The Family Law Review

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Obtaining Military Health and Education Records

By Mark E. Sullivan
Sullivan & Grace, P.A.

In custody cases involving one or both parents who are in the armed forces, it sometimes is necessary to obtain school and medical records of the children involved. Far from being a minefield, as most civilian practitioners suspect, the procedures for access to military educational and health records are simple and straightforward.

Voluntary release of records and medical information from an armed forces medical treatment facility (MTF) is governed by the same federal law, the Health Insurance Portability and Accountability Act (HIPAA), as civilian health facilities. The primary legal references pertaining to the release of medical information are the following:

1. Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. Sections 1320d 1320d 8 (2004).
2. DoD REG 6025.18 R, DOD Health Information Privacy Regulation (2003) and DoD Directive 5405.2.
3. AR (Army Regulation) 40 400, *Patient Administration*.
4. AR 40-66, *Medical Record Administration and Health Care Administration*.
5. AR 27 40, *Litigation*.

The latter three are for cases involving U.S. Army records.

Perry Wadsworth, a hospital attorney for Womack Army Medical Center at Ft. Bragg, N.C., and an Army Reserve JAG major, describes the records access issues as follows:

> The old analysis of Privacy Act vs. FOIA (Freedom of Information Act) used to be one of our standards, but HIPAA is now the controlling federal legal authority on medical information. The law was not written for the military per se; this has caused some confusion in its application, particularly because military functions and command authority are fairly broadbased in comparison to civilian institutions.

Requesting records from an MTF can be both easy and hard. The request is easy but getting the records is sometimes hard. The spectrum, from easy to hard, is summarized as follows:

Easy

If the patient is requesting his own records or completes a HIPAA release form giving authority to someone else to get his records, then the request is straightforward. The MTF will release copies of the records in the normal course of business. This is the preferred method. If an attorney is representing a client whose records are needed, then he can simply have the client complete the appropriate release form with the HIPAA language. The attorney then mails the request and release form to "Medical Correspondence, Patient Administration Division" of the appropriate MTF. It may behoove the attorney to state the purpose of the request, such as "this case involves a custody lawsuit," or "this case involves a potential federal tort claim." If the government has an interest in the case, whether it is the opportunity to recover money for treatment provided or its exposure to damages in a tort suit, then the case can flow more smoothly by explaining that the government. If you know someone in the JAG claims office handling the tort claim, he or she can usually assist you in getting the records in these cases because the JAG office

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Editor's Corner

By Randall M. Kessler
rkessler@kssfamilylaw.com
www.kssfamilylaw.com

What a great year for our section! Due to our Chair Steve Steele's efforts, the State Bar awarded us Section of the Year. The Family Law Institute in San Destin, Fla., was a huge success thanks to Shiel Edlin, Nancy McGarrah and the entire "blue ribbon panel" that they put together two and a half years ago to plan this joint meeting between lawyers and psychologists. In fact, the American Bar Association and the American Psychological Association will be utilizing many of the same concepts and materials at their joint session scheduled for April 2008 in Chicago.

We continue to enjoy significant contributions from members of our section, as well as family law practitioners, professors and judges across the country. For those of you who have not yet submitted an article, please consider doing so. The Family Law Section has a tradition of helping each other and making each other better. Contributing to the Family Law Review is another way to continue that tradition. While we are still recovering from the torrid pace Steve Steele set for our section, there is no time to relax. Shiel Edlin has embarked on an ambitious year (starting with the Family Law Section / Psychological Association Conference in San Destin) and is positioning us for a run at two consecutive Section of the Year honors. Please browse through these pages and enjoy. Please also give us your feedback. (More pictures, more substantive articles, more humor?) Tell us what you want.

Enjoy this issue and I look forward to seeing everyone at our annual get-together in January 2007. **FLR**

Inside This Issue

Note from the Chair

By Shiel Edlin
shiel@stern-edlin.com
www.stern-edlin.com

My 85-year-old father, in his senior years, has plenty of time to reflect on his life and its meaning. Predictably, he is focused on his accomplishments and successes. He dwells on his family and the joys it brings him, especially his grandchildren. Family is his priority. In retirement, he now has time to spend on family, travel and recreation. I have noticed that he expresses himself in new ways. When I see him, he hugs and kisses me. His eyes twinkle when he spends time with my children. And he constantly repeats to me words I do not remember from him when I was younger: "Shiel, I am so proud of you."

If you will all pardon me for sharing this private observation, I do so as I begin my term as chairman of this Section because, like my elderly father, I, too, am so proud of all of us for what we do for the families of Georgia. As I began my career as a family law attorney, the majority of my friends and family questioned my career choice. Why would I want to spend my time practicing "sad" law? "Divorce is not law." "Nobody wants to be a divorce attorney." "You'll never make a living."

Well, here I am, 27 years later and I have never been so proud to be a family law attorney. What makes me proud? It is the good we all do every day by helping people in crisis. We all devote our careers by being problem solvers. We work together in a professional, ethical and collaborative fashion, moving our clients from the dark into the light. We are healers. We are listeners. We are motivators. We are compassionate. We are caring. We are giving. And we are learned in so many areas of the law that it is sometimes overwhelming: tax, accounting, finance, health care, life insurance, psychology, real estate, and the list goes on and on. And we must do all this in a highly competitive environment when one mistake could cause unimaginable consequences to our clients and ourselves. Yet, with all that is required of us, we do it so well and I am so proud of the way we present ourselves.

This next year will be another challenging time for us as we move into the era of new child support calculations. We have much to learn. It is our duty to guide judges and clients through this process. As the leaders in our field, we need to quickly absorb the intricacies of the new law. On Oct. 13 the Family Law Section will host the first statewide child support seminar. This is the first opportunity to begin the journey into the new guidelines. Please sign up for this vitally important seminar. It will be simultaneously broadcast through GPTV and the web. Please attend this seminar and make us proud.

Please feel free to write or call me if you have any comments about how we can continue to improve the practice of family in Georgia. Also, if you would like to become more active in the section, please let me know. This is going to be an exciting year for us and I appreciate the trust you have placed in me. I hope to make you all proud. **FLR**

Case Law Update:
Recent Georgia Decisions

By Victor P. Valmus
vpvalmus@mijs.com

Arbitration Award

Ciraldo v. Ciraldo, **S06A0083 (June 12, 2006)**

The parties were married in 1991 and on Nov. 17, 2003, the wife filed for divorce. The parties submitted certain issues to arbitration and an arbitration hearing was held on Sept. 27, 2004. On Jan. 13, 2005, the trial court issued a final judgment and decree of divorce which stated "on Sept. 27, 2004, the arbitrator...made an arbitration award which has been filed in the office of the clerk of the court. The court hereby approves the arbitration award and incorporates the award into the final judgment and decree and hereby orders the parties to comply with the terms thereof."

However, there was no arbitration award that had been issued at the time of the decree and the arbitration order was not delivered to the parties until Feb. 7, 2005 and not filed with the court until Feb. 18, 2005. On May 9, 2005, the husband filed an application to vacate arbitration award under O.C.G.A. §9-9-13, the trial court denied the application. The Supreme Court reversed.

The trial court erred in stating in its final order that it was incorporating a then non-existent arbitration award into the final judgment and decree of divorce. The court can confirm an arbitration award upon application of a party within one year after the delivery of an award to the court pursuant to O.C.G.A. §9-9-12. A trial court cannot accept and incorporate into a divorce decree an incomplete and unenforceable settlement agreement. Likewise, the court cannot accept and incorporate into a divorce decree, an incomplete and unenforceable arbitration award.

Child Support/Modification

Drake v. Drake, **A06A0771 (May 25, 2006)**

The parties were divorced by court decree which incorporated the settlement agreement of the parties. The divorce decree awarded the parties joint legal and physical custody of their two minor children. Paragraph three of said settlement agreement provided that due to shared custody of the two minor children of the marriage, neither party would be responsible for child support. Paragraph three went on to say that "the father had been a stay-at-home parent and is presently unemployed but is seeking full-time employment. Upon the father securing full-time employment, the parties specifically recognize and acknowledge their respective rights to petition the court of competent jurisdiction and seek an award of child support based upon the parties' then respective employment and relative financial status."

The father later filed this action to establish child support. The trial court ruled that the settlement agreement was not silent on the issue of child support and therefore treated the father's complaint as one to modify rather than to establish child support. The court also denied the request finding that the modification was not warranted since the father's financial situation had improved and the mother's had declined. The father filed for reconsideration and the trial court again stated that the father should have moved for a modification of child support and he may be trying to avoid this because he cannot show a substantial change in circumstance. The Court of Appeals affirmed.

When a divorce decree is silent as to child support, O.C.G.A. §19-7-2 provides a right to institute an original action for an award of child support. However, an action for modification is the exclusive remedy for obtaining a provision supplementing the child support award contained in a divorce judgment. In the instant case, the settlement agreement was not silent on child support and the trial court correctly recited the action as one for modification. The

court went on to hold that responsibility to pay a portion of the child's medical and/or dental expenses counts as an obligation to pay child support. Therefore, regardless of how Paragraph three is construed, other provisions in the settlement agreement may have provided for the payment of medical and/or dental expenses, thus requiring the father to file an application for modification. However, the settlement agreement was not included in the appellant's record and therefore this court must assume that the judgment below was correct and affirm.

Contempt/Bankruptcy/Attorney's Fees

McGahee v. Rogers, S06A0885 (July13, 2006)

The parties were divorced in 2001 after less than nine years of marriage. It was the second marriage for both parties and each party had children from a prior marriage, but had no children born as issue of the marriage. A final decree of divorce incorporating the settlement agreement stated that neither party would receive alimony. However, the agreement did address certain joint marital debts for which each party would assume obligations and would indemnify and hold harmless the other for any debt that party assumed. During the marriage, the parties filed joint tax returns and in the settlement agreement, Mr. McGahee would be responsible for money owed to the IRS from money he withdrew from his IRA but failed to report it and other debt for a loan secured by a car to which he took title and possession. After the divorce, Mr. McGahee filed Chapter 7 bankruptcy and two debts were discharged against him. Afterwards, the IRS and the holder of the automobile note sought payment from Ms. Rogers.

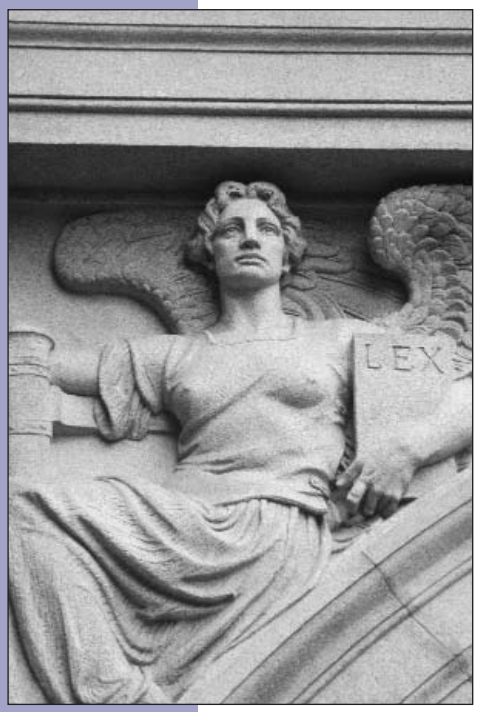
Ms. Rogers filed a criminal contempt action against Mr. McGahee for failure to comply with the provisions of the divorce decree. The trial court found him in violation of the decree but could not hold him in criminal contempt because of the discharge of the debts in bankruptcy. The trial court also held that it had no jurisdiction to determine whether the debts were dischargeable. The Supreme Court reversed and remanded the case.

A general discharge in bankruptcy does not deprive the state court of its jurisdiction to determine whether certain debts of the debtor former spouse were exempted under U.S.C. §523(a)(5) from dischargeability. Therefore, the state court has concurred jurisdiction to make a determination. In this case, there was no evidence the Bankruptcy Court made any specific determination as to the debt to the IRS nor the car loan assumed by Mr. McGahee, as well as the hold harmless clause agreement contained therein were or were not exempt from dischargeability under §523(a)(5).

