The Family Law Review

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Editors' Corner

By Jonathan Dunn

Welcome to the Autumn Issue of the Family Law Review!

It is my distinct privilege to serve as your editor. I am especially grateful for the opportunity to engage with our thoughtful contributors. I hope that you will find this edition to include a balanced offering of timely articles, such as Tonia McGinnis' exposition of the intersectionality of racial and health equity and Trish Murphy's contribution on lawyering and life during a pandemic, and staples such as Mark Sullivan's article on dividing military benefits and Trent Doty's piece on divorce financial planning. I am also pleased to commend to you Trevi-Ann Thompson's take on crediting child support for intact households, and I encourage you to stay abreast of the latest developments by acquainting yourself with Vic Valmus' case law updates.

I am honored to share these offerings with you, and I encourage you to share your thoughts on topics or articles for the next edition of the Family Law Review.

Editor Emeritus

By Randy Kessler

We have been given a tremendous opportunity. It will sound grandiose, but we are being given the chance to save the world, or at least to save hundreds of thousands, and maybe millions from dying. There, I said the unspeakable. Mere mortals now have a chance to save our fellow human beings. How often in a lifetime, is a human being given the chance to save thousands and possibly millions of lives? Well here we are. Scientists, doctors, business people and government leaders and their staffs, have done the unthinkable. They have brought the possibility of a lethal and potentially fatal blow to the biggest common enemy the human race has faced in all of our lifetimes. Yes, there is a vaccine. There are multiple vaccines. And they are more effective than the vaccines many people take yearly for other viruses. And this one is to wipeout a plague. The last similar pandemic, the so-called "Spanish Flu" killed 50,000,000 people, AND THAT WAS WHENTHE

Inside This Issue

WORLD'S POPULATION WAS ONLY 1.5 BILLION. That is over 3 percent of the population of the entire world. And in today's world of almost 8 billion people, that would be the equivalent of over 250,000,000 people dead. AND WE HAVETHE CHANCE TO STOP IT IN IT'S TRACKS. Yes wearing masks, social distancing, washing frequently are crucial, but if the experts are right, if over 75 percent of us take the vaccine, it will basically go away. And isn't that what we all have been dreaming about? So how can there possibly be people who refuse to take the vaccine? No matter how hard I try to see it from all angles, I keep ending up at the obvious answer: we must all take it. So why do I say that? Here are my reasons:

What are the risks associated with the vaccine (possible slight side effects like nausea?) vs. the risks of NOT taking it (DEATH)? Isn't that a good enough reason?

Or:

2. A bigger tragedy even than dying from Covid-19 would be to be the last person to catch Covid-19 and die just before enough people have taken the vaccine and "herd immunity" takes hold. And the delay in reaching herd immunity would only be because some refuse to take the vaccine. THAT WILL CAUSE MANY OF US TO LOSE LOVED ONES, WHO COULD HAVE LIVED IF WE ALL ACCEPTED THE VACCINE JUST A LITTLE FASTER.

Or:

3. Millions of people have now taken the vaccine, how's that for proof it's safe? Millions. Yes, millions. They live and they are much more likely to remain Covid-free. And even if the vaccine didn't work, very few have had minimal side effects, so what's the harm?

Or:

4. What's an easier discussion to have with family, explaining why you made them get a shot, or explaining why you did not let them get a shot, as they lie in an ICU on a ventilator?

To me this is a very simple calculation. And it is a moment we should embrace and not let slip through our hands. How can we let the genius and innovative spirit and effort of our species be ruined by rejecting such hard work? So many have worked so hard to truly save the world. All we should do is to say thank you, we appreciate you saving us and the ones we love.

As soon as I am able, I plan to take it and to be part of the solution. And as I conclude this piece, I am reminded of a client I represented during a difficult mediation process. We almost settled his case, and when the deal fell apart, he said to me in his broken English "Mr. Kessler, we caught the fish, we had it in our hands, but we didn't hold it tight enough and it slipped away". Let's hold onto this solution, and not let it slip away. The consequences are too devastating to even contemplate.

A Word from Our Former Chair

By Kyla Lines

As we (finally) begin to return to normal, my year as Chair of the Family Law Section has come to a close. Since the Bar's year begins July 1 and ends June 30, I have truly been the "Covid Chair" of the Family Law Section. My term began when we were at the height of chaos, and ended now that we are catching a glimpse of what life used to be.

It has indeed been the strangest year ever for all of us in many respects, and it will be interesting to see what changes carry over to our regular lives. I know many of us hope that status conferences and calendar calls will continue to be conducted via Zoom; it's certainly more efficient and cost-effective for us and more importantly, for our clients. I, for one, am thrilled to return to live mediations and hearings though.

The Executive Committee has done its best to successfully handle the challenges handed to us by continuing the Section's purpose of providing quality continuing legal education programs. I am happy to report we have had more success than failure in this regard. While we had to cancel two Family Law Institutes (despite our efforts to conduct a virtual seminar for 2021) we shifted to a virtual format thanks to the hard work of Mary Jo Sullivan and Lane Sosebee at the State Bar. Jeremy Abernathy successfully planned our first virtual CLE, *Race in Family Law*, in conjunction with the State Bar's Midyear Meeting. Using the success of Jeremy's one-hour CLE as incentive and encouragement, we planned and executed an excellent virtual Nuts and Bolts of Family Law seminar thanks to Section Secretary/Co-Chair Elect Ted Eittreim. We have begun a series of monthly Lunch and Learns which will continue through the Fall and Spring, and Secretary-Elect Karine Burney is working hard to bring back our Nuts and Bolts seminars in a live format this Fall, in both Atlanta and Savannah. Finally, we have the 2022 Family Law Institute to look forward to. Leigh Cummings and I will serve as Co-Chairs of that Institute and we are extremely excited to see everyone in person next summer. Finally, Ivory Brown, Chair of the Family Law Section's Inclusion Committee and Immediate Past Chair of the Section, has once again knocked it out of the park with her creativity and ingenuity. Her monthly virtual *Custody Considerations Seminar Series: Dialogue and a Movie*, provided CLE credit along with informative discussion on custody issues from a different cultural or ethnic perspective, with a movie woven in to assist the conversation.

Since we were unable to conduct all of our regular seminars, we shifted focus to community assistance. We continued our partnership with the Warren Boys and Girls Club by providing the children they serve with holiday gifts and summer camp supplies. We also contributed to the DeKalb Volunteer Lawyers Foundation and to the Solomon's Temple Foundation. Finally, we also made a donation to STE(A)MTruck, a non-profit from Community Guilds designed to help eliminate inequities in local school systems by giving students and teachers in Title I schools access to STEAM-based learning experiences that otherwise would not exist.

Hannibal Heredia, our Legislative Liaison, worked with his committee throughout the legislative session to track family-law related bills and keep us abreast of developments. His efforts on behalf of the Section are greatly appreciated, especially his willingness to make last minute trips to the Capitol during the pandemic.

Finally, I cannot fail to mention Jonathan Dunn, who has served as the Editor of the Family Law Review for this term. While our ability to publish was impacted by pandemic, Jonathan continued to gather thoughtful articles on timely subjects so that we could publish as soon as the Bar was ready. His efforts are greatly appreciated.

Thanks to those that joined our Family Law Section Social on June 24 at 5:30 at Magnolia Hall in Piedmont Park. Hopefully this was the first of many gatherings, for which we all have a renewed appreciation. It has been an honor to serve as the "Covid Chair," and I look forward to the leadership of Leigh Cummings.

Lawyering & Life During a Pandemic

By Trish Murphy

Managing stress and achieving a work-life balance as a lawyer is difficult. Now during this pandemic, we are blurring the lines between work and home. Lawyers are mediating, attending mediations, going to court and holding client meetings via Zoom (or WebX) from home. This is an added stress to an already stressful career.

Zoom Fatigue or Zoom Coma is a real thing! Zoom is helpful and has many benefits during a pandemic but it is here to stay because of the convenience and the amount of time it saves for clients and lawyers, as such, self-care is required when using this new platform. These tips are for attorneys, clients, mediators, and Judges.

1. Sitting in one place staring at a screen for hours at a time.

- **Issues:** Sitting at your computer all day already presented problems for most professionals. Your posture suffers and your back & neck hurt, and your mind is drained.

- **Quick Fixes:**

  - **Take a break. Stretch. Breathe.** Take a break does not mean look at your phone. Take a break and walk around, even better walk around outside for a few minutes. The fresh air will do you good! Try not to have back-to-back Zoom meetings. Schedule a break in-between meetings.

  - **Home office.** Make sure your home office is comfortable and you have a proper chair and desk set up to allow you to work comfortably in your home. If possible, have your home office in a separate location in your home. If you have your office in your bedroom, it may be hard to go to sleep because you see all the work you have to do or ruminate about the day you had.

  - **Treadmill.** I recently bought a treadmill for my home office so I can walk and work at the same time. This is amazing for conference calls, phone meetings, and even Zoom (depending on the situation). The treadmill eliminates the excuse about the weather or if you have enough time to squeeze in a walk outside before your next phone call or meeting. My treadmill has a spot on it to hold a tablet so I can review my emails and dictate my responses as I walk. It is right by my sliding door so I can get sunshine and fresh air as I walk. I only wished I would have thought of this sooner!

2. You get Hangry.

- **Issue:** As a mediator, I am on Zoom for 6-8+ hours for a family law mediation. Pre-pandemic, I had a built-in break as I walked from room to room. This allowed me to walk around, stretch, and get a snack. With Zoom you change rooms with a simple click of the button. If you don't build in a break or lunch you will experience low blood sugar and that means you get Hangry.

- **Quick Fix:** I now allow myself the same break when changing rooms by simply putting myself in the waiting room while I grab a snack or more water. Plan ahead and pack your lunch even though you may be at home. A quick break between rooms allows you

to re-energize.

■ I remind parties and attorneys to also take breaks during mediation. A quick break outside to get fresh air and breath will invigorate your mind and body.

