

# The Family Law Review

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A publication of the Family Law Section of the State Bar of Georgia – Winter 2018

Use of “BLS Reports” to Help to Prove  
Earning Capacity

# Editors' Corner

By Leigh F. Cummings  
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This issue of the Family Law Review is full of informative articles on a wide array of family law topics and also highlights the upcoming Family Law Institute, which will be held in Jekyll Island on May 24-26. The article addressing managing client expectations is thought-provoking and provides helpful strategies to help our clients maintain perspective during the divorce process. I believe you will find the article about cognitive bias very interesting. The article concerning the Frozen Benefit Award is the third installment of an instructive series regarding military pensions. The article about sustaining life after divorce offers a unique analysis of the potential impact of the child support guidelines. The 2018 Legislative Summary provides a quick reference to recent legislative changes of which we should be aware. As always, the Case Law Update remains critical to our practice of family law.

Thank you to all of the contributors for the quality content of this edition. Your efforts are appreciated!

See you all at Jekyll Island!

# Editor Emeritus

By Randy Kessler  
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It remains my honor to be able to continue to assist Leigh Cummings and our amazing editorial board in their continued efforts to produce this very useful and important publication. The Family Law Review has remained relevant and highly valuable to Family Law Practitioners across our great state. Our section has so much to be proud of. I continue to benefit from my association with the Family Law Section and I know each of you do as well. Let us know what else we can do to improve the FLR, the FLS and the practice of Family Law in Georgia.

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

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# From the Chair

By Gary P. Graham  
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**2018 FAMILY LAW SECTION SERVICE PROJECT BENEFITTING ANDREW AND WALTER YOUNG FAMILY YMCA, THE JOSEPH B. WHITEHEAD BOYS & GIRLS CLUB, AND THE M. AGNES JONES ELEMENTARY BOYS & GIRLS CLUB.**

**MORE INFORMATION WILL FOLLOW.**

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# Delivering A Dose Of Perspective: Techniques For Managing Client Expectations

By Theodore S. Eittreim

How do we ensure that our clients maintain their perspective in the midst of a divorce or other family law case? How do we help them to keep their focus on what is truly important, rather than becoming distracted by the issues that are more tangential? How do we reassure our clients, who have come to us for help in one of – if not *the* – most difficult periods of their lives, that everything is going to be “alright”? How do we comfort them with the knowledge that while it is certainly true that their lives are changing, that change is, or can be, manageable, and that while that change will likely be emotionally and financially disruptive, their life is not over? By considering and then answering these questions, we can help our clients – and ourselves, for that matter – maintain their perspective and recover it if it is momentarily lost in the throes of litigation.

Of course, ensuring that perspective can be maintained is sometimes easier said than done. Most family law clients seek our counsel in one of the darkest periods of their lives. Telling them that it will “get better”, or that “life goes on”, or that they will “get over this...eventually” is not typically well received, even if delivered with the best of intentions. Guiding a client through a family law litigation while simultaneously ensuring that he or she does not lose the forest for the trees is more of a process than an event; it is

best delivered in a steady stream of advice and reassurance as opposed to a single deluge of information.

Finding the best method for delivering this information can be problematic. Significantly, while we are often referred to as “counselors” we must remember the remaining two, and oft-omitted, modifying words that follow that label: “at law”. The truth is that while we may feel many times like we are, or we should be, most of us are not qualified therapists. But, if we can be at least part “advisor” in addition to being a client’s advocate, we can make a difficult and daunting transition slightly easier for those who seek and demand our counsel. Ultimately, if our clients are more informed and more prepared for the transition that their particular family law case has brought to their doorstep, they can maintain a healthy perspective, which, in turn, can and should strengthen our relationships with our clients and make our jobs as lawyers similarly less fraught with consternation.

## The Struggle to Keep Perspective in Our Modern World.

Again, this is typically not a simple endeavor. Today we live in a truly global neighborhood. Information – good and bad, comforting and disturbing, empowering and dispiriting – is beamed to us live and instantaneously. Because of that, the sad truth is that it is a rare day, or even a rare hour, in the Information Age when we are not subjected to a depressing story or social media post about something horrible happening elsewhere in the world.

Stories large and small about issues and problems both local and global bombard us every day. Genocide, environmental degradation, global pandemics, the plight of refugees, terrorism, starvation and strife in too many countries and regions of the world to mention are all part of the daily newsreel. We see the images, hear the eyewitness accounts, and read the text on our televisions, computer screens, and our omni-present smartphones. Moreover, the fact that we now seem to prefer our news in social media blurbs, or ninety-second, easily digestible (and easily forgotten) snippets, tends to compound the problem. In the incessant barrage, it is easy to become numb to it all.

Perversely, these forces can seemingly cause people to reflexively tune out and turn inward, especially when facing their own personal crisis. It is easier to focus on what we have lost – or in the case of a family law client, what they perceive they are in the process of losing – than what we still have. We tend to focus on things that we can control rather than what we believe that we cannot, and more often than not, we believe that we can control the “little things”. That



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desire to control, or perhaps “for” control, can cause anyone, especially one who is engaged in family law litigation, to grasp for anything that will satisfy that desire. We can fight the small battles in our everyday lives and believe that we are “winning”, and in the context of a family law litigation, those battles are often fought against the ones that we know and those who we used to love.

In that way, our clients may exhibit a tendency to turn to small elements of their lives that they can control. In divorce cases, that can lead to petty squabbling over the trivialities at issue in their case. When dealing with the financial elements of a divorce case, for example, the proverbial “pots and pans” can come to consume their energies. The fight can easily degenerate into the proverbial “zero sum game” where every once-forgotten knick-knack becomes an issue; every individual thing a prize to be claimed.

On the custody and parenting time front, returning the children fifteen minutes late, or not picking up the phone when the other parent calls to say “goodnight” to the children, can provide a temporary sense of satisfaction because it quenches that thirst for control. Every day, in fact every hour, of time of additional time with a child or the children becomes a “win” or a “loss” with those victories and defeats becoming mere hash marks on a mental balance sheet for the clients, and yes, sometimes for the lawyers.

In the heat of the moment, and extending from the immediate into the short-term, these fights are low risk and potentially high reward for the client. In terms of risk, losing a pot or a pan, or depriving the other parent of minutes of time or a phone call at night are unlikely to carry significant immediate ramifications. Conversely, on the reward end of the spectrum, a “win” with a simple act of intransigence or defiance can make the client feel more in control. While the reward is immediate, the damage could be permanent.

Fights of this type can further solidify the clients’ already hard feelings towards each other, making any collaboration or cooperation on more important issues – What schools should the children attend? Is that medical procedure for little Jimmy or Sally really necessary? – more difficult. Co-parenting, or anything resembling co-parenting, after the case has been concluded can be irretrievably damaged by these relatively petty squabbles, which in turn can have effects on the children post-divorce that are as predictable as they are unfortunate.

Again, perspective and an appreciation for the bigger picture can be lost.

Making the situation for the practitioner even more complicated, perspective, or perhaps the lack of perspective, can appear and disappear in our cases and in the minds of our clients with the ephemeral nature of the breeze. Some days, our clients have it, and the next day it is lost to the proverbial winds. Sometimes, perspective is lost only to be regained following the conclusion of the case. Perhaps the client was too focused on denying his or her soon-to-be ex-spouse that painting or trinket to notice – or possibly even to care – that they were giving up every

spring break, or two-thirds of the summer. That realization, that regaining of perspective that had been lost, can lead to the dreaded “20/20 hindsight” phone call or email to the lawyer. “Why did you let me agree to that?” “Why did you make me sign that agreement?” “You know I didn’t want to settle. I told you I wanted to go to trial!” Often, with the regaining of perspective comes the need for blame, and blame is seldom focused inwards.

In fairness to the clients, we engage in family law practice knowing that these issues come with the job. Our clients are in a period of upheaval when they engage our services and trust us to give them our best advice. Even when divorces have been building for years, this transition for the client is difficult. Clients are fearful, and rightly so sometimes; they are unsure of themselves and of how to cope with what is happening to them.

All of this leads back to the central question: How do we let them know that it will be alright? How do we get them to focus on the big picture? The struggle, then, is how do we as practitioners instill in our clients some sense of perspective? How do we help prepare them for the eventual end of the case, when their lives will, inevitably and inextricably, be changed from the life they knew before.

To be sure, these are vexing problems, and there are few answers that are strictly “right” or “wrong” when dealing with these questions. However, the following thoughts and suggestions will hopefully give the practitioner some ideas about how to maintain your client’s perspective – and keep your own – in the challenging arena of a family law case.

### **Information is Power, so Deliver it Early and Often.**

The earlier we inform the client about the process, the better the client will be able to digest the bad news, focus on the good news, and hopefully maintain perspective.

This begins in the initial consult with the client. Clients always want to know how long will the process take and how much it will cost. There are rarely satisfactory answers to either of these two questions. The correct and honest answer – “I don’t know for sure” – is certain to be unsatisfying to the client. Moreover, it could be a recipe for not only losing the client before the case really begins, but also for undermining trust in the attorney-client relationship from the very commencement of the case.

However, even in the initial consultation, we may know a great deal about the variables of the case that could have a profound effect on the cost and the timing of their divorce. Those known, or easily determinable, variables may include the following:

- Where is the case pending, and within that court, which judge has been assigned to the case?
- Who is the lawyer on the other side, and will that affect the progress of the case?
- What are the overall issues involved in the

litigation? Will there be heavily contested custody and parenting time issues? Are there significant, and disputed, separate property claims?

- Are there conduct issues? Does the case deal with serial – or even occasional – adultery, for example?

To be sure, in asking of ourselves and answering for the client these questions, we cannot – and should not allow ourselves to – be pinned down to an exact response in terms of duration and cost. However, while giving exact answers to many of the client’s initial questions may not be possible or even advisable, answers to the above questions can generate at least educated estimates. In this manner, it is critical to be straight with the client. For example, do not promise a quick end to the litigation when you know that the parties will be fighting over millions of dollars in separate property claims. Do not tell the client that the case will be concluded quickly when you know at the outset that both sides are requesting (and actually believe they should be awarded) primary physical custody.

Further on the “information is power” front, if there is a glaring deficiency in our client’s knowledge base, then we should do what we can to encourage them to fill that gap. This will have strategic benefits in the litigation, but it can also have more practical benefits to the client and the children after the final order has been entered. For example, if the client has not been involved in the finances, we should do what we can to get them involved in the financial discovery process. Similarly, if it is known that the client has not been involved in the children’s education, medical treatment, or extracurricular activities, and she or he wants to have shared decision-making at the conclusion of the case, it would be advisable for the client become as knowledgeable as possible in those subjects. Have them attend the parent-teacher conferences and the doctor’s appointments; make themselves visible at the soccer games and ballet recitals. While there is a strategic benefit to the litigation, there is also a practical benefit to the client and, hopefully, the family. If the litigation can be used as a method by which to “educate” the uninformed or uninvolved client, the knowledge gained not only will assist in the overall presentation of the case, but will also help that parent forge a better relationship with the children after the case is concluded. Finally, the client, by becoming more involved in their finances and the lives of their children, will hopefully feel more involved and invested in their own case, which can help them to maintain perspective on the long term issues.

The lawyer will hopefully be able to reap the dividends of the client’s increased knowledge base when it comes to client management, which accounts for much of the daily work on a family law case. An integral part of managing those expectations is to have them prepared for what is coming. If you know that next month will be a heavy billing month because you have depositions scheduled, be sure to tell your client before, and not after, the fact. If you know that discovery is entering a difficult phase in which the client will need to answer tough questions through written discovery, discuss this with them *before* sending them the

three hundred requests to admit or the fifty interrogatories. If they will need to gather extensive documentation, send them the requests the day that they come in, and schedule a call or meeting with them as soon as possible.

The better prepared a client is for what is coming, the better prepared they will be for the emotional roller-coaster of a divorce litigation. The better prepared they are, the more likely they are to be able to keep their perspective. The better prepared they are, the more likely it is that they can keep their focus on what is really important to them and their family. The better prepared they are, the more likely the lawyer will be able to maintain that level of trust necessary for the lawyer and the client to navigate the case as a team.

## Engage Financial Help Early.

Most lawyers are not financial professionals by training. And yet, much of what we do as family lawyers is wade through complicated finances. If we are not prepared to discuss the client’s finances with them in a coherent manner, the client can lose confidence in their advocate, leading to increased insecurity about their financial future.

In large-asset cases, therefore, the knowledge and analysis of a financial expert is irreplaceable. Separate property tracing claims, valuations of businesses, coverage analyses on pension plans, the preparation of financial affidavits and marital balance sheets, all are tasks that can be outsourced, at least partially, to a financial expert in a high-asset case. The information gained in this process can be invaluable in providing the client with a sense of comfort that the finances of the case are being investigated, and that they have qualified people “on the team” who are all working together to ensure that their interests are protected, especially when they, themselves, may not know the true extent of the family finances.

We should not only think about financial experts in large-asset cases, however. Experts can provide many other tasks that are applicable to large and small asset cases alike. The involvement of a financial expert – or a financial planner – during the case can give the client a sense of comfort about what he or she will face financially post-divorce. By reducing fear and uncertainty, the client can better comprehend the process that they are moving through and, equally importantly, can rest in the knowledge that post-divorce, their bills will be paid, their assets preserved, and their budgetary needs met.

### *Ideas in this regard can include the following:*

- *Financial Analysis and Advising.* First, especially in a larger-asset case, even if you have a financial expert to assist with the litigation, consider engaging the assistance of an independent financial advisor if you represent the non-titled spouse. That person can advise the client throughout the litigation and beyond. He or she can create budgets and projections for the client’s review. Once a client understands what he or she is likely to need moving forward, it will be a simpler task for the lawyer in

crafting settlement proposals (or trial positions) consistent with those needs and that budget.

