody. In September of 2012, a hearing was held where testimony was heard, including that of the Guardian Ad Litem. The Court found that the Mother had participated in alienating behaviors and awarded primary physical custody of the child to the Father, for a period of 18 months, to commence at the end of her scheduled winter vacation time with the Mother in 2012, until one week before the start of the child’s 2013-14 school year; the Mother would regain primary physical custody. The Court also awarded child support from the Mother to the Father for a period of his primary custodianship and the Father to the Mother commencing on Sept. 1, 2014. The Court reserved the issue of fees. Several post-trial Motions were filed and, in October 2013, all matters were heard. The Court found several of the Mother’s Motions were frivolous, and awarded $9,362 in attorney’s fees. After the docketing of the appeal and cross-appeal, the Father moved this Court for an emergency supersedeas on the ground that the Trial Court erred when it issued the self-executing provision returning custody to the Mother in the summer of 2014. This Court granted the Father’s emergency motion and ordered the parties and the Court not to observe the self-executing change of custody provision pending the final disposition of the appeals. Both parties appeal and the judgment is affirmed in part, vacated in part, and remanded with directions.

The Father appeals asserting that the Court erred when it ordered the self-executing change of custody. O.C.G.A. § 19-9-3(a)(2) requires the Court to exercise its discretion concerning a change of custody in light of the child’s best interests as evaluated at the time of the proposed change. Here, the self-executing change of custody, that included the Court’s Order, failed to provide for a determination of whether the custody change is in the best interests of the child at the time the change would automatically occur, and violates the state’s public policy. Because the self-executing change of custody has been vacated, the award of child support payments from the Father to the Mother were to take effect at the same time the change occurs is also vacated.

The Father also argues the Court erred when it failed to address his claim for attorney’s fees and costs. In October, 2012, the Father submitted a letter brief detailing his claim for fees and Guardian Ad Litem costs incurred before and through the trial held in September of 2012. In September of 2013, the Father again moved for fees and costs under 19-9-3 and 19-15-14. The Motion asked for an award of a reasonable portion of the $46,892 spent in fees and costs. After the October, 2013 post-trial hearing, the Trial Court awarded the Father attorney’s fees in the amount of $9,362 but limited discussion to the Mother’s frivolous pleadings and motions. The Court did not mention or rule on the Father’s long-standing request for fees and costs incurred up to and including the trial period. The Court erred to the extent that it failed to consider the Father’s request to fees and costs. The issue is remanded to have an evidentiary hearing on the Father’s request for reasonable fees and costs.

The Mother appeals that the Court abused its discretion when it modified custody in favor of the Father. However, the Court included evidence and findings that the Mother had sufficiently undermined the child’s relationship with the Father, that the Mother moved four or more times after leaving Georgia and required a change in school arrangements each time, and she took several actions which alienated the child from the Father. Because the Court’s determination was supported by some evidence, the Court did not abuse its discretion when it modified custody.

**SERVICE OF PROCESS**


The parties were married in July of 2003, had four children, and resided in Butts County, Ga. In May of 2012, the wife filed a Complaint for Divorce alleging the husband was a resident of the state of California who moved from the marital residence within six months preceding the filing of the divorce action; subjecting the husband to the jurisdiction and venue of the Butts County Superior Court. The wife hired a private legal service company to serve the husband in California. After several failed attempts to do so, the process server, named Dunn, returned an Affidavit of Service indicating he served the husband by substitute service by leaving the Complaint with or in the presence of Maria Schiemm, occupant who was a person of suitable age and discretion. A final hearing was scheduled for Dec. 3, 2012, but no notice of the hearing was provided to the husband who failed to file responsive pleadings. The husband did not appear and the following
day the Court entered a Final Decree awarding the wife sole physical custody of the minor children, child support, and visitation when agreed upon by the parties. Upon learning of the Final Judgment, the husband hired an attorney to file a Motion for New Trial, which stated he was not properly served. The husband argued that he did not know Maria Schiemm and she did not reside at the residence. The Trial Court denied his motion. The husband appeals and the Supreme Court reversed.

