Family Law Newsletter

July-August 2002

Making Sense of Collaborative Law

by Robert P. Wildau

To most attorneys including this one, on the first hearing "collaborative law" sounds like a contradiction in terms. Lawyers go to court to find out who's right and who's wrong, so what's to collaborate about? Or if people are truly collaborating, why should they need to resort to law at all?

What is "collaborative law" anyhow? In a nutshell, it is a process of working through a legal dispute, usually a domestic matter, in which the parties and their counsel agree not to resort to the courts.[1] Their so-called "participation agreement" includes rules of engagement whereby the lawyers will

- Cooperate in providing disclosure and discovery
- Model for their clients a commitment to honesty, dignified behavior, and mutual respect
- Neither prepare nor file any document with any court except by mutual agreement

Similarly, the parties agree

- Not to ask or expect their attorneys to advance unethical or illegal positions
- To make full and fair disclosure to their attorneys and each other of all pertinent facts
- To communicate respectfully and constructively with each other, discussing settlement only in conference – not at unannounced times by telephone or unannounced appearances.

The common commitment is cemented by the lawyers' promise that if they cannot reach a negotiated solution, both will withdraw so the parties can hire other counsel to litigate their case.

Collaborative Law is a movement still largely concentrated in the domestic field that grew from one burned-out divorce lawyer's cry, "There must be a better way!"[2] The various collaborative divorce models developing across the country have in common a "team approach" whereby each side may have a therapist or coach as well as a lawyer, and one financial advisor may act as a consultant for both. But what gives the process its unique dynamic is the lawyers' agreement to put down some of their professional weapons.[3]

How Does Collaborative Law Work, and Why?

The Structured Four-Way Commitment. Achieving the goal of the Collaborative Law contract means NOT having to go to court. The requirement that all the lawyers be disqualified in the event of a breakdown assures that participating counsel are motivated to make the process succeed. Thus the diplomat's skills become as important as the warrior's

in "winning" the case. Openness, candor, and cooperation replace guardedness, secrecy, and threats as the techniques most likely to achieve success. Walking out in anger, or provoking the other side to do so, ceases to be a viable tactic.

Setting up collaborative representation in a divorce is an educational process culminating in a set of agreements about how the two parties and their lawyers will work together. First one's own client needs to hear about the basics of divorce law, the dispute-resolution continuum,[4] and the range of a lawyer's services from which he can choose. The collaborative lawyer keeps responsibility for solving the problem firmly on the client's shoulders rather than proposing successive solutions for the client to criticize. She does help the client identify his substantive goals and priorities, and when she is confident that the client understands the choices before him, they sign a Collaborative Law retainer agreement.[5] Then together they plan how to draw the other party into the collaborative mode.

The first attorney will suggest the collaborative model to the other spouse's attorney if one has been identified, and if necessary will provide information about it.[6] If not, she will write and propose the model directly to the second spouse, providing a list of counsel trained and knowledgeable in the process.[7] While prior training is beneficial, the basics of Collaborative Law can certainly be learned in the context of one's first case.[8] Once both parties and their lawyers have had their questions answered and are ready to sign on, customarily they will set up their first four-way meeting to execute the basic agreement to use Collaborative Law."[9]

The agenda at the first "four-way" may include discussions about the employment of neutral experts regarding the finances and psychological issues

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NOTES FROM THE CHAIR

Emily S. "Sandy" Bair, Chair, State Bar of Georgia Family Law Section

It is an honor to be serving as the Chair of the Family Law Section for the 2002-2003 year. As of July, 2002, we have 1,754 members. Our section continues to be energetic and successful. Elizabeth Green Lindsey, our past-Chair won the Section of the Year Award for the Family Law Section. It is a daunting task to follow in her footsteps.

We just completed the Family Law Institute 2002, held at the Sandestin Hilton in Destin, Florida. We had more attendees than any other Institute. From the evaluations submitted, the Institute was a great success. Next year, our new Vice-Chair, Tommy Allgood of Augusta, Georgia, will plan the Family Law Institute 2003. It will be held at the Ritz Carlton in Amelia Island, Florida, from May 22 to May 24, 2003. As always, it is wise to plan early and make your reservations.

Twenty Superior Court judges and one Supreme Court judge came to the Institute 2002 at the Sandestin Hilton as guests of the Family Law Section. Judges brought spouses and children and had a very good time, if the gracious thank you notes they sent were any indication. Evaluations showed that the members enjoyed the camaraderie with our judges at the Institute and we will continue these invitations next year. Of course, we have to rotate our invitations because we cannot invite every judge every year. If you know a judge who would like to come next year, please contact the Chair.

Our goals for the year are numerous. We are continuing to develop the Website that was started by Elizabeth Lindsey. If you have not seen the website the internet address is http://www.gabar.org/familylaw.htm. The Chair could use help with the website, soanyone with creative ideas, please contact the Chair.

The website was recently updated after the 2002 Family Law Institute. If you click on "News Update", you can download a PowerPoint presentation containing more than 100 photographs from the Institute. You may be surprised to see your own picture. Two of the sections in the website are "Under Construction". These are "Practice Tips/ Resources" and "Taxes". We are considering starting a listserv where our members can submit questions, replies and exchange information. Your thoughts on this addition are welcome and appreciated.

It is easy for us to add resources, links, pictures and information to our website as we have the help of Joe Conte at the State Bar of Georgia to do the technical work. For a limited period of time, we are publishing the most recent newsletter on the website. However, we plan to limit the newsletter and certain other sections to the paying members of the Section shortly.

Please check your name, address and other information in the Membership Roster. Most importantly, if you have not given the State Bar your e-mail address, please do so. We are able to send broadcast e-mails to members of the Section when important events in Family Law occur. If you do not want to miss notice of the latest appellate court decisions or other exciting news, let the State Bar know your e-mail address. The website is a work in progress.

Another goal this year is to get more involved in helping the Georgia legislature frame family law. All of our members can become more involved in legislation, particularly during the legislation session. Links to important family law bills are posted on the website. It is easy to send an e-mail from the website to the sponsor of the bill, letting the sponsor know your support, criticisms and suggested changes. We have an active legislative liaison from the Section to the legislature, but we need more involvement from the members. We need to take advantage of our having a governor who has practiced family law and can support us.

We have members with various points of view, all of who need to be more active in getting information to our legislature so that our laws are focused on the needs of the public. This year, we also hope to have a meeting with the Georgia Supreme Court to discuss areas of law and types of issues that need the attention of our appellate courts.

I am pleased to announce the appointments to your Executive Committee for the coming year. They are:

Tommy Allgood	Augusta, Georgia	Vice-Chair
Richard Nolen	Atlanta, Georgia	Secretary/Treasurer
John Lyndon	Athens, Georgia	Member-at-Large

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regarding the children. The lawyers should already have conferred to review any interim problems and identify "hot-buttons," but the primary function of the meeting is to install a collaborative "container" around the parties and their issues, including a schedule of further meetings. Each side then usually conducts a short debriefing session, to take stock of what worked and what didn't, after which the process should be ready to move into the phase where the real work gets done.

Without court rules setting discovery deadlines, documents still get produced because no one is being made to comply by pressure from an opponent. Instead of a financial expert's time being eaten up in deposition defending one side's view of the facts, he can be running "what-if" projections on alternative settlement numbers for both parties. Effective cooperation, rather than the risk of what might happen in court, propels the process because if it stalls and causes a loss of trust, both parties and both lawyers will have failed.

Team Approach. Collaborative Law, as practiced in Georgia and elsewhere, gives equal emphasis to the financial and emotional aspects of divorce, as well as the legal processes with which lawyers are most comfortable. Some divorce lawyers are satisfied with their own expertise in all these areas, and may even see other professionals as threatening their control of a case. But for many others, sending the client to a communications skills coach or child development specialist is a relief from burdens they feel less equipped to handle.

Financial planners, using modern software to analyze the long-term impacts of alternative support arrangements, can help the parties find the most tax-efficient solutions, while satisfying both the paying and receiving spouse that they will work as projected. The collaborative model encourages the parties to hire one expert to evaluate property, instead of making them pay two to do the same work and defend their disparate findings.

The expanded professional team approach offers clients a coordinated, consistent and efficient group of professionals who know how to work together effectively to serve the interests of the re-structured post-divorce family. In the manner of "free trade" versus "protectionism," it also increases the overall professional services pie by encouraging referrals between the disciplines.

Success is Measured Differently. Our legal system relies on the notion that two or more professional adversaries representing the parties to a dispute will draw forth all information relevant to the contest in the process of advocating their clients' best positions, thereby allowing the decision-maker to determine the "truth" and to make the best decision. This process assumes that the only real interest of the parties is to "win". In that sense it reflects the attitude that upon the decision to divorce, the marital relationship becomes a mere struggle for power or property wherein the participants must compete to "win" the power and its associated by-products.[10]

While hardball trial lawyers may dismiss the notion of law as a "healing profession," it remains true that every encounter our clients have with us or the courts tends either to serve or deter healing. Particularly is this so in the stressful passage of a divorce. Ignoring the scarring impact of a litigated divorce on the parties doesn't diminish the damage done.[11]

Collaborative Law goes beyond allocating interests in the "marital" and the "separate" estates, to value and preserve a third, their invisible "relational" estate. This is a range of interests vitally important to clients, but usually treated as inevitable collateral damage in adversarial divorce proceedings. It includes the children's relationships with the extended family of both parents, the web of friendships the spouses shared, their ability to parent effectively after the divorce, and to meet comfortably at future life passages such as graduations, marriages, births and funerals. It also includes the ability of each client to look back on his or her own conduct during the divorce with a sense of dignity and self-respect. Divorce achieved collaboratively preserves to the clients the integrity that comes from valuing what was positive in the marriage as a chapter in their respective life histories. It enables them to feel that under the greatest stress they behaved consistently with deeply held religious and ethical values.[12]

Questions Lawyers Most Frequently Ask About Collaborative Law

What About The Duty of Zealous Representation? Every lawyer seems to remember the concept of "zealous representation" from law school, but may forget its true place in the hierarchy of his duties. It certainly does not oblige him to use any and all means to achieve everything his client may demand during the course of a representation, or to fight tooth-and-nail for every last dollar on the table. Indeed no one of the functions of a lawyer—advisor, negotiator, intermediary and advocate—has primacy over the others.

"As advocate," says the Preamble to the Georgia Rules of Professional Conduct, "a lawyer zealously asserts the client's position under the rules of the adversary system." As negotiator, it also says, "a lawyer seeks a result advantageous to the client, but consistent with the requirements of honest dealing with others." The Rules encourage lawyer and client to discuss and agree on the goals of the representation and the means used to achieve them.[13] That ethical dialogue often ultimately produces a set of objectives quite different from what the client brought to her first meeting with counsel.