- *Budgeting.* Post-divorce budgeting is important in all cases, regardless of the amount of assets at issue. Therefore, consider a financial professional in every case that can even arguably justify the expense. Financial experts and advisors are, by definition, well-versed in looking at budgets and coming up with plans to explain to the client how much money they can reasonably spend every month and year and ensure that they will not be in a situation where they run out of money. This is arguably more important in a smaller-asset case than a larger one, especially with the non-titled spouse. Engaging some financial assistance is well worth the cost if it can give the client a greater sense of security about his or her future.
- *Employment Prospects.* Consider referring the client to an employment advisor if it seems likely that a client who has been out of the workforce for some time will need to find employment. What kind of job can they get? How much money can they make? Experts in the field of employment can be invaluable in answering these questions and assisting a client in preparing a resume, or, if the client desires to gain additional education, the costs and benefits of the same can be analyzed.
- *Taxes.* If the client does not have a certified public accountant, find one. The thought of preparing one's own taxes can be frightening and legitimately concerning to the client who has not typically had that role in the marriage.
- *Medical and Dental Insurance.* Have the client investigate medical and dental insurance for

themselves moving forward. Especially in the current climate, medical insurance is a hot-button issue, and if one party has relied on the other throughout the marriage to provide insurance, the thought of having to deal with their own health security moving forward can be paralyzing. Talk to them about the costs and benefits of COBRA coverage so that can be factored into settlement discussions.

- *Credit.* Consider having the client apply for small credit accounts in his or her own name, even a pre-paid card. It is possible that one party has virtually no credit following a divorce if the other party handled the family finances during the marriage. Something as simple as applying for a cell phone contract or setting up utilities can become problematic and cause a great deal of concern and consternation in these circumstances. If it is going to be an issue post-divorce, then it is an issue that should be raised and dealt with pre-divorce.
- *College Funds.* If the case involves children, try to address college funding in any settlement agreement, especially in cases where the assets are not substantial.
- These ideas to address the financial aspects of a case with a client are just that – ideas. They are suggestive, and not all will fit every case or every client, of course. The important thing is to have this conversation about finances early in the case, regardless of the amount of assets at issue

### Is a Guardian Ad Litem Appropriate?

When a difficult custody case is on the horizon, the lawyer needs to at least have a conversation with the client about the benefits and risks of having a guardian *ad litem* appointed. Guardians are not always appropriate, but in many cases, one party harbors deep fears about the other's parenting abilities. Sometimes those fears may seem unfounded or overblown to the lawyer, but they are legitimate fears to the client nonetheless and need to be addressed with empathy and advocacy.

A guardian, through his or her investigation, can provide a useful, and frequent, outlet for the client to "be heard" by someone other than their counsel. The client, in conjunction with the lawyer's advocacy, can spend as much or as little time as they believe is necessary educating the guardian as to the issues important in considering the best interests of the child or the children. A client speaking to the guardian can, of course, be a pro and a con, strategically, so the lawyer needs to be sure that the client is given some advice on how to speak to the guardian and how to respond to his or her requests. However, once that knowledge and advice is delivered, the client might be reassured that rather than the client being relegated to telling a judge everything important about their relationship with his or her child or children in a few hours at a trial, they can explain their points to a guardian over a series of many months. The pressure of ensuring that



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they remember everything at a trial or a deposition can be lessened in that manner, hopefully calming the client and giving him or her the understanding that no matter the outcome, they will have been given a full opportunity to have been heard.

Of course, the danger for the lawyer is that a guardian may ultimately come out with a recommendation against the desires of the client. The lawyer, therefore needs to consider that fact before recommending to the client that a guardian be engaged. Again, information is power. While we do not always know everything about a case early on, we often know enough. We know enough to advise a client on where we believe their case is likely to go, and we know enough about our client and their soon-to-be ex-spouse, usually, to know the potential risks and rewards of suggesting for or against a guardian.

For the most part, however, the involvement of a guardian in a contested custody case can and should be a net positive for the lawyer and the client. In much the same way as a financial expert or advisor can reassure the client that one aspect of their post-divorce life will be manageable, a guardian can provide that client with similar reassurances and a similar outlet to make his or her case directly to an advocate for the children.

### Everyone Can Benefit From a Little Therapy.

As was mentioned briefly above, while we may think that we are, most lawyers are not therapists. We are therefore not qualified to lead our clients through the emotional and mental struggles that come along with nearly every family law case. If a client does not have an established therapist at the beginning of the case, but starts to exhibit signs of needing a therapeutic outlet, the lawyer needs to be able to recognize these signs and compassionately inform the client that he or she might benefit from talking to someone about what they are feeling. As they fear what the future may hold, they can easily lose perspective. Therapy can be a useful tool to help a client maintain his or her emotional stability and their

focus on what is important.

### Co-Parenting Counseling.

Along similar lines to the concept of therapy, co-parent counseling can be invaluable to assist the client in adapting to the post-judgment parenting time and custody situation.

Many times, the party who has been in substantive control of the children's upbringing has trouble adjusting to the notion that the other parent – who was perhaps, in their mind, at best only a part-time parent – will be given substantial time and the ability to make day-to-day decisions as she or he sees fit without consultation or input from him or her. On the opposite side of the spectrum, perhaps the historical primary parent fails to understand (or chooses to consciously disregard) the meaning of “good faith consultation” that is part and parcel with an award of joint legal custody, regardless of the fact that the primary parent may enjoy decision-making.

These issues can cause continuing consternation in the ongoing co-parenting relationship, and the sooner that the parties are able to air out their grievances on the topic of custody and parenting time, the better it will be for their relationship going forward and ultimately, for the children.

Co-parenting counseling can be made part of a settlement agreement or can commence while the case is ongoing. Agreeing to the former should not really be controversial if both parties claim to have the best interests of the children close at heart. For all but for the most combative parents, talking with the other is rarely a bad idea, especially in the “safe place” of a joint therapy session. Common pitfalls in the co-parenting relationship can be dealt with before the case is finalized, hopefully making post-judgment issues less likely.

### Using Mediation to Its Fullest Potential.

While mediation can be the most effective tool to resolve a case prior to trial, it can also backfire if not properly utilized. Most of that comes down to a commitment by the lawyer and the client to not schedule mediation too quickly. While this may sound counter-intuitive – after all, the sooner the case ends, the generally better for the client – a mediation can fail for want of full information. If the issues in the case are complex on either, or both, the custody and financial fronts, then a certain amount of discovery and due diligence needs to be performed in order to put the parties in the proper posture to be able to make a deal. Timing is important. Agreeing to mediate too early in the case, before that due diligence has been completed can easily lead to the failure of the session, which can be exceedingly demoralizing to the parties.

More concerning for the lawyer, though, than the failure of a mediation itself might actually be the situation where a premature mediation, scheduled prior to adequate due diligence, leads to a settlement. As mentioned above, a settlement prior to a client obtaining full knowledge of the finances may lead to the dreaded call the next day, or some months later, when the client realizes that something was



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missed in the settlement agreement. There is no substitute for due diligence on the part of the lawyer. Such can also serve to put the client in the best possible frame of mind to understand what the finances of the case are and what he or she will be receiving following the divorce case. In short, proper use of mediation can serve to give the client comfort with any deal, and to be able to process the situation better if mediation fails.

### And When All Else Fails ...

No matter how hard we may try to deliver a dose of perspective to our clients, no matter our efforts, there are times that our pleas may fall on deaf ears and our efforts prove all for naught. Even if we have, throughout the litigation, done all we can do to make the client keep their eyes on the important things; even when we've done what we can to ensure them that they will be "OK" after the case is concluded, clients can still lack perspective.

Perhaps they are accepting a bad deal on the custody and parenting time front to receive a greater financial settlement. Perhaps it is the opposite. Perhaps they are rejecting a reasonable deal because when "the judge hears what I have to say", she will understand. Perhaps they are simply insisting on their day in court, when they will be free to tell their story.

People settle their cases or choose to try their cases rather than accept a reasonable deal based on many factors, some of which are not always known to the lawyer. When this occurs, the best thing that the lawyer can do to protect himself or herself is to put those feelings in writing. The "CYA" letter or email does not have to be accusatory or combative. A simple statement that while the lawyer understands that the client wants to settle or proceed to trial, as the case may be, he or she disagrees.

Critically, though, we must not forget, after all, that we work for the client. This is their life, not ours. These are their children and their money at issue, not ours. They pay us for our time and our best advice, and if they choose to ignore that advice, then, frankly, that is their option to take and their decision to make. However, if we have been upfront in our communications with the client, been honest but compassionate in the delivery of our counsel to them during the case, and done what we can do to ensure that they have maintained their perspective along the way, then we have done all we can do. In the end, that is the best way that we can not only prepare the client for the end of their case, but also maintain the best relationship possible with them during and following the litigation. By utilizing these tactics, and others that have not been mentioned, we can do the best that we can to ensure that the client maintains his or her perspective, and in that way, we can provide for a more satisfying outcome – for the client and for ourselves.

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# Fixing the Frozen Benefit Award, Part 3

By Mark E. Sullivan

*Part 2 of this article covered the strategy for a former spouse in obtaining a full “time rule” portion of the military member’s retired pay.*

## How to “Even Out” the Pension Division

The next five methods are not true adjustments to the pension division to make it numerically the same as that which results from the time rule. They will, however, help in ameliorating the result of the “frozen benefit division” for John Doe (the ex-husband of Commander Mary Doe).

## Unequal Share of Pension.

In states where the court has a degree of flexibility in how much of a marital or community property asset to award the non-employee spouse, John’s attorney can ask the court to award a share to him that is larger than the usual “50 percent of the marital share” portion. Thus the order could be framed in terms of “70 percent of the marital share of Mary Doe’s military retired pay,” which would leave John with a larger share than he could receive through frozen benefit analysis.<sup>1</sup> Have a financial expert help to estimate the monetary loss for the FS, so that a set-off can be calculated. Note, however, that it would be impossible to compare the two results at the time of the pension division order. Only in hindsight – at the time of Mary Doe’s retirement – would it be possible to measure one against the other.<sup>2</sup>

## Fixed Percentage Award.

Another alternative, when the laws of a state have not been adjusted to provide for a denominator of the marital fraction which ends on the date of the “court order,” is to have the court award to John Doe, the non-military spouse, a fixed percentage of the military retired pay while Mary is still serving. After all, if John is forced to receive only a share of a frozen benefit at the time of the court order, why shouldn’t he get a fixed percentage of that frozen benefit? In this situation, the amount of the frozen benefit would remain relatively stable, instead of losing value over time (as would occur if the denominator of the marital fraction remains the total amount of Mary Doe’s creditable service). So, for example, if the property division order occurred when the parties had been married for 10 years of the 20 that Mary had already served, John would be awarded half of 50 percent (i.e.,  $\frac{1}{2} \times 10/20$ ), or 25 percent of the frozen benefit. If the fixed percentage approach were not employed and Mary served for a total of 30 years, then John would still receive 50 percent of the frozen benefit times the marital fraction. However, at that time the marital fraction would be  $10/30$ , or 33 percent, and John’s share would be 16.5 percent, rather than 25 percent. Fixing the percentage at the same time as the benefit is fixed is one

way of “retaining value” for John’s pension-share award.

## Present Value.

In addition to the future division of retired pay, state laws also recognize a second method of dividing pensions, the “present value offset.” This analyzes the present value of a series of money payments over the course of the SM’s life; these are, of course, her retired pay. The present value of this retired pay is the amount that can be used for a trade or an offset, allowing the SM to keep her pension intact. This is beneficial for the parties since it results in a complete present accounting and division, not the postponement of property division until retirement. In addition, it provides the spouse with property “in hand” when it is unknown whether the SM will live for many years after retirement, or even survive to apply for retirement.

Evaluating a pension is a complex task. It is not for the faint-hearted, the unprepared, or the amateur. These complicated computations generally demand an evaluation report and the testimony of an expert.<sup>3</sup> Counsel must locate the appropriate state cases which describe the methodology to use in ascertaining the present value of periodic payments.<sup>4</sup> Once the hired expert (e.g., CPA, economist or actuary) has read the cases, applied the methodology and placed a value on the pension, then the hunt is on for some property or asset which matches the pension value and can be given to the FS in exchange for a release of his rights to the pension, or which can be awarded by the judge – in a contested case – to the FS so that the SM may retain her pension.

## Present Value and Payments.

The present value of a military pension can be a pretty large figure in some cases.<sup>5</sup> When this happens, the court



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may need to do a partial setoff for the marital value of another asset awarded to the FS, with the remainder to be made up in periodic payments. Thus, if the present value of CDR Mary Doe's retired pay were \$400,000 and the marital component were \$300,000 (that is, the parties were married for 15 of the 20 years used by the expert in the pension value report), then the court might set off the pension, awarded to Mary, by granting sole ownership to John of marital assets worth \$200,000. To complete the equation, the court could order Mary to pay \$100,000 to John by making annual payments of \$20,000 for five years. This could be done by requiring Mary to set up an allotment immediately for the monthly payment of \$1,666.67 ( $\$20,000 \div 12$  months) to John. Or the court could enter a military pension division order requiring monthly payments of \$1,667.67 from Mary's retired pay. The retired pay center will honor these "set dollar amount" payments so long as they do not exceed the allowable percent of disposable retired pay which may be garnished as property division, that is, 50 percent.<sup>6</sup>

### The Western Gambit.

In several jurisdictions (mostly western states), the court may order the SM to begin present payments to the nonmilitary spouse as soon as the SM is eligible to retire and receive monthly payments. This is so whether the military member has actually retired or not.

The seminal case is *In re Marriage of Luciano*,<sup>7</sup> in which the judge ordered pension-share payments for the wife to begin when the SM-husband retired from the Air Force. The California Court of Appeals reversed, stating that it would be unfair to postpone payment to the ex-wife since that would give the SM the power to determine when she received her own property. The Court went on to say that the employee spouse cannot defeat the nonemployee spouse's interest in community property by relying on a condition solely within his control. The proper order for the judge to issue would state that the former wife is the one who has the choice as to when to start receiving her share of the pension. This election may be made at any time after the pension is matured, through a motion filed by the nonemployee spouse. The Court stated that, if the motion is made before retired pay starts, this constitutes an irrevocable election to give up increased payments in the future which might accrue due to increased age, longer service and a higher salary.<sup>8</sup>

Nothing in the frozen benefit rule blocks or bars this "western gambit," as illustrated by the *Luciano* case. And the logical approach – nay, the only rational approach – for a nonmilitary spouse in those states which follow *Luciano* is to move immediately for payments, to start as soon as the SM attains sufficient service for retirement (usually after 20 years of active duty). Since there can no longer be an increased payment in the future, as mentioned above, and the benefit to the FS is locked into the rank and years of service at the time of divorce, every nonmilitary spouse should file a motion to elect payments from the SM as soon as the pension matures.

