We are excited to present this second FLR in full color in our new “magazine style”. Thank you for the positive feedback and constructive criticism (and thank you again to Derrick Stanley at the State Bar who is responsible for the great new look). We want to continually improve it, and with your help we are doing so. The Family Law Review is your magazine and we want to serve you. So please continue to submit articles and suggestions to us. We wish you best wishes for success and a very happy and prosperous 2012! FLR

If you would like to contribute to The Family Law Review, or have any ideas or suggestions for future issues, please contact Marvin L. Solomiany, co-editor at msolomiany@ksfamilylaw.com.

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

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I cannot believe my year as Chair is half over. It has been a tremendous honor so far to lead this section, but really the credit goes to the Bar staff (Sarah Coole and Derrick Stanley, among others) as well as ICLE staff, headed by Steve Harper. The staff members of ICLE and the State Bar make my job so much easier. Additionally, the officers of the Family Law Section are all working hard, and the proof is in the pudding, so to speak, with over 300 attendees at the Nuts & Bolts Seminar, chaired by Jonathan Tuggle and the Supreme Court event, chaired by our Young Lawyers Division Liaison, Kevin Rubin, as well as the program in January being chaired by Tina Shaddix Roddenberry. I am very much looking forward to seeing all of you at the Family Law Institute this year at the Ritz Carlton the week before Memorial Day. Additionally, please be on the lookout for a seminar on March 28, 2012, on issues in same sex relationships, as this is a topic that is really “cutting edge.”

Additionally, as I am sure you have heard, I would like to acknowledge the loss of two our section members: Jill Radwin and Pamela Treymane. Both were influential in our section and will be sorely missed.

As always, if you have any questions or comments, please let me know how I can help you, or how together, we can help the family law section. FLR

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**Chair’s Comments**

by Randall M. Kessler
rkessler@ksfamilylaw.com

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**Past Family Law Section Chairs**

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Winter 2011
Uncovering Hidden Income in a Closely Held Business*

by Tracy L. Coenen

* Reprinted from the ABA Section of Family Law eNewsletter, February/March/April 2011

When a divorce or a child support issue is looming, it’s amazing how quickly a closely held business starts “losing money.” I use quotes because such a situation is so predictable. One party wants to protect her or his assets, and when there is a business involved, the motivation to hide money can be stronger than usual.

The types of businesses that can be prone to manipulation of the books include restaurants, retail stores, doctor or dentist offices, construction companies, auto dealerships, and law practices. This list isn’t exhaustive by any means, but it provides good examples of businesses at risk of financial maneuvering.

Any business that is closely held and has finances that are easily manipulated by the owner is at risk. A lawyer filing for divorce from his wife may suddenly stop taking a paycheck and then claim he has no earnings from the practice. A restaurant owner could stop reporting cash receipts from customers, thereby claiming much lower revenue for the business while secretly pocketing the cash. A carpenter may offer customers a discount if they pay with cash and don’t request a receipt, never reporting that money as income.

In just about any business, there are many ways to hide income, but there are also many ways to find that income. Family law cases require a keen eye to the finances of a closely held business. It is not unusual for a company to appear to experience a downturn in business following a divorce filing or child support action. It is important to take a look at the books and records to determine if there is any evidence of hidden income.

Third Party Records

The most reliable and obvious way to prove that a company has unreported earnings is through the examination of third party records, such as bank statements and credit card statements. Barring some unusual circumstance, those types of records are nearly impossible to manipulate. So if such records can be obtained directly from the third party, the data within them really doesn’t lie.

The bank statements and credit card statements might show a different picture than what has been reported by the spouse. Deposits may show a much higher level of revenue, and credit card receipts may also add to the revenue. The clever fraudster likely isn’t going to deposit income into the business bank account if she or he is intent on concealing income, but this is still an area that should be examined because there may be other clues in the documentation.

Costs Fluctuate With Revenue

When people underreport their income for tax purposes or to avoid child support or alimony, they often make one critical mistake: They still report all of their business expenses. They are eager to hide income, but they typically don’t want to miss out on any expense deductions.

In almost all businesses, there are some expenses that fluctuate with revenue. For example, in a manufacturing business, cost of goods sold is usually closely correlated to sales. In a restaurant, food costs are generally predictable based on revenue. In any business that is labor-intensive, hourly wages often move along with sales. A dental practice will typically have materials and lab costs that follow with revenue.

To find hidden income in a business, we can isolate the expenses that track with income based on historical tax returns and financial statements. The results of this analysis can be applied to current figures. If the variable expenses that should track with income are suddenly much higher than expected, a good case can be made for unreported earnings.

Capital Improvements

A business that appears to be contracting and losing money (or not making as much as before), likely doesn’t need new capital assets. Check the tax records to see if new buildings, machinery, and equipment have recently been purchased. If so, we need to investigate the reason why these purchases were made.

Such purchases are usually a sign of an expanding and flourishing business, although sometimes they simply relate to replacing old items. There is a big difference, and it is important to get to the bottom of these purchases when searching for hidden income. Capital improvements that appear to be for the purpose of expanding a business can point to hidden income. Such an item alone won’t prove that there is concealed revenue, but it will be one more item in support of that theory.

Cash Versus Credit Sales

A telltale sign of a business owner concealing revenue is a change in the ratio of cash to credit sales. Retail stores, restaurants, and bars accept both cash and credit cards from customers. Many times, there is a predictable relationship between the two. If we look at sales over a period of a few years, we can often see that the ratio of sales
made for cash and sales made on credit cards is within a narrow range.

A sudden change in this ratio is cause for concern. If we see that a much higher than normal percentage of sales are made on credit cards, we have cause for concern that cash sales are being concealed. It is easy to pocket the money from cash sales and leave little to no paper trail. Thus, these sales are more likely to be manipulated.

**Billing Records**

In a service-based business, a look at billing records can point to hidden revenue. Doctors, dentists, lawyers, and accountants are usually meticulous in keeping records of time and procedures, as they want to bill clients for all services provided.

The source records may present a much different picture than the financial statements by themselves. It is easy to manipulate financial statements, while manipulating the underlying timekeeping or procedural records is much more difficult and labor-intensive. Therefore, it is important to look at the underlying records to have a better chance at finding hidden income.

**Lifestyle Analysis**

One way to find hidden earnings is through an analysis of the person suspected of hiding income. The purpose of such an analysis is to determine whether the person’s lifestyle could be supported by the level of income that is being reported. This is done by examining all known expenses, using available documentation and public records to substantiate the numbers.

Items such as mortgage payments, utilities, car payments, and the like are relatively easy to determine. Other spending, such as groceries, dining out, and vacations are not as easy to determine, but conservative estimates can be used. The goal is to tally up the known spending and compare that to the reported income, and determine whether the reported income is sufficient to pay those expenses. If it is not sufficient, then there is some other unknown source of income.

It may also be important to look for evidence of the business paying the personal expenses of the owner. In divorce and child support cases, personal expenses paid by the business harm the other party in two ways.

First, running the expenses through the business reduces the net income of the business, giving a lower base for any support order. Second, the business owner often reduces her or his paycheck from the business simply because there are now fewer expenses that need to be paid out of the personal income. Therefore, any wages or distributions from the business are lower than normal, again reducing the base figures used for a support order. *FLR*

**Tracy L. Coenen, CPA, CFF** is a forensic accountant and fraud investigator with Sequence Inc. She specializes in cases of embezzlement, financial statement fraud, white collar crime, securities fraud, and family law. She can be reached at 312.498.3661 or tracy@sequenceinc.com.
Attorneys Fees in Family Law Cases
by Dean C. Bucci

Georgia law generally follows the “American Rule” whereby each party pays its own attorney’s fees.1 As an exception, a Georgia court may award attorney’s fees when specifically authorized by statute or by contract.2 This Article will review the most common Georgia statutes authorizing awards of attorney’s fees in domestic relations cases. Since each statute carries with it its own rules and procedures, the family law practitioner should be familiar with each. Bear in mind that statutes awarding attorney’s fees are in derogation of the common law, so strict compliance with the particular statute is required.3

Divorce, Alimony, Contempt, and Separate Maintenance Actions

Perhaps the most broadly used authority for fee awards in domestic relations cases is O.C.G.A. § 19-6-2, which permits the trial judge (not the jury) to award fees and expenses in actions for “alimony, divorce and alimony, or contempt of court arising out of” such cases.4 The award cannot include fees incurred in separate proceedings prior to action in which fees are sought.5

Awards under O.C.G.A. § 19-6-2 are not based on a party’s conduct or wrongdoing.6 The purpose of the statute is to “ensure effective representation of both spouses so that all issues can be fully and fairly resolved.”7 To that end, the court must consider evidence of the parties’ financial circumstances before making such an award.8 Absent such evidence, the award cannot stand.9

Fees may be awarded under O.C.G.A. § 19-6-2 without the need for direct testimony on the value of the legal services, as trial judges are considered to be capable of placing a value on legal services rendered by attorneys in divorce actions.10 This ability to award fees without evidence of their value has been limited to divorce and alimony cases.11 The safest practice would seem to be to always provide such evidence. An attorney may testify as to the value of his or her own fees.12 If an attorney is awarded fees without providing evidence of the value of the legal services in a divorce action, the award should be safe on appeal. Where there is no such evidence in the record and the fee award is based on a statute other than O.C.G.A. §19-6-2, the award will likely be reversed.

This Code section provides the authority to award attorney’s fees in contempt actions. However, where there is no finding of contempt in such a case, an award of fees under this statute would not be authorized.13 Where there is a finding of contempt, the award is not limited to fees, but can also include litigation expenses such as the cost of a medical witness.14

In a civil contempt proceeding, the court cannot simultaneously award fees and direct that the party be incarcerated until those fees are paid.15 The court may order incarceration to compel payment of fees, support, etc. previously awarded. However, if there is a new award of fees, the party is entitled to an opportunity to pay the new fees, and he or she would also have the right to a separate hearing on whether any failure to pay was willful prior to incarceration.

Attorney’s fees and expenses may be awarded in separate maintenance petitions under the same rules applicable to divorce cases.16

Child Support Modifications

O.C.G.A. § 19-6-15(k)(5) allows for an award of attorney’s fees and litigation expenses in actions to modify child support. To qualify for such an award, the party must have prevailed in the action. The court is not authorized to simply compare the parties’ financial conditions and to make an award to the non-prevailing party (as it would, for example, in a divorce action under O.C.G.A. § 19-6-2.)

