The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia – Winter 2020

Parents with Disabilities

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Editors' Corner

By Ted Eittreim

Welcome to the Winter 2020 Issue of the Family Law Review! I am honored and humbled to assume the reins as Editor of this publication, following the large footsteps of the Editors before me whose shoes I can only hope to partially fill. It is a responsibility that I take seriously, so if you have suggestions about ways in which I can improve, please do not hesitate to reach out to me and give me your thoughts. All of us on the Executive Committee and the Editorial Board want to make the Section work better for you, and that begins with having an open line of communication with our Members, so please let us know how we are doing.

With that goal in mind, then, this issue begins with an extended word from our Chair, ivory brown, explaining how our Section is striving to serve our Members by re-doubling our efforts, with, as ivory states, an eye towards even "greater inclusion, diversity, and understanding" in all of our communities. We hope that this issue promotes those ideals with articles on topics that sometimes may not garner the attention that they deserve. For example, our cover story by Debra Gold examines how parents with disabilities often confront greater challenges in preserving their rights simply as parents because of false assumptions and stereotypes about their fitness and abilities. Daniele Johnson's review of the book "Know My Name: A Memoir" by Chanel Miller gives a vantage point on the justice system from the important, but sometimes overlooked, perspective of the victim. We hope these and all of the other pieces in this issue offer not only practical information useful to your practice, but also help us to think about issues that may be too often neglected.

Again, it is an honor and a privilege to bring this publication to you. Please know that the success of the FLR depends in large part on you, our Members! So, if you have ideas for future content, or if you would like to submit an article for publication, please do not hesitate to reach out to me.

Inside This Issue

Editor Emeritus

By Randy Kessler

Can you believe it? We have already started the 2020's. As in years past, I continue to be grateful to be involved in this section with such wonderful people. Here's to a decade of continued growth, health and happiness for our members and clients. I continue to look forward to each Family Law Section event and our Family Law Institute and seminars and to devouring this and every edition of the Family Law Review. Congratulations to Leigh Cummings on a fine term as Editor and best of luck to Ted Eittreim as he takes over and best wishes to each of our officers and executive committee members as they and ivory continue to lead our section forward.

A Word from Our Chair

By ivory t. brown

While this page of the FLR has always been dedicated to a brief "word" from the Chairperson, I wanted to take this opportunity to let you, our members, know some of the ways your Section is helping to promote not only increased knowledge through our CLE programs, but also greater inclusion, diversity, and understanding throughout the Bar and in all of the communities that we all have the privilege to serve.

If you stay tuned to pop culture, you know that the term "the shift" was bandied about during the past year. Proudly, our Section has been ahead of the curve and "trend setting" with decided steps to ensure inclusion in our programs, speakers and topics.

Our successful 37th *Annual Family Law Institute* is a prime example of our concerted effort to include the entirety of our members…whether by virtue of age, gender, orientation, religion, location or client base. Building on the success of last May's *Institute*, we are committed to a *38th Annual Family Law Institute in Hilton Head, South Carolina* that will satisfy all your appetites. *Vice Chair Kyla Lines* is hard at work ensuring that you are captivated by topics and speakers and also enjoy fun in the sun!

During the 2019 summer, our *Diversity Committee* partnered with *Atlanta Legal Aid* and *Atlanta Volunteer Lawyers* and sponsored a community service *Pop Up Legal Clinic* for survivors of Domestic Violence. We will continue to partner with *ALA* and *AVLF* going forward to serve those most in need in our communities, so stay tuned for opportunities to help.

Leigh Cummings chaired the *Annual Nuts and Bolts Savannah* in *August* to a sold-out audience and rave reviews. In our continued effort to include locations outside of the Atlanta area, we also held *August's* monthly *Executive Committee* meeting in *Savannah*. The Atlanta Nuts and Bolts Seminar in September was equally successful.

On *October 22, 2019*, our *Diversity Committee* hosted Section members to the premiere of *Ta-Nehisi Coates – Between the World and Me*. This began an important conversation which will continue during our *Custody Considerations Seminar*. The *Diversity Committee* also began the *Intersection of Art and Law* series on *October 24, 2019* at the *Goat Farm* with Artist *Janine Monroe* at *JMonroe Gallery*. We also began a blanket drive and collected blankets for homeless communities.

Our Section also continued our support of *Atlanta Volunteer Lawyers* with a contribution to and attendance at the *Annual Wine Tasting* event on *November 7, 2019*. The *Inclusion Committee* continued the *Intersection of Art and Law* series on *November 20, 2019* with partner *Atlanta Legal Aid's Picturing Justice Exhibit* with Photojournalist and storyteller *Robin Rayne*. We continued our blanket drive and began a clothing drive for *Solomon's Temple, RATL* and women seeking to enter or re-enter the workplace.

The *AAFCA ("African American Film Critics Association")*, a friend of the Section, also offered the *Inclusion Committee* tickets to Advance Screenings of three (3) movies: *WAVES, QUEEN & SLIM and JUMANJI – The Next Level*. The Committee was pleased to invite Family Law Section members and had a full house at each screening

The *Inclusion Committee* renewed the effort to collect gently used professional garb and partnered with *Jack and Jill* on *December 8, 2019* for an additional clothing drive push. In addition, several members chaperoned *Solomon Temple* resident teens to the *Urban Nutcracker* on *December 14, 2019*.

Stay tuned for our mixers with *Fiduciary Law, E-Discovery* and *Entertainment Law Sections*. The *Inclusion Committee* continues the Mentor program. We will begin a *Custody Considerations Series* including Biracial families, children of the African diaspora, families with LGBTQ children, religions (Moslem and Orthodox Jewish families) and custody following domestic violence. Proposed locations for our next events include the *Trap Music Museum, Jackson Fine Gallery* and *Chastain Park Art Gallery*.

Our Section is one of the largest Sections, but – whether large or small – the common theme was the clear desire of each Section to meet the needs of its members and for continued cooperative spirit and transparency between each Section, the *State Bar* and the programming arm, *ICLE*. On behalf of the Section, I invited all interested Sections to partner with us on future legal education events or social mixers and advised that we would be available to assist the new Sections learn the ropes. Each experience was invaluable and provided tools and information shared with the *Executive Committee* to assist our goal of passing down institutional knowledge amongst our members.

Let us know how we are doing. You are part of the family!

Parents With Disabilities[1]

By M. Debra Gold

One of the most fundamental and important rights that we as Americans have is the right to raise and care for our own children. Yet, for parents with disabilities, preserving this fundamental right is often an uphill battle. Discrimination grounded in stereotypes and unsubstantiated assumptions about their fitness and ability to parent have historically placed parents with disabilities at a huge disadvantage in family courts.

Current data is sparse. A 2010 study completed by The Looking Glass, home of the National Center for Parents with Disabilities and Their Families, estimated that 6.2 percent of American parents with children under the age of 18 have at least one disability. This is approximately 4.1 million parents. Of those parents, 2.8 percent have a mobility disability; 2.3 percent have a cognitive disability; 2.3 percent have a daily activity limitation; 1.4 percent have a hearing disability; and 1.2 percent have a vision disability. These are the parents of approximately 6.6 million children, or 9.1 percent of the total population of children in the United States.[2]

Section 504 of the Rehabilitation Act of 1973 ("Section 504") and Title II of the Americans with Disabilities Act ("ADA") have brought great advances for the legal rights of persons with disabilities in many areas of the law. However, child custody and visitation laws in most states still do not appropriately address the troubles encountered by parents with disabilities in family courts. Standards are vague. And, the lack of good direction in the statutes, appellate decisions and court rules often leads to an implicit and unrecognized bias that discriminates against parents with disabilities. In fact, as Rocking the Cradle reported in 2012, parents with disabilities "are the only distinct community of Americans who must struggle to retain custody of their children."[3] The obstacles they face in family courts are multi-layered.

Georgia is making progress. Effective May 2, 2019, O.C.G.A. §30-4-5, now prohibits discrimination against legally blind persons by the Courts, the Department of Human Services or child placement agencies. The purpose of the new code section is to protect the best interests of children whose parents are legally blind, while safeguarding the parents' due process and equal protection rights in child custody, visitation, guardianship, adoption and foster care matters.

O.C.G.A. §30-4-5 is a victory for parents with disabilities. However, the new statute applies only in cases involving parents who are blind. According to the foregoing Rocking the Cradle statistics, this is only 1.2 percent of the parents with disabilities population. Hopefully, in the future, the Georgia Legislature will enact similar legislation which will be more inclusive of parents with other disabilities.

The Legal Background

Historically, people with disabilities have been treated by the law almost as lesser beings, unfit to have, or to parent children. In the early 20th century, most States passed laws allowing for persons with physical, cognitive, sensory and psychological disabilities to be segregated from society and/or involuntarily sterilized because of the belief that they would pass on their disabilities to future generations who would become a burden to society. Some states, including Georgia, still have some form of involuntary sterilization on the books.[4] Countless cases have also been reported of infants and children being removed from their parents, and parents with various disabilities being denied the opportunity to raise their children in their own homes.

In 1973, Congress passed the first federal law protecting individuals with disabilities. The Rehabilitation Act of 1973, as amended,[5] was enacted to "[e]mpower individuals with disabilities to maximize employment, economic self-sufficiency, independence and inclusion and integration into society through . . . the guarantee of equal opportunity."[6] Section 504 prohibits discrimination against people with disabilities by programs receiving federal financial assistance.

In 1990, Congress passed the Americans with Disabilities Act.[7] Title II of the ADA extends the prohibition on discrimination established by the Rehabilitation Act to include public entities and governments, regardless of whether they receive federal financial assistance.

In the context of custody litigation, the intent of Section 504 and the ADA is to protect parents with disabilities from discrimination in family courts so

that they are not stigmatized solely by reason of their disabilities. A "disability" is defined by the ADA and Section 504 as a substantially limiting physical or mental impairment that limits a major activity. This includes, but is not limited to caring for oneself, performing manual tasks, standing, lifting, speaking, walking thinking, reading, learning, concentrating, seeing, hearing, eating, sleeping or working.[8] The two fundamental principles of the ADA and Section 504 are individualized treatment, and full and equal opportunity. Simply put, parents with disabilities are entitled to receive equal justice, just as any other litigant in family courts.

Over the years, however, there has been little consistency in how the courts and other entities have implemented policies, procedures and practices intended to prevent discrimination against disabled parents. Thus, in 2015, the U.S. Departments of Health and Human Services and Justice published technical assistance and guidance to state and local courts "to ensure that the welfare of children and families is protected in a manner that also protects the civil rights of parents and prospective parents with disabilities."[9]

Every state applies the "best interest of the children" standard in custody and visitation matters. But, the delicate balance between ensuring the best interests of the children and ensuring the rights of disabled parents can be a tenuous one. Since most states still do not provide specific guidance to minimize discriminatory practices grounded in assumptions and inaccurate negative beliefs, parents with disabilities are still experiencing unfairness in family courts. Progress is being made, but it has been a slow process. Georgia's adoption of O.C.G.A. §30-4-5 which prohibits discrimination against blind parents in custody matters is a step in the right direction.

Obstacles Faced by Parents with Disabilities

Before we can remedy discrimination against parents with disabilities in family courts, we must first acknowledge that their experience in the legal system can be very different than a non-disabled parent's experience. Parents with disabilities face numerous obstacles in family courts. The basis for many of these obstacles is a general lack of knowledge and understanding of the disabled parents' limiting conditions and mitigating factors. Also problematic is the lack of appropriate standards, available resources, services and training.

1. Obtaining Legal Representation

The first barrier that parents with disabilities encounter in custody and visitation cases is obtaining good legal representation. Most family law attorneys have little training in representing clients with disabilities, and little disability-relevant experience. Because of their lack of understanding of their client's abilities and disabilities, their own implicit biases (of which they are usually unaware) may impact their ability to provide good representation. Attorneys representing parents with disabilities, expecting a full and fair evaluation and adjudication of their clients, are often blindsided by broad leaps to conclusions made by Guardians ad Litem (GAL), evaluators and judges. Since they often lack a good understanding of their client's true abilities as parents, their clients find themselves powerless to redress the unfairness they face.

Attorneys representing parents with disabilities must keep an open mind. They must know the right questions to ask their clients so that they can have a full understanding of their client's capabilities, strengths and weaknesses. Attorneys also need to understand the services, support systems and assistive technology that might mitigate the impact of their client's disability, and facilitate their ability to care and provide support for their children.

Clients with disabilities also often have greater difficulties in obtaining good legal representation because financially, they cannot afford it. Generally, the median family income for parents with disabilities is significantly less than a non-disabled person's income. Many rely on Social Security Income, or Social Security Disability Income. To add to their financial stress, living expenses are often much greater for parents with disabilities. For example, accessible vans or cars are more expensive than a van without the special equipment. Health costs also make a much larger dent in the budgets of individuals with disabilities. Service organizations that provide pro bono legal representation for persons with disabilities rarely become involved in family law matters. Legal aid organizations that do offer assistance in family law cases are sometimes conflicted out if the other party has already consulted with them. Thus, obtaining good legal representation is often almost impossible.

2. Physical Barriers

Although the ADA has been the law of the land since 1990, individuals with disabilities still experience physical barriers which negatively impact their ability to effectively present their cases. Courthouses have ramps to allow wheelchair access into the building. But there are still cases of individuals using wheelchairs who cannot access courtrooms or chamber conferences with the judges because the doorways are not wide enough, or there are steps. It is also not uncommon for parents with sight impairments to receive written communications from the Courts regarding court dates and procedures, but not in Braille. American Sign Language interpreters may be necessary for parents with hearing impairments. Yet, particularly in the rural areas, there are not enough certified or well qualified interpreters.

Attorneys representing individuals with disabilities must be aware of their clients' special needs, as it is incumbent upon them to make sure the Courts are notified so that appropriate arrangements can be made. Under the ADA and Section 504, for example, if the courtroom is inaccessible to a parent using a wheelchair, the court must move the hearing or conference to an accessible location so that the parent can fully participate. Not only are special accommodations necessary to properly present their custody cases, but attorneys and litigants with disabilities should be assured that they have an absolute right to such accommodations. And, when properly handled, the use of adaptations during court proceedings can be the ideal demonstration of how successfully a parent with disabilities can function, despite his or her disabilities.

3. Lack of Knowledge and Understanding

Family law professionals and judges often do not recognize and appreciate the implications and impact disabilities have on litigants in custody cases. There are reported cases, for example, of courts imposing visitation travel and transportation requirements, without considering how difficult and expensive this may be for a parent with mobility issues.

Litigants with disabilities also find that Courts are sometimes unaware of the role adaptations play in facilitating everyday independent life and parenting. A parent with paraplegia is perfectly capable of changing diapers, cooking meals and getting their children to school on time with proper adaptations to their homes and cars. Special equipment for parents with sight or hearing impairments enable them to help their children with homework, and to know what is going on in other rooms where their children are playing or sleeping. Equipment such as computer-aided transcription and telecommunications devices are useful for parents with communication disabilities. Other auxiliary aids that mitigate impairments include medical equipment and devices; medications; behavioral modifications; and assistive technologies.

Some judges have imposed supervised visitation on disabled parents even though the parent lives independently, and the disability has little to no impact on the children. Solely because they do not know any better, courts underestimate a parent's capabilities, and the potential for parent-child interaction despite existing disabilities. Courts also underestimate how well children adapt to their parents' disabilities. One mother without sight, for example, reported that her nine-month-old baby led her hand to the bottle when she was hungry.

Additionally, despite research to the contrary, GALs, custody evaluators and judges often jump to the conclusion that children of disabled parents become "parentified," assuming parental responsibilities such as cooking and caring for younger siblings. There is no empirical evidence, however, to substantiate this assumption. Instead, research indicates that parents with disabilities are so concerned about over-burdening their children, that they generally require them to do fewer chores than children of non-disabled parents.[10]

4. Attitudinal Biases

Having a disability is often perceived as unnatural, or as a tragedy. Such a view of the parent with disability's station in life often leads to a stigmatization that is not only unfair, but is also insulting. Many people have a knee-jerk reaction that children cannot live a "normal" life with a parent who cannot walk to the park and play baseball with them. This attitude, however, fails to take into account that the essence of parenting is found in the emotional, intellectual and ethical guidance that a parent gives to a child as he or she grows, rather than in the day-to-day responsibilities of cooking, cleaning and carpooling the children to school.

Generalizations and assumptions regarding parents with disabilities often lead to negative speculations about their parenting that are not based

on actual parenting. There are cases of parents who have lived independently as their children's primary caretaker for many years, only to have their ability to parent questioned once they become involved in a custody dispute. Courts speculate as to what could happen in the future, and "foresee" exaggerated potential safety or other issues that have no basis in reality. In one case, a mother with mobility issues complained that she had to prove that she could to get upstairs in an emergency by making test-runs while being timed. This is not the kind of treatment non-disabled parents get in most courts.

Many parents with disabilities complain about being disrespected by GALs, custody evaluators and judges who treat their disabilities with disdain. For example, one mother without sight reported that the judge opined that she could not be a "responsible" parent simply because of her blindness. Other litigants have reported that despite medical evidence of their conditions, judges have questioned if they are faking their disabilities.

