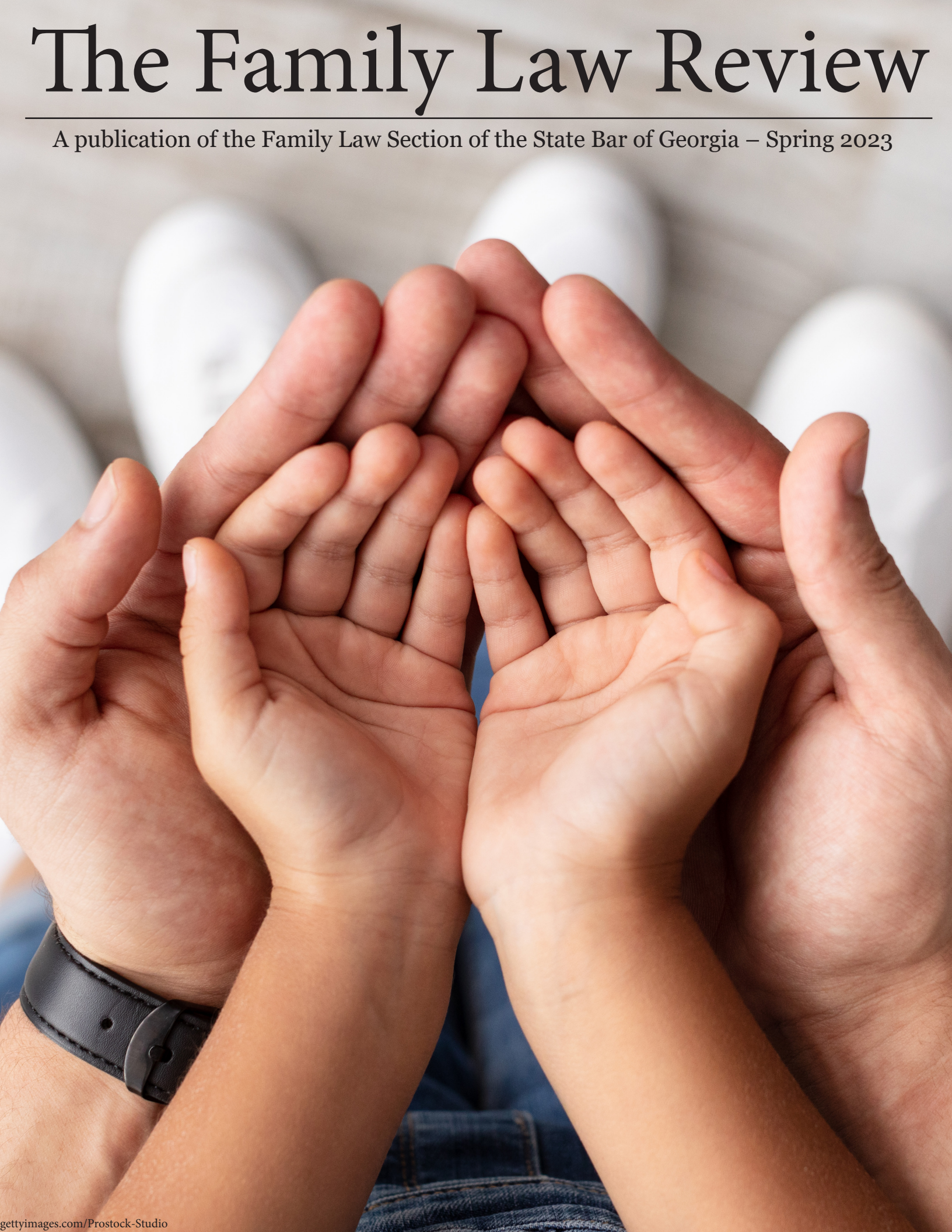
The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia – Spring 2023



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Editor's Corner

By Kem A. Eyo

Welcome to the Spring 2023 Issue of the Family Law Review.

The 2023 Family Law Institute will be held at the Omni Hotel at Amelia from Friday, June 2, 2023 through Sunday, June 4, 2023. Are you also waiting for it with excited anticipation? It is such a great opportunity to get together with fellow colleagues from across the state as well as to learn about, or be reminded of, various topics within our field.