3. Your Attention Span is Shot!

● **Issues:** You are "On" all the time. In Zoom, you are sitting in a fixed spot looking straight ahead most of the time. This never happens in an in-person meeting. In an in-person mediation, you would look around and participate in a more free-flow environment. In Zoom, you feel "on" all the time and that is exhausting. You are gaging how you look almost the entire time. You may also be wary of looking out the window for fear it looks like you are not paying attention.

○ **Quick Fix:** Hide yourself while on Zoom.[1] This feature allows you to still be seen but you don't have to always look at yourself. Just don't forget everyone can still see you so be mindful of what you are doing. I have seen people on Zoom brushing their hair, taking off their make-up, etc. I frequently see a lot of eye-rolling or nasty faces and I want to tell them - *We Can Still See You!*

○ **Switch it up.** Not every meeting has to be by Zoom. Plan a conference call like we did in the old days. Some issues can be done via email as well.

● **Backgrounds are distracting.** Admit it - you look at colleagues' homes & try and check out what is on their bookshelf. It is human nature and we all do it. The problem is this is distracting and you are not focusing on the topic at hand.

○ **Quick Fix:** Change your background to something simple and perhaps even soothing. Your office may even ask that you all use the same background as this helps you feel like you are all in the same place.[2]

4. Brain Drain.

● **Issues:** Video chats mean we need to work harder to process non-verbal cues like facial expressions, the tone and pitch of the voice, and body language; paying more attention to these consumes a lot of energy. Our minds can't relax as we are trying to process facial expression, voice tone, and body language via a platform where we only see people from the neck up. This dissonance causes us to have conflicting feelings and it is exhausting to our mind and body. This is especially an issue in virtual court. In virtual court, you don't get to walk around the courtroom. Walking in court allows us to open our minds and truly listen to a witness's response and think on our feet - literally. Whoever heard of thinking on your rear end?!

○ **Quick Fixes:** Before going to virtual court, do 5 minutes of deep belly breathing to clear your mind. Stretch and do light chair yoga. If possible, take a quick walk outside. The fresh air will awaken your mind and allow free thinking. Think of it like getting your best ideas in the shower. A walk can provide the same benefit.

5. Technology Anxiety.

● **Issues:** Technical issues while using Zoom or WebX are commonplace. Learning to ride the wave during these technical snafus is key. Lawyers are ready and focused when it comes to a trial or mediation and throwing a wrench in your cross-examination with a technology issue breaks your flow. When a party freezes or is dropped it causes additional anxiety. Silence is another challenge. It makes people uncomfortable. There is about a 1.2-second delay between your question and someone's answer. This is not the normal flow of a conversation. The brain quickly thinks there is a problem with technology.

● **Quick Fixes:** Breathe your way through it. No one can see that you are practicing deep belly breathing while you wait for the problem to be fixed. If possible, turn your video off and stretch and breathe so you can stay in the zone. Pick a mantra - a word or sound repeated to aid concentration in meditation - that you can use during these stressful times to keep you relaxed and in the flow.

6. **The Myth of Multi-Tasking.**

● **Issues:** You think you are being efficient, doing two things at once but research shows that multi-tasking cuts into performance.[3] Switching between tasks can cost you as much as 40percent of your productivity. The brain doesn't really do two tasks at once. The brain, in fact, switches between the two tasks. This stop/start process is less efficient, we make more mistakes and it zaps our energy.[4] Stanford researchers found that people who multitask can't remember things as much as their colleagues who focus on a single task. Plus, multitasking during someone's meeting or seminar is rude. Your host and the other members on Zoom can see you on your phone or if you are looking dead head into the screen, everyone knows you are answering your emails or checking your social media feeds.

○ **Quick Fixes:** Simple - Don't multi-task! Stay present! Stay focused and you might just learn something new. Set time aside for each task and focus on one at a time. This helps you get into a state of flow or in the zone and complete more tasks accurately and efficiently.

Endnotes

1. How to Combat Zoom Fatigue by Liz Fosslien and Mollie West Duffy.
2. How to Combat Zoom Fatigue by Liz Fosslien and Mollie West Duffy.
3. How to Combat Zoom Fatigue by Liz Fosslien and Mollie West Duffy.
4. The Myth of Multitasking by Nancy K. Napier, Ph.D.

How Much Credit Should be Given to Child Support Obligors When the Parties Live Together After Child Support is Awarded?

By Trevi-Ann Thompson

Introduction

It has been the long-standing rule that each parent is financially responsible for the care and support for their child/ren even if the parents were not married at the time the child/ren were born. Regardless of marital status, typically the obligor is the non-custodial parent while the obligee is the custodial parent.[1] However, what happens when the parties decide to resume cohabitation after a child support order has been made? As family law attorneys, whether newer or experienced attorneys, we know it is not uncommon for couples- married or unmarried- to get back together, whether in the midst of a divorce or other child-related actions. This article seeks to do a deep dive into how Georgia courts have been handling unique situations like these and by extension, how other jurisdictions have handled the issue in the United States.

Second Time's a Charm?

To illustrate the issue, here is our hypothetical fact pattern: Mary and John have been married for five years and share two children together. John files for divorce and the parties have a settlement agreement in which John, being the non-custodial parent, has to pay $700.00 in child support per month for the care and support of the minor children. The settlement agreement has been filed, a divorce decree has been entered and John begins his first couple of payments for the next few months. The couple then decide to give their marriage another try. Now, ex-husband John moves back in with ex-wife, Mary, and no modification of child support has been filed. They continue to live together for two (2) years. The couple ultimately decide that they had it right the first time and to call it quits indefinitely and part ways. Mary now holds the view that John currently owes $16,800 for the 24 months they lived together because John was not formally making his monthly payments of $700.00 to her. John, of course, argues that there was no need to make such formal payments since they lived together and besides, he has been contributing to the household by paying the mortgage, utilities, paying insurance for the family's car, groceries and childcare, among other things.

A Quick Glance on the West Coast

While there are only a few cases in Georgia hinting at this subject, support can be found in California's case law for giving credit to an obligor who has cohabitated with the obligee pursuant to principles of equity. However, California is not alone because states such as Arkansas, Alabama and Louisiana have allowed credit against accrued child support arrearages or for specific expenses paid for by the obligor parent in cases where the parents lived or resumed living together in the same household after divorce.[2]

In *Ramsey v. Ramsey*, the Arkansas Court of Appeals held Father was allowed to receive credit toward child support arrearage when it found that Father was supporting children and household using his disability benefits.[3]

In *State Dep't. of Human Res. v. Thomas*, the Alabama Court of Appeals held that Father was entitled to credit against child support arrearage for the six-month period the parties resumed living together after there was unrefuted testimony from Father which revealed that the Father supported the mother and children and that Mother had access to Father's bank account and personal papers and also wrote checks on the Father's account.[4]

In *Dunnaway v. Dunnaway*, the Louisiana Court of Appeals affirmed the decision of the trial court which found Father supported the household by providing shelter, food and paying for the utilities for the benefit of the children and Mother when the parents reconciled and that such actions more than offset the amount of child support allegedly owed by Father which was $200.00 per month.[5]

In the California case, *Jackson v. Jackson*, Mother and Father got divorced and Mother was awarded custody of the parties' 16-year-old daughter.[6] Father was ordered to pay Mother $750.00 per month for the support and maintenance of their daughter.[7] Shortly thereafter, Father filed a modification of the child

support order however, Mother countered these claims with two citations of contempt stating that Father was behind on his child support payments.[8] The trial court discharged the contempt citations and ordered termination of the support payments at a fixed date opining that the parties' daughter resided with Father and maintained a permanent residence there.[9] In retaliation, Mother obtained an ex parte issuance of a writ of execution in the principal amount of $16,500.00, which was supposedly the aggregate of 22 months of alleged unpaid child support (in excess of $18,000.00 with interest and costs) and levied on Father's bank account.[10] However, the trial court noted that the date that Father allegedly owed child support was well after the parties' daughter started living with Father.[11] As such, Father moved for an order recalling and quashing the writ of execution and in the alternative, for an order for reimbursement for money expended for the benefit of their daughter.[12] The trial court denied both motions stating that Father's motions were an attempt to modify child support prior to the date of filing his Order to Show Cause to Modify Child Support, which ran contrary to California's Civil Code.[13] Father appealed.[14] The Appellate Court noted that even though it was not the law of the land to retroactively modify child support and that accrued arrearages were to be treated like a judgment for money, these said child support orders were still within the equitable power of the Court.[15] The Court further reasoned that child support was an obligation that belonged to the child and not to the [custodial parent].[16]

The Appellate Court in *Jackson* ultimately affirmed the trial court's decision reasoning that the trial court was well within its discretion in "recalling and quashing the writ of execution or permitting only partial enforcement on the basis that [Father] had directly discharged his obligation or on the basis of equitable considerations."[17] The Court also took into consideration the unreasonable delay of Mother in filing the writ of execution finding that the [Mother] acquiesced in the arrangement and delayed for over 30 months after the parties' daughter took up residence with Father.[18] The Court also noted that Mother only attempted to enforce her claim and only sought to file the writ of execution *after* Father was successful in obtaining a modification of the order.

The case of *Jackson* propelled what is now popularly known as "*Jackson* credits" that is considered in situations when the non-custodial parent later assumes full custody of a child but did not file a motion to modify the child support, custody and in some cases, both. However, the case of *Helgestad v. Vargas*, widened *Jackson's* credit eligibility even more by holding that *Jackson* credits are applicable even in situations where there was not a complete change of custody.[20] The Court held in *Helgestad*, that "the same equitable considerations that apply to support orders arising out of marital cases should also apply to support orders arising out of paternity cases."[21] The Court further opined there was no reason for the trial court to differentiate total changes of custody from periods of living together in the same household because "actual support is actual support."[22]

It is the stance in many jurisdictions, including Georgia, that a parent is not bound to compensate the other parent for the voluntary support of his child, absent an agreement. See *Wills v. Glunts*, 222 Ga. 647, 649 (1966). However, it appears that in the absence of such an agreement, the court will look to whether the custodial parent consented- whether expressly or impliedly- to substituted forms of payment rather than formal child support payments in some instances, which will be discussed below. See *Daniel v. Daniel*, 239 Ga. 466 (1977).

