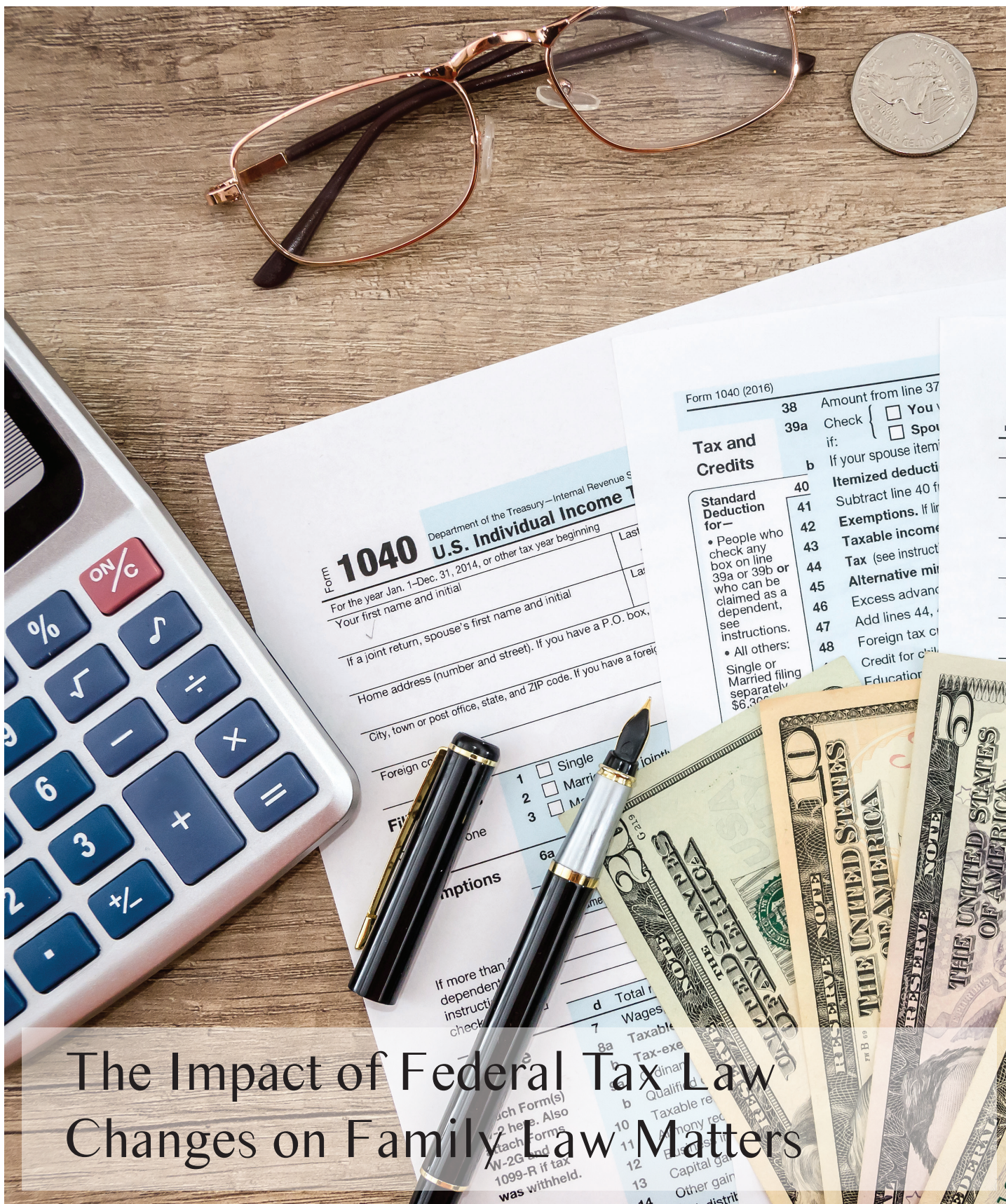


The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia – Winter 2019

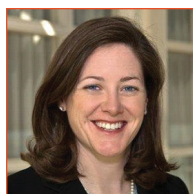


The Impact of Federal Tax Law Changes on Family Law Matters

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Editors' Corner

By Leigh F. Cummings
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This issue of the Family Law Review is full of instructive articles on a broad range of subjects related to family law and also showcases topics and photos from the exceptional 2018 Family Law Institute. The article regarding the impact of the 2018

changes to the federal tax laws on family law matters not only explains the changes but also provides an insightful analysis about the practical effect on domestic relations matters. The article about the Military Survivor Benefit Plan demystifies what can be a very complicated process of properly awarding a party an interest in a survivor annuity associated with military retired pay. I believe that you will find the article regarding Georgia's new Adoption Code to be a very useful reference. This edition of the Family Law Review includes two very helpful articles concerning custody issues for non-married parents—one of which is focused on same-sex parents. The history and evolution of the burgeoning Diversity Committee of the Family Law Section of the State Bar is highlighted in this edition. The piece on trusts and equitable division analyzes the *Gibson* decision and its impact on divorce cases when a party has transferred assets into a trust. The article regarding personal property appraisals provides helpful advice for attorneys considering hiring an appraiser. 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 sincerely appreciated! *FLR*

Editor Emeritus

By Randy Kessler
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2019? Wow, almost two decades into the century. It's great to see our section thriving under great leadership. In today's divisive political environment, we are all still doing what we can to keep families from being worse off, to ease their transition to the

next phase of their life, and I remain honored to be doing that together with all of you. Congrats again to our section leaders, speakers and members for making the Family Law Section a great place to share ideas and learn from each other. See you all at Amelia Island in May. *FLR*

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From the Chair

By Scot Kraeuter
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I am honored to serve as this year's Section Chair. I would like to take a moment and commend Gary Graham's very successful year as our Section Chair for the 2017-2018 Bar Year. Gary followed in the tradition of all of the Section's past chairs and capped his year as Section Chair by winning Section of the Year.

I am very thankful for all of the hard work and effort that all of the speakers and judges put in to make the 2018 Family Law Institute so successful. I am also very grateful for all of Karine Burney's extraordinary work raising sponsorship funds for the Family Law Institute.

Ivory Brown continues to do a wonderful job leading the section's diversity committee. This year, for the first time, the section held a diversity luncheon at the Family Law Institute which was extremely well attended and successful. This will be an annual event at future Family Law Institutes.

Hannibal Heredia heads up our legislative committee which is currently considering proposals for new

legislation. Any new legislation or changes to existing legislation recommended by our section must be approved by the State Bar's Advisory committee on Legislation and the Board of Governors. If you have any suggestions for new legislation please contact Hannibal Heredia.

The executive committee continues to offer free webinars focused on current family law topics and how to improve your law practice. Stay tuned for more details via e-mail blast.

The section sponsored a very well attended Nuts and Bolts of Family Law CLE seminar in Savannah, Georgia, in August with over 100 in attendance. Kyla Lines put together a great seminar and will chair another fabulous Nuts and Bolts seminar in Atlanta in September.

Please feel free to write, e-mail or call me with your concerns or suggestions that you have for the 2018-2019 Bar Year. I look forward to seeing many of you at the Family Law Section seminars, Mid-year meeting and at the Family Law Institute next May at Amelia Island. *FLR*

2018-19 Editorial Board for *The Family Law Review*

- Leigh F. Cummings, Editor
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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*.

The Impact of Federal Tax Law Changes on Family Law Matters

By Dan Branch, CPA/ABV, ASA

The Tax Law Changed?

Uh, yes it did! Hopefully, by now, you have noticed that there was a significant change to the federal tax law at the end of 2017. In fact, right before the end of the year, on Dec. 22, 2017, Congress enacted sweeping tax changes with the passing of the bill known as the Tax Cuts and Jobs Act ("TCJA"). TCJA went into effect Jan. 1, 2018.

Impact on Family Law Matters

The changes to the federal tax law will impact family law matters both in (1) how you will structure tax-related issues in settlement discussions (e.g., alimony) and (2) how much your clients will pay in taxes going forward. In this article, I will focus on the personal tax changes that will impact your cases. Changes to business taxes, which can also impact your cases, are not covered in this article but will be covered in a future article.

Tax-related Issues – Alimony

For the tax-related components, the most significant change is in the treatment of alimony. Alimony, as treated under the old tax law, was deductible by the payer (a benefit to the payer) and the recipient paid income tax on it. Though the recipient had to pay income tax on the alimony (not an ideal prospect for the recipient), the tax deduction to the payer typically helped increase the amount of alimony the payer was willing to pay, which provided a benefit to the recipient (and that offset the fact he or she had to pay taxes on it). In the context of settlement negotiations, the impact of the tax benefit to the payer has been an important piece that typically helped the parties move toward a mutually agreeable settlement. The tax benefit to the payer was considered a "sweetener" that helped make the payer willing to pay more in alimony.



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With the changes to the TCJA, for agreements entered into after Dec. 31, 2018, alimony will not be deductible by the payer and taxes will not be paid on it by the recipient. This is a permanent change.

An example to demonstrate the impact is helpful. Under the old tax law, the payer is typically at a higher tax rate while the receiver was typically at a lower one. For this example, we'll assume the payer was at a 40 percent tax rate and the recipient was at a 25 percent rate. In the real world, payers are usually limited in the amount of alimony they can afford to pay. In our example, we are assuming that the payer can afford to pay a net of \$60,000 in alimony.

As shown in Figure 1, due to the advantageous impact of the tax deduction for the payer, the payer can "pay" gross alimony of \$100,000 per year. The payer would receive \$40,000 in tax deductions while the recipient would have to pay \$25,000 in taxes. Overall, the payer would pay a net of \$60,000 in alimony (the amount that the payer can afford to pay) while the recipient would receive a net of \$75,000 in alimony.

Figure 1

	OLD Tax Treatment	
	Receiver	Payer
Tax Rate	25%	40%
Alimony Amount	\$100,000	\$(100,000)
Taxes	(25,000)	40,000
Net of Taxes	75,000	(60,000)
Gross Alimony	\$100,000	\$(100,000)

In essence, under the old tax law, due to the typically different tax brackets of the payer and the receiver, the U.S. government was subsidizing some of the alimony burden, which ultimately was beneficial to the couple overall. In this example, the receiver is getting \$15,000 more than the payer is paying; this was the "subsidy" provided by Uncle Sam.

One could suppose that with the change to the treatment of alimony (i.e., that the payer will not get a deduction and the receiver will not pay taxes on amounts received) this would be a boon to the receiver. As shown in Figure 2, if everything in our example stayed the same except for the taxes paid or saved, that would be true. In this case, the recipient actually "gains" \$25,000 compared to the treatment in Figure 1, as they would not have to

Figure 2

	NEW Tax Treatment (No Change to Alimony)	
	Receiver	Payer
Tax Rate	0%	0%
Alimony Amount	\$100,000	\$(100,000)
Taxes	-	-
Net of Taxes	100,000	(100,000)
<i>Increase/Decrease Compared to Old Tax Treatment</i>	\$100,000	\$(100,000)
Gross Alimony	\$100,000	\$(100,000)

pay any taxes on the alimony received. The payer, with the loss of the tax deduction, would ultimately pay the total \$100,000 of alimony, far beyond what the payer can realistically pay.

As already mentioned, in the real world, payers are usually limited in the amount of alimony they can afford to pay. As such, the more likely scenario is presented in Figure 3, whereby the payer can only afford to pay \$60,000 in alimony. Without the tax deduction, the payer is on the hook for the total \$60,000. The receiver, even though they do not pay any tax on the amount received, is receiving \$15,000 less than they received under the old tax treatment (Figure 1).

With the loss of the carrot (i.e., the tax deduction for the payer), will we see more cases turn to the Court to resolve alimony issues? Some experts believe it will.

Additionally, since contributions to retirement accounts are from taxed income (and since the alimony to the receiver will not be taxed), alimony receivers will likely contribute less to retirement accounts after the new alimony treatment is in effect, especially if this is their sole source of income.

Let's get technical for a moment about the specifics of the timing of the alimony changes.¹ Per the TCJA, the changes to alimony shall apply to:

Figure 3

	NEW Tax Treatment (More Likely?)	
	Receiver	Payer
Tax Rate	0%	0%
Alimony Amount	\$60,000	\$(60,000)
Taxes	-	-
Net of Taxes	60,000	(60,000)
<i>Increase/Decrease Compared to Old Tax Treatment</i>	15,000	0
Gross Alimony	\$60,000	\$(60,000)

- Any divorce or separation instrument executed after Dec. 31, 2018, and
- Any divorce or separation instrument executed on or before Dec. 31, 2018, and modified after such date if the modification expressly provides that the amendments made by the TCJA apply to such modification.

Regarding timing and treatment of alimony, a helpful breakout is as follows:

- Current alimony payments—no change to tax treatment (i.e., tax deduction will continue to be taken by the payer and the receiver will continue to pay income tax).
- If agreement is executed before midnight Dec. 31, 2018, the tax treatment is the same as it is now (i.e., the tax deduction can be taken by the payer and the receiver will pay income tax). And,
 - o If such an agreement is later modified after Dec. 31, 2018, the tax treatment is the same as it is now (i.e., tax deduction can be taken by the payer and the receiver will pay income tax) if the modification does not provide that the amendments made by the TCJA apply to such modification.
 - o If such an agreement is later modified after Dec. 31, 2018, the tax treatment will be under TCJA (i.e., no deduction is allowed by the payer and the receiver will not pay income taxes on amounts received) if the modification expressly provides that the amendments made by the TCJA apply to such modification.
- If agreement is executed after Dec. 31, 2018, no deduction is allowed by the payer and the receiver will not pay income taxes on amounts received.

Let's again get technical, but this time about the definition of "executed." Though this may be a legal issue, the tax code does provide some guidance. Relating to the effective date of the change, the TCJA includes language about "any divorce or separation instrument executed..." (emphasis added) Let's first define "divorce or separation instrument." Per § 71(b)(2) of the Internal Revenue Code of 1986, the definition pointed to in the TCJA,² this means:

- A decree of divorce or separate maintenance or a written instrument incident to such a decree,
- A written separation agreement, or
- A decree requiring a spouse to make support/maintenance payments to the other spouse.

Though I do not claim to be a legal expert, in my layman's reading, the first and third bullets appear to relate to decrees from the Court, i.e., a final judgment or post-divorce modification order. But does that mean that the final decree has to be entered into by the effective date of Dec. 31, 2018? What if the decree is technically issued after the effective date of Dec. 31, 2018, but all the details have been determined (i.e., the decree is just waiting final signature of the judge which doesn't happen until Jan. 2, 2019)?

Again from a layman's perspective, for the second bullet, "a written separation agreement" would appear to encompass settlement agreements executed by the parties. Could a prenuptial agreement be considered "a written separation agreement" and bind the couple to the traditional treatment of alimony even if they divorce after Dec. 31, 2018? Even if this makes sense in a legal context, would the IRS, who will ultimately be reviewing both party's treatment of alimony, consider that as meeting the timing deadline? Going down that road may be problematic and costly for the taxpayers who file taxes long after the divorce is finalized.

Another question develops—what happens to temporary orders providing alimony that are entered into prior to Dec. 31, 2018? Will the alimony tax deduction for the payer be preserved after Dec. 31, 2018? Likely, the tax treatment will continue in the traditional manner under the temporary order since it would have been issued before Dec. 31, 2018 (though there is no guarantee of how the IRS will treat it!). It is uncertain whether modifications

to temporary orders (i.e., by a final order or agreement) will allow for the traditional tax treatment for alimony even after Dec. 31, 2018; therefore, attorneys may want to consider including language that covers situations where the traditional tax treatment is disallowed.

