

The title "The Family Law Review" is displayed in a large, dark blue serif font. Behind the text is a stylized silhouette of a family consisting of two adults and two children, rendered in a lighter blue color.

# The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia

May 2006

## Relocation Law in Massachusetts Compared to The Determination of Such Cases in Georgia and Two Other States

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### The Absence of a National Standard

This brief article is intended to analyze several legal standards governing relocation with a child by a custodial parent following a divorce or paternity judgment. In the absence of any national consensus or uniform law each state has developed its own set of standards for resolving such cases. It is thought by comparing the law of three states with distinct standards the reader may develop a better understanding of this controversial area of family law. The three states selected represent three distinct geographical areas. They are California, Georgia and Massachusetts.

The issues discussed here relate to situations where one parent has sole legal custody and the other is a noncustodial parent. (While recognizing that various states employ different terminology, traditional terminology of "custodial" and "noncustodial" parent is used here to avoid unnecessary confusion).

For much of the past decades states around the country have been influenced by vastly different decisions on relocation of children after a divorce or paternity case. See Charles Kindregan, *Family Interests in Competition: Relocation and Visitation*, XXXVI Suffolk Univ. Law Rev. 31 (2002) (noting somewhat liberalized treatment of requests by custodial parents to relocate with the children some distance from the noncustodial parent even if this impacts negatively on visitation rights). This trend was heightened by the much-noted Supreme Court of California decision in *Marriage of Burgess*, 913 P.2d 473, 13 Cal.4th 25 (1996), which created a presumption of a right to relocate by ruling that the relocating parent does not have to show the move is necessary as a condition of continuing custody.

Over the past decade some courts liberalized their rules on allowing relocation by separating the request to move from the issue of whether there should be a modification of custody. This was based in part on the concept that a child's welfare is intimately bound up with the welfare of the new post-divorce custodial family. This model of analysis is based on the identity of interest of the custodial parent and child. *Baures v. Lewis*, 770 A.2d 214 (N.J. 2001). However, it has not achieved any kind of national acceptance in the courts.

The older analysis was that the child's best interest lies in having continued and regular contact with both parents. The older analysis continued to be employed in resolving relocation cases in most states, but it was at first believed that the *Burgess* approach would find advocates. See Carol S. Bruch & Janet M. Bowermater, *The Relocation of Children and Custodial Parents: Policy Past and Present*, 30 Fam. L. Q. 245 (1996); Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move?* 30 Fam. L. Q. 306 (1996). But see Sanford L. Braver, et al., *Relocation of Children After Divorce and the Child's Best Interests: New Evidence and Legal Considerations*, 17 J. Fam. Psychol. 206 (2003); Robert Pasahow, *A Critical Analysis of the First Empirical Research Study on Child Relocation*, 19 J. Amer. Acad. Matrimonial Lawyers 321 (2005).

Some states were apparently influenced by the *Burgess* philosophy. See, e.g., *Blivoin v. Weber*, 126 S.W.2d 351 (Ark. 2003) (rebuttable presumption to allow relocation). However, most states have no presumption either for or against relocation and decide the issue based on the circumstances of each case based on the best interests of the child. See, e.g., *Ireland*

See **Relocation** on page 16



# Editor's Corner

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**W**ow, has family law been in the news or what? We've been hearing a lot of chatter regarding the new Child Support Guidelines and the recently announced HR1555 (directing a study of joint custody). Also, prenups easily enforced and then, not so easily enforced.

There is much for us to discuss in our chosen field. Best of all, over the Memorial Day weekend, hundreds of lawyers and psychologists will get together to discuss these and other issues in San Destin, Fla., at our annual Family Law Institute, at which, I personally look forward to seeing each and every one of you!

We hope that you are pleased with this edition of the *Family Law Review*. Our goal has been to ensure that the increased contributions increase the value of the *FLR* to family law practitioners and judges across the state. We appreciate all of our contributors and hope that more and more of you will submit material for us. We particularly want to thank Victor P. Valmus for submitting the case law update for this issue. *The Family Law Review* also wishes to acknowledge and appreciate all the work Sylvia Martin has done in past years by providing the case law update for us.

See ya in Destin! FLR

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# Note from the Chair

By Stephen C. Steele  
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I am fortunate in this busy year to work side by side with my competent and energetic Executive Committee. They are the brightest and most supportive spirits I know. Without the generous and valuable help of these busy professionals, The Family Law Section would have contributed far less to our state and our profession.

## ***Karen Brown-Williams of Marietta***

Karen currently serves in her fifth year on the Executive Committee. She has been a frequent lecturer and contributor of her time, talent, and resources to the Family Law Institute, the Convocation on Professionalism, and numerous panels and seminars. Without hesitation, she responded to my call this year to serve on the Study Committee advising the Statute Review Subcommittee to HB221. Karen also undertook the much needed task of updating the website.

## ***Ed Coleman (Secretary 2006-2007) of Augusta***

Ed helped to rewrite the outdated by-laws of the Family Law Section, and he accepted the nomination and election of the Section to serve as secretary during 2006 – 2007. He has already assembled most of the components for the Nuts and Bolts Seminar in August 2006.

## ***Sheil Edlin (Vice Chairman 2005-2006 and Chairman 2006-2007) of Atlanta***

Sheil has put together a unique Family Law Institute for 2006 which will be a joint conference of Georgia family lawyers and Georgia psychologists. This first event of its kind will allow each and both disciplines to learn much from the other.

## ***Paul Johnson of Savannah***

Paul eagerly contributed to the Study Committee advising the Statute Review Subcommittee of HB221. He tirelessly and meticulously prepared minutes of each

and every meeting of the Study Group. He continues to be a frequent lecturer.

## ***Kurt Kegel (Secretary) of Atlanta***

Kurt contributed to the Forms Subcommittee for implementation of HB221. Kurt is in charge of the Family Law Institute to be held at the Ritz-Carlton in Amelia Island on Memorial Weekend of 2007.

## ***Randy Kessler of Atlanta***

With full force, Randy and his partner, Marvin Solomiany, tackled the job of editing and publishing the *Family Law Review*. These issues have been outstanding in every respect.

## ***John Lyndon of Athens***

John's spirit, guidance, and leadership are invaluable to the Executive Committee. John continues to be a frequent lecturer, and he is an important part of the Family Law Bar in the Athens/East Georgia area. John and Carol Walker provided entertaining and scholarly instruction to the Superior Court Judges during the conference in the Summer of 2005 and will do so again in this Summer. Rep. Earl Ehrhart asked me to have the Section assist the legislature in its study of joint custody and 14-year-old election. John Lyndon prepared the research paper which was subsequently presented to Rep. Ehrhart.

## ***Richard Nolen (Immediate Past President, 2005-2006) of Atlanta***

Richard's guidance, advice, and experience helped provide direction and focus to the Executive Committee this year.

## ***Andy Pachman of Atlanta***

During Andy's first year on the Executive Committee he has assisted Karen Brown-Williams with updating the Section's website.

See **Chair's Column** on page 33

# Sanity Software:

## The Case for Case Management Software

By Steven J. Best, Esq.  
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Every law firm deals with case management (and document generation) and the larger the volume of business and/or complexity of the practice, the more acute the problems can become. Practice management issues bring with them an increased risk of malpractice, profitability limitations and they're a primary source of stress and frustration for practitioners. However, software should solve specific problems so this seminar will focus on common problems and how practice management programs solve them.

### The Players

Before we get into the specifics, we need to mention a few of the market leaders. There's no way to assemble a comprehensive list because there are too many competitors, but the main players are as follows:

**AbacusLaw** by Abacus Data Systems, Inc. (San Diego, CA). Sales: (800) 726-3339; Web: www.abacuslaw.com.  
Target market: Small firms

**Amicus Attorney** by Gavel & Gown Software, Inc. (Toronto, ONT). Sales: (800) 472-2289; Web: www.amicusattorney.com. Free demo CD available.  
Target market: Small, medium and large firms

**Case Master** by Software Technology, Inc. (Lincoln, NE) (also develops TAB-SIII). Sales: (402) 423-1440; Web: ww.stilegal.com. Target market: Small and medium firms.

**Needles** by Chesapeake Interlink Ltd. (Owings Mill, MD). Sales: (410) 363-1976; Web: www.needleslaw.com.  
Target market: Small and medium firms

**PCLaw** by Lexis/Nexis, Inc. (Willowdale, ONT). Sales: (800) 387-9785; Web: www.pclaw.com. Free

online or demo CD available. Target market: Small and medium firms.

**TimeMatters** by Lexis/Nexis, Inc. (Cary, N.C.) Sales: (800) 328-2898; Web: www.timematters.com. Free demo CD available. Target market: Small, medium and large firms

Although I'm going to primarily use Amicus Attorney version V+ to illustrate how these programs work, most of the programs listed above perform the same functions. Amicus is simply used for purposes of illustration and I am not endorsing that product over the others listed.

Recent releases by the top case management players listed above have blurred the distinction between the ABA's definition of "case management" and "practice management." (The former being a robust file management and docketing system, the latter to include that, plus back office billing and accounting functionality as well). Most developers now refer to their respective products as practice management solutions and the litany of new features and functionality built into their most recent versions support this claim.

Furthermore, while case management programs still lack some of the back-office functionality offered internally by the ABA's recommended practice management programs (such as full time/billing and accounting features<sup>1</sup>), they've addressed this issue by integrating or linking with popular third party programs which perform those functions. So called case management programs have flourished in spite of competition by one-stop-shop practice management programs because: a) practice management programs (as defined by the ABA) tend to require a much larger investment in hardware and software than so called case management programs; and b) many lawyers don't need or want to pay

for back-office features, especially when they already use other programs for those functions. The point here is that all of the foregoing programs (which I'll collectively refer to hereafter as practice management programs or "PMPs") are designed to help lawyers organize, automate processes, collaborate, manage workloads, track critical information and work smarter. As such, they are indispensable and one of the few tools that can truly revolutionize your practice.

### **Calendaring/Docketing/File Follow Up**

A problem that every firm faces is keeping track of calendars and docketing issues firm wide. The goals of an effective office-wide calendaring system are ease of use, portability (ability to take it with you), redundancy and security (multiple copies of calendars in the event of a fire or disaster), tracking features (who made any particular entry), error-spotting features, and the ability to make sure that at least one date opens for every file (file follow up system). Individuals who attempt to accomplish these goals with paper-based systems often find the process painful or impossible and waste large amounts of time entering, erasing and duplicating entries by hand. As a result, many have partially or completely abandoned paper in favor of Personal Information Manager (PIMs) programs. PIMs keep track of calendars, tasks, names, addresses and phone numbers, among other things (Microsoft Outlook, Novell GroupWise, and Lotus Notes are good examples). While these programs do a fine job of managing a calendar, tasks and phone numbers, they're generic and not designed specifically for a lawyer. For example, Outlook would be as useful to a maitre d' or school teacher as it would to a lawyer because it has no customization which would specifically benefit any of them. Since PIMs do not address the information needs and work flow required by lawyers, they are simply NOT an appropriate substitution for the PMP. By contrast, PMPs are designed specifically for lawyers, and meet their practice management and calendaring needs far better than any generic PIM.

The foundational elements of practice

management are People (contacts), Events (appointments & tasks), Files (client/matters), Time (billable time records) and Documents (template generation and document storage). PIMs only help with people and events and without the other three, they cannot provide a true practice management solution, no matter how they're customized. To illustrate why the other foundational elements are important, consider that although you can put an appointment in a PIM calendar, you cannot relate it to a client file. With PIMs, you cannot view all the events on a specific file. You can have a task in your calendar, but you cannot link it to other tasks, you cannot have it automatically reschedule according to legal rules. Nor can you have that task automatically draft a document for you while doing a time entry in the background. Good PMPs do all of these things.

If you synchronize your practice management system with a Palm Pilot (or equivalent device) and back up your computer system regularly, you've achieved portability, redundancy and security. Any practice management program worth its salt automatically keeps track of who made an entry, who completed a task and the like. Error spotting occurs via group calendars, synchronizing with a Palm device and good old fashioned manual verification. File follow up features are built into PMPs and most of them allow you to browse through your files while viewing the appointments and tasks associated with each one to make sure an event is open for all files. The end result is a legal-specific calendar/docketing system that strengthens your practice while lowering your malpractice risk.

### **Sharing Information Among Programs**

Many firms accumulated software rather haphazardly over a period of years. Needs arose and programs were purchased to address them. The end result is a hodgepodge of programs that neither share information nor facilitate collaboration among the members of the firm. For example, firms commonly utilize paper files to organize case information, an accounting

See **Sanity Software** on page 27

# Case Law Update: Recent Georgia Decisions

By Victor P. Valmus  
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## Alimony/Separate Estate

### *Searcy v. Searcy, S05A1816 and S05A1819 (March 13, 2006)*

The wife filed for divorce and sought to join as defendants the estates of the husband's late parents. Wife was seeking that the husband's one-third undivided interest in the undistributed estates constituted a majority of the husband's assets. The trial court, sua sponte, added the co-executors of the estates and the husband's two brothers as defendants. The trial court joined co-executors for limited purposes of awarding alimony and affording the wife complete relief under *Gardener vs. Gardner, 276 Ga. 189 (2003)*. The co-executors were residents of counties other than the county in which the divorce action was pending and the trial court found venue proper.

The Supreme Court granted an interlocutory review and affirmed in part and reversed in part. The Supreme Court held that evidence of pending inheritance may be considered for the purposes of awarding alimony. Here, the trial court went further and held that an actual share of the inheritance itself could be awarded as an undivided interest in the estates of husband's late parents as alimony. That ruling was affirmed.

With regards to joinder, the Supreme Court found that there was no evidence that any marital property was in either estate or that the husband had commingled marital assets with the property of the estates, therefore joinder was improper. The court also rejected the wife's argument of complete relief as a basis of joinder under O.C.G.A. §9-11-13(h) and §9-11-19(a)(1). The absence of the co-executors from this litigation would not render the relief awarded the wife partial or hollow because she could obtain an interest as full and complete as that presently held by the husband. The issue of venue was not addressed because joinder was improper.