Georgia Says…

According to O.C.G.A.§ 19-7-2, "[i]t is the joint and several duty of each parent to provide for the maintenance, protection, and education of his or her child until the child reaches the age of majority, dies, marries, or becomes emancipated, whichever first occurs . . . *except to the extent that the duty of the parents is otherwise or further defined by court order*." (Emphasis supplied). However, "a permanent child support judgment is res judicata and enforceable *until modified, vacated, or set aside*."[23] (Emphasis supplied). While it is evident that Georgia does not provide for retroactive child support but rather, supports the proposition that "[a] child support obligation may be modified on a prospective basis only"[24], it appears as if the Georgia Court of Appeals has opened the door for trial courts to consider giving credit towards child support arrearages in exceptional circumstances for the time the parties resumed living together after the entrance of said child support judgment.

In *Davis v. Davis*, appellant Kenneth Davis and appellee Elizabeth Davis were married in 1978 and divorced in 1991.[25] The parties continued to live in the same household for the next two and one-half years, during which time they shared household expenses.[26]

As such, Kenneth stopped paying child support as required by the final judgment and divorce decree during the time in which the parties continued residing together.[27] Kenneth moved out of the household in April 1994, and Elizabeth filed a garnishment action in DeKalb County's state court seeking to recover $15,000 in unpaid child support.[28] Kenneth filed a traverse to the garnishment. At the hearing, Kenneth argued that he should be given credit for the monies he contributed during the period the parties continued to reside together.[29] Kenneth also argued that he should also be given credit for child-care services he provided for the children while Elizabeth worked and attended school.[30] The state court dismissed the traverse stating that it had no authority to modify the terms of the final judgment and divorce decree and that the garnishment was otherwise proper. The Court of Appeal granted Kenneth's application for discretionary appeal.[31]

The Court held that the state court did not err by dismissing the traverse agreeing with the state court's decision that it had no authority to modify the child support provisions of the final judgment and divorce decree.[32] The Court further opined that "such a modification must be accomplished by the filing of a petition in superior court pursuant to O.C.G.A. § 19-6-18 or §19-6-19."[33] However, the Appellate Court noted that under unusual and exceptional circumstances, equity considerations may dictate that the child support payor be given credit for expenditures made on the child's behalf, but noted that this reasoning was inapplicable in the case of *Davis*, because the state court lacked equity jurisdiction.[34] Unlike the state court in *Davis*, Georgia's superior courts do have jurisdiction over issues of equity which means that the superior courts may consider principles of equity and give credit to the child support payor for expenditures made for the child's benefit.[35] See *Baer v. Baer*, 263 Ga. 574, 575 (2) (1993) (holding that equitable considerations can apply to permit set offs when Wife owed Husband money from joint tax return and for expenses incurred post-divorce for maintenance of parties' residence).

Additionally, it appears as though Georgia courts, like California, have also explored the idea that the obligee can consent – expressly or impliedly- to substituted child support payments by the obligor, rather than formal child support payments. This notion was highlighted in the case of *Daniel v. Daniel*.[36] In *Daniel*, Husband and Wife got divorced and settled issues related to child custody, child support, alimony and property settlement, all of which was incorporated into the parties final divorce judgment.[37] Mother brought child support modification action against Father and also obtained a writ of fieri facias against Father for unpaid child support.[38] Father, in addition to answering the modification action, filed a counterclaim arguing, among other things, that child support arrearages should not be required because the parties' children were in his custody during those months in question for non-payment.[39] Father further argued that both parties mutually agreed upon it.[40]

Specifically, the parties' divorce decree provided Wife was to have custody for the months of September through May and was to receive $117.00 per child per month during those months with Father having alternate weekend visitation rights during said months and visitation rights over the children's Christmas vacation and between school terms.[41] Father was given custody of the children during the months of June, July and August, during which time he was not required to make child support payments.[42] Mother was given alternate weekend visitation rights during those months.[43]

The Court held that given the circumstances, it would be *inequitable* to require Father to pay again for maintenance he has already supplied at Mother's request.[44] Therefore, Father was given credit for the alleged child support arrearage because the parties' divorce decree *contained no support obligations* by Father during the time he had custody of the children.[45]

Back to Mary and John

So what does this mean for Mary and John? Given all the guiding case law and principles highlighted above, it seems that John can make at least three arguments standing on the principles of equity namely: (1) Consent; (2) Unjust Enrichment and (3) For the benefit of the children positions:

1. Consent

As mentioned earlier, there are two ways in which the obligor can seemingly give consent as illustrated under California and Georgia law (1) express and (2) implied. In our scenario above, John has a good argument that Mary gave him implied consent by allowing him to live in the house where he was contributing to the household expenses and therefore Mary acquiesced in the arrangement similar to the Mother in *Jackson*. As such, Mary impliedly agreed to the form of payment used.

Additionally, the court may also note Mary's unreasonable delay in filing the petition for contempt as part of its' equitable consideration.

2. Unjust Enrichment

Generally, the non-custodial parent is not entitled to credit towards support payments for minor children if he makes additional voluntary payments for their support and maintenance."[46] However, in the name of equity, if it can be proven that John was making substantial contributions to the household such as paying the mortgage, utilities, paying insurance for the family's car, groceries and child care, among other things, it can be argued that if John is to be held in contempt for child support arrearage then this obviously would be an unjust enrichment to Mary. This is so because Mary would have received the benefit of having all those expenses paid for, for 24 months but also receive the benefit of getting $16,800 in child support. This ultimately goes against the grain of equity and falls within the parameters for equitable consideration by the court.

Of course, Mary may very well make the argument that John should have filed a modification of child support since the parties resumed living together. However, given that the superior court in Georgia is a court that has equity jurisdiction then this argument is definitely worth making given the aforementioned Georgia case law which demonstrates that Georgia has been flirting with the idea of using equitable considerations under these "unusual and exceptional" circumstances. Additionally, there would not be an injustice to Mary if she is not awarded the arrearage of $16, 800.

3. It was for the benefit of the children

The right of child support belongs to the children.[47] Notably "[s]everal jurisdictions, including many which support [this] rule [], have held that a [non-custodial parent] may be given credit if equity would so dictate under the particular circumstances involved, provided that such an allowance would not do an injustice to the [custodial parent]. Included among those equitable exceptions are situations where the [custodial parent] has consented to the [non-custodial' parent's] voluntary expenditures as an alternative to his child support obligation . . . or where the [custodial parent] has been in substantial compliance with the spirit and intent of the divorce decree."[48] See *Farmer v. Farmer*, 147 Ga. App 387, 390 (2) (1978).

As aforementioned, if it can be proven that John made substantial contributions to the household, namely paying the mortgage, utilities, insurance for the family's car, groceries and child care when he and Mary resumed living together, then John has a good argument that all the contributions that he made were for the benefit of the children. As such, the Court may award John credit for the payments made to offset the arrearage.

Conclusion

Even though Georgia law is not one that is clear-cut on this issue, under the case law and principles aforementioned, Georgia law gives room for attorneys to be creative in their argument and fight for their client, as it is still within the discretion of the Judge to look at the circumstances and do what is just. On the other hand, if you represent the obligee, the law is still in your favor since this is not a settled principle of law in Georgia. Thus, it is still worth making the argument that the obligor should have pursued a modification action.

Endnotes

1. Sometimes the obligee can be the guardian, caregiver, or the state, but for the purposes of this article, the focus will be the custodial parent as the obligee.
2. See Alice M. Wright, J.D., Annotation, *Right to Credit on Child Support Arrearages for Time Parties Resided Together After Separation or Divorce*, 104 A.L.R.5th 605 (2002)
3. 43 Ark. App. 91 (861 S.W.2d 313) (1993)
4. 615 So. 2d 84 (Ala. Civ. App.) (1993)
5. 517 So. 2d 1135 (La. Ct. App. 5th Cir.) (1987)
6. 51 Cal. App.3d 363, 365 (1975)
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 365-66
14. *Id.*
15. *Id.*
16. *Id.* at366-67
17. *Id.* at 368
18. *Id.*
19. *Id.*
20. 231 Cal.App. 4th 719 (2014)
21. *Id.* at 721
22. *Id.* at 722
23. *Jarrett v. Jarrett*, 259 Ga. 560, 561 (1) (1989)
24. *Rose v. Thorpe*, 240 Ga. App. 834, 834 (1999)
25. 220 Ga. App. 745 (1996)

26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Overview of the Superior Court of Fulton* County, Superior Court of Fulton County, https://www.fultoncourt.org/about/about.php (last visited March 13, 2021).
36. 239 Ga. 466 (1977)
37. *Id.*
38. *Id.*
39. *Id.* at 466-67
40. *Id.* at 467 (2)
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 468
45. *Id.*
46. *Wills*, 222 Ga. at 649
47. *Livsey v. Livsey*, 229 Ga. 368, 369 (1972)

Past Section Chairs

Kyla Lines.....2020-21
Ivory Brown.....2019-20
Scott Kraeuter.....2018-19
Gary Patrick Graham.....2017-18
Marvin Solomiany.....2016-17
Regina M. Quick.....2015-16
Rebecca Crumrine Rieder.....2014-15
Jonathan J. Tuggle.....2013-14
Kelly Anne Miles.....2012-13
Randall Mark Kessler.....2011-12
Kenneth Paul Johnson.....2010-11
Tina Shadix Roddenbery.....2009-10
Edward Coleman.....2008-09
Kurt Kegel.....2007-08
Shiel Edlin.....2006-07
Stephen C. Steele.....2005-06
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Emily S. Bair..... 2002-03
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Robert D. Boyd.....2000-01
H. William Sams..... 1999-00
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Carl S. Pedigo..... 1997-98
Joseph T. Tuggle.....1996-97
Nancy F. Lawler.....1995-96
Richard W. Schiffman Jr.....1994-95
Hon. Martha C. Christian.....1993-94
John C. Mayoue.....1992-93
H. Martin Huddleston..... 1991-92
Christopher D. Olmstead.....1990-91
Hon. Elizabeth Glazebrook 1989-90
Barry McGough.....1988-89
Edward E. Bates Jr..... 1987-88
Carl Westmoreland..... 1986-87
Lawrence B. Custer..... 1985-86
Hon. John E. Girardeau..... 1984-85
C. Wilbur Warner Jr..... 1983-84
M.T. Simmons Jr..... 1982-83
Kice H. Stone..... 1981-82
Paul V. Kilpatrick Jr.....1980-81
Hon. G. Conley Ingram..... 1979-80
Bob Reinhardt..... 1978-79
Jack P. Turner..... 1977-78

Know What You're Dividing!