As you read this issue of the Review, please consider it as a prologue to the upcoming continuing legal education that the Institute provides. This edition of the Review includes articles pertaining to Immigration Bias within the practice of Family Law, written by practitioners Annelise Araujo and Donald Tye and Judge George Phelan; a brief discussion of professionalism; and Erica McCurdy's explanation of how Parenting Coordinators can assist in custody-related cases. Trent Doty has provided another article, highlighting Estate Planning. Finally, Mark Sullivan has provided a third installment of his Magic Words in military divorces. I hope you enjoy, and benefit from, reading the enclosed articles.

As always, I invite you to contact me with any ideas you may have for future articles and to send any articles you would like to have published in future editions of the Family Law Review. Law firm partners, encourage your junior associates to write articles. What better way to both learn about a nuanced topic within our industry and get introduced to the community at large?

Editor Emeritus

By Randall M. Kessler

Hi everyone and so glad the pandemic is starting to fade away. Seemed like that would never happen. While I can't speak for everyone, with the silver lining of virtual appearances becoming a thing, I think it allows us all to do more "life". We can work from home and stop and have lunch with our spouse. I've even had a suit and tie on for a conference from home, then put on jeans to head into the office. Who would've imagined that a few years ago? But of course, what we all missed was the in-person communications which have now resumed. In court, seminars, and mediations, we can again meet in person. I was at a mediation with Jim McGinnis recently, in person, and it was good to see him; and to walk down the hall and catch up with Ned Bates and Michelle Rappaport. That's what I missed most. I look forward to seeing so many of you as in-person meetings expand and continuing to see such great articles in the FLR. Got an idea? Write about it. Send it in. Let's keep sharing ideas and thoughts; keeping the FLS and the FLR on the cutting edge.

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

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

Inside This Issue

From the Chair

By Ted Eittreim

All,

I hope everyone is doing well.

As I write this, it is difficult to believe that my tenure as Chair of the Section is quickly coming to a close. It reminds me of how fast the time goes in life, but also reminds me of how privileged I have been to lead this Section. And so, if you will forgive me for taking a point of personal privilege, I wanted to use this outlet to thank everyone on the Executive Committee of the Section for their year of hard work and service that, more often than not, goes unnoticed. It has been said that service on the Executive Committee in our Section involves a significant time commitment, and that certainly proved to be the case again this year. So, thank you to all of the members of the Executive Committee who, despite the failings and inadequacies of their leader, managed to make this year, once again, a successful one for the Section.

And of course, a good deal of that hard work goes towards organizing the Family Law Institute, which this year finds us at the Omni Amelia Island Plantation on the weekend of June 2 – 4. If you have not yet made plans to attend the FLI, I strongly encourage you to do so because it is not too late. As I mentioned in my last "From the Chair" update, the FLI is not only the easiest way to get in a full year's worth of CLE credits, but it is also a great way to meet and mingle with your family law colleagues in a way that, hopefully, fosters a greater sense of comradery in a business that can be, let's face it, extremely stressful.

We know that this year's CLE program, which is the 39th iteration of this event, will live up to the high bar set by the previous 38 Institutes. Led by Karine Burney, we have put together a stellar lineup of judges and speakers who will offer their insight and practical advice on family law topics both important and timely. Our CLE offerings as a Section at the FLI are second to none, and this year's lineup of topics and speakers will, I know, show that to be the case yet again.

In addition to the CLE program, though, are the receptions, get-togethers, dinners, and events that comprise the rest of the weekend at FLI. As important as the CLE may be, it is these other events that I submit distinguish our Institute from programs offered by other sections. For those to be successful, it takes you, our Section Members, to come to the beach and offer what each of you individually possess – your friendship, company, conversation, and insight. The Family Law Section is the third-largest section of the State Bar, with just under 2,000 Members, and our success depends on all of you. It's a case where the whole is definitely greater than the sum of its parts, and nowhere is that fact on display more than at the FLI. With that in mind, and understanding that it is all of you that make the Section thrive from year to year, I hope to see you all at Amelia Island in June.

