The Family Law Review

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Fear Not: How Georgia Attorneys Can Face The Child Support Change Without Anxiety

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"[J]ustice can be better achieved by simple math than by simple guesswork."[1]

On Jan. 1, what could be considered perhaps the largest legislative overhaul in Georgia in many years took effect. Georgia's superior courts no longer apply a simple flat-percentage to the obligor's income to determine a support award, but have now begun working with the far more formulaic income-shares model.[2] Under this model—the majority view—a table of guidelines is established based on an economic analysis of both the individual state and the various possible income levels of families.[3] A combined parental child support obligation is established based on the combined total income of both parents and the number of children being supported.[4] The noncustodial parent then pays his pro rata share of that support amount in proportion to his contribution to the total parental income.[5] These obligations tables take into consideration a belief that obligors, even had their household remained intact, generally save more as their income levels increase (spending less of their income overall each month) and as a result they spend a lower percentage of that overall income on their children.[6] Thus, as the combined parental income rises, the percentage the table applies in order to calculate child support slowly, but steadily, decreases.

Thanks to this recent conversion to the income-shares model, Georgia falls more into line with the mandates of Federal Support Act of 1988.[7] In the Act, Congress mandated that states set up mathematical-based support guidelines and avoid systems giving too much discretion to the courts. Congress further instructed that, in addition to the obvious goal of ensuring adequate support for the child before the court, states should also aim for consistency and predictability in child support cases. Under Georgia's new system, the basic child support obligation listed in the table (based on combined parental income and number of children to be supported) is considered a rebuttable presumption that may only be deviated from if either parent provides sufficient evidence that he warrants a change in his support obligation. Ideally, in striving for the congressional goals, the superior courts would limit departures from the presumptive amount (to sustain predictability in the system), and would also strive to apply specific and straightforward methods when deviations are warranted (to maintain consistency.)

As with the implementation of any new policy, uncertainties abound concerning the application of the new guidelines. Nonetheless, skeptical practitioners who feel Georgia's new statute is too complicated may eventually change their tune. What many now consider unnecessary complexities may prove to be wisely drafted provisions that in fact allow for fewer hurdles in applying the guidelines. Where other states have struggled with provisions giving too much discretion and too little guidance to trial courts, leaving appellate-level courts to later place the limits that the legislature failed to include, Georgia's statute quite consistently provides a considerable level of direction for courts and practitioners.

Nonetheless, grey areas exist, especially in the realm of deviations, not only because they require the presentation of sufficient evidence, but also because they

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Editor's Corner

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Jolie Miriam Kessler

It's Spring 2007 already. Wow, how time flies. Our annual Family Law Institute, to be held this year in Ameila Island, Fla., over Memorial Day Weekend is already shaping up to be a great program. The rumor is that this may be our last time at the Ritz, given the rising costs. So get your reservations soon.

We are again pleased to have so many great contributors to the FLR, but we need more. Please consider writing an article or interviewing a judge or respected colleague for our next issue, which is due out in late May or early June. Any good stories or information about how the new child support guidelines are working (or not) would be a good subject.

On a national note, the American Bar Association is hosting a summit on unified family courts in Baltimore, Md., in early May. Our own Chief Justice Leah Ward Sears and Fulton Superior Court Judge Gail Tusan will be presenting. If you are interested, please contact me for more information.

And on a personal note, I now know what family law is really about. My wife gave birth to our daughter, Jolie Miriam, on Jan. 19 and life will never be the same. Perhaps now my client's concerns for their children will ring just a bit truer? Enjoy this issue and please send me your comments, criticisms and general feedback. **FLR**

Inside This Issue

Note from the Chair

By Shiel Edlin
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Dear Georgia General Assembly: We have now completed two months of the "Great Child Support Experiment." From all reports, your experiment has caused complete chaos out here in the field. Divorce cases are stalled and, in some cases, stopped. Lawyers are not able to give clear advice to their clients regarding predictability. Even judges are intimidated. While the anticipated rush to the courthouse for modification of child support cases has not occurred, because of the complexity and uncertainty of the new guidelines, the divorcing public is now caught up in the uncomfortable position of being the "guinea pigs" of these new guidelines.

It has been reported that some clerks of court are not accepting new filings of divorce cases in the absence of the new child support worksheets. Could you please clarify this immediately by amending the statute and providing that the absence of the child support worksheets is an amenable defect, which can be subsequently cured? It is totally unfair that the door to the courthouse is closed to those who fail to file these worksheets at the time of filing the complaint for divorce.

While I want to thank you for preserving jury trials in child support cases, I must inform you that the implementation of the new child support guidelines has made it nearly impossible to try child support cases before a jury. At this time, Superior Court judges do not have standardized jury charges for child support cases. It is not clear how to present evidence effectively with regard to the child support guidelines. Does the court allow for evidence on gross income followed by closing argument and jury verdict; then a second phase of trial with evidence on deviations, closing argument and jury verdict? Are courts required to provide computers and printers in the jury room with the Excel version of the child support worksheets? Must jurors now be qualified to use a computer to sit in a jury case? Are jury cases with child support issues now going to take a minimum of a week from start to finish?

It has also been reported that some family law attorneys are now increasing their initial retainers when children are involved in divorce cases because of the extra time required to prepare cases for filing. Was it your intention that the divorcing public have additional costs associated with their divorce cast upon them?

These are difficult times for attorneys. You have left us in a quagmire that will take much time to recover. You now have the opportunity, while the session is pending, to make substantive and procedural changes to alleviate the stress caused by the new child support guidelines. As chairperson of the Family Law Section of the State Bar of Georgia, I urge you to work with us and the courts to make this transition into this brave, new world. **FLR**

Obtaining Discovery From the *Guardian ad Litem*

By Vic Brown Hill
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The *guardian ad litem* (GAL) in a custody case is in a position to make or break the case for either party, second only to the trial judge and the parties themselves. For that reason, attorneys and litigants alike are well advised to work cooperatively with the GAL during litigation. In the ideal world, the GAL is able to perform a quick yet thorough investigation and give insightful advice to both counsel that will allow their parties to reach an amicable resolution of custody and/or visitation issues that is in the best interests of the children involved. Unfortunately, we do not practice in a perfect world. One party's perception of what is best for the children frequently varies significantly from the other party's perception. When the parties simply cannot agree on a way to handle custody and visitation, the GAL's investigation and recommendations become central to the trial of a custody case. The GAL's recommendation is likely to be received poorly by at least one of the parties.

Courts place a great deal of importance on a GAL's findings and recommendations. To do otherwise would make appointment of a GAL a needless expense to the litigants. When the parties are polarized on the issue of custody or time-sharing, the GAL will invariably take a position adverse to one party or the other. When a GAL takes a position adverse to a party, at the least it is a major setback for that party's case—in some cases it is the "death knell".

Every attorney who litigates custody matters has been confronted with a GAL who takes a position contrary to the attorney's client. So, what then? When confronted with the GAL, whom the court appointed, who recommends adversely to his client, what does the attorney do? There are only two reasonable alternatives – negotiate a settlement with the opposing side or litigate the case in spite of the GAL's position. To take either route effectively, one must know the full extent of the GAL's work and recommendation and one must know the facts upon which the GAL bases his position.

Frequently, a party is so convinced that his/her position is best for the children that the party cannot settle. The party's position may be fueled by true love and concern for the children; or it may be fueled by a self-serving motive. Either way, the party will frequently not consider settling the case. Thus, the only alternative is to litigate.

When the decision to litigate is made, the next question invariably will be, "What do I do about the GAL's position?" There are two choices there as well: refute the GAL's position with evidence or, "the unthinkable," impeach the GAL.

Traditionally, a GAL's role in a case could vary greatly from court to court. Almost universally, the GAL would attend depositions, mediation, settlement conferences and hearings. The GAL usually is empowered to conduct discovery. The GAL would try to assist counsel for the parties in negotiating a settlement that is best for the children. If a case went to trial, in most cases, the GAL who was usually an attorney, would function at trial like another attorney. The GAL, armed with the knowledge he had gained through his investigation and from the evidence presented at trial, could examine witnesses and present an argument, which amounted to the basis for his recommendation to the court.

Uniform Superior Court Rule 24.9 changed that to a great extent on May 19, 2005.[1] This rule addresses the appointment, qualifications and the role of the GAL. Under USCR 24.9, the GAL continues to have the right to attend hearings, depositions and the like. The GAL can conduct discovery and can file motions on behalf of the children's best interests. None of that is materially different.

For purposes of this discussion, paragraph seven of USCR 24.9 makes life a bit more interesting for everyone involved in custody litigation. According to that paragraph, "[i]t is expected that the GAL shall be called as the Court's witness at trial unless otherwise directed by the Court. The GAL shall be subject to examination by the parties and the court. The GAL is qualified as an expert witness on the best interest of the child(ren) in question." Under the new rule the GAL is a witness. Like any other witness, the GAL may be cross-examined and his/her credibility may be impeached.

Obtaining Discovery From the GAL

Since the GAL now functions as an expert witness, the basis for the GAL's findings and recommendations is vital knowledge that the parties need. In order to cross examine a GAL and, if necessary, impeach the GAL, the parties need to know what the GAL did or did not do, what conclusions he made, and to what extent he based his position on those conclusions. Traditionally, the GAL has not been subject to discovery. Now that the GAL is an "expert witness", should the GAL be subject to discovery? Absolutely—other expert witnesses certainly are.

With the advent of the Civil Practice Act, discovery became an important process that is integral to our system. Trial by ambush was abolished. Wide latitude is given so that complete discovery is possible. "The broad purpose of the discovery rule, under the Civil Practice Act, is to enable the parties to prepare for trial so that each party will know the issues and be fully prepared on the facts. Discovery is specifically designed to fulfill a two-fold purpose: issue formulation and factual revelation. The use of the discovery process has been held to be broadly construed."[2] To embrace the intent of the discovery rules as articulated by the Court and cited above, it would be absolutely necessary to allow broad discovery from the GAL prior to trial. Though the GAL ordinarily communicates his/her findings to the parties through counsel prior to trial, the GAL does not always communicate the factual basis for reaching those findings. During an investigation, the GAL typically talks to witnesses and considers various pieces of evidence that may not be admissible evidence at trial. Thus, the Court receives a recommendation that is based upon evidence that the Court could not otherwise consider. The GAL's recommendation can be an indirect way of influencing the Court with hearsay.

Further, there is always the possibility that aside from the evidence the GAL has considered, that the GAL has been influenced in his/her recommendation by outside factors that may include biases or prejudices held by the GAL. One would hope that the GAL would leave personal feelings aside when making an investigation and recommendation. However, GALs are human and if the GAL is influenced by peripheral factors, discovery is the tool that would elucidate that aspect of the case. The parties could then try their case fully armed with knowledge of all the facts that influenced the GAL.

The scope of discovery is within the sound discretion of the trial court. The Georgia Court of Appeals instructed us in *Deloitte Haskins & Sells v. Green*[3] that ". . . the discovery procedure is to be construed liberally in favor of supplying a party with the facts." If the trial court's decision is to be influenced by the report/recommendation of the GAL, and if the GAL is to consider facts and circumstances in preparing that report / recommendation, it stands to reason that the parties have full discovery from the GAL – and the law supports it.

Impeaching and Rehabilitating the GAL

Now that the GAL is an expert witness, does that mean that "the gloves are off" with regard to the GAL? In the past, the conventional wisdom held that attacking the GAL risked alienating the Court. Will the courts now accept a GAL being handled as any other expert witness? If the GAL is subject to examination and cross-examination, why not?

It seems reasonable that any party should be concerned about obtaining discovery from the GAL, impeaching the GAL's testimony and rehabilitating the GAL. The GAL should be concerned with these matters as well. While the attorneys may seek to impeach or rehabilitate the GAL, the GAL should be concerned with protecting himself from impeachment.

Before the new rule, some would have considered it unthinkable to impeach a GAL. Why? First, the GAL is an officer of the Court. USCR 24.9. Second, most courts do not appoint GALs in a vacuum—judges appoint GALs in whom they have confidence.

Commonly, when a judge appoints a person to serve as GAL, it is because the court has confidence in that person's ability and integrity—impeaching that person could be viewed dimly by the court. Yet, when the client demands his/her day in court and wants to overcome a GAL's position, if there is not sufficient evidence alone to overcome the GAL's recommendation, impeachment may be the only choice.

A GAL may be impeached like any other witness by:

1) attacking the GAL's veracity;

2) attacking the GAL's fitness;

3) showing that the GAL is improperly prejudiced or biased with regard to the parties;

4) attacking the GAL's performance of his/her duties; or

5) showing that the GAL has misconstrued or misinterpreted the evidence he/she has received.