### *Smelser v. Smelser, S05F1490 (Dec. 1, 2005)*

The parties were married eight years and after a bench trial, the judge entered a Final Judgment Decree of Divorce. There was no transcript of the proceedings nor was there a stipulation of evidence filed. The trial court granted the wife legal and physical custody of the parties' two minor children and ordered the husband to pay \$844 per month in child support (28 percent of his gross monthly income). The husband was awarded title to his unvested retirement account; an equitable division of marital property was made with respect to the two automobiles and certain household goods. The trial court also determined that the husband is employed as a plumber, earns \$3,014 per month, the wife has 10th grade education, currently unemployed and has some impairment due to a childhood accident. The trial court found the marital residence to be non-marital property of the husband and awarded the wife one-half undivided interest in the residence as alimony for her support conditioned as follows: Wife is to have sole possession and use of the residence until both children obtain the age of 20 years or upon her remarriage; the husband is to pay the mortgage, taxes, and insurance on the property as alimony. Further, the parties would equitably divide all costs of maintenance in excess of \$200 and the wife is authorized to sell the property at any time with the net proceeds being divided equally between the parties. The ages of the children were not stated. The Supreme Court affirms.

The husband contends that the trial court erred by awarding an interest in a non-marital residence as alimony to the wife and in granting her a portion of the proceeds upon a future sale. The Supreme Court stated that alimony may be awarded either from the husband's earnings or from the corpus of the estate by granting to the wife the title or use of property in the pos-

session of the husband. Nor is there any legal prohibition against requiring the husband to pay the indebtedness due on the house and the cost of reasonable maintenance as other forms of alimony granted to the wife. As the Court held in *Newell v. Newell*, a spouse may receive a future interest in non-marital property as alimony.

## Attorney Fees

### *Williams v. Cooper*, S05A1949 (Jan. 17, 2006)

The Wife filed a Motion for Contempt based upon the husband's failure to pay child support. The husband was represented by Rita Williams in the pending Motion for Contempt. Wife sought attorney's fees incurred as a result of the husband's willful failure and refusal to comply with a support order and prayed that she be awarded costs and expenses of litigation including reasonable attorney's fees. The trial court ruled in favor of the wife on the issue of Contempt in September 2004 and reserved the issue of attorney's fees. Williams was given notice by the trial court on March 9, 2005 of the March 31 hearing on Ms. Cooper's request for attorney's fees.

Williams contested the claim the wife made against the husband for attorney's fees. The trial court calculated the allowable attorney's fees as \$10,557 based on affidavits submitted by wife's attorney. The trial court considered the financial circumstances of the parties and awarded the wife \$500 in attorney's fees against the husband pursuant to O.C.G.A. §19-6-2, and then held without elaboration, that half of the fees were attributed to Williams' conduct expanding the scope of litigation, pursuing defenses lacking substantial justification and delaying the contempt hearing and awarded the wife \$5,278.53 against Williams under O.C.G.A. §9-15-14(b). The Supreme Court reverses and remands.

Williams argues and the Supreme Court agrees that the award against her is invalid because there was no motion for attorney's fees pursuant to O.C.G.A. §9-15-14(b). Attorney's fees pursuant to the above code section can be based upon a motion of any party or by the court itself. In the present case, there is no evidence in the record that contained a motion by any party or the

court itself for attorney's fees under O.C.G.A. §9-15-14(b). There is also no mention by the trial court that it was considering an award of attorney's fees under O.C.G.A. §9-15-14(b) nor an award on any basis against Williams. The Supreme Court added that where an award of attorney's fees is sought, the person is entitled to an evidentiary hearing upon due notice permitting her an opportunity to confront and challenge the value and need for the legal services claimed.

The Supreme Court also distinguished an award for attorney's fees pursuant to O.C.G.A. §19-15-14(b) from an award for attorney's fees pursuant to O.C.G.A. §19-6-2 in which §19-6-2 is to ensure effective representation of both spouses so that all issues can be fully and fairly resolved. An award under this section depends on the financial circumstances of the parties and not their wrongdoing. Therefore, since Williams was never given a proper notice of the possibility that the attorney's fees hearing could result in an award against her, the award cannot stand.

Williams also objected on appeal that she was not provided an opportunity to cross examine one of the attorneys whose work was represented by the claim for fees. Williams stipulated to the consideration of Affidavits by the wife's attorney regarding their billing, but that stipulation was made only when the only claim for attorney's fees at issue was under O.C.G.A. §19-6-2. Therefore on remand, wife's counsel will need to establish by the evidence the impact on their billing by Williams' conduct. Further, wife's counsel will bear the burden of showing how Williams' conduct increased the amount of attorney's fees incurred by the wife and how much the fees are attributed to that conduct.



## Loan/Gift

***Baker v. Baker, S06F0374***  
(Feb. 27, 2006)

The wife filed for divorce and the only issue on appeal is whether the proceeds from \$170,000 check which the wife received from Wilkes Investment, LLP, a partnership formed by her parents, constituted a gift or a loan. The evidence at trial was that once the wife received the check, she endorsed it and gave it to her husband who placed it into a stock trading account which thereafter lost most of its value. The jury resolved all issues of the marriage and found that the \$170,000 alleged marital debt to Wilkes Investment was not a loan, but a gift, and neither party was ordered to pay said alleged debt. The wife appeals the jury's verdict in that there is no evidence to support the jury's finding that the \$170,000 was a gift and not a loan. The Supreme Court affirms the jury's verdict.

The Supreme Court found that a valid gift must meet the requirements of O.C.G.A §44-5-80. The donor must intend to give the gift, the donor must accept the gift and the gift must be delivered. The delivery of a personal property by a parent into the exclusive possession of a child living separate from the parent creates a presumption of a gift to the child. Citing O.C.G.A. §44-5-84. Even if there is no evidence to support the jury's findings, then the presumption of a gift pursuant to O.C.G.A §44-5-84 is itself sufficient to support a jury finding with respect to the \$170,000. There was also evidence to support the jury's findings of a gift in that the check was drawn on partnership property with the wife's parents being the only individuals who were authorized to convey partnership property and the parties did not and were never required to make repayment of any of the alleged principle.

Even though the resulting presumption of a gift is rebuttable by evidence of an actual contract of lending or by circumstances from which such a contract may be inferred, there was no actual written contract evidencing a loan even though there was some evidence presented in rebuttal of presumption of a gift, but the presumption only disappears if the jury decides to discount it.

## Marital Property/Criminal Trespass

***Jones v. State, A06A0265*** (March 31, 2006)

After a bench trial, the Defendant-Husband Garland Jones was convicted of two counts of Criminal Trespass for maliciously interfering with the wife's use of her two automobiles by letting the air out of the tires and removing the lug nuts from one car and by disconnecting a battery cable on the other car. The husband stated that he disabled the vehicles because he didn't want his wife leaving in those vehicles. At trial, the husband claimed that one of the cars was considered his vehicle and he could not have interfered with its use. There was testimony that the wife's father had given both cars to her and the cars were registered in her name. The trial court found that there was no evidence that one of the vehicles belonged exclusively to the husband. Rather, the vehicles were gifts from the wife's father and were registered in the wife's name. The Court of Appeals affirms.

The Court of Appeals stated that she clearly had a property interest in both cars. The Court of Appeals went on to add that "even if this Court assumed for the sake of argument that the husband also had an interest in each car as marital property, he may not unlawfully interfere with the wife's property interests." Therefore, because the wife had a property interest in each car, the husband's conviction on both counts was supported by evidence.

## Prenuptial Agreement

***Corbett v. Corbett, S06F0328***  
(March 27, 2006)

The parties were married in 1987 and three days prior to their marriage, they entered into a Prenuptial Agreement which stated, *inter alia*, that should the parties divorce, each would retain their separate property and assets with each party waiving any and all rights to seek alimony, maintenance, support, inheritance, or intestacy. The agreement acknowledged that they had read it and had the document explained to them by a specifically identified independent counsel of their own



choosing. There was also a purported full disclosure with separate property and assets of the husband and wife that each was waiving any current or future claim. In 2002, the wife filed for divorce and the husband moved for partial summary judgment seeking to enforce Prenuptial Agreement. The trial court found that the agreement was unenforceable under all three prongs of *Scherer v. Scherer*. The Supreme Court affirms.

At trial, the uncontroverted evidence established that the wife had not read the agreement before signing it nor did she have an attorney review or explain the agreement. She did not provide to the husband a list of personal property and assets nor their estimated value and had no knowledge, independent or otherwise as to the amount of the husband's income.

Pursuant to the trial court's Application of *Scherer*, the three factors that a trial court must consider in determining the validity of Prenuptial Agreements are (1) Was the agreement obtained through fraud, duress, or mistake, or through misrepresentation or nondisclosures of material facts? (2) Was the agreement unconscionable? (3) Have the facts and circumstances changed since the agreement was executed, so as to make enforcement unfair and unreasonable?

The trial court's application of the first prong of *Scherer* was correct because the husband did not disclose his income. It was undisputed that both parties at the time of the marriage had been previously married and divorced and possessed separate assets. That each party owned their own separate homes and the husband had various business and residential interests. The Supreme Court found that the husband's income was material to the Prenuptial Agreement and would have been a critical factor in the wife's decision to waive alimony. The Supreme Court additionally found that there was nothing in the party's standard of living before the marriage which would have put the wife on notice that the husband has failed to disclose a material fact or facts so as to render the non-disclosure immaterial. The Supreme Court distinguishes this case from *Malin v. Malin* where the wife was put on notice of the husband's significant income from the high

standard of living before the marriage. Because the Agreement failed the first prong, the Supreme Court did not address the application of the remainder of the three prong test.

### **Prenuptial Agreement/Death**

#### ***Heirs v. The Estate of Heirs, A05A2254 (March 15, 2006)***

The parties were married in Florida in 1994. The husband was 51 years old, the wife was 43 and the marriage was a second for both.

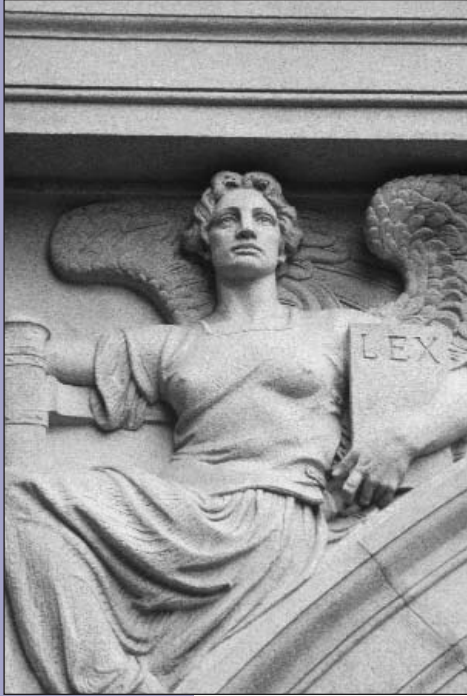
Prior to marriage, the parties met with a Florida attorney with regards to entering into a Prenuptial Agreement. The wife had an opportunity to ask questions of the attorney but did not and the attorney advised the wife not to sign the agreement.

Without further inquiry, the wife executed the documents in the presence of a notary and with witnesses that day. The agreement provided that in the event of divorce, she would receive only \$5,000 and she would also only inherit \$5,000 upon the husband's death as provided for in his will. The wife had an opportunity to read the agreement but chose not to. The wife signed the agreement of her own free will and there was no coercion and no evidence that the wife made an inquiry into her husband's financial condition, read his financial statements or that she relied on the statements. In January 2003, the husband executed his Last Will and Testament with the wife present in which the will provided "I give and bequeath to my wife Mindy Heirs and in lieu of year's support the sum of \$5,000 as set out in the Prenuptial Agreement signed prior to the marriage." The wife asked no questions with regards to the will and understood the husband was not leaving anything else for her in the will. During the nine year marriage, the wife did not



discuss, question or contest the terms of the agreement.

The husband died in May, 2003, the wife accepted the \$5,000 that her husband left for her in the will. She also received \$94,300 in cash from bank accounts and for four months, continued to work and draw



salary at the husband's company and remained in the marital residence. The husband's estate was valued at approximately \$6 million dollars.

In September 2003, the wife voluntarily moved out of the marital residence and contacted the estate's attorney asking for additional assets from the estate. In December 2003, she filed a petition for year support seeking approximately \$1 million in cash, 512 acres of land, cars

and personal effects. The deceased husband's son objected to the wife's petition. The trial court granted summary judgment in favor of the son. Wife appeals the decision challenging the validity of the Prenuptial Agreement pursuant to *Scherer* or in the alternative was unenforceable because it was obtained by fraud. The Court of Appeals affirms trial court's ruling finding the Prenuptial Agreement enforceable.

In determining the validity of Prenuptial Agreements in contemplation of divorce, the Court of Appeals applied the test set out in *Scherer*. The agreement between the parties was made in contemplation of both divorce and death and the Court of Appeals have found no cases that have expressly applied the *Scherer* analysis to a Prenuptial Agreement made in contemplation of death. The Courts have long upheld Prenuptial Agreements waiving rights in contemplation of death, and in determining the enforceability of agreements in contemplation of death, the test of validity was based on intent and what was the under-

standing of the parties. However, the Court of Appeals applied the *Scherer* analysis as it pertains to a spouse waiving her rights in her husband's estate at death.

The three factors of *Scherer* are (1) Was the agreement obtained through fraud, duress or mistake, or through misrepresentation or nondisclosure of material fact? (2) Is the agreement unconscionable? (3) Have the facts or circumstance changed since the agreement was executed so to make its enforcement unfair and unreasonable? Even though the husband asked for the Prenuptial Agreement as a condition of the marriage, this was not sufficient to invalidate the contract or did not raise the level of duress to void the contract. Also, there was no evidence that the wife inquired as to her husband's financial condition or relied in any way on the 1994 financial statement. The wife also claimed that the husband promised to "take care of her" was also an insufficient basis for finding a fraud or misrepresentation unless there was some evidence that the wife made efforts to determine exactly what "take care of" meant.

With respect to the second prong of *Scherer*, the Court of Appeals stated "an unconscionable contract is one so abhorrent to the good morals and conscience where one of the parties takes fraudulent advantage of another, an agreement that no sane person not acting under a delusion would make or that no honest person would take advantage of." The evidence shows that the wife entered the marriage with \$2,500 and no property and left the marriage with approximately \$100,000 and was able to remain in the marital home, drove the cars belonging to the estate and was employed by her husband's company until she chose to leave those belongings behind. The fact that a Prenuptial Agreement perpetuates an existing disparity of wealth between the parties does not render it unconscionable. Neither the disparity in financial situations and business experiences when executed would render the agreement unconscionable.

Applying the third factor of *Scherer*, the Court of Appeals found there were no children born of the marriage, the wife's health and job skills remained unchanged. There is no case law that suggests that a spouse's

untimely death, natural aging of the surviving spouse or increase in value of one spouses' assets over time are sufficient as changed circumstance to invalidate a Prenuptial Agreement. The Courts have held that an increase in wealth is a foreseeable change in the party's circumstances. Citing Mallen.

