The Family Law Review

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

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Editor's Corner

By Kem A. Eyo

Welcome to the Winter 2024 Issue of the Family Law Review!

Thank you for allowing me the opportunity to serve as your editor for another year. If any of you had a year like many people that I have spoken to, you too are VERY pleased that 2023 is behind you. Here is hoping that 2024 will be filled with promising and pleasant developments in our professional and personal lives.

For this edition, we are yet again blessed to gain knowledge and insight from reputable contributors. This issue includes the last installment of Mark Sullivan's Magic Words series on military divorce; a recap of two recent family law continuing legal education events – the Joint Family Law Conference and Networking Exchange that took place in Barcelona, Spain, presented by Debbie Gold, the Midyear Meeting CLE that took place in downtown Atlanta, and information regarding the inclusion or exclusion of PPP income in calculating support, written by Sam Hubbard, MBA, CFA, CDFA, Jenna LuCree, CPA, and C. Nicole Roth Rogers, CDFA of Coastal Divorce Advisors, LLC. Also included are useful tips for tax planning, presented by the Schultz Wealth Management of Janney Atlanta, and regarding questioning the expert in contested custody cases, presented by Howard Drutman, PhD of Atlanta Behavioral Consultants. Finally, as always, Vic Valmus' case law updates will provide you with the opportunity to learn about recent developments in family law topics.

I am delighted to share the enclosed with you. As always, I invite you to send me any articles you would like to have published in future editions of the Family Law Review. While we were all too busy practicing law to easily find time to write, the feedback that I receive is that the information shared by our fellow practitioners and professionals in the Family Law Review has a positive impact on our ability to provide effective representation to our clients. Please add to the body of knowledge… contribute!

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Inside This Issue

From the Chair

By Karine Burney

Happy New Year.
2024 is already underway and there is a lot to look forward to this year. The Family Law Section Nuts & Bolts CLE will take place on Tuesday, March 12, 2024, in person, at the State Bar. We just had our mid-year meeting where our new slate of officers for the upcoming bar year was elected. I'm thrilled to report that Jonathan Dunn will be our incoming Chair of the Section, Jeremy Abernathy is the incoming Vice-Chair, and Jamie Perez will be our incoming Secretary.

We are in very good hands with this group, and I want to personally thank each one of them for their efforts on behalf of the Executive Committee and the Family Law Section. Our continued gratitude also goes out to Randy Kessler. Randy has been incredibly active with this publication even after his tenure as Chair, and our Section has benefited greatly as result of his efforts.

I know there are a lot of questions about the Family Law Institute. We are scheduled to have FLI from Friday, May 31, 2024 - Sunday, June 2, 2024, at the Westin in Hilton Head. Unfortunately, issues have arisen that need to be resolved by the Executive Committee prior to the room block being opened. We will keep everyone abreast of the situation as we have more information. We appreciate your patience in the meantime. Again, Happy New Year to you and your families.

9 Considerations for 2023 Year-End Tax Planning

*By Jeff Schultz**

~ Schultz Wealth Management of Janney Atlanta

In addition to the continued challenges brought on by inflation and rising prices, 2023 also saw new tax laws as well as anticipated changes in 2024 and beyond. This article examines what you should be aware of as you prepare for year-end tax planning. Despite the challenging environment, you are still able to and should focus on traditional year-end income tax planning. While many issues are out of our control, our tax situation is not one of them. Here are several things to consider before the beginning of 2024.

1. EXPLORE ROTH CONVERSIONS

If you have considered converting your Traditional IRA or 401(k) funds to a Roth IRA, 2023 may be a fitting year to do so. Although Roth conversions generate immediate taxation, federal tax rates remain low, the markets are still off their high, and we cannot predict how much longer they will remain so. If you are reluctant to absorb a big tax bill, consider a series of smaller partial conversions over time, using up lower tax brackets. Keep in mind, Roth conversions are permanent, so be certain there are enough funds to pay the taxes before completing the conversion. All conversions must be completed by December 31 in order to qualify as 2023 taxable income.

2. TAKE YOUR RMDS

Beginning in 2023, the RMD age increased to 73, which means IRA owners age 73 or older must take RMDs. Participants in employer plans who are age 73 or older are also subject to RMDs if they do not qualify for the "still-working exception." Beneficiaries may also be subject to RMDs.

December 31, 2023 is the deadline for most RMDs. However, there is an exception to this deadline for a person's first RMD. If 2023 is the first year an RMD is required for a retirement account owner, the deadline for that RMD is extended to April 1, 2024.

Proposed regulations were issued earlier this year that expanded and sometimes conflicted with provisions of the SECURE Act.

One of the conflicts is related to whether people needed to take RMDs in 2020 and 2021 after the SECURE Act took effect if the plan participant had reached their required beginning date.

The IRS Notice 2022-53, provides that the IRS will not impose a penalty for missed 2021 and 2022 RMDs for those beneficiaries who inherited IRAs from owners who died in 2020 and 2021 on or after their required beginning date.

3. CONSIDER CHARITABLE GIVING

Consider giving appreciated securities to charities and avoiding a potential taxable capital gain when sold. Avoiding the capital gains tax is one advantage, a tax deduction for those itemizing their deductions is another potential benefit, and, of course, the benefits reaped by the charity itself.

Normally, itemized deductions for cash charitable contributions can't exceed 60% of adjusted gross income (AGI) in a single tax year. Remember, you must itemize to take advantage of this strategy. Annual income tax deduction limits for gifts to public charities, including donor advised funds, are 30% of adjusted gross income (AGI) for contributions of non-cash assets, if held more than one year, and 60% of AGI for contributions of cash.

4. CONSIDER QUALIFIED CHARITABLE DISTRIBUTIONS

Qualified Charitable Distributions, or QCDs, are distributions from your IRA account directly to a qualifying charity. IRA owners 70½ years of age and older are eligible. While the SECURE Act raised the RMD age from age 70½ to age 73, QCDs are still available at age 70½. The benefit of giving to charities from your IRA is that you do not pay income tax as you would on funds distributed from your IRA. The charity gets the full donation, and the donor does not have to claim the distribution as income.

5. KEEP TABS ON THE PROPOSED TAX LEGISLATION—BE PREPARED TO UPDATE YOUR ESTATE PLAN

There have been many different tax proposals in recent years and a number of the proposals, if enacted, would have a significant impact on many Americans. Some, in fact, would dramatically alter or severely restrict

traditional estate planning techniques. While it does not appear likely that any may pass in the near future, something smaller could be added on to another piece of tax legislation. The lifetime estate and gift tax exemption is increasing to $13.61 million on January 1, 2024, and the annual exclusion is increasing to $18,000 per person per year; but remember, whether new legislation is passed or not, the current exemption will sunset on January 1, 2026, and be reduced to nearly half its current amount. Therefore, it is a good time to discuss your estate planning goals with your Financial Advisor.

6. INTEREST RATES AND THE EFFECT ON PLANNING

As inflation increases and interest rates rise, they can have a major impact on estate planning. The section 7520 interest rate—which is equal to 120% of the applicable federal rate and is used as a "hurdle" rate or assumed rate of return on estate planning vehicle calculations—has risen from 4.6% in January of 2023 to 5.6% in November 2023.

Qualified Personal Residence Trusts and Charitable Remainder Trusts are two vehicles that may perform well in a higher interest rate environment. A client using these techniques now may benefit by leveraging their exemption.

7. OTHER END-OF-YEAR THOUGHTS

- When interest rates increase hey have the inverse effect on bonds, i.e. bonds decrease in value. When harvesting losses in 2023, don't just focus on stocks, look at bonds. It is easy to buy a comparable, higher yielding bond that will not be subject to the wash sales rules.
- When considering charitable techniques, don't forget that the standard deduction is still high, and we still have limits on state taxes, so you may still want to consider bunching charitable contributions to a donor advised fund if a QCD is not utilized.
- The Inflation Reduction Act extends various tax credits, expanded certain credits and put limitations on others beginning in 2022. The new law extends an existing tax credit of up to $7,500 to individuals who buy a "clean vehicle," that is, an electric car, plug-in hybrid, and hydrogen fuel cell vehicle. The law also provides for a used "clean vehicle" credit of up to $4,000 or 30% of the sales price, whichever is less.