On a remand, Ms. Rogers amended her motion to have Mr. McGahee held in civil contempt and sought an award of attorney's fees for bringing the Motion including all previous hearings and appeal to the Supreme Court and all hearings subsequent to the remand of the case. The trial court conducted a hearing and found that the debts and the hold harmless agreement were in the nature of support and therefore, not dischargeable in bankruptcy. The trial court held Mr. McGahee in contempt for failing to pay the debts or to indemnify Ms. Rogers and ordered Mr. McGahee to pay Ms. Rogers $2,143 and $12,161 in attorney's fees and the Trial Court stated that "his stubborn stance when dealing with her forced unnecessary expansion and increased expenses of this proceeding." The Supreme Court reversed.

USC §523(a)(5) provides in relevant part that "bankruptcy does not discharge an individual debtor from any debt…to a spouse, former spouse, or a child of a debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record,

determination made in accordance with the state or territory law by a governmental unit, or property settlement." Joint marital obligations assumed by the debtor or former spouse as part of a separation or divorce settlement are exempted from discharge in bankruptcy only if they fall within paragraph five of §523(a) or in other words are they actually in the nature of alimony, maintenance or support.



To determine the dischargeability of a debt, the court must look to the parties' original intent and not the subsequent results of a default. The Supreme Court defines a debt as in the nature of support or alimony, if at the time of its creation, the parties intended the obligation to function as support or alimony. Ms. Rogers argues that the husband's failure to pay the debts as outlined in the settlement agreement has damaged her credit rating and has prevented her from borrowing money to help her children with student loans and her ability to find new employment in the banking and financing field. The nondebtor spouse almost always suffers financially when the debtor spouse defaults on his or her obligations under divorce decree to assume responsibility for joint marital debts, but it is the intent of the parties that at the time of the decree which is despositive. Where the specific intent of the parties is not clearly stated in the agreement or order, courts having considered such factors as need, the absence of support payments in the dissolution decree, the presence of minor children of the marriage, and the disparity of income between the parties. In the present case, neither party received payment or receipt of alimony, a short duration of marriage and there were no minor children born of issue. Ms. Rogers also testified that at the time the settlement was reached, she was not in need of support and was capable of supporting herself and therefore the assumption of the responsibility for the two joint debts was not intended as support for her. Therefore, the allocation of the two marital debts appears to be in the nature of a property settlement. The Supreme Court stated that all the factors enumerated by Ms. Rogers were related to the adverse financial effects suffered from Mr. McGahee's eventual failure to pay the debts, but non-debtor spouse almost always suffers financially when the debtor spouse defaults on his obligations. However, the controlling factor is the parties' original intent and not the subsequent results of the default.

With regard to attorney's fees, Ms. Rogers filed her amended motion which included a prayer for attorney's fees but did not recite the authority for which she was seeking such an award. Ms. Rogers, on appeal, claims she was relying on O.C.G.A. §19-6-2 that depends on the parties' financial circumstances and not their wrongdoing. However, the Trial Court's award of attorney's fees was for Mr. McGahee's "stubborn stance which forced unnecessary expansion and increase of expenses of this proceeding" which more clearly indicates an award under O.C.G.A. §9-15-14(b) which authorizes attorney's fees when a party unnecessarily expands the proceeding by improper conduct. Therefore, attorney's fees under O.C.G.A. §9-15-14(b) are not authorized because the Trial Court never provided proper notice to Mr. McGahee that such an award was under consideration. In addition, there was no evidence of any improper conduct on the part of Mr. McGahee and that he asserted his discharge in bankruptcy defense from the outset. The necessary expansion of the proceedings was attributed to Ms. Rogers and not to an unnecessary expansion attributed to Mr. McGahee. In addition, attorney's fees incurred in connection with the appellant proceedings are not recoverable under O.C.G.A. §9-15-14. Here, Mr. McGahee was justified in making a stubborn stance with regards to the discharge in bankruptcy defense and therefore the Trial Court erred in awarding attorney's fees pursuant to O.C.G.A. §9-15-14(b).

The Supreme Court did not remand the

case to review the attorney's fees under O.C.G.A. §19-6-2 which is the statutory authority for award of attorney's fees where a finding of contempt is authorized because the finding of contempt in the present case was unauthorized.

Contempt/Gross Income

Tate v. Tate,
S06F032, S06X0438 (May 17, 2006)

The parties were divorced in 1998 and the final divorce decree incorporated the settlement agreement negotiated by the parties while the husband was still enrolled in medical school. That decree stated that on completion of medical school, the husband would pay the wife child support for the couple's two children equaling 25 percent of the husband's gross income each month until the youngest child reaches the age of 21. The husband was also required to furnish the wife a copy of his W-2 form each year by April 1. After the husband concluded his medical education and residency, he married and established a surgical practice in Sparta, Tenn. The husband formed a Tennessee professional corporation and later assigned to the corporation all sums received by him for rendering medical services. The corporation paid a salary to the husband and his new wife annually and forwarded salary payments on W2, wage forms and tax statements. The husband calculated the child support obligation based upon the wages reflected on his W-2's rather than the gross income assigned to the corporation.

In 2002, the wife filed a contempt action alleging the husband willfully violated the terms of the divorce decree and the trial court agreed in finding that the parties intended for the term "gross income" to constitute 25 percent of the husband's gross earnings, less reasonable expenses and awarding the wife child support arrearage of $314,944.25 and finding the husband in willful contempt. The husband appealed and the wife cross appealed. The Supreme Court affirmed.

The Supreme Court uses the usual rules of contract construction when determining the meaning and effect of a divorce settlement agreement. Where a contractual term is ambiguous, the contract must be construed against the party undertaking the contractual obligation. The trial court found an ambiguous term "gross income" and construed settlement agreement against the husband, as obligor. The trial court properly found that the agreement was to be based upon the Georgia Child Support Guidelines and the gross income shall include 100 percent of the wage and salary income and other compensation for personal services reduced by allowable expenses. Therefore, the husband's gross income significantly exceeded his W-2 wages thereby creating child support deficiencies.

The trial court was also correct in that it would be beyond the wife's comprehension at the time of the agreement that the husband would use a subsequently created professional corporation as a conduit to reduce his gross income subject to the child support. That finding would create an unacceptable result in that the husband is the corporation's sole director and manager and could arbitrarily set his child support obligations irrespective his gross income received for personal services.

The husband also contends that the trial court used reverse corporate veil piercing as a theory of liability by utilizing the corporation's income to calculate his child support obligations. But in the instant case, that didn't happen. The trial court merely determined the husband's gross income under the settlement agreement which encapsulated all of his gross income.

The wife's cross appeal argues that the trial court should not allow particular business expenses claimed by the husband in calculating the gross income. However, the husband showed the legitimacy of the accepted expenses and wife produced no evidence demonstrating a contrary finding.

Contempt/Incarceration

Smith v. Smith,
S06A0631 (June 12, 2006)

The parties were divorced in 2000 with the mother awarded primary physical custody of the parties' minor children and the father was ordered to pay $900 per month in support. After the husband failed to meet his obligation, wife moved for contempt on Feb. 15, 2001. The father was

found in contempt and incarcerated and remained in jail until May 1, 2001. The parties reached an agreement pursuant to which the court entered an order declaring that Mr. Smith owed $13,500 in back child support and he was to extinguish that debt by paying $1,000 per month to the clerk of the court, with $900 being a monthly support obligation and $100 being applied toward arrears. The order also stated that if he failed to make a payment of $1,000 per month, "an affidavit shall issue to the effect and the court would then execute an order directing the sheriff to arrest and incarcerate Mr. Smith until the balance of the $13,500 arrears is paid."

Jan. 15, 2005, the clerk of the court averred that the father had not paid anything to the clerk's office under the release order and on Jan. 26, 2005, the court entered an order that Mr. Smith be incarcerated until the child support arrearage was paid in full. The father moved to set aside the order under O.C.G.A. §9-11-60(d) asserting that incarcerating him without serving notice or holding a hearing was a violation of due process and constitutes a non-amendable defect on the face of the record. On June 30, 2005, the court denied the motion. The Supreme Court reversed.

The Supreme Court has repeatedly held that, in Georgia, a trial court cannot order incarceration pursuant to a self-executing order regarding future acts without the benefit of a hearing. The wife argues that this order is not the sort of self-executing order prohibited by precedent and that the incarceration was not based upon her own affidavit, but that of a court officer based on objective information and therefore she did not have the keys to the jail in her own hands. The Supreme Court noted that there was no language in the order requiring a court officer to make the affidavit. It only states that "an affidavit shall issue to the effect." The record is devoid of any information as to what prompted the clerk of the court to issue an affidavit three and a half years after the entry of the release order and there was no motion made to the court for such affidavit or notice was given that affidavit was filed.

Even though the court found the father to be in contempt and ordered him to purge contempt by paying $1000 per month for the child support and arrears, the Supreme Court cannot ignore the wording of the order which specifically states that "the incarceration is to result if Mr. Smith fails to make a payment of $1,000 a month." Therefore, his ordered incarceration was a result of a self-executed order regarding future acts and could not be lawful without a hearing nor can the parties, by agreement, give the trial court power that it cannot exercise. Justice Hines writes a lengthy dissenting opinion.

Declaratory Judgment/ Cohabiation/Attorney's Fees

Waits v. Waits, S06A0445 (July 5, 2006)

The parties were divorced following a jury trial in 1999. The amended final judgment and decree of divorce upon the jury's verdict awarded title and possession of the marital residence to the wife and required the husband to make mortgage payments including taxes and insurance for the residence and provided that the mortgage payment obligation would terminate if the wife sold the residence, remarried, or cohabitated with a male not related by blood or marriage in the residence. The wife filed a contempt action under the divorce action in Chatham County Superior Court for failure to pay property taxes on the marital residence. The husband then filed suit in Evans County Superior Court seeking a declaratory judgment to determine whether the wife had cohabitated with her fiancé which would have terminated his obligation to pay the mortgage and taxes for the residence. Chatham County case was transferred and consolidated with the Evans County Superior Court case.

After a jury trial, the jury determined that the wife's actions had not constituted cohabitation with a male unrelated by blood or marriage and the wife requested attorney's fees in both the contempt action and the declaratory judgment action. After a hearing on the wife's request, the trial court rendered a judgment on the jury's decision and awarded attorney's fees to the wife in the amount of $25,271.53. The Appellate Court affirms.

In general, Georgia law does not provide

for an award of attorney's fees even to the prevailing party unless authorized by statute or by contract. In the instant case, the trial court order failed to cite any specific statute authorizing the award of attorney's fees. The trial court stated that the wife was the prevailing party in both actions and was entitled to an award of attorney's fees based upon either the contempt action or the underlying contract which gave rise to the declaratory judgment action. The husband claims that the lawsuit was merely a declaratory judgment for which attorney's fees are not authorized, as such, O.C.G.A. §9-4-9 (declaratory judgment) does not include an award of attorney's fees. Also, O.C.G.A. §13-6-11, governing expenses of litigation in contract actions, does not authorize an award of attorney's fees. The rights of the parties after a divorce is granted are based on the judgment and not the settlement agreement. Therefore, whatever claims the parties have are founded on the final decree and not the underlying agreement.

Here, the trial court's award of attorney's fees was authorized pursuant to O.C.G.A. §9-6-2(a)(1) which allows the trial court at any time during the pendency litigation to make such an award based upon consideration of the financial circumstances of both parties in actions for contempt of court arising out of a divorce and alimony case. The husband argues that there was no separate hearing on the contempt action and the contempt issues remain unresolved. The record before the appeals court was incomplete, but the trial court said the wife was the prevailing party in both actions. Therefore, the Appellate Court must assume that the trial court was correct and affirm. Even if the contempt action was still pending at the time of the trial court's decision, the award of attorney's fees are not precluded under O.C.G.A. §16-6-2(a) because it expressly authorizes the trial court to grant an award of attorney's fees at any time during the pendency of litigation and does not require entry of final judgment of contempt as a condition precedent to the award. It was appropriate for the trial court to consider the wife's expenses in defending the declaratory judgment action as part and parcel of the contempt action, and the parties presented arguments to the court regarding their financial circumstances.