But how different can those objectives be? Collaborative Law is part of a continuing proliferation of dispute resolution alternatives which includes the "retainer for limited purposes" or "unbundled legal services."[14] In California, where the latter concept originated, a well-reasoned opinion says that it is ethical for a lawyer even to ghost-write pleadings and give legal advice to a client without appearing as counsel of record, or even disclosing his role to the court.[15] Where a retainer agreement excludes the pursuit of rights and remedies that a court could provide, obviously the

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Stephen Steele	Marietta, Georgia	Member-at-Large
Christine Bogart	Atlanta, Georgia	Member-at-Large
Carol Ann Walker	Gainesville, Georgia	Member-at-Large
Shiel Edlin	Atlanta, Georgia	Member-at-Large
Karen Brown Williams	Atlanta, Georgia	Member-at-Large
Tina Shadix Roddenberry	Atlanta, Georgia	Member-at-Large

Each addition of the Family Law Newsletter contains our respective addresses, phone numbers and e-mail addresses. I hope that you will submit questions, comments and input to one or all of us.

The Family Law Newsletter has a new editor, Kurt Kegel, of Atlanta, Georgia. He will be assisted by Susan Hargus, also of Atlanta. We thank Richard Nolen for the long hours and successful effort he has contributed to the newsletter in the past year. Our newsletter is historically one of the best. If you know any local news, new judges, local rules, news about your firm, please contact your newsletter so that the information maybe included in an upcoming issue. As always, Kurt Kegel is looking for useful articles and hot tips.

Thank you for allowing me to serve as your Chair. We will continue to be one of the most active Sections in the Bar. Our success, as always, is due to the efforts of the entire membership.

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careful lawyer will make sure the client understands and accepts the risks associated with those limitations. According to the California opinion, he may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention. With respect to such problems he would be obliged to advise a client about his or her rights, the alternatives available under the circumstances, the consequences of each, their cost and the likelihood of their success.[16]

Under Georgia law, absent any other agreement an attorney has apparent authority as to procedural or tactical matters[17] but it is the client who decides issues that affect her substantive rights, including the settlement of her claim.[18] Accordingly, though the Collaborative Law retainer agreement alters the usual allocation of authority on procedural issues, it changes nothing about substantive matters. Furthermore though the attorney's services may be limited, they must nonetheless be competently provided, i.e. with the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[19] The protections of the lawyer-client privilege, and the lawyer's other duties of loyalty, diligence and confidentiality are likewise unaffected.

Does Collaborative Law "Protect the Client" (and Thereby the Lawyer Against a Malpractice Claim)? Answering this question requires us first to consider how much "protection" the divorce client enjoys under prevailing practice. We start by noting that there is rarely a domestic outcome that hits every one of the client's original targets. The conventional wisdom used to be that if either spouse left the courthouse happy, the other one must have gotten a bad deal. Depending of course on the facts of the case, the standard by which most family lawyers would expect to have their work judged is that the settlement should be economically at least workable, with no unhappy surprises or unforeseen tax consequences, and should give both spouses the chance to be good parents to their children.

Being a competitive exercise, litigation[20] proceeds by selective disclosure and tactical maneuver, mobilizing evidence and witnesses favorable to one side and suppressing or discrediting the ones favorable to the other. Particularly where clients are disturbed and vulnerable as in a divorce, the warrior's first instincts are to "throw up a perimeter" and fire off heavy rhetoric or onerous discovery to let the other side know they're in for a fight. We hear the client groan, but persuade him that it's for his own "protection," The tone thus having been set, the other side responds in kind. Differences between the parties are emphasized so as to eclipse areas of agreement. To the first offer of settlement the stout-hearted advocate may say, perhaps over-protectively, "I wouldn't let my client agree to that."

The lawyer's instinct to prove her zeal by adopting the client's positions and attitudes often leads to unrealistic expectations. Reality may not set in until trial looms or the liquid assets that might have provided a readjustment cushion have been consumed in the struggle. Hasty settlement on the courthouse steps undermines any sense of control in the client, and increases the risk of drafting errors. When the terms are less favorable than the client was prepared to expect, he may be subject to either "buyer's" or "seller's remorse". And the high emotions and unpredictable results of a jury trial carry their own risks of dissatisfaction. A suit for the higher fees incurred only invites a counterclaim for malpractice.

Removing the element of combat naturally disconcerts lawyers who have not learned other ways to resolve a clash of interests. Being accomplished in the use of the Civil Practice Act to ferret out discoverable information or to preclude untimely claims and issues, one may feel unprotected or even helpless without those weapons in hand. But are they necessary to provide a client the essential benefits of legal representation? The Collaborative Law approach recognizes that in domestic matters, the client often has enough knowledge of the essential facts, or enough trust in the other party, for instance, to proceed without court-supervised discovery.[21] Furthermore, expertly hidden assets may well not be discoverable with any reasonable degree of effort. So little if any value may be given up by renouncing the tools of formal discovery.

Unlike mediation without the assistance of lawyers, clients in Collaborative Law can have as much hand-holding as they want. They get the benefit of the lawyer's investigative and analytical skills in detecting any possible fraud as the facts are assembled. They get sound real-time advice in setting goals and skilled help in negotiating. And it all proceeds at a pace not dictated by the "hurry up and wait" demands of a court calendar, so the parties have time to reality-test each other's proposals, and to get comfortable with their deal before signing it. The main difference from litigation is that the lawyer's advocacy is focused on persuading the other spouse rather than a judge or jury.

Collaborative Law cannot work with parties who have significant psychiatric problems, or where there is a pattern of domestic violence or with people who are fundamentally dishonest or unscrupulous, or unable or unwilling to follow through on their commitments. But for parties who are willing to invest in the process, it offers a more satisfactory outcome than litigation, and accordingly more real protection for both client and lawyer.

But Don't Clients Hire Fighters Not Settlers? A lawyer who like most bills himself as a fighter is likely to attract clients who want to fight. When one's only tool is a hammer, everything looks like a nail. But in the writer's experience, one who casts oneself as a settler of disputes attracts a remarkable number of callers who fear getting enmeshed in litigation more than they fear getting less than top dollar at trial.[22]

Some of course are looking for an easy way out. They want the mediator to make the other spouse accept their views, and don't understand that he can't just tell the couple how to resolve their issues. That opposite spouse may be tempted to use mediation but feels vulnerable even with counsel at his elbow, assuming he can find a lawyer willing to take such a mere advisory role. These people share a belief that hiring an attorney will mean losing control of their cases and that the lawyers will delay resolution by inflaming feelings on all sides. Many can afford to pay for good counsel but stumble around on bad advice because they can't overcome their gut-level dislike of lawyers. Collaborative Law is a framework in which this potential clientele can be served. Since the first Georgia Collaborative Law training in October, 2000, some 83 lawyers and 53 other professionals have taken it. But public awareness has grown quickly from stories on ABC-TV and Fox News in Atlanta, and Collaborative Law has been regularly featured in the past year at family law and ADR seminars, both in Georgia and nationally. The more it is understood and promoted as an option by the mainstream of the domestic bar, rather than draw away existing business it stands to attract more.

Conclusion

Collaborative Law is a genuinely new paradigm for the legal resolution of disputes. It has particular advantages in family matters as a structure in which lawyers can help divorcing spouses find genuine "win-win" solutions with all the protections of conventional representation, and express their better selves in the process.

(Endnotes)

1. "Neither party nor his or her attorney will use the public judicial process during the course of the Collaborative Law Process", Principles of the Collaborative Law Institute of Georgia, available at http://

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collaborativelawga.com/principles.html.

[2.] Stuart G. Webb, Esq.; see generally Collaborative Law Institute of Georgia Program Materials October 12-13, 2000, p. 01-002, Institute of Continuing Legal Education in Georgia.

[3.] "We bury the hatchet / But leave the handle sticking out," Garth Brooks, Ropin' the Wind, 1991, © Major Bob Music and Warner-Chappell Publications.

[4.] Douglas H. Yarn, Alternative Dispute Resolution, Practice and Procedure in Georgia, (2d ed. 1997), §2-3; Pauline H. Tesler, Collaborative Law, Achieving Effective Resolution in Divorce Without Litigation, (American Bar Association Section of Family Law, 2000), p. 59.

[5.] See Tesler, supra, Chapter 7, Form 3, among an excellent set of forms for this purpose, on floppy disk as well as text.

[6.] Tesler, supra, Chapter 7.

[7.] Members of the Collaborative Law Institute of Georgia are listed at http://collaborativelawga.com/members.html. Counterpart organizations in other states can be found at http://www.collabgroup.com/, the Website of the International Academy of Collaborative Professionals.

[8.] "There is really only one irreducible minimum condition for calling what you do 'collaborative law': you and the counsel for the other party must sign papers disqualifying you from ever appearing in court on behalf of either of these clients against the other. Beyond that requirement, all else is artistry, ... ," (emphasis in original) Tesler, supra, p. 6.

[9.] Tesler, supra, Chapter 7, Form 4.

[10.] See Janet Weinstein, And Never the Twain Shall Meet: The Best Interest of Children and the Adversary System, 52 U. Miami L. Rev. 79, 82-83 (1997).

[11.] Tesler, supra, p. 21, n.14.

[12.] Tesler, supra, p 80.

[13.] Ga. R. Profl. Conduct r. 1.2 (eff. 1-1-01), and Com. 1 thereto; State Bar of Georgia Handbook, Part IV, pp. H-23-24.

[14.] California attorney-mediator Forrest W. ("Woody") Mosten, an inactive member of the Georgia Bar and former clinical professor at Mercer Law School, is credited with coining this term in 1993. Mosten is also the author of Unbundle Your Law Practice: How to Deliver Legal Services a la Carte for Improved Service and Profits, (ABA Law Practice Management Section, September, 2000).

[15.] Formal Opinion No. 502 (November 4, 1999), Los Angeles County Bar Association Professional Responsibility and Ethics Committee available at http://www.lacba.org/showpage.cfm?pageid=431.

[16.] Id., citing Nichols v Keller, 15 Cal.App. 4th 1672, 1684-87, 19 Cal.Rptr. 2d. 601 (1993).

[17.] OCGA §15-19-7 (2001).

[18.] OCGA §15-19-6 (2001)

[19.] Ga. R. Profl. Conduct, 1.1, (eff. 1-1-01) State Bar of Georgia Handbook, Part IV, p. H-23.

[20.] "Litigation: A machine which you go into as a pig and come out of as a sausage." Ambrose Gwinnett Bierce, The Devil's Dictionary (1911).

[21.] If a Collaborative Law attorney learns that his client has withheld or misrepresented information that should have been disclosed, the participation agreement requires him to withdraw. If deception is discovered later, a settlement agreement reached via a Collaborative Law process is no more or less susceptible to being annulled for such a reason than any other negotiated agreement.