8. MAXIMIZE RETIREMENT SAVINGS AND HEALTH SAVINGS ACCOUNTS

IRA and Roth IRA contributions have an April 15, 2023 deadline, but employer-sponsored retirement plans need to receive contributions by December 31, 2023. Your contribution to an HSA also needs to be received by December 31, 2023.

9. USE YOUR FLEXIBLE SPENDING ACCOUNTS

Flexible Savings Accounts (FSA) follow a "use it or lose it" rule. If you funded an FSA with pre-tax dollars, be sure to use it to its full advantage. Spend down all money that you would otherwise lose on January 1, 2024.

**Jeff Schultz and his team at Janney have been working with wealth business owners, executives, and divorced/inheritors for over 30 years throughout the Southeast. He can be reached at jschultz@janney.com or www.schultzwm.com*

Magic Words - Last Chapter

*By Mark E. Sullivan**

Previous parts of the "Magic Words" series dealt with a) wording to secure the Survivor Benefit Plan for the non-military spouse, b) wording required by the Frozen Benefit Rule so that the retired pay center would accept the pension division order, c) the language of indemnification, and d) language required to establish the court's jurisdiction for division of military retired pay. The final set of "magic words" are ones which belong in every military pension division order, incorporated settlement or divorce decree. These required phrases are set out in the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. §1408, and in the rules for administration and enforcement of pension division, found at Chapter 29 of Vol. 7b, Dept. of Defense Financial Management Regulation (a.k.a. the DoDFMR).

Compliance with the SCRA

Every pension division instrument must state that there has been compliance with the Servicemembers

Civil Relief Act, found at 50 U.S.C. 3901 et seq. This means that the rights of the servicemember (such as the right to obtain a stay of proceedings under certain conditions and the bar against default judgments) have been protected.

MAGIC WORDS: "The rights of John Doe, the defendant, under the Servicemembers Civil Relief Act, Chapter 50 of Title 50, U.S. Code, have been observed."

The "10/10 Rule"

Getting direct payments from the retired pay center is important for the former spouse (FS); it means a regular garnishment of retired pay, deposited in the recipient's bank account around the first of each month. It is important for the retiree as well, since it eliminates the need to write a check to the FS every month and to keep track of COLAs (cost-of-living adjustments) once a year. The law requires 10 years of service overlapping 10 years of marriage.

The "retired pay center" is DFAS, the Defense Finance and Accounting Service, for those who are retired from the Army, Navy, Air Force and Marine Corps. It's the Coast Guard Pay & Personnel Center for those retiring from the Coast Guard and the commissioned corps of the Public Health Service (PHS) and the National Oceanic and Atmospheric Administration (NOAA).

MAGIC WORDS: "The parties were married at least 10 years during which the member performed at least 10 years of service creditable toward retirement."

"Disposable" Retired Pay - It's Disposable

Surprisingly, the phrase "disposable retired pay" is not in the set of "magic words" for the pension order. Although Congress stated in the USFSPA that "disposable retired pay" is all that a state court can divide in military pension division (see 10 U.S.C. §1408 (a)(4)), the rules have made this term irrelevant or, more properly, disposable. All awards of a portion of the military pension are to be construed as dividing the retiree's "disposable retired pay," regardless of their wording. So the order will not be rejected for faulty language or the absence of "magic words" if it divides John Doe's "military pension" or "uniformed services retired pay," for example.

In the Meantime…

Interim payments must be addressed in the pension division order. That's because the parties need to know who makes what payments while the order is being processed by the retired pay center. The retired pay center begins pension-share payments within 90 days of the retiree's entitlement to receive retired pay or the receipt of an acceptable order, whichever is later. For this reason, the order should specify that the retiree is responsible for payments in the interim.

MAGIC WORDS: "Plaintiff will receive payments at the same time as Defendant. The parties acknowledge that payments won't start until 90 days after receipt of an acceptable order or the start of retired pay, whichever is later. Defendant will be responsible for making these payments each month to Plaintiff until these payments start; during this interim, Defendant will pay Plaintiff directly her full share, unadjusted for taxes."

Language for the Award - Four Options

Finally, there are "magic words" involved in phrasing the award. The retired pay center will only accept a pension division instrument which specifies the award to the FS in terms of a fixed amount, percentage, formula, or hypothetical amount of retired pay. Examples of each one may be found in these Silent Partner infoletters: "Getting Military Pension Orders Honored by the Retired Pay Center," and "Military Pension Division: Guidance for Lawyers." All of the Silent Partner infoletters will be found at www.americanbar.org > Family Law Section > Military Law Committee, and at www.nclamp.gov > Publications.

A Helpful Checklist

Note that "one size fits all" definitely doesn't apply to military pension division orders. It pays to check and re-check the pension division order to be sure it complies with the regulations and the statute, accomplishes the needs of the client, makes sense, and will be honored by the retired pay center. Here is a checklist that DFAS uses for pension division orders:

DFAS CHECKLIST FOR MILITARY PENSION DIVISION ORDERS

FORMER SPOUSES' PROTECTION ACT CHECK SHEET	
MEMBER'S NAME	SOCIAL SECURITY NUMBER

- ☐ Service of Application (personal, certified or registered mail, return receipt requested)
- ☐ Final decree of divorce, Dissolution or annulment or legal separation issued by a court - or - a court ordered, ratified or approved property settlement incident to such a decree

- ☐ Authenticated or certificied prior to service of pension
- ☐ Member properly identified (E.G., Name, Address, and SSN)
- ☐ Name, address, and SSN of former spouse
- ☐ Order provides for one of the following:
  - A) Payment of fixed monthly amount of $_____
  - B) Fixed percentage of _____%
  - C) Formula calculation (must use retirement points in Guard/Reserve case):
  - D) Hypothetical calculation:
- ☐ Member's rights under the service members civil relief act complied with
- ☐ Jurisdiction met –
  - ☐ Residence (Not due to military orders)
  - ☐ Domicile
  - ☐ Consent
- ☐ Order has not been amended, superseded, or set aside
- ☐ Order is final decree, no appeal may be taken, no appeal was taken within time permitted
- ☐ Former spouse married to member at least 10 years during at least 10 years of creditable service

PAY ENTRY DATE:	RETIREMENT DATE:
MARRIAGE DATE:	DIVORCE DATE:

- ☐ If divorce after 12/23/16 and member was not receiving retired pay at divorce, order contains two data points required by DoDFMR Vol. 7B, Ch. 29, §2908: High-3 pay at divorce and total years of creditable service (For RC member, total retirement points) at divorce

More detailed information and illustrations can be found in Chapter 8 of THE MILITARY DIVORCE HANDBOOK (Am Bar Assn., 3rd Ed. 2019).

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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). He works with attorneys nationwide as a consultant in military divorce cases and in drafting military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com.

***The Family Law Review* is looking for authors of new content for publication.**

If you would like to contribute an article or have an idea for content, please contact Kem Eyo at Kem@rbafamilylaw.com

"It's Complicated": Living Together as Defined Under the Georgia Family Violence Act

*By Catherine Priebe**

The requirement for victims to establish a qualifying relationship under the Georgia Family Violence Act (FVA) has consequences for petitioners, respondents, and attorneys alike. Such consequences may be best demonstrated through the use of a hypothetical:

Let's say a client comes to your office and wants to file an order of protection against her boyfriend of the past six months. It is up to you as her attorney to decide what type of protective order to request: Family Violence, Dating Violence, or Stalking. It is clear based on the facts that this is not a case of stalking. When you ask the client about her relationship with the respondent, she states that she sleeps at his apartment most days of the week. When she is not staying at his place, she stays at her mom's house in her old childhood bedroom. The power bill is in her name and she has bought most of the furniture that is in the apartment. She and her boyfriend split the cost of groceries each week. The lease is in her boyfriend's name alone, but she receives mail at the apartment. Her mother's address is the one

listed on her Georgia driver's license.