Another impact from the change to the tax treatment of alimony relates to the deduction for legal fees. Because alimony (after Dec. 31, 2018) will no longer be taxable to the recipient, the payer will likely not be able to deduct legal fees related to obtaining alimony (i.e., the portion of legal fees related to that effort).

Tax-related Issues—Personal and Dependency Exemption

The personal and dependency exemptions would have been \$4,150 for each person for 2018, which would have been worth about \$1,245 to someone with an effective rate of 30 percent. These exemptions are typically negotiated as part of settlement discussions, as they can have a real impact on the taxes each parent owes. However, under the TCJA, the personal and dependency exemptions were reduced to \$0.⁴ Unlike the alimony change, this change is not permanent and is set to sunset in 2025 (meaning that if Congress does not act to extend the TCJA, the personal and dependency exemptions will revert to their treatment under the old tax law).

As such, parties with young children should consider allocating dependency exemptions in agreements with included qualifying language (e.g., "the father gets the

exemption, if the exemption is available"). Another reason to consider allocating dependency exemptions—the child tax credit, which was increased from \$1,000 to \$2,000 per child (and is actually more "valuable" when it comes to taxes because it is applied directly against taxes), can still be allocated to the parent with the dependency exemption. Lastly, including such qualifying language even if children are not young may be a good idea because the TCJA could be repealed at any time (though this is probably unlikely).

And what happens to existing agreements which include dependency exemption allocations (e.g., "father gets dependency exemption for two children every year")? Especially if those tax benefits were negotiated and the agreed-to-allocations were a trade-off for other concessions. Would the fact that the dependency exemptions are worth \$0 (at least through 2025) be grounds for modification?

Taxes Going Forward

If you consider the permanent change to alimony to be bad news, rest assured that there is good news in the TCJA, much of which will impact taxpayers directly—though it should be noted that the changes that are "good news" are all temporary and scheduled to sunset after 2025. For one, generally tax rates for individuals decreased, whether filing as an individual or jointly.⁵ That means less of your client's money will be going toward income taxes.

Other good changes include:

- An increase in the standard deductions, which nearly doubled (from \$6,350 to \$12,000 for individuals; from \$9,350 to \$18,000 for head of household).
- The child tax credit increased to \$2,000 per child (generally under age 17 at the end of the year). Plus, an additional \$500 tax credit is available for other dependents (e.g., dependent children age 17 and older). The income phase-outs related to the child tax credit were increased to \$200,000 for individuals and \$400,000 for married or joint filers (a sizable increase), which will allow more individuals and married couples to take advantage of the credit.
- The alternative minimum tax (AMT) remains in the TCJA but the exemption was increased, which should result in fewer taxpayers owing AMT.
- Under TCJA, the AGI limitation was increased from 50 percent to 60 percent for charitable contributions to qualified charities.



- The popular 529 college-related accounts became more flexible. Under TCJA, distributions of up to \$10,000 per student are allowed for tuition at public, private, or religious elementary or secondary schools. Additionally, TCJA also changed the definition of higher education expenses so that it now includes certain expenses related to homeschooling.
- The threshold for medical expense deduction was reduced, but only for 2018.

However, there are other changes to the tax law that may offset some of the good news items mentioned above. One highly publicized change was the introduction of a limit on deductions for state and local taxes, which are now capped at an aggregate total of \$10,000 (this includes state/local income or sales taxes and local property taxes). Taxpayers with high property taxes will see this impact them the hardest.

Other not-so-good changes include:

- Mortgage interest on primary residence was limited to interest on up to \$750,000 of the mortgaged amount (previously at \$1 million)—this will likely only impact very high net worth individuals with very large mortgages.
- Interest on home equity lines of credit is no longer deductible, which may limit your client's plans to use such debt going forward.
- Job expenses and miscellaneous deductions, which had previously been subject to 2 percent AGI limitation, were eliminated.

Summing it Up

The federal tax law changes enacted in the TCJA should have you thinking how those changes will impact your settlement discussions and your client's future.⁶

Understanding the tax changes that will impact your clients going forward after your engagement concludes will allow you to best prepare them for the road ahead. *FLR*



Dan Branch is a partner with IAG Forensics & Valuation. He specializes in all aspects of forensic accounting for family law matters, including business valuation, and has over fifteen years experience. Prior to his work in forensic accounting, Dan was an officer in the U.S. Navy. You can learn more about Dan's background and IAG by visiting www.iagforensics.com. Feel free to contact him with any questions about the tax law changes. Dan@IAGForensics.com

Endnotes

- 1 The specific language of §11051 (c) of the TCJA which relates to the effective date states that the change "shall apply to:
 1. any divorce or separation instrument (as defined in section 71(b)(2) of the Internal Revenue Code of 1986 as in effect before the date of the enactment of this Act) executed after Dec. 31, 2018, and
 2. any divorce or separation instrument (as so defined) executed on or before such date and modified after such date if the modification expressly provides that the amendments made by this section apply to such modification."
- 2 Note, the definition in the TCJA has not changed from that presented in §71(b)(2) of the 1986 Code; however, the location of the definition did change to §121(d)(3)(C) under the TCJA.
- 3 This is based on the assumption that a signed, final written separation agreement between them suffices as meeting the requirement of having an executed divorce or separation agreement.
- 4 Note, the exemptions are not technically eliminated in the law; however, making them \$0 effectively eliminates them.
- 5 Note, the actual change depends on the income bracket of the individual. For instance, an individual making \$150,000 will see a tax rate decrease of 4 percent. While an individual making \$175,000 will see a tax rate increase of 4 percent. However, overall, rates have decreased about 2 percent.
- 6 It should be noted that several changes in the TCJA were not covered in this article (e.g., changes related to the qualified business income tax deduction for pass-through entities, corporate tax rates, estate and gift issues, etc.). These changes may impact other aspects of your client's case and the diligent attorney will familiarize themselves with those changes as well.

Navigating Custody Issues for Unmarried Parents

By Michelle Jordan

According to the CDC's National Center for Health Statistics, 44.9 percent of children born in Georgia are born to unmarried parents.¹ Married parents have equal rights to children of the marriage and if they separate, a divorce or separate maintenance order will specify custody rights for the parents. Unmarried parents who are navigating custody issues may encounter various unexpected legal complications. This article provides some strategies for addressing the issues which may arise.

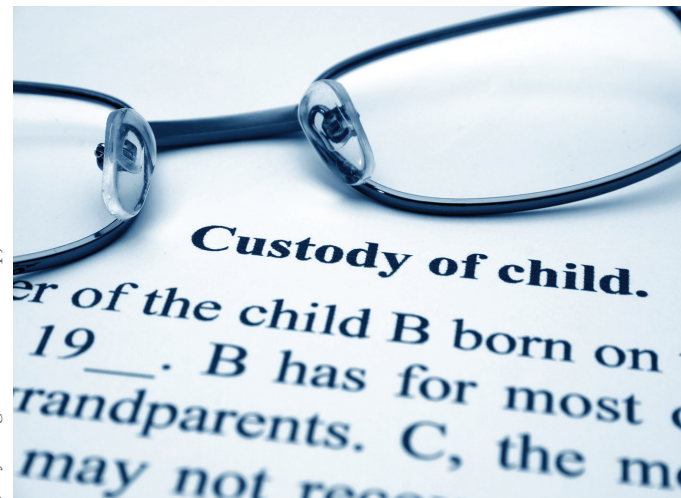
Under Georgia law, if a child is born outside of marriage, the mother has sole legal and physical custody rights to the child. She exercises all parental power and is entitled to custody against the biological father (unless there is a court order to the contrary).² Only the mother of a child born out of wedlock is entitled to custody of the child, unless the father legitimates the child as provided in O.C.G.A. § 19-7-22. Otherwise, the mother may exercise all parental power over the child.³ This is true even if the father is listed on the child's birth certificate or has a court order for child support through the Georgia DHS Department of Child Support Services.

Birth Certificate Issues

A child of unmarried parents will have only the mother's name listed on the birth certificate unless the father and mother consent in writing to adding the father's name.⁴ No paternity testing is required to add a father to the birth certificate. If the father is not present at the birth of the child he can add his name to the birth certificate with the mother's consent through the Georgia State Office of Vital Records. Changes to the birth certificate may also be done in a legitimation petition, a complaint to establish paternity or a petition to amend a birth certificate.

Birth Certificate Amendment

If paternity of a child is determined by a court, the name of the father and the surname of the child shall be entered on the certificate of birth in accordance with the finding and order of the court.⁵ If no father is listed on a birth certificate, the Georgia Department of Vital Records can amend a birth certificate if there is a court order for legitimation or if there is a properly executed acknowledgment of paternity.⁶ If the incorrect father is listed on the birth certificate of the child, the birth certificate may be corrected via a petition to amend the birth certificate or a petition for legitimation by the biological father or by including a claim for birth certificate amendment in another appropriate pending action.



Passports and Travel

Despite Georgia's clear law providing that the mother has sole custody rights, a mother of a child born out of wedlock may have difficulties with some issues relating to her rights to the child when she is dealing with entities outside of Georgia.

For example, a mother who needs to obtain a passport for her child may encounter difficulties obtaining one if the father's name is listed on the child's birth certificate. In some cases, the passport office may refuse to issue a passport without the biological father's written consent. If that consent cannot be obtained, an administrative option is available via the U.S. Department of State Form DS-5525 STATEMENT OF EXIGENT/SPECIAL FAMILY CIRCUMSTANCES FOR ISSUANCE OF A U.S. PASSPORT TO A MINOR UNDER AGE 16. If this form does not suffice, the mother can seek a court order declaring her sole custody rights including the right to obtain a passport without the consent of the other parent. This can be done in a Petition for Declaration of Custody. Under Georgia law, a court can issue a declaratory judgment even if other remedies are available to the party.⁷ If the absent father's location is unknown, the order can be obtained after service by publication.

Another issue may arise when sending a child out of state for a visit with another parent. To avoid a situation where the other parent may refuse to return the child, the mother in Georgia may want to consider obtaining an order for custody in Georgia prior to sending the child out of state. If the child is being withheld and there is no order in place, the mother can file a custody action in Georgia but should do so before the child has been voluntarily gone from the state for more than six months in order

to preserve Georgia's home state jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).⁸ The mother may want to file a Petition to Establish Custody or a Petition for Declaration of Custody.

Rights of Surviving Parent

Upon the death of either parent, the survivor is entitled to custody of the child; provided, however, that the judge, upon petition, may exercise discretion as to the custody of the child, looking solely to the child's best interest and welfare.⁹ Therefore, in the absence of a court order to the contrary, a surviving mother or father automatically has custody of the child. If the mother dies, a father who has not legitimated the child can file a petition for legitimation to clarify his rights as a surviving parent.¹⁰

Legitimation Practice and Procedures

An unwed father must "legitimate" his child in order to get legal rights to the child.¹¹ Legitimation recognizes the biological father as the child's legal, in addition to biological, father. A father can legitimate by filing a petition for legitimation in superior court. The venue for legitimation is in the mother's or legal custodian's county of residence if the mother or legal custodian lives in Georgia.¹² If the mother or other party having legal custody or guardianship of the child resides outside this state or cannot, after due diligence, be found within this state, the petition may be filed in the county of the biological father's residence or the county of the child's residence. If a petition for the adoption of the child is pending, the biological father shall file the petition for legitimation in the county in which the adoption petition is filed.¹³

Legitimations must be done by petition in superior court. In some situations a legitimation may also be filed in juvenile court if there is a dependency action pending.¹⁴ A father may file for legitimation and also address issues of custody or visitation at the same time. O.C.G.A. § 19-7-22 (g) states that "A legitimation petition may also include claims for visitation, parenting time, or custody. If such claims are raised in the legitimation action, the court may order, in addition to legitimation, visitation, parenting time, or custody based on the best interests of the child standard. In a case involving allegations of family violence, the provisions O.C.G.A. § 19-9-3(4)(a) relating to protection of victims of violence shall apply.¹⁵ The legitimation can also include a request to change the child's last name to be the same as that of the father.¹⁶

O.C.G.A. § 19-7-22(c) provides that upon the presentation and filing of the petition, the court may pass an order declaring the father's relationship with the child to be legitimate, and that the father and child shall be capable of inheriting from each other in the same manner as if born in lawful wedlock and specifying the name by which the child shall be known. A petition for legitimation will also involve an adjudication of child support. O.C.G.A. § 19-7-22. A superior court shall, after notice and hearing, enter an order establishing the obligation to support a child as provided under Code Section 19-6-15.¹⁷

Repeal of Administrative Legitimation

Previously, between July 2005, and June 2016, a father could also legitimate a child by signing a DHS Paternity and Legitimation form. Former O.C.G.A. § 19-7-21.1. Under that prior law, a mother needed to consent and sign this form as well. If this form was signed by both parents, the child would be legitimated; however, the father would still not have legal or physical custody rights to the child. He would have to get a separate court order for visitation or custody. The prior O.C.G.A. § 19-7-21.1 (e) stated that voluntary acknowledgment of legitimation shall not authorize the father to receive custody or visitation until there is a judicial determination of custody or visitation. However, the administrative legitimation provision has been repealed as of June 2016. See O.C.G.A. § 19-7-21.1

If a father has already administratively legitimated the child under the prior law but does not have a custody order, he can file a Petition for Custody and/or Visitation. However, some parents are unsure of whether they executed an administrative legitimation and may often not have a copy of anything other than the birth certificate. To be sure that the father's rights have been addressed it is often best to file a petition for judicial legitimation in conjunction with the claim for custody or visitation.

Delegitimation

A man can be recognized as the "legal" father of a child in the following ways: adoption of the child, O.C.G.A. § 19-7-22(a)(2)(A); marriage to the mother of the child at the time of conception or birth, O.C.G.A. § 19-7-22(a)(2)(B), see *Baker v. Baker*, 276 Ga. 778, 582 S.E. 2d 102 (2003); marriage to the mother after the birth of the child and acknowledgment of the child as his, O.C.G.A. § 19-7-22(a)(2)(C); or obtaining a court order in a petition for legitimation, O.C.G.A. § 19-7-22(a)(2)(D). A putative father is a person who is believed to be the father of a child or alleges to be the father of the child but has not been established as the biological father via paternity testing or acknowledgment of paternity.

A child born during a marriage is generally presumed to be the child of the husband and the husband is therefore officially considered to be the legal father.¹⁸ If the child is not actually the biological child of the husband, it is possible for the husband to be a legal father although he is not the biological father. Similarly, if a man has legitimated a child administratively, under the prior law, or via a court proceeding, and the child is not his biological child, he will be the legal father although not the biological father.

If a biological father wants to establish his parental rights against a legal father, he would need to file a petition for legitimation against both the mother and the legal father.¹⁹ If successful, such an action would terminate the parental rights of the legal father. However, the biological father will need to show more than a positive paternity test to obtain a legitimation order. Under *Davis v. LeBrec*, the court will consider (1) whether the biological father has lost his opportunity interest by waiting too long to pursue the issue and (2) whether it is in the best interest of the child

to terminate the existing legal relationship and substitute a new one.²⁰

In *Davis v. LeBrec*, the Court ruled that the biological father was not automatically entitled to legitimate the child and that the decision regarding the termination of legal father's status should be governed by the best interests of the child standard. The Court ruled that when a biological father is not diligent to avail himself of his opportunity interest, he does not necessarily lose his opportunity interest, but the test as to who will be the legal father will be based on the best interests of the child and not on the biological father's fitness.²¹

Previously, the Supreme Court of Georgia, in *Brine v. Shipp*, held that superior courts did not have subject matter jurisdiction to address the termination of a legal father's rights and such cases had to be transferred to juvenile court for an adjudication of the termination of the legal father's parental rights.²² However, in 2013, the Official Code of Georgia was amended, to allow superior courts the jurisdiction to terminate parental rights in actions for divorce and legitimation.²³ Under that section, a parental power may be lost by "...[a] superior court order terminating parental rights of the legal father or the biological father who is not the legal father of the child in a petition for legitimation, a petition to establish paternity, a divorce proceeding, or a custody proceeding pursuant to this chapter or Chapter 5, 8, or 9 of this title, provided that such termination is in the best interest of such child; and provided, further, that this paragraph shall not apply to such termination when a child has been adopted or is conceived by artificial insemination as set forth in Code Section 19-7-21 or when an embryo is adopted as set forth in Article 2 of Chapter 8 of this title."