[22.] Reliable statistics on pro se filings are remarkably difficult to come by. One source, unconfirmed by the Office of Court Administrator, reported that, some 31% of the cases filed and assigned to the Family Division of Fulton Superior Court in 2001 had no attorney listed—clearly not only for financial reasons.

How Should Parents Introduce New Significant Others To Their Children During And After Divorce?

Anthony C. Levitas, Psy.D., Licensed Psychologist, Atlanta, Georgia

Recently, I was asked to speak to a group of superior court judges and judicial officers on cooperative parenting in divorce cases. One judge raised the issue of what the court should do when one or both parties are involved in a new relationship and they have introduced this new person to the children, or that this new person is living with one of the spouses or spending the night. As a psychologist, my task in such cases is above all to keep the best interests of the child at heart. From a child's developmental and psychological perspective, one needs to appreciate that divorce is often a time of great change, loss, conflict and turmoil. Children of divorce are frequently caught up in loyalty binds, not knowing which parent's side they are supposed to be on. It can be quite confusing and disturbing enough for children to have to adjust to drastic changes in their family, without having to deal with a parent's new love interest. Children can also be quite sensitive to the needs of the parent who is not dating or involved with a new significant other and feel pressure to protect them. They may also feel guilt and a sense of betrayal towards this parent if they develop friendly feelings for the other parent's new love interest.

The issues of attachment and abandonment must be considered also. Far too often, children are introduced to a parent's new significant other prematurely. Children develop relationships with and become attached to these individuals. If the parent's new relationship does not pan out, and the child has become emotionally attached to this person, the child is faced with additional loss and abandonment issues on top of adjustment to divorce issues. Therefore, I recommend parents use great caution in introducing their children to new relationships during and after divorce. Unless the parent has a high degree of certainty that the relationship is long-term, there is no point in introducing the child at all. Even with a high level of certainty, parents should introduce their children to these new relationships slowly and gradually. While I appreciate that divorcing parents are frequently eager to move on, start dating or begin new relationships, they need to appreciate that their children likely have different needs and are not ready. Depending on the child's age and level of emotional maturity, parent's should wait six months to a year to begin introducing new significant others to their children. Initial meetings should occur at neutral sites such as restaurants, parks or other leisure sites. The new relationship should initially be introduced as a friend, in order to give the child a chance to adjust and get acquainted. It should be clarified to the children that this new person will never take the place of their biological parent. As the child's level of comfort with the new relationship increases, the frequency of meetings may increase as well. Finally, I do not recommend that the parties in such cases should live with their new relationship or have them spend the night when minor children are present. This can be very unsettling and distressing to children of many ages.

These are some steps parents can take to help their children with the painful adjustments of divorce. Children need their parents to treat one another civilly and respectfully. Parents need to communicate with each other regularly about their children. One of the best predictors for how children will adjust to divorce is the level of conflict between the parents. Parents owe it to their children to work diligently to lower the conflict and be adults.

Negotiation not Advocacy

By The Honorable Stephen E. Boswell, *Senior Superior Court Judge, State of Georgia*

In the last article I talked about the basics of mediation. What is mediation? How should you prepare for mediation? What is the role of the mediator and attorney? In this article, I am stressing another of the fundamental elements that everyone needs for a successful mediation—Negotiation.

What is Negotiation?

One of the fundamental tools of mediation is the art of negotiation. Negotiation is not advocacy. In advocacy, our job is to present an argument and mentally overcome the opponent with persuasive facts or substantiating data. Advocacy is viewed in terms of "won" "lost" "contest" "carry the burden" "prevail." Attorneys are taught from the first day of law school, "We are advocates for our clients." Indeed, the oath we take when we are admitted to the Bar says we must be advocates for our clients.

Negotiation is not advocacy, but you do not have to forget what you have learned as an advocate to be effective in negotiations. However, in a mediation where negotiation is the art of the day, the skills of advocacy are largely useless. Rather than thinking of negotiation as an offshoot of advocacy, you must think of it as learning a new skill. Put aside your advocacy hat and try on a new one. Do not be afraid to learn a new art, or "trick of the trade".

The art of successful negotiation requires one party to convince the other side in the dispute to do something in cooperation to help resolve the dispute. In negotiation, they gain—you gain. It is something like "tact." I once heard "tact" was defined as "telling someone to go to Hell in such a way that they will ask for directions." Successful negotiation is not a "winner take all" contest. I am afraid we lawyers usually take the "winner take all" approach to many disputes we enter. However, we are now being asked by the courts and often by our clients to take a new approach.

Learning to Negotiate

I first thought negotiation was a skill that could not be learned. It was more like athletics, music, or art. I thought of it like "freckles"—you either have them, or you don't. Now that I have been involved in mediation for some time, both as a mediator and an educator, I have changed my opinion. Negotiation skills can be learned. In fact, everyone has some basic negotiation skills they learn through living. You can improve the negotiation skills you already have.

Whether we are advocates or negotiators, the first thing we must have is a dispute. What is a dispute? It can be anything that two or more persons must jointly resolve. Disputes can be as mild or innocent as "Honey, where are we going for dinner?" to "I am fed up with you and I'm suing for divorce and I'll see you in court . . . !!!! (expletive deleted). We have "disputes" all the time with a lot of people. We settle disputes in several ways.

The first approach is the "jungle method." In this method, one party says, "I am bigger and stronger than you and I'll just whip you to resolve this dispute." This approach is more akin to advocacy than any other approach. (For example, "I am bigger and stronger than you and I'll bury you in paper!") It is also the prevailing mentality for too many lawyers.

The second approach is the "head in the sand" or "wake me when it is over" approach. This approach has a dangerous corollary, the "I still reserve the right to be angry if you make the wrong choice" resolution. Come now, every one of us has to admit that at least once when you and your friend or spouse have gone to dinner, and your dinner companion asked "Where do you want to go for dinner," you have responded, "I don't care." Yet, when your companion said, "OK, let's have Chinese," you, suddenly "care." After your companion made the decision, you, the "non-committal" party replied, "I don't think I am in the mood for Chinese and I want to go somewhere else, and I'm not going to have Chinese." You just took the "head-in-sand" approach. And, when you leave the dispute in another's hands without providing input, you are likely to be unhappy with the result.

The third, and generally best approach, is negotiation. Negotiation requires both parties to think about and discuss what is the best resolution for the dispute. For example, if you and your companion were planning dinner and your companion asks, "where do you want to go to dinner," you would answer differently and provide some guidance. You might say, "Let me think. I am not really in the mood for Chinese and I had Mexican for lunch." Your companion might reply, "OK, I think I'd like a sandwich," to which you might reply, "Sounds good. How about the deli down the street?"

Divorce is so full of emotional clients that attorneys usually go directly to Approach One or Two. Remember emotions, usually very high emotions, come in the door with the divorce client as excess baggage, but, baggage or not, it still comes in the door. Try to get the emotions out on the table

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Negotation (continued)

with the client. The emotions will not simply go away if your client finds a convenient sand pile into which he or she can stick a head. Your job is to get the client to recognize that divorce involves a lot of emotions and that is normal, but they generally need to look outside of the litigation to resolve their emotional issues. The true legal issues—Child Custody, Child Support, Alimony, and Property Division—these issues can be negotiated. Remember that no one—not you, nor the judge, nor the jury—is going to render a verdict that says "You, Mrs. Smith, are the just and good one and your spouse, Mr. Smith, is a bad and evil person."

To negotiate, we must discuss, compromise, and most of all communicate about a resolution of the issues involved in the dispute. In negotiations, we must obviously talk. I suppose we could do it all in writing, but we like the speed of talking. However, as much as we like talking, remember that listening is more important than talking.

Mediation is defined as a facilitated negotiation. This means that the mediator is injected into a negotiation for resolving a dispute. The mediator's role is to assist the discussions or negotiations. Remember, the mediator is not the "talker". It is not his or her dispute, nor is it his or her negotiation. He or she is merely the facilitator to aid the others who are negotiating. You as negotiators are the ones who must know and practice negotiation skills because the mediator is going to use other skills in this process and it not going to tell you how to do your job.

Why?

The most important word in any negotiation is "Why?" Advocacy does not care why. Advocacy is the dispute blunderbuss. Throw it all up against the wall and see what sticks. Why do you want the house? Why do you want the speed boat? Why do you want that amount for child support? Why do you want that amount of alimony? Make you client answer these questions and others like them. Get them to explain to you and then the mediator, "why." "Just because" is an unacceptable answer to these questions for a mediator, judge, and most of all for a a jury. Making your client answer "why?" also requires at least some degree of honesty from your client and some honesty with your client as to the ramifications of bad or dishonest answers to the "why?" questions. If you sense your client is not being honest with the "why" answer to these questions, you need to forewarn them about the certain failure of your impending case.

We all negotiate with our clients when they first come to our office, generally at least over the fee arrangements. I think we need to negotiate more actively with our clients about the issues in the case itself. Negotiating about how the case will be handled at the outset does several things. First, it gets your client to become more honest with him- or herself. Next, it helps you get a better assessment of how your client is going to come across on the witness stand. It also prepares the client for mediation. Finally, believe it or not, it also helps in the long term relationship between parents when dealing with the issues surrounding raising their children.

Negotiating in the Mediation

Lets assume you and opposing counsel have gotten both of your clients to mediation. The mediator will begin with a general or plenary session when everyone is around a single table. Each lawyer informs the mediator about the parties, the posture of the case, and the issues. The mediator may allow some "venting" by the each party toward the other. While this may not seem to be the point to start negotiating, negotiation starts the very minute the mediator sits down. Start listening immediately. Listen to what the mediator says, the other party says, and the other lawyer says. A lot of the general session involves posturing by all involved, but it can informative if you listen. Unless you have had a temporary hearing, this should be the first time a "neutral" has been involved in the case. It now becomes more that just the parties talking to each other. Someone else is listening and watching. Also, remember that they hoped for outcome of the mediation is a resolution. While it is important to present each party's position, both attorneys should avoid inflammatory statements which don't aid the mediator in understanding the case and may simply inflame the emotions of clients who will shortly thereafter be asked to work together for a resolution of the dispute.

Be on the look out for and be aware of signals. Signals can be sent several ways before, during, and even after the mediation, or trial for that matter. Most signals are verbal. Make sure if the signal is verbal that you receive the whole signal and interpret the signal correctly. All too often, we hear the start of signal in the form of a statement or question and assume the remainder and begin formulating a response to our assumed verbal signal. Listen first, then respond.

Another type of signal is the physical signal. Crying, fidgeting, restlessness are examples of signals. A signal can also be an absence of verbal response. Silence is a powerful signal. You must read the correct signal and attach it to the correct stimuli.

Finally, there are written signals. These we will get into later.