The court may award fees and expenses to the prevailing party, as the interests of justice require. However, the court must award attorney’s fees to a custodial parent who prevails in a petition seeking an upward modification of support based on the non-custodial parent’s failure to exercise court-ordered visitation.

Child Custody Modifications

Until recently, there was no authority of an award attorney’s fees in actions brought to modify child custody.17 Fees were not awardable regardless of which party prevailed and regardless of the parties’ financial circumstances. It seemed as if the policy of ensuring effective representation “so that all issues could be fully and fairly resolved” which existed in divorce cases simply did not extend to custody disputes once the divorce was concluded.

The legislature corrected this anomaly with the amendments to O.C.G.A. § 19-9-3 which took effect January 1, 2008.18 O.C.G.A. § 19-9-3(g) now contains a broadly-worded grant of authority for the trial judge to award attorney’s fees and expenses of litigation, including the costs of experts, the guardian ad litem, “and other costs of the child custody action and pretrial proceedings, . . .” The statute specifies that the award may be made both at the temporary and the final hearing, in full or on account.

O.C.G.A. § 19-9-3(g) states that it applies “except as provided in O.C.G.A. § 19-6-2 (dealing with alimony, divorce and alimony, and contempt of court actions arising out of such cases), and in addition to the attorney’s fees provisions contained in Code Section 19-6-15 (dealing with child support modifications), . . .” Unfortunately, initial appellate review of this new statute has done little to explain the meaning of this clause. The Court of Appeals has considered whether the reference to O.C.G.A. § 19-
6-2 requires a trial to court consider the parties’ financial circumstances, but it did not decide the issue. In another case, the Court stated that the reference to O.C.G.A. § 19-6-2 limits the Code Section’s application to only those same cases to which O.C.G.A. § 19-6-2 applies. Clarity on this cause will have to await further appellate review.

Alimony Modifications

Two alternative statutes authorize fee awards in actions to modify alimony: O.C.G.A. § 19-6-19(d) and O.C.G.A. § 19-6-22.

O.C.G.A. § 19-6-19(d) authorizes an award of attorney’s fees and litigation expenses in actions to modify alimony, but only to the “prevailing party.” The trier of fact designates who is the prevailing party. Where a party seeks to terminate his alimony obligation but only obtains a reduction, he is still the prevailing party. This designation is determined solely by the result of the modification action, not by whether that result was more or less than any settlement offer.

The court has discretion on whether to make the award, as the interests of justice may require. But it must award fees to a party who successfully defends against an action to modify alimony which was brought on the grounds that the defendant was cohabitating in a meretricious relationship.

O.C.G.A. § 19-6-22 is available only to a party defending against a modification of alimony brought by the obligated party. The statute applies whether defending against a claim asserted in a petition or in a counterclaim. Like O.C.G.A. § 19-6-19(d), awards under this Code Section are discretionary and not mandatory, but they are not restricted to the prevailing party.

Family Violence actions

A court is authorized to award attorney’s fees in actions brought under O.C.G.A. § 19-13-1 et seq., the Family Violence Act. Although the statute states that fees may be awarded to “either party,” it has been held that fees may not be awarded against a prevailing party solely based on a disparity of income. An award against a prevailing party who acted properly and filed the petition in good faith would run counter to the statute’s purpose, which is “to bring about a cessation of acts of family violence.”

Misconduct during Litigation

O.C.G.A. § 9-15-14 authorizes an award of fees against litigants (or their attorneys) who have asserted frivolous claims, defenses, or other positions. Although this statute is certainly not limited in its application to domestic relations cases, it is often used in such cases where such conduct has occurred. The statute is generally applicable to proceedings in all courts of record. It is not applicable in Magistrate Court or in the appellate courts.

Awards of fees under O.C.G.A. § 9-15-14 are made by the judge, not the jury. They are intended “not merely to punish or deter litigation abuses but also to recompense litigants who are forced to expend their resources in contending with [abusive litigation.]” Subsection (a) requires the Court to award fees in more egregious situations, whereas Subsection (b) provides the Court discretion to award fees and expenses in less severe circumstances.

Awards under O.C.G.A. § 9-15-14 are based on misconduct occurring during the litigation (i.e., filing a frivolous lawsuit, asserting unreasonable defenses, etc.) This is in contrast to O.C.G.A. § 13-6-11 (used most often in contract litigation) which is based on conduct occurring before suit is filed. The order awarding fees must recite the misconduct which justifies the award. Absent such findings, the award will be vacated.

The claim for fees must be brought by a motion (not by counterclaim). The motion can be brought during the litigation or up to 45 days after disposition. The respondent is entitled to notice and a hearing.

Some rulings by the trial court may insulate a party against an award under this Code Section. This can occur where a party survives summary judgment or directed verdict, where the court grants an interlocutory injunction in favor of the non-movant, or where the court grants the “essential relief” sought by the non-movant. (Such rulings imply there is some merit to that parties’ claim, so it must not be frivolous.)

A party must pay an award of fees before it can proceed with another case against the party to whom the fees were awarded.

This is the appropriate Code Section to employ when seeking only attorney’s fees and litigation expenses incurred in opposing the frivolous claim, etc. If additional damages are sought, such as emotional distress, lost wages, etc., the party would need to file an independent action for abusive litigation under O.C.G.A. 51-7-81.

Conclusion

Keep in mind that attorney’s fees, when authorized, generally must be proven. The movant must present evidence of the fee charged, number of hours invested, and the reasonableness of the fees in light of the case history and the caliber of the attorney. The opposing party must be given the opportunity to confront and challenge that evidence. An Affidavit of the movant’s attorney without details of the work performed, rates charged, and the reasonableness of same is not sufficient.

Various other statutes authorize an award of fees and expenses in particular domestic relations cases. For example, fees may be awarded in paternity actions, where there has been an unsuccessful attempt to set aside paternity, when enforcing a custody order under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), when enforcing a support obligation under the Uniform Interstate Family Support Act (UIFSA), and in actions brought under the Child Support Recovery Act.

Know the particulars applicable to the case at hand.
and you will increase the likelihood of obtaining a fee award and protecting it on appeal, while at the same time protecting your client against such an award. FLR

Dean C. Bucci obtained his B.B.A. degree in Economics and a B.A. degree in Spanish from Georgia Southern University, where he graduated Magna Cum Laude. He obtained his Juris Doctor degree from the University of Georgia School of Law, where he graduated Cum Laude

(Endnotes)


2 Suarez v. Halbert, 246 Ga. App. 822, 824 (2000). Note that where parties settle their case but reserve the issue of attorney’s fees for determination by the court, such an agreement may be interpreted as a contractual basis for an award of fees, even when not otherwise authorized by statute. Haley v. Haley, 282 Ga. 204 (2007).


16 O.C.G.A. § 19-6-10.


19 In Lurry v. McCants, 302 Ga. App. (2010), the petitioner argued that the clause in 19-9-3(g) stating “except as provided in Code Section 19-6-2, . . .” requires that the two Code Sections be read together, thereby grafting the requirement that a court consider the parties’ financial circumstance (existing under 19-6-2) onto 19-9-3(g). The Court of Appeals did not decide that issue, but it noted that no such requirement is expressly contained in 19-9-3(g). Id., at FN 15.

20 In Harris v. Williams, 304 Ga. App. 390 (2010), the petitioner sought unsuccessfully to modify custody, visitation, and support, and the trial court awarded fees to the respondent without specifying the statutory basis for same. In considering statutes which might authorize the fee award, the Court of Appeals stated that “O.C.G.A § 19-9-3(g) only authorizes an award of attorney fees in an action for alimony, divorce and alimony, or contempt of court arising out of either an alimony case or a divorce and alimony case. See OCGA § 19-6-2. This is not such a case.” Id., at Division 3. But such a holding seems to conflict with the language of O.C.G.A. § 19-9-3(g) itself. See also Moore v. Moore-McKinney, 297 Ga. App. 703 (2009) where the Court of Appeals reviewed an award of fees in a post-divorce modification of visitation action and noted that fees were available to a party “under newly enacted OCGA 19-9-3(g)).


23 Keeler, Id.

24 O.C.G.A. § 19-6-19(d).

25 O.C.G.A. § 19-6-19(b).


30 Id., at 824.

31 Allstate Ins. Co. v. Reynolds, 210 Ga. App. 318 (1993) (stating that the award may only be made against parties or their attorneys, not against non-parties).

32 O.C.G.A. § 9-15-14(h) As an exception, this Code section states that a party may collect fees incurred in magistrate court where there is a frivolous appeal to superior court.


41 Porter v. Felker, 261 Ga. 421 (1991) (but the court could still award fees against the party in the unusual circumstances in which it could not have foreseen at the time it denied summary judgment the facts justifying the fee award).


45 O.C.G.A. § 9-15-14(g).


47 An exception would be a fee award pursuant to O.C.G.A. § 19-6-2.


49 O.C.G.A. § 19-7-50.

50 O.C.G.A. § 19-7-54(g).

51 O.C.G.A. § 19-9-90(b); O.C.G.A. § 19-9-92(a).

52 O.C.G.A.§ 19-11-132(b).

Mediation Dealbreakers
by Andy Flink

At the start of every mediation I’m always thinking (and of course hoping) that we’ll walk out of the room with a full agreement. While this doesn’t always happen and partial agreements are the next best option, there are reasons why we may end up with no agreement at all.

Some mediations reach impasse in the first 15 minutes, others in the last 15 minutes after 10 hours of negotiating. Sometimes it’s obvious as to why there is no agreement, other times it isn’t so clear. What causes all of our hard work to unravel? Why did a done deal all of a sudden fall apart? There are many reasons why cases don’t settle, but here are the ones I see the most often that typically send mediations into a tailspin:

- **Bad timing:** The mediation is scheduled but discovery isn’t completed (or even begun), there has been little communication between Attorneys or the parties simply aren’t ready. Fortunately when this happens it’s usually detected early in the mediation before the parties spend countless hours and dollars.

- **Lack of respect:** While it’s always a good idea to listen, not everyone does. Conceding some amount of respect to the other side and hearing their argument only helps the negotiations. Allowing them an opportunity to explain their position without interruption, then pausing before reacting, goes a long way in showing consideration and value in their claim (even if you think it’s unreasonable).