Setting Aside Paternity and Terminating Child Support

If a purported father discovers he is not actually the biological father and wants to terminate his legal rights and child support obligation, he can file a Motion to Set Aside Paternity under O.C.G.A. § 19-7-54. In that motion he can ask for termination of an existing child support order. The petitioner will need to show that after the entry of the paternity judgment, newly discovered evidence came to light that caused him to question his paternity of the child and that within the past ninety days, genetic testing has been done and that the results from the genetic testing show that there is a zero percent probability that he is the father of the child for whom child support is required.

All of the following statements must be true concerning the child, the child's mother and the Defendant/purported Father: a) the Defendant has not adopted the child; b) the child was not conceived by artificial insemination during a marriage between the Defendant and the mother of the child; and c) the Defendant did not act to prevent the biological father of the child from asserting his paternal right with respect to the child.²⁴



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Additionally, he cannot have done any of the following acts after acquiring the knowledge that he is not the biological father of the child: a) Married the mother of the child and voluntarily assumed the parental obligation and duty to pay child support; b) Acknowledged paternity of the child in a sworn statement; c) Been named as the child's biological father on her birth certificate with his consent; d) Been required to support the child because of a written voluntary promise; e) Received and disregarded written notice from DHS, any other state agency, or any court directing him to submit to genetic testing; f) Signed a voluntary acknowledgment of paternity as provided in OCGA § 19-7-46.1; or g) Proclaimed himself to be the child's biological father.²⁵

Child Support Obligation for Non-Biological Children

Note that, under *Wright v. Newman*, it is legally possible for a non-biological father to be held responsible for child support under the theory of promissory estoppel.²⁶ In *Wright*, the Court held that the husband was obligated to support his non-biological child under the theory of promissory estoppel. The child had been born prior to the parties' marriage and prior to their relationship. However, the husband, knowing the child was not his biological child, voluntarily acknowledged paternity and put his name on the child's birth certificate. He told the wife he wanted to be the child's father and would support the child. Relying on this, the mother did not pursue a child support action against the child's biological father. The Court held that husband's promises had been relied on by the mother to her detriment because she did not pursue an action against the biological father.²⁷

The holding in *Wright* was distinguished in *Garcia v. Garcia*, 284 Ga. 152, 663 S.E.2d 709 (2008) where the opposite result occurred. There the Court held that the mother, in that case did not establish that she had relied to her detriment on the promises of her husband to support the child. The mother's failure to pursue child support from the biological father was not shown to be related to the husband's promises. As a result, she was not entitled to child support from the non-biological father.

These are some of the many issues which may arise for unmarried parents. It is important to be aware of the potential legal complexities for parents and to consider strategies to provide the best solutions for the families involved. *FLR*



Michelle Jordan is the managing attorney of the Atlanta Legal Aid Society's Family Law Unit. She previously served on the Family Law section's executive committee and coordinated the statewide Child Support Worksheet Helpline.

Endnotes

- 1 <https://www.cdc.gov/nchs/pressroom/sosmap/unmarried/unmarried.htm>
- 2 O.C.G.A. § 19-7-25
- 3 O.C.G.A. § 19-7-25
- 4 O.C.G.A. § 31-10-9
- 5 O.C.G.A. § 31-10-9(e)(2)
- 6 O.C.G.A. § 31-10-14
- 7 O.C.G.A. § 9-4-2
- 8 O.C.G.A. § 19-9-61
- 9 O.C.G.A. § 19-9-2
- 10 O.C.G.A. § 19-7-22
- 11 O.C.G.A. § 19-7-22
- 12 O.C.G.A. § 19-7-22(b)
- 13 O.C.G.A. § 19-7-22(b)
- 14 O.C.G.A. § 19-7-22(e)
- 15 O.C.G.A. § 19-7-22(g)
- 16 O.C.G.A. § 19-7-22 (c)
- 17 O.C.G.A. § 19-7-22 (f)
- 18 O.C.G.A. § 19-7-20(a)
- 19 O.C.G.A. § 19-7-22(c)
- 20 *Davis v. LeBrec*, 274 Ga. 5, 549 S.E. 2d 76 (2001), affirming 243 Ga. App. 307, 534 S.E. 2d 84 (2000)
- 21 *Davis v. LeBrec*, 274 Ga. 5 (2001)
- 22 *Brine v. Shipp*, 291 Ga 376 (2012)
- 23 O.C.G.A. § 19-7-1 (b) (8)
- 24 O.C.G.A. § 19-7-54
- 25 O.C.G.A. § 19-7-54
- 26 *Wright v. Newman*, 467 S.E.2d 533, 266 Ga. 519 (1996).
- 27 *Wright* at 535.

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A “Legitimate” Cause for Concern

By Essie Lazarus

As the decades have rolled on, the dynamics of families have changed significantly. What was once the “Leave It to Beaver” standard structure of the nuclear family is no longer. While the white picket fences may still exist, the families that live behind them are ever changing. A significant number of children are no longer being born as a result of marital relationships. Additionally, families are no longer being headed solely by heterosexual couples. A cause of these shifts can be attributed to changes in societal acceptance, which in some cases, such as marriage equality, have led to changes in the law. However, that is not true in all cases, particularly in the case of legitimation in Georgia.

The current laws in Georgia governing the establishment of parental rights regarding children outside of wedlock, known as legitimation, are antiquated to say the least. While legitimation was created as a vehicle for fathers to establish a legal relationship with their children when born outside the bonds of wedlock, its application has created inequities not only for putative fathers, but also for unmarried same-sex couples. While there is an option for these same-sex couples to pursue a second-parent adoption, the laws in Georgia regarding second-parent adoptions are not clear; and, in fact, there are many counties in the state that will not grant them.

A second-parent adoption is defined as “a legal procedure that allows a same-sex parent, regardless of whether they have a legally recognized relationship to the other parent, to adopt her or his partner’s biological or adoptive child.”¹ Currently, fourteen (14) states and the District of Columbia have a state statute or appellate court decision allowing second-parent adoptions.² Additionally, there are currently some counties in another fourteen (14) states, including Georgia, that have at some point granted second-parent adoptions to same-sex couples.³ However, these states do not have statutes or appellate decisions that provide definitive guidelines concerning the granting of these adoptions, which undoubtedly leads to confusion.⁴

A prime example of the confusion surrounding second-parent adoptions can be seen in the Court of Appeals of Georgia case, *Bates v. Bates*. In this 2012 case, the two parties, who were involved in a same-sex relationship with

one another, decided to have a child together biologically.⁵ Given that this case went before the Court in 2012, three years pre-*Obergefell*, there was no option, at the time, for the couple to marry and establish parental rights through marriage.

After the child was born, the parties filed a second-parent adoption action for the non-biological parent to adopt the child, which was granted by the Fulton County Superior Court.⁶ Unfortunately, the couple’s relationship later dissolved resulting in the biological parent returning to the Court to set aside the adoption.⁷ The Court dismissed the biological parent’s motion to set aside on the basis of untimeliness.⁸ Contemporaneous to the aforementioned litigation, a custody dispute between the parties regarding the child was occurring in a neighboring county.⁹

When the biological parent failed to have the Fulton County Superior Court set aside the adoption, she made a motion in the court of the neighboring county to set aside the adoption in response to the non-biological parent’s custody petition.¹⁰ The Court granted the motion to set aside under the “reasoning that Georgia law does not recognize ‘second-parent adoptions.’”¹¹

Although, on appeal, the Court of Appeals of Georgia reversed the judgment of the lower court, the Court failed to establish whether or not Georgia law permitted second-parent adoptions as it instead based its opinion on the application of *res judicata*.¹² Given the Court of Appeals of Georgia’s failure to rule on the issue, there is currently no definitive answer as to whether Georgia will permit second-parent adoptions, which is not only problematic for the parties involved in these relationships, but more importantly the children that result from these unions.

As of now, children who are born into families in which their parents are of the same-sex and not married, have no legal right to inherit from the non-biological parent, receive healthcare benefits from the non-biological parent, continue living with the non-biological parent if the biological parent dies, becomes incapacitated, or if the relationship between the parents dissolves before the child reaches the age of majority.¹³ Under the above mentioned circumstances, children involved these family structures do not receive the equal protection that laws allowing for legitimation or



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adoption provide.

While on the surface this might appear to be an inconsequential problem, given the decline in the marriage rate and the number of children conceived outside of marriage there is no question that there are a number of same-sex couples who want to raise children together, but for a number of reasons may not believe that marriage is a feasible option for them. While the methods of conception differ between heterosexual and homosexual couples, the laws that not only give parents legal rights to their children, but more importantly give children access to the benefits of having a second parent should be equal.

The Georgia legislature needs to address this issue either by making the language regarding legitimation gender-neutral or introducing legislation that provides a clear pathway for unmarried, non-biological parents involved in same-sex relationships to establish legal rights to their children. The legislature's failure to do so could lead to the raising of constitutional questions as well as further litigation seeking guidance on this issue at the expense of children who are being denied the benefits that come with having a second legal parent. *FLR*



Essie is a proud, native Atlantan and a recent graduate of Emory Law School. Throughout her law school career, she has been dedicated to learning about the practice of family law. She will be sitting for the February 2019 Georgia Bar Exam and plans on practicing family law in the Metro-Atlanta area thereafter. She can be reached at esther.lazarus@emory.edu.

Endnotes

- 1 National Center for Lesbian Rights, *Adoption by LGBT Parents* (2018). http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf.
- 2 *Id.*
- 3 *Id.*
- 4 *Id.*
- 5 *Bates v. Bates*, 730 S.E.2d 339, 340 (Ga. App. 2012).
- 6 *Id.*
- 7 *Id.*
- 8 *Id.*
- 9 *Id.* at 341.
- 10 *Id.*
- 11 *Id.*
- 12 *Id.* at 344.
- 13 Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion -Legitimacy, Dual-Gender Parenting, and Biology*, 28 *Law & Inequality: A Journal of Theory and Practice*, 308-309.



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Military Survivor Benefit Plan – Practical Tips for the Practitioner

by Mark E. Sullivan

The Survivor Benefit Plan (SBP) is the survivor annuity associated with military retired pay. If the servicemember (SM) or retiree dies first, the spouse or former spouse (FS) survivor will receive 55 percent of the selected base amount (usually the full pension) for life. The cost is 6.5 percent of the base amount for active-duty retirements, and about 10 percent for Guard/Reserve retirees. When the parties are divorcing, this is an important part of the process, since former-spouse coverage can be provided at divorce through a court order.¹ Here are the most important points to remember, regardless of which side you're representing.

Tip #1: Don't Leave it Out

If you're representing the spouse/former spouse, make sure that you state that the SM or retiree must elect former spouse SBP coverage. This is the only way to protect the flow of income which starts with the share of the pension. While your client, Mary Doe, is living, you need to ensure that she receives her proper share of the military retired pay as marital property. If her former husband, John Doe, dies before her, what happens to the pension? It's gone. The pension payments stop when the pensioner dies. Make sure you've insured the client for continued payments in the event of the untimely death of the military member or retiree. If you don't mention it, the SBP is lost. Remember "LIFE and DEATH." Be sure to protect your client for both

of these contingencies—a share of the pension during life, and SBP coverage upon the member's death.²

Tip #2: What's the Deadline?

To effectuate coverage, you must comply with the deadlines imposed by federal law. The military member or retiree, John Doe, needs to submit to the retired pay center³ his election form within one year of the divorce.⁴ An election filed by the retiree is effective upon receipt by the retired pay center.⁵ The form to use for submissions to DFAS is DD Form 2656-1; John can get it by searching on the Internet for "2656-1" and it's available in fillable PDF format.⁶ At the time of making this election, the applicant must provide a statement setting forth whether the election is being made pursuant to a court order. If it is not, the statement must indicate whether it is pursuant to a written agreement previously entered into voluntarily by the retiree as part of, or incident to, a divorce proceeding (and, if so, whether such written agreement has been incorporated in, ratified, or approved by a court order).⁷ You need to mark that deadline on your "docket control system" and make sure you meet it.

Tip #3: Watch Your Wording

If you are representing Mary Doe, the former spouse, make sure that the language used in the SBP clause reflects a duty on the part of the SM or retiree to make the election.

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Mary's "deemed election" only applies if John has failed or refused to make the election for her. If your wording is "Mary is entitled..." or "the government will provide..." you've missed the boat. You need to write it up to impose an affirmative duty on John to make the former-spouse election for Mary. Otherwise you cannot take advantage of the "belt and suspenders" protection for Mary which is provided by her "deemed election."

Tip #4: Spouse's Suspense Date

Just as John Doe has a deadline, described above at #2, Mary Doe (the FS beneficiary) has a suspense date for her SBP election. The "deemed election" which she can file, in the event that her former husband fails or refuses to submit a court-ordered election for her, is one year from the entry of the order giving her FS coverage.⁸ Note that this may or may not be the same as the divorce date; sometimes the court bifurcates the issues, granting the divorce on one date and deciding on property distribution, pension division and the survivor annuity later on. That deadline should also be a mandatory entry on your docket control system. The form to use is DD Form 2656-10 for DFAS, the Defense Finance and Accounting Service.⁹

Tip #5: Process Overview for Locking in SBP

One way to think of the SBP-and-divorce process is to remember the letters R-R-R.

R—means Requirement. You need to get a court order to require the election of former-spouse SBP coverage. The essential language is: "John Doe will elect immediately former-spouse SBP coverage for Mary Doe."

R—stands for Request. There must be an election of former-spouse coverage. The election is made by the member or retiree. John Doe must make this request by signing an SBP form selecting Mary Doe as his former-spouse beneficiary. If he fails or refuses to make the election, then Mary Doe can make a deemed election, requesting SBP as if John had properly made the request.

R—means Register. The election form, along with the court order or decree, must be served on the government (retired pay center or, with Guard/Reserve members, the appropriate headquarters as shown on the election form).

Tip #6: Who pays the Tab?

If John Doe gets 60 percent of the pension, then he'll pay 60 percent of the SBP premium, due to federal rules requiring that the FS premium is deducted "off the top," (i.e., subtracted from John's gross retired pay before the division of the pension). This has the effect of splitting the SBP premium between John and Mary in the same ratio as their shares of the pension itself (e.g., 60 percent : 40 percent). Federal law does not allow SBP costs to be apportioned between the parties. You can, however, require one party to reimburse the other for the cost of coverage; in this situation, the retired pay center will not

object, since it doesn't involve changing federal rules. In fact, you can actually shift the premium to the FS by reducing Mary's nominal share of the pension, and the retired pay center will honor the order. The reduction is fully explained in the SILENT PARTNER infoletter, "Military Pension Division: The Servicemember's Strategy," at www.nclamp.gov > For Lawyers > Silent Partner. The SILENT PARTNER series is published by the military committee of the North Carolina State Bar.