By Mark E. Sullivan*

We were just about finished with the hour-long Zoom interview when I heard it. It was one of those moments when your ear says to your brain, "What? Hold on – stop everything!"

The military client was telling his local lawyer and me how he expected to retire from the Army in four months. He said he'd know for sure when the PEB report came through.

"PEB… as in *Physical Evaluation Board*?" I asked. He confirmed that's what he meant.

It was now clear – as it definitely had not been in the previous hour – that "John Doe" was not gracefully exiting the Army after 20 years of service at his own choice. Rather, he was being forced out with a disability retirement. And that made all the difference in the world.

Disability Retirement

We'd been discussing what share his wife would receive in the divorce settlement, how to write up the military pension division order (MPDO), how much of the pension would be allocated to her, when payments would start from the retired pay center, and what language and data points were required. But now, with the new information, it became clear that this was not a longevity retirement; he was being "put out to pasture" because he was mentally or physically unfit to continue to serve.

And that meant that there was a good possibility that none of the pension would be divided. When a service member gets a disability retirement under Chapter 61 of Title 10, U.S. Code, his retired pay is calculated in two ways, and he always receives the higher amount. The first is retired pay based on his *percentage of disability*. The second method is pay calculated according to his *years of service*. In John's case, if the higher amount were based on percentage of disability, then none of the pension would be divisible. 10 U.S.C. § 1408(a)(4)(A)(iii). If his retired pay were based on years of service, then only the difference between that amount and the percent-of-disability amount would be divisible.

This made a huge difference in the structure and strategy for the case, and the PEB information only came to light in what we thought were the *last five minutes* of the hour's interview. It led us to continue the conversation for almost another hour, ranging over topics such as the duty to disclose information to the wife's attorney, what discovery requests (if any) were served by the other side, the possible role of spousal support in the settlement, grounds for a later motion by the wife to set aside the divorce settlement for fraud, and the Rules of Professional Conduct. The main lesson coming out of the interview was the importance of *knowing what you're dividing* when the interview involves military pension division.

Retirement from Active Duty

In many cases, John Doe's pension is based on active duty only, and he will receive a "regular retirement" under Chapter 71 of Title 10. When the divorce is after December 23, 2016 and he isn't receiving retired pay at divorce, then the MPDO must contain his years of service and his High-3 pay, both as of the divorce date. Further discussions often involve how to calculate the marital fraction.

If John's "regular retirement" is based on active service as well as time in the National Guard or Reserves, then the discussion may involve calculating the marital fraction according to time, and then again according to retirement points acquired during the marriage; each of the parties will want that resulting percent which most benefits him or her. The time calculation will involve not only active-duty service but also "extra Section 1405 service," that is, additional time attributed to retirement points received for weekend drill.

Non-Regular Retirement and "Pay Status"

If John is to receive a "non-regular retirement" from the National Guard or Reserves under Chapter 1223 of Title 10, then the data points are still required, but the "years of service" is replaced by "retirement points at divorce," and someone has to do that calculation. The marital fraction can be fixed as of the divorce date, or it can be a "formula clause" with marital pension service divided by total pension

service (and the latter is unknown when John hasn't stopped drilling). The fraction would look like this:

$$\frac{\textbf{Marital military service}}{\textbf{Total military service}}$$

When the denominator is not fixed on the date of separation, filing or divorce, it is represented by "X." And in this situation, military rules for Guard/Reserve retirements require that the fraction be expressed in terms of retirement points, not time.

When John is already in pay status and he's getting monthly pension payments deposited into his bank account, the issue often involves "back payments." If the parties have been separated for, say, two years, then he may owe "Jane Doe" a sum of money for the pension-share payments, which he received in the past 24 months and did not share with her. Or he may owe her nothing if he's been making the house payments or paying spousal support from his pension during the interim period.

When it's Disability Retired Pay…

And finally, when John's retired pay is based on disability, the golden key for the pension-division issue is: *Can the pension be divided at all?* If that issue is not spotted during the interview, then the consequences could be serious and substantial for the spouse or the service member down the road when the pension order is entered and sent to the retired pay center. The reply letter sent to Jane Doe will likely say that John's retired pay "cannot be divided since it is based entirely on disability." Jane's attorney might file a motion under Rule 59 to amend or alter the divorce settlement. The motion could be under Rule 60, asking for the settlement to be set aside or vacated. There may be a motion for contempt, and Jane might even file a grievance against John's attorney.

All of this can be avoided if the attorney for Jane or for John is aware of what's being divided. It means that – to start the interview – the responsible attorney needs to ask about the nature of the retired pay that the court will be allocating in divorce. It means, in short, that you need to *know what you're dividing*.

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Addressing Racial and Health Inequities

By Latonia McGinnis

In the United States, regardless of region, racial inequities exist across every indicator for success—including criminal justice, education, jobs, housing, and even health outcomes. These inequities are largely driven by racism and bias that are embedded in our systems, institutions, policies and practices. This structural racism results in a lack of access and opportunity, increased sickness and premature death among communities of color. Compared to white women, Black women (across socioeconomic status) are three times more likely to die within one year of childbirth. Black women are also more likely to experience more than triple the rate of death in childbirth than U.S. white women. Black men are 70percent more likely to die from a stroke as compared to non-Hispanic white men. These are just a few examples of the health disparities people of color face. These disparities are rooted in many cultural and historical influences, including bias among healthcare workers that can lead to mis- or under-diagnosis and other social factors that limit access to adequate healthcare.

Public Health experts have often stated that a person's zip code is the largest predictor of their health status. Research has demonstrated that some groups within the United States are less healthy than others and have poorer health outcomes based on factors such as less to green space, crime, lack of access to quality health care, and food deserts. Who lives in which neighborhood and whether that neighborhood has decent housing, good schools, and well-paying jobs is determined by multiple, institutional policies and practices. Whether intentionally or not, these policies and practices have often discriminated by race, which is why we see so much difference in life outcomes of people of color. This uneven distribution of social resources results in Health disparities.

According to the CDC, "Health equity is achieved when every person has the opportunity to attain his or her full health potential and no one is disadvantaged from achieving this potential because of social position or other socially determined circumstances". Racial and Health inequities have a myriad of causes and cannot be addressed by one entity alone. As professionals, we all have a role in acknowledging that these inequities exist and ask ourselves what we can do to help reduce or eliminate them.

As it relates to health equity, Healthy People 2020 outlines five key domains related to people's physical and social environments and how they affect health outcomes. These domains require a joint effort from various community and professional entities and can impact both racial and health equity:

Neighborhood and built environment: Key issues are nutrition, safe housing, interpersonal violence, and physical environmental conditions, such as exposure to pollution or noise.

Social and community context: Key issues are community participation, incarceration of a family member, and discrimination.

Economic stability: Key issues are poverty, employment, food security, and housing stability.

Education: Key issues are high school graduation, higher education, literacy, and access to early childhood education.

Health and health care: Key issues are ease of access to health care (affordability, transportation, etc.) and health literacy.

Partnerships within the community, education, housing, media, planning and economic development, transportation, and business partners is essential. These partnerships can work to improve the underlying community conditions that make healthy living easier, particularly in underserved communities.

Workplaces have a unique opportunity to help advance racial equity in their places of business by:

- Supporting a person bringing their whole self to work; Many people of color practice 'covering' to fit into societal norms (that tend to be racially biased) and this can be emotionally and mentally exhausting leading to unnecessary and undue stress.
- Being mindful of total rewards programs and offerings that have biases built in due to structural racism
- Removing the stigma around getting support for mental health

• Providing the resources to reduce the disparities that people of color face in regards to their health, wellbeing, financial and community resources

• Encouraging organizations to take a deeper dive into the social determinants of health and addressing them in their company mission and values and community partnerships

To advance racial equity, government and other institutions must focus not only on individual programs, but also on policy and institutional strategies that create and maintain inequities.

We must transform our systems and dismantle policies and practices that uphold racism and continue inequities. Apply a racial equity lens to all decisions about policies and programs. Companies can help advance racial equity within their organization as well as the communities that surround them. This, in turn, will help advance health equity and health outcomes of people of color. If racial equity is addressed collectively and properly, this can lead to improved outcomes for all.

What is the takeaway for the family law attorney? Family law practitioners are uniquely positioned to help facilitate institutional change as employers and advocates. Specifically, with regard to recognizing the intersectionality of racial and health inequities, domestic lawyers would do well to consider the application of equitable principles in the courtroom, in their hiring practices, and in their daily interactions. As family law attorneys are already well versed in the language of equity and enjoy positions of influence within the communities they serve, they are particularly equipped with the tools and opportunity to advance systemic reform.

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Divorce Planning: Financial Considerations

By Trent Doty

Divorce can strain your finances as well as emotions. But being prepared with an investment plan before, during, and after divorce can help protect yourself and take charge of your future financial well-being.

Let's take a look at a few of the financial considerations that are important when going through a divorce:

What do you have right now?

One of the first, and most important things to do when starting the divorce process is to make a list of assets and debts you and your spouse have. It is imperative that you have your own copies and access to all-important records. Assets include all properties, possessions, investments, businesses, and other items that have a cash value. There may be other items depending on your unique situation, but your list of assets and debts should include:

- Personal bank accounts, shared accounts, retirement accounts, brokerage accounts, life insurance/long term care/disability insurance
- Real estate properties, vacation homes, land
- Cars, boats, motorcycles, and any other vehicles
- Any other high-value assets such as jewelry, art, antiques, etc.
- Home loans (mortgage), equity loans, personal loans, auto loans, student loans
- Medical bills, credit card bills
- Any other debts

Once you have these assets compiled, it is important to list the assets/debts that you 1. Owned prior to the marriage 2. Inherited during the marriage 3. Received as gifts during the marriage. These can sometimes be protected when it comes to the division of assets.