- **I’m the better parent:** If the parties cannot agree on who the custodial parent should be rarely do any other issues get settled. Even if this is put aside to work on financial items the parties are reluctant since neither can address or consider the topic of child support.

- **Secret keeping:** We’ve reached agreement but one side didn’t declare an item that is now a “must have.” This “11th hour insult” can carry a huge cost in dollars and ego. Something not revealed earlier now becomes an issue mentioned too late.

- **Impractical expectations:** Clients are anchored in their position and believe they are entitled to get everything they want. They are finished negotiating as they’ve already given in on way too many points, even though they’ve barely moved at all.

- **The financial house is out of order:** Parties don’t realize the financial impact of having to support two separate households. There is an unwillingness to face the harsh reality of the cost of two homes and it’s simply easier not to deal with it. The numbers do not and will not work.

- **Manipulation:** One side seeks to control the mediation taking any authority and power away from the other side as well as from the mediator.

- **Draft breakdown:** While writing the agreement the other side continues to request too many small, insignificant, and meaningless changes. This causes multiple versions of virtually the same document to be drafted over and over again resulting in needless additional expense to your client.

- **Attorney fees:** Depending on when this issue is raised, fees not addressed at the right time almost always have a significant effect on whether or not the deal will get done.

- **Cold feet:** The deal is done, everyone is ready to sign, and at the last moment one of the parties decides that they need to “think about it.”

Avoiding these issues will help parties find a smoother path towards reaching their goal of a full and comprehensive agreement. It is always important to consider when and how items should be raised in mediation, and eliminating as many of the obstacles as possible increases the possibility of a successful outcome. FLR

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Andy Flink is a contributing author on post divorce and trained mediator and arbitrator. He is familiar with the aspects of divorce from both a personal and professional perspective. He is experienced in both business and divorce cases, and has an understanding of cases with and without attorneys. Flink is founder of Flink Consulting, LLC, a full service organization specializing in business and domestic mediation, arbitration and consulting. At One Mediation, Andy serves as a mediator and arbitrator who specializes in divorce and separation matters and has a specific expertise in family-owned businesses. He is a registered mediator with the state of Georgia in both civil and domestic matters and a registered arbitrator.
One of the chief concerns in a divorce or child custody case is identifying the true income of one or both of the parties. It is not unusual for such a case to include allegations of hidden income or assets. It is common for a closely held business to suspiciously encounter declining sales and profits following the filing of a family law case.

In each of these instances, properly determining the income of the party is critical to getting a fair and equitable settlement, maintenance award, or child support award. Until you have the correct numbers, the attorney may find it very difficult to decide what is fair or in the best interest of the client.

How can a spouse or parent with little to no direct access to the other party’s financial records prove that there is undisclosed income? What happens if the financial records obtained during discovery appear woefully incomplete? A forensic accountant is the logical choice to help reconstruct financial records, estimate earnings, and analyze fine details of financial documents to prove or disprove income claims.

A forensic accountant may also be needed when there are few financial records available with which to analyze income. It is not uncommon for records to be discarded or destroyed. Lack of documentation is also an issue when one party works in an all-cash business. In these situations, an analysis of the person’s lifestyle becomes critical.

### Lifestyle Analysis

The most common method of proving an individual’s income is the “lifestyle analysis.” This analysis is not only used family law cases. It is also used by government agencies and defense counsel in tax cases or other prosecutions which involve income issues. It is also called the “expenditures method,” signifying the analysis of a person’s spending patterns relative to known sources of funds.

The concept of a lifestyle analysis is simple, but the execution is not. The analysis attempts to quantify someone’s living expenses and compare those expenses to known sources of income. If there are differences between the living expenses and the known income, they can be attributed to concealed income. The goal is to compute the cost of the lifestyle of the target and determine whether the reported income is sufficient to fund this lifestyle.

With enough information, this analysis can be fairly precise. Estimates are required when there are gaps in information, with the forensic accountant looking for outside pieces of information that can support estimates and assumptions.

In a simple lifestyle analysis, we would add the known expenses such as groceries, mortgage, auto lease, insurance, credit card payments, income taxes, and the like. The key is to include all the ways the subject may be spending money. The total spending is then compared to known sources of funds, such as wages, bonuses, dividends, gifts received, and loan proceeds. Again it is important to include all possible sources of income.

If the spending during the period under analysis exceeds the known funding sources, then it is likely that there is another source of income. The logic is simple: The money has to come from somewhere. The forensic accountant must continue to search for other sources of income that could explain the difference. Any remaining unexplained difference likely represents unreported income.

### Basic Methodology

Lifestyle analysis begins with documentation of known income and expenses such as bank statements, investment account statements, mortgage statements, income tax returns, credit card statements, auto purchase documents, home sale or purchase documents, invoices for home repairs, and the like. Hundreds of items could contribute to this analysis, but these are some of the most common. One-time expenses should be noted as such, and vacation and recreational activities should be examined over a period of time to understand normal patterns. It is typical to look at two to five years’ worth of data to get a good baseline of spending patterns.

After available documentation has been analyzed, the search is on for undocumented spending, which may be evidence of concealed income. Additional spending is often found based on tips from insiders or circumstantial evidence. People in-the-know might be able to point the forensic accountant to vacations taken, vehicles purchased, or other business and recreational interests that cost
money. Basic personal finance knowledge can help the forensic accountant make reasonable estimates of other spending. For example, gasoline and groceries are two common personal expenditures that occur on a regular basis. If documentation shows unusually low figures for these amounts, it may be necessary to try to estimate a reasonable figure.

To estimate the spending on gasoline, the forensic accountant may take into account the person’s commute to work, the number of car drivers in the household, and personal activities that require driving. From this, mileage can be estimated, and along with historical prices of gas, an estimate of spending on this item can be made. Grocery expenses can be estimated based on the size of a household, age of the children, and frequency of dining out.

Using known facts and common sense assumptions, estimates of other spending can be made as well. When estimating expenditures, it is important to consider the historical spending of the person and household. Significant changes in spending patterns should be carefully analyzed to determine if there is a reasonable explanation for the change, or if the change is reflective of hidden income. When a lifestyle analysis finds a difference between known sources of income and known and estimated spending, the forensic accountant will rule out additional sources and uses of funds. Legitimate sources of funds could make up the difference between income and spending. However, there may still be spending that exceeds known sources of funds, and this result is important in the litigation.

Cautionary Notes

Situational factors can affect the reliability of a lifestyle analysis. The receipt of gifts or loans from third parties could constitute legitimate sources of funds, but it may not be possible to factor them into the analysis if they are undisclosed.

It may also be difficult to account for personal expenses or other benefits, such as a vehicle, paid by a business. These items ultimately are income to the individual, but lack of documentation makes them difficult to consider.

These difficulties should not deter a litigant from doing a lifestyle analysis. The calculation is done when there are suspicions or allegations of undocumented or unreported sources of funds and/or to document the parties’ standard of living over time. It is only natural that there may be some unanswered questions or imprecisions in the calculation. However, when done properly, the lifestyle analysis can yield some very valuable information.
Interview with Hon. Reuben Green

by Gary Graham

The 2011 Family Law Institute (FLI)

Judge Green enjoyed attending the FLI. As he is new to family law cases, the FLI gave him the opportunity to learn and meet the family lawyers. Judge Green found that the materials provided were the most beneficial aspect of the FLI, and he also enjoyed getting to know people through the social activities. Judge Green thought the Judges’ discussions were good; however, the only improvement he would recommend is that each session with the Judges is broken down into a separate subject, i.e. an opening statement, direct examination, cross examination, argument on a motion, and closing argument.

How Attorneys can help in his Courtroom

Judge Green likes attorneys who are organized, who explain the problem/issue, have a solution to the problem/issue, provide statutory/case law to support the solution, and provide a proposed order for the Judge’s signature. Green prefers to rule from the bench, rather than taking issues under advisement.

He believes that family law attorneys are in a unique position to settle the cases between themselves and their clients. Green is open to pre-trial conferences when both attorneys agree it may be of assistance to resolving the case or pending issues. With regard to settlement agreements, his staff reviews them first and then he reviews them. If both parties are represented by counsel, then he does not focus too much on the details of the agreement. If a party is pro se, he will pay more attention to the details of the Agreement and will sometimes scrutinize the agreement more for fairness.

He encourages attorneys to move the cases along. When he came on the bench, he recognized a need to increase the number of domestic court days on the court’s calendar. He prefers smaller calendars so that he can give the appropriate amount of time per case, without making attorneys and parties wait around for their turn. Green has at least one domestic day for cases with attorneys, one domestic pro se day and two to four days per month for specially set cases. He usually reads the file and motions before any hearing or trial, especially if the case is specially set. Forty percent of Green’s current workload is domestic cases. He started out with 3,000 pending cases, but has reduced his case load to approximately 1200. Through aggressive case management he has reduced his case load by more than one-half. He believes that most cases should not take as long as they do, and that most divorce cases should be resolved in less than one-year.

With regard to continuances, he will usually grant the first or second continuance, but will not automatically grant any continuances after that. Unless there is a good reason or a conflict, attorneys should not continue family law cases given the emotional nature of these disputes.

Green prefers the parties attend mediation, although he does not require it prior to a temporary or final hearing. He also feels that the judicially hosted mediation with the senior judges is not used often enough. Senior judges are able to accurately value the case, and their result is usually the right result and on the mark. In order to attend a judicially hosted mediation, you need to obtain an order from the judge assigned to the case.

The Hardest Decisions in Family Law

Custody is the toughest issue in family law cases, especially when both parents are either good or bad parents.

In addition to custody, one of the most difficult family law decisions is how to force someone to pay in contempt cases. This is particularly true when the person is unemployed and has no income. One solution when they are employed is to incarcerate them and recommend them to the Sheriff’s Work-Release program. This allows them to continue to work and pay their obligations while also punishing their contemptuous conduct.

Green has observed the family violence statutes being used as leverage in divorce cases. He recommends obtaining a temporary hearing as soon as possible after the ex-parte hearing because of the severity of the remedies in a family violence action. Regarding family violence cases, Green, if he hears them, is not as likely to enter a temporary protective order without independent evidence, such as bruises, photos, police reports, etc.