Tip #7: Your EX or Your NEXT

SBP cannot be subdivided. It's either the property of one's former spouse or one's current spouse. Take your pick. You can't apportion it between the two; SBP is a unitary benefit.

Tip #8: Mirror Award

Don't even go there. There are virtually unsurmountable problems associated with the creation of an SBP amount at John's death which mirrors Mary's pension award during his life. If you happen to get the divorce case when John is just about to retire from active duty, then you might be able to crank the numbers and make it work. Otherwise, leave it alone. No one can work the numbers during active duty which will predict what John's retired pay will be, based on a marital fraction which is unknown, and based on military pay table on which Congress hasn't voted yet.

Tip #9: Age 55 and Remarriage

Speaking of one's NEXT, what if Mary Doe has plans for remarriage? Be sure to remind the former spouse about the "remarriage penalty." This refers to the rule that if she remarries before she turns 55, SBP coverage is suspended. Coverage can be reinstated, however, if that remarriage ends in divorce, death or annulment.

Tip #10: The "Rework" Shop

Often the parties to a divorce do not know that there's a one-year deadline within which to register the FS election for SBP. When the deadlines have been missed, sometimes the BCMR (Board for the Correction of Military Records) for John's branch of service (e.g., Coast Guard, Air Force) can remedy the problem. The request must be made within three years of the error (that is, the entry of a divorce or pension division order without follow-up in serving the election), or discovery of the error.¹⁰ Use DD Form 149 for the petition, and read the service regulations to find out the procedures and requirements. If you're new to this, associate co-counsel who has experience with BCMR applications.

Tip #11: Remarriage Redux

What if John Doe, the servicemember or retiree, remarries? DD 2656-6, the change of beneficiary form, is required to effect coverage for John's current wife. If

the death of John is less than one year from the date of marriage, the new wife will receive a refund of the premium payments. If it is longer, then she will be qualified as his surviving spouse for SBP purposes, and she will receive 55 percent of the selected base amount for the rest of her life, unless she remarries before age 55 (see #8 above).

Tip #12: Put a Price Tag on It.

When Mary Doe has rejected every settlement option and she still demands SBP coverage, John's strategy starts with valuation of the asset.¹¹ Most states require the valuation of all assets acquired during the marriage. Get an expert witness to "price the SBP" so that Mary Doe is charged with that value.¹² If Mary is faced with the cost of this benefit, which may be \$50,000, \$100,000 or even more, she may need to rethink that simple approach of "I demand it." She will have to start thinking about a new issue: "If you want to buy it, then you'll be charged with the price on the tag" for the present value. In other words, "There's no such thing as a free lunch."¹³ Failure to value the SBP can be a fatal flaw. Some courts have held that failure to value a marital asset means that the asset cannot be divided.¹⁴ The burden to establish a value is on the party who wants to include the asset in the marital estate for division by the court. *FLR*



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Endnotes

- 1 10 U.S.C. § 1448(b)(3)(A)(i).
- 2 In *Williams v. Williams*, 37 So.3d 1171 (Miss. Ct. App. 2010), an agreement stating that the wife was to have "all survivors' benefits otherwise accorded to her by law..." did not mean, according to the appellate court, that she was entitled to Survivor Benefit Plan coverage, since SBP is a personal choice, and it is not mandated by law. The chancellor erred in requiring SBP coverage for wife since the agreement of the parties did not entitle wife to coverage. In *Creech v. Creech*, 2010 Ky. App. Unpub. LEXIS 194, 2010 WL 743748, the parties had agreed to the wife getting 50 percent of the marital share of pension. The agreement was not reduced to writing but was dictated into the record. The wife filed a motion later to get SBP, the judge denied her motion and the Court of Appeals upheld the judge's order, stating that the wife cannot get what she failed to mention in her settlement. In *Morris v. Morris*, 804 N.W.2d 314 (Iowa Ct. App. 2011), the appellate court found that "half of husband's military retirement" doesn't mean SBP coverage; in this case, the husband provided life insurance of \$350,000 in the settlement, which didn't mention SBP. The ex-wife also lost out in *Kuba v. Kuba*,

400 S.W.3d 869 (Mo. Ct. App. 2013), a case involving a 2008 divorce decree, followed three years later by a motion made by the former spouse to include the Survivor Benefit Plan in an order dividing military retired pay which had already been submitted in 2008 to DFAS. The trial court denied relief to her, and the appellate court affirmed that decision.

- 3 For the Army, Navy, Air Force and Marine Corps, the retired pay center is DFAS (Defense Finance and Accounting Service) in Cleveland, Ohio. Pension garnishments for the Coast Guard and the commissioned corps of the Public Health Service (PHS) and of the National Oceanic and Atmospheric Administration (NOAA) are handled by the Coast Guard Pay and Personnel Center in Topeka, Kansas.
- 4 10 U.S.C. § 1448(b)(3)(A)(iii).
- 5 10 U.S.C. § 1448(b)(3)(E).
- 6 The form to submit to the Coast Guard Pay and Personnel Center is CG PSC-4700. When the SM is in the National Guard or Reserves, the address to use (not DFAS) will be found on the form.
- 7 10 U.S.C. § 1448(b)(5).
- 8 10 U.S.C. § 1450(f)(3)(C).
- 9 This may also be used for a deemed election when the branch of uniformed service is Coast Guard, PHS or NOAA.
- 10 If the member/retiree has remarried, the new spouse must either execute a waiver of SBP coverage or else be joined in the lawsuit so that the court can enter a ruling barring any claim of the new spouse to SBP. See *Ellison v. Ellison*, 242 N.C. App. 386, 776 S.E.2d 522 (2015) as to the court's jurisdiction to enter summary judgment against the widow of deceased retiree as to SBP which was previously awarded to former spouse, who failed to make a timely deemed election with DFAS and had previously been turned down by the Army Board for Correction of Military Records because the competing claim of the widow had not been adjudicated in a court proceeding in which both women were parties.
- 11 *IRMO Lipkin*, 566 N.E. 972 (Ill. App. '91) (survivor annuity is a distinct property interest within the pension plan, it needs to be distributed at divorce; it has a determinable value, computed by using life expectancy tables).
- 12 *Burt v. Burt*, 799 P. 2d 1166 (Utah App. 1990) (court may fix value of government survivor annuity and consider that sum in distribution scheme).
- 13 See, e.g., *In re Marriage of Forney*, Ore. App. 405, 244 P. 2d 849 (2010) (court ruled that the Survivor Benefit Plan, even though earned by pre-marriage service, had to be valued; the trial judge had disregarded a value placed on it of \$84,000 by the husband's expert).
- 14 See, e.g., *Grasty v. Grasty*, 125 N.C. App. 736, 482 S.E.2d 752 (1997), disc. rev. den. 487 S.E.2d 545, 346 N.C. 278 (1997), and *Johnson v. Johnson*, 230 N.C. App. 280, 750 S.E.2d 25 (N.C. App. 2013).

Georgia's New Adoption Code

by James B. Outman and Justin Y. Hester

Georgia's Adoption Code, O.C.G.A. § 19-8-1 et. seq., was re-codified in 1990. From 1990 to 2013 the Adoption Code was amended 28 times, the most recent being in 2013 when new Code Section 19-8-27 was added. Each of those amendments was designed only to add something new or to clarify an existing provision, but over time the amendments themselves introduced inconsistencies in wording into the Adoption Code that needed to be corrected. In addition, other changes were needed to keep Georgia law in harmony with changes in practice in other states and to reflect changes in Federal law related to international adoption and immigration.

Role of GCAL

Beginning in 2015 the Georgia Council of Adoption Lawyers (GCAL) undertook the effort to update Georgia's Adoption Code that resulted in the enactment of HB 159 as 2018 Ga. Laws Act 285, and it became effective September 1, 2018.

Section-by-Section Summary of Changes

19-8-1 – Definitions

- Four new definitions added.

19-8-2 – Venue

- If filed within the first year of the child's life, petition for adoption may now be filed in the Superior Court of the county in which the child was born.
- In the adoption of a child from DFCS it is now permissible to file a petition in the county in which DFCS has legal custody.
- In the case of an interstate placement of a Georgia-born child that complies with the Interstate Compact on the Placement of Children (ICPC), the petition may be filed in the Superior Court of either the county where: (i) the child was born, (ii) the Child-placing agency is located, or (iii) in Fulton County.

19-8-3 – Who May Adopt:

- Georgia resident, the six-month residency requirement deleted.
- If the child was born in Georgia and was placed with a non-Georgia resident pursuant to the ICPC then the non-Georgia resident may petition.
- Minimum age for a single petitioner reduced to 21 in relative adoption.
- Minimum age difference between the petitioner and the child no longer applies in the case of stepparent and relative adoptions.



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19-8-4; 19-8-5; 19-8-6 and 19-8-7 – Changes Regarding the Surrender of Rights That Apply to All Types of Adoptions:

- Surrender documents must be executed under oath in the presence of a Notary Public and an adult witness.
- Revocation period reduced from ten days to four days.
- Individual signing surrender consents to jurisdiction of the Georgia courts and agrees to be bound by the final decree of adoption.
- Rights of biological father who is not legal father terminated upon the entry of either an order terminating his rights or final decree of adoption.
- Person signing surrender need not be a U.S. citizen or a resident of Georgia.
- A biological father who is not a legal father and a legal father has the option to complete an affidavit regarding Native American heritage and military service.

19-8-4 – Department, Child-placing Agency and Out-of-state Licensed Agency Placements:

- Placement by out-of-state licensed now included under O.C.G.A. § 19-8-4.

19-8-5 – Third-party Domestic Adoptions:

- Third-party financially responsible for the child on date the surrender is signed.
- Notice to the Department in no longer required.
- The ground for the court to waive the 60-day filing requirement changed from "excusable neglect" to "good cause shown."

19-8-6 – Stepparent adoptions:*

19-8-7 – Relative adoptions *

19-8-8 – Domestication of Foreign Adoptions and Adoptions Based Upon Foreign Guardianship

- Procedure for domestication of a foreign decree of adoption completely revised.
- It is now recognized that the petitioner has legally adopted the child in the foreign country and only needs to domesticate their foreign decree to have the benefit of an order from a Superior Court of this state and to obtain a Certificate of Foreign Birth from Georgia Vital Records.
- Provision for the adoption based on legal guardianship in the foreign county.
- Superior Court has authority to change the date of birth of child upon a showing by a preponderance of evidence of a more accurate date.



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19-8-9 – Revocation of Surrender

- Revocation period shortened from 10 days to four days.
- Time to revoke for personal delivery of the notice of revocation expires at “5:00 PM eastern standard time or eastern daylight time on the last day.”
- Certified mail no longer acceptable method for sending notice of revocation.
- A mother who signs a surrender of rights in support of the adoption of her child is without authority to consent to the granting of a petition for legitimation filed pursuant to O.C.G.A. § 19-7-22 with regard to the same child.

19-8-10 – Involuntary Termination of Parental Rights

- A surrender of rights is not a prerequisite to the granting of a petition for adoption, and surrender documents do not have to be filed with the petition.
- Standard of proof is “clear and convincing evidence” for subsections (a) and (b).
- Best interest standard in subsection (a) has been repeated in subsection (b).
- Certified mail may no longer be used to effect service upon a parent.
- Order of publication not required and publication may

** Except as noted above, no substantive changes.*

be undertaken simultaneously with other efforts to effect service.

- The parent whose parental rights are being involuntarily terminated is “not a party to the adoption and shall have no obligation to file an answer.”

19-8-11 – Petition to Terminate Parental Rights by Agency or When no Adoption is Pending in Georgia

- Certified mail may no longer be used to effect service upon a parent.
- Order of publication not required and publication may be undertaken simultaneously with other efforts to effect service.

19-8-12 – The Rights of the Biological Father who is Not a Legal Father

- Biological father who is not a legal father is “entitled to notice of an adoption proceeding only as provided in this Code section.”
- Certified mail may no longer be used to effect service of notice.
- Order of publication not required and publication may be undertaken simultaneously with other efforts to effect service.
- Venue for petition to terminate the rights of the biological father who is not a legal father clarified.
- Where the identity of the biological father who is not a legal father is unknown and a certification from the putative father registry “stating that there is no registrant identified” then absent evidence to rebut statutory no further inquiry or notice shall be required and “the court shall enter an order terminating the rights of such unnamed biological father of the child.”
- Any legitimation action must be filed as a separate civil action.
- Guidance provided to Court regarding the abandonment of opportunity interest by a biological father who is not a legal father.

19-8-13 – Contents of the Petition for Adoption

- The sex, place of birth and citizenship or immigration status of the child must be included in the petition.
- If the child is not either a U.S. citizen or a lawful permanent resident of the U.S. on the date the petition is filed the petitioner is required to “explain how such child will be able to obtain lawful permanent resident status.”
- Petitioner must disclose any other adoption proceeding



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that is pending and whether or not any other individual has or claims custody or visitation rights with the child.

- Petitions pursuant to O.C.G.A. § 19-8-4 must include either copies of the written voluntary surrender and acknowledgement of surrender, or a certified copy of the order entered by a court of competent jurisdiction terminating the parental rights of the parent and committing the child to the department, child-placing agency, or out-of-state licensed agency be submitted in support of the petition.
- Documents required for the domestication of a foreign decree of adoption pursuant to O.C.G.A. § 19-8-8(a) changed.
- Petitions for adoption based upon a guardianship order or decree from a foreign government pursuant to O.C.G.A. § 19-8-8(b) require new documents.
- The affidavit required by O.C.G.A. § 19-8-13(c) now requires additional disclosures for payments for counseling or legal services, and for reasonable expenses for the biological mother as now authorized.
- Putative father registry certification required when mother identifies her husband as the biological father and he has surrendered his parental rights.
- All filings are “deemed to be a filing under seal under subsection (d) of Code section 9-11-7.1” so it is not necessary to redact social security numbers, taxpayer identification numbers, financial account numbers, or dates of birth.

19-8-14 – Filings with the Court and Timing of hearings

- No hearing shall occur sooner than 30 days following service is deemed to have been received pursuant to O.C.G.A. §§ 19-8-10 and -12, when applicable.

- Clerk of the superior court shall provide the petitioner or petitioner’s counsel upon request with a copy of all pleadings filed and all orders entered.

19-8-15 – Objection by Blood Relatives and Family Members

- Decision in *Parker v. Stone*, 306 Ga. App. 636 (2010) specifically overruled.

19-8-16 – Appointment of Agent to Conduct Investigation and Render Report to Court; Criminal History Report Requirement

- Appointment of an agent to conduct an investigation and report under O.C.G.A. § 19-8-16(a) is in addition to the requirement of a preplacement home study.
- In stepparent or relative adoptions pursuant to O.C.G.A. § 19-8-6 or § 19-8-7, if the Court appoints an agent, the investigation is not to include a home study.
- Adoptions involving a child-placing agency also exempt from the appointment of an agent to conduct an investigation pursuant to O.C.G.A. § 19-8-16(a).
- If criminal history report included in home study is within 12 months of the date the petition is filed it satisfies the requirements of O.C.G.A. § 19-8-16(d).
- The agent appointed by the Court pursuant to O.C.G.A. § 19-8-16(a) is not authorized to have access to the criminal history report.
- The Court “shall determine the acceptability of the petitioner’s criminal history.”
- The Court must inform the petitioner or petitioner’s counsel at least five days prior to the final hearing “if the court will require additional evidence with respect to the petitioner’s criminal history or if the court is

inclined to deny such petition because of such criminal history, and afford the petitioner or his or her attorney an opportunity to present evidence as to why the petitioner's criminal history should not be grounds for denial of such petition."

- The petitioner has option to arrange for investigation and report if Court appoints agent who charges more than \$250.