Disrespect of one's disability is often demonstrated in the language used when talking about individuals with disabilities. For example, referring to a person who uses a wheelchair as "wheelchair bound" or "confined to a wheelchair" is negative and disempowering. He or she does not "suffer" from a "debilitating condition," is not a "cripple," and does not park his or her car in a "handicapped" parking space. Rather, more empowering language places the person first so that they are not defined by their disability. The disability is just one of the many attributes that makes the person who he or she is. Thus, the "parent who uses a wheelchair" may "have cerebral palsy," and he or she parks the car in an "accessible" parking space.

5. Lack of Standards and Training for Guardians ad Litem and Custody Evaluators

Guardians ad Litem and custody evaluators have little training in assessing parents with disabilities, and there is an absence of well-defined standards giving them guidance. Uniform Superior Court Rule 24.9, the Georgia rules governing the appointment, qualification and role of GALs, provides only general direction for evaluating such custody cases. Subsection 2 of U.S.C.R.24.9 provides a laundry list of the general topics in which a GAL should be trained. Yet, special considerations in cases involving parents with disabilities is not one of those topics.

GAL and custody evaluation trainings should include at least a general understanding of the various disabilities and their impact on parenting. The knowledge gained gives meaning to what they observe in the homes and families they investigate. GALs and custody evaluators should also be challenged to recognize their own personal implicit biases. Proper training enables them to be sensitive to issues experienced by parents with disabilities that are outside of their ken. Only with awareness can they move beyond unintended biases, and avoid value judgments that may impede a full and fair investigation.

Trainings should stress that undue weight should not be given to the parent's diagnosis of a disability. Rather, the relevant issue for GALs and custody evaluators is the degree to which a parent's disability affects the parent-child relationship, and the health, safety and welfare of the child. The parent's disability is only one of the many considerations that should factor into a custody recommendation. Thus, GALs and custody evaluators must adopt a non-judgmental posture, and put aside their own assumptions, stereotypes and fears about disabilities. They must also work extra hard to guard against the natural tendency to speculate beyond reasonable probabilities, and ensure that their assessments and recommendations are based on actual facts.

Trainings should also impart knowledge about support services and other resources, many of which are not-for-profit, which can be incorporated into custody recommendations. GALs and custody evaluators should be instructed to be open-minded about adaptations and other accommodations that may be available to enable parents with disabilities to perform parenting duties that would otherwise seem impossible. Personal assistants or help from family members, for example, are an acceptable means of maximizing a disabled parent's functioning, not an indication of weakness in parenting skills.

The GAL's investigation should be a fact-specific inquiry into the individual capabilities, strengths and weaknesses of both parents, whether disabled or not. Both parents should be considered equally. A GAL should never require a parent with disabilities to perform tasks that the non-disabled parent would not be required to do, just to prove his or her fitness as a parent.

The best way for GALs and custody evaluators to overcome misunderstandings and biases regarding a disabled parent's ability to properly care for children, is through personal observations of the parent-child relationship in everyday life in their natural home setting. Clinical observations, interviews and standardized testing in unnatural settings may not give the full picture. Questionnaires and testing used by the evaluator must be adapted to accommodate the disability. For example, some GALs and evaluators ask parents to complete extensive questionnaires or testing using pencil and paper. Yet, a parent with physical disabilities may not be able to hold the pencil, or may not be able to sit for long periods of time to complete the work.

The GAL or custody evaluator should be prepared to ask the right questions, in a respectful manner, regarding auxiliary aids, how and when they are used, and how they facilitate parenting responsibilities. The GAL should also consider expert medical knowledge regarding the nature and limitations of the disability. If a parent has issues with verbal communication, the GAL should refrain from using the children as interpreters.

Custody recommendations should be based on objective evidence, and should be appropriately tailored to the unique needs of the family. If there are special transportation, communication or other issues due to a parent's disabilities, the recommendations may include special conditions and accommodations. It may also be appropriate to recommend legitimate safety requirements, support services and/or treatment to remedy various concerns.

Visitation recommendations for parents with disabilities should ensure opportunities for regular contact with the children, even if it is not physically possible. Bedridden parents, for example, can continue to play a major and positive role in their children's lives via Facetime or Skype contact. Supervised visitation should never be imposed unless the objective facts clearly call for it. And, of course, parents with disabilities should also have the right to participate in the decision making process, and attend school functions, extracurricular activities and doctor appointments, if they are able to do so. It may be appropriate to recommend participation in these parental functions via Facetime or Skype.

Applying The Best Interests of the Children Standard

In the United States, every state applies the best interests of the child standard in custody and visitation cases. Georgia's statute includes a long list of factors to consider in making a best interests determination,[11] Even with this list of statutory factors, and the appellate opinions giving guidance as to how they should be applied by the trial courts, there is still a certain amount of vagueness, and trial courts are vested with great discretion in applying the factors. The end result is that in most cases, there can be a number of ways to piece together the best interests of the child "puzzle" This is particularly true in cases involving parents with disabilities.

At the same time that family court judges are obligated to protect the best interests of the children, they are also mandated under the ADA to protect parents with disabilities from unlawful discrimination. This sometimes results in a perceived conflict for judges, who struggle with balancing the two interests. Yet, protecting parents with disabilities from discrimination, and protecting the best interests of their children are not mutually exclusive goals. Rather, the ADA and Section 504 are consistent with, and, in fact, complement the principle of the best interests of the children. The reality is that in most cases, children benefit from the love, affection, security and care that they get from their parents, whether disabled or not. Thus, ensuring that all parents have equal access to parenting opportunities and equal treatment in family courts also promotes the best interests of the children.

With the addition of O.C.G.A. §30-4-5 to the Georgia Code, the legislature also amended O.C.G.A. §19-9-3(a)(3)(I). This subsection authorizes consideration of the parents' mental and physical health in custody matters, and is one of the main factors upon which trial courts rely in cases involving parents with disabilities. As amended, the code section provides that in making a custody determination, the trial court may consider the mental and physical health of the parents "except to the extent as provided in Code Section 30-4-5. . ." What this means is that if a parent's blindness is one of the considerations in a child custody ruling, the trial court must comply with the provisions of O.C.G.A. §30-4-5. The direction provided by this code section should minimize the perception of conflict that many trial courts have struggled with, so that the best interests of the children standard will not unduly overshadow the rights of parents without sight.

O.C.G.A. §30-4-5

Georgia joins many states, including Idaho, Missouri, Kansas, Tennessee, Oregon and Washington that have enacted statutes to address the biases and other difficulties parents with disabilities have encountered in family courts. With specific statutory guidance, the intent of the ADA and Section 504 does not become lost in family courts. Parents with disabilities, and their children, are better protected. Georgia, however, limits this statutory protection to parents who are legally blind.

O.C.G.A. §30-4-5(b)(1) expressly provides that custody, visitation, adoption and other child placements may not be denied to a party "solely because the party is legally blind." Rather, the factors contained in O.C.G.A. §19-9-3(a)(3) may also be considered by the trial court. By explicitly disallowing the presumptions that arise in cases involving parents with visual impairments, trial courts, GALs and custody evaluators must consider the objective facts on a case-by-case basis, free from generalizations and stereotypes. A parent's blindness is only one of many important factors to consider.

If the issue of a parent's blindness is raised by either party, pursuant to O.C.G.A. §30-4-5(b)(2), that party carries the burden of proving by a preponderance of the evidence that the disability is endangering, or will likely endanger the health, safety or welfare of the child. A significant weight is now taken off of the parent without sight, as he or she does not have the primary burden of affirmatively proving his or her capabilities, or the falsity of unsubstantiated allegations of incompetence due to the blindness.

If the foregoing burden is met, the parent with impaired vision has the opportunity to show how supportive parenting services can alleviate any issues. O.C.G.A. §30-4-5(a)(3) defines "supportive parenting services" as "services that may assist a legally blind parent or prospective legally blind parent in the effective use of nonvisual techniques and other alternative methods to enable the parent or prospective legally blind parent to successfully discharge parental responsibilities." This can include special accommodations, assistive technology, personal assistants, and even guide dogs.

Under O.C.G.A. §30-4-5(b)(2) the trial court also has the authority to require supportive parenting services in its custody order. The code section allows for a trial period, as the trial court may "review the continuation of such services within a reasonable period of time." Such a provision is reasonable to ensure that appropriate services are in place to protect the safety and well-being of the child.

If a trial court denies or limits custody or visitation to the parent without sight, O.C.G.A. §30-4-5(b)(3) mandates "specific findings stating the basis for such a determination and why the provision of supportive parenting services is not a reasonable accommodation to prevent such denial or limitation." The trial court should include in its findings what evidence and facts were considered in reaching its custody decision. This should include the impact of a parent's blindness on the health, safety and welfare of the child, as well as the special parenting services considered, and why those services do not adequately address custody concerns.

O.C.G.A. §30-4-5 provides good direction in custody cases involving parents with blindness. The new code section requires the trier of fact to take a more holistic view of a legally blind parent's abilities and disabilities. The requirement to consider the benefits of supportive parenting services takes the focus off of the simple fact that the parent is blind, and ensures that the parent receives fairer treatment in family courts. All of this goes a long way to minimize the unjust situations rooted in discrimination experienced by blind parents in family courts.

What Is[n't] Next?

O.C.G.A. §30-4-5 is limited to preventing discriminatory practices against blind parents. While this is a good start, what about parents with limited mobility, hearing impairments, cognitive issues and other disabilities? Common sense dictates that the trial courts are required to comply with the ADA and Section 504, and therefore do not need a specific statute to remind them that all litigants with disabilities should receive equal treatment and opportunities.

But, is that enough?

Myths, misconceptions and a widespread bias still exist in family courts with regard to parents with various physical, cognitive, sensory and psychological disabilities. Under the current statutory scheme, except in cases involving blind parents, trial courts can continue to apply stereotypes about parents with disabilities. They can also discount or ignore important factors such as supportive parenting services that

enable disabled parents to perform parenting duties. A statute more inclusive of all disabilities would promote greater awareness and better articulated standards, procedures and practices needed to balance the injustices parents with disabilities still experience in family courts.

Protecting the best interests of the children while also protecting the rights of parents with disabilities is the goal. Ensuring that this is done in a manner that limits discriminatory stereotyping, considers all relevant factors and mitigating support services, and allows the parties to maintain the respect and dignity that all litigants in court deserve is the best way to accomplish this. O.C.G.A. §30-4-5 already provides a good framework for a more inclusive statute. The only thing we have to lose is the bias and discrimination that parents with all types of disabilities have experienced in family courts.

Georgia has come a long way toward recognizing that parents with disabilities are not necessarily disabled when it comes to their parenting capabilities and contributions. A greater awareness is evolving. Judges, GALs and custody evaluators are becoming more aware of the implicit biases that creep into their decision making processes. And, they are more open to evenhanded approaches. O.C.G.A. §30-4-5 is one more door that has opened for parents with disabilities. Continuing this trend is the way to go. . There is a light at the end of the tunnel that is getting brighter every day for parents of all disabilities to receive thorough, fair, unbiased and balanced treatment in family courts. And in the end, it is their children who are the winners.

Endnotes

1. This article was originally published in 2017 to accompany M. Debra Gold's presentation at the DeKalb Bar Association "Not Your Everyday Custody Case" continuing legal education seminar. The article has been updated since the recent passage of O.C.G.A. §30-4-5.
2. Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children, ("Rocking the Cradle"), National Council on Disability.
3. Id.
4. O.C.G.A. §31-20-1 et seq.
5. 29 U.S.C. §701 et seq.
6. 29 U.S.C. §701(b)(1)(F)
7. 42 U.S.C. §12101 et seq.
8. 42 U.S.C. §12102(1), (2)(A); 29 U.S.C. §705(9)(B)
9. Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, U.S. Department of Health and Human Services, Office for Civil Rights Administration for Children and Families and U. S. Department of Justice, Civil Rights Division, Disability Rights Section.
10. Lisa Cohen, Mothers' Perceptions of the Influence of Their Physical Disabilities on the Developmental Tasks of Children\ (1998) (unpublished Ph.D. dissertation, California School of Professional Psychology).
11. O.C.G.A. §19-9-3(a)(3)

Avoid Being "That Lawyer" - Fix Your Fee Contract Today!

By Judge Christopher C. Edwards and Kyle Harris Timmons

Do you want to be "that lawyer" who sues clients for fees, or "that lawyer" who works hard but walks away from unpaid fees to avoid suing clients? Amend your future fee contracts today and avoid the misery of being either kind of "that lawyer." Here are two useful clauses to include in your fee contracts. First, an arbitration clause in your fee contact is commended to you by the Supreme Court of Georgia, and the State Bar of Georgia. Second, a client complaint clause in your fee contract is enforceable under an important Court of Appeals decision. We also guarantee you will be better looking. Keep reading to find out how!

First, include a Georgia Bar Fee Arbitration clause in your fee contract. The Supreme Court of Georgia's "Specific Aspirational Ideals" suggests such a clause: "As to clients, I will aspire . . . [t]o fair and equitable fee agreements. As a professional, I should . . . [r]esolve all fee disputes through the arbitration methods provided by the State Bar of Georgia." Clients and lawyers can contractually submit to mandatory binding fee arbitration by the Bar's Committee on Arbitration in the fee contract. To be arbitrated, the disputed fee must be over $750 worth of legal services performed in Georgia by a Georgia lawyer, must be within the previous two years, not already fixed in amount by law nor court order, and not already the subject of pending litigation. The full text of Georgia Bar Rule 6-204 can be found online at https://www.gabar.org/handbook/#handbook/rule549. The Georgia Bar Fee Arbitration staff fields questions with alacrity at 404-527-8750.

What should your fee arbitration clause include? The fee arbitration clause must state all fee disputes shall be resolved solely, exclusively, and finally through the arbitration methods provided by the State Bar of Georgia, under Georgia Bar Rule 6-204. Rule 6-204 requires your fee contract arbitration provision follow three simple but strict rules.

- The fee contract's fee arbitration clause must be in a separate paragraph.
- The fee arbitration language clause font must be at least as large as the language in the remainder of the contract, preferably larger.
- The fee arbitration clause should include adjacent lines on the contract for both the lawyer's and the client's initials and must be initialed by both.

These three rules ensure that the client and lawyer mutually consent to the fee arbitration clause. If your client fails to pay your fee, or if your client disagrees with your fee, the Committee on the Arbitration of Attorney Fee Disputes will render an enforceable decision, at the request of the client or the lawyer.

Second, include a client complaint clause in your fee contract. Your case at arbitration will be much stronger if you follow the guidance of Loveless v. Sun Steel, Inc., 206 Ga. App. 247, 424 S.E. 2d 887 (1992). In Loveless, a client complaint clause was included in the fee contract, stating "any complaint regarding the legal services provided or the amount charged therefor must be definitive, in writing and received by [lawyer] within 30 days of billing or it is waived." Id. at 248, 424 S.E.2d at 889. This client complaint clause creates an estoppel barring evidence of client complaints that are not definite, written, and timely. This clause won summary judgment for the lawyer in that litigated fee dispute because no definite, timely, written complaint was received by the lawyer from the client. State Bar of Georgia arbitrations follow Georgia law, so under Loveless, this clause may be argued at arbitration to create the same contractual evidentiary estoppel as in litigation. ("During arbitration proceedings, the general rules of contract construction apply." Sweatt v. Int'l Dev. Corp., 242 Ga. App. 753, 755, 531 S.E.2d 192, 194 (2000); "Contracts are to be governed as to their nature, validity, and interpretation by the law of the place where they were made." Convergys Corp. v. Keener, 276 Ga. 808, 811, 582 S.E.2d 84, 86 (2003)). This clause is more helpful if your practice sends monthly or periodic billings, but it should still apply upon final billing that is not met with a timely, definite, written complaint.

Professionalism is its own reward but, like any job done well, highly professional lawyers tend to have the greatest financial success in private practice. The most professional lawyers, who read and follow the Supreme Court's advice, are generally happier and have the best client relations. Professional lawyers are also better-looking, because clients, colleagues, judges, and even adversaries, are happy to see them. If this article has been helpful to you, please take half an hour to read and contemplate the other useful pointers written to you by the Supreme Court of Georgia, called "Specific Aspirational Ideals" at https://www.gabar.org/aboutthebar/lawrelatedorganizations/cjcp/lawyers-creed.cfm. The best, brightest lawyers and judges among us wrote these Ideals to tell you what works to be happy, successful, and better looking. (The authors thank Rita Payne and Tom Humphries of the Georgia Bar Committee on Arbitration for their helpful refinements.)

Christopher C. Edwards is the chief judge of Superior Court of the Griffin Judicial Circuit and now serves on the Board of Governors and on the Board of the General Practice and Trial Section of the State Bar of Georgia.

Kyle Harris Timmons is a graduate of the 2017 class of Mercer Law and currently serves as Judge Edwards' staff attorney in the Griffin Judicial Circuit.

Professionalism Towards the Other Party

by Randall M. Kessler

What are we as family law attorneys paid to do? To help our clients, right? However, a lot of us often see or are given a simultaneous directive which is to destroy the other side and that is 100% wrong. As family law attorneys, we are so lucky to represent people who are by and large innocent and decent people who just have family issues that are common to many people, even to those who do not divorce. Do attorneys often feel a need to vindicate our clients by destroying the other side? Some may. My suggestion? Resist, resist, resist.