Attacking the GAL's Veracity

This is a bad idea. Unless there is undisputable evidence that a GAL has been in some way untruthful in the performance of his/ her duties, this approach is likely to lead to disaster. As stated above, the GAL is an officer of the court who was "hand picked" by the judge. An unprovable accusation that the GAL has misrepresented the truth will not be received favorably by the court. In fact, it may seem to be an act of desperation by a litigant who has nothing else upon which to rest a claim. In the face of undisputable evidence however, candor with the tribunal may require it.

Attacking the GAL's Fitness

There may be several approaches to attacking a GAL's fitness, but they should be used with great care. They are closely akin to attacking the GAL's veracity. First, it may be possible to show that the GAL does not meet the qualifications for a GAL as set forth in USCR 24.9. For example, perhaps the GAL has not obtained the necessary training for the circuit in question. It would be more effective to use this approach to have the court change the GAL before the GAL's work is done. Deferring an objection to the GAL's qualifications until the work is done, seems like too little too late. It leaves the impression that the GAL only became unacceptable after his/her position became known.

Second, a GAL may be impeached by showing that he/she has a conflict of interest that calls the GAL's judgment into question. Once again, this would best be used to have a GAL removed early in the case. Once the case is on trial, this approach would seem reactionary unless the conflict was discovered very late in the case – so late that a motion to remove the GAL would not have been practical. In fact, a motion to remove the GAL should be filed anyway. This will show that the party brought the matter before the Court as soon as the conflict was discovered.

The third is the most disastrous approach to attacking a GAL's fitness—to attack his fitness on a personal level. The occasional attorney cannot resist the temptation to attack a GAL on the basis of an act or omission the GAL has committed in his/her personal life. The GAL's personal life is a stone best left undisturbed unless the evidence of unfitness is incontrovertible and so outrageous that no defense exists for it. Like attacking the GAL's veracity, this approach is likely to be received dimly by the court. It is likely to be perceived as an unprofessional, last resort when there is not another argument on the merits of the case. Such a strategy is not likely to be persuasive to the court.

Showing that the GAL is Predudiced or Biased

GALs are human and are subject to becoming prejudiced or biased toward a party. Impeaching a GAL by showing prejudice or bias is similar to showing a conflict, except that the prejudice or bias may be based upon some preconceived notion about a party that has nothing to do with a previous relationship. A prejudice or bias may even arise during the litigation. If it is not based entirely upon facts that are relevant to the case and related to the best interests of the children, it probably has no place in the litigation. If such a prejudice or bias can be shown to influence the GAL's position, it may be a sufficient showing to impeach the GAL's recommendation.

While this approach may be effective, it will be hard to prove the prejudice or bias. First, one must prove that the prejudice/bias exists. Once that is proven, one must prove that the prejudice/bias has affected the position the GAL takes in the litigation. How to prove these things will depend upon the specific facts and circumstances of the case. The actual proof may not be shown until examination of the GAL at trial. Once shown however, such a prejudice or bias is likely to be persuasive to the court. It may not prove a party's case, but it could neutralize the GAL.

Attacking the GAL's Performance of Duties

The GAL's position in a case should be based upon what he has learned in the performance of his duties. If it can be shown that the GAL did not properly perform those duties, his position in the case may be impeached. The GAL may unwittingly provide the attorney with what he needs in order to impeach his performance.

Most GALs send a questionnaire to the parties. That questionnaire requests sundry information about the case and the party. Usually, the GAL requests that the parties advise them of any facts or issues they believe are pertinent to the question of custody/visitation. If a party provides information to the GAL and it can be shown that the GAL completely disregarded that information or failed to follow through with the information, the GAL's position may be impeached.

This approach is especially effective when the GAL requests a list of witnesses from the parties – and most GALs make such a request. If the GAL fails to interview the witnesses submitted by a party and then takes a position adverse to that party, the GAL's position may be effectively impeached. Such a lack of diligence on the part of the GAL may also be used to show bias or prejudice. The GAL is well advised to make sure that he at least attempts contact with every witness submitted by the parties.

Showing the GAL has Misconstrued Evidence

Under certain circumstances, it may be possible to show that the GAL, with all good intentions, has misunderstood or misconstrued evidence. This may be done through examination of the GAL or through the use of a third party witness.

Careful examination of a GAL on the subject of a conclusion he has reached may reveal that he has based that conclusion on an assumption that is flawed in some way. Confronting the GAL on the witness stand with alternative interpretations of the evidence may lead the GAL to question his own conclusion. If the GAL can be made to question his own conclusion, that will weaken the persuasiveness of his recommendation.

At times, a GAL may receive evidence and misinterpret that evidence. For example, a GAL may review school records for a child and draw a conclusion from some notation made in the file. If the GAL bases his position in part on that conclusion, showing that the notation in the file was misinterpreted may impeach the position. This may be done by having a teacher or administrator testify as to the true meaning of the notation that is different from the GAL's interpretation.

All of these approaches to impeaching a GAL depend in large part upon having knowledge of what the GAL did, what conclusions he made, and to what extent he based his position on those conclusions. Discovery is the appropriate way to learn those facts.

Conclusion

Our system is based upon litigating cases with full knowledge of the facts and circumstances that are relevant to the issues pending before the Court. The purpose of litigation is not for one party to defeat the other—ideally it is for justice to be done. Justice is done by applying the law to the actual facts of the case. Our system becomes adversarial when we disagree over which law applies in a given circumstance and what the relevant facts are.

Research and legal arguments educate us as to the applicable law. Discovery educates us as to the facts. The discovery procedures are designed to allow litigants to ferret out all of the facts, even those that are not necessarily admissible.

Attorneys should be allowed to obtain discovery from GALs like any other expert witness. That information should be used like any other expert witness testimony – to evaluate the quality of the expert opinion; to refute the expert opinion; or to impeach the expert.

Once a decision to treat the GAL as an expert has been made, the attorney should plan how to proceed very carefully indeed. If there is a possibility that an adverse recommendation from the GAL may be overcome using information gathered through discovery, the attorney may plan to attempt that. The attorney should carefully consider what negative impact that may have on the court's perception of him and his client however. While impeaching the GAL as an expert witness may seem reasonable in the course of zealous representation, it must also be considered from the perspective of the court. The decision will require careful consideration of what may be gained and what may be lost in the process. **FLR**

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Endnotes

1. U.S.C.R 24.9 (7) Role at Hearing and Trial. It is expected that the GAL shall be called as the Court's witness at trial unless otherwise directed by the Court. The GAL shall be subject to examination by the parties and the court. The GAL is qualified as an expert witness on the best interest of the child(ren) in question. The GAL may testify as to the foundation provided by witnesses and sources, and the results of the GAL's investigation, including a recommendation as to what is in a child's best interest. The GAL shall not be allowed to question witnesses or present argument, absent exceptional circumstances and upon express approval of the Court.
2. Travis Meat & Seafood Company Inc., et al v. Walter W. Ashworth, 127 Ga. App. 284, 193 S.E. 2d 166, 1972, citing Hickman v. Taylor, 329 U.S. 495, 500, 67 S. Ct. 385; Reynolds v. Reynolds, 217 Ga. 234, 123 S.E. 2d 115.
3. Deloitte Haskins & Sells v. Green, 187 Ga. App. 376(2), 370 S.E. 2d 194 (1988)

If you would like to contribute to *The Family Law Review*, or have any ideas or suggestions for future issues, please contact Editor Randall M. Kessler at 404-688-8810 or rkessler@kssfamilylaw.com.

Pre-Engagement and Retention of Expert

By Joy M. Feinberg, J.D. and Sharyn Maggio, CPA
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In the divorce context, the selection and role of the business valuation expert will vary substantially from case to case. There are many factors, which must be considered by the attorney and the valuation expert before retention is achieved and the valuation process begins. Careful analysis and planning at the beginning will allow the entire process to move forward smoothly and efficiently, resulting in a satisfied client, successful engagement and a supportable valuation that can be defended and believed. This paper will cover those all important preparatory steps: preparation and the interview process; credentials; vitaes; prior reports; document collection; sourcing; timetables; facts; interviews and access to information; law of the case; client management and working on the assignment—from the perspectives of both the attorney and the valuation expert.

What Makes One An Expert?

An expert is someone who has specialized knowledge, which an ordinary individual would not have in a particular field. In the arena of business valuation, most valuation experts will have credentials supporting their valuation expertise, such as a certified public accountant further credentialed with a certified valuation appraiser designation from the National Association of Certified Valuation Analysts or the ABV certification awarded by the American Institute of Certified Public Accountants; degrees and experience in the field of finance, business consulting and economics; accreditation through the American Society of Appraisers; Certification as a Business Appraiser by the Institute of Business Appraisers, and other organizations conferring certification. The attorney will want to know your training and experience in the field; your involvement with a specific industry; your track record regarding valuation for companies, which actually sold, based upon your work and more about your history. Additionally, your forensic abilities are of equal importance. Can you sell your valuation? Can you analyze the opposing valuation and assist counsel with litigation support? Can you withstand a vigorous cross-examination? All of these factors will be examined.

In the divorce context, which usually involves the valuation of a closely held business or a professional practice, the valuation expert will encounter two different types of attorneys:

A. Those who are extremely knowledgeable about business and finance, with a clear understanding of financial statements and accounting principles.

B. Those who have very little knowledge of accounting or finance principles.

Thus, the valuation expert will have to be flexible in preparing for and handling assignments. How much litigation support will be required of the valuation expert is highly dependent upon the attorney's business acumen. Since this will also effect costs, the valuation expert must address this matter early with the attorney, while not undermining the attorney's relationship with the client. Many assignments will have financial limitations. Choosing assignments wisely is an important consideration for experts. Ultimately, it is your reputation that is on the line and you do not want to look foolish or unprepared when examined. Your reputation will spread very quickly and you want that to be untarnished.

Preparation And the Interview Process

Naturally, different approaches are required for situations where you have never before worked with the attorney who is allowing you to participate in the beauty contest at the initial meeting phase of the

process than those cases where you has a history with the attorney. Ask to meet with the attorney and client. However, before setting any meeting, you must first determine if any conflict exists which would or should prevent you from taking the case. Do your conflicts check before proceeding further. If you are the accountant for the business and intend to remain in place after the divorce, pass on the valuation assignment. You are far too vulnerable to claims of bias and manipulation to truly help your client. It is even more difficult ethically if you have prepared joint returns for the husband and wife in the past.

You want to assess the type of people with whom you will be working. Is this client honest and willing to provide the information and access you will need to complete your report in a timely manner? Does this spouse of the business owner know much about the business' industry, key customers and key employees? These are just a few of the important questions to which you want answers. Bring copies of your current Curriculum Vitae for everyone at the meeting and extras for various files. Firm brochures are also helpful and allow you to cross-sell available services not being considered in this particular assignment. This also adds an aura of professionalism to your presentation for future considerations. Also bring a list of references so that you make it easy for new prospects to obtain information on your past performances. Having a list of publications to which you have contributed, and copies of shorter articles, written by you, on what you anticipate to be topics related to the instant matter is very helpful. If you do not have such writings under your belt, provide a list of source materials to which you and other experts in your field refer. Make certain that your report is not at variance with the principles set forth in your writings or those of the highly respected national authors on the subject of valuation.

If you know nothing about the business, research it BEFORE you come to the interview and bring that information to the meeting with the client and attorney. Use the interview to broaden your knowledge of the particular business at issue and describe what experience you have related to this industry. If this is a specialized business with which you have little familiarity and for which there are very specialized appraisers and methods of valuation, tell this up front to the lawyer and provide names and contact information. You are preparing for a lengthy working relationship and demonstrating your cooperation, honesty and helpfulness, and this will enhance your long-term prospects with the referral course.

Find out who is on the other side. Over time, you will gather information about a particular attorney's or expert's views on issues in dispute. Armed with this information, you can assist the attorney and bolster your report to account for what you expect to receive from the other side. You may have reports that the other expert has prepared on this subject, which is helpful as a reference and source of cross-examination.[1]

A good presentation will include an itemization of documents you will want to view and have copied for your files. Most such lists are fairly standard; however, given the advance ability to ascertain information about the company, you can easily tailor this list with specifics. This is a very impressive addition to your presentation. A standardized list is attached as an exhibit to this paper.