Equal isn't always fair

It is important to understand that the division of assets/debts may or may not be 'equal'. For example, if one spouse is a stay at home parent while the other spouse has a salary that provides the majority of the income for the household, the stay at home spouse may need more assets in order to keep the same standard of living since they haven't worked outside of the home for many years. Oftentimes, the stay at home spouse gave up a previous career in order for the working spouse to progress through the ranks and grow their career.

This is sometimes covered by alimony, but not always.

How do you value the assets?

Is $250,000 in a checking account the same as $250,000 in a traditional IRA/401(k)? What about a home worth $500,000? My spouse has a pension, how is that valued?

This is where it can help to work with someone familiar with the divorce process. It is important that the valuation of these assets is correct. For example, a pension that pays $6,000/month can be challenging to find the present value if you haven't done that before. In addition to valuing a pension, understanding the tax liabilities and valuations of certain assets can also be an extremely vital piece of the division of assets.

Which assets do you need?

While going through the division of assets, how do you know which assets are best for you?

You need to make sure the liquidity of the assets you're receiving match what you need. Let's look at an example: You are a non-working spouse and you want to keep the family home. The home is worth $500,000, which is 50percent of the total assets. The house is not paid off and costs $2,500/month to maintain. If you are not planning on returning to work or aren't sure what level of job you qualify for, you may not be able to afford to keep the home. It may be more beneficial for you to request a liquid asset such as the checking account or brokerage account.

For this reason, it can be beneficial to have an investment plan that can show your monthly income/expenses and what you can afford.

The division of assets have been made and the divorce is final. Now what?

One of the often overlooked pieces following a divorce is creating and reviewing a new investment plan. The cumulative income and assets that were previously supporting one household have now been divided to support two households. This can change your goals and objectives and it could be a good time to review your investment plan.

What does your support team look like?

Friends and family are incredibly important during this difficult time – they can provide the support and structure you need. However, it is also important that you have a team of professionals on your side to assist with the divorce. You should have a divorce lawyer and a Certified Divorce Financial Analyst® (CDFA®) at a minimum. In addition, it can help to have a mediator, accountant, and a business valuator. These professionals can potentially save you from making costly errors regarding your settlement, and can give you piece of mind while you are dealing with the emotions that come with a divorce.

Ethics dilemma?

Lawyers who would like to discuss an ethics dilemma with a member of the Office of the General Counsel staff should contact the Ethics Helpline at 404-527-8741 or toll free at 800-682-9806, or log in to www.gabar.org and submit your question by email.

State Bar of Georgia

Case Law Update

By Vic Valmus

Attorney Work Product

Moody, et al v. Hill, Kertscher & Wharton, LLP et al. A18A1011 (March 8, 2021)

In this legal malpractice action, former-client appellants moved the Trial Court for a Protective Order claiming that certain documents sought by the appellees from a non-party law firm were protected by attorney-client privilege or attorney work product. The Trial Court denied the Motion concluding the appellants had waived both protections by filing this malpractice action. In a prior appeal, the Supreme Court, on *certiorari*, reversed the Appellate Courts decision concluding the appellants had in fact waived the attorney-client privilege and Trial Court should be affirmed. However, that does not conclude the case as it was still undecided whether the documents at issue were protected by the attorney work product.

Equating the waiver of the attorney work product with the waiver of attorney-client privilege is erroneous. The attorney-client privilege is intended to protect the attorney-client relationship by protecting communications between the clients and the attorneys while the work product doctrine directly protects the adversarial system by allowing attorneys to prepare cases without concern that their work will be used against their clients.

O.C.G.A.§ 9-11-26 (d) (3) provides the standard concerning the protection of attorney work product. Discovery of these items is proper only where the parties seeking disclosure shows: 1) There is a substantial need for the materials to prepare its case; and 2) That he is unable without a hardship to attain the substantial equivalent of the materials by other means. Therefore, the discovery is only available under carefully limited circumstances. Even if a party seeking disclosure makes the requisite showing, the Trial Court may order production of the material only after ensuring that there is no disclosure of mental impressions, conclusions, opinions or legal theories of any attorney or any other representative. Such a step requires an in-camera review and possible redaction of the document.

Here, the Trial Court made no findings fact concerning the appellees need or hardship and made no inquiry into the substance of the documents at issue. Therefore, the case was remanded.

Contempt/Improper Modification of Decree

Stone v. Stone. **A20A1814** (January 29, 2021)

The parties divorced in March of 2015. The Settlement Agreement incorporated into the Final Divorce Decree required the Husband to quitclaim one-half interest in the home to the Wife and the "Wife shall be entitled to the use and possession of the marital residence and shall be responsible for all utilities, expenses, home owners association fees, pest control, lawn maintenance, appliances, fixtures and all other like expenditures on the property… The Husband shall pay the taxes and insurance in 2015 and thereafter the parties shall equally divide the same."

Several years later, the Husband moved for Contempt alleging the Wife had failed to pay her share of the taxes and insurance. The Trial Court found the Wife was in substantial arrears for non-payment of HOA fees and her half of taxes and insurance. The Court further noted that the Wife was unemployed, had no other income except child support and financial obligations regarding the house were a major source of discontent, animosity and conflict between the parties. The Trial Court ordered the marital residence to be sold and the profits divided. The Wife appeals and the Court of Appeals reverses.

The Wife argued that the Trial Court lacked the authority to order the residence sold. The Husband argued that the Trial Court's Order merely clarified the Divorce Decree requirements as to carry out the intent, letter and spirit of the Settlement Agreement. However, there is a firm rule against modifying property division of a Final Divorce Decree. Here, the Divorce Decree awarded the Wife a distinct interest in the marital home and also required her to pay all the expenses, taxes and insurance associated with the home. Neither the Divorce Decree nor the Settlement Agreement specified the remedy if the Wife failed to make those payments and which neither mandated sale of the home for noncompliance. Even though the Trial Court's order to sell the house may appear reasonable given the

Wife's apparent lack of income and failure to meet her financial obligations under the Decree, the Trial Court can clarify, but cannot modify the terms of the Final Decree.

Domestication

Kerr v. Wilson (2 cases), **A20A1668 & A20A2015** (February 22, 2021)

The parties were divorced in 2009 in Tennessee, in which Wilson (Mother) was awarded primary custody of the child and Kerr (Father) was to pay child support. In 2019, the Mother filed a Petition for Registration/ Domestication of their Tennessee Order in Superior Court of Glynn County, Georgia. The Father was served with the Petition and Summons on September 19, 2019. The Father filed a *pro se* response to the Petition on September 24, 2019. The Father did not request a hearing on the matter. On October 3, 2019, the Superior Court scheduled a hearing on the Petition, which was held December 3, 2019. On April 7, 2020, the Court entered an Order granting the Petition to Register and Domesticate the Divorce Decree and pursuant to O.C.G.A. §19-9-85, the Father was properly served with notice, but failed to request a hearing within 20 days of service and therefore, registration of Decree was confirmed. The Father appeals and the Court of Appeals affirms in part and reverses in part.

The Father argues that the Court erred by confirming the Decree on the basis that he failed to request a hearing. Here, the Superior Court specifically cited to 19-9-85 and confirmed the Tennessee Divorce Decree because the Father did not request a hearing within 20 days. However, the code section states to contest the validity of a "registered Order" a party must request a hearing within 20 days after the service of the notice. If a timely request is not made, the registration is confirmed as a matter of law. The Tennessee Divorce Decree was not registered pursuant to 19-9-85(a). Therefore, the Father was not required to request a hearing within 20 days of the service of the Petition.

In order to register a Child Custody Order, a litigant must file: 1) A letter or other document requesting registration; 2) Two copies including one certified copy of the determination sought to be registered and a statement under the penalty of perjury that to the best of his or her knowledge and belief, the person seeking registration the Order has not been modified or set aside; and 3) the name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation and the child custody terminations sought to be registered. Here, the Wife's petition did not contain two copies of the Divorce Decree, but only one certified copy and therefore was not a registered Order and the Court erred by automatically confirming the registration based on the Husband's failure to request a hearing.

When the Mother filed a Petition for Domestication, she also filed a Motion for Contempt claiming the Father was behind on his child support payments. The Motion included a request for attorney's fees. After the hearing, the Court entered an Order finding the Husband was in contempt of his child support obligation and ordered him to add $100.00 per month to his regular payments until the arrearage is paid and awarded the Mother $1,500.00 in attorney's fees and Court costs. The Father argues that the Court erred by entering an Order finding him in contempt prior to domesticating the Tennessee Divorce Decree and by awarding attorney's fees. Pursuant to 28 USC § 1738 B (a)(1) requires a full faith and credit be given the Child Support Orders of Foreign States citing that each state shall enforce according to its terms a Child Support Order made consistent with this section by a court of another state. Therefore, a Child Support Order is enforceable if made consistent with this section, in a court with proper subject matter and personal jurisdiction and if proper notice and opportunity to be heard are given to the parties. The Father has not challenged the Tennessee's jurisdiction to enter the Order or his notice and opportunity to be heard. Therefore, the Court properly exercises authority to enforce Tennessee Child Support Order. The Father also argues that the Court erred by awarding attorney's fees. Here, the Superior Court did not specify a statutory basis for the fees and contains no factual findings necessary to support the award and therefore, the fees were vacated and remanded.