What happens when we "destroy" the other side? When we embarrass and humiliate them? Does it make us look good? Does it help people like the system? Does it benefit our client? Does it benefit the children? Does it benefit our reputation? I suggest the answer to all of these questions is no.

Perhaps a way to look at it would be as follows. Let's say you were on an elevator in a high rise building which gets stuck. You start to panic and are concerned that you may never get out. There is one other person on the elevator. This person reassures you and keeps you calm. You strike up a conversation and it makes the short delay tolerable. Then you realize that the person is the opposing party from a case years ago to whom you were very ugly to in depositions or in trial. How would you feel? That little example and thousands of others (you meet at a concert, or in line at a restaurant or anywhere else) should make us realize that our client's' opponents are often decent people. Wouldn't you like that person on the elevator to say to you "I remember you; thank you for how you handled the situation, our family is doing well"? That's my hope for me and for all of us. And it does not mean you cannot provide very zealous representation. To the contrary. There is power in courtesy. We are not the ones going through the divorce, they are. Both sides deserve our compassion. We should advocate for our client, but let's not leave shrapnel for the family.

Military Legal Assistance Program

The Military Legal Assistance Program (MLAP) is a State Bar of Georgia program that assists service-members and veterans by connecting them to Georgia attorneys who are willing to provide free or reduced-fee legal services.

How can you help?

Take at least one pro-bono case per year. Offer free initial consultations with service-members and veterans, pro-bono or reduced fees if extended legal services are provided.

To sign up for the MLAP, contact Christopher Pitts at 404-527-8765 or at MLAP@gabar.org

Tax Disputes in Family Law Cases: How You Can Help Your Client

by Jason Wiggam

Tax problems are more common than you may think. Currently, there are about 26 million taxpayers facing a federal or state tax issue. These taxpayers are not criminals; they are regular people with good intentions and a tax issue that is beyond their control. Maybe they are dealing with financial issues or a major change in their family. Perhaps they are going through a divorce and are unsure who is responsible for the family's financial obligations. The relationship between tax law and family law can be complex, varied, and full of minutia. This article focuses on two primary issues: 1) What should you do if your client has an existing tax issue or liability, and 2) what should you do if your family law client has a tax issue that they are not yet aware of?

Clients With Existing Tax Issues or Liabilities

Let's begin by establishing that if your client has a tax issue or liability, it is important for them to resolve it. Tax issues can spill over into many different areas of their family law case. It can impact their divorce proceedings and settlement, alimony, child support, and even their passports and ability to travel. Some individuals who owe taxes – whether through their own actions or because of their spouse or former spouse's actions – may ask if they should pay those liabilities. The answer is yes if they have the available funds to do so. Owing a substantial amount of money is bad enough, but owing additional penalties and interests can make those financial hardships even worse.

So, what can they do? The goal is to help stop the government from penalizing your client while setting them up to resolve their debt. There are a couple of ways to achieve this. First, you want to make sure that your client is still **filing their tax returns on time**, even if they are not able to pay the tax liabilities in full. Tax penalties become more severe if the taxpayer does not file on time.

One common solution for family law clients with tax issues is for the taxpayer to submit a proposal for an **installment agreement** with the Internal Revenue Service ("IRS"). This is also known as an IRS payment plan; however, it should be noted that interest and penalties still apply. The IRS has four different types of installment agreements: guaranteed, partial payment, streamlined, and non-streamlined. The taxpayer could also submit an **Offer in Compromise**. This is an agreement between the taxpayer and the IRS that settles the taxpayer's liabilities for less than the full amount owed. The IRS may accept an Offer in Compromise if there is any doubt as to the correct amount of the tax liability, if there is doubt the amount owed can be collected in full, or if there are exceptional circumstances that would create an economic hardship for the taxpayer. The IRS also offers taxpayers **penalty abatements**. For example, the First Time Penalty Abatement program is designed to provide relief for certain taxpayers. The program removes late-payment or late-filing penalties for individuals, businesses, and employers with clean compliance histories. **Filing for bankruptcy** is another means preventing the government from penalizing debt so that clients can work to resolve their tax issues. If a taxpayer files for bankruptcy, the court will issue an automatic stay, preventing the IRS from taking collection action. With bankruptcy, income tax liabilities can also become dischargeable. Another common solution for resolving a joint tax liability is for a taxpayer to file for **Innocent Spouse Relief**. This is a provision of U.S. tax law that allows a spouse/taxpayer to seek legal and financial relief from any penalties resulting from an error made by the other spouse on their joint tax return. Most commonly, that error is unreported income or inflated deductions. If the IRS grants Innocent Spouse Relief, the Georgia Department of Revenue will usually follow the IRS' determination. Finally, a taxpayer could request to be placed into **Currently Not Collectible** status. If the client can demonstrate financial hardship or economic disadvantage, the IRS might grant Currently Not Collectible status, which temporarily pauses the IRS collection process until the taxpayer's financial situation improves.

Clients With Tax Issues They Are Not Yet Aware Of

As a family law attorney who is evaluating your client's case, you might realize that they have a tax issue that they are not aware of. Whether this problem happened because of the client's actions or due to their spouse or ex-spouse's actions, it is important to address the issue and resolve it. Again, avoiding the issue will only make it worse. With late-filing penalties, the taxpayer is charged 5percent per month, with a maximum of 25percent charged. With late-payment penalties, the individual is charged 0.5percent a month, with a maximum of 25 percent charged.

Filing tax returns is a detailed and complicated process, and as such, it can be easy for an average taxpayer to make a minor mistake. But there is a difference between accidental errors and intentional ones. There are several intentional actions which the IRS considers tax crimes. An intentionally *unfiled tax return* can be a misdemeanor crime; a person can face criminal charges if their unfiled tax return was due within the last six years. Penalties include up to one year in jail and $25,000 in fines for each unfiled return. *Tax fraud*, also known as *tax evasion*, is the willful attempt to evade or defeat the assessment or payment of a federal tax. This includes failing to pay taxes, making fraudulent claims, preparing or filing a false return, or failing to report income. Tax fraud is a felony which carries up to three years in prison and $100,000 in fines. Not every taxpayer is prosecuted for tax crimes, but they can be audited and have additional civil penalties asserted against them if additional tax is owed. If the taxpayer's understatement is more than 10percent of the tax required to be shown on the return or more than $5,000, it is considered a "substantial understatement," which carries a penalty of 20percent of the taxes due. The taxpayer may also be liable for a 20percent penalty if the IRS believes that the tax was understated due to the taxpayer's negligence or disregard.

How can you help a client who just recently identified a tax issue? If possible, they should correct the problem before the government discovers it. The client could consider the different **Voluntary Disclosure Programs** offered by the IRS and the Georgia Department of Revenue, which incentivize taxpayers to proactively disclose their unfiled or underreported tax liabilities. In exchange for disclosing the tax issue, qualified participants will usually receive immunity from criminal prosecution and a time limit on requirements to disclose and pay previous liabilities. For the IRS, if the taxpayer accurately files or amends their last six years of tax returns, they will only receive immunity from criminal prosecution. For Georgia, if the taxpayer files or amends their last three years returns, the state will waive all penalties along with the filing requirement for any prior-year tax return beyond the three-year lookback. This is usually an advantageous deal for the taxpayer.

For clients involved in family law litigation, **avoiding a tax lien** should be a top priority. When a person neglects or fails to pay a tax debt, the government protects its interest in the taxpayer's property (ex: real estate, personal property, other financial assets) by filing a Notice of Federal Tax Lien. This is a public document alerting creditors that the government has a legal right to their property. The lien attaches to all of the taxpayer's current assets as well as future assets acquired during the duration of the lien – which can include business assets and accounts receivable. A tax lien can derail a family law case and disrupt the process of equitable division. Not only can the government file a tax lien against a taxpayer's property, but if the situation worsens, the government can also take the person's finances and possessions.

A potential way to avoid a tax lien is to file an appeal with the IRS explaining how the filing of a lien is **not in the government's best interest** – meaning that the government would collect significantly less from the taxpayer if a lien were filed. If the taxpayer cannot pay their liabilities in full, but they owe less than $50,000, they can apply for a **Streamlined Installment Agreement**. Under this plan, the taxpayer agrees to a 72-month payment plan with automated direct debit payments or payroll deductions. In exchange, the IRS will not file a public notice of a federal tax lien.

If your client already has a tax lien against their property, there are a few ways to potentially resolve this issue. The first is to advise your client to **pay the lien in full**. If he or she is financially unable to do that, they might consider applying for a **lien subordination** which enables the taxpayer to refinance their debt with another creditor so they can pay the IRS more money on their tax liability. The client could also apply for a **lien discharge** to have the lien released from a specific property to enable them to sell that property.

Finally, another way a client can resolve their tax issue is **to delay**. The IRS has a ten year and thirty-day Statute of Limitation to collect a tax debt after it is assessed against the taxpayer. The delay strategy involves deferring payment of the tax liability as long as possible and then utilizing installment agreements or currently not collectible status until the statute runs out. Once the Statute of Limitations expires, the IRS must stop its collection efforts, and then typically will write off the debt.

Whether your family law client comes to your office with an existing tax issue or you discover a tax problem once litigation begins, it is vital that you help them address and hopefully resolve that issue. Doing so can make a significant difference in both the success of your case as well as your client's future financial health.

Jason Wiggam is a founding partner of Wiggam & Geer, LLC located in Atlanta, Georgia. His practice focuses on representing individuals, businesses, officers, directors, shareholders, and partners in matters before the Internal Revenue Service, the Georgia Department of Revenue, and other state tax departments. Contact: 404-233-9800, jwiggam@wiggamgeer.com.

2019 Joseph T. Tuggle, Jr. Professionalism Award

by Randall M. Kessler

Starting in 1995, the Family Law Section of the State Bar of Georgia established the Family Law Section Professionalism Award. The award was given in recognition of the person who the Section deems to have most exemplified the aspirational qualities of professionalism in their practice as a lawyer and/or a judge. In 1999, the award was officially named the Joseph T. Tuggle, Jr. Professionalism Award and was given to him that year shortly before his death.

Past recipients include judges and lawyers such as:

Hon. Hilton M. Fuller Jr., Hon. Elizabeth R. Glazebrook, M.T. Simmons Jr., Hon. Cynthia D. Wright, Hon. Mary E. Staley, Hon. Louisa Abbot, John C. Mayoue, Hon. Carol W. Hunstein, Edward E. "Ned" Bates Jr., and Kice Stone.

This year's recipient is my law partner, Marvin Solomiany. Some family background on Marvin. His great-grandfather left Poland in 1930 without his wife or five daughters. He chose to do this given the very difficult economic and other conditions. He arrived in Cuba alone, not knowing Spanish. One of those daughters, was Marvin's grandmother, who instead of money for a wedding, used the money to open a store. But when Castro came to power, she and the family had to start all over again in Puerto Rico in 1960.

Marvin Solomiany and his brothers were born and raised there before going to college in the United States. And today, all four are successful lawyers! The sons of immigrants who were also the children of immigrants!

Marvin started working as a law clerk while he was in his first year at Emory law school in 1995. He did not have a desk, but it was no big deal for him. He simply knocked the middle out of the credenza with a hammer to build his own desk.

At first, Marvin wanted to be a business lawyer, but he saw his first family law trial and thought "I can do that" and that was all it took.

Marvin didn't want his name on door when the subject was first raised many years ago. He thought he was too young. But he had earned it through hard work.

What words are first to mind for me when thinking about Marvin?

Humble, hard working, ethical, driven, family man.

The best partner anyone could have.

How did I get so lucky?

There's no one I'd more fiercely defend than Marvin Solomiany. He defines integrity, work ethic, honesty, professionalism and success.

When Marvin puts his mind to it he can do anything.

A few years ago he decided that he wanted to be a pilot. Of course I thought he'd take a year or two to take lessons on weekends like anyone else I know who did that, but he did it within a month. He went to California and locked himself in a Motel 6 - studied for two weeks straight and came back with a license and now flies patients in need of medical treatment through an organization called Angel Flight

There is nothing more that he values at work than his professionalism and the value of his word. He is someone that will advocate as much as he can for his client, but always by being professional to the attorneys he is working with.

As he likes to say, "the nature of our job is difficult enough, that there is no reason to treat opposing counsel in an unprofessional/negative way".

He understands that since we will deal with other attorneys again down the road, how we act in one case will undoubtedly have an impact on how things happen down the road when we work with that attorney again.

Mediator. Marvin has never marketed himself as one and now the finest lawyers we know seek him out to mediate or late case evaluate their significant cases. What a tribute. To hire a peer, a competitor to serve as a respected neutral to help bring peace to warring parties and lawyers. The ultimate sign of respect.

I was not on the selection committee and had no input, but of course I applaud the decision. Marvin is younger than all prior recipients, but I agree with his selection wholeheartedly not just because of who he is and what he has done as a family lawyer and as a person, but precisely because of his age. He's always worked so hard to be and get ahead. And why not recognize people while they can truly continue to honor the award as he continues to practice and to help improve all of our practice. All prior recipients were certainly deserving years before they were honored. Marvin congrats on joining such elite company. You deserve it.

The presentation can be found at:
https://m.youtube.com/watch?v=7SWK7ZGxr2A.

Bitcoin and Cryptocurrency Issues in Divorce

by David Sarif

Divorces are more frequently starting to involve Bitcoin and other cryptocurrency issues. Bitcoin is the most valuable and well-known cryptocurrency. In fact, at the time of this article it had a total market capitalization of $190 billion dollars (yes, that's billion, with a "b"). For comparison sake, Bitcoin's market capitalization is larger than companies such as McDonalds, Boeing, IBM, Nike, and American Express. While there are over 1,600 different cryptocurrencies, the top 100 have a market capitalization of about $280 billion dollars.

While the first Bitcoin came into existence in 2009, these issues have only fairly recently come to fruition in divorces as public awareness of cryptocurrencies has grown substantially (along with the values of several cryptocurrencies). Quite frankly, you're naive if you think Bitcoin and cryptocurrency is something to ignore in divorce because people are buying it, trading it, possibly mining it, and perhaps trying to use it to hide assets or transactions.

Most of the issues in a divorce regarding cryptocurrency stem from two main challenges for the family law practitioner: 1) Cryptocurrency values can be volatile and 2) Cryptocurrency, by its very nature, can be hidden and hard to find.

What exactly is cryptocurrency?

Cryptocurrency is a form of payment alternative to fiat money. Fiat money is the term for more traditional government-backed currencies, like the US Dollar, the Euro, or the Yen. Cryptocurrency, at its highest level, is basically virtual currency that is completely decentralized and has no affiliation with any governmental organization. Bitcoin is a type of cryptocurrency that is probably the most well-known due to having the largest market capitalization and media coverage. Other popular cryptocurrencies include Ethereum, Ripple, and Litecoin. These virtual currencies are stored in digital wallets and are marketable on various exchanges. The exchanges help facilitate the transfer of these virtual currencies and are also places where the currencies can be traded (think of day trading a stock, except that people are "day trading" virtual currencies). Digital wallets also record and hold the value of the currency in real-time, making it easy to carry out transactions.

Cryptocurrency lives online and is traded on a blockchain, which is an encrypted ledger that details transactions. The blockchain ledger is stored on many different servers, which contrasts with ledgers used by banks or companies that are generally stored in a single location. Because the ledger is not located in one place, transfers of cryptocurrency can take place in seconds when it can take several days or more to transfer dollars from a bank, which has to verify the funds on its centrally located ledger. The blockchain is constantly growing as new sets of recordings, or 'blocks', are added to it. Each block contains a timestamp and a link to the previous block, so they form a chain.

While cryptocurrencies, such as Bitcoin, are being used for everyday transactions, cryptocurrencies are primarily used and traded as an investment commodity. As you might imagine, this has led to a great deal of speculation regarding whether cryptocurrency will ever become a means of exchange for goods in the way fiat money is today. Already, though, there are emerging companies that may make that reality a bit closer. For example, Bitpay is a credit/debit-type card that you can link to your Bitcoin or Litecoin key, and you can use this card as a regular Visa or Mastercard at a store, and the card company effectuates the exchange of crypto- to USD.

Why we should care:

Because cryptocurrencies are to a large extent both unregulated and encrypted, a party might think it is way to convert or hide assets from their spouse. And quite frankly, if someone knows what they are doing, it can be very hard to trace. In a sense, cryptocurrencies can be the modern day "offshore" account. Further, regulatory and legal infrastructure regarding cryptocurrencies are far behind this quickly evolving and growing technology.

Then there are the issues of how to divide cryptocurrency and how to value it. Perhaps the easiest way to look at is to view the issue like you are dividing highly volatile shares of stock. The actual transfer of a cryptocurrency like Bitcoin is very easy as long as you transfer the coins you are transferring from one spouse to the other into the correct "wallet" of the recipient spouse. If you type the wrong receiving address, then there is substantial risk that what you transferred is lost forever. I would encourage the recipient (and perhaps less cryptocurrency sophisticated spouse) to open a Coinbase.com account as Coinbase, for example, is a one stop shop for cryptocurrency trading and wallets. They make the process very user friendly, relatively simple, and can link to a party's checking or savings account if they wish to sell the cryptocurrency and convert it to US Dollars. Remember, similar to

transferring or dividing stocks, it would be prudent to consult a financial expert regarding any tax ramifications.