The ability to articulate technical terms is a must have ability for valuation experts. Can you simplify complex concepts so that they are understandable by the layperson? Few judges have accounting backgrounds or valuation training. The expert will repeat the education process with the less financially sophisticated attorney again, at deposition and then again at the deposition, followed, if required, by a new educational process with the judge at trial. This time, however, the judge is not likely to ask questions or seek repeat explanations until such time as everything is understood. The expert's job is to accomplish this through the use of simple, declarative sentences; reasoned and understandable explanations; use of demonstrative evidence that is in large enough print to be read by everyone and the use of analogies that relate to everyday life to clarify the most difficult points. However, one must be very wary about such comparisons as some are easily twisted in ways that can be more harmful than helpful. If you are able to demonstrate your abilities to do all of this at the initial interview, you are likely to be able to do this for the judge.

Ministerial Beginnings

The expert must have a clear contract with the client (or the attorney, if the attorney is hiring you directly). Minimally, the contract should specify the following:

- retainer amount;
- hourly charges for each layer of individual working on the file;
- the entity (entities) to be valued;
- other experts required (i.e.: real estate appraiser; equipment appraiser; compensation expert, etc.);
- what specific services are to be performed (i.e.: normalization of earnings; drafting a report; litigation support services, etc.);
- deposition fees, when they must be paid and preparation time charges;

- trial time fees, when they must be paid, and preparation time charges;
- expense reimbursement for travel, copies, binding, research and the like;
- who the "client" is;
- time frame for report due date and expected trial dates;
- when and how documents will be supplied;
- how access to key management and employees will be obtained;
- whether or not a meeting prior to writing up the report is desired;
- what the law of the case is as it has been described to you;
- what the valuation date is in the case at hand;
- what the standard of value is in the case at hand;
- anything else deemed relevant.

Remember that your time sheets can be examined in those states where discovery procedures will allow subpoenas for such items. These can provide a great deal of fodder for cross-examination. Your file will also be subject to inspection. Maintaining notes on conversations can also provide the opposing side with too much information. Separate strategic commentary from a lawyer's musings from the facts of the case when note taking. Keep notes on facts only. Remember that if it is important enough to go in your report, it was important enough to make a note. Be especially careful to include in the report those items in your notes, which may be damaging. If you fail to do so, you can be charged with advocacy and may face censure from your credentialing body.

Consider what sourcing information will best serve the valuation of this particular business. Mergerstat has a fine reputation; however, the validity of its ratios is unlikely to be considered valid in a small, closely held entity with an annual EBITDA of $5,000,000 as opposed to the business with $50,000,000 to $100,000,000. See if Pratt's Stats or other indices are a better fit for this company.

Some people want to review your report. This can jeopardize your aura of credibility substantially. Discuss how this issue is to be pursued at the initial meeting so you know what is expected from you. If the attorney does not bring up the subject of a meeting for preliminary indications prior to writing the report, you should do so. If your report will not be helpful to the side that has selected you, they may ask you not to prepare the report in order to cut their financial losses. Another issue about report writing that should be addressed is whether or not your client wants to you retain draft reports. Given the use of computers, papers, reports, letters etc. are drafted and rewritten until finalized. This is a double edged sword: will you be believed if you say that your drafts were not saved but merely showed changes to complete thoughts, correct typos and clear up grammatical errors? If so, perhaps it would be better to save all drafts to demonstrate the truth of your statement. However, unsaved drafts, along with meetings with the client during the preparation of the report can be devastating to your credibility. Lawyers are getting more and more computer sophisticated and when the stakes are worth it, can require mirroring of your hard drives to retrieve various drafts of the report. Ask how your client wants you to handle this issue. If you are in larger firm, your firm may have a policy on document retention, which you do not want to violate.

Role In The Process

What will be your role in this engagement? Certainly, the presentation and appearance must be that of independence and even-handedness; however, the mere fact of being hired and paid by one side in a case already undermines that air of fairness. While the various credentialing bodies mandate that the appraiser not become an advocate, as a forensic expert, you must still tread that very thin line between supporting your valuation report and crossing over into full-blown advocacy. The Uniform Standard of Professional Appraisal Practice Ethics Provisions mandate you ". . . perform assignments with impartiality, objectivity and independence and without accommodation of personal interests." The American Society of Appraisers defines "advocacy" as an act of:

> Suppression or Minimization of facts, data or opinions which ". . . might militate against the accomplishment of his client's objective" or, the Addition of irrelevant data; unwarranted favorable opinions or places an improper emphasis on any relevant facts to aid the client in accomplishing his objective.

Thus, it is very important to report both the favorable and unfavorable factors you considered in reaching your conclusion. There is no "perfect" case without any "bad" facts. It is the act of hiding or dismissing facts, which leads to trouble, or, conversely, placing undue emphasis on facts for the sole purpose of accomplishing the client's goals is also unwarranted.

Today, litigation support efforts are often demanded and/or required by the hiring attorney or client in addition to the work provided in preparing the valuation report. Experts are called upon to assist in the analysis of the opposing expert's report; clarifying the factors that cause the disputes between the opinions; helping prepare the attorney's questions for both depo-

sition and trial and continuing assistance during trial. Lines can easily become blurred between litigation support and "advocacy". Clarity in addressing all issues, both positive and negative in a balanced fashion will assist in credibility. Some experts and some lawyers believe that someone other than the report-providing expert should provide the litigation support. This is possible only in cases where money is available for an additional lawyer. Even with this addition, the testifying expert needs to understand how the opponent is positioning that view of the value and be able to explain what is appropriate or inappropriate in that posited position.

From the start of your engagement, you must be able to assess the strengths and weaknesses of the business to assist the attorney in preparing the overall strategy of the case. Is this a one-man show with little managerial support such that this investment risk factor must be emphasized? Is the industry past its apex and on the decline? Is the industry highly volatile? Is this business traditionally valued under a specialized formula or methodology when sold? The ability to recognize and direct attention early on to key issues in this business is a key to your future success as a valuator.

Seeing strengths and weaknesses is the first step. How the attorney and client react to your insight will help you determine if you want the assignment. If the reaction is to provide you with other reasoned and well-founded factors countering your intuitions, then these are people for whom you want to work. If you are met with derision or strong opposition founded in emotion rather than reason, consider whether or not it is possible to work successfully with these clients. If you are being pushed for a figure from the beginning, it is unlikely that you can ever satisfy these people. There is nothing wrong with walking away politely from an engagement. When you look back on your historical involvement with various engagements, you will admit to yourself that you could see the seeds of discontent planted right back at the initial phase of your involvement.

Client Management

Client management will be substantially different when representing the spouse rather than the business owner. The valuation expert walks a delicate line: how much information should be shared; how much direct contact is warranted with the working owner; how much does or should the spouse be kept in the loop and by whom, which will vary with the spouse's information and many other items are all matters you must know from the beginning. Get your marching orders at the start and stay true to your own ethics and principals as well as the procedures and methodology developed at the earliest meetings.

Documents and Information Needed

- **Financial Statements**

  1. Annual financial statements (balance sheets, income statements of changes in financial position, and statements of stockholders' equity or partners' capital accounts) for the last five fiscal years.

  2. Latest available interim statements and interim statements for the comparable period for the prior year.

- **Federal income tax returns for the last five years; state income tax returns, if applicable.**

- **List of subsidiaries and/or financial interests ino their companies in which the subject company has an ownership interest, and financial statements for these entities**

- **Copies of any available forecasts or projections**

- **Other financial data**

  1. General ledger

  2. Journal entries

  3. Aged accounts receivable

  4. Aged accounts payable list

  5. Check register

  6. List of cash accounts and any significant cash investments.

  7. Equipment list and depreciation schedule

  8. List of prepaid expenses

  9. List of items comprising inventory (description of quantity and cost), and information on inventory accounting policies.

  10. List of any items comprising significant other asset balances.

  11. List of notes payable and other interest-bearing debt.

  12. List of any items comprising significant other liability balances.

  13. Compensation schedule for owners, including all benefits and personal expenses.

  14. Schedule of insurance in force (key-person life, property and casualty, liability).

- **Other Operating Data**

  1. List of stockholders, or partners, with number of shares owned by each or percentage or each partner's interest in earnings and capital.

  2. Detail of any transactions with related parties

  3. Organization chart

- **Legal Documents**

  1. Copies of any significant leases and loans, including notes receivable and notes payable.

  2. Copies of any other existing contacts (employment agreements, covenants not to compete, supplier and franchise agreements, customer agreements, royalty agreements, equipment lease or rental contracts, loan agreements, labor contracts, employee benefit plans, etc.).

  3. If a corporation, articles of incorporation, by-laws and any amendments to either.

  4. If a partnership, articles or partnership, with any amendments.

  5. Copies of stockholder or partnership agreements, including any stock option agreements.

  6. Minutes of board of directors meetings.

  7. Copies of buy-sell agreements and/or written offers to purchase or sell company stock.

  8. Details of any litigation, including pending lawsuits.

  9. Details of any employee benefit plans.

  10. Copies of any reports issued by government agencies such as EPA, OSHA, IRS and EEOC.

- **Other Information**

  1. Brief history, including years in business and details or any changes in ownership and/or bona fide offers received.

  2. Brief description of business, including position relative to competition and any factors that make the business unique.

  3. Marketing literature (including, for example, catalogs, brochures and advertisements).

  4. List of locations where company operates, with size and whether owned or leased.

  5. List of states in which licensed to do business.

  6. If customer or supplier base concentrated, list of major accounts, with annual dollar volume for each.

  7. Completed contract summaries for 10 largest customers.

  8. List of competetors, with location, relative size and any other relevant factors.

  9. Resumes of key personnel, with age, position, compensation, length of service, education and prior experience.

  10. Personnel profile - Number of employees by functional groupings (e.g., production, sales, engineering, R&D, personnel and accounting, customer service, field support, etc.).

  11. Trade association to which company belongs or would be eligible for membership.

  12. Relevant trade or government publications.

  13. Any existing indicators of asset values, including latest property tax assessments and any appraisals that have been completed.

  14. List of patents, copyrights, trademarks, and other intangible assets.

  15. Any contingent or off-balance-sheet asset or liabilities (pending lawsuits, compliance requirements, warranty or other product liability, etc.).

  16. Details of transactions in the company's stock during the last five years.

Endnotes

1. It behooves the expert to retain copies of reports made by the expert and the opposing expert, organized by topic and the attorneys involved. In litigation, you may be called upon to identify the occasions you have worked for and against the attorneys in the case. Being able to access past reports allows your side to demonstrate your consistency on an issue or allows you to prepare for a very credible cross examination in the event you are not consistent. However, you can prepare in advance and explain why different results occurred.

Case Law Update:
Recent Georgia Decisions

By Victor P. Valmus
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Amended Pleadings

Edenfield and Cox, P.C. v. Mack,
A07A0146 (Dec. 8, 2006)

In May 2001, the Edenfield law firm began assisting Victor McLemore, Esq. in representing Mack, who was also an attorney, in Mack's divorce action. Several months afterward, a dispute arose regarding the amount of legal fees Mack owed to the Edenfield firm as well tardiness of the payment. At Mack's request, the Edenfield firm withdrew from representing him and McLemore finalized Mack's divorce settlement agreement. In July 2004, the parties were unable to resolve the legal dispute and the Edenfield firm filed a complaint on open account against Mack. Mack, acting pro se, prepared an Answer and a Counterclaim. Because of his traveling, Mack requested McLemore to sign his name on the pleadings and handle the details of the filings.

Shortly after, Edenfield filed a motion to strike Mack's answer on the grounds that it had not been verified and had not plead a specific amount. Soon after, Mack filed an amended Answer and Counterclaim restating the allegations and denials in the initial Answer and Counterclaim. The Amended Answer was signed by him and included a verification as well as the denial of any money due. Edenfield filed a second motion to strike because the amended answer failed to plea a specific amount. Mack then filed a second amended answer and counterclaim, which specifically addressed the claim that there was no amount due. Several months later, the Edenfield firm learned that McLemore had signed Mack's name on the original answer, which resulted in a third motion to strike his answer and therefore entry of a default judgment. The Edenfield firm argued that because Mack did not purposely sign his original answer, the pleadings violated O.C.G.A. §9-11-11(a) which states, in pertinent part, "that a party who is not represented by an attorney, shall sign his pleadings and state his address." Therefore, Mack's amended answers were null and he was in irretrievable default. The trial court denies all of Edenfield's motions. The Court of Appeals affirms.

O.C.G.A. §9-11-15(a) provides, in pertinent part, "that a party may amend his pleadings as a matter of course or without leave of court at any time before the entry of a pretrial order." The court is to liberally construe in favor of an allowance of amendments, particularly when the party opposing the amendment is not prejudiced thereby. Here, Mack's amended answers were filed prior to the entry of any pretrial order, and the Edenfield firm has not shown that the timing of such answers prejudiced this case. Therefore, Mack's amended answers personally signed by him cure all alleged defects arising from a failure to personally sign the original answer and counterclaim.