### **Set Aside/Mistake**

#### ***Porter-Martin v. Martin,* S05A2090 (Jan. 17, 2006)**

The parties were divorced on Jan. 30, 2003. The divorce decree incorporated the Settlement Agreement entered into the day before. The Final Divorce Decree stated the gross income of the husband as \$160,000 annually. He was required to pay child support in the negotiated amount of \$3,150 per month. The husband received a copy of the Divorce Decree after it was filed and raised no objection the gross income stated therein. Over two years later, the husband filed a Motion to Set Aside and correct final divorce decree pursuant to O.C.G.A. §9-11-60(b), arguing that his income as stated as \$160,000 was due to a mistake or accident. At the subsequent hearing on the husband's motion, the wife's attorney, who prepared the divorce decree, testified that after the parties settled on the amount of monthly child support, he had calculated the amount of the husband's income and listed it as \$160,000 per year to justify the child support payments under O.C.G.A. §19-6-15. The husband argues that he made a considerable bit more than this at the time of the divorce, but now is currently making substantially less than that amount. Also at the hearing, the husband did not ask the trial court to set aside the divorce as his motion purported, but he merely wanted the trial court to correct the amount of his gross income and allow the judgment to stand. The trial court granted the husband's request, but did not set aside the judgment. The wife appealed and the Supreme Court reversed.

O.C.G.A. §9-11-60(d) did not authorize the trial court's action. This does not allow the trial court to revise a single finding of fact while leaving a judgment untouched. The husband argued that O.C.G.A. §9-11-60(g) states that "clerical mistakes in judgment and errors therein arising from over-

sight or admission may be corrected by the court at any time on its own initiative or on motion of any party after such notice, if any, as the court orders." However, the Supreme Court found that the error complained of is neither clerical mistake nor an error arising from oversight or admission. Therefore, the amount in the final divorce decree was correctly stated as \$160,000 and unless the decree is actually set aside, the stated amount of the husband's income is conclusive. In addition, the wife disputed the husband's contention that the amount of the income listed in the divorce decree was a mistake. Therefore, if there is a factual dispute among or between the parties about an error or admission, the only way for the complaining party to rectify the alleged error or admission is by a complaint in equity to set aside judgment.

### **Striking Answer/Counter Claim**

#### ***Bayless v. Bayless,* S05F1953 (Jan. 17, 2006)**

The parties were married for more than 20 years and they had two children born as issue of the marriage and one was still a minor at the time of divorce. The wife sued for divorce on Nov. 13, 2003. During the course of litigation, the husband did not personally appear for a Rule Nisi hearing on Aug. 19, 2004 even though the Rule Nisi was on his Motion to Withdraw Funds for Business Development and Expenses. The husband also failed to comply with an Aug. 26, 2004 Order Compelling Discovery which lead to a second order issued on Sept. 24, 2004 mandating compliance with discovery. The husband never fully complied with the second order. On Nov. 22, 2004, the trial court entered a third supplemental order which invited the parties to attend mediation on Dec. 1, 2004 and that a trial was specially set for Dec. 9, 2004. The husband did not personally appear for the mediation and instead attempted mediation via long distance telephone conference which was unsuccessful.

Although the husband's attorney was present, he did not appear at the specially set final hearing on Dec. 9, 2004. The attorney's request for a continuance was denied. The husband's claim that he was delayed because of a Colorado snow storm, which prevented his timely arrival in Georgia was

rejected by the trial court. The attorney was without sufficient information to determine the reason for his client's failure or inability to appear and proceed with the final non-jury trial without the husband's presence. Because of the husband's pattern of ignoring the trial court's directives and failing to personally attend the court proceedings, the trial court struck husband's answer and counterclaim and prevented his attorney from tendering evidence at the final hearing. The husband's attorney was permitted to cross examine the wife, to challenge the wife's evidence and to present argument on behalf of the husband.

The trial court entered its Final Judgment and Decree of divorce on Feb. 4, 2005 awarding child support, lump sum alimony, attorney's fees to the wife and made an equitable division of property. The wife received, *inter alia*, the Georgia residence and its contents, four automobiles and \$466,990. The husband received the Colorado residence and its contents, 35 additional acres, the contents of a joint storage facility, four automobiles, two all terrain vehicles and \$196,999. The husband's Motion for New Trial was denied. The Supreme Court affirms.

Husband contends that the trial court had no authority to deny him the right to present his case without him appearing in person and granted default judgment. In this case, the trial court did not grant a default judgment in favor of the wife, but tried the case and allowed the husband, through counsel, to challenge the evidence presented. The court acknowledges that the husband correctly argues that Uniform Superior Court Rule 10.4, does not require that a party appear in court or authorize the trial court to impose sanctions for a party's failure to do so. However, Rule 10.4 advises "during the course of a proceeding, no one except the judge may excuse from the courtroom a party, a witness (including one who is testified), or counsel." The trial court has inherent power and is charged with the efficient clearing of cases upon the court's docket and that the trial court has the power to compel obedience to its orders and to control the conduct of everyone connected with the judicial proceeding before the court. The husband had failed to personally appear throughout the litigation

and had disregarded multiple orders issued by the trial court. Any party who intentionally fails to comply fully with a court order may be subject to the harshest of sanctions. Therefore, the trial court was within its authority to strike husband's answer and counterclaim and to bar the presentation of his evidence.

## UCCJEA

### *Devito v. Devito*, S06A0341 (March 27, 2006)

The parties were divorced in Taylor County, Ga., in 1997. The mother was awarded sole legal custody of the parties' minor child with the father receiving visitation rights. In 2002, the mother and the child moved to Louisiana with the father remaining in Taylor County. In 2004, the father filed a Motion to Modify the Divorce Decree's visitation and custody provisions and filed a contempt motion against the mother for failing to comply the decree's visitation provisions. No other court has made a ruling addressing any issues in the divorce decree since the original order was entered in 1997. The mother was served pursuant to O.C.G.A. §9-10-91 (the Georgia Long Arm Statute). Mother filed a Motion to Dismiss for lack of personal and subject matter jurisdiction challenging the constitutionality of the Uniformed Child Custody Jurisdiction Enforcement Act (UCCJEA codified at O.C.G.A. §19-9-62). The mother based her constitutional challenge in that the Georgia Constitution of 1993 provides "that venue is in the County where Defendant resides and all other civil cases not otherwise addressed by the Constitution."

The trial court found lack of personal jurisdiction over the mother regarding the contempt proceeding, but held that it had subject matter jurisdiction because it was the court that made the initial child custody determination and that personal jurisdiction over the mother was not necessary pursuant to O.C.G.A. §19-6-61(c) and that the UCCJEA did not violate the Georgia Constitution. The Supreme Court affirms.

With regards to the constitutionality of the UCCJEA, the Georgia Constitution requires that "civil cases not addressed by other constitutional provisions shall be

tried in the county where the Defendant resides." The Supreme Court found that this provision had no application to out of state Defendants with the obvious reason that they do not reside in any county in this state.

The mother also challenged the trial court's jurisdiction under the UCCJEA to modify the 1997 child custody determination because it was made before the 2001 enactment of the UCCJEA. The Supreme Court held that the UCCJEA in Georgia requires only that the initial child custody determination be consistent with the provisions of O.C.G.A §19-9-61 or §19-9-63. The Supreme Court went on to hold that the trial court was correct and has subject mat-

ter jurisdiction over the mother to modify pursuant to O.C.G.A. §19-9-62 (UCCJEA) and the personal jurisdiction over the mother was not necessary in order to address the requested modification of its child custody determination. To the extent that the UCCJEA applies, it supersedes Georgia case laws rendered prior to its enactment. **FLR**



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## Cohabitants and the Law

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manner, or a written statement by a person certifying that a specific event has occurred, such as stroke or other illness or accident which renders the principal unable to perform their usual financial transactions. Most power of attorney forms list the financial transactions to which the principal can give the attorney-of-fact authority. These include, but are not limited to, real estate transactions, bond share and commodity transactions, banking transactions, estate transactions, litigation and the obtaining of records, reports and statements. This power of attorney also permits the attorney-in-fact to execute any and all documents necessary to enable the principal to receive medicaid and/or medicare benefits, disability benefits and other insurance benefits.

Thus, it is clear that in order to be properly protected, cohabitants need more than the usual Last Will and Testament that ordinarily would be executed by married persons. In order to assure that their wishes will be carried out by the person that they have chosen to share their lives with, if either becomes seriously ill, it is necessary that documents such as health care proxies, Living Wills and powers of attorney also be executed. **FLR**

*Sondra Harris is a family law attorney from New York, holds many positions in the family law section of the ABA and is a member of the Family Law Roundtablers.*

## Endnotes

1. Comparative Laws: Ala.—Code 1975, §§ 22-8A-1 to 22-8A-10. Ariz.—A.R.S. §§ 36-3201 to 36-3210. Cal.—West's Ann.Cal. Health and Safety Code, §§ 7185 to 7195. Colo.—West's C.R.S.A. § 15-18-101 to 15-18-113. Conn.—C.G.S.A. §§ 19a-570 to 19a-575. Del.—16 Del.C. §§ 2501 to 2509. D.C.—D.C.Code 1981, §§6-2421 to 6-2430. Fla.—West's F.S.A. §§ 765.301 to 765.310. Ga.—O.C.G.A. §§ 31-32-1 to 31-32-12. Hawaii—HRS §§ 327D-1 to 327D-27. Idaho—I.C. §§ 39-4501 to 39-4509. Ill.—S.H.A. 755 ILCS 35/1 to 35/10. Ind.—West's A.I.C. 16-8-11-1 to 16-8-11-22, 16-18-2-203, 16-18-2-204, 16-18-2-351, 16-36-4-1 to 16-36-4-21. Kan.—K.S.A. 65-28, 101 to 65-28, 109. La.—LSA-R.S. 40:1299.58.1 to 40:1299.58.10. Md.—Code, Heal-General, §§ 5-601 to 5-618. Minn.—M.S.A. §§ 145B.01 to 145B.17. Miss.—Code 1972, §§ 41-41-101 to 41-41-121. Nev.—N.R.S. 449.540 to 449.690. N.H.—RSA 137-H:1 to 137-H:16. N.M.—NMSA 1978, §§ 24-7-1 to 24-7-10. N.C.—G.S. §§ 90-320 to 90-322. Ore.—ORS 97.050 to 97.090. S.C.—Code 1976, §§ 44-77-10 to 44-77-160. Tenn.—West's Tenn.Code §§ 32-11-101 to 32-11-110. Tex.—V.T.C.a., Health & Safety Code §§ 672.001 to 672.021. Utah—U.C.A. 1953, §§ 75-2-1101 to 75-2-1119. Vt.—18 V.S.A. §§ 5251 to 5262. Va.—Code 1959, §§ 54.1-2981 to 54.1-2992. Wash.—West's RCWA 70.122.010 to 70.122.905. W.Va.—Code, 16-30-1 to 16-30-13. Wis.—W.S.A. 154.01 to 154.15. Wyo.—W.S.1977, §§ 35-22-101 to 35-22-109.
2. *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224.

# Odd State Out:

## How Georgia's Law On Child's Right to Elect the Custodial Parent Compares With Other States

By John F. Lyndon and Debra M. Finch  
Attorneys at Law, Athens, Ga.

In the fall of 2005, Steve Steele, chairperson of the Family Law Section, was asked by some Georgia legislators to compare Georgia's statute giving a 14-year-old child the right to elect his or her custodial parent with similar statutes in other states. I took on the task, with the assistance of Debra Finch, another family law attorney in Athens, and Wendy Furey, a third-year law student at the University of Georgia.

We conducted a survey of the statutes of the other 49 states addressing the right of children to express their preference for a custodial parent and the weight given to that preference.

We were shocked by the results.

O.C.G.A. § 19-9-1(a)(3)(A) provides that a child who has reached the age of 14 years shall have the right to select the parent with whom he or she desires to live. The child's selection shall be controlling, unless the parent so selected is determined not to be a fit and proper person to have the custody of the child. No other state has a comparable law.

In fact, eight states (Alabama, Massachusetts, New York, North Carolina, Oregon, Rhode Island, Vermont, and Wyoming) have no statute addressing the child's ability to state a preference. However, case law in most if not all of these states does incorporate a child's preference as a factor to be considered.

The laws of 10 states (Arizona, Delaware, Idaho, Illinois, Kansas, Kentucky, Missouri, Montana, Pennsylvania, and Wisconsin) provide that the courts shall consider the wishes of the child, along with other specifically stated factors, with no reference to the child's age, maturity or reasoning ability. The statutes simply provide that the child's wishes can be considered. In all of these states, the best interests of the child is the controlling standard.

Twenty-two states (Alaska, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Iowa, Louisiana, Maine, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, South Carolina, South Dakota, Virginia, and Washington) provide that the child's preference shall or may be considered if the child is of sufficient age and capacity to form a preference. No specific age is referenced, although there are varying thresholds that define the child's ability to express a preference. For example:

**Arkansas:** if the child is of sufficient age and capacity to reason, regardless of chronological age.

**Florida:** if the court deems the child to be of sufficient intelligence, understanding and experience to express a preference.

**Maine:** if the child is old enough to express a meaningful preference.

**Nebraska:** If the child is of an age of comprehension, regardless of chronological age, when such desires and wishes are based on sound reasoning.

**New Hampshire:** if the court finds by clear and convincing evidence that a minor child is of sufficient maturity to make a sound judgment.

**Washington:** if the child is of sufficient maturity to express a reasoned and independent preference.

Again, in all of these states, the "best interests of the child" standard applies.

There are only nine states other than Georgia in which a specific age is even referenced. In these states (Indiana, Maryland, Mississippi, New Mexico, Oklahoma, Tennessee, Texas, Utah, and West Virginia), there are significant variations with respect to the age and weight to be given to the child's preference.

In Indiana and New Mexico, greater weight is given to a child who is over the age of 14 years.

In Mississippi, if the court finds that both parties are fit and proper parents, and that it is in the best interests of the child, then 12-year-olds have the right to select the custodial parent.

In Tennessee, a preference may be expressed by a 12-year-old, with greater weight normally given to older children.

In Texas, a 12-year-old may express a written preference subject to the approval of the court.

In Utah, the desire of a 16-year-old is given added weight but is not the single controlling factor.

In Maryland, there is no reference to age in the initial custody determination, but a child 16 years old may file a petition to change custody. However, case law has interpreted this statute to mean that the age of the child and his or her preference are merely factors to consider.

In Oklahoma, there is a rebuttable presumption that a 12-year-old child is of sufficient age to form an intelligent preference, but the best interests standard applies.