19-8-17 – Scope of the Investigation & Report*

19-8-18 – Final Hearing on Petition

- Court may allow petitioner or any witness to appear via electronic means.
- Court must be satisfied child not born in the United States will be able to obtain lawful permanent resident status before granting the adoption.
- Court authorized to continue or discontinue any visitation order that was in place prior to the filing of the petition for adoption.
- Court authorized to domesticate a foreign decree of adoption "upon the pleadings without a hearing."
- Court is authorized to grant adoption based upon a foreign guardianship.
- Factors provided for Court to consider in exercising its discretion to determine whether the adoption is in the best interests of the child.
- Surrenders executed in support of the denied adoption are "dissolved by operation of law and the individual's rights" restored.
- Exception created to requirement that actions for damages be filed within a certain time frame created in case of any action for fraud in obtaining a consent or surrender.
- Clerk of the superior court authorized to issue certified copies of the final decree of adoption to the petitioner "at the time of the entry of the final decree without further order of the court and without cost."

19-8-19 – Effect of Decree of Adoption*

19-8-20 – Certificate of Adoption*

19-8-21 – Adoption of Adult

- Petition must state whether one or both parents of the adult to be adopted will be replaced, and "if only one parent is to be replaced the decree of adoption shall make clear which parent is to be replaced by adoption."

* *Except as noted above, no substantive changes.*

19-8-22 – Validity of Orders from Other Courts and Administrative Proceedings

- Changed to require that decrees or orders dealing with guardianships, as well as adoption, whether issued by courts or administrative bodies in other jurisdictions within or without the United States shall be recognized and given full faith and credit.

19-8-23 – Sealed Adoption Records; Access; Permissible Uses by the Department; and Adoption Reunion Registry

- Petitions to examine adoption records are deemed to be filed under seal.
- Requirement of "good cause" removed.
- Minimum age lowered from 21 to 18.
- The Adoption Reunion Registry now provides for the disclosure of "a detailed summary of all information the department or placement agency has concerning the adoptee's birth, foster care, placement for adoption, and finalization of his or her adoption" to the individual seeking the information, in addition to the name and in some cases the address of the individual being sought.

19-8-24 – Unlawful Advertisement; Inducement; Prohibited Sale and Offer to Sell Child; Criminal Penalties

- An adoptive parent who has a valid, approved pre-placement home study may advertise, as may his or her State Bar of Georgia attorney.
- Authorized payment by a child-placing agency or attorney of counseling and legal expenses for a biological parent.
- Authorized "the payment or reimbursement of reasonable expenses for rent, utilities, food, maternity garments, and maternity accessories for the biological mother if paid from the trust account" of member in good standing with the State Bar of Georgia.
- It is now a crime for an individual "to knowingly make false representations in order to obtain inducements," "to knowingly accept expenses" from either a child-placing agency or a member of the State Bar of Georgia either "for the adoption of her child or unborn child if she knows or should have known that she is not pregnant or is not a legal mother," "to knowingly accept expenses" from more than one adoption agency or attorney with respect to the same child without full disclosure to both, and "to knowingly make false representations in order to obtain" payment for expenses as authorized in the Code section.
- Any child-placing agency or individual who is damaged by a violation of any provision in this Code section is authorized to file "a civil action to recover damages, treble damages, reasonable attorney's fees, and expenses of litigation."

19-8-25 – Transition

- A surrender executed on or before Aug. 31, 2018 shall satisfy the surrender requirements for purposes of an adoption filed on or after Sep. 1, 2018.
- For adoption proceedings pending on Aug., 2018 the prior law will apply.

19-8-26 – Forms

- All forms that existed prior to the passage of HB 159 remain, however, every form was changed in some manner and prior forms should not be utilized.
- Three new forms were added:
 1. “NOTICE TO REVOKE SURRENDER OR RIGHTS/ FINAL RELEASE FOR ADOPTION” to be used to revoke a surrender;
 2. “BIOLOGICAL MOTHER’S AFFIDAVIT IDENTIFYING BIOLOGICAL FATHER OF HER UNBORN CHILD” to satisfy the requirement in subparagraph (e)(3)(E) of O.C.G.A. §§ 19-8-4, 19-8-5 or 19-8-7; and
 3. “AFFIDAVIT REGARDING NATIVE AMERICAN HERITAGE AND MILITARY SERVICE” for the legal father and the biological father to sign at the time he signs his written voluntary surrender of rights.

19-8-27 – Post Adoption Contact Agreements*

19-8-28 – Orphan Child

This new section clarifies where the child is an orphan, i.e., he or she has no living legal parent or guardian, the petitioner is not required to have a guardian appointed and “[s]uch child shall be adoptable without a surrender of rights.”

Conclusion

We hope this section-by-section summary is helpful to the bar in understanding the significant revisions that have been made to Georgia’s Adoption Code. We are very proud of the efforts of all involved in this much-needed update, and we truly believe the new Adoption Code will further promote, enhance, and streamline the adoption process in our state.

For those interested in learning more about the new Adoption Code, the Institute for Continuing Legal Education in Georgia (ICLE) together with the Georgia Council of Adoption Lawyers (GCAL) sponsored a seminar that focused on the new Adoption Code and it was held on Aug. 24, 2018. The webcast of that seminar is available for viewing on the ICLEga.org website.

** Except as noted above, no substantive changes.*



Jim Outman graduated from Georgetown University Law Center in Washington D.C. in 1971. Jim has been the principal author of Georgia’s adoption laws since 1975, including H.B. 159. Jim has chaired the ICLEGA Adoption Law & Practice seminar since 1996, and he has presented on adoption law at both the ICJEGA Superior Court Judges and Law Clerks’ Seminars. Jim is an Adoption Fellow of the Academy of Adoption & Assisted Reproduction Attorneys, a founding Fellow of the Georgia Council of Adoption Lawyers, and he was honored as an “Angel in Adoption” by the Congressional Coalition on Adoption Institute in Washington D.C. in 2003.

Jim is currently of counsel with the law firm of Hester Outman LLC, where he specializes in adoption law, estate planning, and elder law. He can be reached at 404-317-3044 and jim@hesteroutman.com.



Justin Hester graduated from the University of Georgia School of Law in 2000. Justin is a regular presenter at the ICLEGA Adoption Law & Practice seminars. Justin is a founding Fellow and current President-Elect of the Georgia Council of Adoption Lawyers, and he was honored as an “Angel in Adoption” by the Congressional Coalition on Adoption Institute in Washington D.C. in 2017.

Justin is currently Managing Member of Hester Outman LLC, where he specializes in adoption and family law. He can be reached at 770-446-3645 and justin@hesteroutman.com.

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Interview with Hon. Kimberly A. Childs

By Jordan Elisabeth Whitaker

Judge Kimberly A. Childs is the newest Judge to grace the Cobb County bench and brings with her a wide-range of experiences, both inside and outside the courtroom. I sat down with Judge Childs to discuss what she has learned since taking the bench and what knowledge and advice she wishes to pass along to the family law community.

Background and Personal Experience

Judge Childs was elected in May 2016 and took the bench in Jan. 2017, but before her election, Judge Childs worked in private practice litigating complex commercial disputes. She understands the demands of private practice and the cost of protracted litigation. Judge Childs is married with two children, a 14-year-old daughter and a 12-year-old son and brings to the bench her experiences of raising two children. Judge Childs and her husband have always worked full time, so she understands and recognizes that quality time with your children means different things to different people. Judge Childs does not penalize working mothers and understands that the traditional family structure of a working parent and a stay-at-home parent is no longer feasible for a lot of families.

Case Management

Judge Childs hired an experienced staff attorney, Karen Bain, and urges attorneys to use Ms. Bain as their first point of contact when issues arise, such as scheduling hearings or discovery disputes. Judge Childs utilizes a specific form when scheduling hearings and/or trials which requires each attorney to give a certain time announcement. If either party believes an emergency hearing is necessary, they should contact Ms. Bain to get on the calendar. Judge Childs will then block off a specific amount of time for each case and assign each case a specific time to report. This eliminates the need for attorneys and litigants to sit through lengthy calendar calls and wait unnecessarily. But it also means attorneys must provide realistic time announcements and be available at the designated time slot.

As a general rule, if there is a true emergency, Judge Childs will allot no more than one (1) hour for the issue to be heard and will make every effort to get the parties in as soon as possible.

Custody

Judge Childs is open to hearing from parties what parenting time schedule they believe is best for their family. She believes that a 50/50 or shared parenting time arrangement can be extremely beneficial for families in certain circumstances; so can more “traditional” schedules. Factors that she considers when determining these types of cases include how close the parties live to each other and their respective abilities to co-parent. If the parties are



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unable to work together or live too far apart, that creates challenges for a true 50/50 custody.

Guardians ad Litem

Judge Childs frequently uses and relies upon Guardians ad Litem, especially when there is an allegation of misconduct or abuse. She prefers to appoint her own Guardian ad Litem but she is always open to input from the attorneys. While she does rely heavily on Guardians ad Litem to give her insight into the children at issue, she does not blanketly accept a Guardian’s recommendation. As far as custody evaluations are concerned, Judge Childs prefers to appoint a Guardian ad Litem who can recommend a custody evaluation be conducted if necessary, rather than appoint only a custody evaluator.

Complex Issues and Experts

As far as equitable division goes, Judge Childs generally starts every case with a 50/50 division and deviates from equal division as the facts and circumstances of the case warrant, taking into consideration any relevant conduct of the parties and the need of each party. She welcomes financial experts, especially on complex issues such as business valuations, active versus passive appreciation and separate property tracing issues. Judge Childs also welcomes counsel for each party to submit trial briefs or letter briefs on a complicated issue to assist in her understanding of the more problematic issues at trial. Judge Childs uses her own property spreadsheet and trial form when reaching a verdict and may ask the respective attorneys to draft proposed order based on her trial form.

As far as case presentation, Judge Childs appreciates a brief summary of the requested relief at the beginning of any case, in writing. This helps her narrow down the issues and determine what each party wants. Further, any discovery issues or evidentiary challenges should be dealt with prior to the commencement of trial.

Discovery Disputes

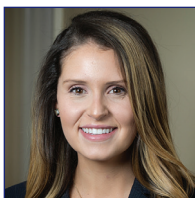
While Judge Childs would prefer that counsel for the parties could work together amicably to resolve discovery disputes, she understands that will not always be possible. In those cases, she encourages parties to reach out to Ms. Bain and schedule a telephone conference with her to resolve the issue quickly. Judge Childs believes all parties should produce any documentation that can be readily accessed, such as bank statements or other financial statements and is more inclined to order a party to hand-over necessary documentation than not. If a party is being uncooperative and she is unable to schedule a telephone conference, she encourages counsel to subpoena the relevant documentation and request fees for said expenses at a later date, if the facts and circumstances so warrant. Further, Judge Childs is open to considering a confidentiality order or protective order if confidentiality is a concern for one or both clients.

Attorney's Fees

Judge Childs understands that litigation is expensive and that attorneys need to be paid. She is inclined to award interim attorney's fees to keep good attorneys on a case and understands the need for good counsel to help resolve a case. However, if you are asking for fees, you must be able to show that the money is available and that there is a need.

Closing Remarks

Judge Childs wants the family law bench to know that she is immensely enjoying her new role and appreciates all the hard work and dedication she has seen thus far. She appreciates when attorneys can work together to come to resolutions but is happy to hear the case if that is not a possibility. Finally, Judge Childs requests that all lawyers be courteous and respectful to her staff. *FLR*



Jordan Whitaker graduated from the Georgia State University College of Law in 2016. She is currently an associate at Boyd Collar Nolen & Tuggle, LLC. She can be reached at jwhitaker@bcntlaw.com.

Past Section Chairs

Gary Patrick Graham.....	2017-18
Marvin Solomiany	2016-17
Regina M. Quick	2015-16
Rebecca Crumrine Rieder.....	2014-15
Jonathan J. Tuggle.....	2013-14
Kelly Anne Miles	2012-13
Randall Mark Kessler.....	2011-12
Kenneth Paul Johnson.....	2010-11
Tina Shadix Roddenbery.....	2009-10
Edward Coleman	2008-09
Kurt Kegel	2007-08
Shiel Edlin	2006-07
Stephen C. Steele	2005-06
Richard M. Nolen.....	2004-05
Thomas F. Allgood Jr.....	2003-04
Emily S. Bair	2002-03
Elizabeth Green Lindsey	2001-02
Robert D. Boyd	2000-01
H. William Sams	1999-00
Anne Jarrett	1998-99
Carl S. Pedigo.....	1997-98
Joseph T. Tuggle	1996-97
Nancy F. Lawler.....	1995-96
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Hon. Martha C. Christian	1993-94
John C. Mayoue	1992-93
H. Martin Huddleston.....	1991-92
Christopher D. Olmstead	1990-91
Hon. Elizabeth Glazebrook	1989-90
Barry McGough	1988-89
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Lawrence B. Custer	1985-86
Hon. John E. Girardeau.....	1984-85
C. Wilbur Warner Jr.	1983-84
M.T. Simmons Jr.....	1982-83
Kice H. Stone.....	1981-82
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Hon. G. Conley Ingram.....	1979-80
Bob Reinhardt.....	1978-79
Jack P. Turner.....	1977-78

The 2018 Family Law Institute Revisited

By Jeanette Holmes

More than 600 family law attorneys attended the 36th Annual Georgia Family Law Institute May 24-26, 2018. Those in attendance were able to hear from a variety of experts, peers, and members of the judiciary on issues that are helpful to our practice of domestic law in Georgia, while also earning CLE credits and visiting with friends and family at the Jekyll Island Convention Center. This is the second time in more than 15 years that the convention has been held in Georgia. If you were unable to make it to the Family Law Institute this year, here is a little bit of what you missed.

The program kicked off on Thursday with tips on how to handle a DFACS investigation, how to handle the unmanageable client, and how to efficiently use a forensic accountant in your case. Attendees learned that, when dealing with DFACS investigations, DFACS typically does not want to hear from us as family law practitioners. It is best for us to stay in the background and advise our clients on how to respond to DFACS inquiries—calmly, politely, and honestly. Further, when you have an unmanageable client, boundaries are key! Be sure to establish clear rules of what kind of treatment is inappropriate for attorneys and staff by the client. Knowledgeable forensic accountants engaged in a lively discussion of whether compensation should be treated as income or an asset—or a combination of both.

Other presenters covered topics of contested custody litigation, attorney's fees statutes and collection tips, the division of trusts, as well as the intersection of our practice with criminal issues and ethical questions. After the first day of presenters concluded, many attendees enjoyed a Family Law Section Diversity Committee Lunch, followed by a well-attended welcome reception on the front lawn of the conference center.

Friday morning was packed full of helpful information on evidence, federal tax issues, and case law updates. When covering evidence questions, the audience was able to interact with the presenters by using "clickers" to share their opinions regarding questions of privilege and work product. We also heard from prominent psychologists about how to deal with narcissists in the context of divorce. Surprisingly, these professionals offered tips on how to use a client's own narcissism to benefit the case and minor children involved in the case.

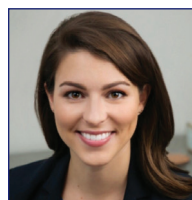
After the morning presentations, attendees were presented with the option of listening to live oral arguments to the Court of Appeals of Georgia or attending

break-out sessions such as a presentation on how to best use a private investigator in a divorce case. One break-out session focused on the importance of knowing your limits as an attorney – and knowing when it is time to bring in reinforcements or co-counsel specializing in other areas of law. Presenters emphasized that a "jack of all trades," when it comes to practicing law, is a master of none. It is important to evaluate your competencies or risk violating the Georgia Rules of Professional Conduct, which requires that a lawyer not handle a matter which he or she knows or should know to be beyond his or her level of competence without associating with appropriate co-counsel. For instance, if you work primarily in family law, and have not had exposure to complex bankruptcy issues, you should engage a bankruptcy attorney to assist you in a divorce case with complex bankruptcy issues.