Requests for Custody as Leverage in Divorces

If custody is truly an issue, Green appoints a GAL. He sees some parties using custody as leverage even though they are the breadwinners in the family and the other spouse has been a stay-at-home spouse. If he feels that the custody dispute is for leverage in the divorce case, he will make that party pay for the GAL, or depending on the outcome of the custody evaluation, he may make an adjustment for the cost at the end of the case based on the parties’ incomes. Often times when he tells a party they will be responsible for paying the GAL fees for the custody dispute, they will back down from their request for custody when it is a leverage based custody situation.

Having been a trial lawyer, Green believes that he can frequently tell when the witnesses are exaggerating their position or outright lying. So be careful how you and your clients conduct yourselves while in the courtroom.

The Use of Affidavits at the Temporary Hearing

Green will rely on affidavits produced at a temporary hearing depending on the relationship of the affiant, such as a nonbiased witness like a teacher, family psychologist,
etc. It is the quality, not the quantity, of the evidence in the affidavit. He can usually tell by listening to the parties’ testimony as to the truth of the allegations without the need for much in the way of affidavits.

Does Conduct Matter?

In short, yes, but it depends on the circumstances, such as whether a child will be harmed, and the physical evidence supporting the conduct. As to adultery, he will not focus so much on that, but it will be in the back of his mind. He feels that dealing with the children is the most important aspect in dealing with the conduct of the parties.

His Background

Green received his J.D. with Honors from Emory University School of Law and a B.A. in Political Science from Lewis & Clark College in Portland, Ore.

Before attending college, he served on active duty in the U.S. Marine Corps. While serving as a Marine, he received the Good Conduct and National Defense Medals, was meritoriously promoted twice, and was Honorably Discharged after four years of active duty. He stated that he would have dropped out of high school if the Marines had not required a high school diploma to enlist.

He began his law career at King & Spalding, where his practice focused on employment discrimination, product liability, and general civil litigation. Green was working at the Washington, D.C. office of King & Spalding on Sept. 11, 2001. After witnessing the events of that day, he decided to become a prosecutor. Prior to coming onto the bench, he was a Special Assistant U.S. Attorney in the Northern District of Georgia, where he prosecuted drug trafficking organizations and violent career criminals. He also served as an Assistant District Attorney for Cobb County, where he handled the prosecution of over a thousand felony criminal cases.

He and his wife have two children and are Cobb County Foster Parents.

Green feels that his criminal prosecution background shapes him as a judge because he tried many cases as a litigator. Because of his criminal prosecution background, he understands litigation, trial work, having witnesses lined up and objections to evidence. He feels that generally in domestic cases it is better to have a bench trial than a jury trial. However, if the facts are right, then a jury trial may be beneficial but you should be able to justify the additional time and cost to your client. FLR
Make your plans now to attend the 2012 Family Law Institute to be held at the Ritz Carlton in Amelia Island. As usual, the Institute will be the week before Memorial Day, May 24 - 26. The theme for this year’s Institute is “The Cutting Edge of Family Law.” This will be the 30th year of the Family Law Institute and thanks to all of the program Chairs who have served before me to make each year such a big success!

The Institute will be presented in a different format this year. I have asked the speakers, to whom I am forever indebted, to address the “meat” of their topic in their written materials. I have limited almost each speaker’s presentation at the seminar to 30 minutes during which they will address the most “cutting edge” aspect of their topic. I want them to share tips and information on issues that are fresh and timely. This will result in a fast paced, information packed, exciting three days of seminar materials. You can go to the Family Law Section website to view the tentative agenda at http://www.gabar.org/sections/section_web_pages/family_law/family_law_section_events/

You will see that the popular “Case Law Update” is now going to be spread over two days and the “Ethics and Professionalism” portion of the seminar will be the very last presentation given by a surprise speaker which you will definitely want to hear!

The Institute is an excellent way to mix and mingle with our invited judges. An equal number of metro and non-metro judges have been invited. The cocktail parties, tennis and golf tournaments, and other activities are an excellent way to socialize with them in an informal setting which is an opportunity we rarely get. Sponsorship monies help to insure that we can have a good attendance from the Bench at the Institute. If you or your firm have not signed up to be a sponsor, please visit the Family Law Section website referenced above for the details. Thank you so much to all of our Sponsors…those who have already committed to be a sponsor and those of you who will hopefully rush to the website upon reading this article to sign up as a sponsor!

ICLE has reserved a block of rooms at the Ritz Carlton at the rate of $209 per night (excluding tax). Not only is this an unbelievably low rate, but, as an added benefit, all of the rooms will have been completely renovated! This block of reserved rooms will sell out fast so I encourage each of you to call and make your reservation as soon as possible, reference “ICLE Family Law Institute” (888-856-4337 or 904-277-1100). In addition, last year many of you indicated a preference to stay in a condo at the Omni at the Amelia Island Plantation. Therefore, we have also reserved a block of two and three bedroom units at Ocean Place and Sail Maker. You can reserve one of these by calling 800-874-6878 or 904-261-6161 and asking for the “ICLE Family Law Institute” rate.

The Family Law Section is pleased to offer up to a total of five scholarships to our section members to attend the Institute. The Section will pay up to $1,000 towards each recipient’s ICLE registration cost, accommodations for three nights at the room rate for the Ritz block of rooms and mileage reimbursement at the IRS rate. The scholarships will be awarded based on financial need and commitment to pro bono work. The deadline for applications is Jan. 15, 2012. For more information please visit the Family Law Section website.

I am hopeful that each of you will find time in your busy schedule to attend the Institute. It is a fantastic way to learn, and get to know each other better. And, of course, “Specific Deviations” will be back by popular demand performing at our outdoor cocktail party! So, mark your calendars, make your room reservations and get your flip flops ready…you do not want to miss this Institute! FLR

Kelly Anne Miles, program chair, kmiles@sgwmfirm.com
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Please Contact Eileen Thomas at 770-818-0301 or eileen@ethomaslaw.com if you would like to join this year’s list of sponsors.
Jonathan J. Tuggle organized and chaired this year’s Nuts & Bolts of Family Law Program, which included a distinguished panel of speakers on a wide range of topics. This year’s program had record attendance, with close to three hundred attorneys present at the Bar Center in Atlanta on Sept. 16, 2011. Many other attorneys attended the program a month earlier, when it was held in Savannah on Aug. 19, 2011.

Tina Shadix Roddenberry started off the program with a presentation on child support and alimony modification. In addition to explaining the five grounds a petitioner can utilize to seek an upward or downward modification of child support and the application of the two year rule, Ms. Roddenberry addressed the topic of attorney’s fees awards in a child support action. In particular, she reminded everyone that an award of fees is mandatory by the Court if the custodial parent prevails in getting an upward revision of child support due to the noncustodial parent’s failure to exercise Court ordered visitation. Ms. Roddenberry also covered the issue of attorney’s fees awards in alimony modification actions as well as the waiver of modification rights. She advised that if a party wishes to waive the right to modify alimony, he or she must use very clear waiver language specifically referring to the right of modification and indicate exactly what grounds he or she is waiving.

Dawn R. Smith presented on the effective use of a Guardian ad Litem (GAL), providing helpful insight on when to use a GAL, and the role and duties of a GAL. She reminded those in attendance that while the GAL is guided by the best interest of the child standard, the GAL does not have a duty of confidentiality because the GAL does not have a client. Ms. Smith also discussed the use of a parenting coordinator to help parties with particularly contentious custody cases. Although he or she cannot make permanent changes to custody or visitation, a parenting coordinator can help resolve disputes and facilitate effective co-parenting.

Jeffrey B. Bogart focused on the intersection of family and criminal law, and outlined a number of frequent scenarios, including family violence, theft, invasion of privacy, drugs, and tax crimes. He pointed out that some of these crimes involved both state and federal law. Above all, Mr. Bogart emphasized that attorneys should be very careful when dealing with criminal issues. Not only does criminal law require the highest burden of proof, but it is an area of law where many things cannot be “undone.” As such, he strongly recommended that these types of issues be handled by someone who regularly practices criminal law.

Gary Graham and Sherri Holder discussed the impact of the holding in Miller v. Miller, as well as practical tips for using a financial expert. In addition to outlining its key points, Mr. Graham offered practical advice based upon the Supreme Court's holding in Miller, including being mindful of the right to request attorney’s fees when defending an appeal. He further pointed out that Miller provided the valuable lesson that if an attorney wants to introduce documents and analyses at the final trial, the attorney should provide them to opposing counsel within a reasonable time prior to the final trial, and not the morning of the final trial. (The trial court in Miller excluded from the evidence at the final trial an amended Thomas calculation due to its production on the morning of the final trial.) Ms. Holder explained how all three business valuation approaches (market approach, income approach, and asset approach) were used in Miller. She also offered advice on effectively using a financial expert in cases. Ms. Holder emphasized communicating with the expert about deadlines, mediation and trial dates, as well as the client’s needs and characteristics. She also suggested using the expert to assist with trial preparation, for example by asking the expert to draft questions for cross-examination of the opposing expert.

Robert D. Boyd gave an inspiring presentation on the challenges of practicing family law. He offered practical advice for managing common ethical dilemmas and also shared his personal experience in finding a sense of balance in this demanding profession. Sharing the famous scene in To Kill a Mockingbird, when everyone in the courtroom, including his children, stands up as Atticus Finch passes by, Mr. Boyd challenged everybody to consider whether their own professional conduct was worthy of that level of
respect. He reminded everyone that while the ethical codes provide guidance for when problems arise, a lawyer must ultimately rely on his or her best professional judgment to make tough decisions.

Kelly Anne Miles addressed the increasingly relevant issue of electronic discovery. She provided valuable advice on the acquisition, admissibility, and authentication of various forms of electronic discovery, including social networking websites, text messages, emails, and instant messages and chat room discussions. Ms. Miles also cautioned against the risk of spoliation, and suggested sending a preservation letter at the beginning of a case as to relevant items, and requesting that the evidence be preserved.