Once again, it has been my great honor to lead our Section for the past year, and I thank all of the Members of the Executive Committee, as well as all of you, for that privilege.

All the best.

Thanks,

Ted

SAVE THE DATE

The Family Law Institute

When:

June 2nd - June 4th, 2023

Where:

Omni Amelia Island Resort

39 Beach Lagoon Road

Fernandina Beach (Amelia Island),

FL 32034

Come earn all of your CLE credit in a single weekend, while at the beach!

"MAGIC WORDS"- AGAIN??

*By Mark E. Sullivan**

The two prior installments about the special language in military divorce cases dealt with a) wording to secure the Survivor Benefit Plan for the non-military spouse, and b) wording required by the Frozen Benefit Rule so that the retired pay center would accept the pension division order. This "magic words" installment deals with the all-important issue of jurisdiction. If the court lacks jurisdiction, then your efforts would be wasted. Be sure that the judge makes the right findings.

Searching for a Jurisdictional Basis

The issue of jurisdiction under 10 U.S.C. 1408, the Uniformed Services Former Spouses' Protection Act, is covered at subsection (c)(4) of the statute. Since most cases are settled with a consent order or a separation agreement incorporated into the divorce decree, the likely "magic words" you'll need to use would be: "The court has jurisdiction to divide the uniformed services retired pay of the defendant, John Doe, due to his consent to the jurisdiction of the court." When the case is contested, you'll have to look elsewhere for a jurisdictional basis for the order dividing military retired pay. The usual base to use is domicile. If your state is the "state of legal residence" of John Doe – that is, his domicile – then the order might state: "The court has jurisdiction to divide the uniformed services retired pay of the defendant, John Doe, due to his domicile in the state of East Virginia."

"Home of Record" and Domicile

Don't be deceived by "home of record." That phrase is not intended to mean one's domicile. It's only a reference to the place from where John Doe entered the service, and to which his household goods will be shipped upon his discharge. It may be his domicile, but that's not dead certain. For example, the author entered military service in December 1971 with a domicile and home of record of Ohio, the place for entry into military service. Upon my transfer to Ft. Bragg in 1972, both were still Ohio. But in 1976, when I decided to obtain reciprocity admission to the North Carolina Bar, I changed my domicile to N.C. (by changing my car title and driver's license, my bank, my voting records, my personal property tax listing, my state income tax info, etc.), even though my home of record remained Ohio. The reader can look up the incidents of domicile in a Silent Partner infoletter, "Divorce and Domicile," at www.americanbar.org > Family Law Section > Military Law Committee, or at www.nclamp.gov > Publications. The infoletter contains a checklist of every conceivable item that would be relevant in a domicile determination.

The Last Test

The last test is rarely used. It involves the exercise of jurisdiction by the court in East Virginia due to John Doe's residing in that state, but not due to military orders. Thus, your order might use the following "magic words" for jurisdiction (assuming that you have the facts to back this up): "The court has jurisdiction to divide the uniformed services retired pay of the defendant, John Doe, due to his residence within the territorial jurisdiction of the court other than because of military assignment."

This test is only used when there is a nearby state boundary. A simple example will illustrate the point. Assume that the defendant-servicemember is stationed at Eglin AFB, Florida, but he's living just across the state line in Gulf Shores, Alabama to be near his aged parents (and to get rent-free lodging). In that case, Alabama could exercise jurisdiction over the military pension division, since his residing in Alabama is not due to his military assignment in that state.

Rules and Requirements

The rules for military pension division are published by the Defense Finance and Accounting Service (DFAS); they're found at the Dept. of Defense Financial Management Regulation, Vol. 7b, Chapter 29. These rules state that an acceptable court order must explicitly state the basis for the court's exercise of jurisdiction. So don't just recite the usual "blanket language" of "This court has jurisdiction over the parties and the subject matter of this case" without adding the proposed language set out above. Anything less than the specific basis for jurisdiction

will result in a rejection letter from the retired pay center, whether that's DFAS (for Army, Navy, Air Force and Marine Corps) or the Coast Guard Pay & Personnel Center (for USCG, and for the commissioned corps of NOAA and PHS). All of this (and more) can be found in Chapter 8 of THE MILITARY DIVORCE HANDBOOK (Am Bar Assn., 3rd Ed. 2019).

*Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina, and is the author of THE MILITARY DIVORCE HANDBOOK (Am. Bar Assn., 3rd Ed. 2019). He works with attorneys nationwide as a consultant in military divorce cases and in drafting military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com.

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Martha C. Christian.....1993-94
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Christopher D. Olmstead.....1990-91

ESTATE PLANNING CAN BE FOR EVERYONE

*By Trent Doty**

There's a common myth that estate planning is only for the wealthy. However, in reality, everyone should consider an estate plan. Bank accounts, investment accounts, 401(k) or 403(b) plan accounts, your house, cars, jewelry, family heirlooms – your estate may include all this and more, and your plan can determine what happens to all these when you die. A good plan will also focus on taking care of you as you age or if you become ill or incapacitated.

It's All About Control

Estate planning is about helping take control of your future, and asset management is only part of the picture. For example, a will is an essential part of an estate plan; and for parents, having one is the only way to name a guardian to raise your minor children if both parents die.

A well-designed plan will also include documents designating who can communicate with health care professionals and make decisions about what type of care you should receive if something happens and you can't make those decisions yourself.

Ultimately, if you don't make your own plan, your family may be left scrambling at an already difficult time. Someone will have to ask a court to decide who will act as guardian for your minor children (or maybe even for you), and state law will determine what becomes of your assets. Bottom line: If you don't decide, someone will decide for you.

Remember, establishing a plan is only the beginning. Significant life events are likely to call for changes. It's important to regularly review your plan to ensure it continues to meet your needs. You should consider whether your documents, asset titling, and beneficiary designations allow your assets to be handled the way you want them to be

Five Essential Documents

Your situation's complexity will determine which documents your plan requires; however, these five are often essential:

A **will** provides instructions for distributing your assets to your beneficiaries when you die. In it, you name a personal representative (executor) to pay final expenses and taxes and distribute your remaining assets.

A **durable power of attorney** for financial matters lets you give a trusted individual management power over your assets currently and/or if you can't do it yourself. This document is effective only while you're alive.

A **health care power of attorney** lets you choose someone to make medical decisions for you if something happens and you can't make them yourself.

A **living will** expresses your intentions regarding the use of life-sustaining measures if you are terminally ill. It doesn't give anyone the authority to speak for you.

By transferring assets to a **revocable living trust**, you can provide for continued management of your financial affairs during your lifetime, after your death, and even for generations to come.

Turn to a Team of Professionals

The notion of making the decisions involved with estate planning may seem intimidating at first, but it doesn't have to be. The key is to rely on a team of trusted professionals, including a financial advisor, estate planning attorney, and accountant. They know the questions to ask and can help you avoid potential pitfalls.

If you don't currently have relationships with these individuals, a financial advisor may be a good place to start. He or she can discuss his or her role in the planning process and can refer you to an estate planning attorney who can work with you to draw up the necessary documents.

This article was written by/for Wells Fargo Advisors and provided courtesy of Trent Doty, Senior Financial Advisor in Savannah, GA at 912-600-3232.

NAVIGATING TAX RETURNS: TIPS AND KEY FOCUS AREAS FOR FAMILY LAW ATTORNEYS AND DIVORCING INDIVIDUALS/BUSINESS OWNERS – PART I