In the afternoon, a beach party was hosted by the Young Lawyers' Division. After the beach party, there was a reception hosted by the Family Law Section. The reception was a great opportunity to catch up with colleagues while enjoying music by the Specific Deviations—a band made up of a few of our own section members.

On the final day of the conference, participants heard from a panel of seven judges, as well as the Chief Judge of the U.S. Bankruptcy Court, who explained how old bankruptcy case law addressing domestic relations issues may no longer be binding due to the significant changes to the bankruptcy code brought about under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). One of the most significant changes in the bankruptcy code is that all domestic support obligations (as defined in Section 101(14A) of the bankruptcy code) created by a divorce decree or separation agreement are non-dischargeable in every chapter. The entire program was both fun and informative.

Special thanks to the many, generous sponsors who made the Institute possible and successful! *FLR*



Since graduating from Emory University School of Law in 2013, Jeanette has practiced exclusively in the area of family law. She is an associate at Connell Cummings and lives in the Castlewood neighborhood with her husband, William. She can be reached at holmes@connellcumplings.com.



Diversity for Everyone

By Rob Wellon

It all began with the American Bar Association, as many useful programs do. ABA Family Law Section member Randy Kessler, soon to rise in the leadership to Section Chair, began seeing the need for more inclusion within the ABA, along with a more diverse membership of attorneys willing to serve.

Incorporating that idea while serving as State Bar Chair of the Family Law Section, Kessler decided to establish formal committees to allow more section members to become involved, something the section never had in the past. He formed six identified committees, one of which was titled the Diversity Committee. And take off it did. First meeting at the Family Law Institute each year, it then was expanded into regular meetings at the State Bar Headquarters. Its stated goal, as explained by Kessler, was to provide opportunities for lawyers to become more involved, and to create a more diverse membership within the Family Law Section. Marvin Solomiany was its first chair, followed by the naming of Ivory Brown, then Michelle Jordan and Brown served as co-chairs, and presently Brown is the chair again.

One of the first identified tasks was to seek a more diverse representation of presenters at the Section's CLE's including the extremely popular and well-respected annual Family Law Institute. When Ivory T. Brown, the current Section vice chair who will chair the program in 2019, was challenged with the task, the effort began with a widely diverse 2017 Nuts and Bolts CLE and will culminate in the inclusion of a TED Talks initiative, which would allow for those who had not been a speaker in the past to present on issues of their particular passion or interest in a specific area of law or practice. There will be auditions for these wanting to present, and a number of them will be included as presenters at the 2019 Family Law Institute.

Emphasis has been placed in other areas as well, always attempting to get lawyers involved. A Pop-Up Legal Clinic to serve the community was staged, partnering with Atlanta Legal Aid and AVLf on Mar. 17, 2018, to provide pro bono services at Thomasville Heights Elementary School to the neighboring community and to residents of a homeless shelter. A second Pop-Up Legal Clinic was held partnering with Atlanta Legal Aid and AVLf at the Cherokee Family Violence Center on July 28, 2018. Additionally, a mentorship program has been continued to allow younger or less experienced lawyers the ability to gain valuable input and knowledge from more senior members of the Bar, as well as provide opportunities to meet and associate with other lawyers who would be associating with that mentor.

One of the most constructive areas in which the Committee is involved is its educational focus. Brown has initiated a speaker's series which is inculcated into the meetings, wherein learned members of the community are asked to present on a topic of significant interest on issues about which lawyers need to be informed and sensitive, and the speakers have proved up to the task.

The Family Law Review

The following are the programs she has championed with knowledgeable and experienced speakers who are truly making a difference:

(1) "Cognitive Bias: 5 Tactics to Improve Results and Increase Client Satisfaction," by Elizabeth Berenguer, Associate Professor, Director of Upper Level Writing, Norman Adrian Wiggins School of Law, Campbell University.

- Cognitive Bias in judicial decisionmaking
- Anticipating and managing client cognitive bias
- Drafting to persuasively utilize (neutralize cognitive bias)
- Acknowledging and managing our own biases
- Potential dangers of cognitive bias

(2) "Transgender Equality and the Law," by Taylor Brown, the 2017-2019 Tyron Garner Memorial Fellow at the Southern Regional Office of Lambda Legal. Topics included a discussion of major issue areas:

- Criminal Justice
- Identity Documents
- Employment Discrimination
- K-12 Students
- Healthcare

(3) "Disabilities and the Law—Equal Access and Accommodations," by Synge Tyson and Vincent Martin. Synge, MA, OMS, CPACC, conducts training and workshops with a focus on disability etiquette, ADA and Rehabilitation Act compliance. Vincent, MS in Human Computer Interaction, is the first totally blind student in the history of Georgia Tech. He serves on the advisory board for the Georgia Vocational Rehabilitation Agency which provides resources for Georgians with disabilities to reach employment goals and live independently. Topics included:

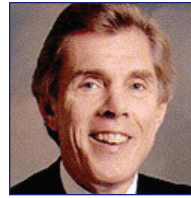
- Inclusive Behavior
- Disability Explained in 10 Minutes or Less Because We Do Not Have All Night
- Access - IQ Test
- Accommodation Is Not Inclusion
- Moving from Motivated Reasoning to Forward Inclusive Thinking

During these excellent presentations, Ivory arranged for some wonderful eats and a splash of inviting drinks, so the Diversity Committee meetings proved to be an exhilarating time for all. Each meeting justifiably qualified for CLE credit.

While the topic is focused on food, the Diversity Committee arranged its first luncheon at this year's Family Law Institute, where tables showcased the many activities of this Committee. The luncheon also provided

an opportunity for attendees to gather to discuss the multi-faceted programs offered to those attendees interested in the Committee's affairs, or perhaps to enjoy a splendid meal, as only Brown and her sub-committee could put together—a buffet luncheon offering Gullah/Geechee fare in keeping with the coastal regions of South Carolina, Georgia and Northern Florida. Wow! Shrimp & Grits, Hoppin' John, Fried Chicken, Collard Greens. Looking forward to another gourmet delight next year.

From the activities outlined above, it is easy to conclude that a committee of the State Bar Family Law Section has clearly fulfilled its twin goals of diversity and inclusion. Yet there are certainly more challenges ahead. Look for this committee to meet those challenges and continue its fine work. After all, diversity is for everyone. *FLR*



Rob attended Emory College and Stetson Law School and began practicing family law with Jack Turner until he started his own practice, focusing on complex family law and contested custody matters. He was the founding member and first president of the Weltner Family Law Inn of Court, and the founder and first Director of the Litigation Section's College of Trial

Advocacy, and received the State Bar Justice Marshall Professionalism Award in 2012. He has been serving as an adjunct faculty member of Emory Law School since 1995, and in 2013 he created a trial advocacy course in family law. And most importantly he is the father of two and grandfather of seven, and is most pleasant to all.


 cherokee family violence center

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Trusts and Equitable Division

By Kevin J. Rubin

State planning and trusts serve many purposes, including the transfer of wealth to future generations. However, when assets are transferred into trusts for nefarious purposes to deprive a spouse of his or her rights to equitable division or alimony claims, then the aggrieved spouse has recourse under Georgia law. Specifically, the case of *Gibson v. Gibson*, 301 Ga. 622 (2017), provides guidance to family law practitioners who are presented with those scenarios in divorce cases.

In *Gibson*, the husband created two irrevocable trusts and funded the trusts with assets titled in his individual name to protect his family from potential liability associated with his oxygen business, which was a significant contingent liability for his family, as well as to provide for his special needs daughter. The husband was the grantor of both trusts, but was not (and could never be) a beneficiary or a trustee of the two trusts. Between 2010 and 2013, the husband attempted to place approximately \$3.2 million worth of assets, including bank and brokerage accounts, life insurance policies and an ownership interest in a business interest into the two irrevocable trusts. The wife joined the trustees of the trusts to the divorce case and asserted fraudulent conveyance claims against the husband and the trustees in an effort to claw back the trust assets into the marital estate for purposes of equitable division. After a lengthy bench trial, the trial court involuntarily dismissed the wife's fraudulent conveyance claims, finding that the husband did not fraudulently transfer the assets to the trusts and that the transfers were proper under Georgia law.

On appeal, the Supreme Court of Georgia held that property in trusts like those in *Gibson* "are exempt from equitable division absent a finding of fraud." The Court affirmed the dismissal of the wife's fraudulent transfer claims because the trial court's finding that the husband's transfers of assets into the trusts were not fraudulent was supported by record evidence. However, the Court agreed with the wife that the husband's transfers of the assets in the two brokerage accounts to the trusts were ineffective under O.C.G.A. § 53-12-25(a) because the accounts erroneously listed the husband as trustee. The Court remanded the case to include the assets in the two brokerage accounts in the equitable distribution of marital assets.

There are several key takeaways from the Supreme Court of Georgia decision. First, *Gibson* confirms that the concept of whether an asset is marital property, separate property, or third-party property does not apply until a divorce action has been filed. In reaching its conclusion, the *Gibson* Court reaffirmed its holding in *Armour v. Holcombe*, 288 Ga. 50, 52 (2010), that if one spouse transfers assets that he or she owns to a third party before any divorce action has been filed, the transfer will be upheld unless it is a fraudulent or voidable transfer. The Court reiterated the law that transfers to a trust are transfers to a third party.

There is an exception under O.C.G.A. § 53-12-80(f) and *Speed v. Speed*, 263 Ga. 166 (1993), where the transferring spouse is also a beneficiary of the trust. In that situation, a spendthrift provision will not be valid and property in a trust that is attributable to a beneficiary's contribution is subject to a spouse's claims for alimony and equitable distribution of property. However, because the husband in *Gibson* was neither a beneficiary nor trustee of the trusts, the corpus of the trusts was third-party property not subject to the wife's claim for distribution, unless a fraudulent transfer had been present.

Second, in determining that dismissal of the wife's fraudulent transfer claim was supported by evidence in the record, the *Gibson* opinion clarified the case law surrounding the confidential relationship of marriage. The Court held that there is generally a confidential relationship between spouses, and that this finding does not depend on the particular circumstances of each marriage. While the trial court erred in relying on the evidence of the parties' financial situation to find that no confidential relationship existed, the Court held that the proper result was reached. The Court distinguished its prior decisions, finding that a spouse has a duty of candor when seeking agreement on a matter related to termination of the marriage, and a duty to disclose a sexually transmitted disease, from what it has never held—"that a person must gain the consent of or even inform his or her spouse before undertaking every financial transaction, whether a moderate lunch bill, a generous holiday gift to a friend, or a \$50 charitable contribution." The Court noted that the size and circumstances of the financial transactions at issue could give rise to some suggestion of fraud, but it did not set any particular threshold. Because spouses generally have a confidential relationship with each other, *Gibson* suggests that certain transfers may be carefully scrutinized by a court; however, the Court did not go so far as to say that every transfer must be disclosed to a spouse. While the failure to disclose a \$50 transaction is not evidence of fraud, it is unclear what amount would suggest fraud. Since spouses are in a confidential relationship, if there was a finding of fraud, then the four-year statute of limitations related to fraudulent or voidable transfers under the UFTA/UVTA would be tolled and a spouse could claw back additional transfers during a marriage.

Third, the *Gibson* Court concluded that a person's spouse is a creditor or potential creditor under Georgia's fraudulent or voidable transfer laws (i.e., O.C.G.A. § 18-2-70, et seq.).¹ However, the existence of actual intent to defraud remains a question of fact, even in the context of a spousal relationship. The Court affirmed the trial court's conclusion that there was no actual intent to defraud, because it properly applied the "badges of fraud" listed in O.C.G.A. § 18-2-74(b), and its factual findings were supported by evidence.



Finally, with respect to two brokerage accounts that were not titled in the name of the legal trustees, the *Gibson* Court concluded that those transfers to the trusts were incomplete under O.C.G.A. § 53-12-25(a). Because O.C.G.A. § 53-12-25(a) provided that “transfer of property to a trust shall require a transfer of legal title to the trustee,” and the brokerage accounts were not titled in the name of the trustee, the brokerage accounts were not trust property. In this respect, *Gibson* stands for the proposition that the titling of assets is important, and strict compliance with O.C.G.A. § 53-12-25 is critical to effectively transfer assets to a trust. However, effective July 1, 2018, O.C.G.A. § 53-12-25(a) was revised and broadened to not limit a transfer solely to the legal trustee, but to acknowledge valid transfers where the trust is named as a grantee on the title of the property. Even with this expanded criterion for property transferred to trusts, the family law practitioner should still engage in a deeper analysis of the issues surrounding the criteria for inter vivos gifts, such as whether the donor spouse relinquished dominion of the assets or the requirements under the trust instruments

related to the trustee’s obligation to accept or refuse to accept property to the trust. *FLR*



Kevin Rubin is a partner at Marple Law Firm, LLC, and has practiced exclusively in the area of family law since graduating from Emory University Law School in 2008. Kevin can be reached at kevin@marplelawfirm.com or 404-795-5021.

Endnotes

- 1 Effective July 1, 2015, the Uniform Fraudulent Transfer Act (UFTA) became the Uniform Voidable Transactions Act (UVTA). Whether the UFTA or UVTA is applicable depends on which act was in effect at the time of the transfers. *Interfinancial Midtown, Inc. v. Choate Constr. Co.*, 343 Ga. App. 793, 797 n.7 (2017)(citing *Gibson*, 301 Ga. at 628 (2)).



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Case Law Update

By Vic Valmus

Attorney's Fees

Moore v Hullander, A18A00592 (April 25, 2018)

The parties were divorced in 2005. Hullander (mother) was awarded primary custody of the children and \$250 per month in child support. Several years later, the trial court entered an order modifying child support to \$450 per month. In 2016, Moore (father) filed a petition for Modification of Custody based upon a 14-year old's election. The mother answered and counterclaimed for contempt, alleging the father's failure to pay child support. During the hearing, the father paid the child support arrearage in the full amount of \$16,400. The mother stated she did not intend to go forward with her contempt, because the father paid the arrearage in full. At the conclusion of the hearing, the trial court declined to modify custody during the remaining weeks of the school year, but indicated that the court would revisit the issue of custody before the end of the summer at the final hearing. A temporary order was never issued by the trial court. Months later, the child changed her mind about the election and the father decided in September of 2016 that he would dismiss his petition. However, the father did not file his voluntary dismissal until March of 2017. The mother filed a Motion seeking attorney's fees and expenses under O.C.G.A. §§ 9-15-14 (b); 13-6-11; 19-6-2 (a); and 19-9-3 (g). The billing statements were \$6,201. The court awarded the mother \$4,000 in attorney's fees, but the subsequent written order did not specify the statutory basis. The court found the mother entitled to partial reimbursement of attorney's fees based on the fact that the father was found in contempt for being substantially behind on his child support payments and that the father unreasonably delayed the resolution of this matter by his actions or lack thereof.

On appeal, the father argues that the trial court erred in awarding of attorney's fees in part on the prior finding

of contempt for failure to pay child support because no such finding had actually been made. The mother stated at a temporary hearing that she did not intend to go forward with her contempt motion in light of the father's full payment of the child support arrearage and the court never entered a written order after the temporary hearing. Because the mother did not pursue her contempt action, the issue of contempt was never adjudicated. Accordingly, the trial court abused discretion by awarding attorney's fees based on the erroneous finding that it had previously held Moore in contempt for failure to pay child support.