Grandparent Visitation

Luke v. Luke, A06A0216 (July 5, 2006)

Mia Luke (mother) and Pete Luke's son (father) were divorced in 2002. The mother received sole legal custody of the three children who were born in 1998, 1999, and 2001. The father received visitation that included every other entire weekend. In 2004, the father enlisted in the U.S. Army for a term of three years and 23 weeks and relocated to Washington State. Pete Luke (grandfather) petitioned for court ordered visitation with the grandchildren. The grandfather based his petition on the fact that the children's health and welfare would be harmed without visitation and it would be in the children's best interests that they develop a strong familial bond with him and his family. At the hearing, the grandfather testified that before and after his son joined the Army, he had maintained a relationship with the three children and there had been informal arrangements which allowed him to visit with them every first, third, and fifth weekend of the month. The two older children would stay the entire weekend and the youngest child would visit on Sunday afternoons. During the visitation time with the grandfather, the children did several activities which allowed the children to have a close bond with their grandfather. On the other hand, the mother testified that at one time the youngest daughter said that Granny had popped her on the face when she tried to open a present. A case was opened with DFAC, investigated and closed. The mother also stated that sometimes the children would return home and be very emotional and questioned why

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Section Receives State Bar's Section of the Year Award

By Jonathan J. Tuggle
jtuggle@wmbnlaw.com

At the Annual State Bar Meeting in June, the hard work of our section members over the past year, under the leadership of Section Chair Steve Steele, culminated in the Family Law Section receiving the Section of the Year Award. Executive Committee member Tina Shadix Roddenbery, who was in attendance at the meeting, proudly accepted the award on behalf of the section from then Bar President Robert Ingram.

Tina Shadix Roddenbery accepts the Section of the Year Award from 2005-06 Bar President Robert Ingram.

In speaking with Robert Ingram, he indicated the following were but a few of the highlights leading to the Bar's decision:

1. The Family Law Section stepped forward to assist the State Bar in its effort over the past year to improve the Bar's relationship with the legislature and the governor's office by volunteering the talents of its lawyers with expertise in the family law area to provide advice, counsel and research to legislators regarding pending legislation. The Family Law Section Chair Steve Steele spent a considerable amount of time along with other family law experts in working with legislators on HB 221 and SB 382 over the last two legislative sessions. Family Law Section lawyers provided critical and important input and expertise to legislators as this legislation was molded into law. Ingram added that as State Bar president he heard from many legislators who complemented the Family Law Section on their tireless work in helping with this process.

2. The Family Law Section, under Steele's leadership, raised more than $40,000 from private resources to assist in the production of the Family Law Institute, which included inviting numerous superior court and appellate judges and justices to attend and participate in the Institute's continuing legal education seminar and social event. He noted that this year's Institute was well attended with excellent topics being included in the seminar.

3. The Family Law Section supported the creation of the Family Law Committee of the Bar's Young Lawyers Division, and took great steps toward helping train future leaders by including the chair of the YLD Family Law Committee as a standing member of the Family Law Section's executive committee.

4. The Family Law Section produced several outstanding newsletters which were sent to all section members, as well as state, superior and appellate court judges.

This award marks the third time in 11 years that we have received the highest section honor. The Family Law Section also won Section of the Year at the 1996 Annual Meeting (1995-96 Bar year, Nancy F. Lawler, chair); and the 2002 Annual Meeting (2001-02 Bar year, Elizabeth G. Lindsey, chair).

Congratulations to Steve Steele and all section members on this tremendous honor! **FLR**

Family Law Institute a Success

By Paul Johnson
pauljohnson@mpjattorneys.com

For most Georgia family lawyers, Memorial Day weekend has become synonymous with the Family Law Institute. Every year, family lawyers from all over the state convene at the beach to learn and mingle. This year's Institute added a new twist to this long-standing tradition in the form of a joint session with the Georgia Psychological Association.

The joint session was the brainchild of Shiel Edlin, chair-elect. Shiel says he got the idea for the Institute while attending an American Bar Association conference 15 years ago. He remembers that session, which also included family lawyers and mental health professionals, as the best conference that he had ever attended. Shiel formed a "Blue Ribbon Committee" of approximately 20 lawyers and psychologists to plan the 2006 Institute. With the help of Nancy McGarrah, Ph.D., the committee met approximately a dozen times to bring together these two groups. As a matter of fact, the American Bar Association's Family Law Section is going to do it again on a nationwide scale in Memphis in Spring 2007. For more information on that, you can contact the ABA or Randy Kessler.

After two years of planning, the Institute was an unparalleled success. Steve Harper at the Institute for Continuing Legal Education reports that approximately 350 lawyers, 35 speakers and a dozen invited judges and justices attended the event in Destin, Fla. Joining the legal community were approximately 150 psychologists from all over the state.

The program included joint lecture sessions on Thursday and Friday, with attorneys and psychologists speaking on a variety of topics, most of which focused on the intersections of the two professions. The program's keynote speaker was Dr. Joan B. Kelly of California, who spoke about issues surrounding alienated children and the difficulties in relocation situations. Some of the other high-points of joint session portion of the program included a look at marriage and divorce in the cinema compiled by Jonathan Levine and Dr. Robert Simmerman and a mock trial of a custody case. On Saturday, the attorneys broke out into their own session, in which Tina Roddenbery and Carol Walker reviewed Georgia's new child support guidelines, Bob Boyd spoke on avoiding ethical dilemmas and John Mayhoue covered national trend and Georgia developments in matrimonial law.

As always, the Institute was not all work. Several cocktail parties provided ample opportunities for attorneys and psychologists to mix and mingle. In addition, golf and tennis tournaments gave everyone a chance to enjoy Destin's beautiful weather. It was a wonderful weekend. Those of you who could not make it will hopefully be able to join us next year when the Institute will be held in Amelia Island, Fla. **FLR**

Richard Nolen, Jonathan Tuggle, Kirby Turnage, Andy Pachman and Joy Turnage enjoy the cocktail reception.

Tina Roddenbery and Carol Walker explain the new child support guidelines.

Shiel Edlin welcomes everyone to the Institute.

Q&A: Judge Jeffrey S. Bagley

Chief Judge, Superior Court, Bell-Forsyth Circuit

Conducted by Jonathan J. Tuggle, Esq.
jtuggle@wmbnlaw.com

Q: Now you were born and raised here in Forsyth County?

A: Well technically, us lawyers like to say "technically," I was born at Georgia Baptist Hospital in Atlanta and was promptly brought home to Forsyth County by my parents. So, yeah, for all purposes, raised here in Forsyth County.

Q: How long has your family been here in Forsyth?

A: The Bagley family, my ancestors, arrived and settled here in 1820. I am a sixth generation Forsyth Countian.

Q: I imagine you've seen some changes in Forsyth County over your lifetime?

A: Great, great changes. When I was growing up here, it was a rural farming community. Atlanta seemed far away. Before the advent of Georgia 400, I can remember we went to Atlanta on old Route 19 through Alpharetta, Roswell, Sandy Springs, and it was quite a journey.

Q: You did your undergrad at Georgia Tech and law school at Emory?

A: Yes.

Q: So you never strayed too far from home?

A: I graduated in '79 from Forsyth County High School. I really thought I wanted to be an engineer. I went to Tech, got a Civil Engineering degree, and started working for the Department of Transportation. Found out that was not what I wanted to do for the rest of my life. So that next spring I took the LSAT and, and also at the same time took the EIT, which is the Engineering Training Exam and decided that whichever one that I did the best on that Providence would take over and whatever was meant to be would be. In the fall of '84, I started at Emory Law School.

Q: First lawyer in the family?

A: First lawyer in the immediate family. My mother's first cousin, Leon Boling, founded the Boling Rice Firm in town. I went to work for that firm, which I considered the premier, and certainly the oldest firm, in Cumming.

Q: From your beginnings at that firm tell me how you came to sit where you are now, Chief Judge?

A: It's been a journey. I'll tell ya, I'm a firm believer, and I'm a person of strong faith. I believe that things happen for a reason along the way, and we can look back on our life and see how the path goes and know that we're not always in control of everything that happens to us. I started out working for the firm. Even as late as the late '80s, Cumming was still a small town and you pretty much had a general practice. I did criminal, I did civil. I did divorces. I did it all. I got most of my trial experience with criminal appointed cases. Also had a number of civil cases that

would have to be tried. I gravitated toward litigation, and that's what I focused on. And then we had a tragedy occur in '91. Mr. Larry Boling, the litigator partner, died suddenly of a heart attack. He was only 40 years old. So I was thrust into the position of taking all over all of his civil cases. I basically wrote a letter to all the judges in the circuit, at that time it was Cherokee and Forsyth, saying that because of the case load that I'm having to take on, I couldn't do the criminal anymore. From that point on I focused on civil. Did some domestic, but I had a custody case in '92 that was just a bad experience for me. And I vowed never to take another custody case again. It just wasn't for me. I continued to do some divorces, some domestic. However, they were only financially-related divorce cases. I didn't want to touch the cases involving custody of children. I don't know if I didn't have the stomach for it, or, you know, I don't know what. From that point on, I became involved in quite a bit of construction litigation, and I did a lot of condemnation/eminent domain and zoning work. I also did some plaintiff's work. That's a broad brush of where I evolved until '96 when the State Court of Forsyth County was created and I was urged by members of the Bar to go for it.

Q: Why do you think that is?

A: Well, I think they had a lot of respect for me and wanted somebody on the bench they had respect for. I sort of had the nickname of the 'gentleman lawyer' around here. I guess that's kind of a complement.

Q: I think it is.

A: After much soul searching, I felt like it was almost time for me to do something and I didn't know what. I committed to prayer and felt like that this was something that was meant to be. And, I took a leap of faith, I'll be honest with you, because State Court up here at that time was really more of a traffic court. Most of the civil cases were filed in Superior Court at that time. Looking back on it, I did the right thing, I know now. It was very tough, New Year's Eve 1996. I was to be sworn in on Jan, 2, 1997 by Gov. Miller to be the first State Court judge here in the county. I would leave a very, very good practice and take a huge paycut, but, we know we're not going to make what we could in private practice. And, it is a sacrifice, it's public service, we know that going into it. Anyway, I got into State Court, worked on streamlining procedures there, and getting a good working court, and, the lawyers started filing more civil cases. We got the traffic court smoothed out, and got some procedures in place, got a traffic violations bureau in place, and I, of course I learned a lot about DUI law, because that was the lion's share of what I did in State Court.

Q: Have you also served as a juvenile court judge?

A: Yes, I also did juvenile court when I went on State Court, because at that time, the stipulation was if you're going to have a State Court, you've got to do juvenile as well.

Q: So you didn't necessarily have a choice in that?

A: No, the Superior Court judges said, "you're going to be the juvenile court judge in Forsyth County." So I did juvenile, and that was an experience. I mean, that was tough dealing with kids and, the troubles they were in, the child abuse and neglect cases, those were very difficult to deal with. I was real, real busy, you could imagine with both courts. In the middle of '99, we were able to get a grant to get a separate juvenile court judge, so I was able to shed that juvenile court responsibility, so then I just had the State Court. Things are happening pretty quickly, as you can imagine with a county growing so rapidly.

Q: You were eventually appointed to Superior Court?

A: Yes. Of course, up until July 1998, Cherokee and Forsyth Counties were together in the same circuit, the Blue Ridge Circuit. There were three judges in the circuit. Mills, Roach and Gault. Judge Gault was instrumental in splitting the circuit. So, Forsyth became it's own circuit, the Bell-Forsyth Circuit. Cherokee retained the title of the Blue Ridge Circuit. Judge Frank Mills is the Chief Judge over there. Judge

Stan Gault became the Chief Judge here. He was the only Superior Court judge. By 2000, he was able to get approved the second Superior Court judgeship. So, I went for that, and was appointed by Gov. Barnes. I was sworn in Aug. 25, 2000. So, I became Superior Court judge, started doing divorces then. And started refamiliarizing myself with family law after several years of not being in it. Then in 2003, another tragedy. July, 23 2003 Stan Gault died suddenly of a heart attack at the age of 62. And that catapulted me into the chief position, Superior Court. I was the ripe old age of 42. So, I was the youngest Chief Judge in the State of Georgia. Still am, I think. Anyway, tragic circumstances, you know, here I am, sitting as the Chief Judge.

Q: And I understand you will be re-elected again?

A: Yes, I will be elected without opposition again this year. I've never had opposition. So, I'm very thankful for that. Not to have to put the signs out and, do the campaign, and raise money. I'd hate to have to raise money.

Q: Well, as a Georgia graduate, I can't help but be distracted by all the Tech paraphernalia in your office. I guess you're a big fan of the Jackets?

A: Oh, yeah, yeah. I spent four years down there, and it's hard not to follow them.

Q: Are y'all ready for the Irish?

A: I hope they are. They'd better be. Or they'll get slaughtered.

Q: What is the hardest part about being a Superior Court Judge?