Red flags / clues to finding undisclosed cryptocurrency.

Bank/Credit Card Statements – Look for transactions to or from an exchange such as Coinbase (one of the most popular exchanges).

Exchange or E-Wallet Statements – these are available to the subscriber in some, but not all, instances. Be sure to look and see if the investments are traceable in this way.

Tax Returns – According to IRS Bulletin 2014-21, cryptocurrency is considered property (and not currency). Accordingly, for tax purposes, cryptocurrency transactions are reported as capital gains or losses on an individual's Form 1040, Schedule D. Each time a party sells or spends cryptocurrency it should also be reported on an income tax return.

Discovery – Ask about it in discovery via Interrogatories and Notice to Produce and/or Request for Production of Documents.

Companies – Many people involved in cryptocurrencies have diverse portfolios, and even for those less sophisticated investors, many people created companies to manage the crypto-investments, including running mining operations. Be sure to consider valuing these companies, their assets, or their tax losses when calculating the marital estate.

Review of Stock Trading Documents – Stock trading platforms such as Robinhood and TD Ameritrade allow customers to trade cryptocurrency so it would be prudent to review such transactions and statements.

Apps History – Consider asking an opposing party to print out their Apps download / purchase history from the Apple Apps Store or Android Apps on Google Play. There are many articles online explaining how to do this such as https://www.cnet.com/how-to/find-all-the-apps-youve-ever-downloaded-on-your-phone/ and if there are cryptocurrency related apps in their history you should consider inquiring further.

This article is just the tip of the iceberg when it comes to cryptocurrency and issues in divorces. I would be happy to discuss cryptocurrency with you and try to help you on your case if such issues arise. Please feel free to call or email me.

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Protecting Your Adult Child from the Claims of an Ex-Spouse

By Conner Watts

Nobody likes to imagine *themselves* going through the turmoil of a divorce. As a result, most people refuse to even contemplate the idea and wholly reject the notion of drafting a pre-nuptial agreement. Clients usually have an easier time discussing the possibility of their *children's* divorces, however. Most parents, after all, will do anything to protect their children from being hurt emotionally, financially, or otherwise.

As an estate planning attorney, I often encounter parents who want to defend their children from hypothetical, future creditors, including ex-spouses. Psychologically, I suspect this stems from the same parental drive that seeks to protect the child from tears as an infant, or from bullies at an elementary age. Irrespective of the desire's origin, asset protection for one's children can often be a huge priority for a married couple when sitting down with an estate planning lawyer.

In crafting an estate plan, married couples have the opportunity to address what happens after the second spouse dies and the family estate is passed-on to the next generation. Even non-lawyers are generally familiar with the concept of a trust left for children (e.g., *"my kids can't get the inheritance money until they are 25 and graduate from college"*).

Non-lawyers and legal practitioners alike, however, are often unaware that careful trust planning can protect a child's inherited assets in the event of their future divorce. Not only can a trust protect the bequest from creditors - including ex-spouses - but when drafted properly, Georgia code provisions reinforce the ability of the child to maintain complete control over the trust assets for the entirety of their lives.

Trust Provisions for Asset Protection at the Second Generation

In the most common estate planning scenario I see, parents leave the family estate to their children in equal shares after the death of the second parent. Most clients like to enumerate certain conditions on obtaining the assets. For example, the parents will nominate a trustee to be in charge of the estate assets until the child reaches a particular age, say 21 or 25. In most cases, the trustee will have the discretion to make distributions for the benefit of the descendant, whether it is for college tuition and fees, living expenses, vacations, or any number of needs that benefit the child.

In scenarios where a trustee has such discretion, Georgia statutes provide creditor protection to the beneficiary, wherein the trustee may never be forced to make a distribution. This makes intuitive sense. Creditors of a beneficiary cannot *force* a trustee's distribution to a beneficiary which, by nature, is discretionary.

Georgia law, not uncommon among the 50 states, goes one step further. Parents may nominate the children themselves as trustees over their own shares of the trust, yet Georgia law still protects them from making forced distributions to themselves, as beneficiaries. O.C.G.A. § 53-12-81 states,

> *"A transferee or creditor of a beneficiary shall not compel the trustee to pay any amount that is payable only in the trustee's discretion regardless of whether the discretion is expressed in the form of a standard of distribution, including, but not limited to, health, education, maintenance, and support,* ***and whether such trustee is also a beneficiary****."*[1]

Therefore, even after the child assumes the role of sole trustee at an age chosen by the parents, no creditor – not even an ex-spouse – can force the trustee-beneficiary to make a self-directed distribution in order to satisfy a judgment. The assets held within the trust may continue to grow and be invested over time.[2]

Drafting the trust with precision is paramount. Although the asset protection is provided by statute, the general exercise of distribution powers in favor of one's own benefit may only be done in accordance with an "ascertainable standard," a technical term in the estate planning community with strong overtures from the Internal Revenue Code.[3]

While a descendant will still have to satisfy an ex-spouse judgment through another avenue, the asset protection provided by such a trust can add a dimension of flexibility in an otherwise inflexible situation. In fact, the existence of such a trust may even make an ex-spouse more amenable to an amicable settlement in the first place.

Regardless, an asset-protection trust established for a child usually lends itself to a less defensive posture in litigation and can potentially provide a welcome gift for the duration of the child's entire life.

Conner Watts is an attorney for Morris Legal and Tax, LLC in Buckhead, Atlanta. He focuses his practice on estate planning for individuals and business owners, as well as tax representation against the IRS. He can be reached by e-mail at Conner@AtlantaTaxandEstate.com.

Endnotes

1. Note that a beneficiary's "right to a current distribution" is subject to claims of alimony or child support, among other things, under O.C.G.A. § 53-12-80(d). Inasmuch as the trust provides that distributions are made on a purely discretionary basis by the trustee, the beneficiary – even if the same person as the trustee – has no "right to a current distribution" of the trust principal. Once the trustee exercises the discretionary authority to make a distribution to the beneficiary, such a right is created, and creditors' claims are valid against the distribution.
2. If the descendant's asset-protection trust was the beneficiary of a parent's qualified retirement plan, the funds are subject to Required Minimum Distribution rules, wherein federal tax law requires a withdrawal of a certain incremental amount over a specified time-frame. The Congressional intent in passing such rules were to prevent perpetual growth in tax-advantaged accounts by passing said accounts across generations. In order to maximize the length of time over which Required Minimum Distributions must be taken, certain provisions called "conduit" or "accumulation" provisions should be included in the trust terms. For a more in-depth discussion of these topics, see Life and Death Planning for Retirement Benefits by Natalie Choate.
3. See O.C.G.A. § 53-12-270.

Trial Outline: Active Duty Service and Military Pension Division (Part 2)

By Mark E. Sullivan

[Part 1 of this article covered how to educate the judge on military pension division issues, how to question the military member upon direct examination, the important facts and data needed by the trial court, and the introduction of documents such as the LES (leave and earnings statement) and the Thrift Savings Plan account statement.]

Cross-Examination of Servicemember

This is an example of the cross-examination of MSG Ellen Baker which might be employed by the lawyer for Jake Baker, the husband. As can be seen in the rapidly deteriorating line of cross-examination illustrated below, the non-military spouse's attorney might want to take a pass on adverse examination of the servicemember regarding SBP. It would be wiser to wait until direct examination of Jake Baker, letting *him* tell the story and explain why he needs the protection of SBP for his stream of income after the retirement of his wife.

Q. [Questions by the attorney for the husband] MSG Baker, what is the SBP?

A. It's the Survivor Benefit Plan.

A. Didn't you conveniently forget to mention that?

A. I wasn't asked about the Survivor Benefit Plan.

Q. Whatever. You didn't mention the SBP available to my client, Jake Baker, did you? If he outlived you, shouldn't he get some form of income protection?

A. Well, of course I would. He's got a job, he earns good money, so he has income and he has protection.

Q. No – I'm not talking about his present earnings as a department store cashier. I'm talking about payments from the Survivor Benefit Plan after you die. Do you object to his being the beneficiary for your SBP?

A. Oh, that! No, of course not. I'm not planning on remarrying so someone else can get my SBP. I haven't even thought of that. And I don't care about Jake's getting my SBP, so long as he pays for what he is going to get; that's only fair.

Q. Why should he have to pay for it?

A. It's worth nothing to me – I would have to be dead for it to start paying money to him. So I'm okay with his receiving it if he pays for it![1]

Questions and Goals for the Nonmilitary Spouse

The facts have been established previously for the court to enter an order for pension division.[2] The primary goal of the petitioner at this stage is to stake his claim for coverage as a former spouse regarding the Survivor Benefit Plan.[3] Like his wife, Jake Baker will want to gain credibility on direct examination and retain that credibility with the judge in regard to any testimony on cross-examination which he might give.

Direct Examination of the Nonmilitary Spouse

At this point, Jake's attorney could easily forego the examination and simply wait for closing argument to show to the court what the benefit and costs are, using statutes, federal rules found in the Department of Defense Financial Management Regulation, and information found at the DFAS website. Each of the issues illustrated in this testimony should be briefed to the court, along with the relevant citations to authority and any state cases which apply.

But oral testimony – based on the law and the rules – usually has a better impact and a greater chance of convincing the judge. Thus the text below shows the explanation of SBP through the testimony on Jake Baker, the nonmilitary party (and also the party in most cases who is less familiar with SBP).

Since most of the points about SBP are not common knowledge, the witness will need to be thoroughly prepared for direct examination. The best approach is for Jake to have a folder which he takes to the witness stand. The folder should contain, in large font, the appropriate sections of the federal statutes which govern the issues that he will be addressing, such as the monthly premium, the age-55 suspension of coverage when the beneficiary remarries, and the benefit multiplier, which is 55%. How this is used will be shown below.

Q. [Questions by the husband's attorney] Mr. Baker, have you been married to the Respondent for more than ten years during her military service?[4]

A. Yes, sir. We have about 13 years of marriage during her service.

Q. Do you want the court to order that you receive a share of Ellen Baker's military pension?

A. Yes, I do – half of the part acquired during our marriage.

Q. What else, if anything, are you requesting the judge to do?

A. I would like the judge to order Survivor Benefit Plan coverage for me.

Q. What does the Survivor Benefit Plan provide in terms of benefits for a surviving spouse?

A. Well, he would receive monthly payments of 55% of the amount chosen as the base if the other party dies first.

At this point, opposing counsel will likely make a loud and vigorous objection. The objection may be phrased in terms of hearsay (*e.g.*, Jake only knows this information because his lawyer told him or he learned about it from the Internet). In reality, it is not hearsay at all; it's the law. Jake is simply stating what the law says about these benefits. He will be referring to federal statutes, the Department of Defense Financial Management Regulation, and the information found at the DFAS website.

When the uproar dies down, the court may rule that opposing counsel may examine the witness as in the *voir dire* of an expert witness, interrupting the direct examination to allow the other side to determine the basis for the answers that are being given. The court may also reserve the questions of opposing counsel until cross-examination, ruling that the source of the information goes to the weight being given the evidence and testimony, and not to admissibility.

Assume that the court allows the *voir dire* approach. Here is what should come out in Jake's testimony.

Q. [from Ellen Baker's attorney] That testimony you just gave about the SBP and benefits – you don't really know that, do you?

A. Yes, I do.

Q. What I mean to say is, you don't have any personal knowledge of that stuff, isn't that right?

A. Yes, I do have personal knowledge.

Q. What do you mean, you have personal knowledge?

A. In preparation for this trial, counsellor, I made sure that I knew the important issues and the questions I might be asked. I thought that SBP might come up, so I did my homework. I spent hours making sure that I knew what it is, what it pays, what it costs – the rules, in other words. What I just testified to – the 55% benefit – comes directly from federal law. It's found at Title 10, U.S. Code, Section 1451 (a)(1)(A)-(B). I have a print-out right here if you'd like to take a look at it. [Here the witness should pull out the printed section and show it to opposing counsel and to the court; it is not, however, introduced into evidence, since this is the *voir dire* examination by opposing counsel which is proceeding.]

Q. [attempting to interrupt] But you got that…

A. I'm not finished. May I please finish? I also checked the rules to back up what I know about SBP paying 55% of the base amount to the beneficiary. I found that this is correct, based on the Department of Defense Financial Management Regulation. I verified that Volume 7B, Chapter 46, states at Paragraph 460101 the following: "The Survivor Benefit Plan (SBP) provides a monthly annuity of 55 percent of the annuity base amount, cost-of-living adjusted, to the eligible spouse or children." I have a copy here for you if you'd like to see it.

Q. [still trying to interrupt] But that came from…

A. Counsellor, I'm still trying to answer the question. Could I please finish my answer? I then backed up what I'd learned by checking on the website of the Defense Finance and Accounting Service. Under the heading, "Retired Military and Annuitants," I found a tab for "Provide for Loved Ones." And I found there…

Q. Enough already! I withdraw my objection, your honor.

Here the direct examination resumes. Jake's attorney will probably ask the questions below.

Q. [from Jake Baker's lawyer] In an active-duty case such as this, what is the cost of SBP coverage?

A. It's 6.5% of the base amount chosen.

A. From where is that money paid?

A. It comes out of the individual's military retired pay.

Q. So, for example, if an airman were to receive $3,000 a month in retired pay, and if her full retired pay were chosen as the base amount, what would be the cost?

A. It would be about $195 a month.

Q. And, using the same retired pay figure, what benefit would the survivor receive if the military retiree died first?

A. That would be 55% of the base amount, or $1,650 per month.

Q. If the judge awards you SBP coverage and Ellen Baker dies before you, who pays the taxes on SBP payments made to you?

A. I do.

Q. What happens if you remarry before age 55?

A. It is suspended. I cannot receive SBP payments if I decide to remarry before age 55.[5]

Q. Thank you – no further questions, your honor.

Issues for the Husband's Attorney – Testimony, Evidence and Closing Argument

If the Respondent hasn't testified about her accrued leave or the TSP account, then those subjects should be covered in further testimony by the Petitioner. Ordinarily this will require knowledge and use of the state's rules of evidence in producing and explaining the documents which the petitioner's lawyer has obtained. As noted above, counsel will need to check the rules of evidence to find out the requirements for admission of business records and public records, since every state's rules are different. Some have adopted the Federal Rules of Evidence (FRE), and some have their own evidence codes. The business records authentication rule is contained at FRE 902 (11), but the rules in our hypothetical state of East Carolina might be slightly or entirely different.

At this point, there are no further facts to be drawn out in Jake's testimony. There are, however, three remaining items for his attorney to consider. The first deals with the new rules about military pension division and would be the subject of closing argument. When the servicemember spouse, as with Ellen Baker, entered military service on or after September 8, 1980, then her retired pay is calculated according to the highest three years of compensation, her "High-3" pay. Due to an amendment made December 23, 2016 in the Uniformed Services Former Spouses' Protection Act, which is at 10 U.S.C. §1408(a)(4)(B), the definition of "disposable retired pay" has been revised to mean *the hypothetical retired pay that the member would have received if he or she had retired on the date of divorce*. Thus Ellen's attorney will want to argue that the court order must fix the retired pay according to "the Frozen Benefit Rule," as it is sometimes called, rather than determining what will be divided as the final retired pay that Ellen actually receives (as is the law in 90% of the states). Details are found at "Serving the Servicemember" in the Silent Partner info-letter, *All Clauses Considered: Writing the Frozen Benefit Award*.[6]

There are two other items that remain uncovered, and these are important issues from Jake's standpoint. The first is interim pension-share payments pending the start of payments made by the retired pay center. The second is indemnification. Both are important, but neither is subject to testimony since they are both "legal issues," not facts and data to be adduced through examination of a witness. Thus these should also be reserved for closing argument, and they should be further explained to the judge with a written memorandum.

Since the Baker case involves a "10/10 overlap" (that is, 10 years of marriage overlapping 10 years of military service creditable toward retirement[7]), service of the pension division order on the retired pay center (DFAS in this case) will result in direct payments to Jake Baker upon Ellen's retirement.[8] However, there will be a delay of up to 90 days for processing.[9] During this interim period, Ellen Baker will need to send payments directly to her former spouse, initiate an allotment from retired pay, or arrange for an electronic fund transfer. Without one of these payment arrangements, Jake will miss out on two or three monthly payments. This should be addressed in the military pension division order.

Indemnification is also an important issue for a non-military spouse. If Ellen Baker applies for and receives disability payments, the amount of her disposable retired pay may be reduced by the disability pay which she receives from the VA (Department of Veterans Affairs).[11] This results in a reduction in Jake Baker's share of the pension.[12] For example, if Ellen has a disability which is rated at 40% by the VA, then she can receive about $600 a month in tax-free disability compensation if she waives an equal amount of her retired pay. This means that there is a $600 drop in the retired pay which Jake was supposed to share, and thus he receives a smaller amount of retired pay as marital or community property.

Jake Baker's lawyer will want to ask the court for a clause that requires the ex-wife to make reimbursement payments to her former husband for any reduction in his share of retired pay, due to her election of any form of disability pay. Without an indemnification clause, Ellen Baker is free to increase her own monthly payments with tax-free disability pay, without regard to the reduced amount of retired pay that her former husband receives. But can he get the court to order indemnification?