Grandparent Visitation

Davis et al. v. Cicala, **A20A116** (October 5, 2020)

Davis and McKinney (Parents) had two minor children, one born in 2004 and one born in 2009. The parents divorced in 2014 with the Mother as the primary custodian. In 2018, the Mother filed a Petition for Modification and Contempt. Cicala (Grandmother) filed a Motion to Intervene in the modification proceeding and requested reasonable visitation. The Grandmother testified that the children's Father lived with her for two years during which time the children stayed with her in her home every weekend and every other Wednesday. Each child had a bedroom. She

took care of the children, paid financial support, went to Florida each year on vacation and had a continuous and constant relationship with the children since the day they were born. After November 2017, the Grandmother was no longer allowed to visit with the children. The parents testified that the Grandmother had provided financial support and had the children for extended periods of time and had seen the children regularly. In addition, the Mother stated that DM had been harmed by not seeing the Grandmother and was concerned over her health conditions because she has immune deficiency disease. The Trial Court granted the Grandmother's Motion to Intervene and awarded Grandparent visitation under O.C.G.A.§19-7-3(c)(1) and determined by clear and convincing evidence that harm would result if the children were denied independent Grandparent visitation and it was in the children's best interest. The Grandmother was granted independent visitation with the children for one day during the Christmas break from school, one week during the summer breaks to coincide with the Father's portion of the parenting time. The parents appeal and the Court of Appeals affirms.

The parents argue that the award of Grandparent visitation was not supported by evidence, but the record contains sufficient evidence to support the Trial Courts award of visitation to the Grandmother. Under O.C.G.A.§19-7-3 which is known as the Grandparent Visitation statute, the Court utilizes the balancing of interest for the child, the rights of the parents and the wishes of an alienated Grandparent. The Court could consider 1) if the minor child resided with a family member for six months or more; 2) the family member provided financial support for the basic needs of the child for at least one year; 3) there was an established pattern of regular visitation with the child by the family member with the child or 4) any other circumstances that exist indicating that emotional or physical harm would reasonably result if the visitation is not granted. Even though the parents argued that they have not blocked the Grandmother from having a relationship with the children, the parents offer no authority that requires the Trial Court to balance the competing interest and rights of a Grandparent and a child in such a way that O.C.G.A.§19-7-3 would only apply where all visitation has been cut off. Also, the Trial Court found that the health and welfare of the child would be harmed in the absence of visitation of the Grandmother and the visitation would be in the child's best interest. In considering this, the Court found that 1) the child has resided with the Grandmother for two years during the period of the Father's visitation for the historical pattern of visitation; 2) the Grandmother provided some financial support for the children's basic needs for several years and 3) considered the child's emotional and extended family at the stage of their development. These finding were supported by the evidence. Judge Coomer concurs, however, believes the statute itself appears to be unconstitutional, but the Appellate Court lacks jurisdiction to strike the statute as unconstitutional.

Legitimation/Past Due Child Expenses/Attorney's Fees

Day v. Mason, **A20A0964, A20A1520** (October 29, 2020)

Brandon Day (Father) and Ariel Mason (Mother) had a child (KRD) that was born in December 2016. During the first few months of the child's life, the Father paid $350.00 every other week. In July of 2017, the Mother graduated college and began working full time. Their relation ended in late 2017, but the Father continued to make regular payments to the Mother. In 2018, the Mother enrolled the child in daycare programs. In October 2018, the Father filed a Petition for Legitimation, Custody and Visitation and the Mother filed an Answer and Counterclaim for Paternity, Child Support and Past Child Support, Medical Expenses Not Covered by Insurance and Attorney's Fees. The Legitimation and Parenting Plan was consented to, leaving the other issues to determination by the Court. At trial, the Mother produced evidence showing that she had spent $15,164.00 on non-child care, non-medical expenses for the child, which included clothes, diapers, formula, groceries, toys and $2,272.00 for day care expenses. She also had an additional $915.00 for out-of-pocket childcare expenses that was not covered by the Father. The Father testified that he had already paid voluntarily $16,304.00 since the child's birth and that she had spent a ridiculous and excessive amount on items that were not necessities. The Trial Court's Final Order awarded future monthly child support payments and also ordered past child support $2,051.00 towards child care expenses plus $7,582.00 towards other reasonable and necessary expenses, required the parties to split the cost of the extracurricular activities and ordered the Father to pay all of the Mother's attorney's fees requested of $4,757.00 under O.C.G.A. §9-11-37 and $52,000.00 under O.C.G.A §19-9-3(g). Father appeals and the Court of Appeals affirms in part and reverses in part.

The Father challenges the Court's award of past

child support. Pursuant to O.C.G.A §19-7-24 it's a joint and several duty of each parent of a child born out of wedlock to provide for the maintenance, protection and education of the child until the child reaches the age of 18 or becomes emancipated. The measure of the Mother's recovery for past expenses is the expenses actually incurred on the child's behalf. Father claims the expenditures sought were not reasonable or necessary, however the Court found that the Mother had actually incurred these expenses and they were reasonable and necessary. The Father objected generally at trial that the Mother's purchases were excessive, but never challenged the reasonableness of or the need for any particular expenditure below and therefore waived the argument and cannot raise it for the first time on appeal. The Father also argues that the mother cannot recover past due support because she accepted what he paid and waited to pursue her claim after he filed his legitimation action. However, this Court has held that a latches defense does not apply in this context.

The Father contends the Trial Court erred by requiring him to pay half of the child's future extracurricular activities. The Trial Court ordered the Father to pay half of the extracurricular activities, but made no findings of fact to support a deviation from the presumptive amount of child support and therefore, this is reversed.

The Father next argues that the Trial Court erred by awarding attorney's fees pursuant to O.C.G.A. §9-11-37 in the amount of $4,700.00 with his failure to comply with discovery. However, the Mother never filed a Motion to Compel and the Court never entered an Order Compelling Discovery. O.C.G.A §9-11-37 allows attorney's fees as sanctions for failure to provide discovery, the general scheme is that ordinarily sanctions can be applied only for a failure to comply with an Order of the Court and therefore for sanctions to be valid, there must be a violation of some sort of Discovery Order. In this case, the record contains no indication that the Father violated any discovery related Court order. Therefore, these fees are reversed.

The Father also challenged the Trial Court's award of $52,000.00 in attorney's fees under O.C.G.A §19-9-3(g) arguing there was no evidence to support the award and that it was excessive. However, the record shows at the conclusion of the bench trial, the Mother's counsel argued for an award of attorney's fees and listed billing rates and these rates are fair and reasonable for an experienced domestic relation attorney in Atlanta and also had billing records in the Court as well as charts that summarize the legal bills and settlement offers that were made in the case. After the Mother's attorney finished, the Father's attorney said "I don't have anything" He did not ask to see the invoices or charts and did not seek cross examination of the counsel or challenge the reasonableness of the rates. The record contains no indication that the Father's attorney objected to the submission of these documents or otherwise sought to challenge their content or validity. In addition, the Father filed no Motion for Rehearing or post judgment challenge to the fee award. Here, there was evidence to support the award of fees even though the Father challenges the billing records as inadequate and the fees were unreasonable, but he never sought to question the Mother's counsel about the fees at the Bench Trial and did not request a further hearing. Therefore, the Father has waived these challenges. A party cannot acquiesce in a procedure by the Trial Court and then complain of it later.

The Father also objects to the Trial Court erred by ordering him to pay the past child support in the amount of approximately $10,000.00 and $52,000.00 in attorney's fees within 90 days and argues that this deadline is unreasonable plus he does not have the resources to pay. However, the Trial Court is not required to consider the Father's ability to pay in awarding past child support. In addition, O.C.G.A. §19-9-3(g) does not require Trial Court to consider the parties financial circumstances in making an award of attorney's fees. After the case was docketed on appeal, the Mother filed in the Trial Court a Motion for Temporary Attorney's Fees under O.C.G.A. §19-9-3(g) to cover her attorney's fees during the impending appeal until the conclusion of the litigation. The Father argues this code section does not permit the award of attorney's fees, which states in pertinent part that the Court can award other costs of the child custody action and pretrial proceedings to be paid by the parties in proportion and at times determined by the Judge. While the statue specifically refers to pretrial proceedings, it is silent to post trial proceedings. Even though O.C.G.A. §19-9-3 authorized an award of attorney's fees at any time during the pendency of litigation, O.C.G.A. §19-9-3(g) does not authorize award of appellate attorney's fees and must be reversed.

Matters Outside the Record

Rodgers v. Rodgers, **A20A1779** (January 29, 2021)

The parties were married in 2005 and had four children. On December 15, 2018, the parties executed a

Settlement Agreement, which included a parenting plan with the Mother as primary physical custodian. The Mother retained the marital home and was responsible for all mortgage payments, taxes and insurance. She would have three years to refinance the mortgage and pay the Husband $20,000.00 as equity division. The agreement was approved and incorporated into the Final Judgment and Decree of Divorce and filed on December 28, 2018. On December 27, 2019, one day before the Court Order was filed, the Father filed a Motion to Rescind the Settlement Agreement and for Primary Physical Custody based on the Mother telling him she was having a difficult time caring for the children, the heat was broken and the children were freezing. In addition, the Mother's conduct was erratic and unpredictable including infestations of lice in the children's hair and poor academic scores. The hearing was held in January of 2019 and on April 8, 2019, the Court entered a Temporary Child Support Custody Order that vacated the Final Judgment and Decree of Divorce and awarded primary custody to the Father. On August 30, 2019, a Final Hearing granted the parties total divorce, but keeping a civil action open with regards to financial issues, child custody and visitation. On January 13, 2020, the Trial Court held the Final Hearing on the remaining issues. Mother appeared *pro se* and a Final Order was entered on February 13, 2020 awarding the Father sole legal and physical custody with the Mother having supervised visitation because of a safety plan that was issued by DFACS. The Court also found the Mother had abandoned the marital home, was in arrears on the mortgage payments, child support payments and a portion of the medical expenses. The Mother appeals and the Court of Appeals reverses and remands.