### Continuing Conundrums

Several questions remain. The answers may be provided in case law developments or in implementing regulations.

How should the courts write a proper court order to implement the frozen benefit rule? Definitive guidance on the rules for military pension division will be published in the Department of Defense Financial Management Regulation.<sup>9</sup> Until there are revisions to Volume 7B, Chapter 29 of the Department of Defense Financial Management Regulation, no one will be completely sure how the division of uniformed services retired pay shakes out. At present, the rules are being circulated to all branches of the uniformed services for editing, comments and revisions. The only information presently available from DFAS is a "Notice of Statutory Change" and a sample order.<sup>10</sup>

The "hypothetical clause" (as it is called by DFAS) is the most difficult clause to prepare. The current DoDFMR rule requires, for those who entered military service after September 1980, that the court order contain very detailed information about the servicemember; this includes the "retired pay base" calculated according to the "High Three," the average of the highest three years of continuous compensation before the specified division date.<sup>11</sup>

At present, counsel must provide this information to the court. What if a court order specifies the "old definition" of disposable retired pay? Will it be rejected by the retired pay center, as would happen before the frozen benefit rule when an order was found to be unacceptable, with directions to counsel who submitted the order to specify the required data for a hypothetical clause? Until the new rules have been set out in the DoDFMR, counsel should adhere strictly to the current requirements for a hypothetical clause and the interim guidance from DFAS.



When a retiree doesn't pay according to a pension division order which uses the original definition of DRP, will the FS be able to obtain compliance through a show cause hearing? Will the court's contempt sanction be upheld? Or will appellate courts strike down the punishment on the basis of federal preemption, ruling that the frozen benefit rule cancels all other methods of dividing the future retired pay of a still-serving member?

If an order entered after 12/23/16 sets out terms under the original DRP definition and the SM wants to petition the court to change the order to comply with the present definition, will the court allow a motion to alter or amend under Rule 59 or its equivalent (in states which have not adopted the federal Rules of Civil Procedure)? What about a motion to set aside under Rule 60? Or will the existence of a final decision bar that change? Generally speaking, courts refuse to modify final property division judgments or to allow them to be attacked collaterally.<sup>12</sup>

What happens if a time rule order dividing the pension is final and unappealed, and then the attorney for the former spouse finds out that it will not be honored by the retired pay center? What if the order will only be honored to the extent that it divides the "frozen benefit," rather than final retired pay? Can the court still hold the retiree liable for the unpaid portion of the pension under 10 U.S.C. § 1408 (e)(6)? That section of USFSPA, known as the "savings clause," states:

*(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) [e.g., 50 percent of disposable retired pay] has been paid....*

Numerous court decisions have held that orders which require the retiree to pay more than 50 percent of disposable retired pay are not void or invalid; they are simply not enforceable through garnishment from the retired pay center for amounts in excess of 50 percent.<sup>13</sup> Can counsel for the FS defeat the arguments of the SM/retiree that federal law preempts state court orders, since this section of USFSPA provides an "escape hatch" for the FS in enforcement of the pension division order?

## Final Notes

Labelled as John Doe's "Plan B" above under Strategy for the Former Spouse, other methods and strategies exist for obtaining a "fair deal" (or perhaps a "fairer deal," in John's view) regarding division of military retirement benefits. These would include requiring the SM to pay the full cost of the Survivor Benefit Plan, or valuing the SM's military medical coverage and placing that as an asset in

the SM's share of marital or community property.<sup>14</sup> These do not involve a larger portion of the pension; rather, they focus on other benefits which may be valued and allocated in the property division process.

All of the above methods should be considered by lawyer for the former spouse. And this should be done in consultation with an expert in dividing military retired pay, so as to choose the best alternatives to the frozen benefit approach imposed by NDAA 17.

These rules and requirements, strategies and suggestions may not apply to everyone. There are certainly variations among the states as to what may be done in the area of division of retired pay. For example, while some states may allow "make-up alimony" to adjust the equities when a spouse is left short in the pension division, others maintain a strict line of division between spousal support (based on need and the ability to pay) and property division (based on the value of what was acquired during the marriage and how best to divide it). Be sure to understand the law and the cases, consult an expert in your state (if you're not one yourself), and contact a specialist in military pension division whenever possible – even if it's in another state! You can't ask too many questions or know too much in this area. "One size" does not fit all!

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## Endnotes

- 1 John's share of the pension, divided as property, is limited to 50 percent of disposable retired pay which may be garnished through the retired pay center. 10 U.S.C. § 1408 (e)(1).
- 2 It would also be possible to have the court award other assets to John in view of his loss due to the truncated division set out in the new frozen benefit rule.
- 3 See, e.g., *Trant v. Trant*, 545 So. 2d 428 (Fla. Dist. Ct. App. 1989), cited in *Smith v. Smith*, 934 So. 2d 636 (Fla. Dist. Ct. App. 2006).
- 4 See, e.g., *Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009) and *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994) for rules regarding the present value of pensions and the methodology to be employed in North Carolina.
- 5 See, e.g., *Cunningham v. Cunningham*, 173 N.C. App. 641, 619 S.E.2d 593 (2005) (remanding case for presentation of husband's valuation of military pension; wife's value, without expert, was about \$500,000 for a mid-career officer).
- 6 This 50 percent means half of the disposable retired pay of the SM calculated at the date of the court order. The same limits apply if the court – instead of time payments on a present-value setoff – decides to order the SM to pay the FS a fixed dollar amount upon retirement. See Note 1 supra.
- 7 *In re Marriage of Luciano*, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980). See also *In re Marriage of Scott*, 156 Cal. App. 3d 251, 202 Cal. Rptr. 716 (Ct. App. 1984); *Ruggles v. Ruggles*, 860 P.2d 182 (N.M. 1993); *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986); *Gemma v. Gemma*, 105 Nev. 458, 778

- P.2d 429 (1989); Balderson v. Balderson, 896 P.2d 956 (Ida. 1994); Blake v. Blake, 807 P.2d 1211 (Colo. App. 1990); In re Marriage of Harris, 107 Wn. App. 597, 27 P.3d 656 (Ct. App. 2001); Maccarone v. Maccarone, 108 A.3d 1053 (R.I. 2015); Janson v. Janson, 773 A.2d 901 (R.I. 2001); Furia v. Furia, 692 A.2d 327 (R.I. 1997); and Bailey v. Bailey, 745 P.2d 830 (Utah App. 1987) (“... the distribution of retirement benefits should generally be postponed until benefits are received or at least until the earner is eligible to retire.” (emphasis added)).
- 8 In re Marriage of Luciano, 104 Cal. App. 3d at 960–961, 164 Cal. Rptr. at 95–96.
  - 9 DoD 7000.14-R, Department of Defense Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures – Retired Pay (DoDFMR), Vol. 7B, ch. 29.
  - 10 Type into any search engine, “Notice of Statutory Change” and “DFAS” to locate this. DFAS has placed the Notice at its website, [www.dfas.mil](http://www.dfas.mil) > Garnishment Information > Former Spouses’ Protection Act > NDAA-’17 Court Order requirements.
  - 11 DoDFMR, Vol. 7B, ch. 29, Sec. 290608.
  - 12 See, e.g., In re Marriage of Thorne, 203 Cal. App. 4th 492, 136 Cal. Rptr. 3d 887 (2012); Moore v. Moore, 484 S.W.3d 386 (Mo. App. Unpub. 2016).
  - 13 See, e.g., In re Hicks, 530 B.R. 912 (M.D. Fla. 2015); In re Madsen, 2002 Bankr. LEXIS 2037 (Bankr. S.D. Iowa 2002); In re Mackmeekan, 117 B.R. 642 (D. Kan. 1990); Ex Parte Smallwood, 811 So. 2d 537 (Ala. 2001); Grier v. Grier, 731 S.W.2d 931 (Tex. 1987); Forney v. Minard, 849 P.2d 724 (Wyo. 1993); Marquis v. Marquis, 175 Md. App. 734, 931 A.2d 1164 (Md. Ct. Spec. App. 2007); Deliduka v. Deliduka, 347 N.W.2d 52 (Minn. Ct. App. 1984); Stout v. Stout, 144 So. 3d 177 (Miss. App. 2013); Gonzalez v. Gonzalez, 2011 Tenn. App. LEXIS 21; Maxwell v. Maxwell, 796 P.2d 403, 406 n.6 (Utah Ct. App. 1990); In re Marriage of Bocanegra, 58 Wn. App. 271, 792 P.2d 1263 (Wash. Ct. App. 1990); Geesaman v. Geesaman, 1993 Del. Fam. Ct. LEXIS 126 (Del. Fam. Ct. 1993).
  - 14 Both of these approaches are covered in detail in Chapter 8 of Sullivan, THE MILITARY DIVORCE HANDBOOK (American Bar Assn., 2<sup>nd</sup> Ed. 2011) and both may be employed in any military divorce case, not just one which falls under the frozen benefit rule.

**The opinions expressed within *The Family Law Review* are those of the authors and do not necessarily reflect the opinions of the State Bar of Georgia, the Family Law Section, the Section’s executive committee or Editorial Board of *The Family Law Review*.**

# Cognitive Bias and Its Impact on the Legal System

Elizabeth E. Berenguer served as an and director of legal skills and professional programs at Savannah Law . the of 2016, Berenguer joined the Campbell Law faculty, where she currently directs its upper level writing program. Her teaching responsibilities Legal Writing, Research and Advocacy, Appellate Advocacy, Trial Transactional Drafting.

Prior to her career in academia, she was a practicing attorney, first as a public defender, then in private practice as a criminal defense and immigration attorney. As she made the transition from the legal profession to her current role, Berenguer was required to write an article on a modern legal issue as a condition of her academic scholarship. At the time, Florida had just passed its Stand Your Ground legislation. Intrigued by this new development in the state's legal system, Berenguer chose to explore its potential ramifications. Through her research, many facets of this new law were revealed to her, including, cognitive bias and the influence it may have on human behavior.

Since 2008, Berenguer has taught others to understand what cognitive bias is; how it works; and how to use this knowledge effectively for trial. Recently, Berenguer was the guest speaker at the Family Law Section-Diversity Committee meeting and provided a crash course on cognitive bias. Berenguer began her presentation with a rather fascinating group exercise. She presented an array of four photographs that consisted of one brightly colored bird; a pair of black and white birds; a speckled black and white moth; and a penguin. She then asked, "Which one of the photos do not belong?" Shockingly, the responses from the group were relatively equally divided among the choices. She went on to explain that our responses were basically based on how our individual minds processed and organized the information.

Berenguer defines cognitive bias as a mistake in reasoning; evaluating; remembering or other perceptive processes, often occurring as a result of holding onto one's preference and beliefs, regardless of contrary information. It is a natural human phenomena by which our minds utilize tools to organize information received. Berenguer identifies these tools as embodied rationalization; categories; associative networks; canalization; metaphors; stereotypes; and heuristics.

The theory of embodied rationality proposes that the human brain cannot process abstract information without first connecting it to an existing negative or positive experience. For example, imagine trying an exotic meat for the first time, such as, alligator or frog legs. Many would compare the taste to that of chicken because chicken is

a more familiar experience. Berenguer explained that embodied rationality is a way our mind insulates itself from other groups, hindering our ability to empathize with others.

Berenguer went on to explain categories as a means of organizing information. According to Berenguer, categories are made by, not found in, our society. Although they are entrenched in practice, categories are never final. They tend to be determined by our ever-changing culture and society. Slavery would be a prime example of this concept. Once widely accepted in our society, most are now repulsed by the very thought of one group of people owning another.

The use of associative networks, Berenguer explained, is our mind's attempt to process new information by forming a connection with something it already knows. As an example, Berenguer gave the natural response to meeting someone whom you've learned attended the same university as you. Quickly, the conversation transitions to professors that you may have had in common or even fellow classmates. This may seem innocent in and of itself, but what happens when the new information is connected with negativity? For example, meeting someone who shares the name of a notorious serial killer, like Jeffery Dahmer or Ted Bundy. Imagine your initial reaction to that individual.

Berenguer identified another tool our minds use to organize information as canalization. Canalization refers to an idea that is not yet entrenched. However, the more we experience or think the same, the more entrenched the thought becomes. Hitler's repetitious rhetoric on how the Jewish people were the cause of the decline of the Aryan race would be a prime example of the dangers of canalization. After the publication of Hitler's *Mein Kampf*, it took nearly 10 years of main stream circulation of the book, several anti-Semitic speeches delivered to the masses, and the inundation of Nazi-belief to the country's youth before he had an army large enough to wage war on the world and humanity.

A metaphor, Berenguer explained, is a device we use to give a name to a nameless thing. Metaphors tend to steep into our society over time. As an example of how dangerous the use of metaphors can be, Berenguer gave the example of the Yin-Yang symbol. Many interpret this symbol as the white side to standing for the innocence and good while the black siding for evil and bad. A quick review of modern history will reveal how this concept has and continues to negatively impact race relations in this country.

Stereotypes are devices by which the brain utilizes neutral short cuts to reduce complex decisions to simple

assessments. Berenguer gave the Trayvon Martin case as an example of how stereotypes may yield deadly results. Perhaps this tragedy would have been avoided if Mr. Zimmerman had not allowed his quick perception of a young African-American man walking the streets at night wearing a hoodie dictate his actions.

Heuristics, Berenguer explained, is basically internalizing a metaphor and/or stereotype and allowing these cognitive tools to influence behavior and decisions, despite objective facts that are readily available. Berenguer demonstrated this point by elaborating on the Trayvon Martin case a bit further. In her opinion, Mr. Zimmerman allowed the stereotype and metaphor formed by his mind that a young man fitting the description of Trayvon Martin was dangerous. This split assessment of the information compelled Mr. Zimmerman to decide to engage in behavior that led to this young man's death.