The judge will probably deny the indemnification request. Ever since the U.S. Supreme Court's 2017 decision in *Howell v. Howell*, state courts have been aware that the judge may not impose an indemnification condition on the payment of a share of the pension. Details are found in the Silent Partner, *The Death of Indemnification?*

Conclusion

Using this testimony and trial outline, the attorney for the servicemember or for the non-military spouse can be familiar with the basic rules and requirements for direct and cross examination in a military pension division trial involving an active duty servicemember. Different rules, of course, will come into play if the case involves a member of the National Guard or the Reserves, or

when the member has already retired. In the case of a serving member of the armed forces, however, counsel will be aware of the issues which need to be put in front of the court, how to explain the issues clearly and convincingly, and how to state the relief which counsel is requesting. If trial is necessary, the ends of justice will be served when the husband, the wife and the judge are presented with the facts and the issues on military retired pay, the Survivor Benefit Plan, accrued leave and indemnification. With all present and potential military benefits known, the court will be able to prepare (or order the preparation of) a military pension division order which addresses these issues is a just and fair manner.

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Endnotes

1. While the court can order Jake to reimburse Ellen for the cost of SBP coverage, or the court can adjust Jake's share to a lower amount to take into account the cost of the SBP premium, it cannot order DFAS to take the premium out of Jake's share of the pension. This is because the SBP premium must be deducted "off the top," that is, it is a mandatory deduction from the entire amount of retired pay in arriving at disposable retired pay. 10 U.S.C. § 1408(a)(4).
2. Since Ellen Baker is on active duty at present, the court in most states will enter a "formula clause" in the pension order. If the trial is held, for example, at the point when Ellen Baker has been married for 13 years during her military service, that clause might read, "The Respondent will pay the Petitioner 50% of the portion of her military retired pay acquired during the marriage of the parties. That portion is defined as 13 years divided by the total years of service which the Respondent has when she retires." Most of the time the order will be phrased in terms of months, not years, for the sake of accuracy.
3. Unless his SBP coverage is suspended due to remarriage before he turns 55, Jake can count on the SBP to pay continued income to him if Ellen Baker dies before he does.
4. The requirement of ten years of marriage overlapping ten years of military service creditable for retirement is found at 10 U.S.C. § 1408 (d)(2). This is a requirement for pension garnishment (as property division).
5. The purpose of these questions is to convince the judge that a) Jake Baker will be taxed on what he gets, and b) he loses it if he remarries before 55. Jake is attempting to show the judge that awarding SBP to him is not a "free ride"; it comes with limitations and price tags.
6. Jake's attorney, of course, will oppose this. The arguments for that side of the case are also in the cited Silent Partner.
7. Supra at note 4.
8. 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 and of the National Oceanic and Atmospheric Administration are handled by the Coast Guard's Pay and Personnel Center in Topeka, Kansas.
9. According to 10 U.S.C. § 1408 (d)(1), "In the case of a member entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin no later than 90 days after the date of effective service. In the case of a member not entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin no later than 90 days after the date on which the member first becomes entitled to receive retired pay."
10. Gross retired pay is reduced by VA disability payments to arrive a "disposable retired pay" pursuant to 10 U.S.C. § 1408(a)(4).
11. See 38 U.S.C. § 5304-5305.
12. A full explanation of disability deductions is found in the Silent Partner info-letter, Military Pension Division: The "Evil Twins" – CRDP and CRSC, found at www.nclamp.gov > For Lawyers.
13. Howell v. Howell, 137 S.Ct. 1400 (2017).

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Child Dependency Exemptions: Did The Supreme Court of Georgia Get Blanchard Wrong?

By R. Mark Rogers[1]

Introduction

New documentation from the IRS indicates that the Supreme Court of Georgia took the wrong position on child dependency exemptions and state court authority to allocate them in child support cases. The Supreme Court of Georgia has consistency held the view that Georgia courts do not have authority to allocate child dependency exemptions (along with accompanying Child Tax Credits) in whole or part (split or rotating basis) to a noncustodial parent. The key case is *Blanchard v. Blanchard*, 261 Ga. 11, 15, 401 S.E.2d 714 (1991). A number of subsequent opinions fall in line with *Blanchard*.[2]

However, Blanchard conflicts with opinions held by the vast majority of state supreme courts that allow family courts to allocate child dependency exemptions. Three dissenting votes in the *Blanchard* opinion agreed with the mainstream view of other states.

This article recaps highlights of the *Blanchard* decision, other states' views on the issue of allocating the dependency exemption, and intent from the *Federal Register*. Key additions in this article focus on the newly increased impact of Child Tax Credits on the proportional burden of custodial versus noncustodial parents for child support. Key new evidence on this issue comes from internal training documents from the Internal Revenue Service which show the IRS specifically training its agents to allow claims for dependency exemptions by noncustodial parents arising from court ordered allocation to the noncustodial parent. The huge impact of federal tax reform in 2017 on net child costs and recent documents on IRS agent training procedures indicate that issues addressed in *Blanchard* should be revisited.

The Impact of Changes in Federal Income Tax Code in 2017

Exemptions and accompanying Child Tax Credits have a huge impact on the net cost of raising children—including in child support situations. The Tax Cuts and Jobs Act of 2017 has had an enormous impact on Child Tax Credits which are offsets to the cost of raising children. Tax reform effectively eliminated child dependency exemptions, but these tax benefits were vastly offset with more positive standard deduction and Child Tax Credits. Qualifying for exemptions still is the IRS procedure used for qualifying for Child Tax Credits.

Child Tax Credits are a significant tax benefit to custodial parents. They are cost offsets from the government toward the cost of raising children. They are not taken into account in child support child cost schedules.

Under new federal tax code, Child Tax Credits still go to the qualifying custodial parent and the custodial parent can sign over the Child Tax Credits to the noncustodial parent (by agreement in Georgia and by agreement or by court order in most states). The Child Tax Credits are sharply higher than pre-reform and likely are the easiest to understand in terms of impact on child costs in most cases.

Tax Reform's Effect on Child Tax Credits

The following highlight the changes from the Tax Cuts and Jobs Act of 2017 on personal income taxes for Child Tax Credits.

- In 2017, the Child Tax Credit was $1,000 per child per year. This jumped in 2018 to $2,000 per child per year. Keep in mind that a tax credit is a dollar-for-dollar offset to taxes owed, in contrast to an exemption's reduction to taxable income (before tax rates are applied).
- New Child Tax Credits apply for tax years of 2018 through 2025 (expires after 2025).

- Phaseout begins with annual modified adjusted gross income over $400,000 for married filing jointly, $200,000 for all other tax filers. The reduction is $50 for each $1,000 by which income exceeds the threshold amount.
- The Additional Child Tax Credit was eliminated but replaced with a partially "refundable" Child Tax Credit that is built into the overall Child Tax Credit. Prior to 2018, the Child Tax Credit was nonrefundable which means that if the available tax credit exceeded your tax liability, your tax bill was simply reduced to zero. Some of the Child Tax Credit was "unused."

Requirements for Claiming Child Tax Credit

What are the key requirements for claiming Child Tax Credit? The following are found in IRS Form 104 Instructions. The child must be under age 17 — age 16 or younger — at the end of the tax year. The child must either be your son, daughter, stepchild, foster child, brother, sister, stepbrother, stepsister or a descendant of any of these individuals, which includes your grandchild, niece or nephew. An adopted child is always considered your own child. The child must not have provided more than half of their own support. You must claim the child as a dependent on your federal tax return. The child must be a U.S. citizen, U.S. national, or U.S. resident alien and you must provide a valid Social Security number *(SSN)* for the child by the tax return due date. The child must have lived with you for more than half of the tax year (some exceptions apply).

These requirements focus on a custodial parent claiming Child Tax Credits. One may also claim Child Tax Credits if the qualifying custodial parent signs over the claim to the noncustodial parent with IRS Form 8332.

Under code effective for tax year 2018:

- The Child Tax Credit is one credit worth up to $2,000 per child and includes a refundable portion of up to $1,400 per child.
- The $1,400 refundable portion is included as part of the $2,000 Child Tax Credit and is not an additional credit.
- This means a large portion of the Child Tax Credit now can be used by low income earners that previously would not have benefited if the standard deduction and personal exemptions covered all taxes owed.
- To claim the refundable portion, you must have earned income (generally, wages, salary, tips, and net earnings from self-employment).
- For purposes of the new Child Tax Credit, the refundable amount is equal to 15% of your earned income which exceeds $4,500 up to the maximum credit.

How much are Child Tax Credits an offset to the cost of raising children? Because, the offset is dollar credit against dollar tax, the offset annually is the full value of the Child Tax Credit times the number of qualifying children. The below table shows the value of Child Tax Credits Annually and Monthly (which is a direct comparison for use against presumptive child costs in child support awards).

Impact of Child Tax Credit as Cost Offset to Before-Tax Presumptive Shares ($s) of BCSO

Impact of Child Tax Credit, 2018 and Later		
Number of Children	Annual Child Tax Credit	Monthly Offset to Child Support Obligation
1	$ 2,000.00	$166.67
2	$ 4,000.00	$333.33
3	$ 6,000.00	$500.00
4	$ 8,000.00	$666.67
5	$ 10,000.00	$833.33

For an offset against presumptive child costs, it is important to note:

- Only the custodial parent gets Child Tax Credits unless the CP signs over claiming the children to the NCP.
- The child tax credit sharply reduces the cost to the CP of paying the CP share of the presumptive BCSO.
- The number of child tax credits tracks the number of "qualifying" children.

An Example of the Impact of Child Tax Credits on After-Tax Share of BCSO

- Two children; both under 17
- Child tax credit of $2,000 each annually
- $4,000 monthly gross income per parent

It is assumed that there is enough federal tax incurred by the custodial parent to fully apply all of the Child Tax Credits. However, at low and high incomes, the Child Tax Credit amount would be less.

Presumptive Worksheet with Child Tax Credits Added (Some Trivial Rounding Errors Are Seen)			
	Mother	Father	Total
Monthly Gross Income	$4,000.00	$4,000.00	$8,000.00
Monthly Adjusted Income	$4,000.00	$4,000.00	$8,000.00
Pro Rata Shares of Combined Income	50.00%	50.00%	100.00%
Basic Child Support Obligation (from Table)			$1,567.00
Pro Rata Shares of the Basic Child Support Obligation	$783.50	$783.50	
Adjustment for Work Related Child Care and Health Insurance Expenses	$0.00	$0.00	
Adjusted Child Support Obligation	$783.50	$783.50	
Adjustment for Additional Expenses Paid	$0.00	$0.00	
Presumptive Amount of Child Support	$784.00	$784.00	
After-Tax Credit Share of Combined Gross BCSO	28.76%	50.03%	
Child Tax Credit Share of Combined Gross BCSO			21.27%

In the above exhibit, the net child support burden for the custodial parent is sharply lower after taking into account Child Tax Credits as a cost offset. Without sharing the Child Tax Credit (which is tied to the child dependency exemption), the child support burdens of the parents are not the same as presumptive shares of the BCSO---the noncustodial parent bears 50 percent of the burden while the custodial parent bears only 28.8 percent. The remaining 21.3 percent (rounding error) is covered by the federal government through the Child Tax Credit.

What Did the Georgia Opinions of *Hulsey* and *Blanchard* State in Regard to Georgia Courts Allocating Federal Dependency Exemptions?

Blanchard v. Blanchard is the key opinion setting precedent in Georgia on the issue of state courts and ability or inability to allocated child dependency exemptions in child support cases.[3] The below are notable quotes from the opinion. The focus is on Congressional intent with the court noting that Congress gives the right to the exemption to the custodial parent and that the power of federal taxation is not subject to state control.

> Custodial parents are "entitled to have the statute applied as it was written.... Where the words and meaning of a statute... are clear, there is no room for judicial consideration of Congressional intent. *Gemsco, Inc. v. Walling*, 324 U.S. 244, 65 S.Ct. 605, 89 L.Ed. 921 (1944)." *United States v. Prudential Insurance Co. of America*, 461 F.2d 208, 210 (C.A. 5th Cir. 1972). "In the exercise of its Constitutional power to lay taxes, Congress may select the subject of taxation, choosing some and omitting others. [Cits.]" *Sonzinsky v. United States*, 300 U.S. 506, 512, 57 S.Ct. 554, 555, 81 L.Ed. 772 (1937).
>
> If a state forcibly takes the tax exemption from a custodial parent, with earned income, that parent's income becomes subject to unauthorized tax liability. The state would be exerting the power of taxation, and that power "is not subject to state control." *Burnet*, supra 287 U.S. at 110, 53 S.Ct. at 77. It is for that reason and others which follow that we cannot agree with *Cross v. Cross*, 363 S.E.2d 449 (W.Va. 1987), ("one of the premier cases to decide this issue." *Nichols v. Tedder*, 547 So.2d 766, 776 (Miss.1989)), that a state court has "the equitable power to require the custodial parent to sign the waiver[,]" *Cross*, supra at 458, or, that it is "reasonable that a trial judge should allocate the deendency exemption to the parent in the highest tax bracket...." Id. at 460.

"[T]ax law is statutory and equitable considerations are inapplicable." *Fears v. United States*, 386 F.Supp. 1223, 1227 (N.D.Ga.1975), aff'd 518 F.2d 1405 (5th Cir.1975).

As further stated in *Fears*, supra at 1226:

> Congress, not the Courts, bears the responsibility for establishing the rules of taxation, and as long as Congress has acted within its constitutional powers, the Courts cannot use broad powers to frustrate specific statutory language. [Cit.]

State courts are not authorized to impose income tax liability, nor are they authorized to reduce federal income tax receipts. "Deductions, including dependency exemptions are allowed as a matter of legislative grace. *New Colonial Ice Co.*, Inc. v. Helvering, 292 U.S. 435, 54 S.Ct. 788, 78 L.Ed. 1348, 13 A.F.T.R. 1180 (1934). [Only] Congress has the power to condition, limit or deny deductions in arriving at the net income it chooses to tax. [Cit.]" *Labay v. CIR*, 55 T.C. 6, aff'd per curiam, 450 F.2d 280 (5th Cir.1971).

Again, *Blanchard* essentially relies upon what it views as the intent of Congress.[4] This is noted in a key sentence from just above in *Blanchard*: "[Only] Congress has the power to condition, limit or deny deductions in arriving at the net income it chooses to tax." This opens the door to the question of whether the Supreme Court of Georgia correctly interpreted the intent of Congress. Specifically, the IRS implements the intent of Congress through the manner in which it applies Internal Revenue Code. If IRS implementation of federal law differs from the view of the Supreme Court of Georgia (and Congress makes no correcting or clarifying legislation) regarding application of Congressional intent, then the court's opinion is in error.

IRS Regulations on Allocating and Sharing Child Dependency Exemptions

First, only the federal government through statute and, in turn, the IRS specifically allocate child dependency exemptions. But these facts are separate from the issue that the custodial parent can sign over the exemption and Child Tax Credit to the noncustodial parent. The issue then boils down to whether a state court can require a custodial parent to sign over the exemption through IRS Form 8332 ("Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent"). As a part of that issue, we will see that the important issue to the IRS is for it to be easily certain of who is entitled to a child dependency exemption (as the right of a custodial parent or as a right signed over by Form 8332)—and the IRS not become involved in civil litigation.

Second and just as importantly, federal law does not preclude and even contemplates state court ordering that exemptions be signed over to noncustodial parents. That is, IRS procedures will show that a state court can order that paperwork be processed to transfer the dependency exemption to the noncustodial parent—and not violate IRS regulations. The distinction is that if a state court orders an exemption to be signed over, the only issue before the IRS is whether paperwork has been properly filled out for transfer of the exemption. The IRS still retains its authority over determining who is entitled to the exemption and does not get involved in enforcing state court orders. Either the paperwork (IRS Form 8332) is properly filled out or it is not. It is up to the state court to enforce when paperwork has not been properly filled out to comply with a court order to transfer the exemption to the noncustodial parent.

The *Federal Register* clarifies how the noncustodial parent may become entitled to claim a child dependency exemption and Child Tax Credit.

> Example 18. (i) W and X are the divorced parents of Child. In 2009, Child resides solely with W. The divorce decree requires X to pay child support to W and requires W to execute a Form 8332 releasing W's right to claim Child as a dependent. W fails to sign a Form 8332 for 2009, and X attaches an unsigned Form 8332 to X's return for 2009.
> (ii) The order in the divorce decree requiring W to execute a Form 8332 is ineffective to allocate the right to claim Child as a dependent to X. Furthermore, under paragraph (e)(1) of this section, the unsigned Form 8332 does not conform to the substance of Form 8332, and under paragraph (e)(4) of this section, the Form 8332 has no effect. Therefore, section 152(e) and this section do not apply, and whether Child is the qualifying child or qualifying relative of W or X is determined under section 152(c)or (d).

(iii) If, however, W executes a Form 8332 for 2009, and X attaches the Form 8332 to X's return, then X may claim Child as a dependent in 2009

Federal Register, Vol. 73, No. 128, July 2, 2008, Rules and Regulations.

Other States' Appellate Opinions Find that the Federal Government Contemplated State Courts Ordering the Sharing of Child Dependency Exemptions

Appellate court opinion from sister states clearly show that the federal government contemplated state courts allocating child dependency exemptions by court order. There are no federal court opinions or IRS rulings with findings of such state court orders conflicting with federal law nor any penalties by the federal government for state courts ordering such allocation of the dependency exemptions.