A: Hardest part I think is sentencing. That's very difficult, deciding on the sentence. And, I think probably the next hardest part is deciding child custody cases.

Q: What percent of the cases that you see, would you say are domestic relations cases?

A: Without finding the exact numbers, I would say 70 percent of what is actually tried are going to be your domestic relations cases. I'm talking about non-jury and jury cases.

Q: Do you see a lot of divorce jury trials?

A: We have seen a number of them. Not lately, though. Haven't seen a lot of civil jury trials at all lately, for some reason. Since I've been on the Superior Court bench, I've probably had, on the average, maybe one divorce jury trial per year, something along those lines.

Q: Has the economic demographic around here changed with the increase in population?

A: Definitely. I mean, we're looking at a very affluent population. People who've been here have benefited from the land values that have gone through the roof, so they're financially benefiting tremendously from that, as well as the people who have moved into the highend subdivisions. We're talking about some very, very nice developments and some folks who have very high incomes. Of course, I see that when I look at their budgets in domestic relations cases. We're talking about six-digit incomes.

Q: Have you noticed any trends of late in the family law cases you see?

A: Well, we have seen a lot of abuses of the Family Violence Act. The Family Violence Act is very broad. Even if technically there has been an act of family violence, it can be used by the offended spouse to gain the upper hand in the divorce proceedings. It can be a fine line. Is this a manipulation? Or is this really a victim of family violence who needs assistance? We try to weed those out in the 10-day hearing. If it's an abuse of the process and there really wasn't an act of family violence, the case is going to be dismissed.

Q: We hear a lot about how society and our morality is changing, and that conduct doesn't matter. In your court room in divorce cases, does conduct matter?

A: Yes. Absolutely. When it comes to custody, a person who's committed adultery; it may very well still be in the best interest of the child for that person to have

primary physical custody. Maybe, depending upon the facts of the case. Now, if that person who committed adultery has used bad judgment to the extent that it affects that parent's ability to parent the child, then it may be that custody would go to the other parent. You've got to look deeper and find out what's in the best interest of the child. Now with regard to the financial circumstances, certainly. I know there are a lot of causes to the breakup of a marriage, but, sometimes you can actually pinpoint a primary cause, and if it's adultery, for example, then, yes, there may be some consequences on alimony and the equitable distribution of property. Even other fault grounds such as drugs and alcohol, those kinds of things, can affect an award of alimony and equitable division of property. Yes, absolutely.

Q: Do you have any advice for family lawyers appearing in your courtroom?

A: Just stick to the relevant issues. I know it's hard for family lawyers, because the stakes are so high. When you're talking about custody of children, the stakes are really high in a family law case. And I know that the lawyers want to put it all out there, they want to make sure they don't leave any stone unturned. Well, I understand that. On the other hand, I only have so many hours in the day. Time is what is so critical. As you know, I ask for estimates of time, and on our marathon civil non-jury days on Thursday we can only allot so much time for a case, then we have to stop it and have them come back. I hate to do that because it breaks my train of thought, my stream of consciousness as far as what's going on. I like to be able to hear a case and make a ruling. You'll never see me, I won't say never, but if you do, it'd be a special situation for me, in a domestic relations case to take a case under advisement. Why would you ever do that? At the end of the case you're never going to know the facts any better than you know them right then. I might take a few minutes to go back and collect my thoughts and run some numbers and what-not, but I'm going to make a ruling if at all possible at the end of the case. If it's going to take five hours, tell me it's going to take five hours, and we'll get it done, we'll work through it. But nothing stresses me out more than when a lawyer says, "Oh, it's going to take an hour and a half, Judge" and you know it's going to take four or five hours to do it and then here we are an hour and a half later and we haven't even gotten to the first witness, and we've got 50 other cases waiting here. So then they have to sit down, or come back next week or next month and we'll finish it up. That's a waste of time.

Q: I think you have a reputation of being a judge who will let a lawyer try his or her case, and I've seen you afford *pro se* litigants a thorough opportunity to present their case. But I've also been here with you at 10:30 at night finishing a divorce trial. With the explosive change in your case load, do you find it harder to afford that time to everyone? How are you making that work?

A: You know, it's getting more difficult. I'm a firm believer in giving somebody their day in court, because at the end of the day, a decision's going to have to be made, and not everybody's going to be happy with it. But, even if they're not happy, I'm a firm believer that if they believe that they've had their opportunity to have their say, they can't come out of the courthouse saying, "Well, justice didn't work," or "You know, I wasn't given a chance to tell my side of the story, the judge cut me off." I never want people to say that. I want them to say, "Okay, I didn't like what happened, but at least the judge heard me and I understand what the ruling is, because he

explained it…he explained why he did what he did. I don't agree with it, but at least he explained it." But time is critical because drug court is now cutting into my time, too.

Q: Is delegation an option?

A: Not as far as Judge Dickinson and I are concerned. I'm not criticizing other circuits, but, other circuits use Magistrates for a lot of their family violence cases and even temporary hearings. That's well and good if that's what they want to do. I'll probably eat my words one day, but the General Assembly deemed it to be the job of the Superior Court judge to try the family violence cases, to try the divorce cases, and to get into them. And as long as I can do that, you're going to see an elected Superior Court judge in the courtroom in Forsyth County. Lawyers expect to see us on the bench in a Superior Court case and we're going to try to do it as much as we can, as long as we can. Now, I know at some point we will have to get some help before we get a third Superior Court judge.

Q: Are there plans to add a third Superior Court Judge?

A: Well, I would say we're maybe three, four years out from a third Superior Court Judge. I've been told by my district court administrator that we need to at least start getting a study. It takes several years once you start. You've got to start with a study first before the judicial counsel will approve or will recommend an additional seat to the General Assembly. The only saving grace for us in this circuit that keeps us from just working 'til midnight everyday is the low felony case count. We have one of the lowest felony case counts per judge in the state. I believe the reason for that is the demographics of our area. That's the only way Judge Dickinson and I are able to keep our heads above water is the low felony case count.

Q: How many votes shy are you from having a new courthouse?

A: Ah, I wish I knew. The county commissioners historically have, on their sales tax referendums or SPLOST, said we want to accommodate roads and parks and never include the courthouse. I don't see them doing that. They've always wanted to put us on a referendum where your property taxes go up. So three times it's been voted down, while our neighboring counties, Cherokee, Hall, all of them have used the sales tax SPLOST to build new facilities. Until we get some leadership across the street that says we're going to bite the bullet and put the courthouse on SPLOST I don't know that we're going to get a new courthouse, and I think we'll be here bulging at the seams in these cramped quarters.

Q: You mentioned drug court, I understand that is a pet project of yours?

A: Well, it is. And we have, as you know, a methamphetamine epidemic. This spills over into family law. We see that drug pervading in all aspects of society, and this is not just a low-income drug. This goes into every area of society. The drug court is a great tool, great program to mix judicial accountability with the treatment aspect. These folks come to see me and are accountable to me every week. And it actually works. They've got that felony charge hanging over their head, that if they mess up, they're going to be sentenced to some type of incarceration most likely. And it helps to affect that change. It gives them a, "Well, I've got to do this" in the beginning, to six months later, "Well, you know, life is pretty good being sober, you know, I kind of like this being sober thing." And then they begin to further change and it's a great thing to see that change occur in that person and they get their family back, they get their job back, they get employed, and they get their life back, basically. Drug court really works. It's time consuming, but it's worth it. I'm willing to work a little late to work drug court in and to work around drug court.

Q: Pet peeves, do you have any on the bench?

A: Yeah, I do. Lawyers need to stand when they address the court. I don't know if other courts require that.

Q: Has that really been a problem?

A: Sometimes. I'll have to say, "Stand when you address the court." I kind of

feel like the judge on *My Cousin Vinny*. That's one pet peeve. The other pet peeve is lawyers talking over one another. I know they're anxious to get their say out, but I have to say, "You're going to have your chance. Let him speak first and then you speak." That's another pet peeve is lawyers talking over one another.

Q: Last year you swore in 56 members of the Georgia Senate on the first day of the session. Do you actively follow legislation that's out there?

A: Yes, I'm on the legislative committee of the Council of Superior Court Judges and yes, I do. I have a good working relationship with several senators and representatives. Of, course Jack Murphy and Tom Knox. Tom Knox is a lawyer up here by the way. As you probably know, there's very few lawyers in the General Assembly.

Q: I've had that conversation with Tom and he sees that as a real problem.

A: We need more lawyers who will make that sacrifice for public service. Ed Lindsey is one who you may know. His wife, Elizabeth Green Lindsey, I'm sure you know. Yeah, we do need more lawyers in the General Assembly. But I do follow legislation. I tell my legislators to call me if I can help with something and I'll try to do that and let them know what the ramifications may be in court with what they're doing down there. And I'm real grateful to Sen. Stevens, who is running for secretary of state, for that opportunity to swear in the first, I think it was the first, Republican Senate in the state.

Q: Are you ready for the new child support guidelines?

A: Um, no. We judges have had some education last week during the summer judicial conference. I will be. I'm glad I have my able staff attorney Chad Feldman to help me with the calculations. I'll get there. I'll be ready for it, it's just going to take a lot more time. We don't have enough time as it is now. I don't know how we're going to do it. I'm going to have a lot of help from my staff attorney to try to move the cases.

Q: Did you find most of the judges receptive to the new guidelines? Are they excited?

A: I don't know if 'excited' is the word. I'm not going to say all, but I think the majority of us probably see the need for them. I think everybody probably thinks that it's going to be a more fair way of addressing child support than the way we have been doing it under the old guidelines. And probably with the trend nationwide, Georgia needed to be there. I think we all acknowledge that, but I think we all are saying, "Where's the time going to come from to do this? Because it's going to take more time." A little 'apprehensive' may be the better word to use.

Q: Speaking of legislation, there's been a buzz about revisiting the 14-year-old's right to make an election.

A: Yes.

Q: Do you have a particular position or opinion about the right of a 14-year-old to make that decision?

A: Well, I have mixed feelings about that, because I've done a lot of custody cases in the last five, six years, and I've seen children that I don't believe know what they're doing when they choose a parent at 14. I don't believe they can objectively know what the right thing is for themselves. On the other hand, when a child gets to be the age of 14, you just can't make them do anything unless you threaten them with some kind of severe sanction. We all know the trouble with requiring teenagers to visit with the other parent. As I've said, you can't really hogtie them and throw them in the back seat. A teenager begins to have a mind of their own and they're going to do what they're going to do regardless. So, I guess that's a General Assembly responsibility that I gladly defer to the General Assembly, because in different cases, it can go both ways.

Q: I understand you like to take your family on educational vacations.

A: Yes, I do. My daughter will be 17 this month, my son will be 14. I grew up a very simple life working on the farm, I

worked hard as a child, growing up as a teenager. We had poultry, we had cattle here in rural Forsyth County. So, I never went anywhere. My parents were not worldly to take me to difference places. And neither my parents nor my wife's parents were college graduates. So we like to see sights we've read and heard about. And we are seeing these things for the first time, too. We've been to California, Yosemite National Park. We've been to Mount Rushmore. We've been to the Grand Canyon. We recently went to Plymouth Rock. And we've been to New York to see the Empire State Building and the Statue of Liberty. We've been a lot of places and we've enjoyed doing that.

Q: Last May, you visited the White House and interviewed for the open seat on the Northern District Court of Georgia. Describe that experience.

A: Oh, awesome. I obviously have Federal Court aspirations. I interviewed for the position, didn't think I would get anywhere. I mean, just this country boy from Forsyth County, I'm not going to get anywhere, but a few weeks after the interview, I'm just going about my business, not thinking anything, and my secretary brings a note in saying the White House is calling. Of course, I thought, this can't be, I can't…this can't be happening to little me, and, sure enough the White House had called and said that I was on the short list for the Federal Court nomination and they wanted me up there, like now. And I said, OK, how about Friday? It was Monday. So my wife and I go up Friday, and I can't tell you how nervous I was. Not really knowing what to expect. I was nervous as a cat and got in there and I thought I did okay with the interview and tried to be myself. Of course, the deputy White House counsel was the one doing the interview. There was also someone from the Justice Department in there and another person. Pretty tough questions, I mean they were pretty probing questions about "why do you want to be a federal judge?" Then, of course, after the substantive part of the interview, he excused the other two and then he started the rapid fire. "You ever smoke marijuana? You ever had an adulterous affair?" He didn't want any surprises. I answered all those questions and, of course I beat myself up after the interview. You know, what I should have said but I didn't say. You know how you do those things. Five weeks to the day after the interview, I got the call from the White House saying that I had not been selected, somebody else had been. Didn't know who, but I was told I was not selected. I've learned a lot since that process. After you get on the short list, it's pure politics. I was very naïve in that process. Shouldn't have been because I've been through the state process before, but I just didn't know how the federal process worked at that level, needed more political muscle. We'll see what happens next time, if there is a next time.