A savvy lawyer might say this case would fall under the Dating Violence Protective Order category. After all, it sounds like they are in a "dating relationship" according to O. C. G. A § 19-3-A-1 . However, your client has not been the victim of simple battery, battery, simple assault, or stalking. Instead, she alleges that two days ago, her boyfriend, in a fit of jealous rage, took a handfuls of her clothes and burned them on the front lawn. He has made vague threats against her over text and she is fearful that he will commit an act of violence against her in the future. The total value of the burned clothes was less than $500. This complicates things because under the Dating Violence Protective Order, criminal trespass is not listed as a qualifying crime. In the simplest of terms, your client can file for a Family Violence Protective Order or not file for one at all.

For a petitioner to qualify for a Family Violence Protective Order, there must be a qualifying relationship between the parties. When filling out a petition, a pro se litigant would simply check the box(es) next to the relationship that exists. Common options include present or past spouses, parents of the same child(ren), parent and child, stepparent and stepchild, persons who used to live in the same household, and persons currently living in the same household . For our hypothetical client, she would check the box labeled: "currently living in the same household."

But what exactly does living together mean? There is currently no Georgia case law specifically defining what the term means in the context of protective orders. The FVA could have chosen to incorporate terms such as "cohabitate," "abide," or "reside," which are defined in Black's Law Dictionary and throughout generations of case law. Cohabitation is defined as "living together as husband and wife." However, as the above paragraphs states, neither marriage nor intimacy is required between two parties to qualify for a Family Violence Protective Order. (Notably, in Jones v. Spruill the Georgia Court of Appeals stated that siblings that live together would qualify for a family violence order under the plain meaning of the FVA) .

Absent a legal definition or any Georgia case law specific to living together as it relates to protective orders, attorneys who represent clients in this field are left with little to no guidance. The best one can do is to research similar questions that have been answered within the context criminal family violence cases. For example, in 1999 the Georgia Court of Appeals upheld a family violence battery conviction when the victim was a female friend with whom [the defendant] was residing . It would also appear that there is no minimum length of time that parties must share a residence to meet the statutory definition of living together. As the Kentucky Court of Appeals points out, "[s]ome couples may live together for years before an act of domestic violence occurs. Other couples might experience domestic violence in the first few days or weeks of cohabitation. " In 2020, the Georgia Court of Appeals ruled that a victim's testimony affirming that the parties previously lived together was sufficient to support a finding that they were persons living or formerly living in the same household—an element that is required to convict a defendant of battery family violence.

Until either the legislature or the Georgia Court of Appeals offers more guidance into what constitutes living together under the Family Violence Act, judges will continue to have broad discretion in deciding whether the facts support a finding that the petitioner lives or has lived with the respondent. For our hypothetical client earlier, a judge could go either way in deciding whether she meets the living together requirement. If a judge decides she does not meet the requirement, she is left without the protection of a no-contact order and she will have to find a safe place to live. The best attorneys can do is highlight factors that go towards showing a live-in relationship between the parties on direct examination . At least for now, lawyers and domestic violence victims are left to navigate through the factual and statutory ambiguity to the best of their ability.

*Catherine Priebe is the current Post-Graduate Fellow at UGA Law's Jane W. Wilson Family Justice Clinic. The Family Justice Clinic offers low-income survivors of domestic violence with direct legal representation as well as general legal advice and referrals. Ms. Priebe graduated from Mercer University School of Law in May 2023 and was admitted to the Georgia Bar this past fall. She can be reached at catherine.priebe@uga.edu

To PPP, or not to PPP

By Sam Hubbard, CFA, CDFA | Jenna LuCree*, CPA | C. Nicole Roth Rogers*, CDFA*

The Paycheck Protection Program ("PPP") is an emerging issue in divorce cases throughout the country. Financial experts, lawyers, and judges are grappling with how to calculate business owner's income when PPP funds were received during the pandemic.

Income Analysis and PPP Funds

As you know, the goal of an income analysis is to present a realistic expectation of a party's earnings based on their historical income.

As such, one must weigh a number of factors. For example, one must determine:

- The appropriate number of years of a party's historical income to include when calculating average gross income;
- Whether one or both party's employment situation, and thus their future earnings potential, has materially changed;
- How much income to impute to a non-income earning spouse; and
- Many other factors specific to each case and respective income analysis.

The more complicated income analysis is the consideration, inclusion, or exclusion of all types of income when calculating gross income for small business owners. Fortunately, most states provide case law and/or guidelines on how to treat items like depreciation, fringe benefits, and personal expenses that are run through a business. Nonetheless, one must still contend with an ever-evolving financial landscape of changing tax rates, rules, and newly enacted Congressional laws. Unfortunately, the development of new case law and/or guidelines can take several years, leaving no direction on how to best proceed. A prime example is the Paycheck Protection Program that Congress enacted in 2020 in response to the COVID-19 Pandemic.

Most experts, lawyers and judges are still contending with best practices for calculating a small business owner's gross income if the business owner received PPP funds in 2020, 2021, or both years. Should the PPP funds be added into the business owner's gross income, should they be excluded, or should years 2020 and/or 2021 be excluded entirely from the average computation? The initial inclination may be to exclude PPP funds on the basis that they are non-recurring income, however, normalization of gross income is the key factor. The decision to include or exclude PPP funds should be based on whether or not the PPP funds normalized earnings (include them) or created a windfall (exclude them) for the business owner.

Background on PPP

The Paycheck Protection Program ("PPP") was a $790.9 billion loan program the U.S. Department of the Treasury established in 2020 via the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). The goal of the CARES Act was to provide qualifying small businesses with the financial resources to be able to weather the storm of the global economic shutdown. The PPP provided loans to qualifying businesses, which the Small Business Administration (SBA) rolled out and implemented, so businesses could maintain payroll, rehire employees who had been laid off, and cover certain overhead expenses such as utilities, rent, and insurance.

Funds from the PPP were available in two allotments commonly called "draws" or "rounds." The loans in the second round were capped at $2 million versus the $10 million cap for the first round.

Expert Tip: The PPP loan forgiveness may appear on tax returns in either the year the money was spent, the year the application for forgiveness was submitted, or the year the forgiveness was granted. As such, PPP loan forgiveness may appear on more than one year's tax returns and/or may not align with the year in which the money was spent.

Benefits to Business Owners

The benefits of forgiven PPP loans were unprecedented and a major boon to businesses. For example, Congress decided that if the funds were used to cover applicable expenses during the period, then the loan was forgiven. Furthermore, any forgiven PPP loan amount was considered non-taxable income.

Congress did not stop there. They decided that not

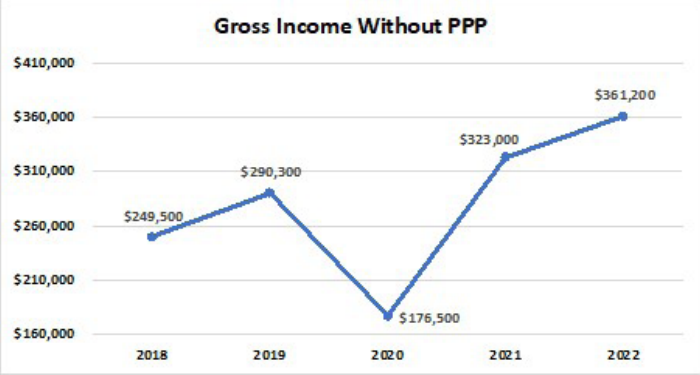
only were forgiven PPP funds non-taxable income, but businesses were also allowed to write off expenses that were effectively paid by the U.S. Treasury. This is significant because businesses were able to further reduce their taxable income.