In West Virginia, custodial responsibility is allocated based on the historical time spent by each party in parenting the child. However, a 14-year-old child (or a younger child sufficiently mature) can express a preference that the court may consider.

Thus, in all 49 states, although the child is granted varying degrees of input, the court has the discretion to deny the stated preference of the child if the preference is not in the child's best interests.

That leaves the Georgia law, which stands alone in leaving the court with no discretion to determine what is in the child's best interests. Only if parental unfitness is found can the court deny the child's election.

The practical effect of the statute, as many of us have witnessed, is that custody is often determined by the son who would rather live with his dad who keeps the dirt bike at his house, or by the daughter who would rather live with her mother who has

the tanning bed. Or, it may be a question of which parent has no compunction about dragging the child to the lawyer's office to sign an affidavit, the effect of which the child often does not fully understand, and the circumstances surrounding which the court has no way of knowing.

How can it possibly be good family law for the trial court, both parents, and both attorneys to be controlled by the whim of a 14-year-old? All most of us have to do is to recall ourselves at age fourteen to recognize that children often do not possess the maturity to be making such a critical, life-changing decision.

We recognize the practical problem that exists when strong-willed older children insist on living with one parent and not the other. However, would it not be preferable for our courts to be able to simply consider this factor, along with all other factors, in making a custodial decision based as a whole upon the child's best interests?

The Ohio statute could perhaps be, in part, a model for a more enlightened process. It provides that either party may request that the court interview the child, of any age, in chambers, with the court having discretion to appoint a *guardian ad litem*. The court determines whether or not the child may state a preference, based upon the court's assessment of the child's reasoning abilities, and then decides whether it is in the best interests of the child to even express a preference. If that is the case, the court may consider the child's preference in determining what is in the child's best interests. No person is allowed to obtain or attempt to obtain from a child a written or recorded statement or affidavit setting forth the child's wishes.

The opinions expressed in this article are solely those of myself and Debra Finch. However, we would not be surprised to learn that they are shared by a number of other family law practitioners and superior court judges in Georgia. Perhaps it is time to consider a review and revision of this aspect of our custody statutes.

If anyone is interested in obtaining citations, summaries of relevant statutes and the supporting case law, you may e-mail me at [jlyndon@lawlyndon.com](mailto:jlyndon@lawlyndon.com) and I will be happy to provide them. [FLR](#)

## Relocation

*Continued from page 1*

*v. Ireland*, 717 A.2d 676 (Conn. 1998); *Roberts v. Roberts*, 64 P.3d 327 (Idaho 2003); *In re Tropea*, 665 N.E.2d 145 (1996). A few states apply the traditional best interests of the child rule, but do not require a showing of compelling reasons to support removal. See, e.g., *Dupre v. Dupre*, 857 A.2d 242 (R.I. 2004) (mother allowed to relocate out of the country).

There is widespread division over the question of whether relocation is itself a change of circumstances which opens up the question of modification of the prior custody order. See, e.g., *Rosenthal v. Maney*, 745 N.E.2d 350 (Mass. App. Ct. 2001) (mother's intent to relocate not a substantial change of circumstances raising modification issue); *Bodne v. Bodne*, 588 S.E.2d 728 (Ga. 2003) (depending on circumstances a relocation request could constitute a change of circumstances).

A number of other states have statutes either requiring notice prior to the move and/or otherwise stating requirements to be met before court approval of relocation. See, e.g., Colo. Rev. Stat. § 14-10-129 (2006). Some states have statutes simply providing the need for court approval prior to an out of state move after a divorce, but without specific standards set out in the statute. See, e.g., Mass. Gen. L. c. 208, § 30 (2006).

### Shared Physical Custody

The theories discussed in this article do not cleanly apply to shared physical custody. Most states have a statute encouraging shared custody, although placing primary care custody in one divorced parent continues to be quite common.

Those shared custody cases present a very different kind of relocation issue than one confronting a court when the parent who seeks to move away is in law and fact the true primary caretaker parent. The American Law Institute Principles of the Law of Family Dissolution, §§ 2.17(1) & 4(c) can be read to require that the court determine if the relocation of a parent will significantly impair the other parent's ability to exercise parental responsibilities when the parents have previously had actual shared custody and if modification

of a prior custody order will after consideration of all the relevant factors impact or promote the child's best interests.

The difficulty with resolving a relocation case when the court has decreed shared physical custody is that such an arrangement will simply not work when one parent relocates a considerable distance. Courts have recognized this incompatibility. In order to justify a relocation order in favor of a move involving a substantial distance it would seem necessary to first modify the original joint custody order, which in turn would require proof of a substantial change in circumstance. *Maynard v. McNett*, (Maynard) No. 20050090 (N.D., Feb. 8, 2006) (after a joint physical custody order relocation cannot be authorized unless the court first determines that sole physical custody is required based on the best interests of the child); *Freedman v. Freedman*, 730 N.E.2d 913 (Mass. App.Ct. 2000) (upholding shared custody award but with dicta cautioning that relocation may require modification).

A California Appeals Court decision reflects the practical consideration that when there is a true shared custody arrangement in place using the changed circumstances test employed in modification actions will not work. This is because where the parents share custody of a child in law and in fact "and one of the parents wants to move away, the changed circumstances analysis is not appropriate since the existing order becomes a practical impossibility." *Ragghanti v. Reyes*, 123 Cal.App.4th 989, 997 (Cal.App., 6th Dist. 2005) [initial order of shared custody after a long period of practical shared custody, court awarded father primary care custody during the school year; mother cannot move away with the child]. If the court cannot apply the changed circumstances test for modification in such a shared custody case then of necessity it will have to rely on the best interests of child test used to determine an initial custody order. *Id.* [based on best interested of child father will have full physical custody if mother decides to move away].

The case law (or statute) governing modification is likely to be well-developed, and from a burden of proof viewpoint may be a practical obstacle to the desires of the relo-



cating parent to move. On the other hand, the parent who objects to the relocation may not be willing to assume greater child-care responsibilities if the other chooses to relocate anyway. The modification of visitation schedules may satisfy some parents and children in such cases but not all. The use of what has been called virtual visitation when parents live far apart may work in some cases, but the emotional and financial costs involving computers and telephone charges are not likely to ever be a substitute for human contact. Given these realities it would be desirable for the law to develop a better body of law to deal with the shared custody cases in relocation claims.

### Georgia Law Reflects the Traditional Approach

Although some states were at least to some extent influenced by the Burgess reasoning, Georgia appears not to have been affected in its analysis of relocation cases. The decision in *Bodne v. Bodne*, 588 S.E.2d 728 (Ga. 2003) ruled that a relocation by a parent out of state with the child can constitute a material fact which affects the welfare of the child and might justify the modification of the prior custody order. In reaching this decision the Georgia court in *Bodne* recognized that the trial court considering a relocation case must weigh the best interests of the child; the trial court cannot apply a rule or presumption that is based on an assumption that relocation is in the best interests of the child even if it would substantially improve the life of the custodial parent. *Id.* at 729.

In *Bodne* the Georgia court considered the counterclaim of the noncustodial mother for custody when the custodial father proposed to move to Alabama. *Id.* at 728. The court ruled out all bright line rules, i.e. that there was neither a presumption in favor of relocation or one against relocation. *Id.* at 729. The Georgia court also ruled that in a relocation case the original custody order will not control, in effect allowing the reopening of custody in the light of new circumstances involved in the relocation matter. *Id.*

In *Bodne* the Georgia court had the opportunity to adopt a Burgess approach to relocation requests. The dissenting judge

cited decisions from other states which adopted an identity of child and custodial parent interest analysis. *Id.* at 732. One such decision was the Oklahoma decision in *Kaiser v. Kaiser*, 23 P.2d 278 (Okla. 2001), in which an Oklahoma court cited Wallerstein & Tanke, *supra*, 305, arguing the proposition propounded by a so-called Wallerstein brief which had influenced the California court which decided *Burgess*. (This refers to an amicus brief by Prof. Judith S. Wallerstein in the *Burgess* case, which argued that the best interests of the child was best promoted by a presumption in favor of allowing the primary-care custodial family to locate even if the effect was to mean the child spending less time with the other parent).

The dissenting Georgia judge in *Bodne* also quoted an older Massachusetts decision in *Yannas v. Frondistou-Yannas*, 481 N.E.2d 1153 (1985), which noted that in relocation cases the court must consider the interwoven interests of the child with those of the custodial parent (although Massachusetts did not explicitly adopt a Burgess-type rule). *Bodne*, 588 S.E.2d at 732-733 (Benham, dissenting). However, the majority of the Georgia court declined to take the bait of following other courts which liberalized their approach to allowing relocation based on a presumption or bright line rule. *Id.* at 729.

So Georgia, like most other states, staked out a middle position between the California in *Burgess* and the attitude of some state court judges who apply a de facto (even if not legal) presumption against relocation. This middle ground favored by the Georgia court views relocation through the prism of traditional custody issues rather than as based on a distinct set of values, which means the application of the best interests of the child standard.

Georgia does have a statute which while not a relocation law in the full sense of the word can have an impact on relocation. Ga. Code Ann. § 30-3-37 (2006) authorizes the court to insert in a judgment a provision requiring the custodial parent to give notice to the other parent as to a change of residence. While failure to comply with such an order is not of itself a change in circumstance the court may give considera-

tion to a suddenly announced relocation without the notice as a factor which could affect the welfare of the child. See *In re R.R.*, 474 S.E.2d 12, 16 (Ga. 1996).

### California Reformulates the *Burgess* Rule

A more recent significant national development is that the Supreme Court of California has modified its *Burgess* views in *Marriage of LaMusga*, 88 P.3d 81, 32 Cal.4th 1072 (Cal. 2004). The result of the later California decision brings its influential views into a closer alignment with states such as Georgia. In *LaMusga* the custodial mother wanted to relocate with the children from California to Cleveland, Ohio, for various reasons including being near relatives and a job opportunity for her new husband; during the appeal she obtained a temporary order allowing her to relocate with the children to Arizona but the court treated the case as involving a proposed move to Ohio. *Id.*

Prior to *LaMusga* the California decision in *Marriage of Burgess*, 913 P.2d 473, 13 Cal.4th 25 (1996) was widely cited around the country for the proposition that the law was evolving toward recognizing that a custodial parent may relocate without the need to show that the move is "necessary." The *Burgess* ruling would allow the custodial parent to change the residence of the child subject only to the power of the court to restrain the move if it is shown that the move would prejudice the rights or welfare of the child. *Burgess*, 13 Cal. 4th at 29. Without formally overruling *Burgess* the California Court qualified this approach in *LaMusga*.

In *LaMusga* the court reaffirmed the basic concept of *Burgess* that a custodial parent does not have to establish that a planned move is necessary to relocate, but added that neither does an objecting non-custodial parent have to establish that a change of custody is essential to prevent a detriment to the children if the move were to take place. 32 Cal.4th at 1078. The essence of this ruling is that "the noncustodial parent bears the initial burden of showing that the proposed relocation of the children's residence would cause detriment to the children, requiring a reevaluation of the children's custody." *Id.* This con-

stitutes some backtracking from how the *Burgess* ruling was originally perceived since the burden on the objecting party is now merely to make a preliminary showing of detriment to the children, after which the case could be converted into what is effectively a modification of custody case.

While this reformulation of the rule by the California court had the effect of questioning the original widespread interpretation of *Burgess* as a practical green light in favor of relocation, the court stressed that there is still a "paramount need for continuity and stability in custody arrangements." *Id.* at 1093. This suggests adherence to the single family model for dealing with relocation issues which lie at the heart of a suggested trend in some American courts of giving deference to reasonable requests in favor of relocation. See *Kindregan*, supra, 43-44. In *LaMusga* the court finally affirmed the trial court order affirming a transfer of custody to the father if the mother moved to Ohio, based in part on the court-appointed custody evaluator that while the mother had several good reasons for the move she also wanted to move to take the children away from day-to-day interactions with the father: "The court may still consider whether one reason for the move is to lessen the child's contact with the noncustodial parent and whether that indicates when considered in the light of all the relevant factors, that a change in custody would be in the child's best interest." *LaMusga*, 32 Cal.4th at 1100.

Thus, the California court which seemed to pioneer the concept of a presumptive right to relocate, has now qualified it by allowing the objecting party to make a preliminary showing that a change of custody would be in the child's best interests if the custodial parent relocates. If such a showing is made the court must then weigh all the factors to determine if the custody order should be modified, including "the children's interest in stability and continuity in the custodial arrangement; the distance of the move; the age of the children; the children's relationship to both parents; the relationship between the parents including, but not limited to, their ability to communicate and cooperate to the put the interests of the children above

their individual interests; the wishes of the children if they are mature enough for such an inquiry to be appropriate; the reasons for the proposed move; and the extent to which the parents are currently are sharing custody." *LaMusga*, 32 Cal.4th at 1101.

An objecting noncustodial parent does not have an automatic right to an evidentiary hearing on the question of modification of custody alleged to be triggered by an expressed intent of the other parent to move away from the area. The Supreme Court of California has ruled that the test for allowing such an evidentiary hearing is necessity. When one parent has primary care physical custody with a right to make decisions relating to the health, education and welfare of a child under Cal. Fam. Code § 3006 and proposes to relocate, the objecting noncustodial parent has the burden of making a prima facie showing of detriment to the child. If that showing "is insubstantial in the light of all the circumstances presented in the case, or is otherwise legally insufficient to warrant relief" then an application for an evidentiary hearing will be denied. *Brown v. Yana*, 127 P.3d 128, (Cal. 2006).

### Massachusetts and the Real Advantage Standard

Massachusetts has an ancient statute governing relocation of a custodial parent after a divorce. Mass. Gen. L. c. 208 (2006), while amended from time-to-time, dates to 1842. The consent of both parents is needed to relocate a child of divorce outside the Commonwealth, or the consent of the child if he or she is "of suitable age." If neither of these situations apply the approval of the court "upon cause" is needed to the child out of the state. The statute appears to have been enacted in order to protect "the custody, support and modification jurisdiction of the Massachusetts courts." Charles Kindregan & Monroe Inker, *Massachusetts Domestic Relations Rules and Statutes Annotated*, 285 (West/Thomson 2006).

A statute which leaves to the courts a determination of what constitutes "cause" is obviously an open invitation to develop new standards as the needs of society change. The standard which has evolved in Massachusetts is based on a formulation called a "real advantage" standard. As

announced by the Supreme Judicial Court in *Yannas v. Frondistou-Yannas*, 481 N.E.2d 1153 (Mass. 1986), this standard requires the judge to most importantly consider the effect of a removal on the child. But also too considered are whether the child's quality of life will be improved and any improvement to the child flowing from the improvement of the quality of the custodial parent's life. *Id.* at 710. Any potential harm to the curtailment of the child's contact with the noncustodial parent must also be considered. *Id.* at 711. The Massachusetts court admitted that such a formulation means that relocation issues have to "be resolved on a case by case basis." *Id.* at 1158.