Contempt/Counterclaim

Seeley v. Seeley,
A06A0843 (Nov. 15, 2006)

In October 2003, a consent final judgment and decree of divorce was entered. The decree states that the parties shall share joint legal and physical custody of the minor child. The decree did not provide for child support or for primary physical custodian, but set forth co-parenting.

However, the decree does allow the mother to have final decision-making authority. Since the divorce, the mother had moved to Gwinnett County, and the father remained a resident of DeKalb County. In May 2004, the father filed the instant action for modification for physical custody and visitation in the Superior Court of Gwinnett County. The mother had moved to Gwinnett County, and the father remained a resident of DeKalb County since the divorce. In June 2004, the mother filed an answer and counterclaim that she contended that physical custody was not equal in that the child spent most of the time with her and the mother sought primary physical custody.

Trial was set for Feb. 23, 2005, and on the morning of trial, the father made an oral motion to dismiss the mother's counterclaim. The father argued that the mother's claim for custody and support had to be brought in a separate action and not as a counterclaim and was required to be brought in the father's county of residence pursuant to O.C.G.A. §19-9-23. The court heard argument, reserved ruling and proceeded with the case. The court revisited the father's motion during trial and denied it. The court concluded that O.C.G.A. §19-9-23 did not bar the mother's counterclaim and it should be allowed when in cases like this, the parties are essentially seeking the same relief. The trial court ruled and placed the primary custody with the mother. The father appealed and the Supreme Court reverses and remands the case to the trial court for a hearing on the father's complaint only.

O.C.G.A. §19-9-23, provides in pertinent part, that "a complaint by a legal custodian seeking a change of legal custody or visitation rights shall be brought as a separate action in compliance with Article IV, Section 2, Paragraph 6 of the Constitution of this state; (c) no complaint specified in subsection ...(b) of this Code section shall be made: (1) as a counterclaim or in any other manner to response to a petition for writ of habeas corpus seeking to enforce a child custody order or (2) in response to any other action or motion seeking to enforce a child custody order." The Courts have repeatedly held that this statute precludes a counterclaim seeking a change of custody. Every complaint seeking to obtain a change of custody of a child shall be brought as a separate action. The mother argues that the Court should not apply O.C.G.A. §19-9-23 because she only sought the change of physical custody and not legal custody, but Section 19-9-23(b) specially provides that "a complaint seeking a change of legal custody, or visitation rights shall be brought as a separate action." It is clear that those counterclaims for primary physical custody sought to change the father's ability to visit with his child.

The mother also argues, on appeal, that the father waived his rights under O.C.G.A. §19-9-23 by moving to dismiss her counterclaim orally instead of in writing, but mother's argument is barred because she failed to raise it at trial

Contempt/Modification

Cason v. Cason, S06A1442 (Nov. 20, 2006)

A final judgment and decree of divorce was granted to the parties in 1995. Through 2004, the husband was a chicken farmer and shareholder member in the Gold Kist Cooperative. As part of his membership in the cooperative, the husband was allocated a portion of the profits earned for each year of his membership. The final decree incorporated the settlement agreement and provided, in pertinent part, that the equity in the marital home amounted to $125,000 and that the wife's share was $62,500, but the wife would relinquish her equity share and allow the husband to continue to reside there. In consideration thereof, the wife would receive the entire Gold Kist patron dividends payment from 1987 through 1993. Historically, patronage equity credits listed in a member's patronage account had been redeemed by Gold Kist and paid in cash, but such payments were made approximately 15 to 20 years in the future. Thus, the parties contemplated that 1987 patronage equity in the account held in the husband's name to be paid by Gold Kist in 2007. The husband expected distribution for those years amount to $150,027.52. The husband was to receive any Gold Kist equity distributions made beyond 1993.

In 2004, Gold Kist converted from a cooperative to a "for profit" corporation and the husband's equity position was converted to cash and common stock. The wife requested the husband deliver to her cash and common stock for the years 1987 to 1993 in lieu of her interest in the patronage equity account for those years. The husband refused and the wife filed contempt. The trial court did not find the husband in willful contempt but ordered the husband to deliver the cash in the Gold Kist stock in lieu of her interest in the patron equity account for the years in question. The Supreme Court affirms the ruling but remands the award of attorney's fees for an explanation of the statutory basis.

The husband argues on appeal that the trial court improperly modified the final decree by awarding the wife stock and cash where the decree provides for a payment of Gold Kist patron dividends. The court may not modify the previous decree in a contempt order, however a court may always interpret and clarify its own orders. The determination of whether an order is clarified or modified is based on whether the clarification is reasonable or whether it is so contrary to the apparent intention of the original order as to amount to a modification. Here, the trial court is authorized to

trade the value of the wife's interest in equity accounts for the years 1987 through 1993 to the stock and cash, which the husband received in lieu when Gold Kist converted to a publicly held corporation in 2004. The trial court's determination was a reasonable clarification because it was consistent with the intent and the spirit of the final decree. Otherwise, it would leave the wife with an illusory or meaningless asset.

Contempt/Statute of Limitation/Dormancy

Corvin v Debter, S06A2039 (Jan. 8, 2007)

The parties were divorced in 1994. In relevant part of the final decree, the wife retained possession of the marital residence, but upon her remarriage, or entering into a meretricious relationship or the youngest child attaining the age of 18 years of age, whichever occurs first, she is to redeem the husband's equity in said house which is set by the court at $22,000. Until such time as the wife redeems said equity, as set forth herein, the husband shall retain his ownership interest in said property. The wife remarried in 1996, but did not pay the husband the $22,000. In 2004, the two parties filed cross motions for contempt. The husband alleged the wife was in contempt because she refused to pay the $22,000 even though she had been remarried for several years and the youngest child was now 19 years of age. The wife filed a response in which she plead estoppel, illegality and waiver as affirmative defenses to her failure to comply with the provisions of the divorce decree. After a hearing on the motions, the court ordered the wife to sell the house and pay the husband $22,000 from the proceeds. The wife filed a motion for new trial and motion to set aside asserting the husband could not recover because the judgment became dormant pursuant to O.C.G.A. §9-12-60, and the husband had not attempted to revive it. The wife appeals on the sole contention that the trial court erred because her obligation to pay the husband $22,000 was dormant and unenforceable pursuant to O.C.G.A. §9-12-60. The Supreme Court affirms.

In pertinent part, O.C.G.A. §9-12-60 states "a judgment shall become dormant and shall not be enforceable within seven years shall lapse after the rendition of the judgment before execution is issued thereon and is entered on the general execution docket of the county in which the judgment was rendered." The statute of limitations begins to run from the time when the judgment could be first enforced. Because dormancy under O.C.G.A. §9-12-60 constitutes a statute of limitations, the wife has a burden to raise that as an affirmative defense in a timely manner. In the wife's answer to the husband's motion for contempt, the wife did not raise dormancy as a defense. The wife only pleads dormancy after the trial court found she was in contempt, and then she included it when she filed a post-judgment motion for new trial to set aside. Therefore, she raised no affirmative defense based upon the statute of limitations/dormancy and that defense is therefore waived.

Equitable Division of Property/Closely Held Corporation

Barton v. Barton, S06F2159, S0X2160 (Jan. 8, 2007)

The parties were married for 29 years when the wife sued the husband for divorce and the matter was referred to an arbitrator who divided the marital assets, but did not award alimony. The husband owned one-half of a closely held corporation, and the stock was subject to a buy sell provision in the stockholder agreement which provides, in pertinent part, that "in the event of the husband's death, disability, bankruptcy or other specific triggering event, the other stockholder has a right to purchase the husband's stock at a price to be determined by a formula." Using the formula, the stock would have been fixed at $342,200. However, the arbitrator placed a fair market value of the stock at $508,000 and the division of the marital property was based on that evaluation. The arbitration award was adopted by the Superior Court. The husband appealed sighting error to division of marital property and the wife cross-appeals asserting the court erred in failing to award her alimony. The Supreme Court affirms.

This is a case of first impression. The Supreme Court recognizes that in a minority of jurisdictions in divorce cases, the non-shareholding spouse should be bound by the shareholder spouse's evaluation agreement. However, the majority of courts hold that the evaluation established a buy sell agreement of a closely held corporation, not signed by the non-shareholder spouse, is not binding on the non-shareholder spouse, but is considered along with other factors of value and

interest of the shareholder's spouse. The reason being is that in a closely held corporation, the buy sell evaluation can be manipulated and may not reflect the true market value. In view of the ruling above, upholding the division of marital property, the wife expressly withdrew her cross-appeal.

Modification/Child Support Arrearage

Facey v. Facey, S06A0693, S0X0694 (Nov. 27, 2006)

The parties were divorced in 2000, and there were three minor children born of issue of the marriage. A final judgment and Decree of Divorce awarded the parties joint legal custody of three children with the primary physical custody going to the mother. The father was to pay child support set at $1,197.92 per month for three children based on 25 percent of his annual income of $57,500. Future payments were to be made by calculating 25 percent of his gross income. The father was a self-employed photographer. In April 2001, the mother filed a petition to hold the father in contempt for failing to provide required income documentation and for unilaterally reducing his child support payments without seeking a modification of the decree. In September 2002, the father filed a petition for a change of primary physical custody from the mother to him and also sought that she be ordered to pay child support asserting a change of circumstance that materially affected the welfare of the children. Both actions were consolidated in December 2002, and a final hearing was held in March 2003, and a single order was issued. The trial court modified the divorce decree where the new child support was $612.50 as a fixed amount and the yearly adjustment was no longer applicable, and calculated the child support arrearage on 25 percent of husband's monthly gross income each month. Both parties appealed the ruling. The Supreme Court affirms.

On appeal, both parties objected to the taking of the final hearing by taking most testimony only by deposition and restricting the amount of time that each party could testify. However, neither party objected to the procedure at trial and therefore any errors were waived in this regard. The father also contends that the trial court erred by modifying child support in the contempt action without either party filing a separate petition for modification of child support. However, the father plead for a primary change of physical custody with corresponding change of child support. Therefore, the father's petition prayed for a modification of the decree as to child support and also prayed for a change of custody, which would meet the requirements of a modification pursuant to O.C.G.A. §19-6-19.

The mother contends the divorce decree's language providing for an automatic annual recalculation of the father's child support obligation either was invalid or should be considered a mere surplusage and should not have been used to compute the father's arrearages. The mother contends that the Court should have computed the arrearages based upon the monthly amount of $1,197.92 set forth in the decree without any recalculation for income changes in later years. The Mother did not attempt to appeal from the decree or set aside the language from the 2000 divorce decree. Therefore, the trial court was correct in recalculating the amount of child support to determine the arrearage for each month since the issuance of the decree.

Modification/Jurisdiction

Bailey v. Bailey, A07A0610 (Jan. 31, 2007)

In February 2004, the father and mother were divorced in Fulton County and custody of their only child was awarded to the father. The mother later moved her residence to Douglas County. In March 2005, the father filed a complaint in Douglas County to modify the mother's visitation rights. Before answering the complaint, the mother filed a petition in Fulton County, where the father and child still resided, alleging a material change in circumstances and seeking a change of custody to her. The Fulton County Court, *sua sponte*, dismissed the action stating that the mother's request could be better heard in Douglas County where the custody arrangements were already being litigated by the father. The mother did not appeal the order. The mother then filed an answer and counterclaim in the father's Douglas County action. In her counterclaim, she sought to have custody of the child changed to her. After the trial commenced, the father moved the Douglas Court to dismiss or in the alternative, transfer the mother's counterclaim to Fulton County. The Douglas Court did not grant this motion to dismiss or transfer the counterclaim under O.C.G.A. §19-9-23, but instead transferred the entire case including the father's claim, to Fulton County under the reasoning that Fulton County had exclusive continuing jurisdiction over the question of custody. The Fulton County Court assigned the transfer case a new civil action file number.

After the case was transferred to Fulton County, the father moved the Fulton County Court to dismiss the mother's counterclaim on the grounds that under O.C.G.A. §19-9-23, she could not assert this as a counterclaim but had to file a separate action in Fulton County. Fulton County Court denied the motion citing the father had waived the issue by moving to dismiss in the Douglas Court and in the alternative, to transfer the counterclaim to Fulton County. Following the trial,

the Fulton County Court granted the mother's counterclaim and awarded custody of the child to the mother. The Court of Appeals reverses.