The Mother argues the Trial Court erred in the rescission of the parties Settlement Agreement which asserted it can only be rescinded due to fraud, inducement, incapacity or some other defense to contract and the Father's Motion was really an attempt to modify the parties Divorce Decree and should have filed a separate action for modification based on a substantial change in circumstances. Although the Father did not amend his Motion or file a new one after the entry of the judgment, the Trial Court treated his earlier filed Motion to Rescind the Settlement Agreement as a Motion to Rescind the Final Order in light of developments. After the hearing, the Court entered a Temporary Order effectively vacating the Final Judgment and Decree of Divorce. However, the Trial Judge has inherent power during the same term of Court in which the judgment was rendered to revise, correct, revoke, modify or vacate the judgment even upon his own Motion. His inherent power may be extended beyond the term in which the judgment was entered when a Motion for Reconsideration is filed within the same term of Court. Even though the Father did not file a formal Motion for Reconsideration after the entry of the December 2018 Final Judgment and Decree of Divorce, it appears from the hearing on the matter that the Trial Court treated his Motion to Rescind the Settlement Agreement as a Motion for Reconsideration of the Final Judgment. The Father's counsel presented arguments concerning events that transpired after the Settlement Agreement was signed. Therefore, we interpret the Court's ruling as a grant of the Father's Motion for Reconsideration filed during the same term of Court as a judgment.

The Mother also argued that the Trial Court erred in considering a safety plan by DFACS when there was no evidence the safety plan admitted by the Trial Court. In the February 2020 Final Order, the Trial Court found that unsupervised visitation was presently prohibited by safety plan of DFACS. Accordingly, the Court ordered that to the extent visitation to the children should be allowed in the future by DFACS, Father shall allow the Mother supervised visitation on the first and third Sunday's of each month. The transcript of the January 2020 hearing does not contain any evidence of a DFACS safety plan. There was no testimony presented or exhibits admitted on the matter. Here, the Trial Court is prohibited from considering matters outside the record. Given the Trial Court's ruling with regards to custody and visitation, specifically explaining that unsupervised visitation was prohibited by the safety plan, cannot be based upon matters outside the record.

The Mother also argues the Trial Court's August 2019 Order granting a divorce while reserving custody and financial issues violates Georgia Law. The Mother is correct that a Divorce Decree should resolve all contested issues and no Divorce Decree shall be granted unless all contested issues in the case have been finally resolved. However, the Trial Court arguably rendered any error harmless as it later purported to rule on the remaining contested issues in its February 2020 Final Order.

Medical Expenses/Contempt

Daniel v. Daniel, **A20A1938** (March 12, 2021)

The parties were married in 2002 and had 3 minor children. In 2017, the parties filed for divorce.

Following the trial, the Court granted the Husband's divorce: awarded the Mother primary custody; ordered child support; made each party is responsible for 50percent of the uncovered medical expenses—but not including over the counter medications or chiropractic, visits unless they were medically necessary and ordered by the children's doctor. The marital home was awarded to the parties as joint tenant in common with the Mother having exclusive rights and possession until the youngest child turned 18. The parties would equally divide the mortgage, pay mortgage taxes and insurance with the Mother paying all utilities and maintenance. They are also to split the expenses on the property located on High Falls Road until the property was sold and equally divide the proceeds and equally divide the monthly proceeds from the sale of the property on Blunt Road until paid in full. Neither party was awarded alimony and the Father was to pay the Mother $9,037.00 in 90 days on the Mother's Contempt claim. The Court found it could not order the Husband to reimburse the Wife for any expenditures on the marital home or the children prior to the Temporary Order. The Mother appeals and the Court of Appeal affirms in part and reverses and remands in part.

The Mother argues the Trial Court erred by not attaching Child Support Worksheets. O.C.G.A.§19-6-15(m)(1) requires the Court to attach Child Support Worksheets including Schedule E. The Father concedes the Child Support Worksheets were not attached to the Child Support Addendum. However, the Trial Court's failure to attach the Child Support Worksheets is not fatal because the record reflects that the worksheets were proffered and admitted during trial and the Trial Court referenced the Child Support Worksheets in the Child Support Addendum. The relevant information was referenced in the Addendum. The Mother also argues that the Trial Court erred in excluding the reimbursements for the children's over the counter medications and chiropractic visits unless ordered by a doctor. The Trial Court is not required to order a party to pay for uncovered medical expenses not deemed to be medically necessary. The evidence showed that the Mother frequently brought the children to the doctor reflecting the Trial Court's belief that the many uncovered medical expenses were not reasonably necessary. Therefore, the Trial Court did not err by eliminating from the uninsured medical expenses, non-doctor ordered chiropractic visits and over the counter medications.

Next, the Mother argues that the Trial Court improperly divided the marital assets. Equitable division of marital property does not necessarily mean equal division. In addition, where the Trial Courts divorce decree does not otherwise provide, property remains titled as it was before the divorce decree was entered. Here, the Court awarded the marital residence to both parties making them joint tenants in common where the Mother would be financially responsible for utilities, maintenance and upkeep. The tenancy in common results in a Divorce Decree with each party having a one-half undivided interest in the property. Here, the Mother had exclusive right and possession to the home until the youngest child turned 18 in which time the parties would sell the home and split the proceeds. In this regard, the Trial Court fashioned a remedy by awarding the marital home as tenants in common suitable to both parties in their respective interest in the home.

The Mother also argues that the Trial Court erred in awarding the same trailer to both parties. Here, the evidence showed there were two different trailers at issue, a box trailer and an open ended trailer because the parties concede on appeal that the Trial Court awarded the wrong trailer and because it is unclear from the Divorce Decree which trailer the Trial Court intended for each party to have, part of the Order is vacated and remanded.

Regarding the Mother's contempt provisions in the Divorce Decree, the Mother argued that the Trial Court erred in determining it could not order the Father to reimburse her for expenditures she paid for the minor children and marital residence after filing the divorce, but prior to the parties Consent Temporary Order. The law provides that a party cannot be held in contempt for violation of order that fails to inform him in definite terms as to the duties imposed upon him. However, where divorce actions pending and a spouse subsequently seeks temporary support for a minor child, the Trial Court may award support covering the period from the time the divorce is filed until a Temporary Order Final Hearing is held. At trial, the Mother testified that the Father paid zero financial support from the time the parties separated up to their Consent Temporary Order and that he owed $4,612.00 in child support for which she wanted to be reimbursed. She also submitted evidence showing expenses she paid for the minor children prior to the Temporary Consent Order. Trial Court found that because there was no court order placed prior to the parties Consent Temporary Order, it could not order the Father to reimburse the Mother for any expenditures on the marital home or the minor children. The Court of

Appeals agreed that the Trial Court lacked authority to hold the Father in contempt for failure to pay amounts that the Trial Court had not previously ordered him to pay. However, the Trial Court was permitted to consider evidence and exercise its discretion to require the Father to reimburse the Mother for such expenses incurred prior to the Consent Temporary Order.

Modification/Relocation

Burnham v. Burnham, **A20A1243** (November 2, 2020)

The parties divorced in June of 2016 and had two children. The Divorce Settlement Agreement awarded the Mother primary custody of the children with the Father having visitation on Wednesday after school to Sunday afternoon for the first and third week of each month. (neither party was represented by an attorney). The parties lived in Coweta County and under the heading "Miscellaneous Agreements," the parties agreed to live within 120 miles of the current home address of the marital home until the minor children are of age 18 unless either party and/or spouse relocates due to employment. After the divorce, the Mother allowed the Father much more time with the children than was in the Parenting Plan to almost where the parties were sharing about 50/50 custodial time. Sometime in 2017, the relationship between the parties changed and the Mother began to strictly enforce the terms of the Parenting Plan. In November 2017, the Mother informed the Father that she intended to move from Coweta County to Marietta, Georgia. Based on the intended move, the Father filed a Complaint to Modify Child Custody, Parenting Time and Child Support asserting the move would constitute material change in circumstances. The Mother filed her own Petition for Modification of Visitation.

The Trial Court consolidated both Petitions and the cases proceeded to a hearing. The Mother stated she was engaged and would be living in a new home with her fiancé and his son. Her fiancé's job was the impetus behind the move. Since the filing of the Motion to Modify, the Father contracted to purchase a home located within the children's school district in Coweta County, which will allow the children to remain in the same school. Evidence at trial showed the children had been living in Coweta County their whole life and been regular attendees at their Coweta County church, attended extracurricular activities. In addition, the son was having behavioral changes since the divorce and was seeing a psychologist for more than a year to help him cope. The psychologist testified the son had mixed feelings about the move and stated that he was scared to move. After the hearing, the Court issues a Final Order granting the Father's petition.

The Mother previously appealed the court's decision citing the Court did not list any material change in condition and the case was remanded back to the Trial Court. Thereafter, the Court issued a second Final Order expressly finding there were four material changes in circumstances justifying in changing custody: (1) There was a significant reduction in visitation and parenting time that the children had with the Father since 2017; (2) The Mother's relocation to Marietta; (3) The Father buying a home within in the children's school district in Coweta County; and (4) The son's enrollment in counselling after he exhibit behavioral changes related to the divorce. The Court then found it to be in the best interest for the primary custody be awarded to the Father. The Mother appeals and the Court of Appeals affirms.

The Mother's claims the Trial Court erred in finding a material change in circumstances. In the record, there is evidence to support the Trial Courts finding of material changes in circumstances. Here, Trial Court correctly considered multiple factors affecting the children including their living arrangement, the time spent with their Father, the participation at church and other extracurricular activities, their individual relationships with their parents, stepparents, stepsiblings and other family and their friendships. Therefore, the Trial Courts findings of material change in circumstances was not based on the Mother's relocation alone, but rather on the Court's assessment of multiple factors in the children's lives.

The Mother also argues that the special terms of the separation agreement amounts to a waiver by the Father to not seek a change in custody unless the Mother relocated more than 120 miles from the marital residence. Parties are generally free to waive both statutory and constitutional rights in their divorce agreements as long as they are not prohibited by a statute or public policy, but any waiver provision must be cast in a clear waiver language. Here, the relocation provision at issue did not include very clear waiver language. For example, it did not include the waive or waiver, nor did it set forth any specific right being waived. In addition, the provision was found in miscellaneous agreement and nothing in the provision connects it to the party's agreement concerning custody of the children in any way. Thus, the relocation provision does not amount to a waiver by either party of his or her right to seek a modification in the custody

based on the relocation of the other party within 120 miles of the marital residence. Also, the Mother challenges the Father's intent or conduct with respect to entering into the relocation provision. The Father did not admit that the parties intended this provision to include a potential change of custody based upon the party's living arrangement. The Father stated at trial that it was part of the Legal Zoom paperwork and believed it was to be commonplace language. His answers do not show any specific intent behind the provision and the Mother points to no other actions by the Father that will allow the Court to infer that he intentionally waived his rights regarding the custodial arrangement of his children. Therefore, the Father's limited testimony did not establish a clear and unequivocal waiver.