The Massachusetts court borrowed the "real advantage" test from the New Jersey decisions. See *Cooper v. Cooper*, 491 A.2d 606 (N.J. 1984). Paradoxically, New Jersey later abandoned this standard in favor of an even more liberalized rule which allows relocation based on any sincere, good faith reason and no longer requiring the custodial parent to show a real advantage. See *Holder v. Polanski*, 544 A.2d 852 (N.J. 1988) (mother allowed to relocate children to Connecticut based on several good faith reasons).

A number of Massachusetts appellate decisions illustrate the application of the real advantage test. In *Rosenthal v. Maney*, 745 N.E.2d 350 (Mass. App. Ct. 2001), the court reversed a judgment which denied a mother's request to relocate to Rhode Island where her new husband lived and where she was employed as violinist in a philharmonic orchestra. The trial judge had awarded the father primary care custody, but this was also reversed. *Id.* at 362. The court ruled that "a request for modification of custody is distinct from a request to be relocated and must be based on material and substantial changes of circumstances other than the move." *Id.* at 354. The fact that the mother had remarried and had relocated to another state was not shown to have a detrimental effect on the child and was not change of circumstance. *Id.* at 355.

The real advantage standard requires consideration of the effect relocation would have on all the parties, and in *Rosenthal* the father argued that it would have an adverse effect on his time with his child. *Id.*

at 353. But the Massachusetts court ruled that the “fact that visitation by the noncustodial parent will be changed to his or her disadvantage cannot be controlling.” *Id.* at 361 (quoting *Yannas*, supra). Given the fact that the distance between the mother’s new home and the father’s is only 55 miles, the court noted that modification of the visitation schedule could minimize any adverse consequences on the father’s time with the child. *Id.* at 360.

Other Massachusetts appellate decisions deal with various aspects of the relocation issue. In *Williams v. Pitney*, 567 N.E.2d 894 (Mass. 1991) the court stressed that the “cause” which had to be shown under the statute and real advantage standard essentially is that the move has to be in the best interests of the child. In this case the state supreme court affirmed a judgment allowing the mother to relocate the children to California on the theory that her increased economic opportunities there and the presence of supportive friends and relatives would be a real advantage to the children and would have an uplifting effect on the mother, which would offset the decreased time the father would have with the children. *Id.* at 899. The reasoning in this case does suggest the weakness of the real advantage test. Even if it benefits the children by improving the quality of the mother’s life, of necessity a move of thousands of miles will adversely effect the relationship of the children to the father, unless substantial changes to the visitation schedule can be made and the family is wealthy enough to afford extensive travel. *Id.* at 898-899. In *Williams* the Supreme Judicial Court also ruled that a prior agreement between the parents that neither would remove the children from the state without the consent of the other, even if it survives the divorce as a contract having independent significance, would not be binding on the court regarding post-divorce issues relating to the welfare of the children. *Id.* at 898.

The issue of whether to allow a temporary removal pending a final hearing also arises from time-to-time. Opinions on such orders are likely to vary greatly. In *Gouin v. Gouin*, 755 N.E.2d 1221 (Rescript opinion, Mass. 2001), the state supreme court denied a writ of mandamus to quash an order allowing the wife to temporarily

relocate the children to Maine while her complaint to relocate was pending. The case might be understood as in accordance with the usual policy of not reviewing interlocutory orders, although in one sense once a relocation has been allowed even on a temporary basis it changes the circumstances which exist “on the ground” once the children settle into a new neighborhood, enroll in new schools and arrange for new medical providers.

A different situation is created when a parent removes a child in violation of a court order or contrary to the governing law. In *Hernandez v. Branciforte*, 770 N.E.2d 41 (Mass.App.Ct. 2002) the mother removed the children to Italy for a limited time pursuant to a stipulation and later a judge allowed her a temporary removal. However, it later became apparent that the mother did not intend to return the children to Massachusetts and the court granted the father temporary custody. *Id.* at 44.

The mother defied court orders that she return the child. *Id.* at 45. The mother attempted to have an Italian court assume jurisdiction on grounds that Italy was now the child’s home state, but while the Italian judge allowed the child to remain in that country it did not assert jurisdiction over the merits. *Id.* at 44. While the removal was not of itself grounds for modification of custody, the court considered evidence that the mother had disrupted the child’s paternal and familial relationships in Massachusetts by her conduct, the father’s good parenting skills, the breakdown in communications caused by the mother’s conduct and her failure to seek legal approval for the relocation. *Id.* at 48-49. The court found that the mother was not being punished for her conduct by the change in custody, but that her inability to act for her child’s welfare in these circumstances justified the modification. *Id.*

Another issue in Massachusetts courts stems from the fact that the statute (Mass. Gen. L. c. 208, § 30) applies only to post-divorce relocations out of state and only when the child has lived in the state for five years. How should the court address issues relating to either a non-divorce situation such as a paternity case or an in-state relocation? This type of problem can arise in any state when a legislature has defined

the circumstances in which court approval must be sought before a non-consented relocation can occur. Presumably at a very minimum cases which do not technically come under the statute could be entertained by a court on an equitable basis, and for reasons of equal treatment decided on the same standards used in cases heard under a statute.

In *D.C. v. J.S.*, 700 N.E.2d 686 (Mass. App. Ct. 2003) the mother proposed to move from eastern Massachusetts where the father lived to the western part of the state. Even though the statute did not apply to an in-state move, they applied the real advantage standard on the theory that "custodial conditions for the child that would result from relocation to a distant part of the State will resemble those applied to removal beyond the State boundaries." *Id.* at 690. Citing and quoting Charles Kindregan & Monroe Inker, *Family Law and Practice*, (2d ed. 2002), the Appeals Court noted favorably that the trial judge concluded that it is likely in a case involving a substantial in-state move the court would apply the real advantage test employed in cases decided under the statute. *Id.* at 690, FN6. There is no reason to doubt that the same standard would be used in deciding a post-parentage non-marital case involving a relocation issue even though the statute would not apply.

Finally it should be noted that as this was written the case of *Mason v. Coleman*, SJC # 09625, is pending before the Massachusetts Supreme Judicial Court. This case raises the question of the proper standard for determining removal cases when the parents have had shared physical and legal custody and one of them wishes to relocate with the child. Should the court in such a case try to apply the "real advantage" test

or is some other standard appropriate. The decision in this case may clarify an issue which has been less than clear until now.

## Conclusion

The widespread different approaches to relocation as reflected in the three states analyzed here reflect a national problem. The growing number of relocation cases brought to the family courts, and the radically different methods of resolving them, calls out for a proposed uniform law. Many issues, including the use of *guardian ad litem*s, mediation, the proper standard for modification of prior orders, the burden of proof and who has it, the use of presumptions, the treatment of a parent who defies court orders, etc. need clarification. But above all, the problem of how to apply the best interests of child rule while still considering the interests of all parties cries out for clarification. No rule can cover every situation, and to some extent the litigation of these cases will continue to be resolved on a fact-intensive case-by-case basis. But the development of a national standard will help reduce the disparity which exists between the states and help to make the resolution of relocation disputes a little more uniform and predictable. FLR

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*The author thanks Daniella Massimilla for her assistance on the manuscript for this article.*

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## Bylaw Changes:

The Executive Committee is proposing the following changes to the bylaws of the Family Law Section of the State Bar of Georgia:

1. *The number of members on the Executive Committee has increased and it will include the editor of the newsletter and the chair of the Young Lawyers Division Family Law Committee.*
2. *Notice of a proposed meeting may be provided by e-mail.*

# Engaging a Business Valuation Expert

By Miles Mason Sr., Esq.  
Crone & Mason, PLC

The process of engaging a business valuation expert can be a serious challenge, even for the experienced lawyer. For the less experienced, the process can be quite intimidating. Clients often fail to appreciate the importance of the business valuation to the overall estate division. Other clients suffer serious “sticker shock” over expert fees, even when estates are significant. Making it even more challenging, some experts themselves act as if they are doing the lawyer a favor by accepting business valuation engagements. This article presents some helpful advice.

If you have made a significant commitment to practicing family law and you do not have a business relationship with three business valuation experts, you should begin creating those relationships today. Do not wait and worry about it when you are hired by a client needing a business valuation. Start by calling and scheduling lunches. If you do not know with whom to schedule those lunches, first call other attorneys you respect and ask for referrals. Next, hit the Internet and look for experts in your area. Search the web sites listed below. Also, search Google with the following phrase: “business valuation expert [name of city].” This should help you find several candidates. Pick three, call them, and ask them to lunch.

If any turn you down for lunch, ask them to mail you a letter describing the categories and sizes of businesses they prefer to value or not value, a description of their typical engagement terms (a sample engagement letter, if available), their curriculum vitae, a list of cases in which they have testified as an expert, and a publications list. When you receive the letter, write on it: “Would not have lunch with me on [date].” Even if you never call the expert again, you will need the reference information to compare to that of other experts.

Place the material in your Experts notebook. (If you do not have a notebook in which you assemble and maintain your experts’ CVs, rates, and other reference information, start one.)

If the valuation expert agrees to have lunch with you, offer to pick up the expert and drive her to a nice restaurant. If successful, you will get to see her offices, which can provide valuable information. If the expert offers to meet you at the restaurant, that is okay. If the expert offers to meet you at your office, that can be interpreted in a bad or good way. Either the expert is embarrassed of her office or the expert “gets it.” “Getting it” means that the expert understands that you can be a future referral source and is willing to come to your office to increase that possibility. Before lunch, you can run the expert’s name through Westlaw and see if any opinions pop up involving that expert. If a business valuation issue was appealed, more than half of all appellate opinions list the experts’ names. Print the case, read it if you have time, and later place it in your Experts notebook behind that particular expert’s tab.

At lunch, be honest about your experience. Get to know the expert’s personality. Let your natural people skills take over. If you can’t get along during a relaxing lunch, forget about working together during a tough deposition. If the expert “big leagues” you, note that in your files as well. After lunch, ask for the same reference material listed above. Write the expert a thank you note and include your card. Put the expert on your mailing list.

Before the business valuation client walks in your office, you still have some work to do. You need to buy and read *The Lawyer’s Business Valuation Handbook: Understanding Financial Statements*,

*Appraisal Reports, and Expert Testimony*, by Shannon P. Pratt. For purchasing information see: <http://www.abanet.org/abastore>. The book is by far the best and most understandable business valuation reference for lawyers. It contains an excellent overview of the different credentials a business valuation expert can have (put a post-it note at the beginning of these pages), including ASA (appraisers.org), CVA (nacva.com), CBA (go-iba.org), and ABV (aicpa.org). If this book does not address a particular business valuation topic, you probably won't need to understand it.

During the consultation with your potential business valuation client, begin explaining why the client really should hire an expert. Provide the client with subtle yet important advice such as the following:

- When you hire an expert in a divorce case, the actual outcome of the expert's report is unknown.
- Expert valuation reports first assist lawyers with preparing settlement offers.
- Strategically, engaging an expert or experts in a divorce case communicates important messages to your spouse. One of the most important messages is that you are serious, ready, and prepared for trial if negotiations fail.
- If settlement negotiations are unsuccessful, the report can be entered into evidence at trial. Also, the expert may testify.
- Each state has its own legal standards by which businesses may be valued for divorce purposes. In most cases, there may be no other way to introduce comprehensive evidence about a business's value other than through an expert witness.
- Typically, experts require a retainer and charge by the hour. Engage the valuation expert and sign the engagement agreement before delivering documents or information. Know what part of the expert's retainer may be non-refundable.
- Most experts offer a range for the expected cost to prepare a report. Most often that range is pretty accurate, but not always. Unexpected things do

come up. The uncertainty in predicting total fees also comes from not being able to know how long depositions or trial testimony will take. For example, the length of depositions varies according to how long the other attorney wishes to depose your expert. Some expert witness depositions last only 30 minutes. Others can take longer than a full day.

It is very common for the potential client to be reluctant to hire an expert. Even so, if a potential client is reluctant to hire an expert, you must be concerned. With all that must be done in the typical case, some lawyers forget that it is a basic function of the divorce lawyer to both identify all marital assets and debts and value them. How can a lawyer advise about dividing up the "marital estate pie" when she does not know how big it is?

Experts are not created equal. Do not be tempted to go with the cheapest alternative. If you want to share a war story with a client, try *Powell v. Powell*, a Tennessee case. You can obtain a PDF of this case for free at: <http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/032/Powellch.pdf>.

A major dispute in *Powell* concerned the valuation of several check-cashing businesses. The husband hired his own CPA, Mr. Noble, as his valuation expert. Mr. Noble testified that the value of the businesses was approximately \$385,000. The wife hired an experienced business valuation expert, W. Robert Vance, CPA, CVA, CFP. He valued the business in excess \$2,200,000. The trial court ruled in favor of the wife's valuation. For several reasons, the Court of Appeals affirmed. In a footnote, the appellate court stated: "[Mr. Noble's] qualifications paled in comparison to those of [Mr. Vance's]."

*Powell* teaches an important lesson. The most significant contribution Mrs. Powell's lawyer made which led to the victory before the appellate court was the first phone call to their future expert, Mr. Vance. (Mr. Vance's professional biography can be viewed at: [www.valuationlitigation.com](http://www.valuationlitigation.com).) Whether you are hiring an experienced sole-practitioner CPA or one of the nation's most prestigious valuation firms, like Mercer Capital, see [www.bizval.com](http://www.bizval.com),

choosing your business valuation expert is a pivotal decision. The first party to engage the best expert for the case may have a perceived and actual negotiating advantage. In *Powell*, the court's valuation decision created an obligation for the husband to pay the wife almost a million dollars. For many cases involving small business valuations, a significant amount of money is at issue.

Before interviewing an expert, learn everything you can about the subject business so that you can speak somewhat intelligently. While the expert will not expect you to understand subtle details about the company's financial performance, knowledge of some basic details will make it clear you have done some homework. Search Google, the local business journal and newspaper, the county register's office (looking for UCC-1s and other financing filings), and industry journals. Also, work the phones. Call and talk to CPAs and stock brokers who make it their business to know a lot about area businesses.