After the general session, the mediator will generally suggest private caucuses between each attorney and his or her client. It is during the caucus that negotiations will start in earnest. The mediator will assist the discussions by asking the "why" question to a lot of your client's positions. Look at the signals your client is sending to the mediator, as well as those that the opposing side sends through the mediator. Observe and listen to the mediator to see what signals is he or she sending. You need to be assertive with the mediator. Ask the mediator, "what do you think of this position?" Remember the priorities you and the client wrote down before the mediation, as I discussed in the previous article. Let the mediator get started on some of the simple issues and negotiate a resolution on them first. Then, once the easier issues are resolved move to the more difficult ones.

Eventually the negotiations will progress to the point that written proposals are exchanged. Be careful not to let emotions get injected into the discussions. Remember this is a negotiation, not advocacy. Look at the proposal with a cold eye. Look for any movement on any disputed issue. You and your client must leave the demons at home. Don't allow yourself or your client to fall in the "escape trap"—The "I'm not listening to any more of that bull, I'm leaving" way out. If you or your client is prepared to take that attitude, you might as well not go to the mediation in the first place. Negotiations are not generally pleasant. Negotiation is not a time where your eloquence and good looks will carry the day. Negotiations are tough, hard, mentally exhaustive exercises. Be prepared so you can see the movement and try not to worry about the size of the movement the opposing party makes. Any movement at all is a positive. Look for those small movements. Good negotiators will build on small movements and go to larger issues.

Sometimes a good negotiator may not see any movement, but can still move the negotiation forward. If you reach a stalemate, try to change the medium of value. By that, I mean take the issue of child support and see if there is another way to accomplish support for the child besides money. Paying day care, summer camp, cheerleading uniforms, karate lessons, piano lessons, anything but giving the other spouse money. THINK.

Negotiating skills are an essential tool of mediation. However, good negotiating skills are also essential tools for all of our relationships in life—not just during mediation. Remember that next time someone asks you to go to lunch.

The Fulton County Family Court Judges Speak

Shiel Edlin recently sat down for a candid discussion with our three current Fulton County Family Division judges. As you will read, their insight and dedication go beyond what you see at a 30-day conference or in the courtroom. Clearly, these judges strive to treat each of our cases with a fresh perspective, while applying consistent standards to give the parties and their attorneys a measure of predictability. Although it is important for the judges to rotate out of the Family Division for a time in order for them to maintain their fresh perspective, it is apparent that the current judges are open to rotating through the Family Court again.

Shiel Edlin: How do you like the job?

Judge Tusan: I think it's a good job. It's interesting, it gives you an opportunity to bring in families and try to address the issues that they are faced with in our court. I've enjoyed working with the Bar. I think that I've certainly gotten to know many members of the Bar much better since the odds are that you're going to repeatedly see people that are working in this area, and I would say overall it's a very, very good Bar, and that the quality of the work and the commitment to representing your clients is apparent. Also, I think as you get to know people, they get to know how I'm likely to respond in a situation and I'm more familiar with how you're going to present your case and I think that helps us kind of cut through stuff and get down to the issues more quickly than if we were strangers. I think also in many cases where children are involved, having the standard of what's in the best interest of the children helps me to focus more easily on what the result is, and that's something that I enjoy because in other areas where you don't have that clear standard, then it makes it more difficult to come to a result. We can try to cut through the behavior and pull the parties together and show them what they need to be doing, what the visitation arrangements should be, what the ultimate custody should be; it's not an easy decision, but at least it keeps you focused, as opposed to going off on tangents.

Judge Westmoreland: There are two things about it. One is, as opposed to the vast majority of criminal work, I get the feeling that I actually accomplish something in the domestic relations area for the community, for people; whereas in the criminal context it's almost like it's after the fact, that all you're really doing is conducting a trial and given the result of that trial, sentencing someone for something that's already happened. Whereas in the domestic context you have a tendency to look down the road, to look at the future, and you hope that you're capable of doing something with these folks that are in front of you that might help make their lives better down the road, as opposed to simply reacting to something that's already taken place.

The other aspect of domestic work that I like is that in some ways it's comparable to what I just said, and in other ways it's contradictory, a lot of times you have people who in a domestic context take advantage of other people and I sometimes have an opportunity to correct some of the wrongs that have gone on in the past. People get away with a lot of things, and until somebody steps in and says "wait a minute, you've done what, you're doing what," they just won't stop, and I have the opportunity to stop people from doing things that are just not right. So when you find yourself in that kind of an instance when you can correct a past wrong and you try to ensure that it doesn't occur again in the future, that's an aspect of judging that led me to want to be a judge 14 years ago when I went on the State Court. It was more sort of a community service kind of approach to things than anything else.

Judge Wright: Well, I think it's great. I like the work, I like the Bar, I like working with the people. I think it's a great area to be a judge, and at the end of the day you feel like you've accomplished something, because you have a lot of cases, a lot of families who come through, as opposed to general jurisdiction where you may be working on motions, or you may be doing a plea and arraignment calendar, or you may be on one trial for several weeks, it's more hands-on, and I'm someone who enjoys that.

Shiel Edlin: Before the Family Court originated, many members of the Bar felt one of the main oppositions was that no existing Superior Court Judges would volunteer as a full-time Family Court judge for a two-year term. So, I'm interested to find out now that you've had some experience, what would you say about that concern?

Judge Tusan: Not everyone on the Bench would necessarily put family law issues as number one, but I think based on the relationship that we have established with each other, Judge Wright, Judge Westmoreland and myself, and initially Judge Dempsey and Judge Bedford, that now five of us have had the experience and it's not so much an unknown territory, and they've seen that we've done it and we're still sane, and they're willing to perhaps step up to the plate when it's their turn.

Shiel Edlin: Does the two-year term feel about the right amount of time?

Judge Tusan: I think it does. I think to retain the interest in returning that's probably a good fit.

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Because the cases have the extra emotional dimension you don't have with your normal civil case or criminal case, I think you need to take a break and then come back. I think if it's much longer than two years, that may have an affect on your willingness to return.

Judge Wright: I think it's a good benchmark. It may be that someone would want to continue, and is able to continue. When I rotated off, it was nice to rotate back into general jurisdiction for awhile, and it was very nice to rotate back into the Family Division after two years being back in general. So, the variety I think is good for judges, and I do believe that somebody could serve longer than two years, maybe two two-year terms, if they were so inclined, but that's not our system currently.

Judge Westmoreland: Right now, I still enjoy it, and still look forward to it. I can see maybe after two years that it will probably be time to consider recharging my batteries and go away. In fact, it's likely that we'll establish an 18-month tour of duty with changes every six months. We did have some transition difficulties last time. We may basically keep on 18-month rotations so that we'll just have one person transitioning in and out every six months.

Shiel Edlin: This is a rare opportunity for the Bar to get personal insight and how these cases affect you personally. Do you take these cases home with you at night?

Judge Westmoreland: I find myself coming back and sort of worrying about decisions much more than I do in your typical civil case or any of the criminal cases that I've been involved with. I have my standard monologue which I use to try to get the parties to resolve their differences amongst themselves as opposed to my having to dictate a resolution to them, and one of the things I always say is "they'll be another case coming in tomorrow that I'll have to deal with, and by this weekend or next week, I'll have forgotten about your case, but you'll have to live with the ramifications of this ruling while your children are minors and sometimes even longer." But the truth of it is there are a lot of cases that you just can't put out of your mind that quickly. And you're right. I don't know that I take it, I guess I do take it home with me because at night is oftentimes when you think about it, right when you're getting ready to go to bed, or when you wake up at 3:00 in the morning and you can't go back to sleep. These cases sort of creep into your mind.

Shiel Edlin: Divorce lawyers have that same problem.

Judge Westmoreland: I can imagine, and to be honest with you, being a judge in the Family Division is a whole lot better job than being a lawyer in the domestic context.

Shiel Edlin: What do you see as the difference?

Judge Westmoreland: You just have to live with too many things that I don't have to put up with.

Shiel Edlin: What are you thinking about when you say that?

Judge Westmoreland: Telephone calls, as Judge Tusan sort of alluded to, there are a lot of things that people try to bring out at a hearing that really don't have a whole lot of bearing on what the ruling is going to be, so sometimes judges won't even let it in, and other times they'll let the parties talk just to sort of get it off their chest, but in reality it doesn't play as important a part in the final ruling as the parties might think. Well, when things happen in their lives, you're sort of the first line, and you get that telephone call that sometimes is important and sometimes is totally irrelevant to the overall picture, but from your perspective you have to let them talk and listen to what they have to say and provide them with direction and guidance, and we just don't do that on a day to day basis, which is difficult.

Judge Tusan: There are occasions, probably if I really sat and focused with these particular cases that when you even hear the name it just immediately brings back all that was involved. But I think one thing that you do take home is just the sense that even if you finish with one case, I mean the very minute that you've made the decision or they've made the decision and you've approved it in one case, there are so many other cases that immediately need your attention, and then the cases that you've resolved before too long, they're back for some reason. Or you issue a decision and you announce from the Bench, and the attorneys are supposed to reduce it to writing and submit it, and they can't agree on what you said, so it's just this constant feeling of there's always something else, and I think that's what probably builds up the stress, it may not be that you're worrying about a particular case, but just that kind of feeling like it's just constant, it's probably something that we all need to make sure we address in a certain way.

Judge Wright: I try to remember that the next family that comes before me, this is their one time to be before me, and they don't really care what's come before me that day and what will be coming the next day, because what's important to them is the problems that they're bringing to the court, and it is critical that you be able to focus on those and not be in last hour's case or next hour's case. Sometimes, we're not as successful at that as we would like to be, and I hate it when that happens, and it does happen on occasion. If we get too far behind, and a case goes over too long, then you have a lot of different things kind of tugging at you, but I really think that's the beauty of the family division. I really noticed when I was back in general jurisdiction – when I was back in general jurisdiction we were still doing family cases, I could tell that with the press of the court's business and the criminal arena and then the civil arena, that sometimes despite my best efforts, the family law cases didn't get the same sort of attention and didn't get the same sort of temperament as they did when that's all I did. And so this way I think the Family Division is successful from the judicial standpoint; it allows you to stay focused on what's important to the family that appears before you.

Shiel Edlin: Given that you have to try to balance the management and moving along of the cases from the court's perspective, against the emotional side, who do you see as being in charge of the timing of the cases?

Judge Westmoreland: I think obviously when you have to come in for a 30 day conference the court is initially. The conferences serve a variety of purposes, and one of them is showing everybody, okay we've got a court, a judge, who is now aware of this case and is going to do everything he or she can to keep it on track and to not let it fall into one of these cracks, and so in that regard I think the court is definitely being more pro-active in the Family Division than it was before, and that's good. Now, you're right, there are some instances where maybe slowing the process down and taking a little bit longer is in everybody's best interest, and the court has to rely on the professionalism of the attorneys to recog-

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nize those situations and to relay that information in a way that's not just, oh yeah, this is the same lawyer whose never done anything on time, he's never ready to provide discovery in a timely fashion, he's never ready to do the depositions, he's always asking for continuances on temporary hearings, when a case is on a trial calendar, he's either got a leave of absence or a conflict or he'll just flat out tell you he's just not ready if he can't come up with a better excuse. There are some, unfortunately, lawyers like that, and you learn who they are, but there are a vast majority of the domestic bar that you can trust and if you relay good information, I think the judges in the Family Division will work with you and handle the case appropriately.