Of course, Berenguer's presentation was a mere glimpse into the complexities of how the mind organizes information. The first part of her hourlong presentation was intended merely to acknowledge the existence of cognitive bias. According to Berenguer, not only do we all have cognitive bias, but we are incapable of ridding ourselves of it. However, one can develop tactics that will help neutralize or, at the very least, doubt cognitive bias found within ourselves and others. These tactics may prove useful when preparing for litigation as they may help persuade a judge; jury; or guardian ad litem to overcome their natural cognitive bias, resulting in an equitable outcome at trial.

The first step is to attempt to identify the cognitive bias of those involved in your case. That includes, but is not limited to, yourself; your client; the opposing attorney; the guardian ad litem; the mediator; the judge, and the jury. Berenguer reminded the group to not forget those who have the judge's ear, such as, staff attorneys; court reporters; bailiffs; administrative assistants, and law clerks. Admittedly, uncovering the cognitive bias of your audience may prove difficult. Sometimes, the best you can give is an educated guess. If you have a jury trial, you can obtain specific information through *voir dire*. With judges, it often is an amalgamation of prior experiences and with how the judge has ruled on pre-trial issues before the case.

Once you have identified those biases to the best of your ability, the next step is to attempt to manage expectations, especially of your client. Remember, your client is coming to you not only in emotional turmoil, but with cognitive bias stemming, in part, from the unpleasant life experiences that have led to the conflict. You must remain in constant communication with your client, defining and redefining your case theory as, hopefully, the client becomes less attached to the identified bias.

At the time of trial, you should have a well-defined theory of your case, which leads to the third tactic shared by Berenguer. Tell the story in such a way that neutralizes and deconstructs the harmful bias, while utilizing the helpful bias. Start by identifying the characters. Name the

villain; the hero; the victim; and the bully. Next, develop a narrative including such aspects as a quest; betrayal; survival; and redemption. Lastly, the most important part of the narrative is to convince your audience to accept your narrative by delivering the emotional appeal. Berenguer explained that we learn from the stories we are told. From those stories, we develop our values of behavior. We cannot make decisions of equity in the case without taking into consideration your values form by the stories we are told. Once the cognitive bias has been identified and neutralized, ask for a decision that is most in line with the values one should hope to instill in others.

In an attempt to apply cognitive bias to a situation we may face in a family law case, please consider the following fictitious fact pattern:

*Emily and Thaddeus Rickles are from a small blue-collar, lower middle-class town in a rural community in Georgia. They met while attending school at Emory University. Emily was pursuing her double major in bio-engineering and business administration, while Thad was earning his degree in education. They got married a week after graduation and settled in their hometown. Fast forward 10 years. Emily is now the CEO of a paper mill company located 30 miles outside of town. Approximately 80 percent of the town's male population works at the mill. In fact, Emily's father supported his family by working at the mill for over 40 years before his retirement. Thad teaches history at the local high school. They have two children, twins, born in March, Timothy and Emma. The twins are now 6 years old. The value of the marital assets is approximately \$100,000. All but \$10,000.00 of those assets are attributed to Emily's 401(k). After the twins were born, Emily stayed home for three months while Thad worked. She returned to the workplace in May of that year. Since Thad was a teacher and did not work in the summer, he stayed home and cared for the children for the following three months while Emily worked. At the age of six months, the children were placed in day care so that both parents could work. Due to her work hours, Emily leaves before the children are taken to school each morning by Thad, but is typically home in time for dinner. Things were going just fine until Thad met and fell in love with Lucy, his 23 year old teacher's assistant. Thad has now filed for divorce citing irreconcilable differences and Emily has counterclaimed citing adultery and mental cruelty as grounds. The case has been assigned to the Hon. Ward Cleaver, who has been on the bench for more than 30 years. (Yes, the reference to the 50s sitcom, Leave it to Beaver, is intentional). With plans of marrying Lucy, who can be a "real mother" to the children, as soon as the divorce is final, Thad is seeking primary custody of the children and 50 percent of the assets. Emily is also seeking primary custody and insists that she keeps her entire 401(k). You represent Emily.*

### Step one: Identify cognitive bias of those involved.

Know your audience. Emily's case will be evaluated

by either a judge who may have the cognitive bias that a woman's place is at home taking care of children or by a jury of her "peers." Those peers may include blue-collar men who may feel that a paper mill is no place for a woman and women who may feel that a woman cannot have it all. She must choose between having a career or family, but she cannot have both.

Of course, Emily may bring her own cognitive bias to the table. She is the mother and, as such, no one can care for the children as well as she can. Also, she is the one who made the money, so she should be the one to keep it. How is it fair that Thad can destroy the family by committing adultery and still be allowed to walk away with 50 percent of her 401(k)?

### Step Two: Manage Expectations.

Take the next several months to convince your client to re-think her cognitive bias by repeatedly presenting her with the indisputable facts of her situation. Thad is a good father. He has proved that he can, in fact, care and bond with the children just as well as she can. If he did not share in the load of rearing the children, she would not be free to pursue her career and earn the money she has managed to invest in her 401(k). Without him, she would have had to either forego her career or use the money she invested to pay for a full-time nanny.

Start developing an image to present to the guardian ad litem, judge, and/or jury. Emily is not a career-hungry woman who has outsourced her motherly duties to her husband. Even though she leaves for work before the children are taken to school, she is the one who wakes the children every morning with a hugs and kisses before she leaves for the day. Every day, her face is the first thing they see. She gets home approximately two hours after the kids get home from school. During that time, Thad is cooking dinner while the children are watching television; doing homework; or playing amongst themselves. Dinner is eaten as a family every night. After dinner, Emily spends time with the children by reading bedtime stories or playing games; handles the baths; and lays out their clothes for the following morning. Her face is the last thing the children see before they go to bed. During the nightly routine, Thad is typically in his study, either preparing his lesson plans or grading papers.

### Step three: Tell the story

First, identify the characters. From Emily's perspective, Thad is the villain of the story. Thad abandoned his family to pursue another women. Emily and the children are the victi Their lives were picturesque before Thad's affair. Perhaps a third victim of the story is Lucy, a young woman fresh out of college who was obviously seduced by a man 10 years her senior. The hero of the story is, of course, Emily. She remained faithful to her husband and devoted to her children. Without her hard work, the family would not have the life they have come to enjoy: a comfortable home; private school; T-ball for Timmy; ballet for Emma; two cars; and a trip to Disney World every year.

Next, develop the narrative. In her quest to provide the best possible life for her family, Emily studied and worked very hard to climb the corporate ladder. She has proved that women, can in fact, have it all, only to be betrayed by the person she should have been able to rely on the most. Despite the impending divorce, she will survive by continuing to be a good mother and a successful business woman. She will be redeemed by living an equally fulfilling life after the divorce is finalized.

While developing the narrative, be sure to neutralize and deconstruct harmful bias and utilize the helpful bias. If Emily had lived the "Leave it to Beaver" life as a stay-at-home mom, she would not have the financial means necessary to leave an unhappy marriage. Any man, including a judge, who has a daughter; granddaughter; or sister may be sympathetic to Emily's situation. Certainly, female members of the jury would acknowledge the benefits of Emily's decision to pursue a career while raising a family.

### Step four: The Emotional Appeal... "Pathos wins the Day"

The values that can be learned from Emily's situation are that hard work and dedication should not be punished, but rewarded. Emily has done nothing wrong. She has worked hard to provide a certain standard of living for her family. Thad ruined everything when he had his affair with Lucy. Emily has been a good mother and should not be replaced by Thad's new wife. If someone has to be designated as the primary custodial parent, it should be Emily, the hero of this story. When Thad abandoned his marriage he forfeited his moral right to receive any part of it, including, Emily's 401(k). Villains should always lose.

In conclusion, although our court system is symbolized by the highly regarded blind scales of justice, cognitive bias can tilt those scales one way or another. Cognitive bias is a natural part of our psyche that cannot be eliminated. However, we can develop processes for questioning them and presenting them in a neutral way.





# Tax Implications of Divorce

By

While going through a divorce can be a stressful and often exhausting experience, both parties should be aware of the potential effects on their individual income tax situations. By proactively planning for the tax implications of divorce, an individual can ensure that he or she will not get hit with an unexpected tax bill and is taking advantage of any deductions or exemptions allowed by the tax code. Specifically addressing income tax implications in the divorce decree or separation agreement can also effectively prevent any confusion or disputes regarding tax consequences once the divorce has been finalized. An individual involved in a divorce as well as his or her advisor should consider several items pertaining to income taxes, including filing status, dependency exemptions, alimony payments, division of property, tax attributes, and legal fees.

## Filing Status

In the year that a divorce becomes final, both divorcing spouses must change their federal tax filing status from “married filing jointly” or “married filing separately” to “single” or “head of household.” In many cases, even if income remains the same for both spouses, they may be in different tax brackets than they were under their married filing status. To account for this, estimated income tax payments and/or tax withholding may need to be adjusted in the year of the divorce.

## Dependency Exemptions

If a divorcing couple has children, the divorce decree or separation agreement should address which spouse is entitled to the children’s dependency exemptions. Some agreements provide for taking the exemptions in alternating years, while in other situations a high-income spouse may forgo the exemptions altogether due to the income phase-out on the deduction for personal exemptions. Note, however that the Tax Cuts and Jobs Act passed at the end of 2017 has suspended the deduction for all personal exemptions for the years 2018 – 25.

## Alimony Payments

An individual who will be required to pay alimony to his or her ex-spouse should ensure that the agreement is structured so that these payments will be deductible. For an alimony payment to be deductible, it must meet each of the following seven requirements:

- Payment is made in cash
- Payment is made under a divorce decree or separation agreement
- The divorce decree or separation agreement does not designate the payment as something other than alimony

- The spouses do not live together
- The spouses do not file a joint return for the tax year
- Payments terminate upon the death of the recipient spouse
- Payment is not treated as child support or a property settlement

Provided that each of these requirements is met, the payment of alimony is deductible by the payor and includible in the income of the recipient spouse. These rules only apply, however, for divorce instruments executed before Dec. 31, 2018. Under the new Tax Cuts and Jobs Act, any payments made under an agreement dated in 2019 or later will have no income tax implications for either the payor or recipient spouse.

## Division of Property

In general, the transfer of property between spouses incident to a divorce is not subject to income taxation; that is, no gain or loss is recognized by either party. To qualify for this tax-free treatment, a property transfer must occur within six years of the divorce if made under a divorce decree or separation agreement, or within one year if it is not made pursuant to such an agreement. Since no income is recognized on the transfer, the original tax basis of property also remains the same in the hands of the recipient spouse. For this reason, divorcing spouses and their advisors should be sure to consider not just the value of property being transferred, but also the tax basis. For example, a highly appreciated asset might be less desirable than another asset of equal value in divorce negotiations due to the higher income taxes that would be incurred upon the eventual disposition of the appreciated asset.

## Tax Attributes

Another potential issue that arises in divorce situations is the splitting of tax attributes that were claimed on jointly filed returns. Certain items can be divided based on the agreement of the spouses, while others must be allocated in a prescribed manner under the tax code and regulations. In general, tax refunds are considered to be property subject to division under the divorce instrument and can be allocated in any way that is deemed equitable. Special care should be taken to track whose funds are used to make estimated payments, and any refunds should be deposited in the account of the spouse as designated by the spouses’ agreement. On the other hand, other tax attributes that carry forward such as net operating losses, charitable contributions, and capital losses must be allocated based on which spouse generated the income or deduction giving rise to the carryforward.

## Legal Fees

In general, legal fees paid in connection with obtaining a divorce are considered to be personal, nondeductible expenses. But the tax code specifically provides that fees incurred in profit-seeking activities or for tax advice are deductible as miscellaneous itemized deductions. The most common deductible fees related to a divorce are any amounts related to tax advice or the collection of alimony. Attorneys who are providing these services to a client undergoing a divorce should allocate their billings between deductible and non-deductible items using a reasonable method such as time spent or difficulty of the issues involved. Alternatively, an individual could hire a separate advisor that only handles tax matters to ensure the deductibility of these fees. Note, however, that the deductibility of these fees has been suspended by the 2017 Tax Cuts and Jobs Act, which repeals the deduction for all miscellaneous itemized deductions for the years 2018 – 25.

Securing a divorce presents many complications for all parties involved, but the income tax implications are often significant and should not be overlooked. By properly planning for these items and addressing them ahead of time, prudent advisors can prevent many future headaches for themselves and their clients.

# 2018 Legislative Summary – What’s New in Family Law, and What’s Next?

By Kyla Lines, Richardson Bloom & Lines LLC

Legislative Liaison, State Bar of Georgia Family Law Section Executive Committee

## 2018 Summary

The Georgia General Assembly finished the 2018 legislative session March 29, 2018. Throughout the session, the Section Legislative Liaison and a subcommittee made up of Family Law Section members tracked legislation relevant to our practice, worked on proposed legislation, and advised legislators on various bills within the parameters of the Bar Rules and the limitations of *Keller v. State Bar of California*, 496 U.S. 1 (1990).

This year, the subcommittee tracked 15 different bills, some of which were proposed for this first time during this session, and some of which were carried over from the 2017 legislative session. The following bills have passed both chambers of the Georgia General Assembly and as of April 2, 2018, have either already been signed by the Governor or are awaiting his signature.

**House Bill 159 – Adoption Reform and Power of Attorney for Custody:** House Bill 159 was quite controversial at the end of the 2017 legislative session, and that controversy carried over to the first half the 2018 session. The bill substantially revises Title 19, Article 1, Chapter 8 to change requirements and procedures for adopting children. It passed both chambers in February and was signed into law by Gov. Deal March 3, 2018.

In addition to modifying various provisions of the adoption code, House Bill 159 also allows parents who experience “short term difficulties that impair their ability to perform the regular and expected functions to provide care and support to their children” to execute a Power of Attorney granting custody of a child or children to a third party, for a period not to exceed one year. There are specific definitions of who may receive custody of a child, limitations on when it can be used (i.e., it is not valid if executed during the pendency of a divorce), notice requirements to a non-custodial parent, and a provision for such powers of attorney to be filed with the probate court in the county where the child resides. See O.C.G.A. § 19-9-120 et seq.

**House Bill 190 – the Family Law Section’s Antenuptial Bill:** This is the fourth consecutive year that the Family Law Section attempted to pass House Bill 190. Section Member and State Representative Meagan Hanson successfully guided the bill through the legislature during the 2018 session. The bill clarifies the signature requirements for Antenuptial Agreements, making it clear that all premarital agreements, whether in contemplation of marriage or in contemplation of divorce, have the same requirements to be properly executed. Now, an antenuptial agreement is

required to be in writing, signed by both parties who agree to be bound, and attested by at least two witnesses, one of whom shall be a notary public.