O.C.G.A. § 9-10-94 provides that if a person is subject to jurisdiction of the courts of this state, he may be served outside the state in the same manner as if he were a resident of this state. Thus, proper service upon the husband could have been effectuated either by serving him personally or by leaving a copy of the Summons and Complaint at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. Here, the Court made no factual findings regarding service in either its Final Judgment or its Order denying the husband’s Motion for New Trial. This Court has previously held service of a defendant’s residence on a daughter that lived next door was insufficient, that service at a defendant’s residence on a daughter-in-law who did not reside there was insufficient, and service at a defendant’s residence on a babysitter who did not reside there was also insufficient service. The record reveals the absence of at least one essential element for proper service. The return service signed by the process server reflects on its face that he left a copy of the Summons and Complaint at the husband’s address with a woman named Maria Schiemm, identified as an occupant of suitable age and discretion. Missing from the Affidavit is any averment that Schiemm was a resident of the address. There is no other evidence in the record to support such a conclusion and therefore service was improper on the husband.

SUMMARY JUDGMENT

Lowry v. Fenzel, A14A2265 (Feb. 24, 2015)

The parties married in 1995 and divorced in 2008. Lowry (Husband) died intestate in 2011. At the time of his death, the Husband held several checking and investment accounts. Several of the accounts held were solely in the Husband’s name with Fenzel (ex-Wife) listed as the beneficiary or transfer on death recipient and others were joint accounts with ex-Wife. The ex-Wife took transfers of all the accounts. The Husband’s niece was the administratrix of the estate and filed suit against the ex-Wife. The Court granted summary judgment to the ex-Wife. The Estate appeals and the Court of Appeals affirms in part and reverses in part.

The Husband’s estate asserts the Trial Court erred in granting summary judgment to the ex-Wife to the accounts held solely in decedent’s name with the ex-Wife as the beneficiary. It is undisputed that the Husband never completed any change of beneficiary form. Paragraph 8 of the parties’ Settlement Agreement stated in pertinent part: “except as may otherwise be stated in this agreement, each party shall be entitled to any and all bank accounts, money accounts, investment accounts including stock portfolios in the party’s name and the other party shall make no claim whatsoever, legal, equitable, or otherwise to the same.” The ex-Wife concedes that paragraph 8 extinguished any claim she may have had to the accounts held solely in the decedent’s name that arose by virtue of their marriage. However, she argues that her beneficiary interest in those accounts is not by virtue of her marriage to the decedent, but rather through the contractual agreements between decedent and the financial institution and she did not waive her expectancy interest in those accounts. The estate argues that the language of paragraph 8 is broad enough to waive the ex-Wife’s right to the payment as a beneficiary. Here, the waiver language clearly expressed the intent of the parties and was sufficiently broad to include the ex-Wife’s expectancy interest. The statement that the other party shall make no claim whatsoever, legal, equitable, or otherwise to the same is broad enough that the ex-Wife waived any claim to those accounts and any expectancy interest therein.

The estate also claims the Court erred by granting summary judgment to the ex-Wife to accounts that were jointly held by the decedent and the ex-Wife. However, the Settlement Agreement states that each party shall be entitled to all such accounts in that party’s name. Nowhere does the Settlement Agreement address accounts that were jointly held by the parties. The agreement completely fails to describe and dispose of the accounts at issue. Where title to property is not described in a divorce decree, it is unaffected by the divorce and remains titled in the name of the owner. Under Georgia law, sums remaining on deposit at the death of a party to a joint account belonged to the surviving party unless there is clear and convincing evidence of a different intention at the time the account was created. The estate argues under paragraph 13 the settlement agreement states any and all claims, actions, demands, and the Plaintiff may otherwise have against the Defendant, as a result of the parties’ marriage, the property accumulated therein, and in order to directly divide said marital property, the Husband shall pay the Wife the total sum of $186,000 as a complete and final satisfaction of same. Here, paragraph 13 applies to the settlement of all claims arising from the parties’ marriage and includes no explicit waiver of any additional interest either party may have arising outside the marriage. Because the ex-Wife did not specifically waive her interest in joint accounts, the funds remaining therein upon the decedent’s death were transferred to her according to the account contracts.