Judge Tusan: The judicial officers are usually the first person to meet with the parties, I have certainly gotten a number of memos or just mentioned to me in passing from the judicial officer, that a case perhaps needs to treated a little bit differently for x, y and z reasons. I think the attorneys should not hesitate to come up with a good reason for special treatment, if that is the right word to use, appropriate treatment for a case. For instance, if one party is getting ready to undergo chemotherapy, well clearly we're not going to press them to a 60-day conference just because that's what the schedule is.

Judge Wright: I know I'm thought of as running a tight docket, and I think I do run a pretty tight docket, but I don't think it's an unreasonable one or an insensitive one. And if someone is having a hard time, or say you have someone who travels a lot on business, and that person be it the man or the woman, must continue their travels to continue the money that comes into the family unit. I think we work with these cases on individual basis. If there is a good reason for delay, fine.

Shiel Edlin: For example, the parties are in counseling to work on the marriage and a potential reconciliation, although there is no dismissal, that's very common.

Judge Wright: Yes, that is common. My theory on that, and I break this rule all the time, is to give them a few months but tell them, I don't really think you can have one foot in the courthouse and one foot in the marriage, so decide what you want to work on. Do you want to work on your divorce or do you want to work on your marriage? And I don't see really why it's so difficult to dismiss and work on the marriage if you're in counseling, and then to simply re-file; usually you haven't really done any depositions, so there's nothing to transfer over to the newly filed case, although it's possible. I try to work with those folks, but I do believe you ought not to have an easy backdoor there.

Judge Tusan: If attorneys approach the court and indicate that they think there's a serious chance of reconciling, and I think that's what we should be all interested in first and foremost, if it's a sincere reconciliation, we'll back off a little bit to give them that opportunity. So I think both sides need to be flexible. It may be though that the case will need to be dismissed and refiled when you're ready to proceed if it needs that slow of a track.

Shiel Edlin: What trend do you see with respect to alimony? Does it exist? Is it a myth?

Judge Tusan: I would say that it's still being awarded in cases of long, long term, where it's clear that the parties had decided that that one spouse is going to remain out of the work force. I think that the trend in a marriage of ten years or less, where the party claiming the right to alimony has an ability to earn but just perhaps hasn't, in those instances I think there's more expectation that maybe a little bit of assistance is necessary to get you back out there, to get back up to speed, but there isn't this expectation that one party, really to his or her financial ruin, should support the other side.

Judge Westmoreland: And I think as a result of there being more dual income families, the pendulum probably swings away from alimony by now, because you just don't have that many divorces that fit the pattern that Judge Tusan is talking about.

Judge Wright: I think in terms of long term first marriage, and where the wife has been a traditional homemaker, that there is still a place for alimony in that case. I have seen a permanent alimony award on rare occasions, usually related to health issues. It may also depend on what the property division is. If there's enough property to support someone, then that's something else to look at.

Shiel Edlin: Routinely, judges are appointing guardians for children, but we don't have any rules about what role of the guardian. What do you see as their role?

Judge Tusan: I really think that it's probably time for us as a division to take hold of that issue and come up with what are we asking the guardian to do, and then how do we receive the information at the ultimate hearing. I give the guardian the benefit of the doubt that they're doing this because of a sincere desire to help, and yes, I guess there's a presumption that there has been appropriate training to be of help. So I'm pretty protective regardless of what the outcome is, unless it's just clear that some rule has been violated, or they just have done a horrible job. They just shouldn't be made the target of a vigorous cross-examination like "What could you possibly have been thinking?" because that just isn't appropriate. And so if I'm looking at it incorrectly and other judges disagree, then there probably is a need for us to come to terms. To be clear, I don't have a problem with the guardian's findings being explored prior to trial. It just seems to me when we get to the trial, to make the guardian's report the big issue, as opposed to one person's opinion, that may or may not be adopted depending on how the evidence develops.

Shiel Edlin: The Bar's perception is that the Court will adopt the guardian's report. Is that a correct perception?

Judge Westmoreland: Well, I don't think that's correct. I mean there have been plenty of instances where I've ended up making what the guardian recommended the order of court, but that's only because I got there in my own mind. There are some times where I'll start at one point and go to the other, and then come back to the recommendation. So I take it as what it is. It's a recommendation. We need to probably have some standards, and we maybe ought to take the lead in that. But as far as, if I'm going to take a guardian ad litem's report into consideration, I've always felt two things. One is the attorneys and the parties ought to be aware of what the guardian's report says. If I'm going to read it, they have the right to read it. And secondly, if it goes against one of the parties, I think they have the right to have their attorney cross examine that guardian as to how they came to their recommendation, and when did they talk to this person or that person, whether they knew they had this information available to them or that information available to them, because there may be some

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things that the guardian doesn't know that they ought to know and I want to know that.

Judge Wright: I think we need to have discussions in that regard, and I think that the Superior Court judges across the state should have discussions with that issue. It's a difficult issue, and I was under the impression before hearing what Judges Tusan and Westmoreland have said, that we pretty much handled it the same, but apparently we all don't. I think we handle the report similarly, but as for your question about what role the guardians really play, I think it's a very gray area of the law, and it becomes difficult to rule on that with any sense of certainty.

Shiel Edlin: What areas do you think that the Bar needs to work on in terms of its presentation of its cases before you?

Judge Wright: I think in general the Family Bar does a great job in the presentation of their cases. I guess some times, if you don't do this full time, then I think there are some attorneys that have come to court and they're not as prepared as say the Family Bar is, where they don't have their financial affidavits prepared, or if they are prepared, they're incomplete and nobody's paid too much attention to that. I think occasionally what I see sometimes is that perhaps an attorney thinks an outcome may be relatively assured, and if it's not assured, I'm not sure that they have well prepared their client for what their client perceives as an adverse decision, and then they don't have any options that they can give to me as to alternative custodial arrangements for example, or visitation because they haven't thought, well maybe the judge won't rule in my client's favor, and I guess sometimes I see that that has been the case, but on the whole I think the cases are well prepared, well presented and very professional.

Judge Tusan: I think when you're talking about the custody decisions, most of the attorneys I think have their eye on the right place. But when you have, in particular a jury trial, of course you wouldn't if it's just child custody, but when you get the jury involved and the attorneys are getting geared up for the trial, it seems to me that you still have a whole lot of side issues, and as you called it drama, I mean things that have happened in the lives of these people that ultimately are not really going to be determinative. And so it is difficult with some attorneys to get them to see that yes that may have happened and I understand that your client may be very concerned about it, but in the ultimate analysis that's not going to be what's going to decide where the children are going to live, or whose time is what, etc., so it's just interesting. Make it more cut and dry. I mean, give me the facts, focus on the most important, in terms of the dirt, leaving most of the dirt back in the office.

Shiel Edlin: Dirt does not move you?

Judge Tusan. It has to be some really bad dirt.

Judge Westmoreland: And it also just makes the case harder to resolve.

Shiel Edlin: Okay. How else can we help? I'm just trying to get some more insight so we can help the Bar through this discussion. How else can the Bar better represent our clients for you?

Judge Tusan: Pushing for an independent evaluation as opposed to going out and getting someone that is hired to say whatever you want them to say.

Shiel Edlin: Are you talking about independent in a custody case?

Judge Tusan: Evaluation in a custody situation. I have a lot of problems with what appear to be a hired gun.

Shiel Edlin: Picked by one side. So you're really not interested in the one-sided evaluation.

Judge Tusan: Exactly.

Shiel Edlin: I think that's unethical by the way to do that from a psychologist's perspective. They can't make a recommendation.

Judge Tusan: And then they hedge, you know, well I'm not really making a custody evaluation, I'm just sharing with you my opinion.

Judge Westmoreland. It just goes back to what I was saying about how much more difficult I think it is to be an attorney in a domestic case than a judge because you are representing your client and you do feel that you need to advocate, but before you pull out all the stops I think it's incumbent upon you in your client's best interest to try to see if things can be worked out amicably, so that's a thin line to walk. I can take that position all the time until we have to go to a hearing and then it's not hard for me to put on the trier of fact hat, but I think you're better off to become a better representative, a better lawyer, a better counselor, a better attorney, if you realize that it's just not every case, it's just not knock down, drag 'em out, got to fight over every little thing. I would start from the other extreme and try to resolve as many things as you can, and then at the end if there are a couple of things left over, and they just can't be resolved, then it's in everybody's best interest to try the unresolved issues.

Shiel Edlin: The American Academy of Matrimonial Lawyers has brought to the court the late case evaluation process. I have been fortunate to serve a few times doing it, and I think I'm a better trial lawyer, as I see it from your perspective and understand the dirt issues and the emotion issues, and it's helped my clients in my representation of them. I can see it better from the Court's perspective. How do you view that process? Is it helping resolve disputes?

Judge Westmoreland: I appreciate the attorneys who do it because more often than not when lawyers are talking to me at a 120-day conference and they say "we have a late case evaluation set" for such and such a timeframe, those cases actually end up being worked out before we have to have a final hearing. I think it's another good settlement tool that effective lawyers ought to use to their client's advantage.

Judge Tusan: I think it's working well. They may not all settle right in the evaluator's office, but I think it appears that they've had significant impact on the cases, and even if they don't settle until they're in the courthouse with all the boxes, I've heard many cases where they've kind of referred back to – well we got so far, or it was either too late or we needed a little bit more time, and we weren't able to do it then, but they seem to go back to the wisdom that's imparted and use it to wrap up the final deal.

Judge Westmoreland: And it brings up the concept of mediation too, which it sort of ironically wasn't so long ago when people said, oh well, mediation might work in other kinds of cases but it really isn't going to work in domestic cases. Well, it works very well in domestic cases. And if it doesn't get cases settled before they get down here, there are plenty of times when I'll say okay

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what are the issues and they'll tell me, and I'll say are you sure you really don't want to spend a little more time trying to work those issues out before we have to have a hearing and go into a lot of other things, and they end up being worked out. I think mediators, like late case evaluation, are serving a very useful purpose in the Family Division.

Judge Wright: As a general rule, I think that the Bar is utilizing all of the settlement resources available effectively. Certainly not in every case, but as a general rule I think that's true I think I generally understand why a case has not been resolved. And it can either be that it's just a very difficult issue, or you have a very difficult client.

Shiel Edlin: Do you get a sense that you're seeing less adversarial cases as a result, or do you feel like you're still trying a lot of cases.