In summary, the benefit of the CARES Act to business owners was fourfold:

- The funds the business received were forgiven;
- The forgiven funds were deemed non-taxable;
- The U.S. Treasury effectively paid for applicable business expenses; and
- Businesses were able to deduct expenses the U.S. Treasury paid.

When to Add PPP Funds to Gross Income

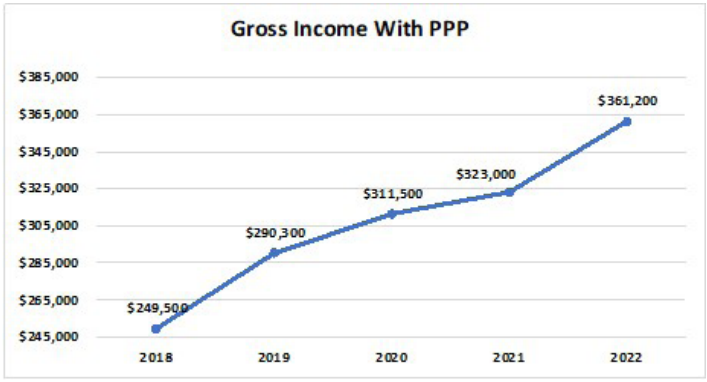
In most cases, it is appropriate to include PPP funds in an income analysis, since adding them to a business owner's gross income would result in normalized earnings.



Example: An electrician who is the sole owner of a local electrical business had the following annual gross income over the prior five years.

The loss of revenue in 2020 from the pandemic is clearly reflected in the above chart. In calculating a 5-year historical average income, one would conclude that this owner earned $280,100. However, 2020 is obviously an outlier year, significantly skewing the owner's income downward.

Building on this example, assume the same business owner received $135,000 of PPP funds in 2020, which were subsequently forgiven. It is an accurate assessment to include the PPP funds because they normalized the business owner's income, which is reflected in the below chart.

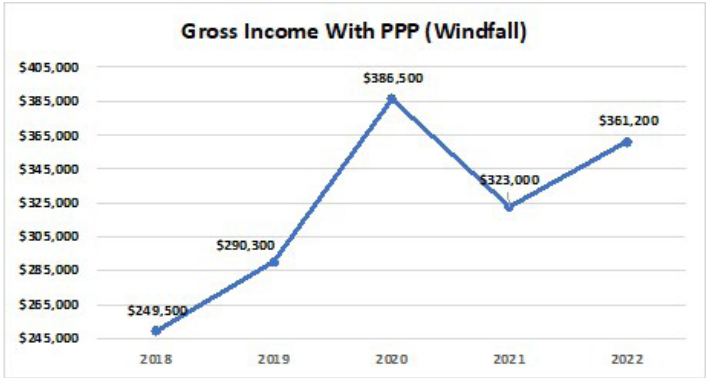


By including the PPP funds in the business owner's gross income, the party's 5-year averaged gross income increases from $280,100 per year to $307,100 per year. The $27,000 of additional income per year equates to nearly 10% higher gross income. It is not difficult to realize that the inclusion of PPP funds, especially in higher income cases, can have a dramatic impact for purposes of alimony/maintenance and child support calculations.

When to Exclude PPP Funds from Gross Income

In 2020, the shutdown did not impact some "essential" businesses (i.e., CPA firms). However, other businesses at risk of being dramatically affected not only were able to survive, but also successfully converted their business model and ultimately thrived. In many of these cases, the businesses were able to maintain or even increase sales, yet also received PPP funds, resulting in an atypical, blowout year for the owner.

Example: A restaurant owner converted the restaurant's dine-in model to a take-out model, and expanded into food trucks and even pop-up events. Because of the owner's creative and timely efforts, she did not realize a decrease in revenue during the pandemic. Let's assume the owner's 2020 earned income was $311,500 and she also received $75,000 in PPP funds. See the chart below.



Similar to the first example with the electrical company, the PPP funds resulted in skewed income, albeit higher in the restaurant example. In the restaurant case, the receipt of PPP funds landed the business owner with a meaningful windfall. Therefore, the PPP funds should be excluded from an income analysis because including them in the restaurant owner's gross income would result in non-normalized income.

Emerging Case Law

The determination by the courts of whether or not PPP funds should be included in gross income in family law cases is slowly emerging in a handful of states across the country.

In most family law cases, one looks to the child support guidelines for the definition of income and expenses. For example, how does one calculate gross income for calculation of alimony and child support? What is considered a business expense when a party is self-employed?

In the State of Georgia, child support is based upon the "Income-Shares Model" guidelines. This model of guidelines presumes that both parents contribute to the financial support of the child, thus the income of both parents is used in determining the child support amount. Although there is no case law in Georgia as of the time of publication of this article that deals with the issue of PPP funds, the states of Vermont, Connecticut and Pennsylvania have cases that address PPP funds. Importantly, the child support guidelines in these three states, like Georgia's, are based upon the "Income-Shares Model," thereby giving guidance to Georgia family law cases.

In March 2023, a case came before the Vermont Supreme Court on the issue of rivaling expert testimony on the very issue of PPP funds in a divorce case in Griggs v Griggs, 22-AP-186 (Vt. Mar 10, 2023). In this divorce case, the Court ultimately found that PPP funds should be included in gross income despite dueling financial experts. The mother's expert testified that PPP funds should be included in gross income and the father's expert testified that it should be removed because it was a one-time windfall of cash into the business. The Court found the "mother's expert's statement that currently valuation professionals tend to leave PPP income in because of the intent of the PPP program was to replace lost income to encourage employers to keep employees on payroll during the Covid pandemic. The court noted that father's expert recognized that 'reasonable experts could differ' on whether to count PPP funds. The court found mother's testimony more convincing and adopted the expert's valuation."

In May 2022, Bialik v Bialik, 215 Conn. App. 559, 283 A. 3d 1062 (Conn. App. 2022) was brought before the Appellate Court of Connecticut. The Appellate Court reversed the judgment of the lower court and determined that "PPP funds and EIDL funds should be included within the definition of 'adjusted gross earnings'…. since they constitute gross business receipts. The PPP and EIDL funds are virtually indistinguishable from ordinary business receipts, differing primarily in their extraordinary dual tax favored status."

In the above case, the Appellate Court of Connecticut goes on to cite the article "Changing Tax Laws and Support: Keeping Up as the Ground Shifts" published in the Journal of American Academy of Matrimonial Lawyers at 33 J. Am. Acad. Matrim. L. 159, 174 (2020) written by N. Shafer. In the article, Shafer addressed a PPP loan of $100,000 and the treatment of it as income in a divorce matter. Shafer wrote "… the reality is that the business has $100,000 more of cash flow. … the reality of this financial shot in the arm of additional cash flows does not change the bottom line for tax purposes, but for cash flow purposes it could have an impact." Therefore, based upon Shafer's article, the Appellate Court of Connecticut found that "the PPP and EIDL funds should be included in the calculation of the defendant's adjusted gross earnings."

In October of 2022, the Superior Court of Pennsylvania found that "loan forgiveness is regarded as 'compensation' within the definition of 'income' for support purposes. The court found that although the husband's law firm had lost revenue as a result of the Covid-19 pandemic, his 'losses were propped up by the PPP loans that are not required to be paid.'" Sullivan v. Masorti, 287 A. 3d 871 (Pa. Super. Ct. 2022).

Conclusion

The global pandemic created a new set of facts and circumstances for finances in family law cases that were non-existent before 2020. While the initial inclination may be to exclude PPP funds when computing a business owner's gross income for purposes of an income analysis, it is however, important to consider them and the impact they had on the owner's income.

In most cases, inclusion of PPP funds in a business

owner's income will result in normalized earnings, more accurately representing that business owner's income and ability to earn income going forward. However, in the event the inclusion of PPP funds results in a windfall to the business owner's income, one should look to exclude the PPP funds from the calculations of gross income.