**House Bill 344 – Paternity** – House Bill 344 allows, under certain circumstances, a third party to a case involving child support to request a genetic test from the Department of Human Resources. Specifically, the bill allows “an individual who is involved in the Department of Human Services’ enforcement of a child support order and who intends to file a motion [to set aside a paternity order]” to request a genetic test from the Department.

**House Bill 834 – TPOs and Termination of Leases/ Term of Ex Parte TPO:** This bill includes revisions to O.C.G.A. § 19-13-3, as well as revisions to Title 44 and existing landlord tenant law.

O.C.G.A. § 19-13-3 will now provide that an ex parte TPO shall “remain in effect until the court issues an order dismissing such order or a hearing as set forth in subsection (c) of this Code section occurs, whichever occurs first.” It also clarifies that a hearing must be held within 30 days of the filing of the petition, but allows the court to delay dismissal of the action for an additional 30 days if the court finds that a party is “avoiding service to delay a hearing.”

Title 44 Chapter 7 now specifies that a person who obtains a civil family violence order (either after notice and hearing OR if the order is ex parte and accompanied by a police report showing the basis for the order) may terminate a residential lease effective 30 days after providing notice to the landlord. The order may be one that protects the tenant or his or her minor child.

**Senate Bill 131 – Stay of Adoption Proceedings:** Senate Bill 131 specifies that adoption proceedings will be stayed pending the appeal of an order terminating parental rights related to the child who is the subject of the adoption/ termination proceeding. The new law also includes additional explanation of and factors relating to the grounds for determining whether parental rights should be terminated.

**Senate Bill 427 – Child Support:** O.C.G.A. § 19-6-15 has been revised to provide the following:

Makes separate worksheets to account for children who “age out” of a support obligation up to the discretion of the court, and specifies that they are also discretionary when a child is going to age out within two years of the entry of the final order regarding child support.

Specifies that a final order which includes a child or children aging out of a support obligation and including separate worksheets “shall not preclude a petition for modification.”

Requires the court to take into account the obligor’s earnings, income, and other evidence of the obligor’s ability to pay when making a child support determination.

Clarifies the process for imputing income to a parent, including what factors should be considered and how incarceration of an obligor should be treated.

#### What to Look for in 2019

The 2019 legislative session will start fresh, without any bills “carried over” from 2018. The Executive Committee of the Family Law Section is currently contemplating legislation to resolve venue conflicts in custody cases created by O.C.G.A. § 19-9-23, as well as proposing an amendment to O.C.G.A. § 48-5C-1 to include “former spouses” in the definition of immediate family members who are exempt from paying tax on a title transfer for a motor vehicle. In addition, we will continue to track legislation as it is proposed, and to keep members of the Section apprised of what is going on under the Gold Dome.

# Family Law Section CLE at Mid-Year State Bar Meeting: A Recap

By Erik Chambers, Stern & Edlin

Karine P. Burney and Katie Kiihnl Leonard, on behalf of the Section's Executive Committee, put together an exciting panel of distinguished judges for this year's Family Law Section CLE at the 2018 Midyear Meeting. The Section was honored to have present the Hon. JP Boulee of the Superior Court of DeKalb County, the Hon. Kimberly A. Childs of the Superior Court of Cobb County, the Hon. Ural Glanville of the Superior Court of Fulton County, and the Hon. T. David Lyles of the Superior Court of Paulding County.

The judges provided insights on three of the most debated topics facing our Section today: (1) Child Support Deviations; (2) Alimony; and (3) Parenting Plans.

## Child Support Deviations

### *Parenting Time Deviations*

Judge Boulee will grant a parenting time deviation if the requesting party meets the statutory standard. However, for him to grant the deviation, the parenting time needs to be 50/50 or pretty close to 50/50. There is no set way for determining the amount of the deviation, because it has varied from case to case. However, he recalled a case where he took the higher income earner's worksheet-provided obligation from Line 13 and from that number subtracted the lower income earner's obligation from Line 13. He then reduced the non-custodial parent's support obligation by the difference in those two numbers.

Judge Childs has not yet had a contested case where one side was asking for a parenting time deviation. She would grant such a deviation in the appropriate case and would not find it unreasonable to request the deviation when the parenting time is 50/50. When there is unequal parenting time, there are additional costs.

Judge Glanville has had a contested parenting time deviation case, and he followed the statute in determining whether to grant the deviation. He reminded the audience that deciding whether to grant the deviation is fact determinative. It is very helpful when the attorneys present him with different ideas and options.

Judge Lyles has had a contested parenting time deviation case, and he granted the deviation. He does not recall the specifics of that case and does not believe there is a set formula for determining the deviation. He knows that, in granting the deviation, the incomes of the parents were a factor. A request for the deviation is often need-based, and he is more concerned about the lower income earning parent. Although he understands the difficulty of the question as to how a downward deviation can be in the

child's best interest, he also knows that sometimes the non-custodial parent needs the deviation to have meaningful time with the child. If both parents have higher incomes, he does not see as great of need for the deviation and is less inclined to grant it.

### *High Income Deviations*

None of the panel could recall having a contested high income deviation case. Because the statute provides that you can apply a high income deviation when the non-custodial parent earns more than \$30,000, Judge Childs would consider a high income deviation at \$31,000 if someone asked her to do so. Whether she would actually award the deviation would then depend on a wide range of other factors, including the number of children, both parties' incomes, the other needs of the family, and the other financial circumstances of the parties.

### *Non-Specific Deviation*

Judge Boulee: He recently granted a non-specific deviation in a case where the child had been in daycare but the non-custodial parent was going to be able to take over the childcare obligation. Given this, he deviated downward to account for that expense. On *Hardeman v. Hardeman*, he reads that case as providing that it is proper to deviate to account for one party paying 100% of an expense. However, the Court of Appeals just wants the trial courts to clearly specify why they are applying the deviation.

Judge Childs: If you want her to grant a non-specific deviation, it would be helpful if you provide her with a proposed child support worksheet with all required information completed – with something more than just that the deviation is in the child's best interest.

### *Travel Expenses Deviation*

Judge Boulee: Judge Boulee has had probably a dozen contested cases involving travel expense deviations. In a recent case, he recalls that the higher income earning parent was the parent who lived in Georgia, and he ordered that parent to pay two-thirds (2/3) of the travel expense. If the parent drives to exercise his or her parenting time, he has factored in mileage and hotel. If the parent is flying, he has factored in airfare.

Judge Lyles: Judge Lyles has had cases involving parents who were coming from Florida, Oklahoma, and Utah. He has historically only ordered that airfare be included in the worksheet because, in each case he could recall, the parent who was coming in from out of state

had family in Georgia who could assist with lodging and transportation. He does not have a specific formula in determining the amount of the deviation. He wants to know how much the parties are earning and how big of a difference exists between the parties' incomes. He will not automatically grant the full amount of the travel expense, but he is going to consider any amount presented to him. He does not believe that you can set a certain amount for airfare because he recognizes that the cost of flights can be dramatically different year-to-year.

## Alimony

### *Duration of Marriage and Duration of Award*

Judge Boulee reminded the audience that the duration of the marriage is only one of seven factors provided for in the statute, and it is not necessarily the most important. There is a more persuasive argument for alimony in a longer marriage, but he does not have a bright line rule as to how long the parties must have been married to award alimony. He thinks parties could have been married for only one year and one of the parties still ask for alimony based on the other statutory factors. Every case is different, but other important factors to him include the parties' ages, financial resources, childcare, education, and career building. Contemplate a scenario where you have a three year marriage where one spouse has just graduated from the Emory School of Medicine as an anesthesiologist and the other spouse supported the graduating spouse all throughout medical school. Because it is only a three year marriage, does this mean the payee spouse, who may now be at home with a one year old and a three year old, should not get alimony even though the payor spouse is earning \$1,000,000 a year? He does not necessarily think so.

Judge Childs recalls the longest term of alimony awarded is three years, but this is because the contested cases she has had before her involved people in their 30s and 40s, and she believes three years is typically appropriate in those circumstances. She would also want to know if there are children involved and whether the party having to re-enter the workforce is the primary parent to a younger child at home. This will make a difference to her. She would consider awarding alimony in a short term marriage if there is a young child and the payee spouse is the custodial parent. Think about the party who has never worked a day in his or her life, was born with a silver spoon, went to school, and then got married. In that case, she might give the payee spouse some alimony for a limited period of time (to find a job...or to find someone new!).

Judge Glanville does have a general rule regarding the duration of the award and believes the attorneys are only limited by their argument. He pays particular attention to the financial need, and the attorneys representing the payee spouse need to be able to articulate that need to him. The more reasonable you are, the more likely you are to get what your client needs, although you may not be able to get everything your client wants. In addition to the incomes

and the length of marriage, he would need to know the education level of the payee spouse, what agreement the parties had during the marriage regarding employment, and whether there are assets to divide.

Judge Lyles usually looks to award alimony for a period of time that is equal to approximately one-third (1/3) the length of the marriage and one-third (1/3) of the payor spouse's income, but he does not have a hard and fast rule and is open to considering an award shorter or longer than a third of the term of the marriage. The length and the amount of alimony he will award is driven by the lower income earning spouse.

*Scenario: What if you had an older couple where they were each on their third marriage and had only been married for five years – would you award alimony?*

- Judge Boulee stated he would consider it, and hopes that the demand would be pretty reasonable – certainly less than five years!
- Judge Glanville agree with Judge Boulee. Do NOT ask for lifetime alimony under this set of circumstances. At the end of the day, just make your requests reasonable and make sure that your client can articulate the need behind the request. It is your and your client's credibility on the line.

### *Retirement*

Judge Glanville stated that alimony is becoming harder to justify, but there is more of a justification for awarding it when the payee spouse is older and will have a more difficult time becoming self-sufficient.

Judge Lyles would still award alimony even if the payor spouse was getting close to retirement age because there is really not a set retirement age anymore, and people are living and working longer. 65 is no longer a definite cutoff. He hopes in these types of situations that there will be assets that can be awarded. If the parties do not have sufficient assets, he does not see how he does not award alimony where the payor spouse has the ability to pay.

None of the panelists have had a contested case where the payor spouse was seeking to modify alimony due to his or her retirement.

Judge Boulee would hope the impending retirement would have been considered when the alimony was first put into place, but he would look at the assets and income expected to be generated over the next few years. He does not believe alimony is a bad thing. You have to look at each case and, oftentimes, alimony makes a lot of sense based on the circumstances.

### *Step-Down Alimony*

Judge Childs tends to do a step-down with alimony because it is consistent with the idea that alimony is bridging the gap for the payee spouse. If the payor spouse had significant assets, she would not be averse to granting a lump sum award if it made since under the

circumstances. However, it has been her experience that there is not usually a big pot of assets available, so she is looking at taking money from the payor spouse's monthly paycheck and allocating that over to the payee spouse.

Judge Glanville has not done a step down award yet, but he would look at the ages of the parties, the parties' standard of living, and the financial need.

Judge Lyles has not done a step down award either. Again, he focuses on the lower income earning spouse. As a general rule, to award alimony, he is looking for at least a ten year marriage where one party has spent a significant amount of time out of the workforce. Alimony is designed to help the payee spouse get back on his or her feet and to be self-sufficient again. How much alimony is necessary and for how long to accomplish this goal is different based on age. However, alimony is not designed to set the payee spouse up for life or allow them never to work again.

### *Two Income Earning Spouses*

*Scenario: What if one spouse earns \$300,000 and one spouse earns \$50,000 – would you award alimony to the spouse earning \$50,000 ?*

Judge Childs would consider it because this is still a pretty significant disparity in incomes. If one spouse earns \$250,000 and the other earns \$100,000 , this is certainly a closer case. Equitable division will ultimately come into play as well – what kind of assets are being divided? The income of the lower earning spouse is the most important because that is the need, and both the length of the marriage and the marital standard of living would be important. Remember, rich people can get alimony too!

Judge Boulee agreed with Judge Childs that the income of the lower earning spouse is most important, but he also needs to know that the higher income earner has the ability to pay alimony. If one spouse earns \$1,000,000 and one spouse earns \$250,000 , he would still consider awarding alimony to the lower income earning spouse because, again, income is just one of seven factors. Given this, he does not believe there is a threshold amount the lower income earning spouse could earn beyond which he would not award alimony. However, the income of the payee spouse may impact the length of the award.

Judge Lyles also agreed with Judge Childs that rich people can get alimony, although he would focus more on the income of the lower earning spouse. Certainly, as the margin between the incomes narrows, it is less likely that he would award alimony. The income of the lower earning spouse may impact the length of the award, but the cases are very fact determinative. Again, he is likely going to start with a term that is one-third the length of the marriage and shorten or lengthen the term based on the facts and circumstances of each case.

### *Lump Sum Alimony*

Judge Boulee recalled one case where he awarded lump sum alimony where the payee spouse was preparing to

go back to school and it was the amount of the tuition. He thought this was a reasonable request.

Judge Childs stated one thing she likes about periodic alimony is that she believes it helps to ensure that the payee spouse is going to have income each month to support herself. With periodic alimony, she can know that all of the money will not go away instantaneously upon the award of same. There is not this same guarantee with a lump sum award.

Judge Lyles determines whether he will award lump sum alimony based upon the facts of the case. However, he is not as big of fan of lump sum alimony because it is non-modifiable. Given a choice, he is less likely to award a lump sum. When he does award it, it often comes from the sale of an asset.

### *Changes to the Tax Law*

All of our panelists are more than happy to stay out of tax issues! It will be up to the attorneys to consider the changing tax landscape and make arguments based on same. If you represent the payor spouse, Judge Childs suggests just outlining what the tax implications will be for that spouse because she does not believe their rulings are intended to do harm with a tax consequence. Both Judge Childs and Judge Lyles did not believe an expert would be necessary. Judge Boulee does not know that this issue warrants an expert, but he usually likes experts. Judge Lyles just asked that you put the argument in writing – what are the incomes, the tax brackets, the implications, etc.