When interviewing business valuation experts, consider including the client in meetings. Often, two candidates will come to the forefront. If you are on the fence in respect to making a recommendation, it is appropriate to ask your client to choose the expert with which she is most comfortable. Normally, clients are most impressed with experts who can answer questions in one sentence of 10 words or less. (Some experts can't.) The following list of questions for a potential expert will impress both the expert and client:

- What are your education, training, and experience?
- What is your prior testifying experience, both in court and in depositions?
- Explain why your credentials are good/better/best.
- What articles/books/speeches have you published? (Get copies of everything the expert has written to help prepare you for opposing counsel's cross examination.)
- What is your prior testifying experience in the subject business's industry? (While this can be extremely helpful, exact experience is not necessary.)
- Have you prepared for the meeting

by performing limited research on the industry or subject business?

- How many times have you been engaged by opposing counsel?
- Do you have any friendships or possible conflicts with potential witnesses?
- What is your practice of retaining work papers? (Read about work paper retention policies in Shannon Pratt's book.)
- What are your engagement fees and costs? (Review the expert's "standard" engagement agreement.)
- Do you prefer to be hired by the client or lawyer? Who will be legally responsible for your fee?

The effort you put into hiring a business valuation expert will never be wasted. You must learn about the subject business anyway. Your client will see a sophisticated, detail-orientated lawyer working the case. You can gain insight from every meeting, even bad ones. Your client will see that the divorce process is as not as simple as he or she might have first thought. From the first lunch to the 10th favorably negotiated settlement, the process of developing serious working relationships with business valuation experts can be financially, professionally, and personally rewarding. FLR



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# Christopher D. Olmstead Receives the 2005 Jack P. Turner Professionalism Award

By Robert D. Boyd  
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The Jack P. Turner Award is the highest honor given by the Family Law Section of the State Bar of Georgia. It was named in honor of Jack P. Turner, the “patriarch” of family law lawyers in Georgia.

The award was established to honor an attorney whose career has exhibited the highest standards of technical expertise and professionalism in the practice of family law.

This award is not given annually. It has been a tradition of this section not to treat the award as something that is routinely presented every year, but an honor that would only be given in special circumstances to uniquely qualified family law practitioners.

In 2005, the Jack P. Turner Award was presented to Christopher D. Olmstead, a partner in the Atlanta law firm of McLain & Merritt, the only place he has ever practiced. Chris received his undergraduate degree from the University of Pennsylvania in 1964. After serving two years as a lieutenant in the United States Army, he earned his J.D. degree from Emory Law School in 1969.

Chris has served as chairperson of the Family Law Section of the State Bar of Georgia and president of the Georgia Chapter of the American Academy of Matrimonial Lawyers. He is a member of the Charles Longstreet Weltner Family Law Inn of Court. Chris was voted as one of Georgia’s Top 100 Super Lawyers in both 2005 and 2006.

On a personal level, I have known Chris Olmstead for more than 15 years. In addition to being an outstanding adversary, he is a great professional colleague and true friend. His word is his bond, and he can always be counted on to exhibit sound judgment, compassion, and wisdom.

Chris Olmstead represents the highest ideals and standards of our profession. Chris is a great lawyer, but an even better person. He epitomizes everything that is good about our practice, and this recognition by his peers validates everything he represents. FLR



Robert D. Boyd presents Christopher D. Olmstead with the 2005 Jack P. Turner Professionalism Award

# Trying to Build Your Practice? Be Yourself



By Jonathan J. Tuggle  
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Looking for advice to share with other younger lawyers, I recently asked a number of seasoned family lawyers for tips on how to generate business. The most common suggestions included: 1) build relationships with other lawyers who do not practice family law; 2) be active socially, consider joining a social club; 3) be active in civic and charitable organizations; and 4) be active in your church or synagogue.

I would add, "Be yourself."

From a networking standpoint, one of the best things about practicing family law is the ability to generate business and build your practice by simply meeting and interacting with people as you go through your personal and professional life. While many of your corporate contemporaries, with an eye toward partnership, stress over the difficulties of landing a business or corporation, you are much more likely to land one of the tens or hundreds of the company's employees who, based on the current divorce rate, will likely need your services. So just by living your life, there is a statistical probability that many of the relationships you form could be potential sources of business.

But in cultivating these professional contacts, do not lose sight of the importance of being yourself and being true to yourself.

For many younger lawyers, particularly those working in larger firms, there is little expectation or requirement that you bring in business. Of course, no partner would dispute that one of the quickest ways for an associate to distinguish himself or herself is to originate business. With the pressures to make partner and to generate busi-

ness, whether self-imposed or not, it can be all too easy to "over sell" yourself, or to tell the prospective client what he or she wants to hear, even if that flies in the face of what you believe in. By applying a "get-the-business-at-all-costs" approach, you can quickly find yourself in over your head, or struggling with client expectations when they discover the person they hired is not the person they thought they hired, or struggling with yourself when you failed to listen to your gut which told you not to take the case. Let it be known from the beginning who you are and where you stand, and the rest will take care of itself.

The business will come.

I recently picked up *The Starter Marriage and the Future of Matrimony*, a book written by Pamela Paul. In her book, Paul describes a demographic phenomenon: the starter marriage, defined as a marriage of five years or less, often before age 30, and before children. Of the 60 starter marriage veterans Paul interviewed, they were predominantly white, middle class to upper middle class, and mostly college educated. This apparent trend underscores the opportunities for younger lawyers. By having friends and contemporaries going through a divorce, you will not only get manageable cases from which to gain experience, but you will be putting your name in circulation at "the ground floor." Do a good job, and the phone will ring.

Ultimately, as you establish your practice and develop your own style, consider first your personal convictions and what type of person you want to be, and that will transcend into your practice. Above all, be consistent. And be yourself. FLR

## Sanity Software

*Continued from page 5*

program for time-billing and GL functions, a word processor program to generate documents and either a paper or electronic calendar and contact system. While such an arrangement might be common, it creates efficiency and management issues because while all of the paper and electronic systems contain client and case information, none of them can share that information. Even if an electronic calendar/contact management program is being utilized, it is often setup incorrectly, used improperly, or installed on computers which are not networked. As a result, an otherwise useful PIM often doesn't allow calendars to be shared and users often maintain separate contact databases rather compiling them into a firm-wide list. As a result, the simple act of updating a client's address requires an email to all staff asking them to update their personal list of contacts and manually changing it in two or three other programs. The calendar and task list is supposed to remind you of deadlines and appointments in your files, but the calendar can't access information contained in the paper files, nor remind you of anything when you're looking through the file. Many billable events are recorded in the calendar and task list, but they're not linked to the accounting software. Documents are generated utilizing the data located in case files but the word processor cannot pull it out. All of this means more errors and a huge amount of redundant data entry by you and your staff.

PMPs also have the unique ability to link together other programs you're using and enable them to share information for the first time. Most synchronize with several hand held devices like a Palm Pilot, as well as Microsoft Word, Corel WordPerfect, Worldox (document management software), CompuLaw (rules-based docketing software), HotDocs (world's leading document assembly software), PaperPort (scanning software), Microsoft Outlook (for purposes of email), Microsoft Exchange Server, and time/billing/accounting programs like Timeslips, PCLaw, TABS III, Juris, QuickBooks and many others. As such, PMPs can get most of your existing programs to finally start working together and

replace those that don't (such as Outlook).

PMPs also enable users to share calendars across the network, case information, contacts and all other practice information in a single firm-wide database. These items can be shared without purchasing any additional software (like Exchange Server or a separate database) and can even be shared on a peer-to-peer network (which lacks a dedicated file server and network operating system). In spite of the fact that all practice information resides in a single database, users have the ability to protect personal items and the Client Server edition of Amicus Attorney also allows one to create and save sets of security settings controlling users' ability to access parts of modules and/or functions.

## Time Billing Issues

Cumbersome time-keeping programs which require every time record to be manually entered often cause attorneys with poor typing skills to abandon the idea of entering their own time. As a result, it is often dictated or written down and then given to someone else who enters the time into a billing program. This is not only the most inefficient way of entering time, but also increases the possibility that errors will be made and time will be lost. PMP's streamline the process of entering time and although many of them do not have accounting functions internally, they link to third party accounting programs. For example, assume you had an appointment on behalf of a client which was billable (see below). Since the appointment is already linked to a matter (Silverthorn re Sales Tax), creating a time entry is a simple matter of clicking the timesheet button in the corner of the appointment window. Doing so creates a perfect time entry with no additional data entry (the appointment description is automatically dropped in and the length of the appointment is also recorded).

In fact, there are "Do A Time Entry" buttons in about every dialog and the program can be setup to either prompt you to create a time entry or automatically create a time entry whenever a task is checked off as done. Since Amicus Attorney automatically enters the time elapsed and pulls the description of the appointment, phone call,

task, etc. into the time entry, users must typically do no more than click an okay button to record the time. This focus on automating time entries means that even non-typists can enter their own time and that more time is typically captured.

### Document Assembly

Family law can be a document-intensive area of practice (settlement agreements, lengthy QDROs, financial affidavits, real estate transaction documents, not to mention pleadings and discovery requests). We spend a huge amount of time drafting and editing documents. However, few firms view document generation as an area of inefficiency or one in which significant improvements could be made. Unless a firm is already using a document assembly system, huge efficiency gains can typically be made. All of the practice management programs named herein have document assembly features, and all of them integrate with Microsoft Word and Corel WordPerfect's merge functions. In its simplest form, document assembly enables you to pull information directly from your practice management program into documents via word processor templates.

Most of the PMPs mentioned herein also integrate with the legal industry standard for document assembly, HotDocs<sup>2</sup>. Frankly, there is no other worthwhile player in the document assembly market. Some firms have been lured to try other document assembly products only to find them to be limited or very difficult to program. HotDocs offers both simplicity of use and ease of programming. Plus, HotDocs completely integrates with Word or WordPerfect and takes document assembly to a whole new level. For example, if I have a fax cover sheet template in Amicus Attorney utilizing HotDocs and Microsoft Word, I must only click a button to create a new cover sheet for any contact in my database. Amicus Attorney feeds the contact information into Word and HotDocs presents a window with all information about the Amicus Attorney contact pre-filled. In the window, all I must enter is the number of pages, the message (if any) and click a Next button. The completed fax cover sheet appears in Word, ready to print, and the entire process takes less than

10 seconds. If you can save three minutes every time someone in your firm creates a fax cover sheet, you will have saved a considerable amount of time each week.

Although HotDocs is adept at automating simple documents, it can be used to develop templates for anything from an enclosed-please-find letter to a heinously complex asset purchase agreement with hundreds of optional paragraphs and thousands of variables (changeable text). More importantly, complex document drafting is where HotDocs really pays dividends. Like most document assembly programs, HotDocs allows users to replace changeable text with variables (i.e., «Petitioner Name», «Petitioner Street Address») and make the inclusion of text (words, sentences, paragraphs, etc.) conditional. With each new variable, you also create a corresponding question (prompt) which will be presented to the user during the assembly process. Generating a new document is a simple matter of answering the questions generated by the template. Think of it as an on-screen interview process. After the questions are answered, the completed document appears on the screen (in Word or WordPerfect), ready edit, save, print, etc. The question/answer format is quite powerful because template designers can control everything about the sequence and content of the interview. With these tools and some practice, you can actually reproduce your entire decision tree in the template. Even if you're a word processing wizard, it is unlikely that any other tool can save you as much time each day as HotDocs.

A well-designed HotDocs template walks even a novice user through the assembly process while nearly eliminating the possibility of operator error. The old cut-and-paste/search-and-replace ("CP/SR") document generation method employed by many lawyers is slow and fraught with peril. Peril arises from fact that CP/SR is unstructured, relies on the user's memory, assumes Word or WordPerfect will "catch" all of the items in need of replacement and requires many steps. Memories fail, word processors don't catch everything and more steps create more mistakes and slower drafting.

Assuming a correctly designed template,

document assembly systems are much more accurate than CP/SR because they only require the user to enter case-specific facts and the items that change (party names, etc.). Since much of the data is coming directly from a practice management system or other database, the likelihood of user input error is further reduced. The template does the work of including the appropriate paragraphs, excluding the irrelevant ones, verb conjugation, punctuation lists, calculating numbers and dates, correcting personal pronouns and replacing the items in need of replacement. For many people witnessing this method of document generation for the first time, it is nothing short of an epiphany. If a lawyer is feeling crushed by drafting projects, a good document assembly system represents the opportunity to catch up, maybe for the first time ever. Since significantly less time is necessary to produce documents but users may still charge the same fees (i.e., value billing), profitability also rises.

## Recommendations

The efficiencies to be gained and the problems solved through the use of PMPs are significant and every firm is a candidate for their use. However, it still requires a time investment to get a system installed, customized for your practice and integrated with the way you work. If you're not a software expert, seek professional assistance. In spite of what you may have heard, one does not have to suffer in order to learn new technology; and there are plenty of experts to help you make a smooth transition into practice automation. Live demonstrations are the best way to get a feel for what the programs do and how they do it; but don't settle for a 15 minute PowerPoint slide-show and don't expect that an on-site practice analysis and customized presentation of the actual software will be free. Make sure your prospective consultant has a lot of experience and beware of "lawyers-by-day, consultants-by-night" unless you only anticipate having questions and issues during non-business hours. Finally, make absolutely sure that hands-on training is a big component of anything you decide to do. This issue is really quite simple. If you can't afford training, then you can't afford the software. If you don't have time for training, then

you don't have time for the software. If you don't think you need training, then you're either in denial or you're in the wrong industry (you should be a consultant).

Organize your practice, track all of your case information, streamline time-keeping, speed up your document assembly, share practice information with co-workers and keep or regain your sanity. Practice management and document assembly programs are designed to help you do it. **FLR**

*Steven J. Best is an attorney and certified law office software consultant. He is the president and founder of Best Law Firm Solutions, Inc., an Atlanta based law practice management and software consulting firm. Steve and his consultants at Best Law Firm Solutions, consult with law firms of all sizes and disciplines nationwide and sells and supports case management products Amicus Attorney® and PCLaw/PCLaw Pro®. In addition to Amicus Attorney and PCLaw, Best Law Firm Solutions also sells and supports HotDocs/HotDocs Pro for document assembly; Worldox/Worldox WEB for Document Management; CaseMap/TimeMap/NoteMap/TextMap for litigation fact management; CompuLaw-computer based court rules; Sanction II and Microsoft PowerPoint for trial presentations; as well as Microsoft Office 2003 (standard/professional) and the Corel Word Perfect Suite. You can contact him at 770.998.3800 or [steve@bestlawfirm.com](mailto:steve@bestlawfirm.com).*

## Endnotes

1. Lexis/Nexis-Time Matters, in 2003, introduced Billing Matters as a companion back office product. Abacus Law now offers Abacus Back Office.
2. HotDocs is document automation software published by Capsoft Development, a Matthew Bender company and part of the LexisNexis Group. There are currently over 200,000 users of HotDocs software from individuals to large law firms and Fortune 500 companies as well as many users of published template sets built on the HotDocs engine. (see [www.capssoft.com](http://www.capssoft.com))

# Deborah A. Johnson Receives 2006 Tuggle Award

By Stephen C. Steele  
scs@mijs.com

On Jan. 26, 2006, at John Mayoue's Family Law Convocation on Professionalism, the Joseph Tuggle Award for professionalism in the practice of family law was awarded to Deborah A. Johnson of the Atlanta Legal Aid Society.