There is an extensive list of state appellate opinions that indicate that state courts can enter an order allocating dependency exemptions between custodial and non-custodial parents. The following are merely example opinions.

Macias v. Macias, 126 N.M. 303, 968 P.2d 814 (1998):

> "For purposes of allocating the dependency exemption, the 1984 tax law created a presumption that child support, and therefore entitlement to the dependency exemption, attached to custody.
>
> . . .
>
> **The majority of jurisdictions permit their state courts to enter an order allocating dependency exemptions between custodial and non-custodial parents.** (emphasis added)
>
> . . .
>
> The substantial majority of jurisdictions that have considered the matter hold that federal law does not preemt a state law or procedure that permits a state court to allocate dependency exemptions between parents based on support payments made by the non-custodial spouse."

From North Dakota case law, *Fleck v. Fleck*, 427 N.W.2d 355 (1988):

> In *Fudenberg v. Molstad*, supra, the trial court's authority to allocate the federal income tax dependency exemption was upheld because "state court allocation of the exemption does not interfere with Congressional intent. It does not involve the IRS in fact finding determinations. State court involvement has no impact on the IRS. Thus, allocation of the exemption is permissible." Similarly, in *Pergolski v. Pergolski*, supra, the Wisconsin Court of Appeals concluded that state court allocation of the exemption has no impact on the IRS and therefore the trial court has the authority to order execution of consent forms assigning the income tax dependency exemption to the noncustodial parent.
>
> We conclude that allocation of the income tax dependency exemption by the trial court is permissible.

Ohio case law, *Hughes v. Hughes*, 35 Ohio St. 3d 165; 518 N.E.2d 1213; 519 N.E.2d 1213 (1988), cites IRS sources allowing state courts to allocate dependency exemptions, and also cites U.S. Constitution separation of powers as authority:

> The sole issue presented in this appeal is whether either Section 152(e), Title 26, U.S. Code, as amended by the Tax Reform Act of 1984 (P.L. 98-369), or the Sixteenth Amendment to the United States Constitution, precludes the domestic relations courts of this state from awarding the dependent child tax exemption to the noncustodial parent in a divorce proceeding. We answer such query in the negative, for the reasons which follow.
>
> ….
>
> The changes to Section 152 were made for the administrative convenience of the Internal Revenue Service. A domestic relations court has broad discretion to determine the proper mix and allocation of marital assets and property rights in a divorce proceeding. *Cherry v. Cherry* (1981), 66 Ohio St. 2d 348, 20 O.O. 3d 318, 421 N.E. 2d 1293. We find nothing in the legislative history of the Tax Reform Act to support appellant's theory that new Section 152 was meant to encroach upon this exclusive statutory power of state courts. That section merely states that, for purposes of the Internal Revenue Service, a presumption exists in favor of the custodial parent receiving the exemption,

absent a declaration attached to the noncustodial parent's tax return. The only concern of the IRS, evident from the history surrounding the changes, is that only one divorced spouse claim and receive the deduction. Indeed, the Treasury Department has acknowledged the presence and underlying authority of state courts, via divorce decrees or separation agreements, to allocate dependency exemptions:

"The bill proposes a rule which is both simple and fair. While the new rule will not eliminate all controversies in this area, most disputes will be easily resolved by reference to the divorce or separation agreement. Moreover, allowing both parents to treat the child as a dependent for purposes of claiming the medical deduction will take much of the pressure off the allocation of the dependency exemption." Treasury Statement on H.R. 3475 (later H.R. 4170), Ronald Pearlman, Dep. Asst. Secy., Tax Policy, Before the House Ways and Means Committee (July 25, 1983).

…

The changes to Section 152 were made for the administrative convenience of the Internal Revene Service. A domestic relations court has broad discretion to determine the proper mix and allocation of marital assets and property rights in a divorce proceeding. *Cherry v. Cherry* (1981), 66 Ohio St. 2d 348, 20 O.O. 3d 318, 421 N.E. 2d 1293. We find nothing in the legislative history of the Tax Reform Act to support appellant's theory that new Section 152 was meant to encroach upon this exclusive statutory power of state courts.

Washington State case law, *In the Matter of the Marriage of Peacock*, 54 *Wn. App.* 12, 771 *P.2d* 767 (1989), allows awarding the dependency exemption to the noncustodial parent based on the issue being one of domestic relations—a state issue—and the awarding of the exemption does not infringe on federal interests:

> Domestic relations is an area particularly within the authority of the states: "Insofar as marriage is within temporal control, the States lay on the guiding hand. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." IN RE BURRUS, 136 U. S. 586, 593-594 [34 L. Ed. 500, 10 S. Ct. 850, 853] (1890).
>
> Federal courts repeatedly have declined to assert jurisdiction over divorces that presented no federal question. See, E. G., OHIO EX REL. POPOVICI v. AGLER, 280 U. S. 379 [74 L. Ed. 489, 50 S. Ct. 154] (1930). On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be pre-empted. WETMORE v. MARKOE, 196 U. S. 68, 77 [49 L. Ed. 390, 25 S. Ct. 172, 176] (1904). A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden. UNITED STATES v. YAZELL, 382 U. S. 341, 352 [15 L. Ed. 2d 404, 86 S. Ct. 500] (1966). HISQUIERDO v. HISQUIERDO, 439 U.S. 572, 581, 59 L. Ed. 2d 1, 99 S. Ct. 802 (1979); SEE MCCARTY v. MCCARTY, 453 U.S. 210, 220, 69 L. Ed. 2d 589, 101 S. Ct. 2728 (1981). The congressional purpose in enacting the recent tax code provision is evident from the following:
>
> "The present rules governing the allocations of the dependency exemption are often subjective and present difficult problems of proof and substantiation. The Internal Revenue Service becomes involved in many disputes between parents who both claim the dependency exemption based on providing support over the applicable thresholds.
>
> . . . .
>
> The congressional interest in administrative efficiency is in no way affected by state court allocation of the dependency exemption.
>
> . . . .
>
> We agree the federal tax provision does not preclude state involvement in this area. To conclude otherwise would be to allow federal tax policy to determine domestic relations issues in which the states have particular interest. RCW 26.09.050 is not preempted by federal law, and the court properly applied the statute here.

These foreign decisions beg the question, how can the vast majority of states allow state courts to require custodial parents to sign Form 8332 and there

be no penalties or repercussions by the IRS? Does the IRS punish Georgia alone if Georgia state courts are allowed to order the custodial parent to sign Form 8332? After more than 30 years since the 1984 major reform of federal tax code, the Supreme Court of Georgia has not provided documentation or pointed to ANY punishment by the IRS for allowing Georgia such orders or any other state court for doing so.

The Dissenting Opinion in Blanchard Summarizes Key Arguments of the Majority of States

> With certain exceptions not applicable here, the 1984 amendment [to Internal Revenue Code] gives the custodial parent the right to claim the children as dependents, unless the custodial parent signs a written waiver of the dependency exemption. The waiver may be made yearly, in one written instrument covering a period of years, or in perpetuity. In addition, the custodial parent's written waiver must be attached to the non-custodial parent's federal income tax return in order to entitle the non-custodial parent to the exemption. IRC § 152(e)(2)(A) and (B) (1984).
>
> Since the 1984 amendment, nineteen of the twenty-seven states that have addressed the question presented here have definitively recognized that state trial courts have the authority to allocate the exemption. One other state has reached the same basic result, while only seven states, in reliance upon the doctrine of federal preemption, have held to the contrary.
>
> The 1984 amendment, unlike the pre-1984 law, does not make express provision for an award of the dependency exemption by court decree. However, the undisputed purpose of the 1984 amendment demonstrates that Congress is indifferent to the question of which parent claims the exemption so long as the IRS does not have to expend its resources in making the decision.
>
> > What the new Code section sought to achieve was certainty in the allocation of the dependency exemption for federal tax administration purposes. By placing the dependency exemption in the custodial parent unless a waiver is executed, the new statute relieves the Internal Revenue Service of litigation. The new statute is entirely silent concerning whether a domestic court can require a custodial parent to execute awaiver, and this silence demonstrates Congress's surpassing indifferene to how the exemption is allocated as long as the IRS doesn't have to do the allocating.
>
> *Cross*, 363 S.E.2d at 457. (Emphasis in original.) Thus, a state court's allocation of the dependency exemption to a non-custodial parent does not conflict with any federal tax policy and has not been preempted by any federal tax law. Consequently, neither the Internal Revenue Code nor general principles of federal law, see *Cross*, 363 S.E.2d at 458-459 (n. 19), prohibit a state court's award of the exemption.
>
> > [W]hat the Davis court missed is that there is no prohibition—expressed or implied—on a state court's requiring the execution of the waiver, and because state ourt allocation of dependency exemptions has been custom and usage for decades, it is more reasonable than not to infer that if Congress had intended to forbid state courts from allocating the exemption by requiring the waiver to be signed, Congress would have said so. Id. at 458. (Emphasis in original.)
>
> Because Congress is wholly indifferent to how the exemption is allocated, I would hold that superior courts in Georgia, which act as courts of equity, do have the discretion to allocate the dependency exemption and do have the authority to order the custodial parent to execute a waiver of that exemption in order to enforce the allocation.

Internal—But Publicly Available—Documents from the IRS Indicate that the IRS Allows Family Courts to Allocate Child Dependency Exemptions Between Custodial and Noncustodial Parents

In light of the conflict of Hulsey with practices in other states and with the lack of documentation by the Georgia Supreme Court of any examples of the IRS disallowing court ordered signed Form 8332s, this author filed a Freedom of Information Act (FOIA) request with the IRS dated May 10, 2018. The key item requested was:

> Training materials of the TRS given to employees for determining whether a submitted Form 8332 should be accepted or denied by employees making such determinations in TRS' W&I Division and SB\SE Division.

The response, dated March 27, 2019, included:

> I am sending you a CD with the requested information in a separate letter.

This letter was signed by Disclosure Manager, Disclosure Office 9.

The training materials provided by the IRS addressed many issues but the issue of whether the IRS accepted Form 8332 when it was signed under court order is rather specific with a few directly related examples from training materials.

Two clear examples follow of the IRS being permissive of accepting claims for a dependency exemption as a result of a state court order allocating the exemptions.

First, from IRS manual, an example comes from *Correspondence Examination Auditing Techniques, Instructor Guide,* pages CS-2-9 through CS-12 (Exhibit 2-4).[5]

In this IRS Exhibit 2-4, an example divorce decree is given as a training example. The names are clearly fictional, but the content of the decree is given as a realistic example. Exhibit 2-4 is a copy of a divorce decree in Superior Court of Arizona, Coyote County, In Re, the Marriage of Petunia Olive Lunar and Marlin Loris Lunar. There are two dependent children, Shepherd and Robin. The mother, Petunia Lunar, is awarded physical custody of the children. The father, Marlin Lunar, is noncustodial parent.

Among many typical findings, the included example divorce decree addresses the issue of child dependency exemptions and states:

> **III. CHILD SUPPORT ORDER**
>
> …..
>
> **IT IS FURTHER ORDERED** that Father shall claim the children for tax purposes in the even years. In odd years Mother will claim one child. Father may only claim the children if he is current on child support as of December 31st of each year.

In this training example, the state court clearly is allocating the dependency exemptions. The father also has two additional children not a part of this case. The two additional children are not relevant for discussion related to the IRS allowing state courts to order custodial parents to sign over the child dependency exemption to the noncustodial parent. The relevant children are stated as "the first two dependents" in the training manual analysis.

A factor that makes this example mildly complicated is that the father/noncustodial parent can only claim the dependency exemption if he is up to date on child support payments on December 31 of each year.

The key discussion is found in "Possible Determination #2," starting on page CS-2-23.

The notable section specifically is on page CS-2-24 and reads as immediately below:

> Dependent Exemptions Per Return 4 Per Exam 2
> (Research and TP [taxpayer] documentation for first two dependents)
> Shepherd Lunar SSN 000-00-5132 DOB 06/07/98 and Robin Lunar SSN 000-00-7823 DOB 09/18/2000 — TP sent copies of BCs showing TP as father (DDBKD agrees and shows TP as non-custody parent). [DDBKD is an internal IRS computer file code that shows standard information from a variety of sources for a taxpayer.] DDBKD shows mother and custody parent as Petunia Olive Birch SSN 000-00-3691. She also claimed the children. TP sent copy of his divorce decree dated 05/15/04 stating mother has physical custody, father shall claim the children for tax purposes in the even years. In odd years, mother will claim one child. "Father may only claim the children if he is current on child support as of December 31St of each year. There are no signatures other than the judge's.
>
> (Determination for first two dependents)
> Relationship and age are verified. TP's right to claim the children who do not reside with him is dependent on his being up to date with his custody payments. Because there is a condition in the decree, it cannot be used to allow the exempt to the non-custodial parent. TP must have filed Form 8332, signed by the custodial parent, with his return releasing the

claim to the exemptions. Spoke to TP — TP states that he is not on good terms with the children's mother and she will not sign anything for him. Explained that without the signed 8332, exemp cannot be allowed. TP may pursue compelling ex-spouse to sign 8332 through state court and request reconsideration or file a claim at a later date if needed. Continuing to disallow these exemps.

The key quote is:

> Spoke to TP — TP states that he is not on good terms with the children's mother and she will not sign anything for him. Explained that without the signed 8332, exemp cannot be allowed. TP may pursue compelling ex-spouse to sign 8332 through state court and request reconsideration or file a claim at a later date if needed. [emphasis added]

The training manual is quite clear. The IRS expects that a noncustodial can seek enforcement of a court order for a custodial parent to sign over the child dependency exemption by having the state court force the custodial parent to sign IRS Form 8332. It is equally clear that the IRS allows a court ordered signed Form 8332 to result in the noncustodial parent to claim the child dependency exemption.

This training example shows that the Georgia Supreme Court opinion of *Blanchard* (and related opinions) conflicts with the fact that the IRS trains its agents to allow courts to order the signing of Form 8332 for the noncustodial parent to claim the child dependency exemption.

As noted in the *Federal Register* earlier, the only concern of the IRS regarding conditions placed upon a noncustodial parent being able to claim a child dependency exemption is that the IRS not get involved with civil litigation. The IRS only wants to be able examine required documents and determine from those documents alone whether a taxpayer is entitled to a child dependency exemption.

Another applicable example is found in IRS *Duplicate Taxpayer Identification Number (DUPTIN) Program Instructor Preparation,* 8665-101, on page 5-28.

Practice Exercise **5-4**

> Laura and Billy are divorced. Laura and Billy both claimed the dependent exemptions for Jimmy (5-years old) and Justin (8 years old) on their 2013 tax return. Jimmy and Justin live with Billy. Laura's return was selected for the examination. Laura provided copies of the following:
>
> x Birth certificate for Jimmy and Justin — verifying Laura and Billy are the parents.
>
> x Divorce decree stating Billy is the primary custodial parent and the following:
>
> **TAX DEDUCTION:**
>
> The husband shall be entitled to claim Jimmy as a tax deduction for Federal and State tax purposes beginning in 2013 and thereafter. The wife shall be entitled to claim Justin as a tax deduction for Federal and State tax purposes beginning in 2013 and thereafter.
>
> a. Is Laura required to provide Form 8332 signed by Billy to be entitled to the dependent exemption?
>
> ... Yes **No**
>
> **There are no exceptions/stipulations in Billy and Laura's divorce decree concerning the children; therefore, the Form 8332 is not required for Laura to be entitled to the exemption.**
>
> b. Based on the information received is Laura entitled to the dependent exemption for Jimmy?
>
> ... Yes **No**
>
> **The divorce decree gives Billy the exemption for Jimmy.**
>
> c. Based on the information received is Laura entitled to the dependent exemption for Justin?
>
> ... Yes **No**
>
> **The divorce decree gives Laura the exemption for Justin.**

In this example from an IRS training manual, the two children live with the father (the custodial parent) and the court orders that the child dependency exemptions be split one and one for each parent. There are no conditions or exceptions/stipulations on being able to claim the dependency exemption. The example specially indicates to the agent being trained that Laura (the noncustodial parent) is entitled

to the exemption for the child Justin while Billy (the custodial parent) is entitled to the dependent exemption for the child Jimmy. The training example shows that the IRS allows a family court to allocate the child dependency exemptions between parents.

By this point, it is clear from key internal training manuals of the IRS, that the IRS—in its interpretation and application of federal tax code—allows family courts to order allocation of child dependency exemptions between custodial and noncustodial parents—especially by ordering the custodial parent to sign IRS Form 8332.

Conclusions

Internal manuals used by the IRS to train its agents in determining acceptance of claims for child dependency exemptions include instructions on allowing court ordered allocation of exemptions to be accepted. This shows that the *Blanchard* opinion was in error—notably in regard that there is no Congressional intent to disallow state court allocation of dependency exemptions. IRS implementation of Congressional intent—as shown in training manuals for agents—shows allocation is permitted.

Other arguments indicate that *Blanchard* should be overturned.

The current federal income tax structure has been in place since 1984. With the same basic code (though with occasional changes in tax rates and other facets) in place for over 30 years, the Supreme Court of Georgia has not been able to cite even one instance in which the IRS has disallowed a noncustodial parent's claim to a child dependency exemption because it was a state court allocation.