O.C.G.A. §19-9-23(a) provides that after a court has determined who is to be the legal custodian of a child, any complaint brought by the non-custodial parent to obtain a change of legal custody of the child shall be brought as a separate action in the county of residence of the legal custodian and that no such complaint shall be made as a counterclaim or any manner as a response to any writ, motion or action seeking to enforce a child custody order. Therefore, a counterclaim seeking a change of custody in an action brought by the custodial parent in the county of the non-custodial parent's residence is not proper because; (1) is not a separate action and (2) it is not brought in the county of the custodial parent's residence.

The mother also argued that the father waived the issue failing to raise the matter earlier and by moving the Douglas Court in the alternative transferred the mother's Counterclaim to Fulton County. It is true that the parties may waive the provisions of O.C.G.A. §19-9-23 by its actions or words. However, the father did not do so here. Although he did not raise the matter as a defense in his pleadings, such was not required since he filed no response to the mother's counterclaim, which does not require an answer and automatically stands denied. Therefore, the father was permitted to raise the matter, as he did, in a written motion just before trial.

Mother finally argued that since she had initially tried to assert a change of custody claim as a separate action in Fulton County but was unsuccessful when the Fulton County Court, sua sponte, dismissed the action, she was properly allowed to pursue it as a counterclaim in the Douglas County action, especially since the entire action ended up in Fulton County anyway. However, the mother failed to appeal the Fulton County order dismissing her action, and just because the Court was mistaken in dismissing the mother's original Fulton County action, it did not excuse the mother from appealing that ruling nor authorize the mother to pursue the action as a counterclaim.

Modification/Military Service/UCCJEA

Jones v. Van Horn, A06A2467, A07A0057 (Dec. 29, 2006)

The parties were divorced in Texas in 2001. The husband was awarded physical custody of their daughter and the wife was awarded physical custody of the son. In June 2005, the mother filed a modification petition in Dade County, Georgia alleging that she had resided there with her daughter for more than six months and was requesting an order changing physical custody of the daughter from the father to the mother. The mother alleges the custody of the daughter should be changed because the father is presently in the military service and scheduled to be deployed away from his present home for at least the next several months. The Texas divorce decree contained a provision that said if Jones was deployed over seas to a location where the daughter was not allowed to accompany him, then the daughter would reside with the mother until Jones returned to the United States.

It is undisputed that on June 22, 2005, Jones commenced the one-year Army deployment to Korea, which his new wife and daughter could have accompanied him, but the father elected for them to stay in the United States. The father argues that the change of custody provision was only triggered if he was not allowed to bring his child to accompany him and not when he elected not to bring her. A final hearing was held on Dec. 22, 2005, where no transcript was included on the appeal. The trial court awarded permanent custody of the child to the mother. The Court of Appeals reverses and remands.

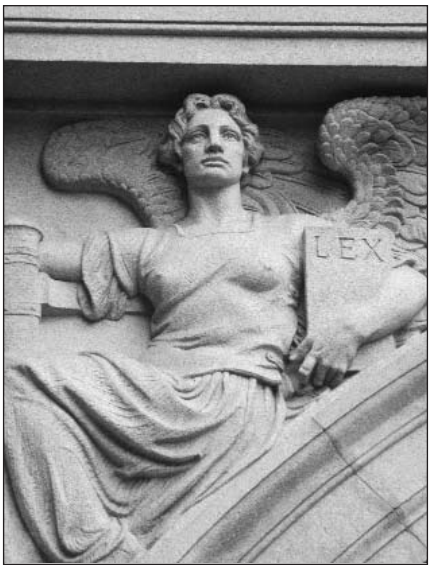
The Court should only grant a change of custody only if it finds there has been a material change of conditions affecting the welfare of the child. At the time of the final order, the father was six months into a one-year deployment to Korea. The court order changed custody based on a purported change of condition that had not occurred, and the court made no findings that any change occurred that substantially affected the welfare and best interests of the child.

The father contends the Court also erred by not granting him a stay of the final hearing under the Service and Civil Relief Act. However, the father did not move pursuant to the act for a continuance of the final hearing. An application for stay under the act must include a letter or other communication setting forth facts stating the manner in which the current military duty requirements materially affect the serviceman's ability to appear, stating the date when the serviceman will be available to appear, a letter or other communications from the serviceman's commanding officer stating that the serviceman's current military duty prevents appearance and that military leave is not authorized for the serviceman at the time of the letter. Father also contends that the trial court should have stayed proceedings because the mother did not contain all of the information required under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA). However, there was nothing in the record that shows that the Father moved for a continuance because the Petition did not contain all of the information required by the UCCJEA. Therefore, the case was remanded to the trial court for the application of the law to the facts and in a manner consistent with this opinion.

Pleadings/Laches/Implied Consent

Howington v. Howington, **(S06F1408) (Nov. 6, 2006)**

The parties were married in 1989, and they separated six years later. In May 1997, the wife filed an action for divorce in DeKalb County where she lived. The wife served the complaint of divorce upon the husband's son who lived in Fulton County, although at the time the action was filed, the husband was living in North Carolina. The husband did not answer the complaint and did not appear at the scheduled November 1997 hearing. The court issued the divorce and awarded wife one-half of the husband's civil service pension for life. An amended qualified domestic relations order (QDRO) was issued on Feb. 17, 1998. The husband filed a motion to set side the divorce decree in June 2004, stating he was not properly served. In the wife's response, she argued that the motion was barred by laches because the husband knew the wife filed the complaint, received a copy of the complaint, and discussed the terms of the divorce with her. The trial court granted the motion to set aside on Dec. 15, 2004 and found the husband was not formally served with the complaint and that he did not waive service of process.



An amended order setting aside the final decree of divorce was entered in October 2005 and to further set aside any such order that distributed any assets between the parties including the amended QDRO dated Feb. 17, 1998. Despite the entry of the order, the wife continued to receive one-half of the husband's pension benefits. A second divorce proceeding was held with both parties represented by counsel. The husband did not include in his counterclaim a prayer for reimbursement of the pension benefits paid after the Dec. 15, 2004 order. A new divorce decree was entered ordering the wife, inter alia, to reimburse the husband in an amount equal to the pension benefits she received after Dec. 15, 2004 order setting aside the first decree. The wife appealed and the Supreme Court affirms.

The wife contends the husband was barred by laches by asserting his claim to set aside the original divorce decree. Laches can be a defense to an action attacking the validity of a divorce decree. However, to prevail on a claim of laches, a party must prove some harm or prejudice caused by the delay. The passage of time could not be enough. The trial court made no findings regarding the defense of laches and assuming all the facts alleged by the wife are true, there is no allegation or evidence in the record demonstrating that she was harmed by the delay. The wife also argues that the trial court erred by granting relief beyond that sought in the Husband's pleading. Even though the husband did not include reimbursement as a counterclaim, the transcript of the final hearing reveals that the wife permitted the issues to be litigated without objection. O.C.G.A. §9-11-15(b) allows amendments to conform to the evidence. Issues not raised by the pleadings that are tried by express or implied consent of the parties, shall be treated in all respects as if they had been raised in the pleadings. Therefore, the husband's claim for reimbursement of the pension benefits was litigated with the implied consent of the parties and was not foreclosed because of its absence from the pleadings.

Qualified Domestic Relations Order

Sweat v. Sweat, **S06F2079 (Jan. 22, 2007)**

After a jury trial, the wife was awarded 43 percent of the husband's retirement account. The husband's attorney did not argue to the jury with regards to division of the pension plan by the form of a qualified domestic relations order (QDRO). The jury did not detail how the division of the pension plan was to be accomplished for the purpose of tax treatment. It appears that simply dividing the pension plan as outlined in the jury's verdict, and not using a QDRO, would result in negative tax consequences for the husband. Even though there were post verdict discussions with regards to the possibility of a QDRO, there was no agreement or stipulation by the parties after the jury's verdict. The husband filed a motion to set aside judgment, motion for new trial and a motion to partially amend or in the alternative, reconsider decree to correct omission of a QDRO and as to retirement plan and alimony issues in regard to the decree. The Supreme Court affirms.

Since the jury did not designate the use of a QDRO and there were no stipulations between the parties after the jury's verdict, the Superior Court was not obligated to provide for the use of a QDRO in the parties' divorce decree.

Recusal

Echols v. Echols, **S06F2153 (Jan. 22, 2007)**

The parties' divorce action was assigned to Judge McGarity. On April 14, 2004, the wife filed a motion to

recuse Judge McGarity based upon allegations that the judge had a long time business and personal relationship with the husband's family and that the wife had perceived bias in favor of the husband existing since the start of litigation. At the beginning of litigation, the husband told the wife the husband's family had known Judge McGarity forever, and that Judge McGarity had already decided to award custody of the child to the husband. Wife also believes that Judge McGarity had received extra judicial information from some other source with regards to refinancing the marital residence. Wife also alleges that on May 6, 2004, Judge McGarity specially set an action for trial with discovery not being completed, thus causing wife to file her recusal motion. On May 20, Judge McGarity denied the recusal motion on the ground that it was untimely filed and/or legally insufficient as a matter of law. The Supreme Court affirms.

Under Uniform Superior Court Rule 25.1, states that "a motion to recuse must be filed no later than five days after the affiant first learned of the alleged grounds for disqualification. . .unless good cause can be shown for failure to meet such a requirement." The wife's motion was based upon Judge McGarity's alleged bias against the wife due to the judge's close personal and business relationships with the husband's family and that the husband told the wife that his family had known Judge McGarity forever and would rule in his favor on custody. Wife should have filed her recusal motion within five days after her conversation with the father in 2003 with regards to the award of custody. That statement should have alerted the wife of Judge McGarity's alleged bias and she should not have waited more than a year to file the present recusal motion.

Separation Agreement/Summary Judgment

D'Errico v. D'Errico, S06F1588 (Jan. 8, 2007)

On June 22, 1996, the parties entered into a separation agreement drafted by the wife's counsel that recited that the parties intended the agreement to settle all questions regarding alimony, property and all other issues of the marriage. Among other things, the agreement provided that the husband will pay $1,100 of monthly alimony and the husband shall have the exclusive use of the marital home titled in his name, and in case of divorce, the agreement would be incorporated into the Final Decree. The agreement further provided that the terms cannot be altered except with the express written consent of the other party. On Feb. 13, 2003, the husband filed a complaint for divorce and on March 26, 2003, the wife dismissed her attorney and filed a pro se answer and counterclaim requesting an interest in the marital home as well as a share of the husband's retirement pay as alimony.

On Sept. 6, 2005, the husband filed a motion for summary judgment requesting the trial court enter a final divorce decree incorporating the settlement agreement. The wife hired new counsel and argued only that the separation agreement failed to resolve the ownership of the marital home and no argument regarding the husband's retirement benefits. The trial court granted the husband's motion for summary judgment and found there existed no genuine issue to any material fact since all the issues arising from the marital unit of the parties were resolved in the separate maintenance agreement entered into by the parties. The wife appealed and the Supreme Court affirms.

Here, the wife through her counsel, drafted a separation agreement which she voluntarily entered into settling all questions concerning the alimony, property and all other issues of the marriage, including the marital home and the husband's military and civil service retirement pay. Therefore, the wife is bound by the separation agreement.

Trust/Interested Party

Richards v. Richards, et al. S06A1269 (Nov. 20, 2006)

In 1994, the father established inter vivo trusts and named the three minor children as beneficiaries with his current wife was the trustee. In 2000, the parties divorced and as a consequence, the mother was no longer trustee. The settlement agreement provided that the father would pay $2,000 per month in child support, in part, upon the existence of the trust and the parties' anticipation that the assets maintained and the income generated by the trust are sufficient to cover any expenses of the children incurred above and beyond the child support. The trust agreement also provided, in relevant part, that the children would receive all income in annual or more frequent installments and the trustee was authorized to encroach on the principle in such amounts as the trustee may deem necessary to provide for the support and education of the children.

The father remarried and his new spouse became the trustee. His ex-wife filed suit against him and his second wife and asserted on behalf of herself and the children various claims including a breach of the trust agreement, removal of the trustee and appointment of a receiver. The trial court appointed a guardian ad litem to represent the interests of the children. The father moved for summary judgment and the mother moved for partial summary judgment. The trial court granted the father's motion and denied the wife's motion and stated that the mother was not an interested party and lacks the requisite standing to maintain an action in her individual capacity. The Supreme Court affirms.