Q: Is it true you've raised your own bees for honey?

A: I have done that, yes. I don't anymore. If you know anything about bees you know there's this bug that's destroyed a lot of the bee hives in the area and mine fell prey to that. So I haven't restarted that effort.

Q: Any other little known fact about Judge Jeff Bagley off the bench?

A: I'm an avid gardener. As I told you, I grew up on a farm. We have a large garden. I have an orchard and a vineyard, small, you know, but I do enjoy growing things. That's pretty much well known in the local circles, but probably not well known to outside lawyers. That's my golf game. My pastime is being out in the garden, doing the gardening type thing. I love to do that. It's my therapy. **FLR**

Premiere Supreme Cork Event: A Grape Success

By Jonathan J. Tuggle, Esq.
jtuggle@wmbnlaw.com
www.wmbnlaw.com

On July 27, the State Bar's YLD Family Law Committee hosted its first annual Supreme Cork wine-tasting and silent auction event at Vinocity Wine Bar in Midtown Atlanta. The event was a smashing success raising $14,219 for The Bridge, a non-profit organization which is dedicated to helping Georgia adolescents and families who have been severely abused achieve independence by offering an on-campus school that emphasizes vocational readiness, solution oriented therapy, family counseling and community based activities.

Delighted with the success of the event and the tremendous exposure it brought to the youth and families it supports, the Bridge confirmed The Supreme Cork was their most successful wine tasting or supper club type of event ever!

The success of this first-time event is largely attributable to the generous support of the 30 sponsors who are recognized in the fall issue of *The YLD Review*. Likewise, without the support and hard work of the Committee members this event would not have been possible. I would like to extend special thanks to our event chairs: Katie Connell, Becca Crumrine, Leigh Cummings, Pia Koslow, Alyson Lembeck, Whitney Mauk and Pilar Prinz.

While thanking everyone for their support of The Supreme Cork, I would also like to extend my sincere thanks to all Section members who have embraced and supported the YLD Family Law Committee since its beginning, particularly the members of the Executive Committee. I am honored to have served as the founding chair of the YLD Family Law Committee, and it has been an absolute thrill to watch what started as an idea develop over the past few years into a strong and organized committee benefiting those in need.

Family Law Committee members at the Supreme Cork event on July 27.

With that, this will be my final column as chair of the committee, as the reigns have been passed into the very capable hands of Chair-elect Pilar Prinz. Thank you all again for your support. **FLR**

If you would like to contribute to *The Family Law Review*, please contact the editor, Randall M. Kessler at 404-688-8810 or rkessler@kssfamilylaw.com.

Confessions of a *Guardian ad Litem*

By M. Debra Gold
mdgoldlaw@aol.com

People ask me all of the time how I handle being a *guardian ad litem*. They think that it is too heartbreaking to witness children being ripped apart by divorce. Some even suggest that I must be nuts to subject myself to this type of work. And sometimes I can't help but wonder if they are right. But after practicing domestic relations law for umpteen years, the one thing that I know is that my work as a *guardian ad litem* has been the work that is nearest and dearest to my heart. It is something I want to continue to do no matter what turns my career may take. So here I am… working as a *guardian ad litem*. And they say I'm nuts. Sometimes, I agree. But usually I don't, because work performed by a *guardian ad litem* is special and rewarding.

To start with, I'm going to use the acronym GAL for *guardian ad litem* as it's much easier. Sorry to all of you guy GALs. Please don't take it personally— the term includes you too!

So why be a GAL? Well, a GAL always represents the "good guy." Representing the best interests of the children is much easier than representing either mom or dad. The GAL makes recommendations that he or she believes in and knows, deep down in his or her heart, are best for the children. The GAL doesn't have to take stands they do not like simply because they represent mom or dad. The GAL gets to go home at night and sleep peacefully with a clear conscience, knowing that he or she looks out only for the best interests of the children. As difficult as the job can sometimes get, the GAL can always sit back and know that he or she is doing the right thing. This can make a difficult job easy.

I recently read that "only" 15 to 20 percent of divorcing parents have "a very high level conflict" divorce. *Only* 15 to 20 percent?!! And what about those that are not "very" but are merely "high" or "medium" level conflict divorces? The bottom line is that most divorcing parents have some level of conflict, or they wouldn't be getting divorced in the first place. In 2005, there were 149,886 domestic relations actions filed in the Superior Courts of Georgia. This includes divorces, modifications, contempt actions, legitimation and paternity actions, domestic violence actions and other cases that fall within the domestic relations arena. Now, granted, not all of those cases involved children, but surely a significant amount did. Assuming only 50 percent of those cases had any level of conflict (which we all know that number is greater), it is no wonder that there is enough work to keep every domestic relations attorney in this state busy! Somebody needs to do something about it. GALs are doing their part by looking out for the best interests of those children who are caught up in all of this mess.

In Fulton County alone, the Atlanta Volunteer Lawyers Foundation placed 117 volunteer GALs in 2005. That does not include the GALs in Fulton County who were appointed to cases without the assistance of the Atlanta Volunteer Lawyers Foundation. Nor does that number include the GALs in the other 158 counties in Georgia whose courts are regularly appointing them in custody disputes. GALs are increasingly becoming an important asset to the courts of this state and their numbers are growing.

The impact GALs have on the system and on the children who are caught up in the system is great. A GAL can help to apply an objective common sense to a situation where the parties and/or their counsel are too wrapped up in it all to find the best resolution for the children. Even the best parents sometimes lose sight of the forest for the trees when they are in the middle of a custody battle. The GAL can help provide non-emotional logic, which may give the parties and/or counsel the ability to step back and take an unbiased, fresh look at the situation so that the children can be provided with the best of all worlds. And, if all else fails, the GAL is there to assist the court in getting to the bottom of the matter so that the court will have as much information as possible to

make the ultimate decision as to what is in the best interests of the children.

In 2005, the Uniform Superior Court Rules adopted Rule 24.9 with regard to the appointment, qualification and role of GALs. The rules provide that a GAL is appointed "to represent the best interests of the child." The rules provide that the GAL is an officer of the court and "shall assist the court and the parties in reaching a decision regarding child custody, visitation and child-related issues." What could be a nobler job than one in which the children are the number one concern?

Does this answer everyone's question about how a GAL handles the job? It's the reward of knowing that one is doing the right thing; the knowledge that one is helping innocents in the greatest upset of their young lives; the honor of assisting the courts in making difficult and important decisions regarding children. But most of all, it's the smiles on all of those children's faces. **FLR**

M. Debra "Debbie" Gold is a family law attorney in Atlanta focusing her practice on her work as a guardian ad litem.

2006 Jack P. Turner Award Given To Judge Wright

By Christopher D. Olmstead
colmstead@mclain-merritt.com

The Family Law Section presented the 2006 Jack P. Turner Award to the Hon. Cynthia D. Wright of the Superior Court of Fulton County for her contributions to the advancement of family law practice and for her demonstrated professionalism as a member of the bench. Judge Wright received the award at the annual Family Law Institute held in May in Destin, Fla. The Award was established as a tribute to Jack P. Turner, the godfather of Georgia matrimonial law.

Judge Wright has enjoyed a varied and distinguished legal and judicial career. Among other things, she served as chief legal counsel to Gov. Zell Miller and prior to that was assistant legal counsel to Gov. George Busby. She was appointed as a judge of the Superior Court of Fulton County by Gov. Miller in 1996 and has since been elected twice without opposition. Before assuming her current judgship, she served on the State Court of Fulton County. Judge Wright graduated *magna cum laude* from Wesleyan College in Macon and received her J.D. from the University of Georgia. She was recently named as one of the top 500 judges in the United States.

In years past, the Jack P. Turner Award has been presented to practitioners of family law who have distinguished themselves as domestic relations lawyers and who have been recognized by their peers as having demonstrated the highest degree of professionalism.

Judge Wright is the first sitting judge to receive the award because of her achievements as a member of the bench. She is universally admired. When asked to describe Judge Wright, the following qualities come to mind: she has unflinching integrity; she treats all attorneys, parties and witnesses with absolute respect, uncommon courtesy and total impartiality; she is a no-nonsense Judge; she unabashedly loves her job; she knows the law and applies it fairly. Perhaps most importantly to all of us, you just know that regardless of the ultimate outcome of a hearing or trial, your client will be given his or her day in court by Judge Wright. At the end of the day, that is all you can really promise to a client or expect from a judge.

It was my great honor and privilege to present the Jack P. Turner Award to our friend and colleague, Judge Cynthia D. Wright. **FLR**

Case Law Update

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she and their father had divorced. The mother also believes the children were being shuffled around too much and that the grandparents seldom took the children to church on Sundays.

The trial court granted the grandfather's visitation with his grandchildren with scheduled visitation for the older two children for the entire second and fourth weekends of each month and for the youngest child from 9 a.m. to 5 p.m. on Saturdays of those weeks until she reached age 5. At that point, she would visit with her grandfather along with the other siblings. The visitation order would continue until the children's father was discharged from the Army, lives within 100 miles of the mother or resumes his visitation. At that point, the grandfather's visitation consists only of the second weekend from 6 p.m. on Friday until 6 p.m. on Sunday. The Court of Appeals affirmed.

Grandparent visitation statute provides that the court may grant any grandparent of a child reasonable visitation rights if the court finds the health or welfare of the child would be harmed unless such visitation is granted and if the best interests of the child would be served by such visitation. This must be established by a clear and convincing standard of proof. The visitation award in this case was based on the trial court's finding that a strong and emotional bond between the grandfather and the said minor children was so well established that the emotional welfare and well-being of the children would actually suffer unless visitation with the grandfather was granted. The order also stated that it applied a clear and convincing evidentiary standard.

Income Tax Dependency/Supersedas

Frazier v. Frazier,
S06F0211 (June 26, 2006)

The parties were divorced after a three-day bench trial and the trial court awarded joint legal and physical custody of the three minor children with the husband having the authority in the event of a disagreement to decide issues relating to education and extracurricular activities and the wife having authority to decide the issues relating to health and religion. The trial court awarded child support to the wife and allocated the income tax dependency exemption for one child to the husband and for the second child to the wife and for the third child to each parent in alternating years and divided the couple's marital property. The wife filed a motion for new trial and a motion to set aside and husband filed a motion for *supersedeas* bond which the court granted requiring payment of some money into the registry of the court and accepting from the *supersedeas*, the custody provisions of the divorce decree. The trial court denied the wife's Motion for new trial. The Supreme Court affirmed.

The wife contends the trial court erred in giving any part of the exemption to the husband. The Supreme Court has held that Georgia courts should not have the authority to award the Federal Income Tax Dependency Exemption to a noncustodial parent. The wife argues that I.R.C. Section 152 (4)(a) provides the term "custodial parent" as the parent having custody for the greater portion of a calendar year." The trial court's calculation revealed that each parent spent essentially equal time with the children and therefore, neither parent can be said to have custody for a greater portion of the calendar year.

The wife additionally argues that permitting the husband to have any part of the exemption will cause the child support award by the trial court to fall below the child support guidelines. In the instant case, allowing the husband to claim the exemption will not affect his gross income, which is the basis for the child support calculation under the statutory guidelines. The trial court has done nothing to cause a reduction in the amount of child support.

The wife also argues that making the husband the decision maker on two issues is not in the best interest of the children because the parties do not communicate well. The trial court's ability to designate decision making authorities provided in O.C.G.A. §19-9-6(2) which states "joint legal custody" means both parents having full rights and responsibilities for major decisions concerning the children, includ-

ing the children's education and health, care and religious training, provided, however, the court may designate one parent to have sole power to make certain decisions while both parents retain equal rights and responsibilities for other decisions. Therefore, the trial court has wide discretion in empowering one parent to make certain decisions while the other parent making others and will not be disturbed unless evidence shows a clear abuse of discretion. Because the evidence in the case showed an ongoing disagreement between the parents on issues of education and extracurricular activities, the trial court's designation was not abuse of discretion.