Judge Wright: I think we're trying a lot of cases but I can't really compare that, because we have so many more cases now. We have all the cases. So I don't know as a percentage if I'm trying more cases, or simply if it's a result of the numbers.

Shiel Edlin: There's a sense among the Bar that individual judges are sensitive to the case management numbers; that is that they get reported publicly, how many cases you have, how swiftly they move through the system. Are you sensitive to that when making these judgments about whether to force cases forward or not?

Judge Tusan: I think the reality is that the public wants something objective to measure our performance, so are we aware of the fact that numbers are reviewed, that numbers can be misinterpreted, yes. We want the numbers to be correct. But would I deny or disapprove a joint compliance certificate because I feel I'm five numbers behind Judge Westmoreland, no.

Judge Westmoreland: The bottom line from my perspective is that I assume when somebody files something, whether it's a contempt or a complaint for divorce, or modification or whatever, that they want it done; that they wouldn't come in and ask for it if they didn't want it accomplished. And so my job is to try and get it accomplished in as reasonable a timeframe as I possibly can. And so that's sort of why I think we all, the parties, the lawyers and the court, need to be moving cases down that track to a resolution as quickly as we can. There aren't many cases that benefit from delay. If there are, tell us about it, and if they're not, then I think we all ought to be trying to resolve them as quickly as we can so that people can get on with their lives.

Judge Wright: Now we will set a case as first on the trial calendar, and if it resolves then we have other cases to deal with that week. We've been running almost weekly trial calendars, and I try not to run anything longer than a two week trial calendar. In fact, I think I'm just about to start running my first two week trial calendar, because what I've found is that the cases that they announce settle, sometimes don't settle, and we really don't know that until toward the end of the week, and then I can't put them back on a trial calendar for another 30 days or so. So, to resolve that issue, then I'm planning on doing a two week trial calendar and letting folks know when they will be going to trial, and then those case that announce settled, and they don't have their settlement agreement in by the conclusion of the first week, then they need to be prepared to go to trial that second week.

Shiel Edlin: Judge Wright, I'm looking for some four-year insight trends. How about with the issue of equitable division, are you seeing what we think of as basically the jury, or the court, basically trying to divide assets in half, or do you perceive it differently?

Judge Wright: I think there's always a starting point, where you look at a division of assets in half, and then you factor in earning abilities of the respective spouses, and all the other factors.

Shiel Edlin: Thank you all for your time. This was very informative.

By Shiel Edlin, *Stern & Edlin, Atlanta, Georgia*

Upcoming CLE Opportunities

August 22-23, 2002	Successful Trial Practice (Marriott Gwinnett Place Hotel, Atlanta)
August 22-23, 2002	Professionalism, Ethics and Malpractice (Marriott Gwinnett Place Hotel, Atlanta)
August 23, 2002	Nuts and Bolts of Family Law (Hyatt Regency Hotel, Savannah)
August 30-31, 2002	Urgent Legal Matters (The Cloister, Sea Island)
September 6, 2002	Nuts and Bolts of Family Law (Swissôtel, Atlanta)
September 6, 2002	Emerging Tax Issues for the Non-Tax Practitioner (Sheraton Colony Square Hotel, Atlanta)
September 27, 2002	National Speaker Series - Eight Steps to Effective Trials (Marriott Gwinnett Place Hotel, Atlanta)
November 21-23, 2002	ADR Institute (Lake Lanier Islands, Atlanta)

For information about these or any other CLE information, except as noted, please contact ICLE Georgia at:

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The Family Law Section was the recipient of this year's State Bar Section of the Year Award!

Pictured are section chair Emily Bair (left), section member and past chair Elizabeth Green Lindsey (holding award), and State Bar section liaison Lesley Smith.

GETTING TO KNOW EMILY S. BAIR - NEW CHAIRMAN OF THE STATE BAR OF GEORGIA FAMILY LAW SECTION

Emily S. Bair ("Sandy") is the new Chair of the State Bar of Georgia Family Law Section. Ms. Bair has been a family law practitioner since 1976. She is a fellow in the American Academy of Matrimonial Lawyers and will be the President of the Georgia Chapter of the AAML in January, 2003.

Ms. Bair was raised in Newport News, Virginia. She was graduated from Smith College in Northhampton, Massachusetts in 1968. After attending graduate school at Emory University and teaching in the Atlanta Public Schools, she obtained her J.D. at Emory Law School in 1976. She was a member of the Emory Law Journal.

After graduation from law school, Ms. Bair began practicing with Nall, Miller and Cadenhead. A year later, she moved to Hurt, Richardson, Garner, Todd & Cadenhead where she practiced in the family law department for 13 years. Ms. Bair then moved to Altman, Kritzer & Levick, P.C. where she practiced family law until September, 2001. Ms. Bair started her own law firm, Emily S. Bair & Associates, P.C. in September, 2001, in Sandy Springs, Georgia. Ms. Bair is a member of the American Bar Association, State Bar of Georgia, Atlanta Bar Association, Cobb County Bar Association, Sandy Springs Bar Association and the Lawyers Club of Atlanta. She lives in Atlanta and is divorced with one adult child, Charlotte, age 23, who is attending the Atlanta Institute of Art.

TECH NOTES FOR THE FAMILY LAWYER

By John F. Lyndon, Athens, Georgia, jlyndon@lawlyndon.com

E-Mail

Some of you are probably wondering why I'm devoting a column to a means of communication that is simply a given in your professional life. If so, you are one of the approximately 1,092 members of the Family Law Section who have e-mail and have already discovered its benefits to you. However, if you are one of the 500 or so members who don't yet have or use e-mail in your practice, here are some things you might want to consider.

Intra-Office Communication: The biggest benefit of e-mail, and an unexpected one for me, was the quantum leap in efficiency, time-saving, accuracy, and ability to document communications that resulted in my office when we went to total e-mail communicating. The phone message slips that littered everyone's desks are a thing of the past. Lengthy and detailed messages can be immediately transmitted to the proper recipient and copied to appropriate staff, and hard copies can be instantly produced for the paper file if needed. Of course, transmitting telephone messages is only one function of intra-office e-mail. Actually, I and my staff communicate on almost every level by e-mail, from scheduling office meetings to "Coffee's running low." The value of having everyone in the loop who needs to be there simply can't be overestimated.

One feature that I particularly appreciate (available on my GroupWise electronic messaging software) has been the ability to have e-mail messages from my staff instantly displayed on my monitor, which I can quickly note without disrupting a client conference. Has your office just received word that a court has ruled in your favor and can't wait to let you know? Or, on the other hand, is there an emergency in the outer office that requires your immediate attention? Instantly, you're in the know. No more opening your door after a lengthy session only to be hit with a barrage of unexpected crises.

Another valuable application is the ability to search for the stream of previous e-mails concerning a case or client and instantly be up on the status, pressing issues, and client concerns. When I return a client's call, I am able to respond intelligently and have the necessary information at hand instead of the client's having to remind me of why we're talking.

Attorney-to-Attorney Communication. The ability to quickly address and resolve numerous significant and sometimes not-so-significant client issues is one of the traits of a good family law practitioner. Sometimes the telephone tag seems never-ending, not only to us but also to our clients. E-mail has the accuracy of paper correspondence without its formality and the time and expense of getting it out. Also, proposed settlement agreements, drafts of consent orders, and other such documents can be sent as attachments that can be opened by the recipient and edited without retyping or scanning. Finally, e-mail is absolutely the best way to communicate with large numbers of people, for example, members of a professional organization.

Attorney-Client Communication. As lawyers we all know that the primary complaint of unhappy clients is the failure of their attorney to communicate with them. E-mail cannot replace the intimacy and immediacy of the telephone and in-person conference, but it certainly provides a level of contact (a "lifeline" of a sort) that can go a long way in maintaining a positive attorney-client relationship. And, while it may seem to be a downside that you will frequently be bombarded with pages and pages of e-mails, I have found this to be an effective way for clients to vent their frustrations and anxieties about the divorce process at little pain to me, so that when we do meet or talk by phone, we can focus on the issues that will move the case forward. We should remember, however, that e-mails are like phone calls in that clients do expect a response, however brief, or at least an acknowledgement of receipt.

Note: Although the ABA has decided that e-mail is a secure means of attorney-client communication, keep in mind that the client's computer needs to be secure and inaccessible to his or her spouse to avoid interception of messages.

Broadcast E-Mail. The State Bar and the various sections are disseminating information to members by broadcast e-mail. This is as good a reason as any to begin using e-mail, and when you do, let the State Bar know. In fact, the Family Law section is planning to deliver the Newsletter to its members by e-mail in the near future.

FAMILY LAW SECTION AT LARGE

MEMORIES ABOUT JUDGE WILLIAM DANIEL

When remembering Judge Daniel, a number of wonderful thoughts come to mind. First, there was no finer trial judge, nor a more commensurate gentleman. When a witness would come to the stand, he would stand, bow, and greet the witness. That set the stage for how he ran his Courtroom. At the conclusion of the witness's testimony, he would thank the witness in the most gracious way that one could imagine. He treated lawyers with similar respect. At the conclusion of an oral argument, he would say, in the most sincere way "Thank You." When he was handed a document, he would never forget to say "Thank You," — and he always had that sparkle in his eye of real friendliness. His Courtroom was well-managed, pleasant, polite, and always gentlemanly. He never raised his voice, but there was never any doubt about his authority.

Judge Daniel had some hallmarks. He probably had a hundred red ties, and always wore cowboy boots, as a mark of the gentleman farmer/cattleman that he was. It was somewhat of a constant joke as to "which" red tie Judge Daniel would have on, or whether the red tie tradition would ever be broken. Would we ever see Judge Daniel wearing a blue or green tie? It never happened!

One of the most memorable Courtroom scenes regarding Judge Daniel was an oral argument by a young lawyer who was not satisfied with answers to interrogatories and document production. After Judge Daniel ruled in his favor on virtually every point, the young lawyer said: "Now, Your Honor, I would like an award of attorney's fees." Judge Daniel looked down at him and said: "Son, pigs get fed, hogs get slaughtered." The young lawyer said: "I understand that, Your Honor, but what about my attorney's fees?" Judge Daniel then looked at him and said: "Young man, there are a lot of lawyers in this Courtroom, most of whom are older than you, and you can ask any one of them how I just ruled." He went on to say quite politely that he did not think attorney's fees were in order. I have never forgotten Judge Daniel's "Pigs get fed" words of wisdom; and I have used his phrase a number of times in my career. Sometimes there is no better answer to a question or issue than: "Pigs get fed, hogs get slaughtered."