Kurt A. Kegel discussed the equitable division of property, specifically the evolution of the source of funds rule. He discussed its application in *Thomas v. Thomas, Lerch v. Lerch*, and where it stands post-*Lerch*. In addition, Judge Mary Staley and Judge Bensonetta Tipton Lane provided insight to the factors that guided their decisions in making equitable division of property awards. They confirmed that bad conduct does play a role in equitable division, particularly when marital funds have been used in furtherance of that conduct, such as spending money on a paramour. They also explained that while remorse can have some impact on equitable division, it ultimately depends on whether the Judge believes it to be genuine.

Rebecca L. Crumrine offered helpful guidance as to the changes attorneys can expect once Georgia adopts the Federal Rules of Evidence in January 2013. Specific changes relevant to family law include, among others: expanding the provisions of existing Code, O.C.G.A. § 24-9-22, to include a broader definition of who qualifies as a religious entity; and allowing both reputation testimony and opinion testimony when character evidence is admissible. While the federal definition of hearsay is easier to understand and apply in a trial setting, Ms. Crumrine reminded everyone that it is imperative to make hearsay objections to protect the record.

Katie B. Connell and Sarah McCormack wrapped up the program by summarizing new case law on a variety of family law topics. They outlined numerous cases and provided thoughtful advice on their practical application. Among the cases discussed was *Greenwood v. Greenwood*, in which the Georgia Supreme Court held that a final judgment of divorce cannot be modified in the context of a contempt action. Ms. Connell and Ms. McCormack also spoke about *Gallo v. Koffer*, in which the Supreme Court held that one party’s announcement of an intention to move gives rise to a change of circumstance, and a trial court is not required to wait until the relocating parent actually relocates to determine whether a change in custody was in the best interest of the child.

Thanks to the hard work of the organizers and presenters, this year’s Nuts & Bolts of Family Law Program was a tremendous success. *FLR*

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**George S. Stern**

George S. Stern founding partner of Stern & Edlin, PC, was presented with the International Academy of Matrimonial Lawyers (IAML) President’s Medal at the Academy’s 25th Anniversary meeting in Harrogate, England on Sept. 10th 2011, in recognition of his work as Treasurer to the Academy from Sept. 1991 until Sept. 2011.

The President’s medal is an annual award presented to an IAML Fellow or person outside of the Academy in recognition of significant contributions to the Academy or to international family law.

The International Academy of Matrimonial Lawyers is a worldwide association of practicing lawyers who are recognized by their peers as the most experienced and expert family law specialists in their respective countries.

The Academy was founded in 1986, inspired in part by the success of the American Academy of Matrimonial Lawyers, an organization founded in 1962 to improve the practice of law and administration of justice in the area of divorce and family law in the USA. Mr. Stern was President of the American Academy of Matrimonial Lawyer from 1998-1999.

The primary objective of the International Academy is to improve international family law practice throughout the world. It pursues that objective in a number of ways: creating a network of expertise in international family law around the world providing its fellows with information about both international and national developments in the law; offering advice and assistance to the wider public; and promoting law reform.

Mr. Stern has been active in the Atlanta Bar Association and State Bar of Georgia for many years and has lectured in Georgia and throughout America on family law matters. He had been included in the “Best Lawyer in American since 1997. *FLR*
Protective Orders Are Effective in Ending Violence Against Women

by Vicki O. Kimbrell

Georgia ranks 6th in the nation in the rate of women killed by men.1 The Georgia Fatality Review shows that domestic violence is an epidemic that is killing women and children in Georgia at an alarming rate. In the past 5 years, 598 victims have been killed as a result of domestic violence.2 A recent study shows that lawyers hold one key to ending this crisis.

According to the research, protective orders are an effective and cost-saving way of ending domestic violence. A study released through the National Institute of Justice shows that protective orders completely stopped the violence in 50 percent of the cases. In 25 percent of the remaining cases, a protective order substantially reduced the violence so that survivors reported a substantial increase in their quality of life.3 The study also showed that one of the biggest barriers for survivors to obtain a Protective Order is the lack of access to an attorney.

In addition to the safety issues that survivors face living in a world where they are at risk of being beaten or killed at any moment, domestic violence has financial costs that we all pay. Because of the batterer’s decision to commit family violence, we are forced to pay law enforcement officers, judges, lawyers, medical costs, and incarceration expenses. Victims and their employers pay costs related to lost work days, insurance expenses, security, and property damage as a result of domestic violence. The research shows that protective orders protect lives, reduce violence, and save the state and individuals millions of dollars in avoided costs.

Lawyers consider our life’s work a profession, rather than just a job because we have particular privileges. We hold the “keys to the courthouse” and only through lawyers can individuals obtain the justice they are entitled to seek. In return, we have certain obligations of professionalism. Lawyers can fulfill those obligations in many ways, but one of the most important is through this life-saving work in representing victims of domestic violence.

Georgia Legal Services recently found out that our federal funding was being cut by around 15 percent.4 IOLTA funding has been cut 90 percent because of the economy in the past four years. The free services of Georgia Legal Services and Atlanta Legal Aid are the only way that many low-income victims can obtain legal representation. As a result of the budget cuts, we are able to assist fewer and fewer survivors of domestic violence who desperately need our help.

One of the hardest areas for us to get pro bono volunteer lawyers is in domestic violence cases. While the majority of domestic violence cases will settle before court, like most litigation, they can also result in protracted litigation. But divorce, along with reasonable child support, is the only way a domestic violence victim can achieve a stable and safe life away from her abuser. At GLSP we screen cases for income and merit and provide litigation support, when requested. Because of funding restrictions and lack of resources, we usually cannot handle domestic violence cases through the divorce. We need help from private lawyers, not just to save the lives of these victims, but also to help keep them safe and financially stable.

Georgia has more than 29,000 lawyers, with 1,500 who are members of the Family Law Section. If each lawyer took one pro bono case for GLSP (or made a financial contribution to fund a case), we can make a substantial dent in helping those in need. Please contact your local GLSP office (www.glsp.org), or me, if you can volunteer your time to help and save a life. FLR

Vicky O. Kimbrell
Family and Health Law Attorney
Georgia Legal Services
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“You saved my life and my child’s life. I wanted help because I didn’t want my son growing up to be violent like his father. How can I ever thank you.”

Middle Georgia Client

(Endnotes)
1 www.wpc.org/studies/wmmw2011.pdf
2 www.fatalityreview.org
4 Aid groups brace for federal cut Georgia’s two biggest legal aid groups say $50M reduction in Legal Services Corp. funding is a big blow to their 2012 budgets, Daily Report, Meredith Hobbs, Friday, November 18, 2011, p.1.
Divorcing – Maybe an ESOP is an Efficient Solution

By Marc A. Borrelli

Divorce is never pleasant, but once that decision has been made, dealing with the split of marital assets should be done in as efficient manner as possible, putting to one side emotion if at all possible.

Assume a divorcing couple, the spouse that is active in the business, “A” and the dormant spouse “D”, who have marital assets of $16 million comprising of:

- Company X: $18,000,000
- Real Property: $4,000,000
- Stocks and Investments: $2,000,000
- Total: $24,000,000

Thus and equitable split of the marital property would be $12,000,000 to each.

However, if A wants to retain control of Company X without any involvement by D, then they could keep Company X and pay D the difference by taking on bank debt as shown below.

Using an ESOP

Alternatively, A could transfer 50 percent of Company X to D and simultaneously D would sell their interest to an ESOP. An ESOP is an Employee Share Option Plan, an employee benefit plan that allows employees to become owners of stock in the company they work for.

Under such a scheme, the ESOP is set up and borrows the money to acquire the shares from D. The shares purchased are valued by an expert and the value is such that the trustee of the ESOP is comfortable that the cash flow to the ESOP can satisfy its debt obligations. The share of income from the company that is paid to the ESOP are the employee contributions to fund the ESOP, and the ESOP uses these funds to repay the debt it used to acquire the shares.

Employees pay no tax on the contributions until they take them out some time after termination or after they take them out of an IRA they roll them into. The ESOP is a trust and pays no taxes, much as a 401(k) plan does not. A transaction would be as follows:

Thus the two transactions result in the following outcomes to the spouses. (Please see chart on page 23). The question is, why would A allow 50 percent of the Company X to be held in an ESOP when they wanted 100 percent control?

A Funding Solution

The ESOP can be considered as a more efficient funding vehicle since it could be established with a life expectancy of 3 – 5 years at which time it A will acquire the shares back from the ESOP and gain 100 percent control once more.

The advantages of using the ESOP as a funding solution are:

- A doesn’t have to take on more personal debt to satisfy the split of assets in the divorce. Depending on the performance of Company X, the debt obligations could the disposable income of A to the point that they cannot agree to the deal.
- It allows A to get some of the liquid assets from the split of marital property allowing better diversification of assets and more income as their share of Company X’s net income is cut in half;
- It provides D with the cash from their share of
The valuation of Company X is usually more realistic as the Trustee will not accept a valuation that is unsustainable and it will reflect market conditions rather than emotional values.

Grow the company.

Research shows that divorce profoundly affects work performance, and a person’s ability to function well in their job. On average, employees miss 21 days of work per year due to the trauma of separation and divorce. I have no data for business owners; however, it is normal and natural for a person’s performance to take a dip due to worries and the overwhelming pain of the divorce process.

Assuming that A is like most people, they will miss 21 days of work and that doesn’t take into account the time when either are unable to focus on their or their judgment is impaired even though they are at the office.

By providing all the employees with a large economic incentive though the ESOP to help Company X achieve its strategic goals and grow in value, will help alleviate the impact on A and may even result in Company X growing more than it would otherwise. Under the ESOP Company X is valued annually so that the employees can see how much their wealth has grown over the last year. This keeps the employees focus on how they add value to the business and usually increases profits and growth over the long term.

Use of the Federal Government’s Money

The tax treatment of the ESOP provides two benefits:

- If the ESOP has to pay tax on the contributions it receives, the cash available to service debt would be about 1/3 lower and thus it could not raise enough money to acquire the shares in Company X from D. Therefore, the Federal Government is enabling the ESOP to purchase the shares for a market price.

- As the ESOP pays no income tax, this enable the employees’ contributions to the ESOP to be used primarily to pay down the ESOP’s debt, resulting in the debt being paid off faster and more value being generated for the employees increasing their drive to grow the company’s value.

Capital Gains Taxes.

Assuming that A would like acquire the shares back from the ESOP at some point 3 to 5 years down the road, at the point A does so, it provides A with a market basis in 50 percent of the shares they own. At the time that A eventually sells Company X to another party, this will reduce A capital gains tax burden significantly.