THIRD PARTY CUSTODY

Strickland vs Strickland, et.al., A14A1577 (March 4, 2015)

The mother had three children: CS, born 1998; LT, born 2000; and IS born 2006. The grandparents obtained temporary emergency custody in 2006 after the home was raided by police. The Juvenile Court granted temporary custody, with the mother’s consent, through July, 2010, with the mother having supervised visitation. The grandparents also filed for permanent custody in the Superior Court of Cobb County. A final bench trial was held in November of 2013. The Superior Court awarded permanent custody in the Superior Court of Cobb County. A
mother filed a Motion for New Trial which was denied. The Court of Appeals reverses and remands.

In custody disputes between a parent and a third party, the Court’s presumption is that the best interests of the children is for custody to be awarded to a parent or parents of such child. A third party relative may overcome the statutory presumption only by showing clear and convincing evidence that all children will suffer either physical or significant long term emotional harm if custody is awarded to the parent. The Guardian Ad Litem described the entire family as a dysfunctional nightmare, but nevertheless recommended that the children continue to live with the grandparents. Here, the grandparents have been the subject of a DFACS investigation and, on one previous occasion, DFACS temporarily removed the mother from the home. It was also reported that the grandfather hits the children with a paddle and DFACS temporarily removed LT from the grandparents’ home.

In granting permanent custody to the grandparents, the Superior Court specifically found that the mother had no present income and that her home with her fiancée was not a stable environment. The Court also found that the children had resided exclusively with the grandparents since 2006, had bonded with the grandparents, that the mother’s interest since 2006 has been sporadic at best, and that the children have unique psychological issues that only the grandparents have addressed. Contrary to the Court’s finding, the evidence showed that the mother had a job working from home and had a stable home with her fiancée, where the children were welcomed. She had completed substance abuse treatment, passed her drug tests, was receiving treatment for her bipolar disorder and maintained a strong bond with the children. While the evidence showed the children also bonded with their grandparents and the grandparents have been somewhat attentive to the children’s needs while in their care, it is not the most compelling circumstances justifying termination of the mother’s constitutional statutory right to custody of her children. Although the children may experience stress and anxiety of moving from one school to another, it is not the kind of harm that is sufficient to rebut the presumption in favor of a paternal custody. There is also neither evidence that the mother will fail to address the children’s psychological issues nor that the mother will fail to provide the type of environment the children need. LT needs an environment where he can express himself without fear of punishment and there is no evidence that any of the children fear punishment from their mother. However, there is evidence that the grandfather regularly engages in unreasonable excessive corporal punishment and that LT has experienced significant emotional challenges while in the grandparents’ custody.

The evidence shows that the problems with the mother have been resolved such that the grandparents have not proven by clear and convincing evidence that the children will suffer either physical or significant long term emotional harm if custody is awarded to the mother.

WAIVER

Grove v. Grove, S14F1887 (Jan. 20, 2015)

The parties reached a settlement agreement on all issues except for the Husband’s visitation with regards to their 2-year-old child. Wife had concerns regarding the Husband’s drug use and he was currently in a rehab facility. The Wife also stated that she understood the paternal grandparents would like visitation with the child, but the Wife also had some concerns with the grandparents’ visitation. The Court asked if counsel for both parties could create a Parenting Plan to resolve all the issues at the hearing and both parties and counsel stated they could. A Parenting Plan awarded visitation rights to the paternal grandparents and was signed by both counsels and was attached to the Final Judgment and Decree of Divorce. The Final Judgment and Decree contained an award of visitation to the grandparents. Both the Settlement Agreement and the Final Decree provided that the paternal grandparents may exercise visitation with the child as a substitute for the Father. The Wife’s counsel indicated he approved the Final Judgment as to form. The Wife appeals and the Supreme Court affirms.