Judge Daniel had a deep sense loyalty to the lawyers who practiced before him, and a real sense of fairness. I can remember one time when I had a family vacation planned, all prepaid, but I failed to obtain a Leave of Absence. My case appeared on his trial calendar, and the opposing lawyer, blaming it on his client, said that he had to insist that I try the case. We met with Judge Daniel "early " one morning in his Chambers, and I explained my plight. The other lawyer insisted on a trial, and Judge Daniel very politely said: "In my Courtroom, a family vacation is more important than a trial that can be had 30 days later." That case was tried the next time it appeared on his calendar. He was famous for this type of kindness and understanding.

Of all the judges that I have ever appeared before, he was "as good as it gets." After an exceedingly difficult trial, having not prevailed, my client said to me in the elevator: "You know, 'we' lost the case. However, Judge Daniel listened to all of the evidence, considered everything, and then ruled. Even though 'we' lost, I got a fair trial before a fair judge." It seems to me that nothing more need be said about the mark of a judge, and a gentleman, than that. It really "doesn't get any better than that." I, like many other lawyers who appeared before him for many years, held (and now hold) him in the highest esteem, respect, and admiration; and those of us who practiced before him, really miss him.

Baxter L. Davis

Past Chairs of the Family Law Section

Elizabeth Greene Lindsey	2001-2002
Robert D. Boyd, Atlanta	2000-2001
H. William Sams, Augusta	1999-2000
Anne Jarrett, Atlanta	1998-1999
Carl S. Pedigo, Jr., Savannah	1997-1998
Joseph T. Tuggle, Dalton	1996-1997
Nancy F. Lawler, Atlanta	1995-1996
Richard W. Schiffman, Jr., Atlanta	1994-1995
Hon. Martha C. Christian, Macon	1993-1994
John C. Mayoue, Atlanta	1992-1993
H. Martin Huddleston, Decatur	1991-1992
Christopher D. Olmstead, Atlanta	1990-1991
Hon. Elizabeth Glazebrook, Jasper	1989-1990
Barry B. McGough, Atlanta	1988-1989
Edward E. Bates, Jr., Atlanta	1987-1988
Carl Westmoreland, Macon	1986-1987
Lawrence B. Custer, Marietta	1985-1986
Hon. John E. Girardeau, Gainesville	1984-1985
C. Wilbur Warner, Jr., Atlanta	1983-1984
M.T. Simmons, Jr., Decatur	1982-1983
Kice H. Stone, Macon	1981-1982
Paul V. Kilpatrick, Jr., Columbus	1980-1981
Hon. G. Conley Ingram, Atlanta	1979-1980
Bob Reinhardt, Tifton	1978-1979
Jack P. Turner, Atlanta	1977-1978

Know about any local news, new judges or local rule changes? Please contact the newsletter so we can include information in the next issue.

Have any news from your firm? Please contact the newsletter so we can include information in the next issue.

GEORGIA CASE LAW UPDATE

Sylvia A. Martin, *Davis, Matthews and Quigley, Atlanta, Georgia*

ADOPTION – STEPPARENT ADOPTION AND LEGITIMATION

Smith v. Soligon, 254 Ga. App. 172

In this case, there was a stepparent adoption proceeding immediately prior to the filing of a legitimation action by the putative biological father. The child involved was born in 1994. There was no dispute that Smith was the biological father and that the father and mother never married. The child had lived with the mother since his birth; and the mother had married Soligon in 1999.

Approximately one year after his marriage to the mother, the stepfather filed a petition to adopt the child. Five days later, the biological father filed a legitimation petition. The two actions were consolidated, and at the hearing on both, the Superior Court found the biological father had abandoned his opportunity interest in the child and allowed the stepfather to adopt the child.

The evidence showed that the biological father had maintained contact with the child during the first few years of his life: the biological father had lived with the mother and the child until 1998; however, he did not provide any significant financial or emotional support for the child. The biological father had not paid any support since 1998; had only sent a few gifts and cards; and had not visited with the child since 1998. The biological father also had a misdemeanor criminal record. The court noted that the biological father had failed to make any effort to develop and maintain a meaningful relationship with the child. The trial court found that it was in the child's best interest to deny the legitimation petition, and it granted the adoption petition.

On appeal, the Court of Appeals upheld the trial court's ruling. Following the tests set forth in In Re Baby Girl Eason and Jones v. Smith, the court found that the biological father had abandoned his opportunity interest to develop a relationship with the child, and that the evidence supported the trial court's conclusion that it was in the child's best interest to deny the legitimation.

The Supreme Court noted at the end of its decision that this case fell squarely within O.C.G.A. § 19812(f)(3), and the Supreme Court was not faced with deciding a legal parent's rights in connection with a stepparent adoption.

CUSTODY – PARENT V. THIRD PARTY

Burke v. King, 254 Ga. App. 351

This case involves a custody dispute between the father of the child in question and the child's maternal aunt. The facts in the case are that the father and mother divorced in 1996, with the mother having custody of the two then minor children. The father paid child support and visited them sporadically. Approximately three and a half years later, the mother died, and left the children in the care of her sister. The mother stated that it was her "last dying wish, that the children would be cared for by her sister upon her death." The father attempted to have the children live with him; however, the aunt would not let them go to the father.

The father filed for a writ of habeas corpus in Catoosa County (the father was a resident of Tennessee), alleging that the aunt was illegally detaining the children. A hearing was held, and on the day of the hearing, the aunt filed a petition seeking custody of the children. The trial court entered an order granting temporary custody to the aunt. A second hearing was held on the aunt's petition for custody. At that time, one of the children was no longer a minor, and she and the younger child had been living exclusively and continuously with the aunt. The court then entered a final order that gave custody to the aunt. In its order, the trial court stated that it was making no finding that the father was unfit, but found that it was in the best interest of the child that custody be awarded to the aunt.

The father moved for reconsideration, which the trial court denied. However, the trial court entered a second order containing additional findings which were that the father had failed to maintain reasonable contact with the child, and that the child had developed a close familial bond with the aunt. The trial court also noted that the father had physically abused the mother and the older child in the presence of the younger child, and had verbally abused the younger child over the telephone.

On appeal, the Court of Appeals found that the record was devoid of any evidence showing that the minor child would sustain any physical harm, nor was there a finding made that the child would suffer significant, longterm emotional harm, as required by the case of Clark v. Wade. There was also no evidence of the verbal abuse which had been mentioned by the trial court in its order. The Court of Appeals noted that the case presented a difficult situation with the trial court and the parties as the father had made efforts to be a good father, but the aunt had thwarted his efforts. Conversely, the children were bonded to the aunt and the aunt was attempting to comply with the last dying wish of the mother. The Court of Appeals found that, in light of Clark v. Wade, the trial court's findings did not satisfy the requisites necessary to award custody of a minor to a third party over a biological parent. The Court of Appeals found that the trial court abused its discretion in awarding custody to the aunt because of the absence of any finding of the father's unfitness, and the absence of a finding supported by specific facts that would establish by clear and convincing evidence that the minor child would suffer physical harm or significant longterm emotional harm. The Court of Appeals remanded the case with direction that the trial court determine upon a clear and convincing evidence standard whether custody in the aunt would harm the child using the definition of "harm" as set forth in the case of Clark v. Wade.

As a practice note, if you are involved in a case involving a custody dispute between a parent and a third party as defined in O.C.G.A. § 1971(b.1), it is very important to be familiar with the case of Clark v. Wade, 273 Ga. 587 (2001), and the specific findings that must be made by the trial court. Make sure to have the court make the specific findings of fact in its order to avoid the situation present in the Burke v. King case.

CUSTODY – PKPA, UCCJA AND CONTEMPT

Edwards v. Edwards, 2002 WL 460371

This case involves two companion appeals as a result of apparently lengthy litigation between the mother and the father of the child in question. The facts are that the parties divorced a few months after the child's birth in 1992. Apparently, the parties fought and litigated for nine years over rights to their son. Pursuant to the final divorce decree, the mother had sole legal and physical custody of the child, with the father having visitation which authorized gradually increasing rights with the child. The mother was not prohibited from moving out of Georgia or to another country. In 1995, the mother moved with the child to the Bahamas.

The father found difficulties in exercising his visitation and filed a petition for contempt against the mother. The court found the mother in contempt for her intentional failure to allow the father to exercise his visitation rights with the minor child. A few months later, the father filed a complaint in Georgia to seek custody of the minor child. The mother was properly served with the complaint. However, she did not answer the complaint and instead filed a plea to the jurisdiction and a motion to dismiss, claiming that she was a nonresident.

The trial court found that Georgia was the home state of the minor child at the time the father filed his complaint in that the mother had not lived in the Bahamas for six months prior to when the father filed his complaint. The mother did not appear at the hearing, and the court entered a finding that the mother refused to comply with the visitation provisions of the final decree of divorce. The court also made a finding that the medical care for the treatment of the child's brain condition in the Bahamas was inadequate in comparison to that available in Georgia. The trial court awarded sole legal and physical custody of the child to the father in 1996. The mother applied for discretionary review of said order, which was denied by the Court of Appeals. The Supreme Court also denied her petition for cert.

The mother then turned to the judicial system in the Bahamas. After living there for a year, she filed a custody petition there. The father filed an answer to her suit, and also submitted an application for assistance under the Hague Convention. Said application for assistance was refused because at the time the mother had taken the child with her to the Bahamas, she had done so lawfully.

The court in the Bahamas in 1997 awarded the mother full custody of the child and authorized the father to have reasonable supervised access to the child. The mother then attempted to have the Superior Court in Georgia recognize both decrees which were entered in the Bahamas. She argued that the custody order from the Bahamas was entitled to full faith and credit. The trial court refused to set aside the order awarding custody to the father and noted that at the time the mother was a Georgia resident and Georgia was the child's home state. The trial court stated that the court in the Bahamas refused to give credit to the decisions of the Georgia court, and that the Bahamian court erred in assuming jurisdiction.

On appeal, the Court of Appeals upheld the trial court's finding of contempt against the mother. The Court of Appeals noted that the contempt occurred prior to the change of custody order entered by the Georgia court, and that the trial court had the right to impose a jail sentence for violation of visitation rights.

On the companion case regarding the trial court's refusal to recognize the Bahamian court's change in custody order, the Court of Appeals reversed the trial court's order and remanded the case. The Court of Appeals found that the PKPA did not apply because the Commonwealth of the Bahamas is not a "state" within the meaning of the Act. Thus, the court in the Bahamas was not required to determine whether the trial court in Georgia had lost jurisdiction under the PKPA. The Court of Appeals did hold that the Commonwealth of the Bahamas constitutes a "state" under the UCCJA as defined by O.C.G.A. § 19942(10). The Court found that the Bahamian court properly assumed jurisdiction over the custody dispute as the Bahamas was the home state of the minor child at the time the mother commenced the custody proceeding. Furthermore, the evidence supported a finding that it was in the child's best interest for the Bahamian court to assume jurisdiction since the child had a significant connection with the forum, and evidence was available there concerning the child's care. Since the Bahamian court assumed jurisdiction in accordance with the UCCJA, the Superior Court in Georgia was required to recognize and enforce the Bahamian custody order.