Efficient use of any available liquid assets.

As mentioned on 1 above, using an ESOP provides A with some liquid assets as well rather than having nothing but Company X as their share of the marital assets. If Active is confident enough in future of Company X, A can provide junior debt to the ESOP to cover part of the purchase price. This will provide A with income from that debt at a good rate as the junior debt will carry a higher coupon; and A could receive warrants in Company X, if is sold giving A a larger return from their investment.

While an ESOP may not work in all circumstances and it should be discussed with A’s financial and tax advisors, in certain circumstances it can increase the amount of realized by A by more than 10 percent while providing a good retirement plan to Company X’s employees. FLR

Marc Borrelli has been helping companies develop and execute growth and exit strategies for over 20 years. He started his career in London before moving to Atlanta, where he worked for Holiday Inn Worldwide and Equifax. During his career he has helped many companies develop and execute their growth strategies, and has completed over 100 transactions with a value in excess of $3.5bn. He received his BA from the University of Reading, England, his MBA and JD Tulane University, and has his Chartered Financial Analyst Designation. Borrelli is currently a managing director in the Atlanta office of Corporate Finance Associates, a national mid marketing investment banking firm. He can be reached at mborrelli@cfaw.com or on 678-270-4020.
ATTORNEY’S LIEN

Outlaw vs. Rye, A11A1419 (Nov. 15, 2011)

The attorney “Outlaw” represented Rye in a custody dispute with his ex-wife. Outlaw had a contract with Rye which stated in pertinent part for the purposes of this representation agreement, any real or personal property you may have will be deemed to have been recovered as contemplated by O.C.G.A. §15-19-14 in the proceeding undertaken by the firm on your behalf. Before the custody proceedings were completed, Rye informed Outlaw that he intended to discontinue his payments on the fees that Outlaw had apparently earned. Outlaw filed a motion to withdraw and after the motion was granted, filed a statutory attorney’s lien against the property in which he had a half an interest. The lien reflected that Rye was indebted to Outlaw in the principal amount of $21,923 for services rendered and expenses incurred in the custody proceeding and interest at the rate of 18 percent annually. The parties settled their custody dispute and entered into a settlement agreement which determined custody but also resolved other property issues and the wife paid $50,000 for all rights and interest in the residence and Rye quitclaimed all of his rights and interests to his ex-wife. Two years after the lien was filed, Outlaw filed a petition to foreclose the lien. The ex-wife appeared at the foreclosure hearing and filed a motion to dismiss the petition which the Court granted. Outlaw appeals and the Court of Appeals affirms.

A Final Decree of Divorce was entered in December of 2007 in which the parties were awarded one-half interest in the property that later became the subject of the lien. Outlaw did not represent either party in the divorce action but was subsequently retained by Rye to represent him in the custody and modification that commenced in March of 2008. An attorney’s lien pursuant to O.C.G.A. §15-19-14 holds that Outlaw could not assert a lien against real property that Rye did not in fact recover in the proceedings in which she represented him. Since this statute concerning attorney’s liens is in derogation of common law, it must be strictly construed. By its clear and unambiguous terms, the statute permits a lawyer to assert a statutory lien only against property recovered by the lawyer for her client or stated another way, a lien that is authorized by the statute attaches to the fruits of the labor and skills of the attorney and it properly can be directed only to properties that are among those fruits. Therefore, Outlaw’s lien in this case was not authorized by O.C.G.A. §15-19-14(c).

Outlaw also argues that the lien was valid pursuant to their contractual agreement. However, a lawyer and her client cannot properly render a statutory lien that is not authorized by O.C.G.A. §15-19-14 enforceable simply by agreeing, at the time the representation commences, that any real property then owed by the client will be deemed to have been recovered by the lawyer for the client when the property is not, in fact, recovered by the lawyer for her client. Therefore, the Court cannot agree with Outlaw that a statute can be effectively amended by a contact between private parties so as to confer power upon a court that the statute itself does not. The Court understands that all the lawyers representing clients in proceedings in which no money or property is recovered cannot properly resort to the statutory lien under O.C.G.A. §15-19-14(c). But, the Court supposes that certain other liens recognized in our existing law may be available to such lawyers. Clearly, Outlaw specifically seeks to enforce a statutory lien pursuant to O.C.G.A. §15-19-14(c), not through any type of equity, express contract or a special lien on specific property nor did Outlaw seek to place a lien against the $50,000 that the ex-wife paid Rye in the settlement of the custody dispute. Here, Outlaw conceded in oral argument that she relies in this case exclusively on the power by statute to enforce attorney’s liens.

CHILD SUPPORT/MODIFICATION/WAIVER

Dean v. Dean, S11A0739 (Sept. 12, 2011)

The parties were divorced in May of 2008. Pursuant to a Settlement Agreement incorporating the Final Decree, the husband would pay the wife monthly child support of $2,290 per month for two children calculated on the husband’s annual salary of $185,000. The agreement further stated that the husband’s child support payment would be recalculated soon after the start of each year with the new amount being retroactive to January 1st, based again solely on his salary income. Finally, the agreement provided that in no event shall the annual recalculation of the husband’s child support result in him paying less than the above stated amount of $2,290 per month to the wife for the support of two minor children.

The annual calculations did not increase for 2009 and 2010. However, in June of 2010, the husband filed a petition for downward modification because of the husband’s recent involuntary job termination that resulted in at least a 25 percent loss of income. The wife moved to dismiss, arguing the husband was barred from seeking a modification by the Settlement Agreement. The Court denied the wife’s motion to dismiss after concluding that the husband had not waived his right to seek statutory modification of his child support obligation, but then the Court held that the obligation could not be reduced below $2,290 as set by the Settlement Agreement. The husband appeals and the Supreme Court reverses.

Child support is a form of alimony and long-standing statutory and case law establishes that alimony includes support for a spouse and for a child or children. By concluding that the Husband could not modify his child support payment below $2,290, the Trial Court held that
the husband waived his right to modify his payment to the full extent permitted by O.C.G.A. §19-6-15(j). The wife argues that the $2,290 floor has nothing to do with the husband’s right to seek modification. However, the wife seeks to recast the provision to operate as a waiver of the husband’s modification right. The Settlement Agreement’s provision that the child support could not fall below $2,290 does not satisfy Varn’s requirement that he clearly and expressly waive his modification right, even to a limited extent. Varn has set the rule for waivers of alimony and child support modification rights since 1978. The parties’ decision not to include its well-worn waiver language or something equivalent to it in their Settlement Agreement suggested that they did not intend to forbid a statutory downward modification of husband’s child support obligation below $2,290.

DECISION-MAKING AUTHORITY


The parties were divorced in 2005. The parties had joint custody with the mother having the final decision-making authority as to healthcare and education and the father having final decision-making authority involving religious upbringing and extra-curricular activities. In 2009, the judgment was modified reversing the custody arrangement based upon the mother’s schedule as an emergency room physician and the mother now had custodial time on the first, third, and fifth weekends of each month from Thursday after school until Monday morning and from June 1st to August 1st and legal custody remained the same. In May of 2010, the father filed a Motion for Contempt because the mother refused to allow the daughter to participate in certain golf tournaments during her custodial time and would continue to use the golf instructor for the child that the father previously fired. After a hearing, the Court denied the father’s motion but held that the golf instructor was forbidden from having any contact with the child but the mother could utilize her custodial time with the child in any way she deemed appropriate and she was not required to follow the final decision-making authority of the father with respect to the children’s extra-curricular activities during her custodial time. The father appealed and the Court of Appeal affirms.

FRAUD


The parties were married in 1978 and were divorced in 2007. Joyner, an attorney, represented Mr. Jordan from 2002 to 2004 in unsuccessful litigation against the bankrupt debtor. Mr. Jordan approached Joyner and asked him to handle the parties’ uncontested divorce in which the attorney initially refused to represent the wife because of his previous professional relationship with Mr. Jordan, but ultimately agreed to do so on the condition that the divorce remained uncontested. According to Joyner, the Jordan’s had agreed on the terms of their settlement agreement and came to his office and told him the terms and he drafted the document and they returned and signed the paperwork. Afterwards the divorce complaint was filed in the Superior Court of Dawson County, the divorce was granted on Joint Motion for Judgment on the Pleadings which incorporated the Settlement Agreement.

Mr. Jordan’s story was different from that of Joyner. According to Mr. Jordan, he only learned of the settlement terms when the attorney presented him with a draft of the agreement and he initially protested that it was not a fair division of marital assets. Mr. Jordan contends that the lawyer told him that the Settlement Agreement was just a formality necessary to prevent the lender from seeking marital assets for any deficiency due after the foreclosure on the marital residence and made an oral side agreement dividing the assets more equitably. Based on this, he signed the agreement. Mr. Jordan said he sent the attorney a fax outlining some of the terms of the oral side agreement but both Joyner and Mrs. Jordan denied ever discussing it. Mr. Jordan sued Mrs. Jordan and Joyner for conspiracy, fraud.
and breach of fiduciary duty in the State Court of Forsyth County. Mrs. Jordan counterclaims contending that Mr. Jordan had failed to make a monthly payment due on lines of credits secured by the vacant lots that she was awarded pursuant to the divorce decree and now required to make monthly payments totaling $93,500 so that the bank would not foreclose on the lots. In addition, both parties moved for summary judgment. The Trial Court denied summary judgment to Mrs. Jordan on the counterclaim. The Trial Court also granted summary judgment to both Defendants on Mr. Jordan’s claim because the Settlement Agreement had been incorporated into the Final Divorce Decree in another court and thus could not be attacked separately. The Trial Court held that the State Court of Forsyth County could not vacate the judgment of the Superior Court of Dawson County which is the only court with jurisdiction to award the Divorce Decree.

The Trial Court also held that even if the Court could consider the merits of the fraud claim against Joyner and Mrs. Jordan, evidence showed that Mr. Jordan entered into the divorce Settlement Agreement for his own fraudulent purposes (to transfer property out of his name to prevent lenders from seizing marital assets) and thus could not challenge it under the principle of in pari delicto. Mr. Jordan appeals and the Court of Appeal affirms.

