The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia – Fall 2024

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Editor's Corner

By Kem A. Eyo

The Family Law Section of the State Bar of Georgia is proud to provide you with another issue of the Family Law Review!

All that were able to attend the 2024 Family Law Institute were present for lovely weather, informative presentations, and a great opportunity to network. Included herein, you will find information about the winners of the two main Family Law Section awards, photos of the 2024 scholarship recipients, and a smattering of other photos from the event.

As usual, the Family Law Review strives to both inform practitioners and to provide tools that may be of use in educating the family law litigant. Herein, you will find information addressed directly to litigants – both divorcees who are of advanced age as well as those who are interested in dating their way through divorce. There is also information that should prove useful to attorneys who deal with child custody matters, military divorces, and persons in need of social service assistance. Finally, the enclosed press release is a form of "congratulations" to one of our own - Vicky Ogawa Kimbrell.

I am delighted to share the enclosed with you. I also implore you to contribute to the Family Law Review content. The best way to read more about legal topics that matter to you is to write something, or to encourage the "authors" that you know to do so on your behalf. Please add to the body of knowledge by contacting me at kem@rbafamilylaw.com.

Editor's Emeritus

By Randall M. Kessler

Gosh, how time flies. Many of you will remember one of my earlier articles, almost 18 years ago, when my daughter was born. She then became a regular attendee at every Family Law Institute, first in a stroller and then dancing in front of the Specific Deviations on Friday nights, and now she's ready to head off to college. Perhaps nothing is a better measure of time than the childhood of one's children. Through it all, the friendships and relationships amongst my fellow family law attorneys has been incredible. It is amazing to see the section continue to grow and expand, and more families coming to the section's Institute and bringing their young children to dance on the lawn at the Friday night cocktail reception. I hope the section will continue to grow and expand as it is a vital gathering place and a respite from the trenches of litigation we are in throughout the year. More importantly, I hope we all will continue to treasure the friendships and relationships we inevitably develop as we help our clients navigate some of the most difficult times in their lives. I look forward to making many more memories with all of you.

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Kyla Lines.....2020-21
Ivory Brown 2019-20
Scott Kraeuter.....2018-19
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Joseph T. Tuggle.....1996-97
Nancy F. Lawler.....1995-96

From the Chair

By Jonathan Dunn

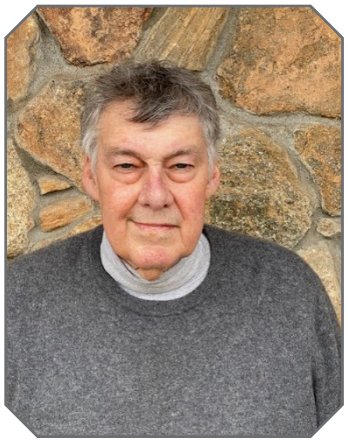
As we begin a new term of the Executive Committee, I want to recognize the sponsors and efforts of the section members, staff, and volunteers who helped make the 2024 Family Law Institute a resounding success. I am especially indebted to our Immediate Past Chair, Karine Burney, and our Vice Chair, Jeremy Abernathy. Jeremy Abernathy will be helming the Institute this year, with support from yours truly, and we look forward to more stellar programming.

Please also note the section will be participating in the Midyear Meeting (January 9-12), to include a presentation and reception on Thursday, January 9, 2025. The Midyear Meeting will be held in Savannah this year, so I look forward to welcoming all to the Hostess City for a few days.

I would also like to express my gratitude to our editor, Kem Eyo. Kem has demonstrated a commitment to producing quality work product and has graciously signed on to another term as editor. Kem is especially interested in soliciting input from our members on hot topics and areas of key interest. Please contact her with submissions and subjects of interest and inquiry.

Client Counseling in Child Custody Cases

*By Richard David Tunkle **



Unique Role of a Child Custody Lawyer

The outcome of a contested child custody case will have direct, profound, and life-long effects on the lives and happiness of not only the litigants, but their children and families as well. The lawyer who practices child custody law practices the law of life and living to an extent not matched in our profession. In each child custody case, the lawyer has the unique opportunity and responsibility to make an important impact not only on the client's case and the custody litigation, but on people's lives in general. In each child custody case, the custody lawyer is called upon not only to be a skilled trial lawyer, but also to be the client's friend, counselor, coach, teacher, and therapist all rolled into one. The lawyer in a child custody case, unlike any other, must frequently provide not only legal counsel and advice but guidance and counseling to clients for purposes of actually modifying not only conduct and behavior but in many cases, values, and beliefs as well. This is how the custody lawyer can make sure the client receives the maximum benefit of the lawyer's representation–that is, all of the lawyer's training, education, experience, judgment, and wisdom.

Take Control

It is important to establish early on in the representation the lawyer's authoritative role in the attorney-client relationship and in directing certain aspects of the litigation, including the client's conduct and behavior, so as to achieve the most favorable outcome in the case.

Custody lawyers sometimes forget that their clients don't always understand the gravity of custody litigation and the impact that their conduct can have on the judge's decisions in a custody case. One of the first things to do in each custody case is to wake the client up as to

what is happening and what is about to happen in the case. The lawyer must impress upon the client the need for the lawyer to know all the facts, in their worst light, in order to effectively represent the client and to best deal with any bad facts which may exist in the custody litigation. It cannot hurt for the lawyer to explain things to clients in these cases that one would think shouldn't have to be explained to anyone. Clients should be made aware that custody litigation is very serious business and that the most important things in the client's life - that is, his or her children's welfare, health, happiness, future, and relationships with both parents are all at stake in this litigation. Nothing on earth should be more important to the client than the outcome of the custody case. What the client has done and will do are usually much more important than what the lawyer can do in the case. Never will all of the client's conduct, words, attitudes, and relationships be as closely scrutinized as during custody litigation, and rightly so.

Unlike most other types of litigation where the salient facts of the case are set in stone before the complaint is filed, in child custody litigation, facts and events occurring during the pendency of the litigation very often actually determine the outcome of the case.

It is a very serious mistake for the lawyer to assume that the client understands the potentially devastating effect that misconduct of any nature can have on the outcome of the custody case. The lawyer should make very clear to the client that there is certain conduct and behavior which the client **cannot engage** in, such as:

1. Any violence towards anyone, anywhere, at any time.
2. Any improper, illegal or inordinate use of drugs.
3. Frequent or immoderate consumption of alcohol.
4. Any unusual, suspicious or inordinate contact with any person that may resemble an improper romantic or sexual relationship.
5. Any mistreatment or unusually severe or harsh punishment of a child.
6. Any interference with a child's relationship with the other parent: disparagement, withholding of visitation or contact, etc.
7. Any failure to exercise all possible visitation or contact with minor children.
8. Any failure to pay child support as required by law or decree.
9. Any violation whatsoever of the letter or spirit of any restraining order or protective order.
10. Any perjury or misrepresentation made under oath.

The foregoing is not an exhaustive list but represents the most common problems which tend to crop up in custody litigation.

Handling Bad Facts

There are essentially two categories of bad facts in custody cases - the bad facts which already exist when the client first arrives at the lawyer's office and those bad facts which arise after the lawyer is hired. Two problems for the lawyer with bad facts in a custody case are, first, to prevent the creation of any more bad facts and second, to minimize the impact of the pre-existing bad facts on the custody litigation.

Both of these problems require the lawyer to take an active, assertive, and vigorous role in counseling, educating, enlightening, controlling, and even at times reforming the client. This is often necessary in order to obtain the client's best conduct and behavior out of court (both during and after the pendency of the litigation) and to be able to prepare the client to testify in the most appropriate manner about bad facts at trial.

Clients who have engaged in conduct giving rise to bad facts are often unwilling or reluctant to reveal or admit such conduct even to their own lawyers. They commonly fail or refuse to understand the impact that bad facts can have on the outcome of the case.

After determining that the client has engaged in conduct giving rise to the particular bad facts of the case, then comes the process of educating, counseling, and controlling the client in order to attain the two goals of preventing the creation of more bad facts and minimizing the impact of the pre-existing bad facts. The lawyer must educate and counsel the client about

how and why the particular bad facts of this case may affect the outcome of the case and about why certain conduct is wrong. The client must come to fully understand and believe that the conduct giving rise to bad facts is truly wrong so as to be more likely to never repeat that or similar conduct and to be able to respond appropriately about the bad facts in discovery and in courtroom testimony.

No More Bad Facts

In order to prevent more bad facts from arising in the case, the client should be told in very blunt and forceful terms not to do anything, say anything, or be anywhere at any time with anyone that the client doesn't want Judge "Whomever" to know all about. The lawyer can virtually guarantee the client that the other side is going to do everything possible to make sure that the judge hears about every single inappropriate thing that the client does during the pendency of the custody litigation. The client must assume that all conduct, communications, and relations are being observed, noted, and recorded 24 hours a day, 7 days a week and will be revealed in court to the judge. The client should be firmly instructed to never violate these prohibitions during the pendency of the litigation. This may be a good time to share some horror stories about former cases involving clients who have failed to heed these prohibitions. The client should be made to know that if the client doesn't follow the lawyer's advice concerning these prohibitions, the lawyer may withdraw from further representation and the client may see adverse effects of failure to heed the lawyer's advice in the court's custody ruling.

Take the Total Blame

To minimize the impact of pre-existing bad facts in a custody case, it is essential to convince the court that the past conduct giving rise to the bad facts will not occur in the future. The court must be persuaded that the client is enlightened and aware of the wrongful nature of prior misconduct and that the client is fully committed to never engaging or repeating such conduct in the future. An effective strategy for demonstrating the client's right thinking in this regard is for the client to voluntarily take the total blame for the misconduct and to willingly and fully accept all responsibility for the conduct or actions giving rise to the bad facts in the case. Unless the lawyer takes an active, vigorous, and authoritative role in counseling his or her client about this particular aspect of the case, the client will almost invariably attempt to minimize, excuse, rationalize, justify, or shift the blame to others for the client's misconduct. The client must be made to see that to do so would be nothing more than a way of telling the court that the client's inexcusable conduct was somehow okay or appropriate. That would be precisely the wrong approach and the lawyer's job is to prevent the client from doing this during deposition or courtroom testimony. Again, this is where the lawyer has to educate, counsel, and control the client. Only by really understanding and believing the conduct is wrong can the client not only modify past behavior, but can also respond appropriately to questions concerning the bad facts in the case.

It is common wisdom in trial practice to bring out the bad aspects of your own case. In custody litigation, that's not enough. It is important to show the court that the client is fully aware that the conduct in question is wrong and was completely inexcusable and that the client knows and believes this for there to be any hope of minimizing the impact of the bad facts. The importance of fully accepting and acknowledging responsibility for prior misconduct cannot be overstated. In fact, one tactic is to ask the client questions on direct examination in a way that might appear to give the client an opportunity to explain, justify or minimize the client's prior misconduct so that the client can affirmatively refuse to take the opportunity to justify or minimize the conduct, and instead the client can take the opportunity to condemn his or her own conduct unequivocally and with conviction. When the client can do that honestly and willingly, the lawyer has gone a long way towards helping the client not only in the litigation, but with life in general as well.