The wife also argues that the trial court was not authorized to except the custody provisions of the decree from the automatic supersedeas provided by O.C.G.A. §9-11-62(b) which states "the filing of a Motion for a new trial or motion for a judgment notwithstanding the verdict shall act as a *supersedeas* unless otherwise ordered by the court, but the court may condition supersedeas upon giving of a bond with good security in such amounts as the court may order." The phrase "unless otherwise ordered by the court" plainly gives the trial court authority to deny *supersedeas* entirely and the power to condition *supersedeas* upon the giving of a bond as further indication of authority of the trial court to control the automatic *supersedeas*. In other words, there is no all or nothing application. Therefore, a party wishing to avoid *supersedeas* with regard to custody provisions of a divorce decree may ask the trial court to include in its final order, a special provision that custody award is effective as of the date of judgment to protect the interest and welfare of the child would affectively modify the automatic supersedeas as it regards to custody. Therefore, there was no error in the trial court's ruling excepting custody provisions of the final decree from the *supersedeas* bond.

Jury Trial

Walker v. Walker, S06F0577 (June 26, 2006)

On reconsideration, the May 17, 2006, opinion in the above case was vacated and a new opinion reversing the holding was issued.

Jan. 13, 2005, the wife filed a complaint for divorce seeking termination of their five-year marriage. The husband, acting *pro se*, filed an answer and counterclaim and on March 4, 2005, filed a timely written request for a jury trial. The case was noticed for jury trial scheduled for 9 a.m. on April 18 and both parties received notice. When the case was called for trial, the wife and wife's counsel were present, but the husband was not. Wife's counsel advised the court that the parties had been in settlement negotiations the day before, reaching a verbal agreement to certain issues, but there was still remaining issues to be resolved and they had agreed to mediate the case. Counsel for wife further advised the court that the parties agreed to meet at 8:30 that morning to review the proposed consent order, but the husband did not appear. The court called the calendar at 9 a.m. and allowed 30 minutes for the husband to arrive and by 9:30 a.m., the husband had not appeared and the court conducted a bench trial and heard evidence from the wife and made a final ruling. The husband appeared at 9:45 a.m. and was told the case was already called and completed. The court issued a final judgment and divided the couple's assets and debts. The husband appealed asserting that the trial court abused its discretion in conducting a bench trial in his absence and in refusing to grant a new trial and to set aside the judgment. The Supreme Court reversed.

Civil litigants in the trial courts are guaranteed a right to a jury trial by the Constitution of Georgia and under O.C.G.A. §9-11-38 of the Civil Practice Act, which states "the right of a trial by jury as declared by the Constitution of the state or as given by a statute of the state shall be preserved to the parties' involate." Waiver of the right to a jury trial is a matter which is carefully controlled by statute. A party in a divorce case can, by his or her voluntary actions, implicitly waive a demand for a jury trial and such waiver must be established by the conduct indicative of the fact that the right has not been asserted. In *Bonner v. Smith*, 226 Ga. App. 3 (1997), the party who requested the jury trial failed to appear in court after being properly notified and also failed to respond to opposing

party's motion for a bench trial and to strike his defensive pleadings. The Court of Appeals held that this repetitive conduct ultimately resulted in the striking of his entire defensive pleadings, and implicitly waived his right to trial by jury.

In the present case, the husband was 45 minutes late in answering the calendar call and the Supreme Court did not perceive this conduct on the evening prior to the trial as indicative of a waiver of his assertive right to a jury trial. Generally, the requirement of a written stipulation before a waiver of a right to jury trial carries implication that such waiver is knowing and voluntary. Here, the husband did not expressly consent to the bench trial and did not take part in the trial at all and therefore, it cannot be said that he implicitly waived his jury trial demand.

Legitimation

King v. Lusk, et al, **A06A0375 (May 24, 2006)**

On Nov. 20, 2003, in Dade County, Lusk filed a petition to legitimate two children, Reilly Lusk, date of birth April 24, 1999, and River Chase Lusk, date of birth Nov. 17, 2001. Lusk verified the Petition that the mother (Herron-King) and he were never married but cohabited for a number of years and the two boys were the result of the relationship. Lusk's name appears as the father on the birth certificates of both boys. The mother filed neither an answer nor an objection.

The proceeding was held on Dec. 18, 2003, in Dade County Superior Court. The temporary order reflected the mother did not appear for the hearing, but following presentation of evidence, the court found that "the petitioner father Lusk is the legal biological father of both children and legitimates the children and declares them to be the children of Lusk with custody placed with the mother and visitation rights granted to Lusk. Lusk was ordered to pay child support for the two children in the amount of $75 per week, as well as medical and dental, pharmaceutical and optical expenses for the children. There was no transcript of this hearing.

On Sept. 15, 2004, Michael A. King filed a motion to intervene in the legitimation proceeding stating that the younger child, River, was his biological son and a DNA test was performed on Nov. 14, 2002, showing a probability of King's paternity to be 99.999 percent. The court granted the motion on Sept. 23, 2004. Another temporary hearing was held on Oct. 7, 2004, which again stated the mother would have temporary custody of the children and that any visitation with Lusk would be by agreement between Lusk and the mother. King was granted visitation with River on alternating weekends, some holidays and was ordered to pay $60 per week for child support and to maintain medical insurance on him. There is no transcript of this hearing. On April 8, 2005, a final order was entered in the legitimation case based on a hearing conducted on Feb. 24, 2005. There was no transcript of this hearing.

The final order of the trial court found that Lusk had been involved with both children during their lives, including activities that established a paternal and family relationship with both boys and made all of his child support payments. The trial court also found that King had not been involved with River except for court ordered visitation that began in October 2004 through Feb. 24, 2005 and he was in arrears of his child support.

The trial court applied the best interest of the child standard and again declared Lusk the legal father of River and granted custody to the mother and ordered Lusk to pay child support for both children and granted visitation rights to Lusk for both boys. King filed a motion for new trial contending that the final order of legitimation was contrary to law and not supported by facts and that King was the biological father and the court erred in applying the best interest standard between Lusk (a third party) and King (the biological father) and in terminating King's parental rights without clear and convincing evidence. The Supreme Court affirmed.

The Supreme Court noted that none of the transcripts of the hearings held before the motion for new trial are before the court and therefore cannot discern upon what premise the trial court originally concluded that Lusk was the legal father of River Chase and granted his petition for legitimation. Therefore, King has failed to

meet his burden of showing error by the record and therefore, will not disturb the order of the trial court.

Modification

Curtis v. Klimowicz, A06A0899 (May 16, 2006)

The husband and wife were divorced in September 2000 and pursuant to the divorce decree, the husband and wife shared joint legal and physical custody of their two-year-old daughter. The husband had physical custody on Wednesdays or Thursdays of alternating weeks through Sunday and the wife had custody on Sunday evenings through Wednesday or Thursdays of alternating weeks. From 2000-2003, the parties alternated custody and in July 2003, husband enlisted in the U.S. Army and was stationed in Kansas. The husband remarried in September 2003 and was called to serve in Iraq in October 2003 and returned to Kansas in February 2004. In May 2004, wife, currently living in Gilmer County, filed an emergency motion for *ex parte* modification of custody seeking sole physical and legal custody of the child. The husband answered and counterclaimed for modification seeking primary physical custody. The trial judge did not find sufficient evidence for an emergency modification and instead, appointed a *guardian ad litem* to investigate and make a recommendation to the trial court.

In November 2004, a hearing was held and a final determination as to custody was made, which denied the wife's petition citing evidence of her drug use and poor care of the daughter and granted the husband's counterclaim awarding the husband primary physical custody. The trial court went on to state with regard to the husband's military service "father is presently serving in the military service of the United States and is subject to be assigned for extended overseas duty. In the event the father is assigned to overseas duty, in other words, outside the United States of America, then the minor child shall at all times remain in the United States and shall not be removed from the jurisdiction of the United States of America."

The father appealed the trial court's order contending that it improperly attempted to retain the jurisdiction of the case and failed to find that the child's travel overseas would affect the welfare of the child. The Court of Appeals affirmed.

The Court of Appeals states that the inclusion in an order of a provision that a minor child must not be taken out of the jurisdiction of the court constitutes an attempt on the part of the trial court to retain exclusive jurisdiction of the case which cannot be done. In the instant case, the order does not prevent the child from being taken from the jurisdiction of the court. The order merely prevents the child from being taken outside the United States and the trial court does not purport to retain exclusive jurisdiction. The Supreme Court has noted that there is a distinction between prohibiting removal of a child from the country as opposed to prohibiting their removal from the state. The Court of Appeals recognizes that foreign jurisdictions would present impediments to enforcing custodial rights that are not present in the United States and additional boundaries to enforcing custody and visitation such as passports, visa requirements and increased travel expenses.

The husband also argues that the trial court's ruling imposes improper self-execution modification in the legal and physical custody triggered by an overseas assignment. However, the trial court's order here does not affect an automatic change of the husband's custody award and does not grant the wife any additional custodial rights, but simply that the daughter would remain at the home with his current wife while the father is on active role overseas.

The husband also argued that the husband's travels overseas would not negatively affect the welfare of the child, but the trial court's order reflects a practical attempt to minimize the challenges of an already difficult situation where two parents share joint legal custody while living in different states and also facilitates the mother's ability to exercise her visitation rights which are at a minimum two weekends per month.

Jones v. Jones, S06A0388 (July 6, 2006)

The parties were divorced in August 2000. The husband, Lee Jones, agreed to pay in child support for two children

$1,657.86 or 28 percent of his gross income, whichever was greater. Paragraph 17 of the agreement provided for a waiver of the husband's right to seek downward modification of his support obligation and included verbatim the waiver language set forth by the Supreme Court in *Varn v. Varn*. The husband in October 2002, filed a petition for modification and a hearing was held in October 2004 where the trial court rejected the husband's challenge for the provision and the settlement agreement stands as enforceable. The trial court thus required the appellant to pay child support in the amount of 28 percent of his then salary of $93,500. Within the same term of court, the husband lost his job and moved for reconsideration of the October 2004 ruling and a hearing was held in April 2005. The husband testified that his new job paid him $60,000 per year and the trial court imputed income to the husband at $75,000 which was $4,000 more than the husband's income at the time of the original divorce decree. The trial court declined to calculate child support under a 28 percent figure set forth in paragraph seven of the settlement agreement. The trial court stated that "the special circumstance of the requirements of justice and fairness necessitate a modification of its prior order and declared void the full amount provision in the settlement agreement. The trial court then awarded 25 percent of the husband's imputed income of $75,000 and set child support at the amount of $1,562.50 per month which is approximately $95.16 less per month than the full amount to which the parties had agreed. The Supreme Court reversed.

The statutory right to seek the revision of periodic child support payments belong to the minor child and not to the custodial parent and therefore cannot waive rights to seek increases in child support payments. However, an obligated parent can waive any right to seek a downward modification. However, the revision must have very clear waiver language which refers to the right of modification.

In 2000, the trial court determined it was appropriate to incorporate into the divorce decree the parties' agreement. In October 2004, the settlement agreement was enforceable because there was no evidence of any fraud, mutual mistake, overbearing or any other legal defense. Husband argues that the language in paragraph seven (in no event shall said child support be less than $1,657.86 per month) does not comply with the strict requirements for the right of modification of waivers as set forth in Varn. The waiver language in paragraph 17, which was taken from *Varn* does not apply to child support obligation because it refers only to alimony. The Supreme Court stated there has been long standing statutory and case law to establish alimony includes support for a spouse or for a child or children and therefore, the wavier of husband's right to downward modify was valid. The Supreme Court affirmed the imputed income of the husband's earning capacity of $75,000 per annum, and the Trial Court's award of 25 percent is vacated and the case is remanded to establish child support award in the amount of 28 percent of the husband's gross income. Justices Benham and Hines dissent.