The father also argues that the court erred, because the court failed to set forth a statutory basis or significant factual findings to support the award. The trial court did not specify a statutory basis for its award of attorney's fees in its Order, but the mother moved for attorney's fees on several statutory grounds. One ground was O.C.G.A. § 19-6-2, but that statute is expressly for actions for alimony or divorce and alimony or contempt of an order arising out of an action for alimony or divorce and alimony. O.C.G.A. § 19-6-2 does not apply to petitions for modification of child custody or contempt proceedings. In this case, it is not applicable because the contempt is based on non-compliance with a modification order and not the original decree.

The mother also moved for attorney's fees under O.C.G.A. § 13-6-11, but those apply only if it can be established that a defendant has acted in bad faith in the underlining transaction which pertains to a transaction and dealings out of which the cause of action arose—and not to the Defendant's conduct after the cause of action began. The trial court did not award attorney's fees based on the finding of bad faith by the father prior to litigation, but rather on a finding that the father had unreasonably delayed the resolution to the case.



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Attorney's Fees/Declaratory Judgement

Belcher v Belcher, A18A0362 (June 6, 2018)

This is a second appeal of the attorney's fees award pursuant to O.C.G.A. § 9-15-14 which was vacated and remanded to the trial court. The Appellant, husband, was required to pay \$500 per month in alimony until the wife's death or remarriage. In Dec. 2013, the husband stopped making alimony payments, because he was uncertain about the health status of the wife. Wife's attorney contacted the husband assuring him that she was alive and to resume the payments. However, the husband refused to pay the overdue funds and resume the alimony payments until he was provided adequate proof of her current health status. The husband filed a subsequent petition for declaratory judgment seeking that the wife to verify her health status. The wife filed an answer and a motion to dismiss. After the wife appeared in court, the trial court dismissed the husband's declaratory judgment for failure to state a claim. The court entered an order awarding the wife \$2,500 in attorney's fees under both the declaratory judgment statute, O.C.G.A. § 9-4-9, and § 9-15-14. The Supreme Court reversed the award under O.C.G.A. § 9-4-9 and remanded the award under O.C.G.A. § 9-15-14 for express findings of the abusive conduct. On remand, the trial court entered a new order granting the wife's motion awarding \$2,500 and attorney's fees under O.C.G.A. § 9-15-14 without identifying which applicable subsection. The husband appeals and the Court of Appeals affirms the attorney's fees award but remands for further proceedings.

An award under O.C.G.A. § 9-15-14 must specify either subsection (a) or (b) and the court must make express findings of facts and conclusions of law of the conduct authorizing the award. However, if the trial court's language substantially tracks the wording of O.C.G.A. § 9-15-14(a) or (b), the trial court's failure to specify a subsection does not constitute reversible error. Here, the court tracked the language of section (a) in that there was a complete absence of any justiciable Issue of law of fact. The husband argues the trial court erred because the declaratory judgment action presented a justiciable issue of law and fact. A declaratory judgment is one which simply declares the rights of the parties or expresses an opinion of the court on a question of law without ordering anything to be done. Such an action is therefore distinguished from other actions in that it does not seek execution or performance from the parties. Declaratory judgment is an appropriate means of ascertaining one's rights and duties under a contract and decree of divorce. Here, the husband sought verification through a declaratory judgment of the wife's health status. The record shows that the husband did not appeal the trial court's order dismissing his petition for declaratory judgment for failing to show he was entitled to relief. The trial court found that the Final Judgment and Decree was clear and unambiguous as to the requirements of alimony payments. And, the husband, without exercising any due diligence, unilaterally and without the authority of the trial court, determined that the wife was no longer entitled to receive alimony payments based upon

his arbitrary terms. Therefore, the husband was not entitled to any of the information requested in the declaratory judgment petition. The husband's actions caused the wife to retain counsel and incur fees, costs and expenses.

The husband also argues trial court erred in awarding a lump sum attorney's fee. The record showed the wife requested \$3,880 in attorney's fees but the court awarded her \$2,500. Even though the trial court's award of \$2,500 in attorney's fees may have been reasonable, in cases involving O.C.G.A. § 9-15-14(a), the trial court must limit the fee award to those fees incurred because of the sanctionable conduct. Lump sum attorney's fees award are not permitted in Georgia. The trial court must show the complex decision-making process necessary in reaching a particular dollar figure and articulate why the amount awarded was \$2,500 as opposed to any other amount.

Attorney's Lien

Edward N. Davis, P.C. v Watson, A18A0087 (June 6, 2018)

A Final Divorce and Decree awarded Robert Cartwright (husband) a warehouse building and a 1966 Ford Mustang and ordered that he pay \$200,000 in attorney's fees and \$150,217 in contempt arrearages to Mindy Cartwright (wife). Warner Bates represented the wife and Edward Davis represented the husband. On June 11, 2014, Warner Bates filed with Taylor County an attorney's lien in the amount of \$200,000 against the warehouse and the wife recorded the deed on July 24, 2014. During the divorce action, in a separate lawsuit, on July 21, 2014, a jury found against husband in the amount of \$9,667,149, and on Aug. 6, 2014, the plaintiff in that suit, Fuji, filed a Writ of Fieri Facias in Taylor County for the full amount of the judgment. The wife, Warner Bates and Fuji disputed the priority of their respective claims against the husband, but Fuji agreed to waive any rights to husband's real property and the wife and Warner Bates waived any right to husband's personal property. In July 2016 at the request of Fuji, the Taylor County Sheriff's Office conducted the sale of the property. After the seizure of the property, Davis contacted Fuji's counsel on July 7, 2016, and asserted an attorney's lien in the unspecified amount against the property. The Sheriff filed a petition for Interpleader and paid the funds into the registry of the court. Several parties filed answers claiming priority. The court granted summary judgment in favor of Fuji and the wife and denied summary judgment to Davis. Davis appeals and the Court of Appeals affirms.

Attorney's liens are governed by O.C.G.A. § 15-19-14. Attorneys at law shall have a lien for their fees on the property recovered superior to all liens except liens for taxes. Davis admits he never recorded or filed an attorney's lien in any amount in Taylor County, but argues that O.C.G.A § 15-19-14 allows him to assert a lien in the Interpleader action and his lien is superior to every other lien except for a tax lien. In order to render the lien of an attorney binding upon a bona fide purchaser, it is incumbent upon the attorney to file his claim of lien but

such a filing is not essential to the validity of a lien as between the attorney and his client or between him and other creditors of the client. However, this rule is limited to the client's existing creditors at the time the property is recovered and has no application to future creditors. Therefore, only a properly filed attorney's lien binds all persons including future lien holders and purchasers for value including bona fide purchasers. Because Davis did not file the attorney's lien within 30 days of the date he recovered property for the husband, his lien does not bind future lien holders, including the wife and Fuji, who became creditors after the husband recovered the property.

Contempt

Morton v McCatee, A18A0514, A18A0515 (May 15, 2018)

The parties were married in 2011 and separated in 2015. At the time of separation, the parties had separate IRA accounts and shared a Keogh Retirement account and a joint savings account designated as the emergency fund account. In the court's final judgment regarding the retirement accounts (emergency fund, joint emergency fund, except for IRA/Keogh) the amount to be divided was \$390,403. Morton's (the wife's) one-half interest was reduced by \$30,000 to give the husband credit for his contributions to the marital property and the home equity line of credit. In addition, the wife's interest is reduced by another \$10,000 to give the husband credit for charges the wife made to the American Express card, bringing her total half interest down to \$155,256.50. The husband was awarded attorney's fees in the amount of \$7,056.20 and the expenses of litigation of \$500, bringing the wife's half interest further down to \$147,690.30. The husband was ordered to pay this amount in full to his attorney's escrow account and his attorney to then disperse the amount in full to the wife within 30 days of the date the order was signed.

Thereafter, the husband insisted the wife accept the \$147,690.30 in the form of a transfer from his IRA to her IRA on the basis he would suffer tax consequences if he withdrew the amount from his IRA. The wife refused. The parties contacted the court for clarity for which the court stated that its findings were that no one party would bear the tax liability on the tax deferred money, nor would any one party get the benefit of only taking his or her share from the already taxed proceeds. After which, the husband again requested the wife to transfer from the IRA to IRA account. Thereafter, the husband filed a contempt seeking to have the wife held in contempt for failing to sign the transfer form to the IRA account. Multiple contempts were filed, but the court declined to hold either party in willful contempt. The trial court, among other things, acknowledged that the Divorce Decree was silent as to potential tax liability. The court then ordered the wife's \$147,690.30 be paid by the emergency fund containing \$110,000 be split equally. The wife's IRA account was awarded to her, which contained approximately \$44,032, and the remaining balance owed to the wife of approximately \$48,108.80 was ordered paid from either the Keogh account or the husband's SEP account or both

in order to transfer these funds in such a way as to not create a tax liability for either party if possible. If there is an unavoidable tax penalty, then the burden was to be shared equally between the parties. The wife appealed and the Court of Appeals affirmed in part and vacated and remanded in part.

The wife appeals, among other things, that the court's Contempt Order constituted impermissible modification of the divorce decree. It is well settled that a court may not modify a divorce decree in a contempt order but may interpret and clarify its previous decree. When the trial court awards an asset in a contempt proceeding that is different from the award in a divorce decree, the reviewing court looks to the nature of the asset awarded to determine whether it is equivalent to the asset awarded in the divorce proceedings. If it was, in essence, the same, the court did not improperly modify the terms of the agreement. Conversely, if the court used the contempt proceeding to substantially alter the Final Decree, it amounted to an unauthorized modification. Here, the Final Divorce Decree was plain and unambiguous. The husband was to pay \$147,690.30 in full to his attorney's escrow account and his attorney was then to disperse the money in full to the wife within 30 days. It is undisputed the order was drafted by the husband's attorney; thus, he is responsible for any failure to consider the tax implications of the plain and unambiguous wording of the divorce decree or in his arguments and presentation of evidence during the trial. Here, the court's order on the competing motions for contempt did not merely construe the relevant portions of the divorce decree which awarded a lump sum of \$147,690.30 to the wife with no reference to tax implications to be paid in full to an escrow account and then dispersed to her in full thereafter. Instead, the contempt proceeding and its resulting order substantially altered the Final Decree by not only altering the amounts to be paid to the wife, (due to tax considerations) but also in the manner for which the amount was to be dispersed. Therefore, it was an unauthorized modification of the Final Decree and does not relieve the husband's obligation to transfer to the wife \$147,690.30 as required by the Divorce Decree.

Modification

O'Dwyer v Schuler, A18A0710 (March 29, 2018)

The parties were divorced in 2007 and entered into a Settlement Agreement, with O'Dwyer (the mother) having primary physical custody. In 2014, the mother graduated from college and the parties discussed the children staying with Schuler (the father) because the mother was in a period of transition in which she sold her house and began to work full time. So, in August 2014, the parties essentially flipped the agreement. The children moved in with the father and registered in the father's school district. Father changed jobs so he no longer had to travel. Father's sister-in-law and her daughters also moved from Ohio to live with father to ensure that an adult would be present in the house when the father was away. The parties' agreement was never memorialized in

a written document. In November 2016, the father filed a petition to modify custody, visitation and child support to formalize the arrangement. The trial court granted the petition, concluding at the hearing that there was a material change of condition that has occurred which affects the best interest and welfare of the minor children to support the children residing with their father as primary physical custodial parent. The mother appealed and the Court of Appeals affirmed.

The mother argues the trial court erred and abused its discretion because there was no material change in condition which affected the children. However, the evidence showed 2007 Divorce Decree was the last custodial award for which the court had to determine whether the conditions have changed. Here, the children began residing with the father and had enrolled in the father's district. This court has previously held that children's enrollment in school was a material change of the condition affecting the children's welfare. Therefore, the trial court did not err by granting the father's petition to change custody.

Prenuptial Agreement

Brantley v Brantley, A18A0343 (May 8, 2018)

The parties began dating in 1999 and were engaged to be married in 2002. In Dec. 2002, they jointly purchased a home which required each party to provide his and her respective financial information for the loan application. On Dec. 27, 2002, three days before their wedding day, they executed a prenuptial agreement which provided, *inter alia*, that in the event of divorce, both parties waived any claims for alimony. In addition, the agreement referenced attached financial disclosures from the parties. The parties agreed and stipulated that they had made a full and fair disclosure of his or her current financial worth. The prenuptial agreement also stated that the parties were "fully acquainted with and/or aware of the financial circumstances of the other party." In 2017, the husband filed a complaint for divorce and filed a motion to enforce the prenuptial agreement. The trial court denied the husband's motion, ruling that the prenuptial agreement was unenforceable because he had failed to provide full disclosure of his income. This court granted an interlocutory appeal and the Court of Appeals vacates and remands.

The husband contends the trial court erred by applying an erroneous legal theory in that the prenuptial agreement was unenforceable because he had not disclosed his income within the four corners of the agreement. Here, only the first column of the Scherer test applies, which requires the party seeking enforcement to show that there was a full and fair disclosure of the assets of the parties prior to the execution of prenuptial agreement, and that the party opposing enforcement entered into the agreement freely, voluntarily and with full understanding of the terms and being offered an opportunity to consult with counsel. Mutual disclosure of material facts is a precondition for entering into a prenuptial agreement. The prenuptial

agreement attached financial disclosures from both the husband and the wife which provided information regarding the parties' current financial worth and income. The husband claims he disclosed his income on three separate forms that were part of the loan application that the parties completed prior to purchasing their home. The husband also argues that he disclosed his income to the wife prior to execution of the prenuptial agreement and that she was aware of his financial status because of their stays in expensive hotel, meals at expensive restaurants and his recounting of vacations and hunting trips to Alaska and Hawaii as well as other foreign destinations. The court found the husband should have disclosed in the agreement and not outside of the contract. However, there are many cases and examples where the courts have reviewed evidence beyond the four corners of the prenuptial agreement in order to determine whether that there was full and fair disclosure of the parties' financial condition prior to the execution of the agreement.

UCCJEA

Gorelik v Gorelik, A18A0707 (June 26, 2018)

The parties were married in Turkey in 2009. The mother was raised in Turkey and possesses a green card to live in the U.S. The husband is a naturalized U.S. citizen. In February 2013, their son was born in Turkey. Then the family moved to Austria. In May 2015, the family moved to New York and in May 2016, the family moved to Georgia. The parties signed a one-year lease; however, the mother never obtained a Georgia license or registered to vote to Georgia and did not enroll the child in school in Georgia. After having lived in Georgia for 22 days, on June 12th, the mother and child traveled to Turkey. The mother filed for a divorce and custody in Turkey and, on Aug. 15, 2016, the Turkish court awarded her custody. It is not clear whether the father received proper notice. Afterwards, the father filed for divorce in Georgia and the trial court awarded the father custody in an emergency order. Afterwards, the mother moved to dismiss the order for lack of subject matter jurisdiction. After a hearing, the court denied the motion finding that the child had no home state and no other state had jurisdiction and that the parties demonstrated their intent to make Georgia their home. The trial court noted there was no evidence to establish how the Turkish court had reached its decision and the trial court declined to consider whether the child had a significant connection with Turkey. The wife appeals and the Court of Appeals reverses.