A party cannot collaterally attack the validity of a Settlement Agreement that has been incorporated into a Final Divorce Decree. While Mr. Jordan is correct that a Settlement Agreement is a contract, that contract was incorporated into a Final Judgment and Decree and its merits can only be addressed by setting aside the Final Decree. This is so because the rights of the parties after a divorce is granted are based not on Settlement Agreement, but on the Judgment itself. Therefore, what claim the Husband has is founded on the Final Decree and not on the underlying agreement.

Mr. Jordan also asserts that the Trial Court erred in finding that his claims was also barred because he entered into the Settlement Agreement with the purpose of defrauding his creditors. An executed contract made for the purposes of defrauding creditors is valid and binding between parties. So far as such contracts have been executed, the Court will not disturb them, but leave the parties as they find them.

POST NUPTIAL AGREEMENT


The parties were married in 1998 and have two children. In 2007, the wife filed for divorce. Later, the Wife confessed to an extra-marital affair and the parties reconciled and executed a Post-Nuptial Reconciliation Agreement. The agreement purported to settle preemptively any future issues between the parties involving child custody, child support, alimony, and property division and provided the husband would receive the marital residence, primary physical custody of the minor children with both parties having legal custody. In 2010, the wife filed a Complaint for Divorce and the husband answered and filed a Motion to Enforce Post-Nuptial Agreement. A hearing was held and the Court determined the agreement was valid and enforceable as to alimony and property division but the Court retained the duty and authority to make a determination of child custody and child support. After a bench trial, the Trial Court ratified the Post-Nuptial Agreement pursuant to O.C.G.A. §19-9-5(b) awarding the parties joint legal custody and the father primary physical custodial, explaining that it was in the best interests of the children at the time the agreement was signed and now. The Court stated several specific findings of fact to support its decision and noted that the wife acknowledged that her moving from the marital residence with the children at separation was the only change in circumstances since the signing of the Post-Nuptial Agreement. Wife appeals and the Supreme Court affirms.

The wife conceded she declined to participate in and pay for the court reporter’s takedown and thus no transcript of either the hearing on the Motion to Enforce or of the trial was included in the record. However, the required assumption that an adequate evidentiary basis exists for the Trial Court’s Order does not automatically require affirmation. The Court must still analyze how the law applies of the Trial Court’s findings of fact. The wife contends Trial Court erred in enforcing the Post-Nuptial Agreement and that the husband failed to comply with the affirmative duty of full and fair disclosure of his financial conditions. The same criteria applies to determine whether to enforce reconciliation/postnuptial agreements as prenuptial agreements. The Court found that the wife had access to the husband’s family business financial records up to the point of filing for divorce, she handled most or all of the husband’s paychecks when he received them and paid the family debts giving her knowledge of their financial status. Even though there were no disclosure statements attached, the body of the agreement listed major assets of
the parties. In addition, the agreement had information that each party had knowingly and voluntarily chosen to forego formal discovery, investigation and analysis of the other party’s financial condition and accept the provisions of this agreement on the basis of information acquired prior to this date without further discovery.

The wife also contends the Trial Court erred by determining child custody was governed by the Post-Nuptial Agreement signed more than 2 years earlier and that O.C.G.A. §19-9-5(b) is applicable only to agreements reached during the pendency of a divorce. However, the Trial Court separately determined the award of primary physical custody was in the children’s best interests. In the core analysis, it did not mention the Post-Nuptial Agreement and supported its determination of custody with specific facts outlining the parties’ past and future performance of parenting responsibility. Therefore, the Trial Court did not base its custody decision solely on the Post-Nuptial Agreement but expressly and properly based that the decision on the best interest standard pursuant to O.C.G.A. §19-9-3.

**Prenuptial Agreement**

*Sides vs. Sides, S11F1140* (Nov. 7, 2011)

The parties met in 1978 and in 1989 started dating. A Prenuptial Agreement was executed on September 17, 1990 and the parties were married 5 days later. After the parties’ child began college on January 29, 2010, the husband filed for divorce and moved to enforce the Prenuptial Agreement. The Trial Court enforced the agreement and the parties’ divorce was finalized 62 days prior to the couple’s 20 year anniversary. The wife appeals and the Supreme Court affirms.

The wife argues that the Trial Court erred in finding the Prenuptial Agreement enforceable. Under Scherer, the three factors to be considered in determining the validity of a Prenuptial Agreement are: (1) is the Agreement obtained through fraud, duress, or mistake or through misrepresentation or non-disclosure of materials facts; (2) is the Agreement unconscionable; or (3) have the facts and circumstances changed since the Agreement was executed so as to make its enforcement unclear and unreasonable. Clearly, full financial disclosures were made to the wife before she signed the agreement. Both attorneys deposed that they would not have allowed their clients to enter into an agreement without full financial disclosures being made and both attorneys signed certificates at the time that the agreement was entered indicating that they fully discussed all terms of the agreement with their clients. The husband also provided a sworn affidavit in which he stated that full disclosures of assets were made.

The Prenuptial Agreement itself did not require that the actual financial disclosure documents be attached to the agreement. The wife had known the husband for many years prior to their courtship and she was aware of the vast disparity between the husband’s income as a business owner and her own prior to their marriage. Therefore, the Prenuptial Agreement was not void for lack of financial disclosures or for being unconscionable. In addition, the wife has not shown that the increase in the husband’s net worth over time presents a change of circumstances in making enforcement of the agreement unfair or unreasonable. The fact that the husband’s net worth nearly doubled over the course of almost the 20 year marriage was not something that was unforeseeable as a significant growth of assets over many years can hardly be considered an unforeseeable change of circumstances that justifies voiding a Prenuptial Agreement. In the past, the Court has upheld a Prenuptial Agreement where the husband’s net worth increased from 8.5 million to 22.7 million over the course of a 18 year marriage.

The wife also asserts the Trial Court erred by entering the Final Decree despite her pending counterclaims. However, the record reveals that all of the wife’s counterclaims dealt with matters that were specifically covered by the Prenuptial Agreement (alimony and division of property) and that the Trial Court’s correct decision to enforce the Prenuptial Agreement disposes of all of those counterclaims.

The wife also contends the Trial Court erred by taking evidence at the same time it ruled on the Prenuptial Agreement. The Trial Court should have set a separate date for trial instead of immediately taking evidence in the Final Decree. However, the wife did not to object to this procedure at the time and therefore cannot now complain on appeal.

**Supersedeas/Visitation**

The parties were divorced in January of 2006 and had joint physical and legal custody of their two children. Shortly thereafter, there was a modification action filed and a Consent Order entered giving the father primary physical custody. In 2008, the mother filed a Motion to Modify Visitation seeking more visitation and primary decision-making authority over healthcare and the children’s extra-curricular activities. The father filed a counterclaim seeking dismissal of the mother’s petition and seeking modification of visitation so the children were not placed in an unsafe situation. The parties agreed to a custody evaluator and a Guardian Ad Litem (GAL). At the urging of the GAL, the husband filed an Emergency Motion seeking the mother’s visitation be supervised. At the July 24, 2009 emergency hearing, the Trial Court entered an Order on the father’s Emergency Motion adopting entirely the recommendation of the custody evaluator and ordered the mother to have supervised visitation every other Saturday from 9:00 a.m. to 6:00 p.m.

On June 9, 2010, the Court conducted a final hearing on the modification petition and counterclaim and entered a Final Order on July 29, 2010 which removed the restrictions on the mother’s visitation and granted her more visitation. The father continued to be the primary physical and legal custodian of the children, and each parent was permitted to make decisions regarding the day-to-day care of the children, including extra-curricular activities and medical treatment, while the children were residing with that parent. The Order also included a condition prohibiting the parties from contacting each other and preventing them from attending extra-curricular activities when the other parent has custody. The Father appealed and filed a Motion to Enforce a Supersedeas, arguing that the Court had to include the language excepting visitation from automatic supersedeas. The legislature has modified subsection (e) of O.C.G.A. §5-6-34 and subsection (k) to O.C.G.A. §5-6-35 which applies to all notices of applications on appeal filed on or after July 1, 2011 stating that where an appeal is taken pursuant to this Code section for judgment or order granting non-monetary relief in a child custody case, such judgment or order shall stand until reversed or modified by the reviewing court unless the Trial Court states otherwise in its judgment or order. However, this case was filed before July 1, 2011. The Court in its Final Order and ruling from the bench ordered that the mother’s unsupervised visitation would begin immediately and that supervised visitation was oppressive, unwarranted and to be lifted immediately. In its Order resolving the supersedeas issue, the Court expressly excepted the custody and visitation provisions of its June 9, 2010 Order from any supersedeas effect. The father still argues that the Court could not include the language excepting visitation from supersedeas once he had appealed the Final Order. Instead, he argues that the Court had to include the key language at the time the Final Order was entered. The Supreme Court in Frazier ruled that a Trial Court was authorized to except the custody provisions of a Divorce Decree from automatic supersedeas. This clearly contemplated a post Final Order adjustment to exempt the custody provision of such a Final Order from the automatic supersedeas. The father also contends the Court’s Final Order amounted to a de facto change in custody which is impermissible because there was no change in material circumstances. It is true that a Court may indirectly change custody by modifying the visitation schedule and create a de facto change of custody. We have previously held a de facto change of custody occurred by giving a non-custodial parent visitation for the greater part of the year or giving the non-custodial parent the right to visitation at all times except for the first weekend of each month, alternating holidays and a set period of summer visitation. Here, the increase did not amount to the de facto change of custody nor did the provision allow the mother to make the decisions regarding the children’s day-to-day care when they are in her custody.