The opinion in this case is very lengthy; if you have a case involving an overseas custody dispute and questions of the applications of the PKPA, UCCJA and the Hague Convention, then this case should be read carefully.

DUE PROCESS AND CONTEMPT

Baldwin v. Vineyard, Ga. , 562 S.E.2d 174 (2202)

At the parties' final divorce hearing, the wife testified, and then the trial court and counsel engaged in discussions concerning a possible fraudulent transfer of some of the marital property. The trial court began to announce its judgment; however, husband's counsel objected and stated that the husband wished to present evidence. The trial court continued to outline its judgment and terminated the hearing without allowing the husband to present any evidence. The Supreme Court held that the trial court improperly terminated the hearing without allowing the husband to present any evidence, and thus, vacated and remanded the case to the trial court for a full hearing.

Although it was not required to respond to the other contentions, the Supreme Court went on to address another enumeration of error in the husband's appeal concerning a selfeffectuating provision in the event husband failed to pay the sums of money required pursuant to the final decree. Specifically, the court in its judgment ordered that if the husband did not pay the amounts as ordered, then the wife could submit an affidavit and husband would be incarcerated until the amount was paid in full. The Supreme Court held that a trial court cannot order incarceration pursuant to a selfeffectuating order without the benefit of a hearing, and that such portion of the trial court's order adjudging husband in automatic contempt for nonpayment of the amounts owed to wife on the basis of her affidavit was also improper.

JUDGMENT – FAILURE TO APPEAR

James v. James, Ga. , 562 S.E.2d 506 (2002)

In this case, the wife was represented by counsel and filed for divorce. The husband was not represented by counsel, was personally served and did not file an answer to the complaint. The court held a status conference and gave husband notice of the conference; however, husband did not appear. The case was set for a nonjury trial. Husband was not given notice of the trial date and he did not appear. Husband learned of the divorce eighteen months after it was granted and filed a motion to set aside based on lack of notice. The trial court denied the husband's motion which was affirmed by the Supreme Court. The Supreme Court held that the case was different from Green v. Green, Crenshaw v. Crenshaw and Melcher v. Melcher. In Green, the Supreme Court noted that opposing counsel was required under the notion of professional responsibility, to inform the plaintiff of the hearing, who had been previously represented by counsel. In Melcher, the defendant's attorney had maintained contact with plaintiff's attorney and was engaged in settlement negotiations, during which plaintiff's counsel

scheduled the case for final trial without notifying defendant's counsel. The trial court held that under those circumstances, defendant demonstrated good cause for not attending the trial and was entitled to have the judgment set aside. However, in this case, the husband never was represented by counsel and never entered into settlement negotiations with opposing counsel. The court held that there was no evidence which would take the case outside of the general rules set forth in O.C.G.A. § 9115, and in Lucas v. Lucas and Hardwick v. Hardwick.

JUDGMENTS – SET ASIDE BASED ON FRAUD

White v. White, 274 Ga. 884 (2002)

Approximately fourteen months after the parties were divorced, the former wife filed a motion to set aside on the basis of fraud. The wife alleged that the husband had hidden assets during the divorce. The husband asserted that the wife was barred from seeking to set aside the divorce because she had retained the benefits awarded to her by that decree, i.e., she had received alimony during the fourteen months prior to the court granting her motion to set aside.

On appeal, the Supreme Court held that although it is wellsettled law that one who has accepted benefits such as alimony under a divorce decree is estopped from seeking to set aside that decree without first returning the benefits, estoppels are not favored by law because the truth is excluded. Thus, because the trial court expressly found that the husband was guilty of fraud in hiding assets during the divorce, the husband was not entitled to assert an estoppel against the wife as he was not free from fraud in the transaction.

In her motion to set aside, the wife relied on a nondisclosure provision in the agreement and on the provisions of O.C.G.A. § 91160. The trial court relied specifically on O.C.G.A. § 91160(d)(2), which provides fraud as a ground for setting aside a judgment. The Supreme Court noted that the trial court could not ground its decision solely on the settlement agreement because the rights of the parties after a divorce is granted are based on the judgment itself, and not on the agreement. Thus, the trial court correctly based its ruling on O.C.G.A. § 91160.

The Supreme Court also held that the trial court did not err in setting aside only a portion of the judgment. The husband asserted that Uniform Superior Court Rule 24.7 forbids the granting of a divorce decree unless all contestable issues have been finally resolved. However, the Supreme Court held that the Superior Court Rule applies to pending actions for divorce. In this case, the divorce had already been granted and all issues had been resolved, and the time for appeal had passed. The Supreme Court noted that the Superior Court Rule clearly addresses divorce cases pending before the trial court, rather than ones which have been already resolved on a final basis.

JURISDICTION

Midkiff v. Midkiff, Ga. , 562 S.E.2d 177 (2002)

The parties were married outside of Georgia; they lived in Florida, had children and moved to Germany where husband was stationed with the military. The wife then returned to the United States but had never lived in Georgia, and husband had not lived in Georgia since he was a child. Husband filed an action for divorce in Georgia. The wife did not answer the petition. A final judgment was entered granting the divorce and awarding custody of the children and child support to the husband. The wife filed a motion to set aside the final judgment which was denied by the trial court. The Supreme Court reversed the trial court's decision.

The Supreme Court found that the wife's domicile had never been in Georgia, and that the husband claimed that his military home of record was Spalding County where his parents had lived; however, he never lived in or visited Spalding County at anytime during the marriage. The husband had never filed a tax return or registered to vote in Georgia. The court noted that a member of the military may abandon his former domicile and establish a new one in Georgia by meeting the same requirements that apply to other citizens. Furthermore, Georgia requires that the domicile of a person may be changed by an actual change of residence with the intention of remaining at the new residence. Thus, there is a requirement of both an act and intent to establish a residence. A member of the military who is stationed in Georgia may file for divorce in Georgia if stationed in Georgia for one year preceding the filing of the petition. The husband in this case was never stationed in a military facility located in Georgia. Thus, the Supreme Court held that the trial court erred in failing to set aside the final decree. The Supreme Court also held that because the final decree was overturned, a final disposition of custody of the minor children and of child support would only be valid when a valid divorce was granted between the parties. Likewise, the awards of custody and child support were also invalid and set aside.

SETTLEMENT AGREEMENT

Schwartz v. Schwartz, Ga. . 561 S.E.2d 96 (2002)

The parties in this case were divorced in 1998. The final decree incorporated a settlement agreement which purported to resolve all issues surrounding the divorce. Regarding the parties' payment of income taxes owed for 1997, the decree stated that the parties would file joint tax returns for that year, and that the husband would be responsible for all state and federal taxes for the year. The parties also agreed that none of the income of the husband payable from his medical practice would be considered as income to the wife for tax purposes.

During settlement negotiations, the parties discussed that they would most likely have a tax liability owed for 1997. However, after the divorce and when the husband filed the parties' tax returns for 1997, he was actually entitled to a refund of approximately $27,000. He refused to divide it with the wife and received a declaratory judgment that he was entitled to payment of the refund. The trial court agreed with the husband's argument, which was affirmed by the Supreme Court.

The Supreme Court held that, in applying basic principles of contract construction to the settlement agreement, the husband was entitled to retain the funds for overpayment of the state and federal income taxes for 1997. The Supreme Court found that the agreement stated that the husband would be responsible for all taxes for that year, and that none of his earned income for that year would be considered as income to the wife. Thus, the Supreme Court concluded that the parties intended for the husband to assume all liability for taxes owed in 1997, and that it was their intention for the wife to avoid any responsibility for income tax liability for that year.

The wife argued that, although it would have been the husband's responsibility for payment of any liabilities owed, she was entitled to a portion of the refund as the agreement is silent in that regard. The Supreme Court held that nothing in the agreement indicated that this divergent result was intended by the parties.

In the dissent, it is noted that the ruling should be such that the division of a joint tax refund which is not specifically stated in a settlement agreement must be determined by reference to the facts of each case and the specific circumstances under which the parties maintained the financial arrangements of their marriage. The dissent stated that because the trial court failed to take such factors into consideration when awarding the refund to the husband, the declaratory judgment should be reversed and remanded to the trial court for further proceedings in that regard.

Editor's Column

Kurt Kegel, Davis, Mathews & Quigley

A Challenge to the Membership

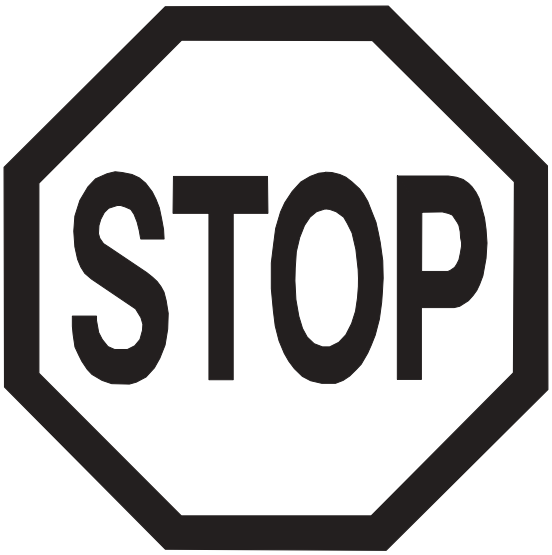
Once again, we were presented with an excellent seminar at the Family Law Institute, with a combination of fabulous topics and exciting speakers. Let's all give a round of applause to our new Section Chair, Emily S. "Sandy" Bair for putting together such a great seminar and making it all come together. Of course, I think everyone would agree that the production of seminars at the level we have come to expect would be very difficult, at best, without all the hard work of Steve Harper - thanks Steve!

I hope that those of you who attended the seminar enjoyed yourselves as much as I did, on both a personal and a professional level. For those of you who could not make it this year, mark your calendars now for 2003, for the next seminar to be presented by Tom Allgood at Amelia Island. While we were in San Destin this year, I tried to talk to as many of you as I could about my incoming task as editor of the Family Law Newsletter. I know that following the efforts of our previous editor, Richard Nolen, is going to be a difficult task, but I am grateful that Susan Hargus has agreed to stay on as assistant editor and to help ensure that the newsletters continue to provide the information and updates the Section members have come to expect on a timely basis. I am honored to be provided with the opportunity to participate in production of the newsletters, and approach this opportunity with a combination of trepidation and excitement. While talking with old friends and new at the seminar, I expressed my desire to receive as many articles and as much input as possible from many different members, on a statewide level. So, as you continue to enjoy these summer months with your family and friends, get out your pens, get out your computers and work on an article to submit for publication in our next issue.

I look forward to meeting and speaking with as many of you as possible. Don't miss the opportunity to be an active participant in your Section. Accept the challenge and send me your article for publication.

Enjoy the summer!

Kurt Kegel



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