*By Karolina Calhoun**

Part I of III- Form 1040

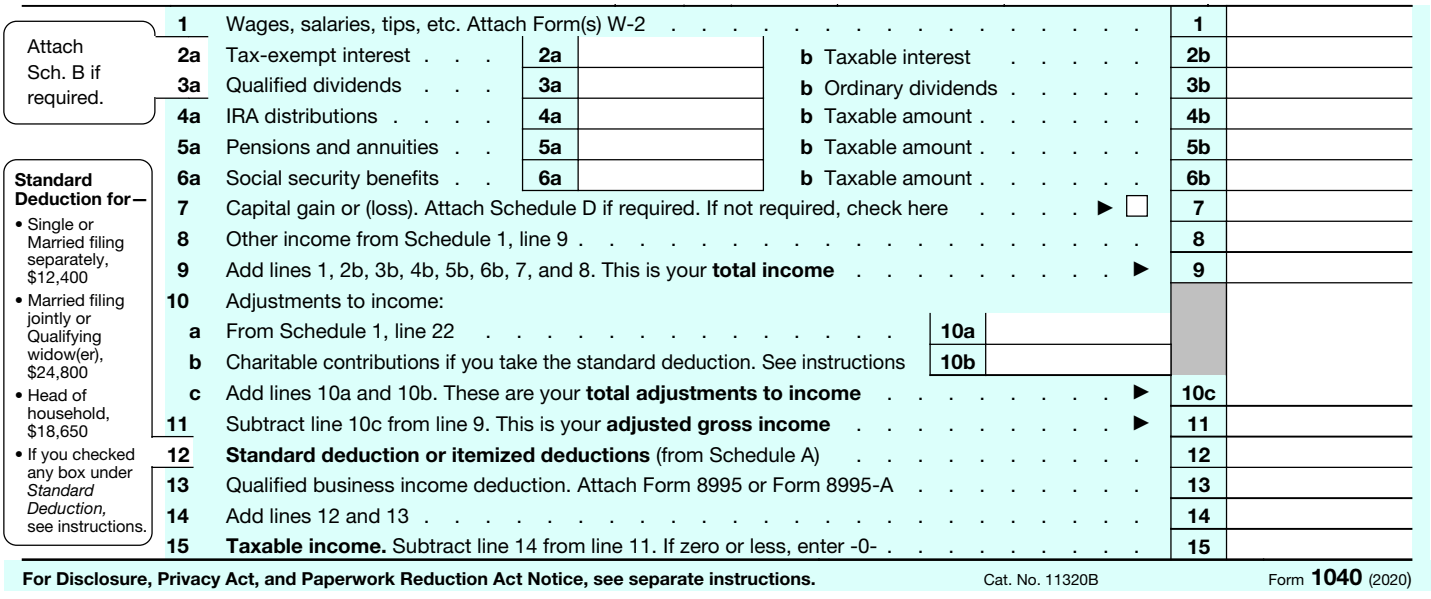
This is a three-part series where we focus on key areas to assist family lawyers and divorcing parties.

Form 1040 is used by taxpayers to file an annual income tax return. It calculates the total taxable income of the taxpayer(s) and determines the amount that should be paid or refunded. There are five filing statuses – single, married filing jointly, married filing separately, head of household, and qualified widow(er) with dependent children.

Why Would Form 1040 Be Important In Divorce Proceedings?

Form 1040 provides a general understanding of a taxpayer's financial status and can be a guide to finding additional information about one's finances. It can serve as a starting point to get a picture of an individual's (or couple's) income(s), assets and liabilities, and lifestyle. Form 1040 is supplemented with additional schedules and documentation which lend detail and insight into one's lifestyle and financial matters. Ultimately, for divorce purposes, multiple years of tax returns should be reviewed and can be a source of inputs for the marital estate subject to division, as well as data for further financial analyses like income determination and lifestyle analysis/pay and need analysis.

Below is a snapshot from Form 1040:



Attach Sch. B if required.

1	Wages, salaries, tips, etc. Attach Form(s) W-2				1	
2a	Tax-exempt interest	2a		b Taxable interest	2b	
3a	Qualified dividends	3a		b Ordinary dividends	3b	
4a	IRA distributions	4a		b Taxable amount	4b	
5a	Pensions and annuities	5a		b Taxable amount	5b	
6a	Social security benefits	6a		b Taxable amount	6b	
7	Capital gain or (loss). Attach Schedule D if required. If not required, check here ▶ ☐				7	
8	Other income from Schedule 1, line 9				8	
9	Add lines 1, 2b, 3b, 4b, 5b, 6b, 7, and 8. This is your **total income** ▶				9	
10	Adjustments to income:					
a	From Schedule 1, line 22	10a				
b	Charitable contributions if you take the standard deduction. See instructions	10b				
c	Add lines 10a and 10b. These are your **total adjustments to income** ▶				10c	
11	Subtract line 10c from line 9. This is your **adjusted gross income** ▶				11	
12	**Standard deduction or itemized deductions** (from Schedule A)				12	
13	Qualified business income deduction. Attach Form 8995 or Form 8995-A				13	
14	Add lines 12 and 13				14	
15	**Taxable income.** Subtract line 14 from line 11. If zero or less, enter -0-				15	