Always Take The High Road

In child custody litigation, the Golden Rule really works. The party who "takes the high road" and treats the opposing party with courtesy, civility and respect despite a bitter custody dispute is the real winner. The lawyer should take the initiative with the client to stress the importance of demonstrating that the client is able to put ill-will and bitterness aside in the interests of what is best for the child or children involved in the case. The party who shows by actions, conduct

and words that the children's welfare comes before personal interest has an advantage in the litigation over the party who permits personal spite and malice to affect all contact and interaction with the other party. Often it is only the client's attorney who can enlighten the client in this important but frequently unstated aspect of every contested child custody case. Good will, courtesy, cooperation, civility, and flexibility in all matters involving the opposing party and the children demonstrate maturity, good judgment and ethics of a party and can only be a positive factor in achieving a favorable outcome in the case. Sometimes it takes a tremendous amount of time and effort to persuade the client to believe in these principles and to modify past attitudes and behaviors accordingly. This is one of the best examples of how helping the client in the litigation can also help the client with life in general. It is a vital aspect of representing anyone involved in a contested custody case, and one way of maximizing the benefit to the client of the lawyer's representation. It is the modification of attitudes that results in the modification of conduct that will benefit the client, the children, and the family regardless of the outcome of the custody litigation.

The Greatest Gift is Free

Parents who are involved in custody litigation should know more than anything else that the greatest gift that they can give their children (and themselves!) is to be able to put past differences aside and made a commitment to treat each other with courtesy, respect, and civility at all times in the presence of the children. Children whose parents are divorcing or who are contesting their custody have been emotionally harmed to some extent by the mere fact that they can no longer live with both parents. When those children know that in addition to that, parents hate or dislike each other, their happiness is further diminished. Parents should know that the happiness of the children is more important than the happiness, pride, or hurt feelings of the parent. The parents owe their children a duty to do everything they can to prevent unhappiness and emotional harm to the children. If the children can look up at their parents at visitation exchanges and see them smiling and treating each other with courtesy and respect the children benefit from that greatly. It may be that the greatest service that the custody lawyer can do for his client is making sure that he or she understands how extremely important this is to the general welfare and happiness of the children, which should be the ultimate goal of any custody litigation.

Child Custody Counseling Commandments

a. Conduct Commandments:

Always take the high road. The golden rule is the golden rule in custody cases. Always show courtesy, respect, and civility to the other side. There is no downside to and no one loses from showing courtesy and respect.

Any hint or trace of disparagement or even negative feelings towards the other parent is radioactive poison to a child's heart, soul, and mind. Never engage in or tolerate disparagement of the other side.

The cop is always on the bumper, not some of the time, not most of the time, all of the time. Don't go anywhere, don't do anything and don't be with anyone and don't say one word that you don't want the judge and the rest of the world to know about.

The greatest gift on earth for the children is free. We want children to say "my parents are divorced and don't live together but they like each other, they respect each other and they are nice to each other."

b. Testimony Commandments:

When you say you were wrong you become invincible!

Take the total blame for wrong or bad words, actions, and conduct.

Do not attempt to shift the blame for, minimize or justify bad or wrong words, actions, conduct.

Have something good to say about the other side. This enhances the client's appearance of reasonableness, maturity, and most of all credibility.

The three most important rules for testifying in court or on deposition:

1. Do not tell a lie under your oath.
2. Do not tell a lie under your oath.
3. Do not tell a lie under your oath.

Don't just say it, believe it.

** A University of Georgia Law School Graduate (1980), Richard Tunkle practiced family law with an emphasis on child custody for over 44 years, until he retired in 2024. He lives in Rabun County with his wife and two Golden Retrievers.*

Seven Myths about Military Pension Division

*By Mark E.Sullivan **

Dividing military retired pay under the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. §1408, can be a daunting task. Clients and lawyers are often confused and mystified by the rules, some of which appear to be contradictory or counter-intuitive. Here are some of the myths which might be heard in the field of military pension division.

* * *

Myth #1 – There's no standard method for dividing military retired pay; you can word the clauses any way you want, as long as it's clear what the court is dividing.

Response: The easiest way to get a *rejection letter* from the retired pay center is to *wing it* when wording the pension division order. This is not a class in "creative writing." There are four accepted methods of wording the clause for dividing a military pension. They are all explained and illustrated in the rules for "Former Spouse Payments from Retired Pay," Ch. 29, Vol. 7B, Dep't of Defense Fin. Mgt. Regulation; each one is found at Section 6.0, "Court Orders." A more extensive explanation, with sample language for each clause, is located in the Silent Partner infoletter, *Guidance for Lawyers: Military Pension Division*.[1]

* * *

Myth #2 – Payments from the retired pay center[2] begin as soon as the pension division order is processed and the servicemember has retired.

Response: When the servicemember's pension is in *pay status* and the government is paying him or her each month, the retired pay center will take up to 90 days to process a court order dividing retired pay.[3] The client who is a servicemember/retiree will want a clause which says that payments to the former spouse will begin when the retired pay center starts to garnish the pension and transmit the money to the ex-spouse's bank account. *Payments beginning as soon as the former spouse is entitled to a share of the pension* is how the ex-spouse would want the clause to read, regardless of when the government starts its electronic fund transfers to the ex-spouse.

* * *

Myth #3 – There's only ONE meaning for "disability" in terms of a military retiree.

Response: "Disability" has several meanings in the military context. Knowledge of each one is essential for attorneys who handle divorce cases.

- Disability compensation is paid by the Department of Veterans Affairs (VA) to those who have service-connected wounds, illnesses or conditions. The money is tax-free and exempt from division as retired pay.[4] If the retiree's VA rating is less than 50%, then the amount of money from the VA must be debited from military retired pay; this is called the "VA waiver."[5] That means that the former spouse gets less of the pension. There is no waiver if the VA rating is over 40%; this is due to Concurrent

1. This and over sixty other infoletters on military family law and divorce may be found at the website of the N.C. State Bar's military committee, www.nclamp.gov > Publications.
2. For division of retired pay involving the Army, Navy, Air Force, Marine Corps or Space Force, the retired pay center is the Defense Finance and Accounting Service, or DFAS. Retired pay division for members of the Coast Guard and for commissioned officers in the Public Health Service and the National Oceanic and Atmospheric Administration is handled by the Coast Guard Pay & Personnel Center.
3. This assumes that the former spouse is entitled to government payments, based on the "10/10 Rule," which requires that the parties have at least 10 years of marriage overlapping at least 10 years of service creditable for retirement eligibility. 10 U.S.C. §1408 (d)(2).
4. VA disability compensation is, however, subject to garnishment for family support (i.e., alimony or child support) when the recipient is a military retiree. 42 U.S.C. §659.
5. See 10 U.S.C. §1408 (aa)(4)(A)(ii) and 38 U.S.C. §5304-5305.

Retirement and Disability Pay, which restores the money that is waived from retired pay.[6] The restoration is automatic, with no application required. VA disability tables, which include higher payments where there are dependents of the veteran, can easily be found by looking for "VA disability rates" on any Internet search engine.

- Combat-Related Special Compensation (CRSC) is another form of disability pay for the military retiree.[7] It is based on conditions arising from combat, training for combat, instrumentalities of war or other situations covered in the statute.[8] CRSC rates involve the same monetary payments as VA rates for the same percentage. They are not divisible as retired pay.[9] The receipt of CRSC wipes out any money paid as CRDP; this can leave the retiree with little or no retired pay to divide with an ex-spouse, while receiving monthly VA and CRSC payments which are exempt from tax.[10]
- Medical retirement is a forced separation from the military.[11] It involves a situation where the servicemember is found to be unfit to perform his or her military duties. When the individual has a *military disability rating*[12] of less than 20%, the separation is accompanied by a government payment of severance pay. If the military rating is over 20% or if the servicemember has at least 20 years of service, then he or she will receive military disability retired pay (MDRP). An extensive explanation of MDRP may be found in the Silent Partner infoletter, *Q&A – Military Disability Retired Pay.* The amount of MDRP paid to a retiree which is based on his or her disability rating is exempt from military pension division.[13]

6. CRDP is found at 10 U.S.C. §1414.
7. See 10 U.S.C. §1413a.
8. A disability is considered to be combat-related under 10 U.S.C. §1413a (e) if it A) is attributable to an injury for which the member was awarded the Purple Heart; or B) was incurred 1) as a direct result of armed conflict; or 2) while engaged in hazardous service; or 3) in the performance of duty under conditions simulating war; or 4) through an instrumentality of war.
9. CRSC payments, like VA disability compensation, are subject to garnishment for family support.
10. For an explanation of CRSC and CRDP, see the Silent Partner infoletter, Military Pension Division: The "Evil Twins" – CRDP and CRSC.
11. Chapter 61 of Title 10, U.S. Code, covers disability retirements.
12. Note that this is a rating provided by the military, not the "VA rating" given by the Department of Veterans Affairs. The military rating measures the servicemember's ability to perform military duties, while the VA rating measures his or her ability to obtain civilian employment.
13. See 10 U.S.C. §1408 (a)(4)(A)(iii).

* * *

Myth #4 – Courts may not order a retiree to indemnify the former spouse for any pension-share money lost if the retiree obtains disability payments.

Response: The U.S. Supreme Court ruled in *Howell v. Howell*, 137 S. Ct. 1400 (2017) that a judge cannot impose on a military retiree a duty to reimburse the former spouse for any pension-share money lost as a result of the retiree's electing to receive VA disability compensation. This ruling, made in the context of a contested case at the trial level, did not speak to the issue of *contractual indemnification*. It did not prohibit the parties from entering into a consent order or separation agreement providing repayment requirements when the former spouse may be shortchanged in pension-share payments received due to the "VA waiver." Numerous courts have upheld indemnification language when the basis for enforcement is either a) agreement of the parties to such a reimbursement arrangement, or b) *res judicata*, that is, the prior entry of an order requiring indemnification, with no appeal of that order.[14]

* * *

Myth #5 – Resisting "direct-pay orders" involving garnishment of military retired pay is important for the servicemember/retiree; such orders only benefit the ex-spouse.

Response: The former spouse does indeed benefit from pension-share payments transmitted by the retired pay center, since they must be transmitted each month unless there is a subsequent order stopping or reducing them, but a *direct-pay order* benefits the retiree as well, since he or she gets to exclude the amount paid to the ex-spouse when the payments are made through the retired pay center; there is no tax break when the payment are made directly between the parties.

* * *

Myth #6 – The ex-spouse is entitled to a share of the final military pension amount which the retiree receives.