Pursuant to O.C.G.A. §53-12-176(a)(2), "the trustee may be removed upon the application to the Superior Court by any interested person showing good cause." Pursuant to O.C.G.A. §53-12-2(4), defines interested person as "a trustee, beneficiary or any other person having interest in or claim against the trustee." Therefore, the mother is not a trustee or beneficiary of the trust, but she argues that she is an interested person because of her routine provision of funds for the support of the children. However, the right to child support does not belong to the mother it belongs to the children, and the mother is the mere trustee charged with the duty of seeing that the funds are applied solely for the benefit of the children. Here, the trust agreement neither guaranteed that the trust would contribute a specific amount toward the children's support nor provided the trust would assume the obligation to reimburse the mother or any other third party for such sums that might be contributed to their welfare. It appears that the trust has complied fully with its obligations to pay the children all income that it generates and the trustee has on occasion, exercised discretionary authority and encroached on the principle. Because the mother lacks standing as an interested person, summary judgment was also proper on mother's individual claim for appointment of a receiver. **FLR**

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Child Support

Continued from page 1

allow opportunities for reductions in the support given to a child.[8] Other more particular provisions likewise leave room for varying interpretation and thus warrant a further inquiry into potential methods of application. An examination of case law from other income-shares states provides guidance for Georgia's courts and practitioners in determining how to interpret our own state's provisions.

Deviation Dilemmas

In an effort to reduce the opportunity for unpredictable awards and to ensure that courts only allow deviation from the presumed amount for well-supported reasons, Georgia's statute, like many other income-shares states' systems, requires a court permitting deviation to justify its decision by setting forth the following findings:

1. The reason for deviation from the presumptive amount;

2. The amount that would have been required if the presumptive amount had not been rebutted;

3. Why the presumptive amount is unjust or inappropriate; and

4. Whether the best interest of the child will be served by deviation.[9]

In determining whether to apply a deviation, "primary consideration shall be given to the best interest of the child."[10] Although there are many grounds for deviation provided by the statute, this note addresses two of the grounds that have caused substantial discussion other income-shares jurisdictions: high income and parenting time.

§ 19-6-15(i)(2)(A): High Income

The Georgia Schedule of Basic Child Support Obligations provides obligation amounts to correspond with combined parental incomes ranging from $800 to $30,000 per month.[11] The statute refers to parents with combined incomes higher than $30,000 as "high income parents" and mandates that a court set the basic support obligation at the highest amount provided in the obligation table.[12] The court may then consider upward deviation "to attain an appropriate award of child support for high-income parents which is consistent with the best interest of the child."[13]

As previously discussed, the premise of the income-shares model is the belief that, as parental income rises, the percentage of income expended on the child decreases.[14] The fact that the legislature found $30,000 to be the appropriate maximum income level for the table suggests a presumption that beyond that level of combined income, the amount spent on a child remains rather static. Georgia's statute, as in every case, then allows the court to deviate from the presumptive support amount as it finds necessary. Since the statute provides separate directions to allow for deviations based on extraordinary or special expenses (the cost of extracurricular activities, for instance), the particular "high income" deviation would assumedly apply primarily when the court feels the basic financial requirements for the child are in excess of $2,236 (the support amount corresponding with a $30,000 combined parental monthly income).[15]

In a similar situation, the Maryland Court of Appeals, in *Voishan v. Palma*, discussed methods for generating a basic support amount where the parents' combined monthly income exceeded $10,000, the highest amount provided in its guideline table. The court

determined that the legislature intended for the maximum support award under the table to be a minimum awarded in cases of incomes above $10,000 and that beyond that "the trial judge should examine the needs of the child in light of the parents' resources . . . ."[16] Thus, the Maryland court judicially created directions for incomes exceeding the table that almost exactly mirror those in Georgia's statute.

The Maryland court then addressed and dismissed several proposed approaches for courts faced with combined incomes above the table amount. Specifically, the court held that trial courts should not simply extrapolate from the guidelines to determine what the support obligation would have been had the schedule extended up to the parties' particular combined monthly income.[17] The court refused to endorse such a method because of the significant restriction it would place on a trial court's discretion: "[W]e believe that the trial judge should consider the underlying policies of the guidelines and strive toward congruous results . . . ."[18] The court supported its conclusion with a statement made by the state's attorney general that:

> "[i]mplicit in this . . . is the view that at very high income levels, the percentage of income expended on children may not necessarily continue to decline or even remain constant because of the multitude of different options for income expenditure available to the affluent. The legislative judgment was that at such high income levels judicial discretion is better suited than a fixed formula to implement the guidelines' underlying principle that a child's standard of living should be altered as little as possible by the dissolution of the family."[19]

Other states' courts, however, have accepted extrapolation-based awards, where they were justified for the situation. In 2004, Division 1 of the Court of Appeals of Washington, in *Rusch v. Rusch*, determined that, contrary to prior holdings by the Division 2 appellate court, the statute did not expressly invite the court to extrapolate beyond the statutory amount:

> "Extrapolation programs do not base calculations on economic data. . . . [T]he figures provided by the extrapolation program are not based on the child's specific, articulable needs."[20]

The court explained that not only would this be contrary to the legislature's intent, because had the legislature intended courts to just continue the table past the maximum income, it would not have capped the table at $7,000.[21] Additionally, extrapolating results in an inappropriate burden-shifting:

> "Using an extrapolated amount also implies a presumption that the extrapolated amount is the correct amount. This forces the challenging party to bring forth evidence challenging that number and places the burden on the obligor to show why the extrapolated amount is not appropriate."

The court also discussed the amount of support a court must provide to justify extrapolating from the guidelines in cases of high incomes: "[C]ursory findings are not sufficient."[22] When entering the findings of fact required by the statute, a court "... must explain why additional support [above the guidelines maximum] is necessary."[23] The court suggested factors such as standard of living of each parent as well as special medical, educational, or financial needs of the children.[24] "Using an extrapolated figure without more presumes that the extrapolated amount is a right of the requesting party, regardless of need. But if the children do not have a need for child support exceeding the statutory maximum, the court cannot award child support exceeding the advisory number."[25]

The court later elaborated, in *In re Marriage of Daubert*, that specific findings must explain why the amount of support being set above the schedule maximum is both necessary and reasonable.[26] The court suggested that factors for determining reasonableness including "parents' income, resources, and standard of living."[27] The court warned that these two factors should be seriously considered, and that the mere fact that the children would benefit from the opportunities that would be provided by additional funds is not enough.[28]

Because both Maryland and Georgia's child support guidelines are based on the income-shares model and because Maryland courts and Georgia courts face similar directives when dealing with "high income parents," Georgia's courts should take into consideration the policy reasons upon which Maryland courts based their rejection of specific formulas. Georgia courts should consider using their discretion based on evidence presented by the parties regarding the basic monthly expenses made on the child.[29] Additionally, when considering specifically whether extrapolation should be utilized in setting a "high income" support amount, Georgia courts should bear in mind the general disfavor of or, at the least, digression from the method. Maryland courts have refused to endorse the method; although Washington courts are permitted to extrapolate, they must jump through hoops to show that the resulting support amount actually correlates with what is necessary and reasonable in the particular case. Georgia's courts should follow suit and focus primarily on the needs of the children and the resources of the parents.

§ 19-6-15(i)(2)(K): Parenting Time

Under Georgia's statute, a court may allow application of a deviation to a noncustodial parent's basic sup-

port obligation[30] when his presumptive amount of support is found excessive or inadequate due to extended parenting time.[31] The statute provides no further guidance as to a threshold level of increased time that must be shown before a deviation in the noncustodial parent's share of the support obligation is warranted, nor does it suggest what sort of evidence a parent seeking such deviation should present to the court.

"[T]he incentive of a reduction in child support may have the effect of promoting the involvement of both parents in the upbringing of their children, a generally desirable circumstance."[32] Although a very specific and formulaic parenting time adjustment scheme was included in House Bill 221, when the Georgia legislature passed Senate Bill 382 into law as the current statute, parenting time considerations were ultimately found better suited as a basis for deviation, which leaves it up to the courts to decide whether to stray from the presumptive support obligation in certain cases.[33] Permitting alteration based on parenting time allows a court to recognize the increased expense that may be incurred by a noncustodial parent who exercises a certain amount of extra visitation. The fact that the legislature removed such an extensive provision, which featured explicit instructions for courts based on exact numbers of extra visitation days, and decided that parenting time considerations would work better as a ceviation ground, implies that the legislature found such considerations better left to a judge's discretion based on the four-part required showing for deviations.[34] The text provides little more instruction than the general requirement that a court may deviate if it finds a presumptive support amount "unjust or inappropriate" in light of the extra visitation.[35]

Louisiana's case law provides perhaps the most insightful discussion and determinations regarding parenting time deviations. In *Guillot v. Munn*, the Louisiana Supreme Court found that the state support statute at that time did not provide guidelines for determining the amount of the deviation, but merely called for a balancing of the interests of the parties involved.[36] In holding that such a deviation is not automatically allowed, the *Guillot* court set forth a three-part showing that the party urging a deviation must make:

> 1. that he exercises shared custody or extraordinary visitation time;
>
> 2. that the extra time spent with the noncustodial parent results in a greater financial burden on that parent and in a concomitant lesser financial burden on the custodial parent, and;
>
> 3. that the simple application of the guidelines would not be in the best interest of the child or would be inequitable to the parties.[37]

Although it set no threshold amounts for finding "extraordinary" visitation exists, the *Guillot* court made it clear that such a deviation, like all deviations, should be allowed only in limited circumstances and only with a showing of the requisite proof.[38]

In *Lea v. Sanders*, the appellate court in Louisiana applied the *Guillot* factors and found that, although the father exercised 43 percent of the custody, because he had the children for very scattered periods of time, the custodial parent did not experience a significant reduction in her own expenses, and thus a deviation was not warranted.[39] The court emphasized the limited scenario that the deviation was created to remedy—a situation where each parent is expending such increased measures of time and resources that the noncustodial parent is making additional expenditures and the custodial parent, as a result of the visitation arrangement, has seen a reduction in necessary expenses on the child.[40] The *Guillot* court itself indicated that extraordinary visitation arrangements may result in greater expense on the custodial parent, whom the court must ensure will still be able to adequately provide for the children.[41]

Ohio's guidelines allow courts to consider "extending parenting time or extraordinary costs associated with parenting time" as a potential basis for a deviation from the calculated support amount.[42] In *Holt v. Holt*, the court of appeals applied an analysis very similar to that of the Louisiana courts.[43] The denial of a deviation in the noncustodial parent's obligation was upheld primarily because the increased parenting time was not so great as to warrant a deviation.[44] Additionally, however, the court found that the denial was warranted based on the custodial parent's financial situation (the noncustodial parent's income was "significantly greater" than the custodial parent's income) and also based on the age of the children being supported.[45]

In *Linam v. Linam*, the Court of Appeals of Ohio upheld a deviation in recognition of increased parenting time. The court also discussed and approved of the method of calculating the reduced obligation.[46] Each parent had the children for 50 percent of the time.[47] As a result, the magistrate court had granted a 50 percent deviation to the father's support amount, which the mother claimed was erroneous.[48] The mother claimed that the deviation should only be 22 percent, based on the idea that a standard visitation order only gives the obligor 28 percent of the time with the children, and the difference between 28 percent (the traditional amount) and 50 percent (the amount exercised by the father) is 22 percent.[49] The appellate court disagreed with the mother and approved of the lower court's 50 percent reduction, explaining that not only would the children be spending almost 25 percent more time

with the father, but they would also be spending almost 25 percent less time with her, for an approximate total of 50 percent change in the support that needed to be paid to her.[50] The court additionally warned that courts should not attempt to equalize the share of the total obligation where the parties' incomes are different, but assured that the calculations the court had approved were "not equalization of obligation" but were "merely a deviation in an amount approximating the time spent with each parent."[51]

Louisiana's three-part inquiry, which is similar to the analysis applied by many income shares states, ensures that the noncustodial parent actually deserves a reduction in the support he pays to the custodial parent, and protects against a noncustodial parent attempting to increase visitation time as a pretext for a desire to pay less money overall. As a result, a custodial parent should not be reluctant to grant increased visitation with the noncustodial parent (usually a benefit to the child) because the noncustodial parent will bear a heavy burden of showing a resulting increased cost to himself as well as decreased cost to the custodial parent before the court will offer any downward deviation. Georgia courts should consider these requirements when faced with parenting time deviation requests. Additionally, Georgia courts should consider making a clear refusal to ever set a bright-line or formulaic test for determining whether a parenting time deviation is merited, especially since it minimizes parental quibbling over visitation for the purpose of influencing the support amount. Georgia courts are given discretion in how they will apply a deviation if they find such is merited based on increased parenting time by the noncustodial parent. The Ohio appellate court's method in *Linam*, or some variation of it, should be considered, but courts should always be able to use their own discretion in how much to deviate based on the factors in the particular case at hand.