The Wife argues the Court erred by granting visitation rights to the paternal grandparents sua sponte, and by allowing the grandparents to exercise visitation with the minor child as a substitute for the Father’s supervised visitation schedule. Wife argues that the paternal grandparents didn’t file a petition to intervene in the divorce action. However, the Wife waived this ground for appeal by not raising the issue below. At the hearing, the Wife, her counsel, and the paternal grandparents were present and Wife made no objection to granting the grandparents visitation rights on the grounds of their failure to intervene. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Here, Wife effectively acquiesced and consented to the grandparents’ participation in the proceedings.

The Wife also argues the Trial Court erred by granting visitation rights to the grandparents because the Court did not find that the health and welfare of the child would be harmed unless the visitation is granted, and the Order should be reversed because there were no specific written of findings of facts in support of the ruling. Here, the Wife, through her counsel, approved the Final Judgment as to form and raised no objection to the Trial Court’s failure to make findings of facts. Again, the Wife did not preserve the issue for appeal. After approving the form of the Order, a party cannot complain of the Court’s failure to include findings of fact and conclusions of law. Having approved the Order as to form, the Wife is estopped from asserting on appeal that the form of the Order was insufficient because it did not include findings of facts. 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 vvalmus@mijs.com.
Child Support Worksheet Hotline

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a service provided by the Family Law Section of the State Bar of Georgia and the Georgia Legal Services Program

We are seeking volunteers to assist pro se litigants prepare Child Support Worksheets.

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The Nuts and Bolts of Family Law

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Q How long have you been on the bench?
A I was first elected for an open seat in a contested election in 1992. I am currently serving my sixth term. I plan to run again in 2016.

Q How long did you practice and in what field of law did you practice before you took the bench?
A After graduating from Emory Law School I practiced for two years as the bottom gopher litigator in a 15-person litigation firm in Atlanta. In 1981, I returned to my hometown of Americus to take a position as an Assistant District Attorney, becoming Chief Assistant in 1983. As a litigator I have been lead counsel in more than 300 completed jury trials from tort and domestic issues to death penalty cases.

Q How big is your circuit, how many other judges are in your circuit and how do you divide the case load?
A The six county Southwestern Judicial Circuit is larger than the state of Delaware, fewer people but more trees. We have had three Superior Court Judges since Judge George Peagler filled the third seat created in 2000. Judge James Sizemore has been with us since 2005. To keep things interesting and to spread the caseload we do a 1,2,3 rotation on everything including death cases. Domestic cases stay with the assigned judge forever from temporaries to finals to modifications and contempts to suggestion of death.

Q What advice to you have for family law attorneys to better handle our cases?
A Talk less and don’t get lost in minutia. Unfortunately, lawyers like to talk and they can’t seem to quit. Once a point is made, it is made unless it is disputed. I got it first, third, and tenth, time. I don’t need to hear it again, (and you are asking for attorneys’ fees??). When talking about a 401-K plan the exact wording of how one party was rude to the others grandmother in 2006 is not really relevant or crucial to a cash division. If a judge wants to know more about a fact, he will ask. If he is not curious about the color of grandma’s dress in the 2006 argument, maybe he doesn’t think it is all that significant to the 401k distribution. Way too often it is apparent lawyers are putting on a show for your client. That is ok, we all practiced law, but don’t forget who the final decision maker is. There is only one person in the courtroom you have to convince. Don’t lose sight of that, make sure your client understands, you need to be sure you understand that also. You are never going to convince the other side. Don’t argue with them, it makes you look unprofessional and they don’t make the decision. A client’s animosity is not constructive to their case and probably adversely affects their credibility.