Permanent Guardianship/Adoption

In the Interest of KGV., a child. **A21A0033** (December 31, 2020)

In January of 2016, the Grandmother of the then 4-year-old child filed a Petition to Terminate the Parental Rights of the Mother and Father or in the Alternative, a Permanent Guardianship. In June, the Court entered an Order denying the Mother's Petition to Terminate, but granted her permanent guardianship. The Court found the Mother and Father had abandoned the child and the child was dependent as a result of the parents chronic un-rehabilitated substance abuse, felony convictions and history of incarceration and that reuniting the parents with the child would be detrimental to the child. The parents also required the parents to pay child support, granted them scheduled phone calls and supervised visitation.

In July 2018, the Grandmother filed a petition in the Superior Court seeking adoption as a relative of the child under O.C.G.A. §19-8-7(a) to terminate the Mother and Father's parental rights on the grounds that the parents had abandoned the child, that the Father had suffered a recent traumatic brain injury and later rendered him incapable of surrendering his parental rights and the child was dependent due to lack of parental care and control. (The Father was represented by a guardian). The Mother then filed a Petition to Dismiss the Petition on the grounds of Res Judicata, which was denied. The Mother filed a second Motion to Dismiss because the Grandmother had already been granted a permanent guardianship and had custody and control of the child which ended the child's abandonment and cured her dependency that the child's care is now the responsibility of the Grandmother and that all claims of abandonment and dependency with respect to the Mother had been rendered moot. The Mother also argued the Grandmother could not show the child was in a present state of abandonment or dependency because of the Mother. The Court granted the Motion to Dismiss the Adoption based on the Mother's argument regarding the permanent guardianship ended the dependency. The Grandmother appeals and the Court of Appeals reverses.

In her Adoption Petition, the Grandmother sought to adopt the child based on O.C.G.A. §19-8-7(a) and §19-8-10(a). In lieu of obtaining a voluntary surrender of parental rights, the Petitioner pursuing an adoption that is a relative of the child can be obtained by satisfying the requirements that the child had been abandoned by the parents. Nothing in the language of these statutes disqualifies the permanent guardian from seeking to adopt the child rather, O.C.G.A. §19-8-3(a) sets out eligibility requirements. The relative who meets these eligibility requirements is entitled to an adoption under O.C.G.A. §19-8-10, irrespective whether the relative might also be the permanent guardian of the child.

The Mother also argues that the issues of abandonment and dependency in respect to the parents are rendered moot once the permanent guardianship is granted. However, neither the statutory language nor our precedence supports the Mother's argument. Although a permanent guardianship indisputably works a limitation on the parental power of the legal parent by vesting that parental power in a guardian, it does not forever terminate the parental rights of a parent. In addition, a permanent guardianship must establish a reasonable visitation schedule which allows the child to maintain communicable contact with his or her parents and therefore, after a permanent guardianship has been entered, the parent/child relationship is not completely severed. The Grandmother must show, among other things, that the child is dependent due to the lack of proper parental care or control or by his or her parents. The record must contain evidence of present dependency not merely past or potential future dependency. However, the child has been removed from the custody of the parents, but present dependency can be shown through proof that, if the child were returned to the parent at the time of the hearing, the child would be dependent. Thus, the fact that a permanent guardian has custody of the child rather than a parent does not prevent the guardian from establishing present dependency.

Term of Court

Johnson v. Johnson, **A20A2061** (March 2, 2021)

The parties were married in 2002, had two children and the Wife filed for divorce in 2017. A trial was held in August 2019 and a Final Decree of Divorce was entered on October 30, 2019. Husband filed a Motion for New Trial on November 25, 2019 for which the Superior Court denied the Motion in February 2020, but entered an Amended Divorce Decree the same day correcting some of the deficiencies alleged by the Husband's Motion. Husband appeals, Court of Appeals affirms in part and reverses and remands in part.

The Husband argues that the Trial Court erred in entering an Amended Divorce Decree after the term of the court had expired. A judge's power to revise, correct, revoke, modify or vacate a judgment does not extend beyond the same term of court, unless a Motion to Modify or Vacate, etc., was filed in the same term of court. In this case, the original judgment was entered in September 2019. However, the Court did not enter the Order amending the Divorce Decree until January, 2020 term. The Husband filed his Motion for the New Trial during the same term of court as the original judgment. Therefore, Trial Court had the inherent power to amend the judgment because the Motion was made in the same term of court in which the original judgment was entered.

Third Party Custody

Ortega v. Temple, et al. **A20A1716** (March 15, 2021)

In 2016, Ortega (Mother) gave birth to a child and 7 days afterwards, the Father severely beat the Mother. On January 20, 2017, the maternal Grandmother filed a Petition for Custody, which was granted. In pertinent part, the Order stated that the Grandmother shall consult and discuss any major decisions for the minor child with the Mother before making such decisions. Visitation between the Mother and the minor child shall be as agreed upon by the Mother and the Grandmother. The Father had no visitation with the child and was required to pay child support.

Ortega's godparents (the Temples) filed a Complaint to Modify Custody against the Mother, Grandmother and Father. In the Final Consent Order, the Temples shall have sole legal and physical custody of the minor child and the visitation between the Mother and the minor child will be as agreed upon by the Temples and the Mother and that visitation will not be unreasonably withheld. In 2018, the Mother filed a Petition for Temporary and Permanent Modification of Custody stating that there had been a substantial change in circumstances and the Mother had made significant strides at recovery from her domestic abuse. In the December 2019 Compliance Hearing, the parties contested the standard to be applied by the Trial Court. The Temples argued that the *"Durden"* Standard should apply because the Consent Order the Mother entered into voluntarily released all of her parental powers to a third person under O.C.G.A. §19-7-1(b)(1). Therefore, the Temples had a *prima facie* right of custody as against the Mother who lost her right to custody and that the Mother couldn't regain custody only by clear and convincing evidence that she was currently a fit parent and it was in the child's best interest. The Mother argued that *"Lopez"* Standard applies and that she had not given up her parental rights and maintained visitation and therefore, the Temple's did not have *prima facie* right and she still had a constitutional presumption of custody. However, the Court reasoned that the Consent Order constituted a clear and convincing evidence of the Mother voluntarily releasing her parental rights to third party and "Durden" controlled. The Mother filed an interlocutory Appeal and the Court of Appeals reverses.

The Temples argued that pursuant to O.C.G.A §19-7-1(b)(1) a parent may voluntarily contract with a third party to relinquish parental rights. Therefore, the Temples have a prima facie right to custody to the child and the burden of proof shifts to the Mother to regain custody of the child. If parental control has not been lost, the parent has a prima facie right to custody. Here, the Mother did not permanently surrender her parental power or custody rights to the child in the Consent Order. The Consent Order reflects only that the Mother, the Grandmother and the Temples agreed to certain custodial terms relating to the child. The Consent Order also provided that the Mother and the Temples would agree upon visitation and it would not be unreasonably withheld. The current Order modified the Order with the Grandmother, which gave the Mother the ability to discuss important issues regarding the child. The Temples cite *"Durden"* which applies only to permanent awards, which were made properly upon an evidentiary hearing with specific findings establishing parental unfitness by clear and convincing evidence. In absence of a permanent custody award that was entered upon an evidentiary hearing establishing the Mother's unfitness by clear and convincing standards, the Trial Court erred in finding a voluntary contract between the Mother and the Temples had permanently relinquished

the Mothers parental rights. Therefore, the burden of proof does not shift to the Mother. The Trial Court should apply the legal standard that the Mother has *prima facie* right to parental custody and the burden has not shifted to her.

UIFSA/UEFJL

Serluco v. Taggart, **A20A1368** (October 21, 2020)

The parties divorced in New York in November 2011. Under the Settlement Agreement, the Husband was ordered to pay the Wife $3,000.00 in alimony and $1,500.00 per month in child support for the parties two minor children which stated the alimony would terminate: (1) upon the death of the Wife; (2) death of the Husband; (3) the Wife's cohabitation in accordance with the New Jersey case law; or (4) the Wife's remarriage or entering into a domestic partnership, civil union or same sex marriage. Both parties subsequently relocated to Georgia and in October 2018 the Husband filed in Superior Court of DeKalb County a Petition for Domestication and Registration of the Judgment of Divorce for Modification of Child Support and/or Alimony pursuant to O.C.G.A. §19-11-160. The Wife answered and filed a Counterclaim for Contempt that the Husband was in arrears in alimony and child support. After a bench trial, the Trial Court issued an Order stated to be in accordance with O.C.G.A. §9-12-130 *et seq*., (Uniform Enforcement of Foreign Judgment Law, UEFJL). The Court domesticated and amended the judgment from New Jersey. Terminated the Husband's alimony and reduced child support to $1,099.00 per month until the minor children reach the age of 20. The Trial Court found that the Wife had been in an exclusive romantic relationship with her boyfriend since 2011. The Wife appeals and the Court of Appeals reverses and remands with direction.

The Wife argues that the Trial Court erred by registering/domesticating the New Jersey pursuant to the Uniform Enforcement of Foreign Judgments law (UEFJL). The Husband petition sought relief from his alimony and child support pursuant to UIFSA and not UEFJL and that the New Jersey judgment was registered in Georgia pursuant to UIFSA on October 2, 2018, 14 days before the Husband filed his petition. Because the Husband registered the New Jersey judgment under UIFSA and sought relief under its terms, the Trial Court erred in failing to consider the Husband's petition under UIFSA or to determine whether the provisions of UIFSA applied. O.C.G.A.§19-11-172 allows modification of an issuing state's child support order subject to the limitations of O.C.G.A.§19-11-170. In addition, the procedures of UIFSA for registration and enforcement of a foreign support orders are in addition to and not exclusive to UEFJL.

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