§ 19-6-15(c)(5): Settlement Agreements

"Nothing contained within this Code section shall prevent the parties from entering into an enforceable agreement contrary to the Presumptive Amount of Child Support," provided that the trial court review the agreement to ensure "adequacy" in its support amounts.[52] The text, however, provides that the court "shall reject such agreement" if the agreement does not comply with the provisions in the statute and also if it does not contain the findings of fact required by the statute when a deviation basis is applied.[53]

This provision appears to contradict itself; it grants parties the freedom to make agreements contrary to the presumptive amount, but, according to the text, such agreements must be rejected if they do not comply with the statute's provisions.

The Arizona child support guidelines explicitly state that one of the purposes for the implementation of its income-shares-based statute is "to promote settlement."[54] The only guidance its statute provides is that the court shall deviate from the guidelines amount if that amount is found unjust or inappropriate, but that the court may allow a deviation from the guidelines "based upon an agreement of the parties" if the agreement is in writing, if the parties agree they are aware of what the support amount would have been under the guidelines, and if the court shows that application of the guidelines would have been unjust or inappropriate and that the best interests of the child have been considered.[55]

The Tennessee Court of Appeals, in *Lichtenwalter v. Lichtenwalter*, addressed settlements between parties in child support cases, and began its analysis by stating that "[p]arents have deeply rooted moral responsibilities to support their minor children" which, under Tennessee law, "imposes a legal obligation on parents to support their minor children in a manner commensurate with their own means and station in life."[56] The court construed that the existence of child support guidelines creates a rebuttable presumption that child support obligations will be set using the guidelines' procedures and formulas.[57] As a result, "even when parents undertake to make their own child support arrangements, the courts have the power—and obligation—to set child support consistent with the Child Support Guidelines unless they make the required findings regarding their reasons for deviating from the guidelines."[58]

The Maryland Supreme Court, faced with a settlement agreement in *Walsh v. Walsh*, declared that "[w]hen a judge approves and incorporates an agreement of the parents into an order of support, the judge must do more than merely rubber stamp anything to which the parents agree. Judges have an obligation to assure that children do not suffer because of any disparate bargaining power of their parents."[59] The court elaborated that judges reviewing such agreements should refer to the guidelines.[60] If the agreed-upon amount contains a downward deviation from the guidelines, the order must include justification for why such a low amount was approved.[61]

Thus, since allowing parties to reach their own agreements regarding support amounts increases judicial efficiency and also since Georgia's statute expressly states that settlements are acceptable, Georgia's courts should review such agreements in a manner similar to Tennessee and Maryland courts; settlement agreements should generally be approved as long as parents can justify any decrease in the overall support amount. Although Georgia's statute does not expressly state that promoting settlements is a goal of the new

guidelines like Arizona's statute does, the step-by-step and formulaic nature of the new statute should encourage parties to plug in the applicable amounts on their own and present the agreed-upon outcome to the court. The trial judge does have an obligation to ensure that the support amounts are in the best interests of the child. Ideally, these amounts would comport almost perfectly with the guidelines. Nonetheless, if the parents have supplied sufficient explanations for any deviations and the resulting support amount is in the best interests of the child, Georgia courts, like many other income-shares states, should respect the parties' freedom to contract and approve the agreement.

§19-6-15(f)(5)(C): Theoretical Support Orders

Georgia's trial courts may, pursuant to the statute's "Adjustments to Gross Income" provision, reduce a parent's gross income for calculation purposes when that parent makes certain showings regarding the existence of an "other Qualified Child living in [his] home for whom [he] owes a legal duty to support."[62] First, the parent must present documentary evidence of the parent-child relationship he claims as a basis for reduction.[63] Upon such a showing, the court may adjust the parent's income if it finds that failure to consider this Qualified Child would result in substantial hardship to the parent and that such consideration of the Qualified Child is in the best interest of the child for whom support is being awarded.[64] If the court decides to consider the Qualified Child, the Theoretical Child Support Obligation for that child (or children) is determined based on the number of Qualified Children and the Parent's monthly gross income[65] plugged into the obligation table.[66] The obligation amount then must be multiplied by 75 percent and the resulting amount is then subtracted from the parent's monthly gross income.[67] This reduced income amount is now used for calculating the support amount for the child actually before the court. A skeptical view of this section inspires the question of when it would ever be in the best interest of the particular child before the court to allow reduction of a parent's income to provide for another child (assumedly usually a half-sibling), or at least what a court should take into consideration in making such a determination.

New Jersey allows an adjustment in the basic child support obligation (as opposed to a deduction from the parent's income) due to the existence of an "other dependent."[68] In *Schwarz v. Schwarz*, the Appellate Division laid out the guidelines for a court considering such a deduction.[69] First, the adjustment should only be used if requested by a serial-family parent and the income, if any, of the other parent of the secondary family is provided to the court.[70] If the other parent in the secondary family is voluntarily unemployed or underemployed, the court should impute income to that person in order to help determine the serial family parent's obligation to the children in the secondary family.[71] Additionally, the court declared that in these situations, three separate calculations must be prepared:

1. a theoretical support obligation for the other-dependent in the secondary family;

2. a support obligation that includes the other-dependent deduction, and;

3. a support obligation that does not include the other dependent adjustment.[72]

The manner in which Maryland courts have handled claims regarding qualified children living with a parent has evolved over the years.[73] Originally, the child support statute allowed generally for downward departure from the guideline amount of support[74] where proof of a qualified child was sufficient.[75] In *Dunlap*, the court granted a noncustodial father a reduction on the basis that he had in his household two children from a subsequent relationship, explaining that the downward departure benefited the child receiving the support payment because it ensured that "his half-siblings [would] not have to do without" any more than necessary.[76] Furthermore, the court justified such a reduction because "it must be remembered that [the guideline figures] are based on the assumption that a single child will enjoy the undiluted largess of his parents . . . . [But even in a unified family,] whenever siblings or half-siblings enter the picture, the expectation of the first child is inevitably diminished."[77]

A year later, in 2000, however, an amendment to the child support statute expressly stated that "evidence of this support obligation [to a Qualified Child], by itself, cannot rebut the presumption that the award under the guidelines is correct."[78] Four years later the Maryland Court of Appeals enforced this amendment and held that "[t]he duty to support other children in the household of either parent . . . cannot form the sole basis for rebutting the presumption that the Guidelines establish the correct amount of child support."[79]

In 2005, the Maryland Court of Special Appeals in Beck applied this requirement and rejected a trial court's alteration of a support award based solely on the finding that it was in the best interests of the marital children at issue that their half-sibling be supported in a reasonable manner.[80] The court cited the dissenting opinion in *Dunlap*, which explained that

> "the guidelines refer to multiple children in the same household, and obviously take into account the fact that there are certain economies of scale

> inherent in having more than one child in the home. For example, when a family has one child, they need a place to live, including a bedroom for the child. If the number of children in the family increases, the family may still make do in the same living space by having the children share the bedroom and bathroom. Other costs, such as utilities, are largely fixed, regardless of whether there is one child or more than one in the home. Therefore, a downward deviation might not be appropriate and should not be automatic in every case in which subsequent children are born to one of the parties."[81]

Thus, Maryland courts, and the Maryland legislature in amending the statute, show a strict standard requiring more than the mere existence of a qualified child to be shown to justify a decrease in the support given to a child. Parents with qualified children must present more than the basic claim that it is in the best interest of the children that their half-siblings be reasonably supported as well.

Georgia needs a consistent means for ensuring that the best interests of the child requirement is fulfilled. Like Maryland and New Jersey, Georgia could require strict and particular showings before granting a party a deduction. This method would give a bit of deference to the trial courts in determining if a sufficient showing has been made in any particular case.

Conclusion

Though Georgia's income-shares-based statute appears complex and impossible to parse out on the surface, a thoughtful and careful examination of it proves that not only are its provisions workable, but that Georgia's statute in fact may require less judicial interpretation than other states' versions. That Georgia joined the income-shares trend later in the game has allowed the legislature to examine the evolution of other states' statutes before enacting our own statute. This holding out will also allow Georgia's judicial branch to consider a variety of suggested approaches to certain provisions. Georgia may be able to accomplish the twin aims of predictability and consistency since it will not be forced to experiment with wholly untried approaches, but can examine the approaches of other states that comport with Georgia's own policies and values. As a result, and most importantly, courts will be able to make more efficient and confident decisions in the best interests of Georgia's children.

Endnotes

1. Franks, How to Calculate Child Support, 86 Case & Com. 3, 3 (1981) (favoring use of mathematical formulas).
2. O.C.G.A. § 19-6-15 (2004)(amended 2007).
3. See Ira Mark Ellman et al., Family Law: Cases, Text, Problems, 464-69 (4th ed. 2004).
4. Ira Mark Ellman, Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines, 2004 U. Chi. Legal F. 167, 180-81 (2004) [hereinafter Ellman, Fudging Failure].
5. *Id.*
6. Ellman et. al., supra note 7, at 463-64.
7. Family Support Act of 1988, Pub. L. No. 100-485, § 103(b)(1988)(codified as amended in scattered sections of 42 U.S.C. (2006)).
8. Law of Apr. 20, 2006, § 4, O.C.G.A. § 19-6-15(i) (Supp. 2006).
9. *Id.* § 19-6-15(i)(1)(B). This requirement is also explicated in § 19-6-15(c)(2)(E), which further elaborates that the court should explain how the presumptive award is unjust or appropriate "considering the relative ability of each Parent to provide support" and also how the best interest of the child will be served. Id.
10. Id. § 19-6-15(i)(1)(A).
11. Law of Apr. 20, 2006, § 4, O.C.G.A. § 19-6-15(o) (Supp. 2006).
12. According to the Table, at subsection (o), the minimum amount would be $2,236 per month for one child, which is the support amount that corresponds with a combined parental income of $30,000. Id. § 19-6-15(o).
13. *Id.* § 19-6-15(i)(2)(A).
14. See supra notes 47-48 and accompanying text.
15. Law of Apr. 20, 2006, § 4, O.C.G.A. § 19-6-15(i)(2)(J) (Supp. 2006).
16. *Id.* at 326.
17. *Id.* at 323.
18. *Id.* at 324.
19. Voishan, 609 A.2d at 323-26 (quoting Maryland Attorney General's amicus curiae brief).
20. 98 P.3d 1216, 1219 (Wash. Ct. App. 2004)(discussing In re Marriage of Clarke, 48 P.3d 1032 (Was. Ct. App. 2002)).
21.-22. *Id.*
23. Rusch, 98 P.3d at 1219.
24. *Id.*
25. *Id.*
26. 99 P.3d 401, 406 (Wash. Ct. App. 2004).
27. *Id.*
28. *Id* at 407.
29. *Id.*
30. It is important to note that this deviation (whether upward or downward) is applied to the noncustodial parent's share of the Basic Support Obligation and not to the total support for which both parents are responsible.
31. Law of Apr. 20, 2006, § 4, O.C.G.A. § 19-6-15(i)(2)(K) (Supp. 2006).
32. In re Marriage of Jones, 653 N.W.2d 589, 593 (Iowa 2002).

33. Georgia House Bill 221, available at www.guidelineeconomics.com/files/GA_HB221.pdf

34. Law of Apr. 20, 2006, § 4, O.C.G.A. § 19-6-15(i)(1)(A) (Supp. 2006).

35. Id. § 19-6-15(i)(1)(A).

36. Guillot, 756 So.2d at 300.

37. *Id.* at 292. These guidelines were later codified in Louisiana's child support statute at La. Rev. Stat. Ann. § 9:315.8 (2006).

38. Lea v. Sanders, 890 So. 2d 764, 769 (La. Ct. App. 2004).

39. *Id.* at 770.

40. *Id.*

41. Guillot, 756 So. 2d at 300.

42. Ohio Rev. Code Ann. § 3119.23 (West 2007).

43. No. 2002-T-0147, 2004 WL 1921974, at *1 (Ohio Ct. App. 2004).

44. *Id.*

45. *Id.* at *1-2.

46. No. 02 CO 60, 2003 WL 22997273, at *1 (Ohio Ct. App. 2003).

47. *Id.* at *3.

48. *Id.* at *6.

49.*Id.*

50. *Id.*

51. No. 02 CO 60, 2003 WL 22997273, at *7.

52. Law of Apr. 20, 2006, § 4, O.C.G.A. § 19-6-15(c)(5) (Supp. 2006) (further mandating that trial court review adequacy of medical expenses and health insurance provisions in negotiated support amounts).

53. *Id.* § 19-6-15(c)(5).

54. Ariz. Rev. Stat. Ann. § 25-320(1)(C) (2006).

55. *Id.* § 25-320(20)(B). This subsection states that "a deviation that reduces the amount of child support paid is not, by itself, contrary to the best interests of the child."