Response: That used to be the rule before December 2016 in all states except Florida, Texas, Oklahoma, Tennessee and Kentucky, which had their own state rules that required division of the "date-of-divorce" pension, that is, the hypothetical amount of retired pay as if the servicemember had retired when the divorce was granted. The new rule, which applies to all states, is based on an amendment to the USFSPA effective

14. For an explanation of the indemnification rules post-Howell, read the Silent Partner infoletter, The Death of Indemnification?

December 23, 2016. It requires that a) in a divorce granted after that date, b) when the military member was not receiving retired pay on the divorce date, c) the only pension capable of division is that which the member would have received if he or she had retired on the divorce date. This is known as the "Frozen Benefit Rule," and it cannot be waived or avoided by the agreement of the parties. There are five Silent Partner infoletters which explain various aspects of the Rule.

* * *

Myth #7 - The marital fraction in a Guard/Reserve case must be expressed in terms of retirement points.
Response: The rules are found in "Former Spouse Payments from Retired Pay," Ch. 29, Vol. 7B, Dep't of Defense Fin. Mgt. Regulation. Paragraph 6.7.3 state that any formula which contains a fraction must be expressed in retirement points when the individual is to receive a non-regular retirement (i.e., retiring from the Reserves or National Guard, which usually means retired pay begins at age 60).[15] The rules do not say, however, that the ex-spouse's share cannot be expressed *as a fixed dollar amount* or *as a percentage*; these are still available methods for dividing the pension. It is only when the clause employs a fraction that the numerator and denominator must be stated in terms of retirement points (e.g., "John Doe will pay the ex-spouse, Jane Doe, 50% of a fraction, the numerator of which is 1,200 retirement points acquired during their marriage, and the denominator is 3,600 total retirement points."). If the denominator is unknown, such as when the member is still drilling and state law requires the denominator to reflect total pension service upon retirement, the retired pay center will fill it in at the time the member begins to receive pension payments.

Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina, and is the author of The Military Divorce Handbook (Am. Bar Assn., 3rd Ed. 2019) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law for over 30 years. He works with attorneys nationwide as a consultant on military divorce issues in drafting military pension division orders. He can be reached at 919-832-8507 and at mark.sullivan@ncfamilylaw.com.

15. Non-regular retirement is found at Chapter 1223 of Title 10, U.S. Code.

2024 Family Law Institute

The 2024 Annual family Law Institute was well attended (with an excess of 350 individual pre-registrants). Attendees not only received a wealth of useful information, they had fun. Here are a few pictures from the event.

2024 Award Recipients

Pictured from left to right: Katie Connell, Esq.; Leigh Cummings, Esq.; Rob Wellon, Esq.; and Stephen Steele, Esq.

The 2024 Joseph T. Tuggle, Jr. Professionalism Award (which recognizes the Family Law Section member who best exemplifies the ideals of professionalism in a given year) was awarded to Leigh F. Cummings of Connell Cummings, LLC. Ms. Cummings' award was presented by her law partner and friend, Katie B. Connell.

The 2024 Jack P. Turner Award (which recognizes the Family Law Section member who has demonstrated outstanding achievement in the area of family law; and, generally, achieved the highest pinnacle of service to the Section, the Bar in general, the area of family law, and to the guiding principles of ethics and professionalism that we all strive to put into our practices every day.) was awarded to Robert G. Wellon, Attorney and Counselor at Law. Mr. Wellon's award was presented by friend, Stephen Steele and colleague.

Ivy Brown was recognized for her tireless work and dedication to the Family Law Section of the State Bar of Georgia.

Pictured from left to right: Karine Burney, Esq., Immediate Past Section Chair.; Ivy Brown, Esq., Past Section Chair; and Jonathan Dunn, Esq., current Section Chair.

2024 Scholarship Recipients and Presenters

Specific Deviations (with guest vocalist)

40th Annual Family Law Institute Sponsors

The following is the final list of all sponsors. As always, we thank you for your support!

Event
($10,000)

Neighborhood Mortgage, Inc. and Chambers Select Group– Saturday Night Cocktail Reception

Five Star
($7,500)

Burney & Reese LLC
Jonathan Dunn P.C.

Double Diamond
($5,000)

Abernathy Ditzel Hendrick LLC
Boyd, Collar, Nolen, Tuggle & Roddenbery
Djuric Spratt
Johnson Kraeuter, LLC

Diamond Event
($2,500)

IAG Forensics & Valuation –
YLD Pool Party

Diamond
($2,500)

Rubin Family Law, LLC
Soberlink
Zagoria Law Firm, LLC
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Evolve Family Law,LLC
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Levine Smith Snider & Coburn, LLC
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Smith, Gilliam, Williams & Miles, PA
Stern Edlin Graham Family Law
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Law Offices of John Lyndon
Hoelting & McCormack, LLC
Connell Cummings, LLC
Oliver Maner LLP
Eittreim Martin Cutler LLC
Stearns-Montgomery & Proctor
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Double Platinum

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Straight Talk On Gray Divorce – Preparing To Go It Alone After 50

*By Heather L. Locus **

In Ernest Hemingway's 1926 novel, The Sun Also Rises, the character Bill asks Mike, "How did you go bankrupt?" To which Mike replies, "Two ways. Gradually and then suddenly." This phrase could also describe why couples over 50 are now seeing the highest divorce rates among all age groups in the world.

Divorce after 50, also called gray divorce, is seeing an unprecedented rise globally. Why this sudden itch to seek greener pastures? The reasons are complex, but boil down to three:

1. Many couples married and had children later and are experiencing empty nests at home for the first time at 50 or 55, prompting a hard look at what they want out of life.
2. More women are earning incomes independently, shattering a big barrier to divorce in the past – splitting one income. Regardless of which spouse is the breadwinner, two incomes with employer benefits make divorce much more manageable.
3. With over 50% of people in mid-life today looking to live past 85, the prospect of "putting up with" someone they've been long married to seems less palatable for an additional 30 to 40+ years.

Getting an understanding of what led you to the divorce path, then imagining a future that is more purposeful, fulfilling, and connected will enable you to manage the process for the healthiest restructuring of your family as possible.

Factors to Consider in a Gray Divorce

Regardless of what the final straw may have been, when you're suddenly single after 50 you face a unique set of challenges that require a more careful look and thoughtful planning to avoid big pitfalls:

- **Income sources**: Your income prospects may look vastly different at 50 than they did when you were 20, or even a few years ago. The market demand for talent is different. Your personal circumstances may make you or your spouse about ready to hit your peak earning years. Conversely, you or your spouses' skills may be becoming obsolete, and income may be substantially less going forward. It's critical to think through all potential future salary scenarios for you and your spouse before agreeing to final terms on paying, receiving, or waiving spousal support.
- **Retirement finances**: Having your nest egg cut in half magnifies your financial challenges no matter how many zeros are in your combined 401(k)s and IRAs. The more accounts you have, the more complex the options for splitting them and potential creative solutions for tax minimization.
- **Health and insurance**: Your ability to manage healthcare and health insurance may present significant challenges if you won't qualify for employer benefits and are not close to qualifying for Medicare. COBRA and Individual Health Insurance Under the Affordable Care Act (ACA) can bridge the gap.
- **Family and children**: Divorce is hard on everyone, even when it's relatively amicable. There are additional financial challenges if you're financially supporting children. Discuss these with your attorney, spouse, and kids as appropriate. Equally important are the emotional and social ripple effects that a parental divorce can create for the adult children involved. Don't take these for granted and consider whether even a few counseling sessions would benefit everyone.
- **Mental capacity issues**: In cases of elderly divorcing couples, the potential for cognitive or other impairments or addictions to negatively influence decision-making can also come into

play. In some cases, you may even need to consider a guardian or conservator.

Four Keys to a Prudent Gray Divorce

As unsettling as it may feel to start all over again at midlife, there's a lot you can do to create a better post-divorce future. Executing well on these four crucial elements will make it easier for you.

Clarify what you want

When you divorce after decades of marriage you face not one, but two big sources of uncertainty – the prospect of a single life plus the unknowns surrounding the age typically associated with retirement. What do you really want out of life for you? What does that life look like on a day-to-day basis? Who do you want to be part of that life – friends, family, professional contacts? Take the time to think through (with as much detail as you can) what your ideal life looks like. Write it down. Only invite those people who make you better or nourish your soul to be part of your next chapter.

Examine your options

What happened between you and your spouse is in the past. No matter how it played out, it benefits you to navigate the divorce process thoughtfully and to land on a mutually agreeable outcome in the end.

There are humane and sound methods to divorce, including collaborative or "holistic" approaches, that take the aid of professionally trained individuals (such as mediators and divorce coaches) to help you get to the best outcome for you. These processes address all aspects of divorce, including the financial and emotional, and can help you work through a challenging time in a supported and holistic way. Explore all options, then trust your gut.

Hire qualified professional help

A well-qualified divorce attorney you feel comfortable with is a must. In addition, a Certified Financial Planner (CFP®) or Certified Divorce Financial Analyst (CDFA®) can provide strategic asset and income tax strategies and the strong financial expertise that is crucial to helping you achieve future financial stability in an emotionally tumultuous time.

Investing time and money upfront to hire the right fit team is crucial to navigate your divorce with appropriate communication, smart decision making, and sound negotiations. This will ensure you obtain a result you won't regret.

Formulate a sustainable future

A big part of a successful gray divorce is laying the foundation for a hope-driven future.

Dr. Joe Coughlin, head of the cutting edge AgeLab at the Massachusetts Institute of Technology, suggests that a good life is based on having sound finances, a thriving social network, a strong sense of purpose, and fun, as you look forward to a better future life. Ensure that you're putting in place the three "F's" as your foundation for a sustainable future: Friends, Finances, and a Forward Focus. When you have all three elements firmly in place, chances are much higher that you'll end up in a better place despite a life change you may have never expected.

Act Now

What next? If you're contemplating divorce at midlife or later, consider taking these steps to put yourself firmly on the path to a better future.

1. **Understand the implications of the pandemic on your divorce timeline**. Do you have the space and the ability to think clearly without disturbance? To talk privately to attorneys? Does it make sense to move now, amidst court delays and complications, or wait a little longer for a return of more normalcy in the court system?
2. **Get a grasp of your finances**. Do you know how much money you have for the future? Do you have a good sense of how much money you'll need to support yourself post-divorce? Crunch your numbers with a qualified financial professional for a realistic picture as soon as you can. Then crunch the numbers again before you sign your final papers.
3. **Think through the intangibles and ripple effects**. Your kids, your larger extended family, your circle of friends all have come to rely on you as part of a married couple. How will a divorce change these things? Give yourself time and space to really think through all scenarios. Brainstorm with a therapist, trusted

friend, and a family member to gain a wide range of perspectives.

What's your first step to create the best next half of your life?