The father argues that, pursuant to O.C.G.A. §5-6-46(a), Notice of Appeal of the Final Order and his payment of appeals costs triggers automatic supersedeas of that Order and the Trial Court erred by denying his Motion for Supersedeas. The legislature has modified subsection (e) of O.C.G.A. §5-6-34 and subsection (k) to O.C.G.A. §5-6-35 which applies to all notices of applications on appeal filed on or after July 1, 2011 stating that where an appeal is taken pursuant to this Code section for judgment or order granting non-monetary relief in a child custody case, such judgment or order shall stand until reversed or modified by the reviewing court unless the Trial Court states otherwise in its judgment or order. However, this case was filed before July 1, 2011. The Court in its Final Order and ruling from the bench ordered that the mother’s unsupervised visitation would begin immediately and that supervised visitation was oppressive, unwarranted and to be lifted immediately. In its Order resolving the supersedeas issue, the Court expressly excepted the custody and visitation provisions of its June 9, 2010 Order from any supersedeas effect. The father still argues that the Court could not include the language excepting visitation from supersedeas once he had appealed the Final Order. Instead, he argues that the Court had to include the key language at the time the Final Order was entered. The Supreme Court in Frazier ruled that a Trial Court was authorized to except the custody provisions of a Divorce Decree from automatic supersedeas. This clearly contemplated a post Final Order adjustment to exempt the custody provision of such a Final Order from the automatic supersedeas. The father also contends that the Court’s Final Order amounted to a de facto change in custody which is impermissible because there was no change in material circumstances. It is true that a Court may indirectly change custody by modifying the visitation schedule and create a de facto change of custody. We have previously held a de facto change of custody occurred by giving a non-custodial parent visitation for the greater part of the year or giving the non-custodial parent the right to visitation at all times except for the first weekend of each month, alternating holidays and a set period of summer visitation. Here, the increase did not amount to the de facto change of custody nor did the provision allow the mother to make the decisions regarding the children’s day-to-day care when they are in her custody.

The father also contends the Trial Court abused its discretion by prohibiting the parties from communicating with each other except through an intermediary and the parent not having physical custody at the time from attending the children’s extra-curricular activities. The
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Trial Court has discretion to place restrictions on custodial parents’ behavior which will harm the children. Here, the provisions do not infringe upon the father’s rights. Rather, they are narrowly tailored conditions justified by the evidence and the Trial Court is authorized to place such restrictions as circumstances warrant.

THIRD PARTY CUSTODY

_Harris f/n/a Snelgrove vs. Snelgrove, S11F0892_ (Nov. 21, 2011)

The parties were married in October, 2002 and had a son born in 2002. The mother filed an action for divorce in April, 2009 and the paternal grandparents intervened seeking custody of the grandson. A Guardian Ad Litem (“GAL”) was appointed and issued a recommendation that the grandparents should be given primary custody of the child. After a 3 day bench trial, the Court awarded sole legal and physical custody of the child to the grandparents and visitation to the mother and father and directed the mother and father to pay child support. The mother appeals and the Supreme Court affirms.

The Court found by clear and convincing evidence that the grandson would suffer physical and emotional harm if custody were awarded to either biological parent and the wife in particular. The Court found, among other things, that the mother had five sons from three separate husbands and her current husband was 14 years younger and was her oldest son’s friend and roommate. The mother became pregnant with the child prior to her previous divorce. There were illegal drugs in the home and there was also evidence of alcohol abuse. The mother admitted purchasing alcohol for at least one of her sons who was under the age of 21. There was also a drug raid in the home during which the mother and father and all of the siblings were handcuffed and the mother was arrested in the raid. There were also violent episodes in the house and DFACS had been involved on previous occasions. The child was absent at least 29 days in the first 4 months of kindergarten and was physically exhausted when he did attend school. The child did not routinely have his own bed and often attempted to sleep on the living room couch. The mother was involved in numerous money-making entertainment enterprises and schemes including a puppy mill which was promoted on the internet. She had removed her name from ownership and used the names of her sons for all of her assets including her home, vehicle, bank accounts, and the puppy mill in an obvious attempt to become judgment proof and obtain various forms of government assistance. Additionally, there were multiple examples of how an appeal and the Supreme Court affirms.

The mother contends that the Trial Court erred by not allowing her attorney to fully cross-examine the GAL. The record shows that when counsel for the mother attempted to question the GAL on the applicable legal standards and was familiar with a named appellate case, the Court halted the line of questioning and reminded counsel that the Court, not the GAL, was the arbiter of the law in regards to custody decisions and then respectfully told counsel you can go into the factual basis and counsel continued cross-examination of the GAL. The Trial Court was correct that the GAL may testify to facts provided by witnesses and sources and other results of the GAL’s investigation.

THOMAS RULE

_Highsmith v. Highsmith, S11F1052_ (Sept. 12, 2011)

The parties were married in 1993 and, after a bench trial were divorced in July of 2010. In the Final Decree, the Trial Court found in relevant part, that certain properties were non-marital and the separate property of the husband, i.e. approximately $70,900 in undivided tracts of 4 lots adjacent to the parties’ marital residence. The Trial Court also found, in relevant part, that certain properties were marital and subject to equitable division, i.e., the Scottrade account of the wife, marital portion of tract of land adjacent to the parties’ marital residence. Wife appeal and the Supreme Court affirms in part and reverses in part.

The parties had rental property business during the marriage and most of the marital property was in the form of houses and/or land lots. For the most part, the parties agree to the value of the real estate based upon the county tax record. In total, the value of the marital estate which the Trial Court awarded to the wife was $872,000 and the portion awarded to the husband was $766,570. The wife was awarded the greater share because the Court took into consideration a credit of up to $210,000 which reflected an amount the wife testified she moved from her Scottrade account and comingled in a joint account of marital funds for the purposes of investing in the parties’ rental property business. The wife contends the Trial Court erred when it improperly designated her Scottrade account as marital property and improperly applied the source of the funds rule. Evidence shows that in 1992 the wife sold the house she owned prior to the marriage and placed the proceeds in the Scottrade account. At the time the parties were married, the Scottrade account had $300,000. She also testified that during the marriage she withdrew approximately $210,000 from the Scottrade account and placed it in the joint account held by the parties in order for the parties to invest in rental properties. There are no marital funds that were placed into the account and its value, with exception of the wife’s removal of the $210,000, rose and fell with the market. The remaining balance in the Scottrade account was $74,000. Therefore, the remaining balance of $74,000 in the Scottrade account is not the result of any labor or investment made by the husband or the parties together during the marriage and therefore is the wife’s separate property. Even though the Trial Court ultimately awarded the account to the wife, the Trial Court erred in designating the account as marital property was not harmless. Accordingly, this issue must be reversed.
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Wife also alleges the Trial Court erred by applying source of funds rule to the husband’s office but not to her Scottrade funds. Here, the source of funds rule cannot be applied to the $210,000 removed from wife’s Scottrade account and placed in the parties’ joint marital account. The funds withdrawn from the account were placed into the joint account held by the parties in order for the parties to invest in rental properties. First, there was no evidence presented establishing the amount of marital funds in the joint account at the time the wife withdrew the $210,000 and so the total amount of the non-marital and marital components was not established. Also, there was no evidence showing how much the $210,000 over 18 years of marriage was spent vis-à-vis the marital funds on numerous real estate properties the parties accumulated for their rental business. With regards to the husband’s office, it is a piece of real estate and it was a relatively static asset and more easily valued. The husband testified that he used $20,000 of his pre-marital funds to renovate an office he purchased after the couple was married. In addition to the $20,000, the Husband used $50,000 of the marital funds to complete the purchase and to make renovations such that the total cost was $70,000. Evidence presented that the fair market value is $82,522. Dividing $20,000, the non-marital component by the total investment of $70,000, comes out to be approximately 29 percent non-marital multiplied by the $82,522 equals approximately $22,931 that was non-marital leaving. This left 71 percent as marital property subject to the equitable division. Therefore, the Trial Court properly applied the source of the funds rule to the husband’s office property.

TRANSCRIPT


The Wife filed for divorce in July, 2009 after 23 years of marriage. In November, 2010, the Trial Court held a bench trial where both parties appeared and were represented by counsel. A court reporter was also present at the request of the wife’s attorney. At the outset of the trial, the Court asked who had requested the court reporter and the wife’s attorney responded he had while the husband’s attorney remained silent. The Court then said “so you will be responsible then for her costs” to which the wife’s attorney replied “yes” and again the husband’s attorneys said nothing. At the conclusion of trial and after the Judge had left the bench, the court reporter asked for clarification regarding any bill for attending trial and takedown notes of the proceedings and the wife’s attorney said to the husband’s attorney “its up to you if you want in on it or not” which the husband’s attorney replied “I am going to let the wife have it.” In November of 2010, the Court wrote the parties a letter with findings of facts and conclusions of law. The Husband filed a motion to require the court to transcribe her notes and to provide him with an official transcript of the trial stating that he claimed the findings of facts misstated the party’s stipulations and were improperly based solely on argument of counsel and not on evidence. The husband was now willing to pay the entire cost of the court reporter and to prepare the transcript.

The husband filed a transcript motion and the Court stated it understood why the court reporter asked for clarification at the end of trial and the Court expressed regret that the Court had not done a better job at the start of the trial period and gotten that question answered. In January of 2011, the Trial Court entered an Order denying the transcription motion. The Court stated that the husband and his counsel made a conscious, intentional decision to remain silent when the Court made an on the record inquiry as to which party would be responsible for the takedown costs and definitively ruled at the commencement of the proceedings that the wife would be solely responsible for the costs of the reporting. The Court also found the husband’s failure to participate in the takedown costs was intentional and not due to inadvertence or from mistake. The husband filed an appeal and an extraordinary motion for relief seeking immediate review of the Order denying the motion for a copy of the transcript. The Supreme Court reverses and remands.

In civil cases, the court reporter and official transcript are not generally required although a transcript may be needed to obtain a full appellate review. In this case, the Trial Court found in its order on the husband’s transcript motion that he made an intentional and conscious decision not to participate in the takedown costs based on the husband and his counsel’s silence in the face of the Court’s inquiry about payment of the court reporter at the outset of the trial. The husband expressly refused to pay and was later asked by the court reporter after trial had ended and the Judge had left the bench. However, this court in Harrington v. Harrington concluded before a finding that a party has waived the ability to obtain an official transcript, the Court must make a ruling at the commencement of the hearing that a party expressly refused to share in the costs of takedown. Such a waiver may not be inferred from conduct such as silence in response to courts inquiring nor can it be based on the parties’ interaction with the court reporter after the trial begins. Because the Trial Court here did not rule at the beginning of the trial that the husband had expressly refused to share payment for the takedown, the Court erred in denying his request to obtain a transcript with appropriate payment. We certainly do not condone the husband and his counsel’s conduct in waiting until after an adverse ruling was announced to invoke the rule of Harrington to obtain a transcript. The litigants in the wife’s position can always prevent gamesmanship by simply ensuring that the Court obtains an expressed refusal by the opposing party to share in the takedown costs at the start of the proceeding.

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