While case law and guidance that exists is limited and still developing in most states, the handful of cases and guidance that do exist lend support to the conclusions posited above.

The inclusion or exclusion of PPP funds can have a dramatic and material impact on alimony and child support calculations and awards in family law cases. Therefore, it is prudent to always assess the big picture and consider what is the most appropriate use of PPP funds in each family law case.

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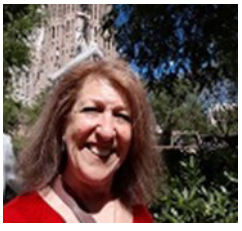
It Doesn't Have to Be 'All Work and No Play'

*By M. Debra Gold**



I love to travel. But, with a full-time law practice, sometimes it's hard to fit all of my travel dreams into my schedule. I, however, have developed a strategy of mixing work and travel to make travel more possible: Destination continuing legal education (CLE) programs.

Scouring the internet, there are many. The Georgia Family Law Institute, for example, held annually at beach resorts, is the most popular and well-attended CLE for Georgia family law attorneys. Other programs are held at ski or island resorts, or on cruises. These CLE programs usually offer generic content, and other travel benefits, including all-inclusive accommodations, planned activities, and meals on the ship or at the resort.

Barcelona Spain is my favorite destination to mix work and travel. In 2022 and 2023, judges and attorneys, mostly from Georgia, travelled to the Joint Family Law Conference and Networking Exchange (Conference) hosted by Il-lustre Col-legi de l'Advocacia de Barcelona (ICAB), the Barcelona Bar Association. There, they were joined by ICAB members for the seminars and activities. Barcelona attorneys and judges also participated on the discussion panels. The immersive experience, and the opportunity to learn and build connections with local judges and attorneys is the added plus to the Barcelona Conference.

The Joint Family Law Conference and Networking Exchange in Barcelona is not just continuing legal education. It is a continuing legal experience!

Family law has become globalized, extending beyond national borders. Families are a mix of cultures, and are more transient than ever. It follows that international divorce and custody disputes are more and more prevalent in today's society.

Focusing on international family law issues, the purpose of the Barcelona Conference is to broaden our horizons with insight and ideas from other cultures. The program is designed to facilitate active engagement, open discussions and a sharing of ideas, experiences and philosophies amongst the Georgia

and Barcelona judges, panelists, and participants. The content of the academic sessions covers international family law issues, including Hague Convention child abduction cases, jurisdiction in divorce and custody cases, enforcement of support and custody orders and a comparative look at the similarities and differences in the law of both jurisdictions. Viewing family law through such a comparative lens enhances our ability to properly apply strategic considerations in international divorce and custody cases. I found it interesting how similar, in many ways, our laws are, yet, how differently they are applied.

One of the more lively discussions centered around a child's right to have a voice in custody disputes. In Barcelona, Guardian ad Litem are not utilized. Instead, "ministerios fiscal," who are employed by the court, perform a limited investigation and represent the child's best interest. Interestingly, judges regularly talk directly with the children. The law gives a child 12 years of age or older the right to be heard as to his/her custody preferences, and the child's views must be given due weight by the judge. Even if the child is younger but shows a sufficient degree of maturity, (in some cases, as young as 8 years old) a judge, in his/her discretion, may meet with the child.

The Conference also gives Georgia participants the opportunity to experience some of the more practical aspects of practicing law in Barcelona. We get a taste of the legal system in action with a tour of the main Barcelona courthouse that houses the family courts. The Ciutat de la Justícia, which translates to "City of Justice," is aptly named. Indeed, it is a magnificent structure of eight buildings connected by a huge atrium. The development straddles the border of, and serves, two jurisdictions (Barcelona and l'Hospitalet de Llobregat). It has 152 courts, and 104 courtrooms. It is a true sight to behold.

ICAB also arranges for a tour of the historic law library located within the ICAB facilities. Renowned as one of the world's first private law libraries, the ICAB library holds over 300,000 works, including a treasure trove of historic books, parchments, manuscripts, maps and documents, some dating back to the 12th century. The tour, led by ICAB Secretary and Librarian Joaquim de Miguel i Sagnier, is fascinating.

The Conference, however, is not only an academic pursuit. Rather, it is also a valuable networking experience for both the Georgia and Barcelona judges and attorneys. Together, participants share some meals, attend get-togethers, and socialize outside of the program agenda. People quickly develop connections and make new professional contacts and friendships. The ICAB attorneys and professionals are welcoming and gracious hosts.

The program agenda also allows for plenty of free time for the participants to explore and enjoy Barcelona. Indeed, it isn't all work and no play! Many people travel with their spouses, children, friends, siblings and parents. Some are celebrating birthdays and anniversaries. Many people join pre-planned group tours of Sagrada Familia, Parc Güell, the Gothic Quarter and other popular tourist sites. Others

And, of course, Barcelona is known for the culinary experience. Seafood, tapas and paella restaurants abound. Some people take food tours. Many dare to try foods and drinks they have never heard of before. Barcelona is also home to over 70 Michelin-recognized restaurants, 26 of which have garnered stars. Everybody eats well!

One of the biggest highlights of the Barcelona Conference is a daytrip to the Penedès wine country where we learn about cava (Spanish sparkling wine) and wine making at the Can Bas and Pere Ventura Estates cellars. After enjoying tastings and pairings, the day is topped off at a nearby restaurant with a typical Catalan lunch. On the way back to the city, the bus is filled with happy snorers!

As a hub city, it is easy to combine a trip to Barcelona with other destinations in Spain and Europe. Some people arrived in Barcelona from other destinations by train, which is, of course, an exciting way to get around Europe. Barcelona is also a major port city for Mediterranean cruises. One participant joined a transatlantic cruise to return to the States after the program. Others flew to other European destinations to extend their vacations.

Even with filed leaves of absences, many people still have work to do. But, that is no problem. Working while travelling is much easier in the 21st century than when I first started practicing law. With the internet, clouds and mobile phones, our law practices can now travel with us. Thus, participants can maintain contact with their offices or clients as needed, albeit sometimes later in the evening because of the six-hour time difference.

All in all, destination CLEs are a great "excuse" to get away from the office and take care of the important business of taking care of yourself, exploring new places, meeting new people, eating great food, experiencing fun activities… and receiving CLE credits. Such a deal! I'm looking forward to returning to Barcelona, and hopefully other destinations too, in 2024!

For more information about the Barcelona Conference in 2024, contact Debbie at debbie@BarcelonaConnections.com.

**M. Debra (Debbie) Gold serves as a Guardian ad Litem and as a Custody Litigation Consultant assisting attorneys and their clients involved in high-conflict custody disputes in Georgia. She is also the sponsor and coordinator of the Joint Family Law Conference and Networking Exchange in Barcelona.*
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Ask and You Shall Receive: The Value of Judges Directly Asking Questions to Neutral Experts During a Trial

*By Howard Drutman, Ph.D**

As a forensic psychologist specializing in family law cases for over 25 years, I have testified in many courts throughout Georgia. As a child custody evaluator, I am the court's neutral expert tasked with evaluating the family and assisting the court with the determination of what is in the best interest of the child. Many attorneys have skillfully examined

and cross-examined me. Occasionally, I have been questioned by attorneys with less skillful witness interrogation techniques. Only rarely have I been directly questioned from the bench.

My experience with judges participating in questioning me in court has been positive and I believe has yielded information that was critically important to their understanding of the dynamics of the parties and the best interest of the child. The information yielded through judicial questioning may have been missed if my testimony was limited to my responses to examination and cross-examination by the attorneys.