The vast majority of states allows state courts to allocate child dependency exemptions in child support cases. It is inexplicable for the IRS to allow one standard on this issue for those states and not in Georgia.

The magnitude of Child Tax Credits results in non-proportional child support burdens for parents if the cost offset effect is not shared between custodial and noncustodial parents. The custodial parent's support burden would be less than proportional while the noncustodial parent's burden would be proportional to the NCP's share of gross income. The Supreme Court of Georgia stated in *Stowell v. Huguenard*, 706 S.E.2d 419 (2011), that child costs are intended by the legislature to be shared on a pro rata basis.

Moreover, this construction of OCGA § 19-6-15(f)(1)(D) [applying a percentage to future bonus income] is contrary to the intent of the General Assembly when it passed the new child support guidelines that took effect on January 1, 2007. [I]nstead of calculating the child support based on the noncustodial parent's income, the new `income shares' model is designed to have the child support divided between the parties on a pro rata basis[] . . . [by requiring] a series of calculations to determine a presumptive amount of child support.

To not allow a state court to order sharing the cost offset from dependency exemptions or Child Tax Credits would be contrary to the legislative intent of proportional sharing of the child cost burden.

Already, OCGA § 19-6-15 allows a deviation for Child Care Tax Credits. The effective impact of applying this deviation is no different than state court ordering the sharing of Child Tax Credits. Both would result in sharing the tax code related cost offset to child costs between both parents.

In sum, the Supreme Court of Georgia should acknowledge that recent review of IRS training documents and other factors show that Georgia should join the mainstream view of other states that allow state courts to allocate child dependency exemptions between parents in child support cases. Do so is necessary for child support awards to be made on an equal duty of support basis—though with costs net of offsets (exemptions and Child Tax Credits) and allocated proportionally.

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Endnotes

1. R. Mark Rogers is an economist that specializes in forensic economics, notably for child support, alimony, personal injury, wrongful death, and life care plan projections. He was a member of the 1998 Georgia Commission on Child Support and wrote that commission's minority report that eventually formed the economic foundation for replacing the state's obligor only guidelines with the current Income Shares guidelines. For family law issues, Rogers consults for both noncustodial and custodial parents nationally. Contact: RMRogers@mindspring.com, 678-364-9105, Rogers Economics, 141 Iron Oak Drive, Peachtree City, GA 30269, RogersEconomics.com.
2. Subsequent Georgia opinions citing *Blanchard* include: *Bradley v. Bradley*, 512 S.E.2d 248, 270 Ga. 488 (1999); *Symms v. Symms*, 707 S.E.2d 368 (2011); *Hulsey v. Hulsey*, 792 S.E.2d 709 (2016); *Park-Poaps v. Poaps*, GA Court of Appeals, A19A2032, A19A2033, September 18, 2019. Somewhat distinguished is *Frazier v. Frazier*, 631 S.E.2d 666, 280 Ga. 687 (2006). *Frazier* allows the tril court to split two child dependency exemptions between both parents but only because parenting time was essentially equal.
3. *Blanchard v. Blanchard*, 261 Ga. 11, 15, 401 S.E.2d 714 (1991)
4. In *Bradley v. Bradley*, 512 S.E.2d 248, 270 Ga. 488 (1999, the Supreme Court of Georgia acknowledged that it inappropriately included the phrase "earned income" when discussing a custodial parent with a dependency exemption. The court correctly noted in *Bradley* that having earned income is not a prerequisite for qualifying for claiming a child dependency exemption.
5. U.S. Department of the Treasury, Internal Revenue Service, *Correspondence Examination Auditing Techniques, Instructor Guide*, ELMS 16959 (8-2017), Official IRS Training Material.
6. From the IRS web site after a search for "DDBKD,": Part 2. Information Technology, Chapter 3. IDRS Terminal Responses, Section 80. Command Code DDBKD, Command Code DDBKD (1) By entering a SSN, Command Code (CC) DDBKD allows a user to display a variety of information about the SSN that comes from external sources. (2) The sources of data displayed comes from Social Security Administration, Health & Human Services, and IRS. The primary use of this command code is to display additional information about a child for Remote Exam to audit returns under the Dependent Database program.

Know My Name: a Memoir

By Daniele Johnson

In November of 2019, the Diversity Committee met for the first installment of its book club. The Committee met at the extraordinary Goat Farm Art Center, located in West Midtown, Atlanta. The selection for the evening's discussion was "Know My Name: a Memoir", written by Chanel Miller. The book is a narration of the author's survival of a sexual assault that took place on the campus of Stanford University. Ms. Miller's journey through the legal system begins on the morning of January 18, 2015, when two bicyclists noticed her assailant atop her half naked unconscious body behind a dumpster outside of a fraternity house. Shortly thereafter, she became known as "Emily Doe", the anonymous victim named in the case of "State of California v. Brock Turner", a promising athletic college student from an affluent family, who had aspirations of making the Olympic swim team.

Ms. Miller gives a compelling account of her experience from the time she wakes up in the hospital, unaware of what has actually happened to her; to the frustration of reading about her ordeal through the voices of the media and public opinion; to the relief of a guilty verdict by a jury; to the disappointing sentence of 6 months of incarceration; and to finally reclaiming her identity by the publication of this book. The last chapter contains Emily Doe's victim impact statement that she read aloud in open court before the defendant's sentencing. The statement has been rebroadcast on and printed in several news and social media outlets. It has become an inspiration to survivors of sexual assault worldwide.

For me, the book is an examination of our justice system as seen from a victim's perspective. Ms. Miller's criminal case begins in a very unique way. It starts with her waking up in the hospital, not even realizing that a crime has been committed upon her. In the following weeks, she learns details of her ordeal, not from the investigators or victim's advocates, but through the media. The media then seems to sympathize more with the perpetrator, reporting not strictly on the facts of the case or the word of law, but instead on public opinion that the young Mr. Turner's life should not be ruined due to a moment of poor judgment. The next several chapters painstakingly detail how her life is in limbo as the criminal trial is scheduled, then rescheduled, the rescheduled again repeatedly over the next 3 years. As the case proceeds closer to trial, the legal battle of "defining" the crime begins. Specifically, can one be convicted of rape or sexual assault when the penetration was "only" digitally? Then, of course, comes the trial…. the dance between the prosecutor and the criminal defense attorney. The prosecutor attempts to navigate the evidentiary rules through the defense attorney's relentless objections, while the defense attorney provides a diligent defense by the apparent strategy of distractions and blaming the victim. Finally, comes the verdict and sentencing. With all the media attention and opinions posted on social media, one can't help but wonder if the defendant's social and economic status in life persuaded the judge to render the sentence of 6 months, of which 3 were served.

The book invites a stimulating conversation about our justice system that will provoke a multiplicity of opinions. If you cannot find the time to read the book in its entirety, I encourage you to take an hour or so to read or listen to the impact statement. Ms. Miller's bravery to speak her truth, is not only inspirational, it forces members of the legal profession and the media to question how we can do better for crime victims.

Case Law Update

By Vic Valmus

ATTORNEY'S FEES

Naar v Naar, **A19A0560** (April 29, 2019)

The parties were divorced in 1988. In the agreement, the Husband would pay alimony of $1,500 a month until July 1992, and then $2,000 per month thereafter until either one of them died or the Wife remarried. The parties waived any right to seek an upward or downward Modification of Alimony based on change of income or financial status pursuant to *Varn*.

The Husband made payments until November, 2017, and then stopped. The ex-Wife filed a Contempt action. The ex-Husband argued that he was now 88 years old, retired and living on a fixed income of $2,953 per month which made a $2,000 per month alimony payment unmanageable. He acknowledged the agreement included a Varn Waiver but he also cited Justice Fletcher's concurrence in a 1995 case in support of his argument that, as a matter of public policy and equity, the court should not enforce such a modification waiver in an inflexible manner. The trial court dismissed the Petition for Modification stating that, although it was sympathetic to the argument, the Husband had waived his right to seek modification as part of an alimony agreement. The trial court also awarded attorney's fees pursuant to O.C.G.A. § 9-15-14. The ex-Husband appeals and the Court of Appeals affirms the dismissal, but reverses the attorney's fees award.

The Husband argues, among other things, the trial court abused its discretion by awarding fees under O.C.G.A. § 9-15-14(b) because it failed to make the required findings of facts and the Petition was a good faith attempt to change a law based on recognized persuasive authority. O.C.G.A § 9-15-14 is intended to discourage frivolous claims; and, after reviewing the transcript, the Court of Appeals determined the trial court abused its discretion in awarding fees. Here, the ex-Husband quickly conceded that his argument was barred by the *Varn* Waiver and thus did not unnecessarily expand the litigation or act for the purpose of harassment. Additionally, at the hearing on the Motion for Attorney's Fees, the trial court stated, " I would like to see this case go up on appeal because I would like to see a change and I agree with you, it should be changed but that's not what the law is. It's a good case to go up". Despite this, the trial court nevertheless found the ex-Husband's conduct in bringing the Petition without justification and awarded fees. Therefore, we cannot conclude that the Petition for Modification is a type of conduct warranting the award of fees under § 9-15-14. Where there is binding precedent, there is no other way to bring about a change in law except to file an action a party knows will not be successful in the trial court. We are hesitant to penalize a party for seeking to be heard under such conditions.

BANKRUPTCY-ATTORNEY'S FEES

Dingle v Carter, A19A0081 (April 24, 2019)

Prior to 2014, the Father had physical custody of the child. In 2014 the Mother filed Modification of Custody and the trial court awarded the Mother primary custody. The Mother was in the army and the custody order stated that in the event of the Mother was deployed, the Mother would notify the Father of her impending deployment within 14 days of receiving her deployment orders; or, if her orders did not allow for 14 days, then immediately upon receiving her notice. The Father would then become the child's temporary guardian. The Order also required the Father pay child support, maintain a life insurance policy and pay $30,000 in attorney's fees. In July 2015, the Father filed a petition for bankruptcy where Mother was a creditor. The Father was generally discharged in February 2016. The Father filed contempt that the Mother did not notify him of her deployment and the Mother filed a contempt for non-payment of attorney's fees. Following the Hearing, the trial court issued an order holding the Mother in Contempt of failing to notify the Father about her deployment, found it lacked of authority to determine if the Mother's attorney's fee award constituted dischargeable debt in the Father's bankruptcy, abated a portion of the Father's child support obligation and awarded attorney's fees to the Father pursuant to § 9-15-14 and § 19-6-2. Mother appeals and the Court of Appeals affirms in part, reverses in part and remands.

The Mother contends, among other things, the trial court erred by holding that it was without authority to determine if the Mother's attorney's fee award was dischargeable debt in the Father's bankruptcy. In 2015, the Father filed a Petition for Bankruptcy and the Mother was listed as a creditor. Six weeks after the Father filed his Petition for Bankruptcy, the trial court ordered the Father to pay $30,000 in attorney's fees to the Mother's attorney. In February, 2016, the Father was generally discharged in the bankruptcy.

The Mother argues that pursuant to 11 USC §253(a)(5), attorney's fees arising from the Modification of Child Custody are subject to an exception from dischargeablity and that the trial court erred when it determined that this issue lies clearly within the jurisdiction of the bankruptcy court. Whether a debt is dischargeable because it is in the nature of alimony, maintenance or support is a question of federal law, with state law providing guidance in determining whether the obligation should be considered support. State courts have concurrent jurisdiction with federal bankruptcy courts to determine whether a debt is in the nature of alimony maintenance or support. If either the debtor spouse or creditor spouse files a complaint to obtain a determination of chargeability of the debts, the bankruptcy court's adjudication of dischargeability is res judicata in state court. If no Complaint seeking a specific determination of dischargeability, then it may be tried in the appropriate state court. If a debtor's former spouse has received a general discharge of bankruptcy, then it does not deprive the state court of jurisdiction to determine whether certain debts of a former spouse are exempt. Since there was no evidence that the bankruptcy court determined whether the attorney's fees were dischargeable, the trial court erred by holding that it lacked jurisdiction to make that determination.

The Mother also contests that the trial court erred by abating a portion of the Father's child support obligation. In granting the Father an abatement for the time period the child was residing with him, the trial court held that under the facts of this case allowing abatement during the time of deployment would not be an injustice to the Mother. However, the trial court did not state how the deviation was in the best interest of the child. Therefore, it was remanded to determine if the deviation was in the best interest of the child and to supply written findings of facts supporting the deviation.

COLLATERAL ESTOPPEL

Brooks v Lopez, A19A0324 (June 11, 2019)

In 2008, Lopez (Mother) was dating Brooks (Father) and gave birth to a child. The Father signed the birth certificate and was given the Father's last name. In 2011, the parties married. In 2012, they divorced and, pursuant to their Settlement Agreement, shared joint legal and physical custody of the child with the Father having primary custody due to the Mother's school schedule. In 2017, the Mother filed a pro se Petition for Modification of custody because of the Father relocating from Butts to Cobb County. Later in 2017, the Mother amended her Petition alleging the couple had always known another man was the child's biological Father. The Mother agreed in the original Divorce Settlement that there was one minor child born as a result of the marriage only because she lacked counsel at the time of the divorce. At the temporary hearing, the Father moved to Dismiss the delegitimating claim on collateral estoppel grounds citing the Divorce Decree. The court invited briefing on the paternity issue. Shortly afterwards, the Mother filed a Motion for Genetic Testing to demonstrate the Father was not the biological Father of the child. The court entered an Order granting the Motion for Genetic Testing. The Father moved for reconsideration or Certificate of Immediate Review which was granted. The Father files an Interlocutory appeal and the Court of Appeals reverses.

O.C.G.A. § 9-12-40 provides a judgement of the court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put at issue or which under the rules of law might have been put at issue. Here, the Mother is trying to relitigate the paternity following a Divorce Decree settling the issue. The parties' Divorce Decree and Settlement Agreement established paternity and the Mother is estopped from challenging the paternity established in her divorce and the trial court erred by granting the Motion for Genetic Testing.

CUSTODY-MENTAL HEALTH

Long v Truvx (2 cases), **A19A0038, A19A0749** (April 10, 2019)

The parties were divorced in 2014 and awarded joint custody, with Truvx (Father) being primary. The following year, Long (Mother) petitioned to Modify Child Custody to obtain primary physical custody of the child. The Father filed a separate Modification Petition seeking to obtain sole legal custody and to change the mother's visitation. The courts consolidated the proceedings and the trial court awarded temporary sole custody of the child to the Father during the pendency of the proceedings. At the Final Hearing, the trial court awarded the Father sole legal and physical custody of the twelve-year-old son and held that the Mother's visitation must be supervised. Mother appeals and the Court of Appeals affirms.

The trial court found, among other things, that the Mother has mental health issues that appear to have deteriorated since the divorce in a manner that is detrimental to the child. The mental health of each parent is a factor that the trial court may consider in deciding whether to modify a custody arrangement. However, the Mother argues the trial court's finding regarding her mental health was an erroneous factual finding. As grounds for finding that the Mother's mental health had deteriorated to the child's detriment, the court cited the testimony of a parenting coordinator, licensed clinical social worker and the court's own assessment. The trial court stated in its Order that the parenting coordinator witnessed several observations regarding the Mother's weaknesses and mental health issues and the record supports a synopsis

of the parenting coordinator's testimony. In addition, the parenting coordinator's testimony found the Mother's behaviors as troubling, that her needs appear to come before the child's and she has inappropriate reactions to everyday life situations. Also, the trial court cited its own observations of the Mother as a witness at the Hearing. The trial court described Long's behavior towards the Father as bizarre and found that it was detrimental to the child. Here, the trial court was authorized to draw conclusions about the Mother's mental health, the impact it had on her ability to act in the child's best interest and whether that ability had materially changed since the prior custody award.

DISMISSAL-CHILD SUPPORT

Grailer v Jones, **A18A2101** (March 6, 2019)

The parties were divorced in 2010 with each parent getting fifty-fifty custody. In 2014, the Father filed a Petition to Modify based upon the child's election to live with the Father. The following month, the Mother filed an election where the son elected to live with her. The case was transferred to Juvenile Court and the Juvenile Court awarded primary custody to the Father. In 2016, the Mother filed a third Petition for Modification attaching an Affidavit of Election from the child to live with her. The Juvenile Court appointed a Guardian at Litem and the Father filed a counterclaim for Modification of Custody to eliminate the Mother's Wednesday night visitation. The Father filed a Contempt stating that the Mother, on three separate occasions, failed to return the child to the Father. After the Mother rested her case, the Father made an oral Motion to dismiss her Modification Petition on the basis that she had withheld custody from him in violation of a custody Order citing O.C.G.A.§ 19-9-24. The Juvenile Court granted the Motion stating there has been a consistent withholding of visitation. The court stated quoting the Mother, "the child did not want to go, so I could not make him, and now, the child is afraid and I cannot make him" therefore, "you are not in control of [the child]." On January, 2018, the Juvenile Court entered a Final Order which stated it dismissed the Mother's Motions for Custody and Contempt because she withheld the child from the Father over thirty-five times after filing her Complaint and even though the child made an election to be in the custody of his Mother, it would not be in the child's best interest to do so. The Mother appeals and the Court of Appeals confirms in part, reverses in part and vacates and remands in part.