Q What is the hardest aspect of family law cases for you?
A Custody

Q Do any of your circuits utilize a guardian ad litem? If not, why not and do you think that is a disadvantage to the case as a whole?
A Generally no, my litigants are often poor and the cost compared to the benefit usually isn’t justified. Often no significant insight is added to the case. Guardians ad litem can be useful, but are used only in a minority of our cases. Unlike urban counties we are lucky to have bailiffs, there are “two” Georgias.

Q Do you think witness affidavits at a Temporary Hearing are useful? Do you rely on them?
A Of course I read them. Too often they are from clearly partial affiants. Don’t lawyers know that? Teachers make excellent affiants and witnesses because their allegiance is more often for the child not for one of the parties.

Q Does the extra marital conduct of the parties matter in a custody case?
A Generally not, certainly not as much as the aggrieved party thinks it should. Being a good parent and being a good spouse requires different qualities. Custody is best interest of the child, not what makes a slighted parent happy, sometimes very different things. Punishment of an errant spouse is generally not an element of “best interest of a child.” Explain that to
your client. Too many clients seem unprepared as to how to appear in front of the judge. Sorry, I may not feel the indignation they feel they deserve. That indignation may hurt their credibility and show they may not be a cooperative co-parent.

Q Do you think your circuit is keeping pace technologically with other circuits? Does technology really help in family law cases?

A Technology is certainly helpful in preparing parenting plans, child support worksheets, and orders. It is nice to access documents from the clerks’ files online. Technology improves everyone’s efficiency and should make it easier to have your document complete and correct. I don’t know that it really helps in the ultimate decision making process.

Q What would you like family law practitioners to do differently with the child support worksheets and schedules, both at the temporary hearing and when submitted with the final judgment and decree?

A Submit all your documents completed and done correctly with your final orders. Make sure your final order or child support addendum match the child support worksheet and the worksheet is filled out completely.

Q Anything else you would like to add.

A Do it right the first time. Judges quickly learn who does their documents correctly and who does not. You are creating your professional reputation everyday. It appears too many lawyers try to sneak things by when the documents are not correct. In the next case, your documents will be delayed as the documents will receive much closer scrutiny. Doing it right the first time saves the wear and tear on lawyers and staff, clients, and judges and staff. It makes you and your office look more professional because, in fact, you are.

I don’t like to send documents back, but I do so almost every day. Some lawyers are a pleasure to work with because you know they did it right and you are not worrying that they are trying to pull something off. Those lawyers generally find their judges similarly satisfying to work with.

Judges are thankfully much smarter than I perceive most general litigators seem to think. Judges also make decisions for the right reasons, we don’t award custody because someone is dating the sheriff’s cousin (as if we knew). It is ok to tell me something two or three times but after a while ridiculous redundance begins to hurt your credibility. Don’t overdo the spin on a fact. Credibility with the judge is critical.

The judges’ job can often be very stressful and can have much seemingly needless detail, but being the decision maker it can be extremely rewarding. Occasionally you know you have really made a difference in someone’s life. Nothing can be more rewarding. FLR
I am here to present the Joseph Tuggle, Jr. Professionalism Award.

The award is given in recognition of the person who the Family Law Section deems to have most exemplified the aspirational qualities of professionalism in their practice as a lawyer or a judge.

I am Gwenn Holland. My law partner is Tina Roddenbery. Tina is this year’s recipient of the Tuggle Professionalism Award.

Our associates, Jamie Perez and Erik Chambers are here. Tina’s husband, Hansell, is also here.

Also present, in spirit, are Tina’s deceased parents, Louise and Ralph Shadix. Tina’s parents were remarkable people. Her mother was a strong, driven, independent business woman. Her father graduated first in his class from Emory Law School. He practiced as a lawyer until he was called upon to run the family business after the death of his wife’s father.