Standard Deduction for—
- Single or Married filing separately, $12,400
- Married filing jointly or Qualifying widow(er), $24,800
- Head of household, $18,650
- If you checked any box under *Standard Deduction,* see instructions.

For Disclosure, Privacy Act, and Paperwork Reduction Act Notice, see separate instructions. Cat. No. 11320B Form **1040** (2020)

Key Areas of Focus for Family Law Attorneys and Divorcing Parties

Line 1: Wages, Salaries, and Tips – Line 1 details wages, salaries, and tips. This amount should match the income reported in Box 1 of the Form W-2. The amount on Line 1 is not gross income. It is likely that there are pre-tax deductions, such as contributions to a 401(k) account. You should refer to the underlying W-2(s) for more information about these deductions as well as gross income.

Line 2 & Line 3: Interest and Dividends – An entry in Line 2 indicates interest income, while an entry in Line 3 indicates dividend income. Both point to ownership of assets and documentation of these assets should be requested. Furthermore, income earned from interest and dividends can be considered as a source of income when calculating spousal and child support. Details about interest and dividend income can be found on Schedule B, Form 1099-INT, and Form 1099-DIV

Line 4: IRA Distributions – An entry in Line 4 shows distribution from an individual retirement account, signaling that the taxpayer has an IRA account and documentation of these assets should be requested. A withdrawal from a retirement account may also point to possible dissipation of marital assets, if not readily identifiable or available by account documentation. Details about retirement distributions are on Form 1099-R.

Line 5: Pensions and Annuities – An entry in Line 5 indicates existence of pensions and annuities, which may be wholly or partially marital property. These must be carefully considered for property division as well as sources of income when calculating spousal and child support.

Line 6: Social Security Benefits – Like pensions, Social Security benefits should be considered as sources of income when calculating spousal and child support. Details can be found on Form SSA-1099, which is a form provided to the taxpayer who receives these benefits. Estimates of an individual's future monthly payments can be extracted from the Social Security Administration website.

Line 7: Capital Gains or Losses – Line 7 indicates capital gains or losses, which means that an asset (or multiple assets) was sold and some sort of monies were made or lost on the transaction. Not only does this information indicate ownership of assets, it can also be important in tracing analyses as well as other forensic analyses when reviewing several years of tax returns. Details can be found in Schedule D and Form 8949.

Line 8: Other Income – An entry in Line 8 should be reviewed further as it often indicates income from gambling winnings or other unusual sources (for example, prizes, jury duty pay, or the taxable portion of disaster relief payments). Information about the sources of other income can be found in Form 1099-MISC (miscellaneous income) or Form W-2G (which is a form that records gambling winnings). However, these incomes are typically not recurring in nature, and are not always reported which may require scrutiny and potential forensic analyses.

Line 9: Total Income –This line is the summation of above lines and yields total income of the taxpayer and can give you information about how the taxpayer earns their income. This number may be used when determining spousal or child support as it does not include any adjustments.

Line 11: Adjusted Gross Income – Adjusted Gross Income (AGI) is the amount used to determine one's taxable income. The AGI is total income less adjustments. A few common adjustments are deductions for educator expenses, health savings account deductions, and student loan interest deductions. Many of these adjustments are optional, and excessive use could potentially be used to skew spousal or child support amounts. Therefore, gross income (line 9) is often considered over AGI when determining spousal or child support amounts. More information on the adjustments claimed can be found on Schedule 1.