*Practice Tip from Judge Lyles: Please make sure that everyone – the witness, opposing counsel, and the Judge – has a copy of the financial affidavit!*

### *Parenting Time/Custody*

#### *50/50 Custody*

Judge Boulee has not had a contested case where someone is asking for 50/50 custody, but if the case is so contested and there is enough acrimony to end up at trial, he doesn't know that that would be the ideal case for a 50/50 schedule.

Judge Childs will consider awarding 50/50 parenting time, but one of the big factors is whether the parties can get along and, if it is a case that ends up in front of her, it is unlikely that this is the case. She very strongly believes there are some children who can thrive under a 50/50 arrangement, but it is not every child and she is going to rely on the guardian ad litem. She would want to hear the recommendation from the guardian because each child is different, and she does not want to talk to the child. The parents would also need to be living very close to one another. Even if one parent is in Smyrna and one parent is in Acworth, this is too far.

Judge Glanville stated that Geography pays a big part – if the physical proximity is close, then the exchanges

will be a lot easier for everyone. If the parties do not live close, it creates a lot of issues even beyond exchanges – extracurricular activities, education, etc.

Judge Lyles has not awarded 50/50 parenting time in a contested case, and a lot of it has to do with the conflict that comes with a case that makes it all the way to trial. The most important factor in deciding to award equal parenting time is whether the parties can get along enough to make it work.

### **Bonus: Attorney's Fees**

Judge Childs said if the party who has control of the assets and income demands a jury trial, and the other spouse asks for temporary attorney's fees, she is very likely going to grant the request. She has done this every time it has happened thus far, although she has not yet actually had a jury trial in one of these cases.

Judge Glanville recalled the biggest award he has made thus far is \$9,000 , although he has several bigger requests that he is considering currently.

Judge Lyles said the biggest award he has made is \$50,000 (and he does not think he has awarded anything in double digits to anyone else). The work and assets need to be there to justify an award. He reviews the notes from all prior court appearances to remind himself of the demeanors of the parties, the reasonableness of the parties, etc. He tries to keep up with all of that.





# Sustaining Life After Divorce

By Mandy Mobley Li

*"I believe the children are our future;  
Teach them well and let them lead the way."  
Whitney Houston, Greatest Love Of All*

## Introduction

Like numbers. Numbers do not lie. Numbers can be used to support a lie, but if you really dig into the numbers, they will expose a true story. The opinions, values, and emotions of the storyteller will not be able to compromise the story's integrity. Below is a true story.

## Georgia History

Georgia's current Child Support Guidelines went into effect over ten years ago on January 1, 2007. They follow an Income Shares model, which includes a Basic Child Support Obligation table. Income Shares tables are not based directly on actual spending on children but rather on indirect estimates of child costs. Income shares assumes that child costs reflect the spending necessary to restore a family's standard of living back to what it was prior to the divorce or having a child<sup>1</sup>.

Georgia's previous Child Support Guidelines followed a Percentage of Income model. Under Georgia's previous guidelines, two children of divorcing parents received 23-28 percent of the noncustodial parent's monthly gross income as their monthly child support<sup>2</sup>. As a matter of practice, judges would usually split the income percentage down the middle at 25.5 percent. Georgia's previous Child Support Guidelines were in place for more than 20 years.

## Child Support Defined

Child support is meant to cover a broad range of expenses, including basic necessities (food, clothing, shelter), medical care, uninsured medical expenses, educational fees (school fees, supplies, and related costs), childcare, transportation/travel, entertainment, extracurricular activities (summer camps, sports activities, etc.), and in some instances, college expenses<sup>3</sup>. Georgia's Basic Child Support Obligation is presumed to be the appropriate amount of child support to be provided by both parents prior to consideration of percentage of income, health insurance, work related childcare costs, and deviations<sup>4</sup>. The presumptive amount of child support may be increased or decreased to achieve Georgia's state policy of affording to children of unmarried parents, to the extent possible, the same economic standard of living enjoyed by children living in intact families consisting of parents with similar financial means (§19-6-15).

## Correlation Between Income And Home Value

Financial advisors suggest that 25-30 percent of a family's monthly budget, which is based on net income, should be allocated toward rent or mortgage payments<sup>5</sup>. The median family gross income in Georgia is \$61,250<sup>6</sup>, or \$45,938 net income, assuming a 25 percent tax bracket<sup>7</sup>. The current average interest rate for a 30-year fixed mortgage is approximately 4 percent<sup>8</sup>. A family that earns \$61,250 per year would have a monthly rent or mortgage payment between \$957 and \$1,148<sup>9</sup>.

Applying similar logic, a Georgia family that earns \$100,000 per year would have a monthly rent or mortgage payment between \$1,500 and \$1,800<sup>10</sup>, assuming a 28 percent tax bracket<sup>11</sup>. A Georgia family that earns \$360,000 per year would have a monthly rent or mortgage payment between \$5,025 and \$6,030<sup>12</sup>, assuming a 33 percent tax bracket<sup>13</sup>.

	Family Gross Income	Monthly Rent/Mortgage Payment	Tax Bracket Percentage
<b>FAMILY A</b>	\$61,250	\$957-1,148	25
<b>FAMILY B</b>	\$100,000	\$1,500-1,800	28
<b>FAMILY C</b>	\$360,000	\$5,025-6,030	33

## Non-Recurring Divorce Costs

According to Nolo's nationwide divorce survey, consumers spend an average of \$15,500 in divorce costs<sup>14</sup>. Consumers who went to trial reported spending an average of \$19,600<sup>15</sup>; however, more than 90 percent of divorce cases settle prior to trial<sup>16</sup>. An average divorce for Family A would cost them 25.3 percent of their gross income, or 33.7 percent of their net income. An average divorce for Family B would cost them 15.5 percent of their gross income, or 21.5 percent of their net income. An average divorce for Family C would cost them 4.3 percent of their gross income, or 6.4 percent of their net income.

The short-term financial impact of a divorce to a Georgia family is the one-time cost of divorce-related expenses. The significance of this impact varies, based on the family's income. For example, the cost of an average divorce is more than an entire year's worth of rent or mortgage payments for Family A. In contrast, the cost of an average divorce is less than a market loss Family C may experience by investing their net income in a moderately conservative portfolio, which may have -7 percent to -1 percent returns in a down financial market<sup>17</sup>.

## Recurring Housing Costs

The long-term financial impact of a divorce is the maintenance of two family residences, each with its own set

of recurring mortgage/rent, utility, and insurance expenses. Other family expense categories, such as personal and grocery items, are not significantly impacted by the addition of a second family home. According to recommended family budget guidelines, monthly expenses of a home (mortgage/rent, utilities, insurance) range between 29 percent and 43 percent of a family's net income<sup>18</sup>. The monthly cost to maintain Family A's home is between \$1,110 and \$1,646. The monthly cost to maintain Family B's home is between \$1,740 and \$2,580. The monthly cost to maintain Family C's home is between \$5,829 and \$8,643.

Following Georgia's current Child Support Guidelines<sup>19</sup>, two children of Family A receive \$1,304 per month in child support, which is *exactly the same amount* they would have received under Georgia's previous guidelines. Unfortunately, this is not the case for Family B or Family C. Two children of Family B receive \$1,578 per month in child support, which is 18.9 percent of gross income. Two children of Family C receive \$3,066 per month in child support, which is 10.2 percent of gross income. Family C's current child support amount is *\$4,584 less per month* than it would have been under Georgia's previous Child Support Guidelines.

Combined Adjusted Gross Income (Annual)	Georgia Basic Child Support Obligation for Two Children (Monthly)	Percent of CAGI
\$61,250	\$1,304	25.5
\$100,000	\$1,578	18.9
\$360,000	\$3,066	10.2

### The Best Interest Of A Child

It is in the best interest of children to minimize the impact of a divorce life event. To the extent possible, enabling children to remain in their family home with their custodial parent, whom they will reside with the majority of the time, will minimize the impact. Assuming the noncustodial parent was employed at the time of divorce, the net income of the custodial parent's household has decreased after the divorce. This may result in the monthly rent or mortgage payments of the family home being greater than 25-30 percent of the custodial parent's new family budget.

Child support is not designed to fully cover the family home's monthly rent or mortgage payments because the custodial parent has an associated cost of living; however, it was designed to fully cover the cost of living of the children. The living cost attributed to each parent is equal to 25-30 percent of each parent's individual net income, which is what they each would be paying for housing if they were not the custodial parent. Subtracting these amounts from the family home's monthly rent or mortgage payments calculates the living cost of the children. According to Georgia's current Child Support Guidelines, this cost is included in the Basic Child Support Obligation.

Children of Family C are the most negatively impacted by Georgia's current Child Support Guidelines. Based on cost of living estimates and family budget guidelines, two

children of Family C will experience a monthly loss of -\$3,284 if their parents choose to divorce in Georgia. The divorce impact worsens as the income disparity between their parents increases. For example, if their parents each earn a gross income of \$180,000, the custodial parent will experience a minimal monthly gain of \$107 (primarily due to a lower income tax bracket), while the noncustodial parent will experience a significant monthly gain of \$10,381. If their custodial parent earns half as much as their noncustodial parent, the custodial parent will experience a monthly loss of -\$2,982, while the noncustodial parent will experience a monthly gain of \$3,371. If their custodial parent does not work outside of the home (\$0 earnings), the custodial parent will experience a monthly loss of -\$9,160, while the high-earning noncustodial parent will experience a monthly gain of \$7,351.

Under Georgia's previous Child Support Guidelines, the impact to two children of Family C was significantly less, and in some cases, positive: a -\$2,525 monthly loss if parents earned equal income, or a \$1,300 monthly gain if their custodial parent did not earn income. However, a non-earning custodial parent would still have experienced the same monthly loss of -\$9,160, so it is arguable whether the children's smaller monthly gain would have been noticeable in the custodial parent's family budget. Meanwhile, the noncustodial parent in the latter scenario would have experienced a monthly gain of \$2,767.

### Is There A Sustainable Solution?

A hybrid model between Georgia's current and previous Child Support Guidelines will fully meet the support needs of all Georgia children and reduce the economic disparity between both custodial and noncustodial family households. The combined adjusted gross income from both parents should still be used in the child support calculation, but the percentage of child support to combined adjusted gross income should remain consistent across all family income levels. If two children of Family C receive child support within the range of 21.5 percent to 29 percent, they should experience no financial impact from their parents' divorce. Both parents would also experience monthly gains in most cases, primarily due to lower income taxes, and only custodial parents who earned 30 percent or less of the family's income would experience a monthly loss. If the contribution of the noncustodial parent to the expenses of the family home were factored into the cost of living of the children in the form of child support, a non-earning custodial parent's monthly loss would be reduced by 60 percent, while the noncustodial parent would break even after only a 2 percent pay increase.

### Accounting For Overlooked Value

According to Salary.com's 16th annual 'Mom Salary Survey', a stay-at-home mom in 2016 is worth \$143,102<sup>20</sup>. This amount was determined by applying market rates to specific jobs (e.g. Day Care Center Teacher) that a stay-at-home mom performs. The value assigned to a stay-at-home mom is a superset of what Salary.com says all moms, both

working and stay-at-home, are worth. In that same survey, a working mom in 2016 is worth \$90,223, which is the value she brings to her family in addition to the salary she earns while working. If we take the difference between these two amounts, we are left with \$52,879, which is the incremental value a mother brings to her family when she chooses to provide care to her children herself.

Before a divorce, a family with a stay-at-home mom experienced this \$52,879 value as a savings in their family budget from reduced monthly expenses on their children from third-party providers (i.e. the children received these service-equivalents, but the family did not have to pay for them because the mother was the provider). A divorce splits this family into two separate households, each with its own family budget of income and expenses. Unfortunately, this \$52,879 savings does not split between the two separate households. Instead, if the family's schedule remains unchanged after divorce, the high-earning father will absorb all of the savings from the childcare that the stay-at-home mother provides. This leaves the stay-at-home mother to fully absorb the opportunity cost (i.e. a loss) from her time spent caring for her children.

This opportunity cost is at least \$52,879 per year, or \$4,407 per month. If this cost was included as part of Georgia's Basic Child Support Obligation as a childcare expense, Georgia would be recognizing that all minor children require adult supervision, regardless of whether a parent or a third-party provides it, and that supervised time has a cost associated with it. Under Georgia's current Child Support Guidelines, childcare expenses must be declared and agreed upon by both parents, which does not protect children from these expenses being entirely excluded from child support.

The Georgia Child Support Worksheet has a line for Work Related Child Care and Health Insurance Expenses, which is considered child support in addition to the Georgia Basic Child Support Obligation. Using this worksheet requires general accounting knowledge and familiarity with family law, so a lawyer, and often an accountant, will complete this worksheet on behalf of her client. Under Georgia's current Child Support Guidelines, a stay-at-home mom will incur both legal and accounting fees to argue for what should already be included in the Georgia Basic Child Support Obligation, which places financial burden on the non-earner to determine the correct amount of child support. Under Georgia's previous Child Support Guidelines, financial burden would have been placed on the high-income earner to argue why his children did not need 25.5 percent of his gross income to maintain their existing standard of living. Financial burden and the ability to pay were aligned under Georgia's previous policy; under Georgia's current policy, they are opposed.

### Is Private School Still Affordable?

If Family C's combined adjusted gross income has not changed after divorce, the abilities of Family C's parents to support their children's existing standards of living have also remained unchanged. The cost of divorce for a high

income family is absorbed as an asset loss, and the recurring monthly savings generated after divorce to the noncustodial parent will more than cover the cost of maintaining a second family home. A divorce for Family C does not impact monthly recurring expenses, such as private school tuition.

The average private school tuition in Georgia is \$8,627 for elementary schools and \$11,242 for high schools. To attend high school at Westminster, a top-rated private school in Atlanta, tuition is \$28,090. Family C would need to spend only 23.3 percent of their net income (15.6 percent of their gross income) to send their two children to attend high school at Westminster. As a percentage of gross income, Family C's tuition expense is consistent with the average percentage of income spent on private school. A divorce life event does not cause Family C to stop paying private school tuition because they can no longer afford it.

If the parents of Family C use divorce as the reason for discontinuing the funding of private school, their children will not qualify for financial assistance. For example, Westminster's financial aid policy states, "a family's contribution to education is based on the family's ability to pay rather than each parent's willingness to pay." Family C's ability to pay has not changed due to their divorce.