** Heather founded the National Divorce Practice Group at CORIENT Private Wealth. Heather helps divorcing men and women find the right fit attorney and educates the team on the tax and long-term financial implications of potential settlements. The CORIENT SettleSmart® analysis gives clients clarity and confidence to end their case based on their attorney's recommendation at the appropriate time. Heather and her team implement the Marital Settlement Agreement and manage client's investments to provide the cash flow and growth they need to fund their future. Heather has been named a Best-In-State Wealth Advisor by Forbes, a Five Star Wealth Manager according to Chicago Magazine, and a Top 200 Wealth Advisor Mom by Working Mother. She has contributed to various publications such as The Wall Street Journal, Crain's Chicago Business, ISBA Family Law Newsletter, Family Lawyer Magazine, and Divorce Magazine on topics ranging from how to protect an estate during a divorce to key financial considerations before signing a divorce settlement or pre-nuptial agreement.*

5 Relationship Rules for Surviving Until the Ink is Dry

*By Erica McCurdy, PCC, CPC, YPFC **

I had an attorney friend of mine tell me once that there were two types of divorce clients: those who had already started dating and those who would be dating before it was all over.

The truth is that most people start to feel single long before they actually *are* single. The physical marriage is over long before most people have settled all the financial issues and completed all the necessary legal filings.

'your ex is looking at your social media profiles - so are the lawyers…'

As a Divorce coach, part of the process of getting to know a client includes talking about how the client spends their time now and how they see their life after the divorce is finalized. With remarkable frequency, clients will share how they have already started browsing the online dating sites and begin to tell stories about 'interesting' people they are spending time with, or even let me know outright that they have begun dating.

'most people start to feel single long before they actually are…'

My advice to clients is to wait at least a year after the divorce is final before entering into a dating relationship of any kind. Clients often fail to realize that little else derails an otherwise amicable divorce more quickly than the appearance of impropriety. What seemed like an easy, agreeable split can suddenly become contentious, difficult, and very, very expensive.

As soon as my client (male or female) moves their focus away from making a healthy transition and instead gets wrapped up in pre-divorce dating, it is time for us to have what I like to call my 'keep it in your pants' conversation. This conversation covers my ***5 rules for surviving until the ink is dry.*** It goes something like this:

1 **- Look But Don't Touch**
The commercials are everywhere - so while you are perfectly fine looking at the online dating sites to see what life will be like on the other side of your divorce, DO NOT SET UP A PROFILE UNTIL THE INK IS DRY on the settlement agreement, everything has been filed and you have the Final Judgment and Decree of Divorce signed.

Anybody worth dating will still be worth dating a few months from now when you are legally single and free to make whatever social decisions you wish to make.

Believe me, your ex is looking at your social media profiles - **so are the lawyers**. In fact, so are your ex's friends, your ex's parents, ***your*** parents, your children, your third grade teacher - you get the point. You do not have control over the internet, and not everyone who is online has your best interest at heart.

2 **- Be a Third Wheel**
Just like you did when you were in high school, go out in groups. There is safety in numbers. Two is considered a date, three or more is a group. You will find that having an extra person in the mix keeps you and your impulses in check. This is especially true when loneliness sets in and you begin to enjoy the attention a little more than is prudent at the time. If you have a particularly jealous ex, being in a group also makes it that much harder to prove you are dating instead of appropriately socializing.

3 **- Leave the Texting, Sexting, Status Updates, Snapchat and Instagram to the Teens**
Please, please, please - exercise restraint and leave the texting, sexting and all other electronic messaging alone. It's not cute, it's not sexy. Everything you put out on the Internet is potentially damaging to your case. Once you put something online, you lose control of that content. Later, you may not want to have that legacy, for you, for your children, or for the person with whom you may later spend the rest of your life.

4 **- Stick to a Two-Drink Maximum**
If you must drink while you are out, pace yourself. Alcohol loosens inhibitions and impairs judgment. Keep your consumption to a reasonable level so that you remain in control **at all times**. If you drink too much, you might not remember what you did the night before, but believe me, somebody will!

5 **- If You Break It, You Buy It**
Be prepared to pay for breaking any of the rules above. Don't get sticker shock at what your carelessness might cost you. If your ex catches you, time, money and mental energy will only be the start of price you will have to pay. Re-establishing a sense of equilibrium and status quo can often come at great expense.

Statistically, any dating relationship you begin before your divorce is final will not be a long-term relationship regardless of how 'real' it feels in the moment. Before opening a Pandora's box and letting mischief and mayhem into your life, take a few moments to think about the consequences of your actions vs. the simplicity of exercising patience and taking some precautionary measures.

Use this time to work on building a new life as a single person/parent. Establish new relationship boundaries and standards with friends and family. Learn healthy ways to manage communication with your ex. Most of all, take time to heal.

**Erica McCurdy is a practicing Divorce and Business Development/Transition Coach in the Metro Atlanta Area with over 25 years of business and consulting experience. You can find out more about her divorce practice at www.ATLDIV.com and her corporate practice at www.McCurdySolutions.com*

The State Bar has three offices to serve you.

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Savannah, GA 31401
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877-239-9910
Fax 912-239-9970

Georgia Legal Services Program Benefits Hotline Checklist

Georgia has several public benefit programs that might be helpful for children and Kinship Care families.

• **Health Care**

Medicaid and PeachCare can provide health insurance in some low- income families. Children on Medicaid up to 21 should be able to receive all medically necessary medical services. Those in foster care at 18 may get Medicaid up to age 26. Pregnant Women, children, and the disabled can receive types of Medicaid. Women with incomes less than 211% of the FPL can receive P4HB Medicaid. Apply at DFCS, online at https://gateway.ga.gov/access at 1-877-423-4746. Georgia Enroll with GLSP may also assist families to apply for healthcare at: 1-866 442-3676.

Indigent Care Trust Fund Many hospitals in Georgia receive ICTF funding from the state on their promise to provide free or low cost hospital care for mid to lower income individuals. https://dch.georgia.gov/providers/provider-types/hospital-providers/indigent-care-trust-fund.

Medicare advice and assistance is available through Georgia Cares at 1-877-220-0127 or at: http://www.mygeorgiacares.org/.

Affordable Care Act: Marketplace Insurance If your income is above the Medicaid income limits, you may be able to get Affordable Care Act healthcare coverage. The ACA also provide help with premiums and co-pays and deductibles for middle and lower income Georgians. Certified Navigators are available to help you find out what is available and to apply. Go to https://outlook.office365.com/owa/calendar/GEORGIAENROLL1@glsp.org/bookings to schedule an appointment or call 1-866-442-3676 to speak to a Navigator. You can also email GeorgiaEnroll@glsp.org.

Prescriptions Some prescriptions are available at low cost or for free based on the type of drug and the income of the patient. Find more information at: https://www.pparx.org/, http://www.benefitscheckup.org/, or https://www.goodrx.com/.

● **Food Assistance**

Food Stamps or SNAP (Supplemental Nutrition Assistance Program) Adults and children can get food stamps if they have low incomes and meet other rules. See: http://dfcs.dhs.georgia.gov/food-stamps. Apply at your county DFCS office or call 1-877-423-4746.

Senior SNAP A shorter application process for those over the age of 60. All members of the household are 60 or older, not working, and household is under the income limits to be eligible for SNAP participation. Household has a permanent fixed income such as Social Security Income, private, state, or federal retirement, etc.

Food banks and other food commodity programs are listed at: http://dfcs.dhs.georgia.gov/commodity-food-assistance-programs; food banks are at: http://georgiafoodbankassociation.org/find-your-food-bank/.

WIC (Women, Infants, and Children) Improves the health of families by providing nutritious foods, health education, breastfeeding support, and referrals to healthcare. Available for pregnant women, new moms, breastfeeding moms and parents and guardians who are the sole provider of children under age five and meet income and nutritional requirements. Applications are available on Gateway at https://gateway.ga.gov/access/.

● **Income Assistance**

Child Support If have children, you may be able to get child support. You can apply for child support assistance at http://dcss.dhs.georgia.gov or call 877 423-4746. Child support worksheet forms are at http://www.georgiacourts.org/csc/. Child support orders are also required to include insurance coverage for children when reasonably available.

Social Security Social Security can provide income and health coverage for some disabled children and adults, retired individuals, or survivors. See, http://www.ssa.gov/.

TANF (Temporary Assistance for Needy Families) provides small cash payments for some very low-income families with children. Children who do not live with their biological or adoptive parents may receive benefits on their own. Apply at your county Department of Family & Children Services (DFCS), https://gateway.ga.gov/access/, or 1-877- 423-4746. Victims of family violence may qualify for an exception from some TANF or Medicaid rules. Georgia also may help low-income Georgians who get TANF to get childcare through CAPS.

Unemployment If you lost your job because of family violence or for any reason that was not your fault, you can apply for unemployment at the Department of Labor. For more information go to http://dol.georgia.gov/unemployment-benefits or contact GLSP if you are denied unemployment through no fault of your own or as a result of domestic violence.

● **Kinship Care Support**

The Kindship Navigator Program serves as a one-stop shop for information and referral services to grandparents, relatives and other caregivers who are currently raising a child. Find more information at https://dhs.georgia.gov/kinship-navigator-program.

Grandparents Raising Grandchildren: Monthly Subsidy Payment (MSP) Monthly subsidy payment ($100 per child, per month) for a grandparent who is receiving or will be approved to receive TANF cash assistance for the grandchild. The household income must be less than 160% of the federal poverty level. The grandparent must be 55 or older, or any age and disabled; must be the caretaker of the child and parent(s) of child is not in the home; and must not be participating in an existing foster care program and not receiving per diem payments. MSP may have an impact on Food Stamps and/or Medicaid benefits. Follow the TANF procedures to apply.

Grandparents Raising Grandchildren: Crisis Intervention Services Payment (CRISP) One-time emergency payment to assist in an emergency that resulted from the grandchild living with the grandparent. The grandparent must receive TANF and meet the GRG eligibility. Follow the TANF procedures to apply.

Adoption Assistance (non-recurring) can be a one-time payment of $1500 per child for attorney's fees and legal costs to adopt a payment. Adoption Assistance can also be a monthly payment in some limited cases.

- **Help for Family Violence Survivors**

Emergency Shelter The 24-hour statewide domestic violence hotline number can help with emergency shelter and other domestic violence services. 1-800-33HAVEN (1-800-334-2936).

Georgia Legal Services Program / Atlanta Legal Aid Society for a lawyer to represent clients in Temporary Protective Order, Stalking, Housing, and Benefits cases. Georgia Legal Services Program - 1-800-498 9469 toll-free or for new clients call 1-833-GLSPLAW (1- 833-457-7529) Atlanta Legal Aid Society – www.glsp.org or 404- 524-5811 – www.atlantalegalaid.org.

Pet Safety AHIMSA House provides information or shelter for pets during a domestic violence crisis. 404-496-4038 or www.ahimsahouse.org/.

Sexual Assault Survivors Survivors of sexual assault can file criminal charges and can ask for civil legal help. Survivors may want a protective order, custody, visitation, benefits, or shelter. Contact www.GNESA.org or www.rainn.org or 1-800-656-4673 to find a sexual assault agency or GLSP for more information on civil remedies for sexual assault victims.