For many reasons, including trial strategy, an attorney may avoid questioning the expert on important pieces of information they may not want the judge to hear. Occasionally, the cross-examining attorney has failed to ask questions on points that were omitted by the examining attorney. In this instance, important information discovered in the expert's evaluation never gets imparted to the trier of fact. A neutral court-appointed expert is ultimately responsible to educate, not just the litigants, attorneys, and Guardians, but the court. The trier of fact is shortchanged on receiving important information about a case if the attorneys fail to ask an expert the proper questions. Too often, I have left court with a nagging feeling that critical information was never examined in the courtroom and the judge is unaware of important facts that would assist in formulating an understanding of the case and lead to a well-reasoned judicial decision.

I have had some judges ask a minimal number of questions, particularly related to things like psychological testing results and their meaning, or about the behavior of the litigants or their child. On rare occasions I have had judges engage in a discussion while I am on the stand where the judge states what they are struggling with and if I, as an expert, can clarify the issue. Those interactions can be very helpful for the judge. That discussion style of questioning illustrates the value of the neutral court-appointed expert as being there to assist the court in understanding the complexities of the case. Under GA Code 24-6-614 (2022) b. The court may interrogate witnesses, whether called by itself pursuant to subsection (a) of this Code section or by a party.

One question I have never heard from any judge, but wish I heard in every case is: "What have you learned in your investigation of this family that you feel is critical for the court to know and has not been discussed in your examination and cross-examination testimony?" This one question would enable the expert to explain important pieces of information that, for whatever reason, were never addressed during examination and cross-examination. Remember, the child custody evaluator is a neutral expert and not an advocate for either side. This broad question prompts the expert to reveal and explain the importance of pieces of information that were discovered in the evaluation that would be relevant for a fuller understanding of what is in the best interest of the child. The net result of this type of questioning is that the judge may become aware of significant information that was never presented in the course of normal examination and cross-examination. The question is broad and prompts the expert to testify to information that they feel is relevant and important for the judge to hear. Certainly, after the questioning by the judge, each attorney can question and cross-examine the expert on this new information.

There are many benefits to having a judge directly question an expert witness in addition to the attorneys. Specific questions can help clarify areas of concern for the judge. These questions will likely be precise and relevant and will assist the judge in the decision-making process. Broad questions will also ensure that the judge is able to hear important pieces of information from the court's own neutral expert. Responding to judicial questions helps clarify complex psychological issues, ensuring a better understanding of the expert's testimony.

Howard Drutman, Ph.D. (drdrutman@atlantanpc.com, www.AtlantaBehavioralConsultants.com) is a psychologist in Roswell, GA who exclusively practices forensic psychological services in family law cases. He provides Child Custody Evaluations, Parent Fitness Evaluations, Drug/Alcohol Use Disorder Evaluations, Parent Coordination, Co-parenting Counseling, Parenting Plan Development, Expert Testimony, Attorney Consultation on Issues Related to Divorce and the Best Interest of the Child, Reviews of Mental Health Professional Evaluations, and Collaborative Divorce Coaching. He is the author of the book, "Divorce: The Art of Screwing Up Your Children."

2024 State Bar of Georgia Midyear Meeting Family Law Section CLE

*By Kem A. Eyo**

Many of you were unable to attend the Family Law Section CLE, entitled Proposed Amendments to O.C.G.A. §19-6-15 and Fulton County Family Division – an Update, which took place on Thursday, January 11, 2024 during the 2024 State Bar of Georgia Midyear Meeting. Unfortunately for you, you missed a rather informative session.

The vast majority of the afternoon's event focused on upcoming proposed legislative changes to the calculation of child support. The presenter, Katie B. Connell of Connell Cummings, LLC, with the assistance of Noelle Lagueux-Alvarex, provided details of the potential changes to the Basic Child Support Obligation (BCSO) table, the removal of certain deviations to be replaced by adjustments, and the reasoning behind not only the proposed changes, but the lack of other changes that we family law practitioners would like to see. The presenters also provided insight into other issues that the Child Support Commission intends to investigate in the future. [If this recap appears to be vague, please know that the vagueness is intentional. A vote on the proposed legislation is imminent. Once the vote occurs, there will be detailed information regarding the change that was, or was not, voted into place.]

Another highlight of the afternoon's presentation was the introduction of the Honorable Alice Benton, newly appointed Fulton County Superior Court Judge. Judge Benton enlightened attendees to future changes proposed by the Fulton County bench. Of utmost concern to those family law section members that practice in Fulton County is the potential elimination of the Family Division.

The final portion of the afternoon's events was the nomination of members of the 2024-25 Executive Board by Karine Burney of Burney & Reese, LLC, current Chair of the Executive Committee. Congratulations to all nominees.

Thank you to Katie Connell, Esq., Noelle Lagueuz-Alvarez, Esq., and the Hon. Alice Benton for an informative hour of continuing legal education.

**Kem A. Eyo is a Senior Associate with Reese-Beisbier & Associates, PC. In addition to handling family law cases of all types (including divorce, custody and support matters, protective orders, and adoptions), Kem is a trained Guardian ad Litem and Mediator.*

Case Law Update

*By Vic Valmus**

ARBITRATION

Nix v. Scarbrough;
A23A0790 (November 3, 2023)

Nix (Wife) and Scarbrough (Husband) are the parents of two children and were married in 1988. The Husband filed a Complaint for Divorce in 2019. The parties entered into an arbitration and an interim agreement. The parties originally planned to arbitrate on March 23-24, 2020, but it was delayed until October 27-30, 2020. The Husband's partnership with his oral surgery practice was terminated and he accepted a buyout of his shares for $1,000.00. He had been earning more than $50,000.00 a month, but the partners insisted that he resign or be fired. The Wife also alleged the Husband received money from refinancing one of his real properties in the marital estate and had expressed that the Husband's transactions had breached

certain provisions of the arbitration agreement and thus the agreement was no longer binding. In July 2020, the Husband filed a Motion to Stay and referred all pending matters for arbitration. The Wife asserted that the Husband had waived arbitration because of his alleged failures to comply with certain interim provisions of arbitration agreement. The Wife objected, requested the agreement be declared void, and argued that the breech of the agreement was not reserved for the arbitrator's determination.

The Trial Court concluded that all pending matters in the case go to arbitration. The Court found that gateway issues of substantive arbitrative ability, such as allegations of conduct-based waiver of arbitration rights, are generally decided by the Trial Court. Procedural questions which grow out of the dispute and bear on its final disposition are presumably not for the Judge, but for the arbitrator to decide. The issues of alleged breaches related to the dispute itself which ultimately affects the distribution of property, despite the fact that it's alleged to be a violation of the arbitration agreement itself, are procedural. Here, the parties agreed to arbitrate all matters arising out of the marriage and this was an issue growing out of a dispute pursuant to the party's agreement. This was an issue for the arbitrator and not the Trial Court to decide. The Wife did not object and the arbitration was conducted October 27-30, 2020. Thereafter, the arbitrator entered an extensive 77-page arbitration award which covered in great detail the division of marital assets and value thereof, and established custody and child support. The Husband filed a Motion to confirm the arbitration and the Wife objected that the arbitrator manifestly disregarded the law and was not impartial. The Trial Court confirmed the arbitration award. The Wife appeals and the Court of Appeals affirms.

The Wife argues the Trial Court erred by forcing her to arbitrate after the Husband breached the agreement. Arbitration is a matter of contract, and the limits of the arbitrator's authority are defined by the party's arbitration agreement. The Trial Court directly concluded that the alleged breach relates to the dispute itself, which is the dissolution of marriage and, if true, ultimately affects the distribution of property despite the fact there is an alleged violation of the arbitration agreement. Therefore, the alleged breach is not a gateway issue related to the arbitrative ability, but rather a procedural matter related to the provisions of the agreement and, as such, the arbitrator is to decide. The Wife also argues that the Trial Court erred by

confirming the award because the arbitrator was biased, imperfectly executed her duty, and manifestly disregarded the law. It is well established once an arbitration award is issued, the Court can only vacate an award in limited circumstances. The burden is on the party attempting to vacate the award to demonstrate the existence of a statutory ground for vacating pursuant to O.C.G.A. §9-9-13(d). In the Wife's brief, she only identified factual findings which she disagrees with. Such as the arbitrator unfairly assigning fault to her, minimizing family violence perpetuated by the Husband against the younger son, and failing to account for the Husband's malfeasance when dividing the marital estate. This cannot sustain the allegations of bias.