### Conclusion

All children are expensive. After a divorce, it costs more to maintain the standard of living of children from a family that earns a gross income of \$360,000 than it does to maintain the standard of living of children from a family that earns a gross income of \$61,250. Even with the addition of a second family home of similar value, a high income family can still afford to allow their children to remain in the family residence with minimal financial impact. Childcare costs from a parent or a third-party provider are the same -- care from a parent produces a savings in the family budget, while care from a third-party provider produces an expense -- and both should be included in Georgia's Basic Child Support Obligation. Children of high income families who attended private school when their parents were still married should still be able to attend private school after their parents' divorce because their family's net income has remained unchanged.

The family incomes of children from high income homes are too high to qualify for relief programs from Georgia's Division of Family and Children Services, such as Temporary Assistance for Needy Families (TANF). It does not cost the state a penny to maintain the standard of living of children from high income families, and yet, a significant amount of these children are moving out of their family homes, changing schools, and leaving friends because Georgia's Basic Child Support Obligation is not protecting them.

As much as we want to believe that a parent will put his children first and "do the right thing," child support policies are in place today to protect against situations when a parent does not. Martin Luther King, Jr. stated, "Morality cannot be legislated, but behavior can be regulated. Judicial decrees may not change the heart, but they can restrain the

heartless.” Georgia has done an excellent job supporting its children of low income families with programs, like TANF, and policies, such as income withholding and wage garnishment orders. It is now time for Georgia to support its children of high income families to ensure that the *correct* amount of child support is being paid to maintain the standard of living of *all* of Georgia’s children. *FLR*



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#### Endnotes

- 1 [https://en.wikipedia.org/wiki/Income\\_shares](https://en.wikipedia.org/wiki/Income_shares)
- 2 <https://www.georgiaadvocates.org/gaareasearch/item.122984>
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- 20 <https://www.salary.com/mom-paycheck/>

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# 36th Annual Family Law Institute Agenda

May 24 - 26, 2018 | Jekyll Island Convention Center | Jekyll Island, Ga.

## Thursday

- How to Handle a DFCS Investigation
- Handling the Unmanageable Client
- Hot Tips: Forensic Accounting
- Navigating Contested Custody Litigation and Professionalism: Avoid the Pitfalls
- Attorney's Fees: Statutes and Collection Tips
- Domestic Practice and Ethics
- Hidden Criminal Law Landmines for the Family Law Practitioner
- Trusts and Equitable Division: *Gibson v. Gibson*

## Friday

- Court of Appeals Oral Argument
- Federal tax Issues and Pitfalls in Divorce
- Evidence Part I
- Psychologist panel: Narcissism and Divorce
- Recent Developments: Top Cases of the Past Year

## Friday Breakout Session

- Bringing in Reinforcements, When to Associate Co-Counsel and Hire Experts

- Basic Use of a Private Investigator
- How to Prepare a Client to Testify
- Find All of the Retirement Assets: What to Ask for and Where to Look

## Saturday

- Continuation of Determination of Separate Property vs. Marital Property
- Recent developments from a Judge's perspective - The five most important domestic cases in the past year
- Domestic Cases and Bankruptcy
- Dealing with a Difficult Opposing Counsel
- Custody Issues with Unmarried Parents
- Evidence Part II

*The FLI will be held at the Jekyll Island Convention Center from May 24-26, on Jekyll Island, Ga. We have availability in the room blocks at the Jekyll Island Oceanfront Suites and the Hampton Inn. There is also a Days Inn and Holiday Inn on the Island. We look forward to seeing you at the beach in May.*

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This year's Institute returns to Georgia and will occur at the Jekyll Island Convention Center. The 2018 Institute will be held over Memorial Day weekend, from May 24-26, 2018.

We anticipate that the attendee list will continue to grow as it has each year. This year's sponsorship opportunities are begin at \$250 and increase incrementally up to \$7,500. We are also offering sponsorship opportunities for various events, including cocktail receptions and our speakers' dinner. The event sponsorships are offered on a first come, first served basis.

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# Case Law Update

By Vic Valmus

## Alimony/Pleadings

*Sedehi v Chamberlin*, A17A2035 (Feb. 9, 2018)

The parties had dated on and off for eight years prior to their marriage on Sept. 5, 2015. Twenty-two days after their wedding, the parties separated. Chamberlin (wife) continued to live rent free in the husband's family owned condominium for the next eight months. In November of 2015, the parties attended marriage counseling during which the husband told the wife he wanted a divorce. The wife stated she would have never gone through with the marriage if she had known the husband was cheating on her, using drugs and lying to her. In December 2015, the husband filed a petition for divorce alleging that the marriage was irretrievably broken. The wife filed an answer contesting the divorce, seeking an annulment and asserting counterclaims for fraudulent inducement to marry and fraudulent conveyance. Wife claimed she had reasonably relied on the husband's promises to be faithful and stop using drugs when she agreed to marry him, that he fraudulently induced her to marry him, and that she sustained financial and mental health damages. Wife claimed she was entitled to no less than \$400,000 in actual damage as well as punitive damage of at least \$1,000,000 and attorney's fees. After discovery was completed, the case proceeded to a two-day bench trial. Afterwards, the court issued an Order granting the parties' divorce on the grounds that the marriage was irretrievably broken, denied the wife's request for the annulment, denied her fraud claims, provided for equitable division of property and awarded the wife a lump sum alimony award of \$105,000. The basis for the alimony award was the wife had incurred certain expenses and costs and had become accustomed to a certain lifestyle and that the wife required the award for a rehabilitative period to get back on her feet. Husband appealed and the Court of Appeals reverses.

The husband argued the trial court erred because the wife never asserted a claim for alimony in her pleadings, she never moved to amend her pleadings to include such a claim and he had no notice that alimony would be an issue at trial. The husband objected to litigating the issue when it was raised for the first time at trial. The wife's answer to the divorce petition sought an annulment as well as actual punitive damage resulting from fraud and never amended her answer either prior to trial or during trial. During the trial, Husband's counsel objected to certain questions regarding the husband's finances and income saying those matters had nothing to do with the case. Wife's counsel responded that the financial issues are relevant because this is a fraudulent conveyance case. From the time the wife answered the divorce petition to the counsel's closing argument, he never used the word 'alimony'. Therefore, the trial court's alimony award violated husband's due process rights because the wife never expressly asked for such relief, either prior to or during trial and the husband

had no meaningful opportunity to be heard or prepare a defense to the claim.

The wife also argued that the alimony award was authorized because the husband never objected, he was not prejudiced by the admission of evidence at trial, and she was not required to amend her pleadings because the pleadings conformed to the evidence. Pursuant to O.C.G.A. §9-11-15(b), the parties can consent, either explicitly or implicitly to litigate an issue not raised in the pleadings, but this is not satisfied here. This code section only applies to new issues if the new issues are actually litigated with the express or implied consent of both parties. Here, the husband's attorney unequivocally objected to the evidence of this additional claim and the wife never pursued it. Therefore, it cannot be said the claim was tried with his express or implied consent. The evidence that the wife presented to support the fraud claims also supports the alimony award. However, even if that was true, this court has held that when a party does not object to evidence because it is relevant to an issue made by the pleadings, and there is no evidence the party offering such evidence was seeking to amend the pleadings, a non-objecting party can scarcely be held to have given implied consent to the trial of an unpled issue.

The husband also argues that the award was excessive. Here, the duration of the marriage was only about eight months and the wife is currently earning \$90,000 per year and the husband was earning approximately \$72,000 per year. The court found that the wife had become accustomed to a certain lifestyle during the extremely brief marriage. This was the result of the husband's family allowing her to live in the condominium rent-free during the engagement and eight months after the separation. Therefore, even if we agree with the wife that the court was authorized to award alimony, there was no evidence to justify such an award when both the husband and wife were equally self-sufficient and there was no evidence suggesting that she needed any amount of alimony from the husband to support herself.

## Attorney's Fees/Tpo

*Bishop v Goins et al., Bishop et al v Powell et al*, A17A2058, A17A2059 (Dec. 29, 2017)

The Bishops were neighbors with Goins and Powell (Petitioners) and had a contentious relationship. The Petitioners obtained a twelve month Stalking Protective Order in 2014 against the Bishops, who did not appeal. One year later, the Petitioners moved for a three-year extension of the Protective Order. At the hearing, the Petitioners established that the Bishops had violated the twelve-month Order and the trial court entered a three-year Protective Order for which the Bishops did file an appeal. The Petitioners hired an attorney to handle the appeal.



The Court of Appeals concluded that the Petitioners had presented reasonable evidence that the Bishops engaged in continuing stalking after the entry of the twelve-month Protective Order and there was no abuse of discretion extending the Order for three years. After the Court of Appeals affirmed the Orders, the Petitioners filed motions for costs and attorney's fees under O.C.G.A. § 16-5-94(b) (3). The motions expressly sought to recoup attorney's fees expended when the cases were on appeal. The trial court granted the motions and awarded attorney's fees. Bishop appeals and the Court of Appeals affirms.

The Bishops contend the trial court erred by failing to grant their Motion to Dismiss the Petitioner's Motion for Costs and Attorney's Fees. The Court of Appeals affirmed the Stalking Protective Order on Sept. 8, 2016 and the Powell's filed their Motion for costs and fees on October 3, and the Goins filed their motion on Oct. 5, 2016. The remittitur was filed on Oct. 17, 2016, and the Bishops argue that because the Petitioners filed their Motion for Costs and Attorney's Fees before the filing of the remittitur, the motions were not properly before the trial court. Although a trial court may be initially without jurisdiction to entertain a motion that is filed before the trial court is reinvested with jurisdiction by the filing of a remittitur, this does not mean that such a prematurely filed motion may not be considered by the trial court. When a trial court acts on a motion after the filing of the remittitur, it is reasonable to conclude that the trial court adopts that motion as a pending matter. Here, the trial court entered its ruling on the Petitioner's Motion for Costs and Attorney's Fees on May 12, 2017 after it was reinvested with jurisdiction by the filing of the remittitur.

The Bishops also argued O.C.G.A. § 16-5-94(d)(3) does not authorize the award of costs and attorney's fees incurred in connection with appealing the granting of a Stalking Protective Order. Here, the court may grant a protective order or approve a consent agreement to bring about a cessation of conduct constituting stalking. Orders or agreements may award costs and attorney's fees to either party. Nothing in the provision at issue expressly limits the recovery of attorney's fees to those incurred in the trial court litigation. The court also concluded that making appellate fees compensable would further the purpose of the act to deter harassing and intimidating behavior and to protect victims from harm by allowing a stalking victim to defend a protective order on appeal.

## Contempt/Modification

*Borotkanics v Humphrey*, A17A1537 (March 2, 2018)

The parties were divorced in 2012 and pursuant to their Settlement Agreement, Borotkanics (Husband) retained the marital home and other property, and Humphrey ("Wife") agreed to execute a Quit Claim Deed to Husband — who was required to refinance both marital properties in to his own name and remove the Wife's name from the mortgage before February 16, 2013. The Husband never refinanced the properties and the Wife filed a contempt action. After an evidentiary hearing, the court found the Husband

in willful contempt and that he may purge himself by immediately placing the marital property on the market for sale with the price to be determined by a certified real estate broker and that any offer within 5 percent of the asking price will be accepted by Husband. The order further provided that, if there is no offer in the first six months of the listing, the listing price will be reduced by 0 percent. The court also required Husband to pay \$3,613.91 in attorney's fees. The Husband appeals and the Court of Appeals affirms in part, reverses in part and vacates in part.

The Wife argues that because the Husband failed to provide a transcript of the contempt hearing, the trial court must be affirmed. If there were factual issues, then the Court of Appeals must assume that the evidence presented supported the trial court's conclusions. In contrast, if issues on appeal are predominately legal issues, as here, the facts necessary to conduct the *de novo* review of the legal issues are undisputed and are part of the record. The absence of a hearing transcript does not hamper review. The Husband argues that the trial court erred by requiring him to sell the marital home. The trial court has broad discretion to determine whether the Divorce Decree has been violated and has authority to interpret and clarify the decree, but it does not have the power in the contempt proceeding to modify the terms of the agreement. Here, the court's Order to sell the property amounts to an impermissible modification of the Divorce Decree. Even though the sanction for the contempt may seem reasonable, it nevertheless violates this rule. However, it does not mean the trial court is left with no effective means of enforcing the Divorce Decree. The court might order the Husband to pay the wife a significant sum every day until he purges his contempt or the court could incarcerate him until he purges his contempt and indeed the Husband may find the purge conditions imposed by the trial court far less draconian than those imposed by the Order he successfully appealed. The Husband may have no other option but to sell the house, but if that happens, it would be based on the Husband's decision to take that action with the house, rather than the trial court's impermissible modification of the Decree.

## Dormancy

*Holmes-Bracy v Bracy*, S17A1682 (Dec. 11, 2017)

The parties were divorced in 1995 and the Settlement Agreement stated, in pertinent part, that at such time that the husband is no longer obligated to pay child support, then the husband shall pay to the wife fifty percent of his Armed Services Retirement pay per month. This money shall be the property of the wife and husband shall be obligated to pay this sum until death. Husband's child support obligation terminated in June of 2006. However, the husband never paid the wife any amount of his retirement benefits; and, because she was married for less than 10 years, the military informed her they could not pay her directly. The wife took no court action until Feb. 25, 2016, when she filed a Motion for Contempt. The trial court denied the wife's motion finding that although the Divorce

Decree clearly entitles the wife to payments, the trial court cannot enforce those payments because the Decree in its entirety had become dormant pursuant to O.C.G.A. § 9-12-60(A)(1). The trial court held that the retirement benefits became due July 1, 2006, and the judgment went dormant on July 1, 2013. Even though it could have been revived after three years, the wife made no such filing. The court held that the husband clearly and knowingly failed to uphold his obligation but may not hold him in contempt. The wife appeals and the Supreme Court reverses.