Abused Deaf Women's Advocacy Services (ADWAS) ADWAS advocates can help people who are Deaf or Hard of Hearing in times of crisis. For domestic violence referrals or more information about domestic violence, advocates are available Monday-Friday from 12pm-8pm. Advocates can be contacted by videophone at 1-855-812-1001, or by email at DeafHelp@thehotline.org.

Victims Compensation Victims of crimes, including family violence, may qualify for up to $25,000 for medical fees, loss of wages, or support. Contact CJCC for more information at http://crimevictimscomp.ga.gov/.

Housing Georgia has several housing assistance programs. Many have long waiting lists and the Department of Community Affairs has more information https://www.dca.ga.gov/safe-affordable-housing/rental-housing-assistance. If you live in subsidized housing and are at risk because of domestic violence, the Violence against Women Act (VAWA) may help. Contact GLSP at 1-800-498-9496 for more information.

Elder Abuse can be reported at 1-866-55AGING (1-866-552-4464) - Press "3".

- **Assistance for Military Personnel**

Military One Source Transitional Compensation If you have been sharing a home with, and are married to, a service member who has been convicted of a dependent-abuse offense, you may be eligible for transitional compensation benefits. Find additional eligibility requirements at https://www.militaryonesource.mil/family-relationships/relationships/relationship-challenges-and-divorce/transitional-compensation-help-for-victims-of-abuse/ or 1-800-342-9647).

Military Installations Families of active duty, guard, and reserve service can utilize their local Family Advocacy Program (FAP) office to report family violence, and find additional resources and referrals. You can locate your local FAP at https://www.militaryonesource.mil/family-relationships/family-life/preventing-abuse-meglect/the-family-advocacy-program/.

- **Other Programs**

The Kinship Navigator Program serves as a one-stop shop for information and referral services to grandparents, relatives and other caregivers who are currently raising a child. Find more information at https://dhs.georgia.gov/kinship-navigator-program.

Student Loan Relief for Disabled The Higher Education Act allows for loan forgiveness for borrowers who are totally and permanently disabled. Find more information at https://disabilitydischarge.com/.

Taxes Some low-income parents can get an Earned Income Tax Credit (EITC) when filing taxes. You may also qualify for child tax credits. More information is

available at https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit. Free tax assistance is available at: https://www.irs.gov/individuals/find-a-location-for-free-tax-prep.

Telephone The Lifeline program helps low-income Georgians to get low-cost phones with limited minutes. You must either have low income or get Medicaid, Food Stamps, SSI, housing assistance, TANF, or School Free Lunch help. To locate a Lifeline company and get more information go to www.lifelinesupport.org.

LIHEAP Usually beginning in late fall, applications are available for Georgia's Low Income Home Energy Assistance Program which helps pay utility costs for seniors, disabled, and other Georgians. To get more information, contact https://dfcs.georgia.gov/services/low-income-home-energy-assistance-program-liheap or call 1-800-436-7442.

LIHWAP Help with Water Bills - LIHWAP. The Low-Income Household Water Assistance Program (LIHWAP) is a federally funded program created in response to the COVID-19 pandemic that helps households pay for drinking water and wastewater for their homes. This program helps eligible customers experiencing a water burden pay their home water bill. LIHWAP opened on Nov. 1, 2021 in Georgia and prioritized households that had an arrearage or past due water bill through the remainder of that year. On Jan. 3, 2022, the program began serving households that contain seniors 60 years of age and older and households that contain children 5 years old and younger. All other households became eligible to receive LIHWAP assistance beginning Feb. 1, 2022.https://dfcs.georgia.gov/services/low-income-home-energy-assistance-program-liheap/low-income-household-water-assistance-lihwap.

National Foundation for Credit Counseling (NFCC) Some victims of crime may see significant changes to their credit score as a result of their victimization. A certified credit counselor may be able to help you understand your options for credit repair, and provide additional referrals as needed. You can learn more about NFCC at www.nfcc.org or connect with a credit counselor at 1-800-388-2227.

Identity Theft and Data Security Learn more about how to identify signs of phishing scams, identity theft, and security issues at https://www.ftc.gov/news-events/media-resources/identity-theft-and-data-security, or call 1-877-382-4357 to file a complaint.

If you are denied benefits, you can contact GLSP at 1-833-457-7529. Deadlines may apply.

Case Law Update

*By Vic Valmus**

ATTORNEY'S FEE – 19-6-2

Freeman v. Freeman; **A24A0805** (August 19, 2024)

The Wife filed for divorce in 2021 and requested the equitable division of property, attorney's fees, and short-term alimony. The day for the scheduled final hearing, April 11, 2023, the parties reached a Settlement Agreement which stated that each party shall pay their own attorney's fees incurred in the action. On April 17, 2023, counsel for the Wife electronically sent the Agreement to the Husband and his counsel, indicating they needed to sign the Agreement. On June 20, 2023, the counsel for the Wife again sent the executed signed Agreement for the Husband and his counsel's signatures. The Wife filed a Motion to Enforce on July 17, 2023, which also sought fees under 19-6-2. Two days after the Wife filed the Motion, the Husband's counsel returned the executed signed Settlement Agreement to the Wife's attorney, and the Trial Court entered a Final Judgment and Decree of Divorce. In September 2023, the Trial Court held a hearing on the Wife's request for attorney's fees. Based on the evidence presented at the hearing, the Trial Court found the Husband's counsel had originally contested some of the language in the Final Order but had agreed to sign the Agreement in May 2023. The Court found that neither the Husband nor his counsel had executed the Agreement until July 2, 2023. The Trial Court concluded that the Husband, through his counsel, failed to promptly execute the Settlement Agreement, causing a delay in the entry of the Divorce Decree. Based upon these findings, the Trial Court granted the

Wife's request for attorney's fees pursuant to O.C.G.A §19-6-2 and ordered the Husband to pay $2,388.49 to the Wife's attorney. The Husband appeals and the Court of Appeals reverses.

Pursuant to O.C.G.A. §19-6-2, the Trial Courts are required to consider the financial circumstances of the parties to ensure effective representation of both spouses in an action arising out of divorce, and such award cannot be predicated upon a finding of misconduct of a party. Therefore, the Trial Court must make findings of fact regarding the relative financial circumstances of each party. Here, the Trial Court's Order did not indicate that it considered the financial circumstances in making the attorney's fees award. In addition, the record does not contain a transcript of the Trial Courts hearings on the fees issue. Ordinarily in the absence of a transcript, this Court must presume that the evidence supported the Trial Courts finding. However, because the Trial Courts Order indicates that it's attorney's fees award was based, at least in part, on the Husband's alleged wrongful conduct (i.e., his delay in executing the Settlement Agreement), this presumption does not apply. The Order indicates the Trial Court awarded fees under O.C.G.A. §19-6-2, at least in part, to punish the Husband's conduct. There is no indication that the Trial Court considered the financial circumstances of both parties as part of its determination regarding the amount of attorney's fees. Therefore, the Order is vacated and remanded.

CONDITION PRECEDENT

Hawbarker v. Brittingham; **A24A0611** (October 4, 2024)

The parties were divorced in 2022. Brittingham (Wife) agreed that by June 30, 2022, she would "pay, discharge and otherwise refinance into her sole name" all the mortgage indebtedness on the marital residence on which Hawbarker (Husband) was the sole obligor. She also agreed to cease using the last name Hawbarker within 10 days of the Trial Courts entry of the Final Decree. Based upon the date of divorce, July 25, 2022, the Wife was to cease using Hawbarker's last name by August 4, 2022. The Agreement also provided that upon the Wife's performance of all obligations undertaken by or imposed upon her by the Settlement Agreement, including but not limited to the payment and discharge and satisfaction of the Husband's indebtedness to the mortgage company, the Husband was to dismiss the Wife with prejudice from a civil lawsuit that he had filed in Pike County. On November 22, 2022, the Wife filed a Petition of Contempt against the Husband contending that he had willfully failed to comply with the Decree and Settlement Agreement because he had not dismissed her from the Pike County lawsuit even though she had satisfied her obligations to him. The Husband argued that she failed to fully timely perform her obligation under the Agreement, which was a condition precedent to his duty to dismiss her from the Pike County lawsuit. After the hearing, the Trial Court entered an Order denying the Husband's Motion to Dismiss and holding the Husband in contempt, providing he can purge the contempt by dismissing the Wife from the Pike County lawsuit by date certain period. The Husband appeals and the Court of Appeals reverses.

The Husband argues that the Trial Court erred by impermissibly modifying the Settlement Agreement and Decree to require him to dismiss the Wife from the Pike County lawsuit. Here, the Settlement Agreement required the Wife to refinance the mortgage by June 30, 2022. The Wife argued that the Settlement Agreement was fully executed on June 22, 2022 and that it was an impossibility for her to refinance from June 22nd to June 30th. However, when she was asked if she had asked the Husband to do anything to accommodate the payoff that he did not do, she replied "no". She testified that she could not refinance the mortgage under the short timeline despite her diligent efforts to do so. She was able to close on the refinancing on August 12, 2022.

Regarding the name change, the Agreement required the Wife to cease using the Hawbarker name by August 4, 2022. The Wife testified that she initially filed an action seeking the name change but the Trial Court dismissed it, finding that she could change her name within the Divorce Decree itself and, therefore, she was not able to begin the name change process until the Final Decree was entered on July 25, 2022. The Wife testified she changed her name on several legal documents, including her Social Security card, driver's license, and passport, but she had no idea of which of those name changes occurred before August 4, 2022 deadline. She did acknowledge that she closed on the

refinance of the house on August 12, 2022 with the name Hawbarker and that, as of November 2022, her Georgia Real Estate License still carried the name Hawbarker and could have carried the Hawbarker name as late as February 2023. By the time of the contempt hearing in June 2023, she testified that the license was in her name and she no longer introduced herself or signed documents using the Hawbarker name.

At trial when the Judge asked the Husband if he would dismiss the Pike County lawsuit, he said no because she did not timely comply with these obligations and because she had not requested an extension of time to comply. The Trial Court responded, "I find your position unreasonable. I find your position contrary to the Settlement Agreement and I'm going to order that you do so. I'm going to find that she has performed her obligations to the best of her ability in the spirit of the Order." The Trial Courts Order holding the Husband in contempt found that the Wife had timely performed all her obligations under the terms of the Agreement. However, there is no evidence to support this finding. Condition precedents are created by language such as "on condition that," "if," and "provided," or by explicit statements that certain events are to be construed as conditions precedent. Although conditions precedent are generally not favored under Georgia Law, when the language of the contract clearly creates such a condition, that condition must be enforced. It is clear from the record before the Appellate Court that the Wife did not satisfy the conditions precedent required in the Decree and Settlement Agreement that would have triggered the Husband's duty to dismiss her from the Pike County lawsuit. When a Plaintiff's right to recover on a contract depends on a condition precedent to be performed by her, she must allege and prove the performance of that condition or allege a sufficient legal excuse for its nonperformance. The Wife's testimony that she did not timely perform is uncontradicted. The Trial Court's Order modified the Agreement terms by effectively negating or deleting the dates and conditions precedent. The Trial Court also found, despite evidence to the contrary, that the Wife had timely complied. While it is true that the Trial Court has the power to ensure compliance with the spirit of the Decree, it cannot modify the original Judgment being enforced. Therefore, the Trial Court impermissibly modified the Divorce Decree and Settlement Agreement to render meaningless the language provided for in the condition precedent. Since the Trial Court was not authorized to modify the Decree, its Order finding that the Wife had timely complied and holding the Husband in contempt for failing to dismiss her from the Pike County lawsuit must be reversed.