The Wife also argues that the arbitrator manifestly disregarded the law. The concept of manifest disregard has never been the equivalent of insufficiency of evidence or misapplication of law to the facts, and is a much narrower standard which requires showing that the arbitrator knew the law and expressly disregarded it. Such a failure by the arbitrator does not amount to concrete evidence of a deliberate decision not to apply the law. The Wife must prove evidence that not only was the correct law communicated to the arbitrator, but that the arbitrator intentionally and knowingly chose to ignore that law despite the fact it was correct. The incident that the Wife raises is the allegation that there were errors in applying the law, but this does not establish manifest disregard. A mere error in the law or a failure on the part of the arbitrator to understand or apply the law does not amount to deliberately disregarding the law. Therefore, the Wife has failed to make a concrete showing of the deliberate disregard of the law by the arbitrator.

CONTEMPT/DECLARATORY JUDGMENT/MILITARY PENSIONS

Phelps v. Phelps;
A23A0646 (October 27, 2023)

The parties entered into a divorce Settlement Agreement in November, 2023. As part of the Settlement Agreement, the wife was awarded equitable division of 25% of the husband's military retirement income. The parties were married for 12 years, during which time the husband performed at least 12 years of credible military service. In 2021, the husband petitioned for declaratory judgment to clarify that under the provision the parties intended the wife to receive 25% of the retirement she would have received at the time of the divorce not 25% of his final retirement – including the years of service accumulated post-divorce. The Court's initial Order found the military pension language ambiguous. The Court also stated that it did not have authority to award the wife a percentage of any portion of the husband's future military retirement that would accumulate post-divorce and the Court awarded the wife 42% of the husband's military retirement due to his rank and months of service at the time of divorce. The wife appeals and the Court of Appeals reverses and remands with direction.

The State Declaratory Judgment Act gives Superior Courts the power to declare rights and other legal relations of any interested party in cases of actual controversy. In this case, the original divorce decree awarded the wife 25% of the husband's military retirement income. The decree stated the years of marriage and the husband's years of service during the marriage, which could be read as a limit on the portion of the retirement from which the 25% is taken. However, the decree did not award the wife 42% and therefore, the Trial Court erred by modifying the 2023 decree. In addition, the Trial Court erred when it determined that the original Court did not have the authority to award the wife a percentage of any portion of the husband's future military retirement. Here, the parties entered into a Settlement Agreement and therefore, unlike the Trial Court's equitable division of property which is limited to property accumulated during the marriage, the parties in this case were free to include post-judgment retirement amounts in the award to the wife in their Settlement Agreement.

The Trial Court also erred by considering military retirement law codified after the divorce. It should have applied the governing military retirement law at the time the Settlement Agreement was entered, not the current law. The law at the time explained that no award to an ex-spouse in a divorce decree could exceed 50% of the service person's disposable retirement. On remand, the Trial Court should have applied the usual rules of contract construction to determine the intent of the parties and not the intent of the Trial Court at the time of the award. Because the provisions are ambiguous, the Trial Court should look beyond the paragraph to determine if the ambiguity was clarified when reviewing in the context of the entire Settlement Agreement and if not, should consider parole evidence to determine the meaning of the provision.

GRANDPARENTS VISITATION/MODIFICATION

Shelley Namdar-Yeganeh v. Cyndi Namdar-Yeganeh et al: and vice versa;
A23A0999, A23A1000 (October 26, 2023)

This case involves a girl born in 2008 and a boy in 2010. The father died in 2016 and at the time, all parties lived in New Mexico. Five months after the death of the father, the grandparents filed a Petition in New Mexico seeking visitation with the children. In May, 2017, a Court entered a stipulated Order awarding the grandparent's certain visitation. At some point, the mother moved to Georgia. In February, 2019, the grandparents filed a Petition in Georgia to register the 2018 New Mexico Order, modify, and find contempt of the New Mexico judgment against the mother. The mother filed a Motion to Dismiss pursuant to O.C.G.A. §19-7-3. Trial Court denied the mother's Motion to Dismiss and, after a 5-day hearing in August, 2022, the Court expanded visitation rights of the grandparents with respect to the grandson, but would not require the granddaughter to participate in visits and refused to mandate family therapy or additional reunification. The mother appeals and the Court of Appeals reverses. This case presents a narrow issue of whether a grandparent who has been granted visitation rights is authorized by the grandparent visitation statute or any other provision of Georgia Law to file a Petition seeking to modify an existing grandparent visitation order. Under the plain language of O.C.G.A. §19-7-3(b), grandparents can either file an original action, provided the parents are separated and the grandchildren are only living with one parent, or they can intervene in certain specific existing proceedings. On the other hand, subsection (c)(2) specifically lists the groups of persons who may petition to modify grandparent visitation once it's granted: the legal custodian, the guardian, or the parent of the child. The grandparents do not fall into any of these 3 categories. Therefore, the grandparent visitation statute does not authorize the grandparent to initiate an action to modify an existing grandparent visitation order. However, the Trial Court stated that it would be illogical and impractical to find that O.C.G.A. §19-7-3 is the only means to modify grandparent visitation and then determine that O.C.G.A. §19-9-3 supplements and compliments 19-7-3. However, the Trial Court erred by supplementing the provisions of 19-7-3 with the provisions of 19-9-3. On its face, 19-7-3 applies to grandparent visitation and on its face 19-9-3 applies to custody between parents. The only reference to grandparents is subsection (b) which essentially is to encourage continuing contact with the children and grandparents who've shown the ability to act in the best interest of the child. The Courts cannot construe a statute to force an outcome that the legislature did not expressly authorize. Accordingly, the Trial Courts Order denying the mother's Motion to Dismiss Modification case is vacated.

GUARDIAN AD LITEM

Barrett v. Bryan;
A23A1644 (December 7, 2023)

In January, 2022, Bryan (Husband) filed a Petition for Divorce against Barrett (Wife). The husband sought primary physical custody of the couple's young daughter. Wife moved to have a Guardian Ad Litem appointed and the Husband objected. The Trial Court proceeded to a temporary hearing, the Wife reiterated her request for a Guardian Ad Litem, and the Court stated it would listen to the evidence at the temporary hearing and make a decision afterwards. After the temporary hearing, the Trial Court concluded both Husband and Wife had some mental health issues, but the Husband's issues were situational where the Wife's issues were chronic and awarded the Husband primary physical custody. The Wife renewed her request for an appointment of a Guardian Ad Litem and the Court stated, "I just don't see where this is a case where the parties, either one of them, needed to spend the money on it. I just don't see it. I don't see the need for it." In February, 2023, the Trial Court entered a Final Divorce Decree awarding primary physical custody to the Husband. The Wife appeals the Court's decision in denying her Motion to Appoint a Guardian Ad Litem and the Court of Appeals affirms.

The appointment of a Guardian Ad Litem in the domestic relations case is governed by Uniform Superior Court Rule (USCR) 24.9(1). The issue becomes whether a party is entitled to a Guardian Ad Litem under this Court Rule. The Wife does not assert in her brief that the Rule requires the Trial Court to appoint a Guardian Ad Litem, but relies on a case which specifically recognizes a Trial Court's discretion in appointing a Guardian Ad Litem in domestic relations cases. This Court has never addressed the issue of the Trial Courts obligation under the USCR 24.9 and the previous cases relying on O.C.G.A. §29-4-7, which was repealed in 2005. This Court concludes that the abuse of discretion standard applies to the Trial Courts decision whether to

appoint a Guardian Ad Litem for the child under USCR 24.9. In determining whether to appoint a Guardian Ad Litem for the child, the Court is to consider the best interest of the child including indications of potential dangers to such a child and whether the interest of the child is likely to be adequately protected by its natural guardian. Once the Trial Court has exercised its discretion in considering these factors, the Court may appoint a Guardian Ad Litem under USCR 24.9, but the Court is not required to do so.