The wife's first viable opportunity to enforce the judgement occurred in July 2006. To properly analyze the application of the dormancy statute to the award of military pay, it must first be recognized that the wife is entitled to installment payments and not a lump sum amount. This court has held that the dormancy period does not begin to run until each installment is due and each installment payment is treated as a new and separate judgement. Applying the dormancy statute to installment payments however has not been limited solely to alimony payments and child support. Here, the installments that became due within seven years preceding the recording of the execution are collectable and enforceable and installments that are dormant remain subject to revival pursuant to O.C.G.A. § 9-12-61. Therefore, the trial court's ruling is reversed that any and all installment payments due to the wife cannot be enforced, and the case is remanded to the trial court to properly apply the dormancy statute.

## Fourteen Year Old Election

*Edler v Hedden*, A17A1547 (Feb. 21, 2018)

The parties were divorced in February 2012. Hedden (Mother) was awarded primary physical custody of their children. In December 2015, the Final Divorce Decree was modified so that EE could reside with Edler (Father). In March 2016, the Mother filed a Petition for Change of Custody indicating that EE, age 15, had signed an affidavit electing to return to the physical custody of Mother. The trial court granted the request noting that EE had made her second election within two years of the prior election therefore, her request was valid under O.C.G.A. § 19-9-3(A)(5). Father appeals and the Court of Appeals reverses.

Pursuant to O.C.G.A. § 19-9-3(A)(5), a child who has reached the age of 14 has the right to select that parent with whom he or she desires to live. The statute further provides that the child's selection may only be made once within a period of two years from the date of the previous selection and the best interest of the child standard shall apply. The issue before the court is the proper interpretation of the statute and specifically, the statutory section that provides that a child's selection may only be made once within a period of two years from the date of the previous selection. Mother argues that the court should interpret the statute section to provide that after a child has elected with which parent he or she wants to live, the child may make a different selection once within the two years following the date of the child's original selection. At first glance, this

argument seems meritorious, but such of an interpretation would render the statute meaningless and would result in unlimited selection cycle and each selection by a child would begin a new selection period as soon as the child changes his or her mind thus restarting the running of the two-year period. So as to give effect to all parts of the statute, the most logical interpretation is that the legislature intended for the child's selection to be effective for two years from the date his/her previous selection and since she originally chose to live with the Father in December 2015, she could not change her mind for two years following that date or December 2017. However, a judge is not restricted from changing the custody arrangement for a child where there is a change of material conditions or circumstances in less than two years.

## In the Interest of K.M.

*In the interest of K.M.*, A17A1747 (March 1, 2018)

K.M. was born in 2011 and the father legitimated the child. Later in 2011, K.M.'s grandparents were granted temporary guardianship to the maternal grandparents. In 2016, the mother filed a petition to terminate the temporary guardianship and the grandparents objected and the case was transferred to the juvenile court. A hearing was held and the record showed that in the initial years, the mother went through a period of instability but had maintained contact with K.M. Over the last several years, the mother had made positive changes in her life and did not have a history of drug or alcohol abuse. The biological father testified he supported the termination of the guardianship and return of custody to the mother, with the father having visitation. The court appointed guardian ad litem who filed a written report that stated if the guardianship was terminated, there was a possible threat of emotional and physical harm to K.M. The guardian stated it remains to be seen whether there would be probable cause of likely abuse, neglect or abandonment of the child if the guardianship were terminated. All parties agreed that at some point the custody of K.M. needed to be returned to the mother, but the continuation of the guardianship was recommended and the case should move forward as a dependency proceeding. Following the hearing, the juvenile court entered a one-page Order that contained no findings of facts or conclusions of law, denied the mother's petition and stated it would be in the best interest to continue the temporary guardianship. Mother appeals and the Court of Appeals reverses.

Although the juvenile court's Order did not articulate an evidentiary standard it applied, the record reflects the court's belief that it could continue the guardianship if probable cause existed to believe that K.M. would suffer harm if custody was returned to the mother and probable cause of harm is the wrong legal standard. A juvenile court deciding a petition to terminate a temporary guardianship must engage in a two-step analysis. First, the court must determine whether termination or continuation is in the best interest of the child. Second, if the court finds that termination is in the best interest of the child, then custody

must be returned to the child's parent unless the juvenile court finds probable cause to believe that the child will be abused, neglected or abandoned while in the parental custody. If the juvenile court continues a temporary guardianship over the objection of the parents, the court is required to retain jurisdiction and to have the case proceed as a dependency matter. Here, instead of applying the clear and convincing evidence standard to determine the best interest of the child, the juvenile court erroneously applied the probable cause standard which is to be used in determining whether a child whose guardianship has been terminated should be returned to his parents. In addition, the burden of satisfying the stringent standard rests on the third party who is seeking to obtain or maintain custody of the child. Therefore, to terminate a temporary guardianship, a juvenile court must determine whether there is clear and convincing evidence that a termination would cause a child either physical harm or significant long term emotional harm, and in making the determination, the court must bear in mind that the burden of coming forward with clear and convincing evidence is on the party opposing the termination. Here, the juvenile court erred when it applied the probable cause of harm standard to determine whether termination was in the best interest of K.M.

The mother also contends that even when the correct legal standard is applied, the grandparents failed to show by clear and convincing evidence that it was in the best interest of K.M. to continue temporary guardianship. Here, the current record contains no clear and convincing evidence that termination of the guardianship would cause K.M. physical or long-term emotional harm. The court recognizes however, there has been a year since the juvenile court heard the case and if the grandparents continued to oppose the termination on remand, the juvenile court can consider any additional evidence or more recent evidence that may be available regarding the best interest of K.M.

## Mediation/Attorney's Fees

*Gallemore v White*, S17A1464 (March 5, 2018)

The parties divorced in 2009, and as part of the parties' Settlement Agreement, they agreed to mediate any dispute related to child custody within thirty days of either party's written request for mediation and agreed that legal action in a court of law would ensue only after the failure to reach a mediated agreement. Afterward, the wife filed a contempt petition for non-payment of child support in December of 2014. The petition was granted in March 2015, but it was set aside when Gallemore (Former Husband) filed a Bankruptcy Petition which stayed the Contempt. Once the bankruptcy stay was lifted, an evidentiary hearing was scheduled. One day prior to the hearing, Former Husband served on Former Wife's attorney a demand for mediation and filed a Petition for Modification of Visitation and Child Support. After the hearing, the trial court found Former Husband in willful contempt and awarded Former Wife unpaid child support in the amount of \$81,298 and awarded attorney's fees. Former Husband

appeals and the Supreme Court affirms in part and vacate and remands in part.

Former Husband asserts the trial court erred by granting Former Wife's Motion for Contempt without first requiring mediation pursuant to the Settlement Agreement. While the record contains a copy of the mediation demand letter, it did not reflect that Former Husband sought a stay of the hearing until such time as mediation could be conducted or moved to dismiss the contempt proceeding. In addition, Former Wife testified that she attempted to find a private mediator to work with the parties to attempt to resolve the dispute, but Former Husband refused to participate. Here, it is Former Husband's duty to have the transcript prepared, so that it can be included in the record. Because the Former Husband failed to attach the transcript of the hearing, it is not possible for this court to determine whether the issue is properly preserved. Therefore, in the absence of a transcript of the hearing, we must presume the evidence supports the trial court's findings.

The Former Husband also stated the trial court erred by awarding attorney's fees. The trial court awarded attorney's fees to the Former Wife in the amount of \$11,200 pursuant to O.C.G.A. § 9-15-14(b). The order contained no findings of facts necessary to support an award. Therefore, the award of attorney's fees is vacated and remanded.

## UCCJEA

*Bowman v Bowman*, A17A2082 (March 6, 2018)

The parties were married in Georgia in 2009 and their son was born in Georgia in 2011. In 2012, the family moved to Michigan and a daughter was born there in 2013. For more than a year, the family moved around in Michigan and then moved to Wisconsin for the husband's job and remained there for a year and then moved to Indiana. At that time, the mother and the children returned to Michigan in October 2015. In November of 2015, the parties brought the children to Georgia to visit for the Thanksgiving holiday and agreed that the parties would return to the mid-west after the holiday period. However, after the husband left, the wife filed an emergency *ex parte* motion in Georgia for custody of the children. In December of 2015, the trial court granted temporary custody to the mother. In January of 2016, the court held a hearing to address the issues of jurisdiction. Shortly before that, the husband had filed for divorce in Michigan. In February of 2016, Michigan court held a hearing to determine which state was proper jurisdiction for the custody dispute. The Michigan court concluded there was no basis for Michigan to exercise jurisdiction. That decision was appealed in October of 2016 and the Michigan Court of Appeals issued a decision upholding the determination, but remanded it because the Michigan trial court failed to communicate with the Georgia court before reaching its decision. Both courts confirmed and agreed that the proper jurisdiction was Georgia. There is a stipulation that neither Michigan or Georgia was the home state and thereafter the Georgia court made a blanket statement that the children had a significant connection with Georgia that warranted the

exercise of jurisdiction. The husband filed an interlocutory appeal and the Court of Appeals reverses.

The husband argues the trial court erred by exercising emergency jurisdiction when there was no basis for such relief. A court may exercise emergency jurisdiction when the child is present in the state and the child has been abandoned or there is an emergency to protect the child because the child is subject to or threatened with mistreatment or abuse. In addition, the trial court has jurisdiction to make an initial custody determination if certain jurisdictional requirements are met, even if there was no basis for emergency jurisdiction under O.C.G.A. § 19-9-64. The trial court properly considered whether it had jurisdiction under § 19-9-64. Therefore, any error in considering the emergency custody motion is rendered moot by the trial court's subsequent ruling on the jurisdictional question.

The husband also argues that the court did not consider the mother's alleged misconduct in evoking emergency jurisdiction. The trial court did not find the mother has engaged in any misconduct. Furthermore, even if there had been some misconduct, the UCCJEA does not require a court to decline to exercise jurisdiction on finding misconduct.

The husband also argues the trial court erred that Georgia has more significant connections than Michigan. Here, neither state involved qualifies as a home state, but the court may nevertheless obtain jurisdiction under §19-9-61(a). In determining whether these requirements are met, the trial court considers the situation at the time the initial custody application is filed. Conduct occurring after the petition is filed does not serve to create a substantial connection within a state. Viewing only the connections with Georgia that existed at the time the custody petition was filed, the trial court erred in exercising jurisdiction. Although the wife grew up in Georgia and her family continued to live here, and the wife had returned to Georgia for less than thirty days before filing the Petition for Custody, the only ties between the state of Georgia and the children at the time of filing were that: one of the children was born in Georgia, the grandparents and other family lived in Georgia, and the children had been to Georgia to visit their grandparents in the past. The children's mere presence in Georgia along with their mother's is not sufficient to establish a significant connection required for the courts of this state to exercise jurisdiction. Indeed, exercising jurisdiction here would tend to reward the very type of forum shopping the statute was designed to prevent.

The trial court also concluded that it retained jurisdiction because the Michigan court declined to exercise jurisdiction. However, at the time the Petition for Custody was filed, the Georgia court was faced with the jurisdictional question and Michigan had not yet declined to exercise jurisdiction. Therefore, we cannot accept jurisdiction under the circular reasoning that the Michigan court declined to exercise jurisdiction when the Michigan court did so based upon our state's decision to exercise

jurisdiction. This type of bootstrapping is exactly the type of behavior the UCCJEA is intended to prevent.

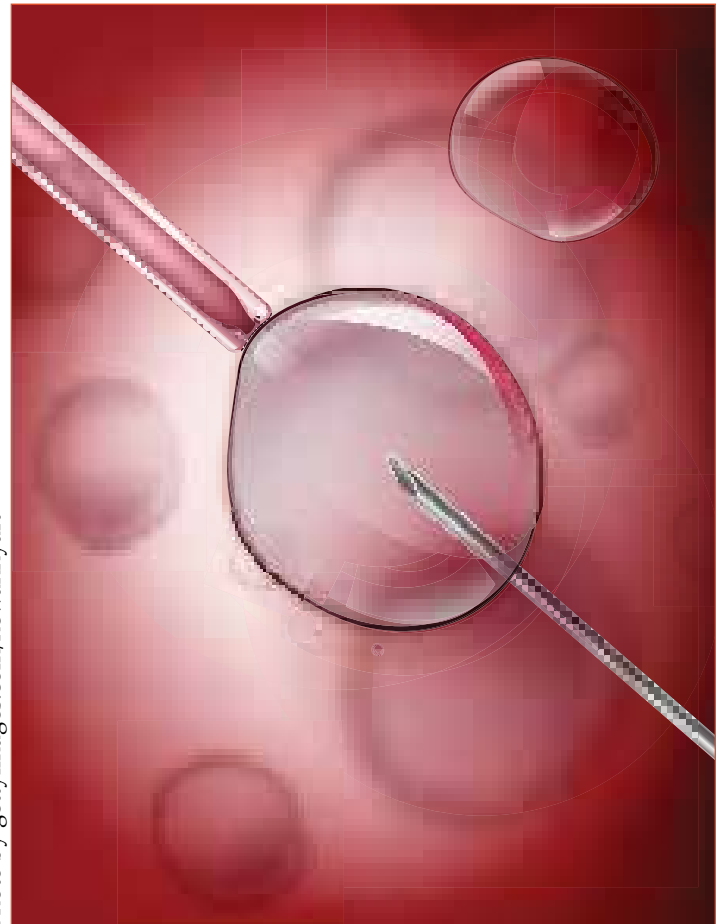


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# Child Support Worksheet Helpline

## *A Call for Volunteers*

a service provided by the Family Law Section of the State Bar of Georgia and the Georgia Legal Services Program

*Flex your child support worksheet prowess to assist income eligible, pro se Georgians with the completion and filing of child support worksheets!*

- Convenient and easy way to serve the community
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  - Contact caller(s) from the comfort of your office or home on your schedule
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  - You may volunteer for as many cases as you would like to take
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3. Office Address: \_\_\_\_\_
4. Phone: \_\_\_\_\_
5. Email: \_\_\_\_\_

6. I would like to assist with no more than \_\_\_\_ callers per month.

7. I understand that by signing up for this volunteer position, I am certifying that I have a working knowledge of Child Support Worksheets in the State of Georgia and how to complete them based on information provided to me by a pro se litigant. I also certify that I am a member in good standing with the State Bar of Georgia.

\_\_\_\_\_  
Number \_\_\_\_\_ Interested Volunteer Georgia Bar

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