DISCOVERY SANCTIONS

Cerna v. Cornejo; **A24A0988** (October 24, 2024)

The parties were married in 2014 and had four children. The Wife filed for divorce in December 2022 and the Husband counterclaimed that the marriage was irretrievably broken and the Wife had committed adultery. The Wife requested certain discovery and the Husband responded through counsel. In May 2023, the Wife filed a Motion to Compel alleging many of the Husband's responses were incomplete or deficient. Particularly, she argued the Husband failed to produce vehicle records, credit card statements, medical records, surveillance records, children's educational records, records related to Husband's criminal conduct, or any evidence of the Wife's adultery. After the Wife filed her Motion to Compel, the Husband's attorney withdrew and Husband was *pro se.* The Husband failed to respond to the Motion to Compel and did not appear at the hearing on that Motion. After the hearing, the Trial Court entered an Order stating the Husband failed to provide complete responses related to the requested information. The Court characterized the Husband's deficiency discovery responses as willful, issued immediate sanctions against him, and enjoined him from entering evidence regarding custody of the children, the Wife's alleged adultery, or any other issues that the Wife specifically requested in her Motion to Compel.

The Husband appeared *pro se* at the bench trial and the Wife was the only witness. After the Wife's testimony, the Husband took the stand. Before he testified, the Trial Court gave him a warning concerning any testimony regarding criminal charges pending in Cobb County and informed the Husband that he could not present any evidence on the issues addressed in the Motion to Compel Order. The Court told the Husband that the Order covered "pretty much everything." The Husband attempted to explain to the Trial Court that he was unaware of the Motion to Compel, that

everything seemed one-sided to him, and that he had not had the benefit of counsel. The Court responded "Hogwash, Horsefeathers." Thereafter, the Husband declined to testify. In addition, it does not appear that the Husband was given any opportunity to ask the Wife any questions. In the Final Order, the Court awarded sole legal custody of the children to the Wife with the Husband's visitation at her discretion, child support of $2,377.00 per month, alimony of $1,000.00 per month, sole and exclusive possession of the marital residence and all of the equity, all furnishings, and attorney's fees. The Wife was also awarded any joint funds in the joint marital accounts and required the Husband to pay all joint credit cards, debts, and liabilities; and awarded the Husband only his clothing and personal effects, his personal bank account and pool business, which the Court stated had no value. The Husband filed a Motion for Reconsideration and for a New Trial which was denied. The Husband appeals and the Court of Appeals reverses.

The Husband argues the Trial Court should have entered and Order compelling the Husband to respond to the Wife's discovery prior to issuing immediate sanctions of exclusion of evidence. Pursuant to O.C.G.A §9-11-37, in regards to the consequences of failure to submit discovery, when there is an alleged discovery violation, the party must file a Motion to Compel, obtain an Order from the Court compelling an answer, and then seek sanctions if the responding party still refuses to comply. The exception to the requirement that the Court first issue an Order compelling discovery response prior to issuing sanctions, which is found in O.C.G.A. §9-11-37(d) is when a party totally fails to provide certain discovery or provides false or deliberately misleading discovery responses. Then, certain sanctions could immediately be ordered. This section has been construed to apply to nothing less than a serious or total failure to respond. Here, the Trial Court did not find the Husband's discovery deficiencies were serious or a total failure to respond, and the Wife's Motion to Compel only sought an Order compelling the Husband to respond. While the Husband's production documents may have indeed been deficient, there was no finding by the Trial Court that he provided false or deliberately misleading responses or that he had seriously or totally failed to respond to the request. The Appellate Court is especially concerned with the Trial Court's Order that the Husband could not tender evidence at the trial regarding the issue of child custody. This ruling is not in keeping with the legislative mandate that the Trial Court consider all circumstances and render a decision that furthers the best interest of the children. Therefore, the Order issuing sanctions is reversed and all other issues in the Courts Final Order are also reversed and remanded for a new trial.

INDEFINITE OBLIGATION

Blount v. Blount; **A24A0779** (October 10, 2024)

The parties were married in December 2007, separated in August 2021, and had no minor children. They purchased a marital home in 2010 and utilized the Husband's retirement assets to purchase and renovate, and titled the home in both of their names. The Wife took out a mortgage against the property to pay the tax liability associated with cashing out the Husband's retirement account. In 2014, the parties started multiple businesses. At the time of the parties' divorce, the Husband was 68 years old receiving Social Security benefits and the Wife was 55 years old operating both businesses. After the final hearing, the Trial Court held (in pertinent part) that the marital residence had a fair market value of somewhere between $540,000-$725,000.00 and there were 2 debts on the marital residence – a home equity line of credit with a balance of $12,000.00 and a mortgage with a balance of $92,000.00. The Court awarded the marital residence to the Husband and held that he shall timely pay the mortgage owed to the bank Ally Bank (in the Wife's name) and ordered the Wife to pay the balance of the HELOC and gave the Husband access to the online account with the mortgage servicer. The Trial Court did not require the Husband to refinance the mortgage in his name, but instead ordered the Husband to pay the mortgage pursuant to its terms and hold the Wife harmless indemnify her for any failure to do so. It also ordered the Wife not to take any action to alter the mortgage terms, interest rate, and/or balance owed to the bank, awarded the Wife both businesses, and required her to pay $125,000.00 lump sum payment to the Husband. The Wife appeals and the Court of Appeals affirms in part and reverses in part.

The Wife argues, among other things, that the Trial Court erred in awarding the marital residence to the Husband without requiring him to refinance the mortgage under his own name. The Wife maintains this creates an impermissible indefinite obligation which harms her credit. Although a Trial Court can order certain events to happen after the finalization of the Divorce Decree as part of its Order, it may not indefinitely extend a party's obligation relating to the equitable division of property. The Georgia Supreme Court has held that the absence of a time frame for a payment rendered the obligation indefinite and that an obligation of a party relating to equitable division of property may not be extended for an indefinite period of time. Here, the Trial Court's award of the marital residence to the Husband did not require him to refinance the mortgage under his own name despite the mortgage maturity date of 2042, which was nineteen years after the Final Divorce. Whether or not extending this obligation for nineteen years was the best idea under all circumstances is not a question before the Court. Keeping the mortgage in the Wife's name and requiring the Husband to pay it pursuant to the terms does not impose an indefinite obligation on either the Husband or the Wife, but instead imposes an obligation that carries with it a clear directive with a finite (albeit lengthy) duration.

The Wife also argues the Trial Court erred when it granted the Husband's Motion to Compel and ordered $9,000.00 in attorney's fees. The Wife correctly argues the Trial Court Order erroneously required her to produce discovery that had not been requested by the Husband's original discovery request or other discovery that was not sought in his Motion to Compel. Therefore, the part of the Order Granting the Motion to Compel, to the extent it compelled the Wife to produce documents that were not previously sought after, is reversed. In light of this finding, we also vacate the Trial Courts award of attorney's fees pursuant to O.C.G.A §9-11-37 and remand for further consideration.

INTERSPOUSAL TORT IMMUNITY

McDaniel v. McDaniel et al; **A23A1310** (March 13, 2024)

The Wife, (Angie McDaniel) filed a Complaint for Divorce in April 2014. The Wife alleged that in late April 2014, Francis (Husband's Mother) and Galan (Husband's Brother) gave false statements to the police, resulting in the Wife's eventual arrest and involuntary commitment to a mental hospital for seven days. She also claimed forged evidence was placed on her phone by the Husband which had pictures that resulted in her arrest and indictment. In November 2015, several State Court arrest warrants were issued for the Wife for charges for sexual exploitation of a minor. The parties reached a Consent Final Decree of Divorce in June 2016. The Wife was indicted in January 2019, in Federal Court, for charges of sexual exploitation of children. After the FBI investigation confirmed that the evidence was planted, the charges were dismissed in October 2019. The Wife filed a claim for malicious prosecution, false imprisonment, false light invasion of privacy, damage to reputation, infliction of emotional distress, punitive damages, and attorney's fees against her ex-husband, Nathan, and her in-laws, Galen and Francis McDaniel. Defendants answered, motioned to dismiss, and claimed the statute of limitations had expired and the claims were barred by interspousal tort immunity. A hearing was held on June 15, 2022, for which the Wife did not appear. The Trial Court dismissed the Wife's suit on the basis the claims were either barred by the applicable statute of limitation or by interspousal tort immunity. The Wife appeals and the Court of Appeals reverses.

In order to state a claim from malicious prosecution, the Wife had to allege 1) the prosecution for criminal offense was instigated by the defendants; 2) issuance of a valid warrant, accusation, indictment or summons; 3) termination of prosecution in favor of the plaintiff; 4) malice; 5) want of probable cause; and 6) damages. Interspousal tort immunity is a common law doctrine that bars claims by one spouse against the other for damages from a wrongful or negligent act committed by that spouse during the course of or prior to their marriage. The policy behind interspousal tort immunity is to foster marital harmony by preventing suits between spouses, and to avoid fraudulent and collusive lawsuits between spouses against other parties. If there is no marital harmony to protect and no fear of collusion between the parties, then the doctrine of interspousal tort immunity does not automatically bar an action sounding in tort. Here, the Wife and the Husband were already in the midst of separation in a pending divorce; and the tort that the Wife alleges

the Husband and his family members committed was done intentionally as a means to injure her during the divorce proceedings and had lasting irrevocable damages on her life. Therefore, the Trial Court erred by granting the Motion to Dismiss on the basis of interspousal tort immunity. The Wife does not appeal the Court's ruling that dismissing false imprisonment, false-light invasion of privacy, damage to reputation, and intentional infliction of emotional distress claims based on statute of limitation grounds.

MODIFICATION

Yntema v. Smith; **A24A0478** (May 31, 2024)

The parties were divorced in 2010. They had two children and pursuant, to the Final Divorce Decree, the Father had primary custody and the Mother was to pay $250.00 per month in child support. The Mother filed certain petitions to modify visitation, including one in 2017 seeking joint physical custody. In June 2022, amid ongoing disputes, the Mother entered into a Consent Interlocutory Order which required the parties to attend reunification therapy, allowing the Mother to have temporary sole physical custody and the Father having no contact with the children. The Order did not change the Mother's child support obligation, nor did the amendment to the Order in July 2022. In June 2023, the Mother filed an Amended Petition for Modification of Custody and Child Support as well as attorney's fees. In July 2023, the oldest child turned 18 years of age and went to live with the Father, but he was still enrolled in high school. During the evidentiary hearing in July 2023, the Mother introduced evidence of various child related expenses she incurred since the children came to live with her the prior year. The Court entered three Orders: one awarding past expenses related to the children; one awarding attorney's fees related to Mother's pursuit of child support; and one awarding child support to the Mother. The Father appeals and the Court of Appeals affirms in part and reverses and remands in part.