56. No. M2003-03115-COA-R3-CV, 2006 WL 236945, at *2 (Tenn. Ct. App. Aug. 21, 2006).

57. *Id.* at *3.

58. *Id.* (emphasis added).

59. 635 A.2d 1340, 1346 (Md. 1994).

60.-61. *Id.*

62. Law of Apr. 20, 2006, § 4, O.C.G.A. § 19-6-15(f)(5)(C) (Supp. 2006).

63. *Id.* § 19-6-15(f)(5)(C).

64. *Id.* § 19-6-15(f)(5)(C).

65. *Id.* § 19-6-15(f)(5)(C). The subsection text further mandates that "no other amounts shall be subtracted from the parent's gross monthly income when calculating a Theoretical Child Support Order..."

66. *Id.* § 19-6-15(f)(5)(C).

67. Law of Apr. 20, 2006, § 4, O.C.G.A. § 19-6015(f)(5)(C) (Supp. 2006).

68. Pressler, Current N.J. Court Rules, comment on Appendix IX-A (2000).

69. 745 A.2d 592, 597 (N.J. Super. Ct. App. Div 2000).

70. *Id.* at 596-97.

71. *Id.*

72. *Id.* at 597.

73. *See* Beck v. Beck, 885 A.2d 887, 891-92 (Md. Ct. Spec. App. 2005).

74. Maryland's statute is distinguishable from Georgia's because it allows a deviation from the support amount based on the existence a Qualified Child, while Georgia's statute allows for a reduction in the particular parent's gross income. For the purposes of analyzing the inquiry that courts should make in determining whether to grant any sort of alteration on the basis of a qualified child, however, this difference in application is not crucial.

75. *See* generally, Dunlap v. Fiorenza, 738 A.2d 312 (Md. Ct. Spec. App. 1999).

76. *Id.* at 318.

77. Id. at 317-18.

78. Md. Code Ann. Fam. Law § 12-201(a)(2)(iv)(2006).

79. Gladis v. Gladisova, 856 A.2d 703, 709 (Md. 2004).

80. Beck, 885 A.2d at 888.

81. *Id.* at 893 (recounting Judge Hollander's dissenting opinion in Dunlap, 738 A.2d at 322).

HB 369 Introduced to Rewrite Child Custody Statutes, Provide for Direct Appeal

By Andrea Knight
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Have you mastered child support worksheets and the new affidavit? Great! In the words of Monty Python's Flying Circus, "And now for something completely different."

On Feb. 12, Representatives Tom Rice, Ed Lindsey, Earl Ehrhart and others introduced HB 369, a bill that aspires to transform the practice of domestic relations law in Georgia, particularly in custody proceedings. The bill developed out of hearings held in 2007 by the House Shared Parenting Study Committee. In addition to rewriting the custody statute, HB 369 would also provide for direct appeal in all domestic relations cases and for attorneys fees awards and binding arbitration in custody proceedings.

One of the primary goals of HB 369 is to rewrite Georgia's custody framework so as to move the focus away from custody awards and towards the details of planning for that child.

Prior to the introduction of HB 369, Rep. Lindsey indicated that the Study Committee planned to introduce legislation that would not pass until 2008. The goal of the delay was to increase the opportunity for quality feedback on the proposal from the family law bar and others. As introduced, HB 369 would apply to all cases filed on or after July 1, 2007, (not 2008). I would urge all family law attorneys with opinions on HB 369 to contact their legislators and Representative Lindsey, chair of the subcommittee conducting hearings on HB 369.

One of the primary goals of HB 369 is to rewrite Georgia's custody framework so as to move the focus away from custody awards and towards the details of planning for that child. While the statute would retain the definitions of traditional custody terms such as "legal custody", "joint custody" and "primary custody", under HB 369, parents would be required to move beyond those terms and focus instead on the details required in the mandatory parenting plans.

What is a parenting plan? HB 369 would require a parenting plan to cover nine topics. While the bill describes each of these factors in great detail, the primary requirements of a parenting plan are that it provide:

- Where the child will be each day;
- How holidays and other special occasions will be spent;
- The process of transporting the children for visitation and allocation of the cost;
- Whether supervision will be required;
- An effort to take into account future changes in the needs of the child;
- An allocation of decision making and, for joint decision making, how conflicts will be resolved;
- A recognition that a parent with custody may make day-to-day and emergency decisions;
- A recognition that a close and continuing parent-child relationship and continuity in the child's life may be in the child's best interest; and
- Any limitations when one parent has

the child on the other parent's right of access to contact with the child and to access education, health, extracurricular activity and religious information about the child.

HB 369 proposes treating the failure to submit a parenting plan similarly to the failure to file an answer: a judge may simply enter the other parent's plan into effect, provided there is a finding that the plan is in the child's best interest. The bill authors envision that the parenting plan would become a form in the Uniform Superior Court Rules, similar to the Domestic Relations Financial Affidavit.

HB 369 also proposes a list of statutory factors to determine the best interest of the child. Under the proposed legislation, a judge "may consider any factor, including but not limited to" a list of sixteen factors. It is no coincidence that the listed factors echo the arguments we make at trial already. At the request of Shiel Edlin, section members Catherine Knight, Debbie Ebel, Rebecca Hoelting and Dan Bloom invested significant time and effort in surveying statutes in various states to develop a compelling list that has been incorporated into HB 369.

In addition to a rewrite of the framework of custody proceedings, HB 369 also amends the election rights of teenagers. Under the proposed legislation, the 14-year-old election would be eliminated. The current 11-year-old election would be retained in a modified form so that children aged 11 and up can continue to express a preference, but the judge would have complete discretion. HB 369 also proposes that a child's expression of a preference "shall not, in and of itself, constitute a material change of condition or circumstance."

The authors of HB 369 are also seeking to assist custody litigants who testified to the Study Committee that they had difficulty reconciling to decisions from the absence of any rationale for the judge's decision. HB 369 would require the judge to issue a written order within 30 days of the final hearing that sets forth specific findings of fact as to the basis of the judge's decision, including any of the statutory factors relied on by the judge in making the decision.

This is not the only component of HB 369 likely to raise concern among our esteemed judges. Section 2 of HB 369 would amend O.C.G.A. § 5-6-34 to provide for the right of direct appeal of all domestic relations cases. The appellate courts have indicated that they do not have a sufficient number of judges on the bench to handle domestic relations appeals. There has been talk of adding three additional judges to the Court of Appeals in order to create a family law panel. The direct appeal provision of HB 369 may fall by the wayside as the bill travels through the General Assembly. Alternatively, it may signal that a family law panel is in the works.

Finally, HB 369 proposes that judges in custody proceedings would have the discretion to award attorney fees and costs of litigation and to allocate expert fees at both temporary and final hearings. Even though it will not affect any pending cases, I think this provision will certainly bring a smile to those of us mired in modification actions that seem ridiculous but not quite ridiculous enough to be considered frivolous.

The full text of HB 369 can be accessed online at:

http://www.legis.state.ga.us/legis/2007_08/fulltext/hb369.htm. **FLR**

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2007 Family Law Institute

Once again, the time is here to plan for the annual Family Law Institute! This year, we return to the Ritz-Carlton in Amelia Island, Fla., and Program Chair Kurt Kegel is very excited about the program. While the program always includes many interesting topics, this year's Institute stars the Supreme Court of Georgia! The participation of the Supreme Court will feature live oral argument of a mock appeal, presented by two seasoned veteran attorneys, to our Supreme Court, including: Chief Justice Leah Ward Sears, Presiding Justice Carol W. Hunstein, Justice Robert Benham, Justice George H. Carley, Justice Hugh P. Thompson, Justice P. Harris Hines and Justice Harold Melton.

The fun and opportunities to learn do not stop there, so don't delay, make your reservations early and register for the Annual Family Law Institute! As part of your registration, as always, you will have the opportunity to mix and mingle with fellow attorneys, judges and justices during the conference and during cocktail hours sponsored by ICLE on Thursday evening and the Family Law Section on Friday evening.

Thank you to our sponsors. It is not too late to join the list:

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Call or e-mail Eileen Thomas (770-818-0301 or eileen@ethomaslaw.com) with any questions. **FLR**

Confessions of a *Guardian ad Litem*

By M. Debra Gold
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We've all heard the quote from Shakespeare's *Henry VI*: "The first thing we do, let's kill all the lawyers." Many of us have been teased by this quote. But surely most of us don't have the same sentiment. I know that I don't. . . usually, that is. However, as my confession for this issue, I must say that sometimes I can't help but wonder if Shakespeare was right on target.

However, I also must confess that I feel lucky, because while there are some attorneys who stir up this sentiment within me, they are the exception rather than the rule. Most attorneys know how to work with the GAL toward the common goal of a resolution that is in the best interests of the children. Most have the ability to recognize the impact of a custody dispute on the children and work toward averting those problems that affect the children as much as possible. The rest of you—learn from them!

Before I started limiting my practice to GAL work, I used to tell my clients that I could not adequately represent them unless we had a common goal of promoting the best interests of the children. I told them that I would withdraw from the case if I were asked to do anything that was illegal, unethical, immoral or that went against my conscious. I confess that as a GAL, I enjoy working with attorneys who take a similar approach with their clients. I struggle and squirm when I become involved in cases with attorneys who make it their mission to fuel the fires, as doing so lessens the possibility that the children will come out of their ordeal happy and as unaffected as possible. Not only does fueling the fires not serve the client, but worse, it also serves as an absolute injustice to the children. We need to do our part in calming the waters.

To validate and promote a client's negative and destructive words and behaviors is a disservice to that client and will only create further havoc in their children's lives. The better alternative is to promote a realistic resolution to their custody dispute that works for everybody. . . .

A good lawyer should be able to recognize when a custody dispute is about a sincere desire to be a part of the children's lives, or whether it is more about ego, winning, losing or revenge. We all know that there are no winners in divorce and the real losers are usually the children. Everyone also knows how devastating revenge can be. The better lawyers help their clients examine their own motives and do not facilitate this mentality or promote revenge, particularly since it is detrimental to the children. It's sometimes important for the lawyers to confront their clients and tell them what they need to hear rather than what they want to hear so that they can develop realistic expectations. Of course, with some clients this can be very difficult. However, to validate and promote a client's negative and destructive words and behaviors is a disservice to that client and will only create further havoc in their children's lives. The better alternative is to promote a realistic resolution to their custody dispute that works for everybody, working toward a positive end, rather than a negative one.

Sometimes it may become necessary to take a deep breath and step back to get a good look inside of a custody case before

one can get a clear vision of what is really going on. It may sometimes be helpful to call upon colleagues and friends to ask for a reality check with regard to how the case is being handled. Family law can be a very difficult area of law in which to practice, and we sometimes have to be reminded not to get too personally involved. Nothing is worse than when the fight between the two parties becomes a personal fight for the lawyers.

In their attempt to find a positive end to what could otherwise be a nasty custody dispute, lawyers need to work alongside the GAL. Their relationship with the GAL should not be an adversarial one, but rather one of mutual respect and cooperation. The GAL is not the enemy just because he or she does not see eye to eye with your client on every issue. We should remember that the GAL is looking at a puzzle that sometimes has thousands of pieces. Some of those pieces may be more favorable to the mother and some may favor the father. It is the GAL's job to put those pieces together so that a complete picture can be had of the case. It is the attorney's and client's jobs to hand the pieces to the GAL and to help the GAL know where those pieces should be placed in the puzzle. With the cooperation of the attorneys involved, putting the puzzle together does not have to be such a daunting task. It's so amazing how much can be accomplished when everybody involved is focused on their genuine concern for the children, rather than on their desire to "win" or get revenge.

So, we should all aspire not to give reason for others to want to "kill all the lawyers." Rather, we should aspire to live up to the standards Hamlet talked about in another one of Shakespeare's works when he said, "What a piece of work is man! How noble in reason! How infinite in faculties!" **FLR**

Chair Shiel Edlin, Secretary/Treasurer Ed Coleman and Vice Chair Kurt Kegel

Family Law Section Meets in Savannah

By Paul Johnson
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Members of the Family Law Section met on Jan. 19, at the Hyatt Regency Savannah. The well-attended meeting was held in connection with the State Bar's Midyear Meeting. The section was honored by the attendance of several Superior Court judges from across the state and Justices Hunstein and Thompson. Section Chair Shiel Edlin officiated over the meeting and moderated an impromptu and lively discussion on the effect of the new child support guidelines in the circuits around the state. The section also voted at the meeting to pass new by-laws. The new by-laws can be viewed at the section's web page on the State Bar's website at www.gabar.org. **FLR**

Karlise Grier, Regina Quick, Ellisa Garrett and Melinda Katz

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