The Wife argues that the Trial Court erred by not appointing a Guardian Ad Litem in the face of recent uncontroverted evidence of the Husband's mental health which could have resulted in serious harm to the parties then 4-year-old child. However, in the argument section of her appellate brief regarding this enumeration, the Wife never mentions the appointment of a Guardian Ad Litem, but instead, she appears to assert that the evidence was insufficient to support the Trial Courts award of custody to the Husband. Because the Wife did not raise a sufficiency argument in her enumeration of errors in her application for discretionary appeal, this enumeration presents nothing for this Court to review. Even if this Court generously construes that a Guardian Ad Litem appointment was required, given the factual circumstances of this case, we find no merit to the argument. The Wife has not met her burden of demonstrating error in her brief by generalized statements that the Trial Court abused its discretion.

The Wife also argues that the Trial Court erred in refusing a GAL based on the monetary cost to the parties. While the Trial Court did mention, following the temporary hearing, that it did not see the need for the parties to spend the money on a GAL, we do not find these statements inappropriate or as the Court's sole reason for refusing the Wife's request for a GAL. To the contrary, the Trial Court's initial Order denying the Wife's request for a GAL noted only that the Wife failed to include any reasons in her Motion justifying the request. The Order did not mention any financial cost to the parties. Therefore, there is no evidence that the Courts sole driving force was cost.

PUTATIVE CHILD INHERITANCE

In Re: The Estate of Marvin Mobley, Jr., Deceased; **A23A08027** (October 3, 2023)

Mobley died intestate in December, 2020. After his death, Malathia Mobley, who is one of the Mobley's children, filed a Petition to determine heirs to decide whether Alicia and Ryan Rhodes were the decedent's children (Appellants). At the hearing, the Appellants' mother testified that at the time of their birth that she was married to Nathaniel Rhodes; however, she stated that she engaged in an extra marital affair with Mobley and became pregnant with the two children, but Nathaniel Rhodes was listed as the father on the Appellants birth certificates. Nathaniel Rhodes died intestate in 2006 and Alicia and Ryan Rhodes attested that they were the children of Nathaniel Rhodes and did inherit a portion of Nathaniel Rhodes' real estate. At the hearing, the Probate Court found that there are both significant evidence that the Appellants were Mobley's children and significant evidence that they were not. In addition, the Appellants did not petition for DNA testing. Based on the contradictory evidence, the Probate Court found that the Appellants failed to show that they were Mobley's children by clear and convincing proof and were estopped from asserting that they were Mobley's children because the Appellants had previously claimed to be Nathaniel Rhodes children. The Appellants appeal and the Court of Appeals affirms.

The Appellants argued that the Probate Court erred by finding they did not carry their burden of showing that Mobley was their biological father. Pursuant to O.C.G.A. §53-2-3(2)(a) a child born out of wedlock may inherit from the father who died in testate only if 1) the child had been legitimate by Court Order, 2) the Court entered in an Order establishing paternity, 3) the father has executed a sworn statement signed by him attesting to the parent/child relationship, 4) the father has signed the birth certificate of the child, or 5) there is other clear and convincing evidence that the child is the child of the father.

Notwithstanding the above, DNA tests showing paternity creates a rebuttable presumption of kinship. However, the Appellants did not request DNA testing, but instead relied on section (5) clear and convincing evidence the child is the child of the father. The Court found that the Appellants lived with Nathaniel Rhodes for several years and the Appellants were

listed in Nathaniel Rhodes' obituary as his children. There were no written documents, such as a birthday card or insurance policy, where Mobley identified the Appellants as his children. The Court also noted the Appellants did not petition for DNA testing. Based on the contradictory evidence, the Probate Court found that the Appellants failed to show that they were Mobley's children by clear and convincing evidence. Ultimately, it is up to the fact finder, not the Appellate Court, to weigh the evidence and to determine witness credibility. As noted by the Probate Court, the evidence was contradictory and the Appellants did not petition for DNA testing. In addition, absent of a transcript, this Court must assume the evidence deducted below was sufficient to support the Probate Court's finding. Due to this finding, we do not reach the issue of whether the Court erred in finding that the Appellants were estopped from asserting they were Mobley's children because the Appellants previously claimed to be Nathaniel Rhodes children, inheriting his property.

TERMINATION OF RIGHTS/SERVICE OF PROCESS

In the Interest of C. B., et al., children.;
A23A0726 (October 13, 2023)

In 2019, the wife filed for divorce and was awarded primary legal and physical custody of 2 children and obligated the father to pay child support beginning March, 2019 as well as to pass a drug screen prior to visiting with the children. In January, 2022, the wife filed a Petition to Terminate the Father's Parental Rights. The Return of Service indicated that the husband was personally served a week after the Petition was filed, but he failed to appear at the pretrial conference. However, he did appear pro se at the termination hearing in April, 2022 and contested the sufficiency of service. The husband argued that he was not living at his mother's house at the time and stated that he had been homeless and jobless for the previous 3 years. The husband testified that his mother put him on the phone with the deputy who was attempting to perfect service, and he then directed the deputy to leave the Court documents with his mother. The husband still denied he was living with the mother at the time of service but was living there by the time of the hearing 3 months later. The husband also admitted he never paid any child support, was in arrearage over $40,000.00, and had not contacted the children nor sent them letters or gifts for the past 3 years, and had not taken a drug screen. The wife stated she would have allowed him to see the children if he had complied with the Court's Order and tested negative. The husband, at the final, testified that he had not been using drugs and he could pass the drug screen albeit he had still not taken one. The Guardian Ad Litem testified that it would be in the children's best interest to terminate parental rights. The Juvenile Court terminated the father's parental rights. The father appeals and the Court of Appeals affirms.

The father contends that the Juvenile Court lacks jurisdiction to terminate his parental rights because of improper service of process. Pursuant to O.C.G.A.§9-11-4(e)(7), personal service is achieved by delivering a copy of the Summons attached with the copy of the Complaint to the Defendant personally or by leaving copies at the Defendant's dwelling house or useful place of abode with person of suitable age and discretion residing therein. When the deputy attempted service, he contacted the father who confirmed that he was out of town and directed the deputy to leave the documents with his mother which the deputy did. Importantly, neither the father nor his mother indicated that he did not live there. Thus, by leaving the documents with the mother, the deputy notoriously, and thus personally, served the father.

The father next argues that the evidence was insufficient to support the Court's finding. Under Georgia Law, termination of parental rights is a two-step process. The Juvenile Court first determines whether one of the five statutory grounds under O.C.G.A. §15-11-310(a) is satisfied. If so, then the Court must determine whether termination is in the child's best interest. Here, the Juvenile Court found the children to be dependent and the father had no contact with the children for approximately 3 years, has no relationship with them, and has not shown that he conquered his drug addiction. The Court's ruling is supported by clear and convincing evidence in the record. Most strikingly is the father's abject failure to develop and maintain a parental bond with his children in a meaningful, supportive manor. The father's only justification he gave for lack of contact with the children was it wasn't good for them to be around someone who is homeless, dirty, and nasty all the time. Even though the father admitted he was no longer a drug addict, he never submitted a drug screen, either prior to or during the course of the litigation, especially since drug screens are an absolute requirement under the divorce decree to exercise visitation rights. Additionally, the father has still not paid any child support. Therefore, the Court's finding

that dependency would likely continue was supported by clear and convincing evidence. The Juvenile Court was authorized to consider the parents' past conduct to determine whether the causes of deprivation were likely to con tinue and the decisions as to the child's future must rest on more than positive promises which are contrary to the negative past facts.

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