The Father contends the Trial Court erred by ordering back child support during a period in which the Mother's obligation to pay him child support had not been modified or terminated. The written Order granted the Mother's portion of actual expenses she incurred for the children from July 7, 2022 through July 31,

2023 to account for the time she had full custody of the children, but no child support award was in effect. The Mother presented itemized expenses. Once the Court reached a total recoverable amount expended by the Mother, the Court wrote it deemed the Father's portion of the expenses at ninety percent, which was $39,731.00, and that amount was reduced by $2,500.00 which was equivalent to the Mother's missed child support payments. Aside from deeming the Father's portion of expenses should be ninety percent, the Trial Court's Order did not engage in any of the statutory mandatory fact findings nor analyze any deviations from the statutory presumptions. Therefore, the Court erred in awarding ninety percent of back expenses, and it's remanded for the Trial Court to engage in fact finding and analysis in accord with O.C.G.A. §19-6-15.

The Father also argues the Trial Court erred by not awarding child support for the oldest child, who was eighteen but under the age of twenty, enrolled in high school, and living with the Father. At the child support hearing, the Trial Court stated that it could not award custody of the oldest child to either party, so the child support payment was not going to be calculated. The Court stated that it could not change custody of a child who reached the age of eighteen and, therefore, refused to award any child support to the Father for the oldest child. Although a Court cannot award custody of a child once the child has reached the age of eighteen, child support may be contingent on the child remaining a minor, that is, ordered financial assistance to be extended until the child's majority as authorized by O.C.G.A. §19-6-15(e). Here, the Trial Court misapplied the law at the hearing when it stated the oldest child would not be considered in the child support calculations because "I cannot consider him." The Court erred by holding it was without authority to award child support to the Father for the oldest child during the time he qualified for support as provided in the Divorce Decree.

The Father also contends the Trial Court erred in its calculation of the child support obligation of the Mother by failing to take into account her Husband's contribution to her expenses. Because the Mother is remarried and does not work outside the home, her husband provides for her support and pays for expenses which the Mother listed on her Financial Affidavit. The Father argues this should be deemed income for the purposes of child support calculation. Instead, the Trial Court imputed income of approximately $5,000.00 per month based upon her earning capacity and her past career as a consultant. Imputing the income the Mother could earn and not including her Husband's support for her whole household was within the Trial Courts discretion because the Mother's husband has no legal obligation to contribute, directly or indirectly, to the support of the Mother's children from her prior marriage – even if the income of her husband reduced her living expenses, contributed to a better life style, or enabled her to devote more of her time to raising the children.

MODIFICATION/CHANGE OF CIRCUMSTANCES

Wilson v. Arnold; **A24A0661** (August 13, 2024)

Wilson (Mother) was married to the Father (Arnold) when the child was born in 2015. Pursuant to the parties' Settlement Agreement that was incorporated in their divorce in 2019, they shared joint legal custody and decision-making authority as well as approximately equal parenting time. However, the Agreement stated that the Mother had primary physical custody and tie-breaking authority on major decisions, and the child would live with the parents on alternating weekly schedules. In January 2022, the Mother filed a Petition to Modify Child Custody, alleging a material change of circumstances, and requested the Father be awarded standard visitation. The Father filed a Counterclaim seeking primary physical custody and tie-breaking authority. Both parties alleged contempt. At the final hearing, the Trial Court concluded that both parents had exhibited no co-parenting skills whatsoever and that there was no material change of circumstances such that custody could be modified. As to the contempt, the Court found both Mother and Father to be in contempt on various grounds and ordered them to take co-parenting counseling classes. Even though the Court found no material change in circumstances, the Court found that a change in visitation and parenting time was in the child's best interest and changed the parties' schedule from a weekly rotation to a six-month rotation with the non-custodial parent having visitation on the 2nd and 4th weekends. As to decision making authority, the Court ordered that the Father shall have sole decision-making authority relating to

the child's ADHD treatment. The Court also changed the tie-breaking decision-making authority to the parent who had physical custody of the child at the time the decision is being made; that is, the Father would have tie-breaking authority from January 1st to June 30th of each year and the Mother would have such authority from July 1st to December 31st. The Mother appeals and the Court of Appeals reverses.

Here, the Trial Court expressly found there had been no material change in circumstances such that a change of custody was warranted. However, there were various modified provisions of the party's custody arrangement. Because the Court found no material change of circumstances, the Court was not authorized to modify the parties' custodial arrangement, including their decision-making authority. The Court stated in its Order that a modification under O.C.G.A §19-9-3(b) was appropriate. However, O.C.G.A. §19-9-3(b) authorizes changes to the parent's visitation rights and parenting time but not to the parties' decision-making authority or other custodial rights. Here, the Trial Court's modification to the parties Parenting Plan was not limited to changes to their visitation rights and parenting time. Therefore, the Trial Court erred by relying on this provision as a basis for all of its changes to the parties' Parenting Plan. Although some of the modifications ordered by the Court fall within the scope of the permissible changes to the parties' parenting time schedule, the changes are intertwined with the Court's removal of the Mother as the designated primary custodial parent and changes to the parties' decision-making authority. Therefore, all the custody and visitation rulings contained within the Courts Order are reversed and the case remanded.

MODIFICATION/INVOLUNTARY LOSS OF INCOME

Dial v. Burge; **A24A0885** (August 21, 2024)

The parties had 2 children and were divorced in January 2011. The Final Judgment was modified on January 14, 2021, which included detailed child support obligations and directed Dial (Husband) to pay Burge (Wife) for some previously unpaid expenses. Two years later, the Father sought another modification of his child support obligation. A Final Order was issued April 26, 2023 modifying his child support obligation to $600.00 per month. Two months later, on July 19, 2023, the Father again filed a Complaint for Modification of Child Support alleging that he suffered an involuntary loss of income of more than 25% of his income since April 26, 2023 Order and seeking an additional downward modification of his child support obligation. The Wife answered and filed a Motion to Dismiss, arguing that O.C.G.A. §19-6-15(k)(2) prevents a party from seeking a modification of child support within 2 years from the date of a previous modification Order. A hearing was held that was not transcribed; and less than 2 weeks later, the Court issued a half page Order that summarily noted that "having heard evidence and considering the Defendant's Motion to Dismiss, it is therefore ordered that the Defendant's Motion to Dismiss is hereby granted." The Husband appeals and the Court of Appeals reverses.

The Husband argues the Trial Court erred in granting the Wife's Motion to Dismiss, arguing that his Complaint for Modification of Child Support alleged circumstances falling within an exception of O.C.G.A. §19-6-15. Wife's position, that the law prohibits the filing of a Petition for Modification of Child Support within two years from the date of the Final Order on a previous Petition to modify filed by the same parent, is true the on its face; but there are narrow exceptions. Here, in his Complaint for Modification of his child support obligation, the Husband clearly alleges that he suffered an involuntary loss of more than 25% of his annual income since the Trial Court issued the April 26, 2023 Final Order. Therefore, his Petition raises the allegation that qualifies for an exception to the 2-year bar against petitioning for a modification. Therefore, the Trial Court is reversed and remanded.

MODIFICATION/PLEADINGS/HEALTH INSURANCE

Calvert v. Calvert; **A24A0353** (June 26, 2024)

The parties were married in 2008 and divorced in 2013. The Mother was granted primary custody of one minor child, born in 2008, and the Father required to pay child support. Shortly after, the parties reconciled and resumed living together, but never remarried. During this time, they had 2 more children, one born in 2014 and one in 2016. The parties finally separated in January 2020 and all 3 children remained with the

Mother. One year later, the oldest child went to live with the Father and in April 2021, the Father filed a Petition for Legitimation of the two younger children; joint physical and legal custody of and visitation with the two younger children; primary custody of the older child; and modification of child support. The Mother counterclaimed for joint legal custody and primary physical custody of all three children. Several months later, the Mother filed for contempt based upon the Father's failure to pay child support. The Father was found in contempt and ordered to pay attorney's fees on the contempt. A Guardian Ad Litem was appointed, and in December 2022, the Guardian sent a written report recommending the Father be given primary custody of all three children. Prior to the final hearing, each party filed proposed Parenting Plans and Child Support Worksheets. The Father requested custody of all three children and a credit for $300.00, in the calculation of child support, for the children's health insurance that was paid through his Wife's company, and the Mother requested physical custody of all three children and a child support worksheet credit of $420.00 in health insurance premiums for the children. At the final hearing, the Mother objected to the Father arguing for physical custody of the two youngest children, noting that he had failed to request that relief in any pleading. The Trial Court overruled the objection. After the hearing, the Trial Court entered a Final Order granting joint legal custody to the parties with the Father being primary of all three children, requiring the Father to maintain health insurance for the children and gave the Father the $300.00 credit for the children's health insurance, and requiring the Mother to pay child support. The Court also changed the initial repayment of past due child support and attorney's fees in a previous Order in the Final Order. The Mother appeals and the Court of Appeals affirms.

The Mother argues the Trial Court erred in allowing the Father to pursue primary physical custody of the two youngest children because he had not requested that relief in his pleadings. Issues that are not raised in the pleadings can be tried by express or implied consent by the parties. If the evidence is objected to at trial on the grounds that it is not within the issues made by the pleadings, the Court may allow the pleadings to be amended and shall do so freely. The Mother contends that because she objected to the Father's custody of the two youngest children, that issue was not tried with her consent. An objection to relief not requested in a Complaint will be sustained where the objecting party had insufficient notice of that claim prior to trial. Here, the record shows that the Mother had notice well in advance of the trial that the custody of the two youngest children was at issue. Moreover, six months prior to the final hearing, the Mother received the Guardian Ad Litem's recommendation that the Father be awarded primary custody of all children. Thus, the Mother had notice that the custody of the two younger children was at issue at trial and the Trial Court was correct in allowing the Father to proceed.

The Mother next argues the Trial Court erred in giving the Father $300.00 credit on his Child Support Worksheet for child health insurance because the health insurance at issue is provided by the Father's Wife rather than the Father and the Trial Court should have allowed her to maintain health insurance for the children. However, pursuant to O.C.G.A. §19-6-15(h)(2)(B)(i), the evidence showed that the Father had health insurance for the children "reasonably available" to him through his Wife's employer. In addition, the health insurance through the Father was approximately $100.00 less per month than the one available to the Mother.