The Mother appeals, among other things, that the Juvenile Court erred by dismissing her Modification Petition pursuant to O.C.G.A. § 19-9-24 which states in relevant part, that a physical custodian shall not be allowed to maintain against a legal custodian an action for change of child custody or change of visitation rights or any application for Contempt of Court as long as the custody of the child is withheld from the legal custodian in violation of a Custody Order. The Mother first contends that this is an affirmative defense and must be asserted in either a responsive Pleading or by separate Motions, and the Father waived his right to seek a dismissal of her Modification Petition. However, the Mother cited no legal authority and the code section imposes no such requirement. The trial court held the Mother had withheld visitation which was supported by the record and the Mother's testimony that the child did not wish to visit with the Father is unpersuasive. The fact that a child of fourteen can select the custodial parent does not require the conclusion that such a child can be allowed to elect not to visit with the non-custodial parent. The Juvenile Court also found that, notwithstanding the Father's right to the dismissal of the Petition, it was not in the child's best interest to honor the election to be in the Mother's custody.

The Mother also argues the Juvenile Court erred by modifying the child support obligation because the Father never filed a Modification and it did not demonstrate a substantial change in the parent's income or financial status. Here, neither party filed written pleadings seeking a Modification of Child Support. The Juvenile Court's Order modifying child support must be reversed because it did not comply with O.C.G.A.§19-6-15(k)(4) which states a trial court modifying child support shall enter written orders that justifies the basis for the modification if any, and shall include all the information as set forth in paragraph 2 of section C. Although the court did not specifically state that it was modifying child support, the Order did. Neither the Order nor the Addendum listed the basis for the modification nor reflecting a finding that the Juvenile Court found a substantial change in either the parent's income, financial status or the needs of the child. Therefore, part of the Order addressing child support is vacated.

Duress

Rowles v Rowles, **A19A467, A19A0719** (June 28, 2019)

The parties divorced was in 2012 with Wife having primary custody of the two children. They remarried, but divorced again in 2014 after the wife found out about the husband's continuing infidelity with a co-worker. In 2016, the husband filed a Petition for Contempt because the wife refused to allow visitation with the children and filed a Motion to Set Aside the judgement. At the hearing, the husband testified that he agreed to the terms of the Second Settlement Agreement under duress due to the Wife's threats to expose his extra-marital affairs to his boss and others, which could have resulted in his termination from his job. It was only after the wife ceased allowing him to visit with his children that he sought aid of an attorney and filed a Petition for Contempt and Motion to Set

Aside. By the time he filed the petition, it had been six months since he has seen his children. The court granted the Motion to Set Aside because of duress as to custody, parenting time and visitation, but denied the motion for the remaining financial portions of the agreement. After a five-day hearing, the court entered a final award awarding sole, legal and physical custody of the children to the husband with the wife having supervised visitation for six months and then unsupervised thereafter. The court also awarded the husband attorney's fees in the amount of $112,189.00 under both O.C.G.A. §19-6-2 and §9-15-14(b). Both parties appealed. The Court of appeals affirms in part, reverses and remands.

Wife argues the trial court erred by setting aside the second divorce decree based upon duress. A duress claim must be based on acts or conduct of the opposing party which are wrongful and unlawful and complainant had a good defense that he was prevented from asserting at the original hearing or trial. Here, the husband testified he acquiesced to the wife's demands and signed the settle agreement because he was afraid of losing his job and his deferred compensation. The trial court found the wife made threats to gain a financial advantage, but the record also shows the husband not only participated in the proceedings, he and the wife mediated the custody and visitation portions of the second divorce decree agreement. The trial court also found prior to the wife cutting off visitation, the parties were following the parenting plan they had agreed to during mediation. It was the husband's own conduct and not duress that brought about the unfavorable bargaining position during the mediation and the fact that the wife had the upper hand, does not mean the resulting agreement and judgement was subject to being set aside. Here, the husband appeared and participated in the second divorce proceedings and was not prevented from appearing to put forth a defense. Trial court erred by setting aside the custody agreement.

The wife also argued it was trial court erred by awarding attorney's fees. O.C.G.A. §19-6-2 is not predicated on the wrongdoing of either party. Both parties filed petitions for contempt from the original divorce decree. The trial court made its order to reimburse fees and expenses incurred during the litigation and properly considered the parties relevant financial positions. Therefore, the fee award was authorized under §19-6-2 however, that does not end the analysis. By the plain terms of §19-6-2, only authorized the award of attorney's fees and here the trial court ordered reimbursement of expenses. Expenses could be awarded under §9-15-14(b); however, although the wife's alienating behavior was supported by the record, the trial court did not make findings as how the award was limited to the prohibitive conduct. Therefore, the award must be vacated to the extent expenses other than attorney's fees were awarded

Judge McFadden dissents.

LEGAL MALPRACTICE

Edwards v Moore et al, **A19A0082** (June 27, 2019)

In 2011, Edwards' marriage was struggling and she hired an attorney to draft a Separation Agreement which provided that Edwards would receive monthly alimony in the amount of $2,800 for so long as the parties are legally separated or until May 1, 2026, whichever shall first occur. It also provided it would be incorporated into the Final Divorce Decree if the parties proceeded to divorce. In 2012, the Separation Agreement was approved and incorporated into a Final Judgment in Edwards' separate maintenance action. Later that year, Edwards' husband filed for a Divorce in which Edwards hired new counsel. Her attorney filed a verified answer and counterclaims and requested that the Separation Agreement be incorporated in the Final Divorce Judgment because it resolved all issues between the parties. Edwards' 2nd counsel withdrew and she retained Moore to represent her in the divorce. Shortly after, Moore filed Edwards' Motion for Judgment on the Pleadings contending all issues in the divorce including alimony were resolved. In 2014, the parties filed a Joint Consent Agreement for Judgment on the Pleadings and the following day, the court entered a Final Judgment and Decree of Divorce incorporating the Settlement Agreement. Following the divorce, Edwards' husband ceased paying alimony because the parties were no longer legally separated. Edwards filed a Motion for Contempt for nonpayment of alimony, but the trial court denied the Motion, stating that under the plain language of alimony provision in the Settlement Agreement, the Husband was relieved from paying alimony once the divorce was final. Edwards fired Moore and hired a new attorney.

A year later, Edwards sues Moore and the two law firms Moore was affiliated with bringing claims for legal malpractice, breach of fiduciary duty, breach of contract and fraudulent concealment. Defendants moved for Summary Judgment and Edwards cross claimed for partial Summary Judgment. The trial court granted the Defendants' Motion for Summary Judgment and denied Edwards' Motion finding that Edwards could not prove, as a matter of law, the Defendants' proximately caused the cessation of her alimony nor could she prove her damages. Edwards appeals and the Court of Appeals affirms.

To prevail on a legal malpractice claim, the client must prove that 1) she employed the defendant attorney, 2) that the attorney failed to exercise ordinary care, skill and diligence; and 3) this failure was approximate cause of the damages to the client. To establish probable cause, the client must show, but for the attorney's error, the outcome would have been different. Here, Edwards has failed to establish a

question of fact as to whether Moore's conduct caused her damages which is fatal to her case. Edwards' theory is that Moore should have amended the answer to assert a counterclaim for alimony and sought to reform the Settlement Agreement which would have resulted in her obtaining alimony post-divorce. A client suing her attorney for malpractice not only must prove that her claim was valid and would have resulted in a judgment in her favor, but also that said judgment would have been collectable in some amount, for therein lies the measure of her damages.

Here, there is no evidence that Edwards would have succeeded on her counterclaim for alimony nor is there any evidence what the measure of her damages would be. Edwards has no inherent right to alimony. Alimony is authorized, but is not required to be awarded to either party in accordance with the needs of the party and the ability of the other party to pay. There is a letter in which Edwards' ex-husband indicated that he could no longer sustain the child support and alimony payments. There is no evidence of her ex-husband's financial status, his annual income, or his assets that would support an award of alimony in her favor based on his ability to pay. Therefore, Edwards cannot show that, but for the Defendants' error, the outcome would have been different and therefore has failed to establish proximate causation. In addition, Edwards' claim for damages is entirely speculative.

SIGNIFICANT CHANGE OF CONDITION-RELOCATION

Burnham v Burnham, **A19A0675** (June 4, 2019)

The parties were divorced in 2016 and had 2 children. Pursuant to the parties' Settlement Agreement, the Wife had primary physical custody and the parties were to live within 120 miles of the current home located in Palmetto, Georgia, unless one of them had to relocate due to employment of either the parent or the parent's new spouse. In 2018, the Mother with her fiancé moved to Cobb County because of her work schedule and it is undisputed that the move is within 120 miles contemplated by the Separation Agreement. The Husband with his new wife purchased the home that would allow the children to remain in their current school district. As a result of the Wife's move, the Husband filed a Complaint to Modify Custody and Child Support stating the move was a material change in circumstances and that the children were living in Coweta County their entire lives and had family nearby to whom they had close relationships. The children were doing well in school and were involved in several extracurricular activities and active in church. The Wife filed her own Petition for Modification and Visitation and for Contempt based upon non-payment of child support and maintaining a life insurance policy. At the hearing, the trial court addressed only whether the change in custody was in the best interest of the children and modified custody to award primary custody to the father and ordered the Wife to pay child support. The Wife appeals and the Court of Appeals reverses and remands.

The Wife argues that the court's order must be reversed because it failed to make the threshold determination that there was a material change in circumstances given that the Separation Agreement specifies that only a move beyond 120 miles would qualify. Here, the Husband argued that the Wife waived her alleged error by not arguing it before the trial court and by implicitly conceding that there was a change of circumstance. However, the Wife was not the party seeking a Modification of Custody and thus was not her burden to show a change of circumstance. As such, the failure to raise the argument that there was not a sufficient evidence of a change of circumstances does not waive the issue nor is there evidence in the record that the Wife conceded the issue, because the Wife denied the move constituted material change in circumstances. Here, the trial court must make a threshold finding that there has been a material change in circumstances before it considered what is in the best interest of the children. In addition, there is nothing in the trial court's order that shows it considered this threshold issue. In fact, the trial court begins its conclusions of law by explaining in Custody cases involving the relocation of a parent, the court's sole consideration is the best interest of the children. Therefore, the case is reverse and remanded to make those factual findings.

TERMINATION OF PARENTAL RIGHTS

Woodall v Johnson, **A18A1927** (February 7, 2019)

The child was born of issue of the marriage in 2010 between the Father and Johnson (Mother) and the parties divorced in 2013. Mother was granted primary custody and the Father ordered to pay $400 per month in child support. In 2015, the Superior Court entered an Order finding the Father in contempt requiring him to pay arrearage, unpaid medicals and to submit to a drug screen, with the provision that the Father shall have no visitation until he provided a clean drug screen. There was a detailed Parenting Schedule which provided for initial supervised visitation working up to unsupervised overnights along with counseling. In 2017, the step-father filed a Petition for Adoption, attaching the Mother's written consent and the step-father alleged that the written voluntary surrender of the Father was not necessary because the Father, for a period of one year or longer immediately prior to the filing of the petition, failed to communicate or make a bonified attempt to communicate with the child in a meaningful and supportive parental manner. The Father objected.

In August, 2017, the Mother testified that the Father regularly texted her to schedule visitation but she denied his request because of not providing

proof of a clean drug screen. However, the Father's attorney provided proof of the clean drug screen from September, 2016 but the Mother continued to deny the Father's repeated request for visitation. The paternal grandparents also had a good relationship with the child and passed along gifts from the Father to the child. The Father testified that he attempted to schedule counseling but was unable to because of his work schedule and that he called the Mother's phone regularly to speak with the child but was only able to speak with him once or twice in the 3 years before the hearing. The parties also testified that the Father was making regular monthly child support payments since the petition was filed but was still in arrears by $1,100. The Superior Court entered an Order granting the Petition for Adoption thereby terminating the Father's rights. The trial court determined that the Father had no meaningful contact with the child and failed to obtain a drug screen until August, 2016 or to go to individual counseling sessions. The court found the surrender or termination of the Father's rights was not required as a prerequisite to the filing of the petition because there was clear and convincing evidence that the child had been abandoned by the Father. The Father appeals and the Court of Appeals reverses.

The former O.C.G.A. §19-8-6(a)(1) provides that a child whose parents are living but not married may be adopted by the step parent only when the other voluntarily surrenders his right to the child. However, O.C.G.A. §19-8-10(a)(1) provides such surrender is not required if the court determines, among other things, by clear and convincing evidence that the child has been abandoned. In the alternative under section B, the court may grant an adoption without a parental surrender if the parent for a period of 1 year or longer immediately prior to the filing of the Petition for Adoption without justifiable cause has significantly failed to communicate or make a bonified attempt to communicate with the child in a meaningful and supportive parental manner. Here, the step father alleged that the written surrender of the Father was not necessary because the Father had for a period of 1 year before the petition was filed failed to communicate or make a bonified attempt to communicate with the child in a meaningful and supportive parental manner.

Here, the Trial Court found by clear and convincing evidence that the child had been abandoned by the Father. However, the evidence does not support a finding of abandonment. It is well settled that adoption laws must be strictly construe in favor of the natural parents. Therefore, there must be in the record clear and convincing evidence of an actual desertion accompanied by an intention to severe entirely. Here, the Father paid child support, even though late at some times, provided proof of a clean drug screen a year before the final hearing, sent gifts to the child through the grandmother, requested through counsel to begin visitation and attempted to contact the child on almost a daily basis for a year proceeding the Final Hearing. These facts do not support a finding that the Father ever acted or failed to act with the intention to sever entirely his parental obligations. The trial court was not authorized to grant the adoption pursuant to O.C.G.A. §19-8-10(a)(1). In addition, the step father's petition neither referenced nor tracked the language of the former O.C.G.A. §19-8-10(a) and therefore, the Father received no notification that he must be prepared to show cause why his parental rights should not be terminated and therefore, the Father was not properly notified and the trial court failed to strictly construe the former §19-8-10 in favor of the Father.

TPO

Smith v Smith, **A19A0320** (June 20, 2019)

On August 23, 2017, the Wife filed a Verified Petition for a 12-month Protective Order for which an *Ex parte* Order was issued and a hearing was set for September 12, 2017. However, it was later cancelled due to inclement weather and the Superior Court rescheduled the hearing for September 27th. On September 27th, the Father filed a Pretrial Motion to Dismiss on the grounds that the hearing was statutorily untimely and that once the court failed to meet the statutory 30-day hearing requirement, the underlying Petition should have been dismissed as a matter of law. The court denied the motion and its rationale was the extension of time due to the inclement weather. The Chief Judge of Superior Court issued an Order of Judicial Emergency pursuant to O.C.G.A. § 38-3-6 closing the courts in Cobb County on September 11th and 12th and ordered all court deadlines, time schedules or filing requirements were suspended, tolled or extended during the duration of the Judicial emergency. On September 28th, the court entered an Order granting the Wife's Petition for Protective Order. The Husband appeals and the Court of Appeals reverses.

O.C.G.A. §19-13-3(c) provides as the sole exception to the 30-day time frame to holding a hearing, is that the parties otherwise agree to extend. The Order issued by the Superior Court's Chief Judge could not have provided an additional exception for noncompliance. However, this opinion does not rule upon the interplay between the cited statutory provisions in this case. Even accepting Arguendo that the Chief Judge Order was competent to affect the suspension, tolling or extension of time constraints, it would have only pushed the expiration of the 30-day period from September 22nd to September 25th as opposed to September 27th when the hearing was held. Notwithstanding the court's position that the very next practical available scheduling option was the 27th , this fell short of satisfying the statutory requisite. Therefore, the TPO stood dismissed as a matter of law.

UCCJEA/PLEADINGS

Wertz v. Marshall, **A19A0009** (June 26, 2019)

Wertz (Mother) and Marshall (Father) were married and had 2 children and divorced in Florida in 2006. The Mother was awarded primary custody of the children. In 2012, the Mother allowed the younger child to live with the Father who had moved to Georgia. In 2017, the Father filed a Petition to Modify the Florida custody award in Georgia seeking permanent custody of the child. The Mother filed an answer in which she admitted the allegation of the Father's Petition that she is a resident of Colorado and that the Walker County Superior Court had jurisdiction over the Petition. At the time, the Mother's husband was an active duty service member that was temporarily stationed in Colorado. Six months later, the Mother moved to Dismiss the Petition under the UCCJEA claiming Florida had continuing exclusive jurisdiction. The court denied the Motion and found that the Mother, through counsel filed an answer admitting that this court has jurisdiction and venue to hear the case and that the Mother is a resident of the state of Colorado and that the Mother did not timely file a Motion or Pleading raising the defense of lack of jurisdiction and improper venue or insufficient service of process. The court entered a Final Order awarding the Father primary custody. The Mother appeals and the Court of Appeals affirms.

The Mother argues the trial court erred in addressing the merits of the Modification because Florida had exclusive jurisdiction over the case and stated the court should relinquish jurisdiction because the Mother still resides in Florida. However, the Mother admitted in her answer that she was a resident of Colorado, which conclusively divested the Florida court of jurisdiction. This was an admission of fact. As often is the case, the Mother later disclaimed admission as not actually authorized by her. Nowhere in the record does it show that the Mother ever amended her answer or ask the court's permission to withdraw her admission.

Judge McFadden dissents.

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