Partial Summary Judgment/ Bankruptcy

Benton v. Benton, S06A06065 (April 25, 2006)

Husband filed for divorce on May 13, 2003, and 13 days later, the wife filed an answer and counterclaim where she prayed for temporary and permanent alimony, including attorney's fees and equitable division of marital property. In February 2005, while the divorce was pending, wife filed a voluntary petition for Chapter 7 Bankruptcy in the United States Bankruptcy Court for the Middle District of Georgia and filed a statement of financial affairs which listed the pending divorce case as one of the three suits to which she was or has been a party in the preceding year. In schedule B under personal property, when asked to list, alimony, maintenance, support and property settlement to which she is or may be entitled, wife checked "none." The wife was granted a discharge by the Bankruptcy Court on May 19, 2005. Husband moved for partial summary judgment in the divorce action against the wife for claims for property division and alimony, including attorney's fees. Husband filed his motion based on the doctrine of federal judicial estoppel in that the wife's failure to disclose to the

Bankruptcy Court, in schedule B, that she might be entitled to support and property in the pending divorce case prevented her from pursuing such claims in the pending divorce action. Wife filed a response claiming that the claims for relief in the divorce were inchoate and therefore had not made an omission in her Bankruptcy Petition. A hearing was held on Oct. 3, 2005, on the matter and the trial court denied the husband's motion for partial summary judgment after expressly finding that a genuine issue as to one or more material facts existed. On Oct. 28, 2005, the wife moved the Bankruptcy Court to reopen the case in order to allow her amend schedule B. On Dec. 6, 2005, with no objection being filed, the Bankruptcy Court issued an order allowing the wife's motion to reopen her case allowed her to amend schedule B and on Dec. 16, 2005, she filed an amended schedule B listing the pending divorce action and the possibility that she might receive alimony and other support. The Supreme Court affirmed.

Trial court did not abuse its discretion when it refused to apply the doctrine of federal judicial estoppel to bar the wife from making claims for support and marital property in the divorce proceeding. The Federal doctrine of judicial estoppel precludes a party from asserting a position in one judicial proceeding after having successfully asserted a contrary position in a prior proceeding. Generally, it is invoked to prevent bankruptcy debtors from concealing a possible cause of action, asserting a claim following the discharge of a bankruptcy and excluding resources from the bankruptcy estate that might have otherwise satisfied creditors. The purpose of judicial estoppel is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.

The Supreme Court went on to state that even if accepting, *arguendo*, that there was an omission in the bankruptcy filing, the application of federal judicial estoppel is still not warranted in this case. Generally, judicial estoppel is inapplicable when a plaintiff has successfully amended his or her bankruptcy petition to include any claims against the defendant as a potential asset because it cannot be said that the position in the trial court is inconsistent with the position asserted by the plaintiff in the bankruptcy proceeding. The Supreme Court stated that after the judicial estoppel issue is raised, the question of whether the debtor acted with requisite diligence is within the sound discretion of the trial court, and under the circumstances of this case, abuse of discretion cannot be found in a refusal to apply the doctrine of federal judicial estoppel.

The Supreme Court also reviewed other factors that weighed against the application of judicial estoppel in that the wife did not mislead or manipulate the bankruptcy court about the existence of the pending divorce; she listed it as one of the three suits to which she has been or had been a party in the preceding year and her claims for alimony and marital property are not inconsistent with any position taken during the pendency of the bankruptcy action. There is also no evidence of any benefit that accrued to the wife by the initial failure to elaborate in the bankruptcy petition about her claim in the divorce action for support and property nor was there an objection to the reopening of the bankruptcy case by any of the parties in interest. Finally, the Supreme Court stated that the Court should be hesitant to apply the federal judicial estoppel to defeat the important rights of a spouse to a potential support and equitable share of the marital property.

With regard to the motion for partial summary judgment, the wife's evidentiary response to the husband's motion for partial summary judgment created a genuine issue of material fact about the existence of any omissions at all, which is the sole grounds for the sought application of judicial estoppel. All Justices affirmed except Carley who writes a lengthy dissent. **FLR**

Victor P. Valmus is an associate at Moore Ingram Johnson & Steele, LLP, in Marietta, Ga., and he can be reached at vpvalmus@mijs.com.

Military Records

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has an interest in obtaining the records as well.

Moderately Easy

When litigation is involved and the judge signs an order or a subpoena for the release of records, the release process is relatively easy. Attorneys for the patient or party opponent often make it difficult by not getting a judge's signature on the subpoena or order. They frequently issue subpoenas in their own names. This makes it more difficult and delays the whole process, because the MTF will contact its servicing JAG office and the request for records will be denied. This occurs more frequently in civil cases, particularly domestic ones, than you might imagine. The other factor that most commonly causes a denial or delay of the release, is the failure to make a timely request. An Army facility needs to get the judge's order or subpoena at least 14 days in advance of the date the materials are due. AR 27-40 details this from the Army's perspective.

Hard

Whether litigation is involved or not, when there is no judge's order and no release authorization signed by a proper representative, the analysis becomes more nuanced. We then have to look to exceptions under HIPAA and implementing agency regulations for release of medical information. Child custody disputes seem to bring out the worst case scenarios. Other common examples include criminal investigations, social service involvement (e.g., child abuse), and command-directed mental health evaluations. The main reason these types of cases can be more complicated is because often there is one party who does not want the records released, yet the requesting party argues that some other interest is more compelling than the individual's right to privacy, such as the best interests of a child, a government investigation, the need for justice, etc.

The constraints on release of medical information also apply to conversations or testimony of health care providers, not just the release of medical records. Some attorneys would like to get information directly from the physicians as a back door approach to avoid requesting the records. Unfortunately, this can ultimately backfire on the attorneys. If or when the physician mentions it to his legal counsel (the JAG officer or civilian federal attorney representing the MTF, for example), he or she will be reminded of the rules of release and may be hesitant to cooperate in the future. AR 27-40 provides a great deal of leeway in allowing a military command (through its attorney) to determine whether a physician can provide testimony and, if so, what the limits of that testimony will be. Overall, it is better for attorneys and patients to be candid and honest about their intentions in a case. Most of them are, but there are of course exceptions; this leaves a bad taste in one's mouth and decreases the spirit of cooperation that might otherwise prevail. For example, I've seen doctors who, although they were technically not reasonably available to testify or did not receive at least 14 days notice of the scheduled testimonial appearance, were still willing to bend over backwards just a few days before their deployment or PCS[1] or discharge to provide testimony or talk to an attorney about the patient. If they had felt they were being tricked or mislead by the patient or his attorney, then they just would not have provided assistance and testimony.

The following are some tips that may helpful in trying to obtain records:

1. Learn the name of a proper point of contact in the Medical Correspondence office, such as the office chief. Then send the request for records by certified mail to that person's attention at his or her work address. This is not a guarantee that you will get records faster, but it does provide a record of your request.

2. Be as specific in your request as you can if time is of the essence. If you need to dot every "i" and cross every

"t" by requesting every single record, lab and radiograph from every single clinic for the past 50 years, then by all means request them. Otherwise, narrow your request to those records you really want. If you are only concerned about the inpatient admission of Feb. 14-22, then say so. If you only want a specific treatment notes or radiology results, then say so. Few things bog down a request like overstating the amount of records one wants.

3. Know which clinic and/or institution has possession of the records. This is the corollary to being specific. If you need a person's outpatient records, then the hard copies will almost always be located at the clinic of the installation to which he and his family are currently assigned. For example, a spouse might have gotten treatment at Fort Bragg, N.C., but when she moved with her military sponsor to Fort Lewis, Wash., the outpatient records should have moved with her. On the other hand, inpatient records remain with the facility where the admission occurred. A caveat to this is that inpatient records are retired to the National Personnel Records Center, St. Louis, Mo., after a certain period of time (usually five years after date of treatment). Electronic records also remain in database storage at the facility where they originated.

4. Know that some clinic records are maintained separately from the main medical record. If you want these, mention them specifically: behavioral health, (e.g. psychotherapy) records, social work services, Early Development Intervention Services (for minors), disability evaluations, and (sometimes) physical therapy and occupational health. Also, certain electronic records may not appear in the medical record jacket B, things like lab results, radiology reports, telephone consults, autopsy reports. These items usually are printed off and placed in the records jacket, but it is worth asking for them, even if you have to do so in a subsequent records request.

5. Show some grace if your request takes longer than you think it should. Remember that administrative staff members are often busy trying to maintain records and perform their various duties. Those who copy records are doing so for many agencies, including patients, health care providers, government agencies, insurance companies, and other attorneys. They also have to gather the records from a number of sources, including outlying clinics, radiology, social work, etc. It goes without saying that being cordial and professional in your conversations with staff can only help your cause. If you ever have to complain, you can always use the chain of command to express any concerns.[2]

For Army cases, it is helpful to have a copy of 32 C.F.R. part 516.40-46 for information on Army litigation policies regarding the release of information. Briefly summarized, this regulation provides that:

- Except as provided in this regulation, DA (Department of the Army) personnel will not disclose official information in response to subpoenas, court orders or requests.
- The appropriate legal authority (e.g., staff judge advocate or hospital legal advisor) must approve in writing the release of information.
- If DA personnel receive a subpoena, court order or request for attendance at a trial, deposition or interview which reasonably might require disclosure of official information, they should immediately contact the appropriate legal authority, who will attempt to satisfy the subpoena, order or request informally under this regulation or else will consult with the Litigation Division, Headquarters, Department of the Army.
- Those who seek official information must submit at least 14 days before the desired date of production a specific written request setting out the nature and relevance of the official information sought, and DA personnel may only disclose those matters specified in writing and approved by the appropriate legal authority.[3]
- DA personnel will not release originals; only authenticated copies will be

provided when disclosure is authorized.

- AR 37-60 provides a schedule of fees and charges for searching, copying and certifying Army records for release in response to litigation-related requests.

- If the request complies with this regulation, it is DA policy to make the information available for use in court unless the information is classified, privileged or otherwise restricted from public disclosure.

- There are a number of factors which must be considered in determining whether to release information; they are found at 32 C.F.R. part 516.44(b).

- If the deciding official determines that all or part of the requested documents or information shall not be disclosed, then he will promptly communicate directly with the attorney who requested the documents or information to attempt to resolve the matter informally. If the order or subpoena is invalid, the reasons should be explained to the attorney. An explanation is also warranted when the records are deemed to be privileged. The military attorney should try to obtain the attorney's agreement to withdraw or modify the subpoena, order or request.

- A subpoena duces tecum or other legal process signed by an attorney or a clerk for DA records protected by the Privacy Act, 5 U.S.C. ' 552a, does not justify the release of the protected records. The deciding official should explain to the requester that the Act precludes the release of such records without the written consent of the individual involved or "pursuant to the order of a court of competent jurisdiction."[4] Such an order is one signed by a judge or magistrate.

- If the records are unclassified and are otherwise privileged from release under 5 U.S.C. 552a, they may be released to the court if there is an order signed by a judge or magistrate directing the person to whom the records pertain to release the specific records, or that orders copies of the records to be delivered to the clerk of court and indicates that the court has determined the materiality of the records and the nonavailability of a claim of privilege. The clerk must be empowered to receive the records under seal, subject to request that they be withheld from the parties until the court determines whether they are material to the issues and until any question of privilege is resolved.

- A subpoena or court order for alcohol abuse or drug abuse treatment records shall be processed under 42 U.S.C. 290dd-3 and 290ee-3, and Public Health Service regulations published at 42 C.F.R. 2.1-2.67.

The final rule on Standards for Privacy of Individually Identifiable Health Information, published by the Department of Health and Human Services, is found at 45 C.F.R. Parts 1160 and 164.[5] The Military Health System Notice of Privacy Practices, effective April 14, 2003, also provides useful information on what records and data are confidential and how they may be disclosed.[6]

Getting Children's Education Records

Parents or legal guardians of a student may be given access to the student's academic records, disciplinary files, and other student information without regard to who has custody of the child, unless the divorce decree or court-approved parenting plan states that such access should be denied or indicates that the non-custodial parent is denied access to the child. State law is generally the key to release of educational records from local public and private schools. North Carolina law, for example, specifies these rights at N.C. Gen. Stat. ' 50-13.2(b). It's another story for schools run by the Department of Defense (DoD).

Many on-base primary and secondary schools for military dependent children are run by the Department of Defense Education Activity (DoDEA). Children's school records are available to a parent or legal guardian of the children (including academic records, disciplinary files and other student information) without regard to who has custody of the child, unless the decree of divorce or dissolution or the court-approved parenting plan (including a

custody order) requires that records access should be denied or states that the non-custodial parent is denied access to the child.