On appeal, the mother raises several related errors and, among other things, that the trial court lacked jurisdiction. UCCJEA is heavily dependent on the question of the child's home state and, as the court correctly found, neither Turkey nor Georgia would be the home state. Next, the court turns to other jurisdictional considerations of the UCCJEA when there is no home state which the child or the child's parents, or the child and at least one parent or a person acting as a parent has a significant connection with this state, other than mere physical presence, and

substantial evidence is available in this state concerning the child's care, protection, training and personal relationships. However, a court of this state may not exercise its jurisdiction if at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in the court of another state having jurisdiction substantially and in conformity with the UCCJEA. The court considers jurisdiction in a foreign nation in the same matter as if it were a sister state.

Because the Turkish case was commenced prior to the Georgia action, Turkey's custody determination must be enforced if it was made under factual circumstances and substantially in conformity with the jurisdictional standard of the UCCJEA. Here, the court erred when it concluded there was no evidence that, when awarding custody to the mother, there was not a substantial conformity with the UCCJEA. Even though the Turkish court does not expressly state the basis for its assertion of jurisdiction, it was demonstrated that the child was born in Turkey, the child has lived in Turkey longer than in any other place, the mother was raised in Turkey; and so it is apparently clear that the child and the child's parent have a significant connection with Turkey. The child and the mother's connection is definitely a stronger connection than with Georgia. There is also substantial evidence in Turkey concerning the child's care, protection, training and personal relationships that predates the 2016 trip to Turkey.

UCCJEA/Child Support Arreage

Weiss v Grant, A18A0002 (June 12, 2018)

In 2011 the parties entered into a divorce in Paulding County. There were 2 minor children and the mother and the children were residents of South Carolina. There was a pending child custody action where a final order awarded Weiss (the mother) primary physical custody and awarded Grant (the father) one week of visitation per month. Shortly afterward, the husband failed to return the children to the mother and moved them to different homes, concealing their locations from the mother. In 2012, South Carolina entered a custody order finding the father had fled with the children, that they were still missing, and granted sole custody of the children to the mother and suspending the father's visitation. In October 2012, the husband and children were found in Alabama. The husband was arrested on the South Carolina warrants and the children were returned to the mother. The father pled guilty to the misdemeanor charge of interference with custody. In 2015 the husband filed a complaint in Paulding County for modification of the South Carolina order which awarded sole custody to the mother and had suspended his visitation. The mother filed an answer, counterclaim for contempt and a motion to dismiss for lack of jurisdiction. The court denied the Motion to Dismiss finding it did have jurisdiction. Over a year later, the court held that there were no issues that would prevent the husband from having a full relationship with the children. In 2017, the trial court entered a final order modifying the South Carolina order and found that there was a significant change of condition.

The court found the father in contempt for non-payment of previously ordered child support with arrearages in the amount of \$27,270. The court ordered the father to pay \$100 per month until such time as the entire support arrearage was paid off. The court granted joint legal custody with the mother having primary physical custody and awarded the husband visitation rights. The wife appealed and the Court of Appeals affirmed in part and reversed in part.

The mother appealed, among other things, that the trial court lacked jurisdiction to modify the South Carolina custody order. The trial court expressly found in its 2017 Final Order, that the husband had lived in Georgia since 2012 and that at the time the action was filed, the mother and the children were residents of Paulding County and Georgia was the home state of the children. The trial court found that at the time the law suit was filed, and up until the time of the trial, Georgia was and has remained the home state of the children. The mother argues on appeal that no determination was ever made that Georgia was the home state of the children at the time the complaint was filed, but the record showed the trial court made that determination multiple times. Therefore, neither the children nor any parent resides in South Carolina, and Georgia was the home state of the children at the time the action was filed.

The mother also appealed that the provisions for the father to repay the child support arrearage of \$27,270 at the rate of \$100 per month as erroneous because, at that rate, it would take over 18 years to pay the entire amount. The trial court's order required the father to pay only \$100 per month. In a portion of the decision, the Court of Appeals reversed, holding that this amount improperly limited the mother's ability to collect the child support due by postponing the payment of much of the child support until after the children reach the age of 18. *FLR*



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What to Look for When Seeking a Qualified Personal Property Appraiser

By Courtney Ahlstrom Christy

When someone asks me what I do for a living, I sometimes describe myself as an object social worker. Like attorneys, appraisers are often called upon during times of emotional upheaval. In the appraisal field, we call them the four D's: death, debt, divorce, and downsizing. Selecting a qualified appraiser can alleviate the situation by providing a professional opinion on the value of items that often have deep meaning for the owner. An appraisal report provides useful information that can impact how the property is viewed and treated. However, not all appraisers are created equal, and it behooves the individual to engage a qualified professional who conducts proper research, follows current methodology, and objectively reports the value conclusions.

What is a Personal Property Appraiser?

The Appraisal Foundation Board defines an appraisal as “the act or process of developing an opinion of value.” Therefore, an appraiser is a valuation expert who develops reports that provide property value conclusions in a given situation. Simply put, an appraiser answers the question “What’s it worth?” And the proper response is always influenced by context. A few common reasons to hire an appraiser may be estate planning, estate tax, gift tax, noncash charitable contribution, equitable distribution, insurance coverage or a damage/loss claim.

There are several different types of appraisers including real estate (or real property), personal property and business. The term “personal property” encompasses all tangible property such as furnishings, antiques, fine art, jewelry, collectibles and even machinery. Personal property appraisers develop expertise in particular categories that often relate to one another. I have yet to encounter an individual who values both tractors and gems. For the purposes of this article, the word “appraiser” signifies a personal property appraiser as opposed to business or real estate.

In addition to the different types of appraisers and intended uses, another significant concept in the field of appraising is that there is more than one type of value. The same item may have several different values depending on factors like timeframe to purchase/sell and appropriate market levels. For example, the insurance replacement cost of an eighteenth century Chippendale chair at retail may be significantly different than its resale value at auction. A qualified furniture appraiser should be able to determine the correct kind of value to use after discussing the scope of the assignment with the client.

USPAP Compliance

There are no licenses for personal property appraisers. Unlike real estate, no governmental agencies regulate personal property appraisal practices. Technically, anyone can claim to be a personal property appraiser. If an appraiser does mention having a license, it may be in reference to another aspect of his or her business such as auctioneering.

The closest form of regulation that an appraiser may opt to adhere to is the Uniform Standards of Professional Appraisal Practice (USPAP). Adopted by Congress in 1989, USPAP as set forth by The Appraisal Foundation is the widely recognized ethical and performance standard for the appraisal profession in the United States. To become compliant, an appraiser is required to take a fifteen-hour course followed by five-hour update courses every two years. However, not all appraisers or firms providing appraisals are USPAP compliant. If an appraisal report will be filed with the IRS or has the potential to be used in court, it often benefits the client to select an appraiser who follows USPAP. In fact, current President of The Appraisal Foundation David S. Bunton recently stated, “For the past three decades USPAP has become deeply embedded in our legal and regulatory system.”

How is the Word “Certified” Used?

The way that appraisers use the word certified when describing their qualifications can be revealing. While you can be certified by an appraisal society or organization, you cannot be “USPAP certified.” The appropriate description should be something similar to “USPAP compliant,” “in compliance with USPAP,” or “adhering to USPAP guidelines.” The use of the phrase “USPAP certified” is an indication that the appraiser is not paying attention to The Appraisal Foundation rules nor understanding nuance, an important quality in an appraiser.

The word “certified” is used correctly when describing an appraiser’s credentials, often in association with a professional appraisal organization. The three largest associations for personal property appraisers are the International Society of Appraisers (ISA), Appraisers Association of America (AAA) and American Society of Appraisers (ASA). These groups require their members to be compliant with USPAP as well as maintain their own specific standards. In addition to testing, continuing education and demonstration of appraisal experience, members usually must requalify every five years to maintain their accreditation. For instance, you can be an ISA Certified Member, an ISA Accredited Member, or an ISA Member — with certified being the most rigorous level to achieve.

It is also important to check that the appraiser is up-to-date with both USPAP and any organizational membership. You may be surprised to discover the number of individuals who claim to be in good standing yet have not maintained their continuing requirements. An appraiser's status can usually be verified by contacting the appraisal society or searching the online directory.

How Does the IRS Define a “Qualified Appraiser”?

When filing an 8283 form for noncash charitable contribution, the IRS requires the appraisal report to be performed by a qualified appraiser for deductions of \$5,000 or more. Instructions for Form 8283 (see Part III, Declaration of Appraiser) describe the requirements that must be met by the appraiser:

- A Qualified Appraiser has earned a professional designation from a recognized professional appraiser organization for demonstrated competency in valuing the type of property being appraised, or has met certain minimum education and experience requirements.
- The individual regularly prepares appraisals for which he or she is paid.
- The individual demonstrates verifiable education and experience in valuing the type of property being appraised.
- The individual has not been prohibited from practicing before the IRS under section 330(c) of title 31 of the United States Code at any time during the three-year period ending on the date of the appraisal.

In addition, the IRS has recently issued a new rule entitled “Substantiation and Reporting Requirements for Cash and Noncash Charitable Contribution Deductions” that specifically cites USPAP. As stated in Section III (B) of the rule, appraisals are to be performed by a qualified appraiser according to the “substance and principles of the Uniform Standards of Professional Appraisal Practice [USPAP] as developed by the Appraisal Standards Board of the Appraisal Foundation.” Effective July 30, 2018, this clarification pertains to charitable contributions of all property types.

The goal of these requirements is to help people choose appraisers who are professional, competent and objective. While these regulations currently address only donation appraisals, there is a strong possibility that it will be expanded to cover all appraisals prepared for federal tax claim purposes.

Education and Experience

Often a good indication of competency is the appraiser's education and experience. A combination of coursework in both connoisseurship and appraisal methodology provides a strong foundation for the appraisal profession. The appraiser may have taken classes from an appraisal

society, attended subject-related seminars, and/or obtained a university degree relevant to the field. In addition to ongoing learning, an appraiser's work experience demonstrates exposure to handling property and an understanding of market dynamics. Past roles may have been at an auction house, a museum, a gallery, an estate sales agency, etc. It is often interesting to learn about the path that leads individuals to a career in appraising with no two stories exactly alike. It can be a musician-turned-guitar appraiser or a former fashion editor who values Victorian clothing. You can usually discover an appraiser's background by either visiting the business website or requesting his or her curriculum vitae.

Generalist versus Specialist

When researching your options for an appraiser, look for a professional who either has the necessary knowledge about the property to be valued or is able to collaborate with someone who does. Appraisers are usually divided into two kinds: generalists and specialists (even though there is often overlap). A generalist has working knowledge in a wide range of subjects while a specialist has deep knowledge in a specific field.

When it comes to valuing a household full of contents, it is unlikely that a client can afford to hire specialists for every type of property. While in an ideal world it would be nice to enlist several niche experts, the reality is often cost prohibitive. This is when a generalist comes in handy. A good generalist will be able to handle a variety of items and use discernment to know when a specialist should be consulted. Take caution if an individual claims to be an expert in everything and feels there is never the need to seek a professional second opinion. Most generalists work with a network of specialists and fellow appraisers to provide an accurate evaluation.

If you have a specific type of collection that needs to be appraised, consider a specialist. I once had a call from a woman whose husband had a warehouse devoted to the storage of vintage model train sets and associated ephemera. In her instance, a vintage toy specialist with expertise in model trains was her best option. However, sometimes specialists don't live geographically close to the property, and the client may have to pay travel expenses. Alternatively, a local qualified generalist can consult with a faraway specialist by taking useful inspection notes and images needed for evaluation.

Appraisers are Not Authenticators

Being an appraiser is not equivalent to the role of authenticator. A competent appraiser will evaluate an object and communicate whether further authentication is needed. Authentication is the formal process of proving a piece to be genuine. Steps may include researching provenance, checking the catalogue raisonné, forensic material analysis, and/or foundation review. Such lengthy measures are usually taken for items that may have significantly high value where there may be issues surrounding attribution or ownership history.

An authenticator for a particular work or object requires not only specialized expertise, but must also be considered the recognized authority on the matter. The accepted authority can be an individual, a foundation, or sometimes an artist's estate. As you can imagine, having a website declaring to be the sole expert on Picasso doesn't mean he or she is. A similar caution should be taken when trusting certificates of authenticity. This is especially true for artwork purchased on cruise ships; I am constantly the bearer of bad news for Salvador Dali prints bought while in the Caribbean. Qualified appraisers should be able to suggest authentication options and possibly assist you through the verification process.

Independent and Objective

A qualified appraiser will provide an independent and objective opinion of value. An appraiser's role is to remain impartial to the outcome and the parties involved. If there is any potential conflict of interest, it must be immediately disclosed to the client. In the instance of a divorce, the appraiser does not act as an advocate on anyone's behalf even if hired by only one side. This ethical duty to remain unbiased is paramount to the development of a credible appraisal report.

Many appraisers also provide additional services such as consultation, brokering and estate liquidation. These other roles are separate activities and should not occur during the appraisal process. It is common to hear that appraisers wear many "hats," and which hat is being donned should be made very clear to the client.

Galleries and auction houses can also have appraisal departments. There is ongoing debate as to whether there is an inherent bias because the main focus of these businesses is to sell and receive commissions. It all depends on who you are working with, but pay attention to how they treat the appraisal process. Is it delineated from consignment proposals or offers to buy? If the appraiser starts to mention selling while the appraisal is still in process, be wary. Once an appraisal is concluded and you have received the final report, then a new discussion about possible de-acquisition can begin.

How Do They Charge for Their Services?

Like any professional, qualified appraisers have worked hard to gain the skills to value property and will charge appropriately for their services. On average, professional appraiser fees are between \$100 and \$400 per hour depending on the type of project. Expert witness and litigation services are often at a higher price. It is unethical to charge a percentage of the value of items being appraised. Compensation should be based a flat rate that is hourly, daily, per item (for jewelry), or a negotiated project fee. You can usually ask the appraiser for the fee structure at the beginning of the assignment. And many will provide an estimated quote before beginning the assignment.

Like any other circumstance, you usually get what you pay for. Something offered as a free "appraisal" is more likely to be a valuation sales tool. Free appraisals often

come in a one-page format. Be very suspect of treating these documents as appraisal reports. Unlike some sales proposals or gallery receipts, the information required in a qualified appraisal report cannot all fit on a single page. A one-sheet valuation may also be an indication that it is only a portion of the complete report. The pagination should indicate the total number of pages there are in the document.

Despite the quick turnarounds presented on several reality television shows, a qualified appraisal does not occur on the spot. Rather, it takes time to inspect the property, research the market, analyze findings and develop a value conclusion. We're appraisers, not psychics.

In Conclusion

Common sense and due diligence goes a long way when seeking a qualified appraiser. A good starting point when looking for an appraiser is to check the ISA, AAA, and ASA online appraiser directories; you can search by either location or category. A few initial questions to ask when speaking with an appraiser include the following:

- Can the appraiser provide a CV which includes formal training in a given field and appraisal methodology?
- Is the appraiser compliant with USPAP? And has the most recent update course been taken within two years?
- What is the appraiser's experience in handling a particular category of property? Do they work with specialists when needed?
- Are they members of any professional organizations? If so, at what level?
- What is the fee structure? Do they charge by the hour, day, or project?
- Can they provide the report within your timeframe?

What will always ring true is that appraisers are passionate about that which they value. This enthusiasm combined with knowledge, experience, and ethics is what makes a qualified appraiser worth engaging. *FLR*



Courtney Ahlstrom Christy is a fine and decorative arts appraiser based in Atlanta. Her interest in offering valuation services tailored to each client's needs led to establishing Ahlstrom Appraisals LLC, a firm that provides appraisals and consultations throughout the American Southeast. As an ISA Certified Member, an AAA Accredited Member, and USPAP compliant, Christy is involved in a professional community that seeks higher standards and ongoing inquiry into how to best value personal property.

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