When I interviewed Jack Turner to write the article which appeared in the Family Law newsletter for February 2006, I heard Jack Turner state that practicing law has become less of a profession and more of a business. That is to say, lawyers of every specialty now focus more concentration and effort on the financial profit from their practice, focusing less on professional service to the public.

Deborah A. Johnson has been the Managing Attorney of The Atlanta Legal Aid Society since 1993. Undeniably, she has directed her talent toward professional service, and not financial profit. Deborah Johnson graduated from The Boston University School of Law in May 1981 where she served on Boston University Law Review. In 1982, she began serving as a staff attorney for Legal Services of

Southeastern Michigan, progressing to the position of Deputy Director in 1991 when she left to start as a staff attorney with the Atlanta Legal Aid Society. While practicing in Michigan, she served as a board member for the Family Law Project of Ann Arbor Michigan, providing free legal representations to victims of family violence. She also served as a member of the Georgia Commission of Child Support in 1998 and 2001.



Deborah Johnson was the clear focal point in drafting

the child support worksheet and the supporting schedules for the new Child Support Guidelines which appear in the 2006 Georgia General Assembly as SB382. With her assistance, the worksheet and the schedules should be usable by the lay public, much of whom will be unable to hire attorneys.

Deborah Johnson has sacrificed personal gain in order to champion professional service to the public. In the purest sense, she is a professional. The Family Law Section is honored to award the 2006 Joseph Tuggle Award for Professionalism to Deborah A. Johnson. *FLR*

## Wine Tasting/Silent Auction

The YLD Family Law Committee will be hosting its annual fundraiser on July 27 at Vinocity Wine Bar in Midtown Atlanta. The event, which will be open to everyone, particularly members of the Family Law Section, will include a wine tasting and silent auction. Proceeds from the event will benefit The Bridge, a non-profit organization which is dedicated to helping Georgia adolescents and families who have been severely abused achieve independence by offering an on-campus school that emphasizes vocational readiness, solution oriented therapy, family counseling and community based activities.

# 2005-2006 Annual Report of the Family Law Section

By Stephen C. Steele  
Chairman, Family Law Section

**D**uring the 2005-2006 term, the Family Law Section of the State Bar of Georgia contributed greatly to the people of the State of Georgia, the Georgia Legislature, and to the profession. The internal structure, membership, and finances of the Section continue to be exceptionally strong. Accordingly, as herein explained, I proudly urge the State Bar of Georgia to recognize the Family Law Section as Section of the Year.

## I. Service To the Legislature and to the Public

The experienced and busy professionals of the Family Law Section embraced the opportunity to assist with the implementation of the new Child Support statute which passed as HB221 in the 2005 legislative session and SB382 in the 2006 legislative session. I wrote an article for the *Family Law Review* of Nov., 2005. As I explain in my article, of the five subcommittees created by the Georgia Child Support Commission, four were chaired by members of the Family Law Section. In fact, the only subcommittee not chaired by a member of the Family Law Section was the Economic Study Subcommittee chaired by economist Roger Tutterow, Ph.D. The Commission's requests for study groups were always directed first to the Family Law Section, and we eagerly responded with cogent and helpful advice and direction. Moreover, and importantly, the work of the Family Law Section was completely non-partisan and did not, one single time, attempt to shape or influence the substance of any legislation. We viewed our role to be that of providing scholarly and experienced advice on implementation of the bill. Consistent with the policy of the State Bar of Georgia, our advice was strictly technical and practical in nature, based upon our experience and knowledge of the law.

The leadership of the Bar need not blindly accept my proud proclamation of our

service in this connection. Attached under Tab 2 is a letter from Jill Radwin, Esq., Staff Attorney for the Georgia Child Support Commission. As you can see, the letter was directed to Rep. Earl Ehrhart, chairman of the Commission and to Cliff Brashier, executive director of the State Bar of Georgia. Ms. Radwin reaffirms the valuable and broad extent of our contribution to the Child Support Commission.

Also at the request of Rep. Ehrhart, John Lyndon, a member of the Family Law Section Executive Committee from Athens, prepared a research paper which was submitted to Representative Ehrhart to provide a state-by-state analysis of joint custody. I was recently flattered to be appointed by Rep. Ehrhart as legal advisor to the task force he has formed in order to further study and prepare legislation on this subject.

Catherine Knight of Atlanta has succeeded Shiel Edlin as legislative liaison for the Section. As a member of the Family Law Section's task/study group, Ms. Knight virtually single-handedly wrote what now appears as OCGA 19-6-15(b). During the 2006 legislative session, Catherine and numerous other members of our section monitored legislative developments of Family Law during the session of the General Assembly. We will continue to do so.

## II. Service to the Profession

Randy Kessler and Marvin Solomiany of Atlanta are co-Editors of our *Family Law Review*, which entertains and informs the entire membership. Subjects of cutting-edge interest, recent case law developments, notices of seminar, and significant news about the judiciary are all found within each edition.

Karen Brown-Williams of Marietta energetically tackled the assignment of updating the Section's website, making it more current and helpful to the membership and to the public.

The Section continues to encourage lifetime achievement and contribution to the profession with the Jack Turner Award. To recognize professionalism, our 2006 Joseph Tuggle Professionalism Award was given to Deborah A. Johnson of Atlanta Legal Aid for her years of service to those of less fortunate circumstances. The Family Law Section, by giving our Tuggle Award to Deborah Johnson, recognizes her years of service to the less fortunate as the true mark of a professional.

Through our seminars, we continue to provide education and camaraderie to the members of our Section. The Family Law Institute is a three-day seminar, the location of which has alternated between Destin, Fla., and Amelia Island for the last five years. Over Memorial Day 2005, the Family Law Institute was attended by approximately 385 lawyers. The environment of scholarly instruction and the opportunity to enjoy the company of our colleagues outside of a courtroom is a valuable and enjoyable experience for all.

An important part of the Family Law Institute is the attendance of Superior Court Judges and Appellate Judges. Four Supreme Court Justices, three judges from the Court of Appeals, and more than a dozen Superior Court Judges, attended the 2005 Family Law Institute. The finances of the Family Law Section are strong enough to support inviting all of these members of the Judiciary – at no cost to any of them.

The Family Law Institute of 2006 will be a unique event. Chaired by Shiel Edlin, the Family Law Institute will be paired with the annual meeting of the Georgia Psychological Association. Thursday and Friday of the three day session will consist of joint sessions of lawyers and psychologists, with lecturers speaking to the entire homogeneous group. Additionally, lawyers and psychologists will unite their talents and experience to present a mock trial with issues of psychological import to both professions. We anticipate approximately 300 psychologists and at least 400 lawyers will attend this event. It will truly be the first of its kind.

Carol Walker, John Lyndon, and Stephen Clifford of the Section lectured at the Superior Court Judge's conference in July

2005 on issues of interviewing children in custody cases and on recent developments in Family Law.

In January 2006, Randy Kessler presented an overview to the Superior Court judges of the new child support legislation. In July 2006, Carol Walker, John Lyndon and I will teach the Superior Court judges the new child support statute, and we will demonstrate the forms and the calculator which will be used to implement the new guidelines. Members of the Executive Committee have been asked by the Council of Superior Court Judges to assist in the redrafting of forms and rules in light of the child support legislation passed in the 2006 session.

### **III. Membership, Finances and Internal Structure of the Section**

At 1,459 members, our Section is strong. Our financial report of March 31 from Johanna Merrill, section liaison, showed that the State Bar held in the treasury of the Section \$38,034.71. Further, in 2005 we received contributions of approximately \$22,000 to help produce the Family Law Institute. I understand that in 2006, more than \$40,000 has been pledged from private resources to assist in the production of the Institute. These contributions have enabled us to routinely invite at least 20 Superior and Appellate Court judges and justices to help educate us. Further, the opportunity to speak with judges and justices in a relaxed social setting is a valuable aid in our members' communication and liaison with the judiciary.

Because our bylaws were outdated, Ed Coleman of Augusta and I substantially revised the bylaws to allow notice of meetings by e-mail and further updated, enlarged, and specifically defined the membership of Executive Committee and the job descriptions of the officers.

Within the last year, Jonathan Tuggle and Marvin Solomiany created the Family Law Committee of the Young Lawyers Division of the State Bar. Our newly amended bylaws appoint the Chairman of the Family Law YLD (Jonathan Tuggle this year) as a standing member of the executive committee of the Family Law Section. By doing so, the Family Law Section pledges its commitment to developing



future leadership for the Section, which continues to grow in number, diversity and strength.

My active executive committee has been of invaluable assistance to me. In my recent *FLR* article (page 2) I summarize the contribution from each member of the executive committee.

#### IV. Conclusion

The membership, finances, and structure of the Family Law Section are strong. We are comprised of experienced professionals who have grasped the opportunities to be of assistance to our profession and to the public. It is with enormous pride that I again cogently restate my declaration that the Family Law Section of the State Bar of Georgia has earned the award of Section of the Year. *FLR*

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#### Chair's Column

*Continued from page 3*

##### *Jonathan Tuggle of Atlanta*

Jonathan is chairman of the Young Lawyers Division of the Section. He has undertaken the task of writing a history of the Section.

##### *Carol Ann Walker of Gainesville*

For her work on HB221 and SB382, Carol Walker deserves a medal. She, Tina Shadix-Roddenbery, and Sandy Bair wrote most of the statute. Carol helped to write many of the forms. She and I have put together the Child Support Commissions Training Seminar, which will probably be on Oct. 13, 2006 at GPTV Studios in Atlanta. Carol will again be an instructor at the Superior Court Judge's Seminar during the Summer of 2006. She has been a valuable and tire-

less worker. Her contribution of time and talent span a wide spectrum.

This has been a very busy year. The Family Law Section has invested numerous and valuable contributions to the profession and the public. The contributors to this effort include not only the Executive Committee, but many other members of the Section, only a few of whom I have managed to thank publicly. To those of you whom I have not mentioned in this or any article, I thank you on behalf of the Family Law Section of the State Bar of Georgia.

For the next group of officers, I wish for you the same enthusiastic support from the Executive Committee and the Section.

I am profoundly grateful to all of you for the opportunity to have served as your chairman for the 2005-2006 Bar year. *FLR*

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## Past Chairs of the Family Law Section

Richard M. Nolen . . . . .	2004-05	Christopher D. Olmstead . . . . .	1990-91
Thomas F. Allgood Jr. . . . .	2003-04	Hon. Elizabeth Glazebrook . . . . .	1989-90
Emily S. Bair . . . . .	2002-03	Barry B. McGough . . . . .	1988-89
Elizabeth Green Lindsey . . . . .	2001-02	Edward E. Bates Jr. . . . .	1987-88
Robert D. Boyd . . . . .	2000-01	Carl Westmoreland . . . . .	1986-87
H. William Sams . . . . .	1999-00	Lawrence B. Custer . . . . .	1985-86
Anne Jarrett . . . . .	1998-99	Hon. John E. Girardeau . . . . .	1984-85
Carl S. Pedigo . . . . .	1997-98	C. Wilbur Warner Jr. . . . .	1983-84
Joseph T. Tuggle . . . . .	1996-97	M.T. Simmons Jr. . . . .	1982-83
Nancy F. Lawler . . . . .	1995-96	Kice H. Stone . . . . .	1981-82
Richard W. Schiffman Jr. . . . .	1994-95	Paul V. Kilpatrick Jr. . . . .	1980-81
Hon. Martha C. Christian . . . . .	1993-94	Hon. G. Conley Ingram . . . . .	1979-80
John C. Mayo . . . . .	1992-93	Bob Reinhardt . . . . .	1978-79
H. Martin Huddleston . . . . .	1991-92	Jack P. Turner . . . . .	1977-78

# Q&A: Judge John H. Bailey Jr. Chief Judge, Superior Courts, Northern Judicial Circuit

Conducted by John F. Lyndon  
jlyndon@lawlyndon.com

**Q:** Tell us a little bit about your background prior to being appointed to the Superior Court.

**A:** The governor appointed me, actually called me just before Thanksgiving 1995, swore me in in December, and I took office Jan. 1, 1996. I am in my 11th year on the bench, and prior to that I was with the district attorney's office for almost eleven years. After law school I practiced for about three years but didn't particularly like it, so I went back to work at Gulfstream Aerospace in Savannah where I had worked before law school.

Judge Lindsay Tise, who was the district attorney in the Northern Circuit at the time, called and asked if I would go to work for him. I had never tried a lawsuit before, and I didn't want to die and not know whether I would like it or not. I went to work for him and fell in love with it. Of course I was born and raised right here in Elberton, so I was just coming home.

**Q:** In undergraduate school you were an art major?

**A:** I went to Middle Georgia College and Georgia College at Milledgeville, getting an associate degree in commercial art and a degree in art education.

**Q:** What percentage of cases you are handling are in the domestic relations area?

**A:** In the civil side of it... well if you count legitimations and custody disputes, probably 35 to 40 percent, I would think, at

least that if not more.

**Q:** You are chief judge now of the Northern Circuit, which has five counties: Madison, Elbert, Hart, Franklin and Oglethorpe. That's a pretty big geographic area for you to cover. Tell me what's good or bad about being a circuit judge like that.

**A:** There is nothing bad about it. I love it. Of course my office is here in Elberton. I have court in Hartwell, Franklin County, Madison County. I was over there yesterday, I was in Hartwell this morning, next week I will be in Oglethorpe County, and then I will be back here.

I'm not in the same courtroom with the same folks and the same attorneys and the same litigants day after day. I have a different place to look forward to. I get to get out and clear my mind before I get to work and see different folks and travel around, which I really enjoy.

That's the best part of it.

I don't think I would want to be in a single county circuit and have to go the same office everyday.

**Q:** I assume you end up with a lot of miles on your vehicle.

**A:** I do and thankfully the state reimburses me for those miles (laughs).

**Q:** Well, in the Northern Circuit we have motion days and you hold hearings in each one of those counties once a month.