The request to a DoDEA school should comply with the Privacy Act, and citations to the system notices for educational records are found below. The Department of Defense Dependent Schools system notice, which covers all DoD-operated overseas dependent schools, is known as DODDS 22.[7] Covering selected domestic schools (e.g., Ft. Bragg, Ft. Rucker, U.S. Military Academy) is DODDS 261[8]; DoDEA has not yet published a system notice for all domestic dependent schools. Further information on requesting student records and transcripts can be found at the DoDEA website, *www.odedodea.edu* under "Student Records and Transcript Request Procedures." General information on the interrelationship between FOIA (the Freedom of Information Act) and the Privacy Act can be found at "FOIA/PA in DoDEA" at the DoDEA website.

If a child is presently in a non-DoDEA school (e.g., private school, charter school or public school), the records from previous DoDEA schools will not be in the child's educational records folder unless a parent copied the records and brought them to the non-DoDEA school or else that school, with the consent of a parent, requested the DoDEA records from a previous DoDEA school. A non-DoDEA school cannot simply request the previous military school records; due to the Privacy Act, a parental consent form must accompany the school's request. Conversely, on-base schools may and usually do require previous non-DoDEA schools to copy and produce the child's records for inclusion in the child's DoDEA educational records folder. The best course of action for the requesting party is to contact the particular school involved, speak to the school administrator and provide the following information:

- Full name of student
- Name used during school attendance
- Date of birth
- Dates of attendance
- Identity and location of school
- Name of requesting party
- Address of requesting party
- Signature of requesting party

Getting access to school and medical records may initially appear to be a daunting task. By following these procedures, the attorney will find it much easier to obtain data and records from these sources for litigation, discovery, or settlement. **FLR**

Endnotes

1. Permanent Change of Station, or transfer to another base.
2. E-mail, Perry Wadsworth, to the author, subject: Protected Health Information and Legal Issues (July 26, 2004) (on file with the author).
3. See United States ex rel.Ragen, 340 U.S. 462, 71 S. Ct. 416, 95 L. Ed. 417 (1951).
4. 5 U.S.C. ' 552a (b)(11).
5. www.tricare.osd.mil/hipaa/downloads/privupdate14aug02.pdf (last visited Aug. 18, 2004).
6. www.tricare.osd.mil/hipaa/downloads/Notice-of-Privacy-Practice-FINAL-FOR-PRINTING-10_21_02.pdf (last visited Aug. 18, 2004).
7. www.defenselink.mil/privacy/notices/osd/DODDS22.htm (last visited August 18, 2004)
8. www.defenselink.mil/privacy/notices/osd/DODDS26.html (last visited Aug. 18, 2004)

Mr. Sullivan, a retired Army Reserve JAG colonel, is chair of the Military Committee of the Family Law Section, American Bar Association and author of The Military Divorce Handbook (ABA Spring 2006), from which this article is adapted. Practicing with Sullivan & Grace, P.A. in Raleigh, N.C., he is a fellow of the American Academy of Matrimonial Lawyers and has been a board-certified specialist in family law since 1989.

Dawn of a New Era in Child Support in Georgia

By Tina Shadix Roddenbery, troddenbery@kvlaw.com
Carol Ann Walker, cawlaw@bellsouth.net

Income Shares – A Brief History of Where We Ended Up

In 2005, the Georgia Legislature passed HB221, which radically changed the methodology governing Georgia's child support calculations from a flat percentage method to an income shares method. By the passage of legislation basing parents' child support obligations upon income shares, Georgia joined the majority of states in its methodology for child support calculations. Thirty-two states now calculate their child support obligations on an income shares model.

When the Georgia Legislature considered this change in calculation method, much was made of the position that child support awards should be based upon the income of both parents, not only upon the income of the non-custodial parent. An assumption of this methodology is that, when child support awards are based upon both parents' incomes, litigants will perceive that child support awards are more "fair," resulting in more actual payments made and more obligations honored. Experience and time will tell us whether this legislation will produce that result.

HB221 provided for the appointment of a child support commission, who were charged with, among other things, creating a child support obligation table. HB221 implied that the table should provide the same "economic standard of living enjoyed by children living in intact families consisting of parents with similar financial means."

HB 221 is the child support legislation in the pocket parts of your Georgia Codes, which you received in 2005, and, as passed in 2005, had an effective date of July 1, 2006. Please remember that HB 211 is not the final child support bill and do not use it for any purpose.

After appointment, throughout 2005 the Georgia Child Support Commission (the Commission) began meeting and implementing the provisions of HB221. The Commission was charged with creating a child support obligation table to be applied to the basic assumptions contained in the legislation. The Commission contracted with Policy Studies, Inc. (PSI) of Denver, Colo., to obtain economic data concerning estimates of child rearing expenditures. According to PSI, it was the intent of the Commission that the financial data used was as close as possible to current price levels. One of the criticisms voiced during the 2005 debate over HB221 was that other states had utilized outdated data in the calculations supporting their child support obligation tables. For example, Tennessee's tables were based upon 2004 data, North Carolina's tables were based upon 2002 data, South Carolina's tables were based upon 1996 data, and Florida's tables were based upon 1991 data.

The child support tables in the final bill, as passed in 2006, have been adjusted to September 2005 price levels. The Commission, in making its recommendation concerning the child support tables to the legislature, adopted a recommendation that a tables be drafted based upon an average of the lowest and the highest estimates of child rearing expenditures, based at September 2005 price levels. This recommendation was adopted by the Georgia Legislature and is in the final bill.

The child support legislation, with its recommended changes and additions, was reintroduced as SB382 in the 2006 Legislative Session. After much debate, there were some significant changes to the bill, and SB 382, as passed, significantly differs from HB221. The automatic reduction in the presumptive child support obligation for parenting time in excess of 100 days was deleted, the provisions relating to modifications were substantially changed, the use of the law with juries was modi-

fied, other deviations were created (from low-income self-support reserves to parenting time adjustments), and right to direct appeal was deleted, among other changes. The effective date of the statute was moved to Jan. 1, 2007.

On April 28, 2006, Gov. Perdue signed the legislation with an effective date of Jan. 1, 2007.

Basic Points

In order to calculate income shares, one must be able to perform fourth grade math. A basic understanding of percentages, multiplication and division will enable any person to do the calculations necessary to determine the appropriate amount of child support based upon an income shares model. Contrary to popular opinion, it is not and will not be necessary to have an electronic calculator or computer program in order to calculate child support obligations. While those tools may be useful to practitioners, judges, and litigants, they are not necessary to obtain the proper amount for an award of child support.

Income shares methods of child support calculations considers the gross income of both parents of the child for whom support is being determined from a wide variety of sources. There are and will be some exceptions to inclusion in income, but the definitions of income in the new law are much broader than those under the previous statute. There are new rules for how to consider overtime income, imputed income, and self-employment income. There are rules for the factors the court should consider when determining "willful or voluntary unemployment or underemployment" issues. There are rules for how to deal with variable income. There are specific exclusions from income, and there are provisions for how to deal with Social Security benefits for dependents.

There are now guidelines for how to apply adjustments for preexisting support orders for other children. There are rules for the order in which these other support orders should be applied, and rules for how that will adjust a parent's income for calculation purposes in the present case.

The basic concept of income shares provides that each parent shall share in the responsibility for the support obligation for basic support and certain other expenses based upon an allocation of that parents' percentage share of the combined income of the parents. For example, assuming that the custodial parent makes $40,000 per year and the non-custodial parent makes $60,000 per year, the parents' combined income is $100,000. The custodial parent's percentage share would be 40 percent and the non-custodial parent's percentage share would be 60 percent. The basic principle remains the same throughout: percentages of adjusted income will be used to allocate basic child support obligations and other expenditures to be considered in the final determination of child support in each case.

The court will now consider the costs of health insurance premiums and the costs of child care costs, which are work related. These expenses will be added to the basic child support obligation amount and allocated between the parents in accord with their percentage.

One important distinction between the flat percentage method of calculation, as in present legislation, and the new income shares bill relates to the legislative intent contained in the bill. In many places in this statue, you will see the words "best interest of the child." Obviously, that is a new concept in child support litigation. While judges and juries may have considered the best interest of the child under the existing law, especially in considering deviation factors, this concept was not specifically addressed nor mandated under existing law. Especially in the area of modification, the requirement that revisions of support "are in the child's best interest" will create some interesting issues when this statute goes into effect next year.

Future Developments

A free electronic calculator and electronic worksheets are currently under development. The Commission has directed the Office of Child Support Enforcement of the Georgia Department of Human Resources to contract for the creation and implementation of an electronic calculator and electronic worksheets. Additionally, manual worksheets will be created by and implemented in connection with this legislation.

It is anticipated that both the electronic calculator and electronic worksheets will be available both in a web-based format and in a downloadable format.

Additionally, there will be an interactive web-based program for *pro se* litigants who are not familiar with the terms and methodology of the statute. The format of the program for non-experienced persons will be a Turbo Tax type of format, and the person putting the data into the calculator will be prompted for proper responses and following instructions.

For an example of another state's electronic calculator and electronic worksheet options, we suggest that you view the Indiana Child Support Calculator at *https://secure.in.gov/judiciary/childsupport/calculator/support.pl*.

It is envisioned that the online website will include the ability to be able to create the required worksheets from the data placed into the electronic calculator. Those electronic worksheets will be available for use in the court, and the worksheets will be essential and are required by statute. However, the manual worksheets will also be acceptable and usable as well, although the chance of making a mathematical error increases with their use.

The Counsel of Superior Court Judges and the Administrative Office of the Courts are in the process of determining the modifications, which may be necessary to the Uniform Superior Court Rules after effective date of this statute, including the domestic relations financial affidavit. If modifications are necessary, they will be implemented prior to Jan. 1, 2007, the effective date of the statute. The worksheets are mandated by the stature, so it is likely that they will be included in the rules.

Additionally, the Uniform Jury Instructions for Civil Cases must be modified to comply with the provisions of the new statute, in as much as the jury will have specially specified requirements in connection with the determination of child support. While the jury's role has not been completely removed, it has been limited, and the Uniform Jury Instructions will be modified in order to comply with the new requirements.

This program is intended to be an introduction only. It would be impossible to provide a step-by-step analysis of each element of this legislation in the time allotted for this program. Please plan to attend the child support guidelines seminar produced by the Institute of Continuing Legal Education on Oct. 13, 2006. A full day program will be presented, which will include detailed explanations of the eleven steps to calculations, definitions of income and adjusted income, basic child support obligations, adjusted child support obligations (included the misunderstood and confusing theoretical child support order), presumptive child support awards and deviations from the presumptive award and how to present evidence to obtain them. By that time, the electronic calculators will be ready, and we will work through numerous problems together in actual demonstrations of fact patterns and scenarios.

A recent development in technology will allow those who do not wish to attend the program in person to webstream the program by obtaining the appropriate information at the time of registration or afterwards from ICLE. The program will be televised live from the studios of GPTV in Atlanta, and with the appropriate computer equipment (DSL connection, speakers, and certain software), you should be able to stay at your office or home and watch the entire program on your computer, if desired. **FLR**

Tina Shadix Roddenbery is a partner at Kidd & Vaughan LLP, exclusively practicing and mediating family law cases. She is a fellow in the American Academy of Matrimonial Lawyers and a master in the Charles Longstreet Weltner Family Law Inn of Court.

Carol Ann Walker is a family law solo practitioner in Gainesville, Ga. Ms. Walker lectures frequently on family law issues. She is also a member of the executive committee of the Family Law Section of the State Bar of Georgia.

Notice of Proposed Change to the Bylaws of the Famliy Law Section of the State Bar of Georgia

At the annual meeting of the Family Law Section to be held in January 2007, approval of proposed amendments to the bylaws will be brought before the section for a vote. In summary, the proposed amendments to the bylaws will include the following:

(1) The number of members of the executive committee will be increased to include the editor of the newsletter, the legislative liaison, and the chair of the Family Law Committee of the Young Lawyers Division of the State Bar of Georgia.

(2) Notice of proposed meetings of the section may be provided by e-mail.

You may direct any request for a copy of the proposed amended bylaws to okmiller@mijs.com.

This notice is published as required by Article IX, Section 2 of the current bylaws of the Family Law Section of the State Bar of Georgia.

Stephen C. Steele
Immediate Past Chair, 2006-2007
Family Law Section, State Bar of Georgia

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 of the State Bar of Georgia, the section's executive committee or *The Family Law Review* editor.

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Carol Ann Walker
cawlaw@bellsouth.net

Karen Brown Williams
thewilliamsfirm@yahoo.com

Family Law Section
State Bar of Georgia
Randall M. Kessler, Editor
104 Marietta St, NW
Suite 100
Atlanta, GA 30303

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