PRENUPTIAL AGREEMENT

Arlotta v. Arlotta; **A24A0961** (September 23, 2024)

Shortly before the marriage, in September 2012, the parties executed a prenuptial agreement in Minnesota. According to the agreement, each party had consulted with counsel and the parties each attached financial disclosure statements. The parties had three children during the marriage, moved to Georgia, and separated in January 2022. The Wife filed for divorce. The Husband answered and filed a Motion to Enforce the parties' prenuptial agreement. The Wife argued that the prenuptial agreement was unenforceable because there was not a full and fair disclosure of his financial assets, the agreement was unconscionable, there was a change of circumstance, the agreement failed to distinguish between marital and separate property, the agreement contradicted itself in that it mandated equal division of marital property but required the court to consider the laws of both Minnesota and

the state where the parties resided, and was against public policy because it prevented the Court from considering the parties' separate property. At the hearing, the Court granted the Motion to Enforce as it related to the identification and allocation of the parties' separate property. However, the Court denied the Motion to Enforce to the extent that the agreement limited its consideration of the parties' separate property in determining the equitable division of the marital property, alimony, attorney's fees, and any other determination based on the consideration of the parties' financial circumstances. The Husband was granted an interlocutory appeal, and the Court of Appeals reverses.

In determining whether to enforce a prenuptial agreement, the Trial Court has discretion to approve the agreement in whole or in part or to refuse to approve it as a whole. In making this determination, the Trial Court should employ basically three criteria set forth in *Scherer*: 1) was the agreement obtained through fraud, duress, mistake or through misrepresentation or non-disclosure of material fact; 2) is the agreement unconscionable; 3) have the facts and circumstances changed since the agreement was executed so as to make it unfair and unreasonable. Here, when the Trial Court applied the *Scherer* test, the Trial Court found the prenup did not run afoul of *Scherer*. The Court nevertheless found that some of the terms of the prenuptial agreement were against public policy and directly contrary to Georgia Law because the provisions barred the Court's ability to consider the parties' separate property in determining alimony and equitable division of marital property.

The Georgia Supreme Court has stated that the criteria set forth in *Scherer* is exclusive and exhaustive. In addition, Georgia Courts have consistently held enforceable prenuptial agreements that limit the Trial Court's discretion with regards to division of property and award of alimony so long as the three-part test forth in *Scherer* are met. The Wife has pointed out no cases, and this Court has found none, in which a prenuptial agreement was held unenforceable against public policy because provisions were inconsistent with Georgia statutory law. Therefore, as long as the *Scherer* test is met, Georgia Law permits parties to enter into prenuptial agreements that waive benefits that otherwise would have been entitled to by statute.

SPLIT PARENTING, CHILD SUPPORT WORKSHEETS/9-15 NOTICE

Turney v. Turney; **A24A0932** (September 30, 2024)

This case previously came before the Appeals Court where the Trial Court's Order was vacated, and the Trial Court's child support and attorney fees were remanded. The parties divorced in 2020 and the Father was awarded primary custody of the parties' youngest girl, and the Mother was awarded primary custody of the four other children. The Father was ordered to pay child support. The Father filed a lawsuit in June 2020 seeking custody of the two youngest boys based upon their election, child support, and attorney's fees. In response, the Mother submitted multiple proposed child support worksheets in different calculations based upon different potential custodial placements of the three boys. The Trial Court ruled that the Father should have primary custody of the two youngest boys and would revisit the issue of custody on the oldest boy if an election was made. The Court stated the child support would only include the two youngest boys because the oldest boy's custody was not being modified. Counsel for the Father stipulated to the Mother's Child Support Worksheet, but it is unclear which of the Mother's multiple worksheets counsel and the Court were referring to. The Father requested attorney's fees in the amount of $6,000.00, the amount which he paid to his counsel, and argued the Mother had unnecessarily expanded litigation and had been stubbornly litigious.

The Court awarded the Father his attorney's fees "in full," finding that the Mother had not complied with discovery rules, engaged in wasteful litigation, and filed unnecessary motions. On November 22, 2022, the Trial Court entered a Final Order awarding the Father primary physical custody of the two youngest boys and requiring the Mother to pay the Father $786.00 in monthly child support, $6,000.00 for his attorney's fees, and $1,700.00 for the Guardian Ad Litem fees. The Final Order also incorporated one of the Mother's Child Support Worksheets, which was labeled "For Final Hearing Version 2.2 w/ Mother Deviation for Insurance Premiums." The Court further ordered that the Mother have primary custody of the oldest and youngest boy, and calculated the Father's monthly child support obligation at $1,070.00 and the Mother's monthly obligation at $786.00. The Mother appeals

and the Court of Appeals affirms the custody ruling and the ruling regarding the Guarding Ad Litem fees but reverses the award of child support and attorney's fees.

Pursuant to O.C.G.A. §19-6-15(b)(11), in a split parenting case, there shall be a separate calculation and a Final Order for each parent and separate worksheets are required for each child. The Mother argues that the revised remanded child support award was improper because it did not include any calculation fir support owed for the boy in her custody. Here, the child support award in the revised remanded Final Order suffered from the same flaws as the award in the initial Final Order. It did not include a Child Support Worksheet for the oldest boy, whose custody was with the Mother under the split parenting arrangement. The Child Support Guidelines apply not only to the initial determination of child support, but also to modification actions. Here, the fact that the Trial Court was only modifying custody of the two youngest boys, or that the Court issued an award of child support for the oldest boy at the time of the party's divorce in 2020, did not relieve it of the requirement to conduct an updated child support calculation for the oldest boy when it modified custody. In addition, the provision of the Child Support Guidelines regarding the requirement that a child support award of a split parenting arrangement include a calculation for each custodial parent and that parent's children does not include any exceptions for children whose custody is not being modified. Here, the Trial Court erred by issuing a revised child support award without including a support calculation for the oldest boy. On remand, the Court should include a support calculation for this boy at the time of the custody modification.

The Mother also argues that the revised attorney's fees award is improper because she did not receive proper notice of the potential award under O.C.G.A. §9-15-14(b), the award was a lump sum, the award did not apportion the fees awarded to any sanctionable conduct, and the award was not supported by findings of facts. The record here contains no indication that the Mother received any notice that an attorney's fees award under O.C.G.A. §9-15-14(b) would be addressed at the final hearing or issued thereafter. The Trial Court's notice of the hearing provided no indication that the Court was contemplating an award under O.C.G.A. §9-15-14. Since the Mother was not given proper notice of the possibility that the final hearing could result in an award against her under O.C.G.A. §9-15-14, the attorney's fees award cannot stand. The Court also notes that an award under O.C.G.A. §9-15-14(b) must be limited to those fees incurred because of the sanctionable conduct and cannot be based on conduct occurring before the preceding was initiated. Lump sum or unportioned attorney fee awards are not permitted in Georgia and will be vacated and remanded for further fact findings where the Trial Courts Order, on its face, fails to show the complex decision-making process necessarily involved in reaching a particular dollar figure or fails to articulate why the Court awarded one amount of fees rather than another.

UNJUST ENRICHMENT/EQUITABLE DISTRIBUTION

Tapplin v. Tapplin; **A24A1164** (October 23, 2024)

The parties first married in the 1980's, divorced in the 1990's, and had two children. Two years after their divorce, they reconciled and began living together. During this time, they were both employed and financially provided for family expenses. In 2010, while the parties were unmarried and living together, the Husband purchased a home on Sweet Apple Lane for $134,714.00 and the deed was placed in his name only. During this period, the Wife paid for family groceries; child related expenses, including food, extracurricular activities, school related expenses; and health insurance for herself and the children. Beginning no later than 2013, the Wife started depositing $500.00 every month in the Husband's bank account, which increased to $700.00 in 2016, $800.00 in 2017, $900.00 in 2018 and $1,000.00 a month by 2019. The parties married a second time in June 2021 and then finally separated in September 2022. Additionally, the Wife contributed to her own 403(b) retirement before and during their second marriage. The Husband never contributed directly to the 403(b). The statement showed the Wife contributed $320.00 per month and her employer contributed $137.00. The Wife filed for divorce in January 2023. At the final hearing, the Trial Court concluded it could not determine what part of equity in the residence constituted marital property under the source of the funds rules because the parties submitted no evidence on the issue. Nevertheless, the Court awarded the Wife thirty percent of the equity

in Sweet Apple Lane under the theory of unjust enrichment. The Court also awarded the Wife full value of her 403(b) account. The Husband appeals and the Court of Appeals affirms in part, and vacates and remands in part.

The Husband argues that the Trial Court erred by awarding the Wife thirty percent of the equity in the Sweet Apple Lane property under the theory of unjust enrichment. The theory of unjust enrichment applies when, as a matter of fact, there is no legal contract, but where the party sought to be charged has been conferred a benefit by the party contending an unjust enrichment which the benefited party equitably ought to return or compensated for. We agree the Trial Court erred by including in its calculations of the thirty percent award any increase in the value due to the Wife's contributions from the time between June 2021 (date of second marriage) and the second divorce. During this time, the parties were in a marriage, which, under Georgia Law, consists of parties able to contract, an actual contract, and consummation according to law. A cause of action for unjust enrichment will lie only in the absence of an express contract. Although marriage is not a contract dealing with property ownership, after undertaking the second marriage, the two were subject to special rules of property division not applicable to unwed parties. It was thus incumbent upon the Wife to provide proof of the approximate value of Sweet Apple Lane from June 2021 to the second divorce in order for her to have the Trial Court equitably divide the increase in value of the home and property due to marital efforts, but she failed to do so. Therefore, the Trial Court's award is vacated to the extent that it included in its calculation the Wife's monetary transfers to the Husband during the parties' second marriage and remanded to recalculate the award consistent with this opinion. However, we affirm the Trial Court to the extent that it determined that it could award the Wife a portion of the equity from Sweet Apple Lane for the period of time she cohabitated with, and was transferring funds, to the Husband for the payment of family expenses, including the mortgage.

The Husband also argues there is insufficient evidence to support the Wife's claim for unjust enrichment. However, the Wife made regular deposits into the account controlled by the Husband, totaling at least $76,000.00 during the premarital cohabitation, while also paying many of the family's expenses from her own accounts. There was evidence that the home was valued by the County at $211,630.00 in 2020, that the Husband valued it at $292,678.00 in 2023, and that the Husband owed less than $80,000.00. Therefore, there was evidence to support the Wife's unjust enrichment claim.

Next, the Husband argues that the Trial Court erred when awarding the Wife the full value of her 403(b) account and the Court erred when it stated it could not apply the source of the funds rule to determine the portions of value acquired during the marriage from the parties' efforts versus market forces. The Husband testified that approximately $21,000.00 constituted marital property subject to equitable division. The Trial Court held that no calculation was provided to show how much of an increase value was attributed to market forces rather than marital contributions. The Trial Court found that, notwithstanding whether the marital portion of the account accrued via the party's contributions or market forces, it was equitable to award the total amount to the Wife. Although the Trial Courts Order does not explain its rationale for this award, based on the wide latitude afforded the Trial Court in making such award, the Husband has failed to establish an abuse of discretion as to this issue.

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