**A:** We try to, yes.



**Q:** Given the number of hearings that have to be conducted on one day, I am sure you want to have an idea of how long a hearing is going to take. In my experience lawyers aren't very good at predicting this. What do you do when we're an hour and a half into a hearing with no end in sight?

**A:** Well, judges are no better at judging how long it is going to take than the lawyers are, but I understand that witnesses may be more difficult than you anticipated and the cross examination may last 20 to 30 minutes longer than you anticipated. If you are at the top of the calendar and I've got a courtroom full of folks with 20 other lawyers waiting to be heard and you are running over, I will try to stop it at a convenient stopping place and say, "How 'bout you all take a break and let me handle these other matters and come back this afternoon and we'll finish it up this afternoon?" Or if that's not possible, we can finish it up tomorrow in whatever county I will be in. It makes me uncomfortable for people to be waiting on me and seeing all those folks looking at their watches, but you can't hold people's feet to the fire on a strict timetable. Everybody has a right to have their case heard and heard fully. That's what I try to do.

**Q:** We are usually limited to one live witness at the temporary hearings, but we can have additional witnesses testify by way of affidavit. I know from past conversations with you that you generally do not put a lot of stock in affidavits from witnesses. Is that in fact the case?

**A:** That's true. As you know, you can't cross examine an affidavit, and by nature they are self-serving. I often get them the morning I show up for the hearing and I'll scan through them but I do not put a whole lot of faith in them for those very reasons. It's easy to say one thing on an affidavit but you may say something quite different if you are sitting on the witness stand under oath. I know they are necessary and I do read them but I don't think I have ever based a decision entirely on what I have read in an affidavit.

**Q:** Jeff Bogart told me once that in his practice they use a cover sheet stating that the witness statement is attached and



John Lyndon and Judge John Bailey

the witness writes out the statement or types the statement in his or her own words and the affidavit is submitted in that form. Do you think that is an improvement over the lawyers drafting the affidavit themselves?

**A:** I certainly do, because I would tend to trust what was said in the witness's own words. I've had cases where there is an inch to three-inch stack of affidavits that are all worded exactly the same except for the signature on the back and the age of the affiant. I know who prepared these affidavits. And these people more than likely haven't read them, much less given them any thought. If they actually testified, they may say something entirely different. So I think Jeff is on the right track. As a prosecutor I would have rather put a statement written by a witness or defendant before a jury than one of the police officers saying, this is what he told me and I wrote it down. As a judge I'm going to put a lot more stock and a lot more faith in that type of evidence.

**Q:** You have a reputation for being a very congenial and courteous judge on the bench, but is there anything that lawyers do that gets under your skin or you feel is inappropriate in the courtroom?

**A:** The thing that comes to mind immediately is when lawyers argue among themselves during the hearing rather than to the court, or talk over the other one when the other one is trying to make an objection, or being uncivil to each other. I

“Other than the aches and pains, I still feel like I am 15. I keep expecting some of my dad’s friends to come in the courtroom, sit in the back, and say, ‘John Bailey, quit playing around and get off the bench. You got no business being up there,’ calling my bluff.”

- Judge John Bailey

just think there is no room in the courtroom for that. You may not like each other, you may not like each other’s client, but you at least need to be civil and professional in the courtroom. Judge Grant always taught not to argue with the court. Well I’d rather have the lawyers argue with me than argue with each other, because I can only listen to one at a time. My hearing is not so great anyway and I can only pay attention to what one person is saying. It makes it easier for me to do my job if they will be courteous in that way.

**Q:** We are having more and more parents asking for a true joint physical custody arrangement with substantially equal time with both parents. What factors do you consider when you are attempting to determine whether or not that type of custody arrangement truly is in the children’s best interests?

**A:** I think you have to look at whether or not the parents live in the same county. If they do, that works better than if they live in an adjoining county or two counties over. I look at how many children are involved, their ages and where they go to school. You may have four kids in three or four different schools. You have to take into consideration the relative income of the parties. But I think the overriding factor would be the animosity level between the parties. If they are not talking to each other, don’t like each other, and don’t have a civil thought in their mind about the other, they are going to make the kids be the messengers, which just never works. I know that joint physical custody is something we need to consider, but the circumstances have to be exactly right for it to work well.

I don’t know how many true joint custody arrangements I have ordered unless by agreement. It would be interesting to go back and see how many of those I had to change later because it just was not working. I did have a case in which the mother’s parents were across the road and the dad’s parents were just up the road and they were arguing about who was going to get the house and who was going to get the kids. I awarded the house to the kids on a temporary basis and made the parents go home to their parents and alternate spending a week in the marital residence. On a temporary basis it worked out pretty well and the case was resolved without a trial. That was a unique set of circumstances that allowed me to do that.

**Q:** But as a superior court judge you have tremendous discretion in entering both the temporary orders and the final decision.

**A:** The beauty of a temporary hearing is that you can’t be appealed. You can always go back and fix it.

**Q:** Are you trying many jury trials these days in domestic relations cases?

**A:** Not as many as I started out. When I first went on the bench I handled Judge Grant’s and Judge Bryant’s civil calendars for the first six months because I was barred from doing any criminal work until we had had several grand juries and had cases I had not been involved in. But as I’ve worked into my own calendar, they have gotten fewer and fewer. I may try two jury trials a year in domestic relations cases. I do a lot more bench trials than jury trials, but it not as many as I would have thought.

**Q:** I think mediation has had a big impact on the frequency of final trials. Would you agree with that?

**A:** I do, and I think it is wonderful. Linda Horvath, the head of our Alternative Dispute Resolution program, and her staff do a great job. The program was initially in the Western Circuit only but now operates in the Piedmont and Alcovy circuits as well. I think Linda sent me statistics showing that we have about a 68 percent success rate or settlement rate, including all magistrate courts as well as the superior court

and state court cases as well. We have got a great pool of mediators here that do a great job. I think it is the best thing since sliced bread as far as the civil docket is concerned. These folks do not literally get their day in court but they get to present their side and they have to listen to the other side as well, with an impartial person sitting in between and trying to settle the matter. I don't know that everybody goes away happy but I think they are more likely satisfied with the result than if it went to a jury or if I had to decide it myself.

**Q**: You mentioned Judge Bill Grant who was the chief judge here in the Northern Circuit, and you were an assistant district attorney practicing before him.

**A**: Yes, that's right, I was assigned to his courtroom for the last few years.

**Q**: And I know that Judge Grant could be a strict judge in a courtroom...

**A**: He ran a tight ship and he expected everybody to mind their Ps and Qs and to do it the right way.

**Q**: And I remember once you had a particularly bad day before him?

**A**: That's right. I had come up here from Savannah and was living with my parents while my wife Rosemary was still in Savannah trying to sell our house. It was one of those days in court when everything had gone wrong and it was my turn to be the one at fault. I was thinking maybe I should have stayed in Savannah. I came home and my dad could tell I was bothered. Judge Grant and my father were great friends, so he knew him quite well. And he said, "What's wrong with you, son?" and I said, "Dad, just excuse my expression but Judge Grant has just chewed my ass all day long." And he put his paper down and said, "Son, he is an old man. You've got more ass than he's got teeth." (Laughs) And after that, I didn't have too many of those days that I went home really feeling sorry for myself.

**Q**: Tell us something that folks don't know about the Judge John Bailey they see in the courtroom.

**A**: I will at the drop of a hat fly to New York with friends to see an Allman

Brothers concert. I have a lot of different hobbies. I try not to take my work home with me; I never take a computer home and do work at home unless I just absolutely have to. Rosemary and I have been remodeling our house for the last four years which has kept me busy most every night and weekends. I like to fly fish; I tie flies. When I have time, I make knives. I've got a friend, an excellent knife maker, who has tried to teach me how to forge steel and make knives.

I do a little painting every once in a while. I play guitar. I can't read a note, but I like to play. I play by ear, which is rough on the ears, especially those who are listening. I've got three guitars sitting there and one is out being worked on right now. I wish I had your brother here; I need a guitar tech. And I listen to music. I don't know how many judges have iPods but I've got one and I certainly listen to mine.

**Q**: You think rock'n roll has the ability to keep us young?

**A**: Without a doubt. I graduated from high school in 1966. At one of the last reunions I had a great time and I said afterwards to one of my classmates, "You know, it is a shame not too many of us 15-year-olds showed up for this thing." Other than the aches and pains, I still feel like I am 15. I keep expecting some of my dad's friends to come in the courtroom, sit in the back, and say, "John Bailey, quit playing around and get off the bench. You got no business being up there," calling my bluff. **FLR**

# Who Lives, Who Dies, Who Decides: Cohabitants and the Law

By Sondra Harris  
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The only relationships recognized by law between cohabitants are contractual ones. Therefore, it is, perhaps, of even more importance to cohabitants, than to other persons, to have health care proxy, and advanced medical directives executed.

## Do Not Resuscitate Orders, Medial, Living Wills and Health Care Proxy

There are several kinds of advanced medical directive orders which can be executed. The most common is one known as the do not resuscitate or "DNR" order. The DNR orders are specific in that they deal solely with cardio pulmonary resuscitation, and not with treatment, nutrition or hydration issues. The do not resuscitate orders are given either by the patient when they enter the hospital, or during the hospital stay, or if the patient becomes incompetent by a surrogate. The priorities of the surrogates are as follows: 1) the spouse; 2) the son or daughter 18 years of age or older; 3) a parent or a brother or sister 18 years of age or older; and finally 4) a close friend. A close friend is defined as one who is over 18 years of age who presents an affidavit to an attending physician stating that he or she is a close friend of the patient, and has maintained regular contact with the patient, and is familiar with the patient's activity, health and religious or moral beliefs, and states facts and circumstances in the affidavit that demonstrates such familiarity. However, as can be seen, a close friend is the lowest part of the higher archei, and almost any close relative comes prior to "a close friend." Thus, it is of utmost importance, if cohabitants wish the other person to make their medical decisions for them if they become incompetent, that a written advanced medical directive known as a Living Will, and a Health Care Proxy be executed. A Living Will is a document that states an expression of a person's wishes and directives which are to guide others, if a time comes when that person

can no longer take part in decisions for his or her own future.<sup>1</sup> This document is meant to be read both independently and in conjunction with a health care proxy, because it lists the specific wishes and directives of the person executing it. For example, a "Living Will" will often state that the person does not wish to be kept alive by medications, artificial means or heroic measures. It can define measures of artificial life support that are to be specifically refused such as a) electrical or mechanical resuscitation; b) a naso-gastric tube for feeding; and c) mechanical respiration, if it is considered a medical futility that the patient will ever breathe on their own again. An AMD can also grant the use of organs for transplants and/or autopsy, or deny such right.

A health care proxy, however, is a different document. A health care proxy delegates the authority to make the health care decisions listed in the Living Will to a third party, and must be executed in accordance with a statute of the state in which the executor resides.<sup>2</sup>

The authority of a proxy under a health care proxy is the same as the authority that the patient would have to make any and all health care decisions, subject, of course, to any expressed limitations in the health care proxy. Interestingly, there is no confidentiality between the physician and the chosen proxy, and the proxy has the right to receive any and all medical information, and medical and clinical records necessary to make informed decisions regarding the principal's health care. In many states, the agent is required to consult with a physician, a registered nurse, or a licensed clinical psychologist or certified social worker prior to making any decisions for the principal. Any decisions made by the proxy is governed first, by the Living Will and the health care proxy, read together, which state what the principal's wishes, religious and moral beliefs are, and, if the principal's

wishes are not reasonably known, and cannot, with reasonable diligence be ascertained, the decision is made in accordance with the principal's best interests. In many states, however, artificial nutrition and hydration are not within the realm of a health care proxy decision-making power unless the principal has specifically stated that these measures should not be used. Perhaps the most important issue regarding cohabitants and health care proxies is that statutory authority is clear that a health care proxy has priority over any other surrogate in making decisions for the principal. This is the only way that a cohabitant can provide that a domestic partner will be able to determine what happens to him during a last illness.

A health care proxy becomes effective when an attending physician determines, to a reasonable degree of medical certainty, that a principal lacks the capacity to make health care decisions for him or herself. That determination is usually in writing, and must contain the attending physician's opinion regarding the cause and nature of the incapacity, as well as the extent and probable duration of such. It is important that the determination be included in the patient's medical chart. Once that determination is made, the health care provider must comply with the health care decisions made by the agent, in good faith, to exactly the same extent as if such decisions had been made by the principal. If they do that, there is a statutory immunity for any criminal or civil liability.

A private hospital may, however, refuse to honor a health care proxy under certain circumstances. For example, if the decision of the proxy is contrary to a formally adopted policy of the hospital that is expressly based on religious beliefs, or sincerely held moral convictions central to the facilities operating principals, then the hospital would be permitted, by law, to refuse to honor the decision. If the decision had been made by the principal prior to admission, the hospital must inform the patient or the proxy of such policy prior to, or upon admission, if reasonably possible. The patient must be transferred promptly to another hospital that is reasonably accessible under the circumstances, and that is willing to honor such decision. If the hospi-

tal takes those steps, it has no further liability to the patient or to the proxy. However, if they do not, they become liable for both civil and criminal liability, as well as professional discipline sanctions for abandoning the patient.

### **Revocation**

A competent adult may revoke a health care proxy by notifying the agent and/or the health care provider. Either a) orally; b) in writing; or c) by any other act evidencing a specific intent to revoke the proxy, including the execution of a new health care proxy. Indeed, pursuant to most statutory schemes, an earlier health care proxy is revoked by the execution of a subsequent health care proxy. The law also states that the divorce of a spouse revokes that spouse's agency under a health care proxy. Therefore, it would seem logical that a former cohabitant could not be considered a "close friend" under the statute. Indeed, in order to be a close friend, the person must be over 18 years of age, and must present an affidavit to an attending physician stating that such person has maintained regular contact with the patient as to be familiar with the patient's activities, health, religious or moral beliefs, and stating the facts and circumstances that demonstrate such familiarity. Certainly, if the parties are former cohabitants, such affidavit cannot be made, and a former cohabitant could not be considered a "close friend" under the statutes.

### **Powers Of Attorney**

A third document should also be executed by cohabitants in order to provide the with stability at the time of serious illness or accident. That document is a durable power of attorney, preferably, a durable power of attorney effective at a future time (also known as a springing use of power of attorney). This document permits the principal to appoint one or more attorneys-in-fact, and the power of attorney will take effect only upon the execution of a written statement either by a physician named by the principal stating that the principal is suffering from diminished capacity that would preclude the principal from conducting his or her affairs in a competent

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