Together, Tina’s parents provided the standard by which Tina measures herself. We often think that ethical failure is due to weakness of character. However, more often than not, it is due to an inadequate ideal. Tina was very fortunate. Her parents served as exemplary ideals.

Our profession comes with certain rules, obligations and standards of excellence. In the process of subordinating ourselves to our profession, those rules, obligations and standards of excellence structure our soul, making it easier to be good. By “practicing” the ethics of our profession, we are admitted to an honorable institution – one we can draw upon to steer a straight and ethical course.

Tina has shown over the 28 years that she has been practicing – that she has a deep reverence for our profession. She considers service to clients and service to the institutions of the Bar as something sacred.

She considers service to clients and service to the institutions of the Bar as something sacred.

Among the many, many ways she has served the profession:

- Board of Governors
- Family Law Section Chair
- Institute of Continuing Judicial Education Board
- Supreme Court of Georgia Unauthorized Practice of Law Committee
- Disciplinary Board
  - Investigative Panel
  - Review Panel
- Chief Justice’s Committee on Professionalism
- Young Lawyers Section President
- AVLF – Chair
And it goes on and on and on.

And, unlike many of us, when Tina is on a committee or board, she doesn’t just show up on occasion. She is present. She is intensely involved. She makes sure she understands the institution, she leads the institution, she nurtures the institution – pushing it to be its best.

Tina’s work, together with Carol Walker and Sandy Bair, on the child support guidelines is another example of this. They recognized that some form of child support guidelines was going to be passed by the legislature. The form it was in was a disaster. They worked long and hard – out of their love for this profession – to mold those guidelines into something reasonable, something acceptable. They didn’t do it for personal gain, for referrals or ego or recognition. They did it out of their reverence for our profession.

Tina does the same with the people in her life. When we might be inclined to be lazy, she pushes us to be our best, for us to act with a full heart.

Ours is not an easy profession. We deal with overworked, imperfect judges. We have difficult, antagonistic opposing counsel. We have angry, and often times crazy, clients. But through all of that, Tina understands that we are practicing a sacred vocation.

You know, the source of our strength is also the source of our weaknesses. The same qualities that make us empathetic are also what make us insecure. The same qualities that make us demand the best of ourselves are also those that make us impatient when others don’t demand the best of themselves.

Like all of us, Tina is engaged in that struggle as well – to moderate those characteristics when they lead us down the wrong path and stand firm when they lead us on a moral and ethical road.
Our world is immeasurably complex. We have to make hundreds of decisions a day. With each decision we need to hold an ideal.

I have been fortunate to have worked with Tina for 28 years. Though younger than me, she has served as my model for professionalism. My failures are mine, but my successes follow from the standards she sets. Find yourself a model – an ideal. May you be as blessed as I have been in doing so. FLR

*Inspired by and quoting from “The Road to Character” by David Brooks.*

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**JOSEPH T. TUGGLE JR. AWARD**

The Family Law Convocation on Professionalism was commenced in March of 1992 in response to the Supreme Court’s initiative on professionalism. The Convocation is held annually and involves discussion and analysis of issues regarding judicial and lawyer professionalism. Starting in 1995, the Family Law Section in conjunction with the Convocation on Professionalism established the Family Law Section Professionalism Award. The award was given in recognition of the person who the Section deems to have most exemplified the aspirational qualities of professionalism in their practice as a lawyer and/or a judge. In 1999, the award was officially named the Joseph T. Tuggle, Jr. Professionalism Award and was given to him that year shortly before his death.

Past recipients include:

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2000 - Hon. Cynthia D. Wright
2001 - Hon. Mary E. Staley
2002 - Hon. Louisa Abbot
2003 - H. Martin Huddleston
2004 - John C. Mayoue
2005 - Hon. Carol W. Hunstein
2006 - Deborah A. Johnson
2007 - Jill O. Radwin
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2010 - Steven J. Harper
2011 - John Lyndon
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