Line 13: Qualified Business Income (QBI) Deduction – If the taxpayer is taking this deduction, it indicates that they own a business, which should lead to requests for related business documents. The QBI deduction is for pass-through businesses, therefore, a Schedule C or Schedule K-1 should also be included with the tax return. Examples of pass-through businesses are sole proprietorships, LLCs, partnerships, and S-Corporations.

Line 37: Amount You Owe Now – Line 37 indicates the incremental amount owed based on the total tax liability less any federal tax withholding, estimated payments, and credits. Reviewing the amount owed or amount to be refunded over several years can potentially uncover intentional over or under payment. However, business owners or self-employed individuals who pay quarterly taxes may have fluctuating incomes from year to year. It is important to understand that quarterly tax payment estimates are based on prior year realized income levels, which may or may not be the reason for over or under payment. A financial expert can accurately assess these types of scenarios.

Conclusion

Knowing how to navigate key areas of Form 1040 can be quite useful in divorce proceedings. Information within the tax return can provide support for marital assets and liabilities, determination of spousal and child support, and potential further analyses. Reviewing multiple years of tax returns is typical as multi-year overviews may reveal trends, provide helpful information, and may even indicate the need for potential forensic investigations.

While we do not provide tax advice, Mercer Capital is a national business valuation and financial advisory firm and we provide expertise in the areas of financial, valuation, and forensic services.

**Karolina Calhoun, Vice President at Mercer Capital, has been involved with hundreds of valuation and litigation support engagements in a diverse range of industries on local, national and international levels. Prior to joining Mercer Capital, Karolina was a Senior Auditor at EY (Ernst & Young) in their Audit and Assurance Services practice. she provides valuation and forensics services for family law, gift & estate planning, commercial litigation, transactions (M&A), and further matters related to privately held businesses, dissenting shareholders, intellectual property, personal goodwill, etc. With her forensics accreditation, she provides economic and financial damages studies, asset tracing, lost profits, and lifestyle analyses.*

Visit this link to read the entire NTR piece:
https://mercercapital.com/article/navigating-tax-returns-tips-and-key-focus-areas-for-family-law-attorneys-and-divorcing-individuals-business-owners/

WHERE OH WHERE DID PROFESSIONALISM GO?

*By Kem A. Eyo**

Please forgive me if the following sounds preachy, but …

There has been growing talk lately about the decline of professionalism in the work force. According to an article posted in the Emily Post Etiquette, professionalism has declined over the past three years; and the decline cannot be attributed merely to generational differences. For example, though the workforce had generally appeared to embrace the concept that workers need a healthy work-life balance in order to be productive, there has been a growing trend, of late, of employees engaging in "quiet quitting." This terms is defined on Dictionary.com as the "informal term for the practice of reducing the amount of effort one devotes to one's job, such as by stopping the completion of any tasks not explicitly stated in the job description. The term implies that this is done secretly or without notifying one's boss or manager."

Pursuant to the Emily Post Etiquette, information gleaned from the Polk-Lepson Research Group suggests that the four indicators of professionalism are interpersonal skills, work ethic, appearance, and communication skills. Specific to the legal profession, the New Jersey State Bar Association defines "professionalism in the law" as "using your skills you gained through your education and your innermost compassion and compass for truth to guide your clients and advocate for them respectfully and zealously before the courts." The well-rounded members of our profession understand that truly "professional" attorney will embrace each of these three components of professionalism (zealous advocacy of clients, respect for fellow professionals, and truth and compassion) with equal importance. Unfortunately, the balance is not always present. Rule 9-101 of the State Bar Handbook states the following:

The Court believes there are unfortunate trends of commercialization and loss of professional community in the current practice of law. These trends are manifested in an undue emphasis on the financial rewards of practice, a lack of courtesy and civility among members of our profession, a lack of respect for the judiciary and for our systems of justice, and a lack of regard for others and for the common good. As a community of professionals, we should strive to make the internal rewards of service, craft, and character, and not the external reward of financial gain, the primary rewards of the practice of law. In our practices we should remember that the primary justification for who we are and what we do is the common good we can achieve through the faithful representation of people who desire to resolve their disputes in a peaceful manner and to prevent future disputes. We should remember, and we should help our clients remember, that the way in which our clients resolve their disputes defines part of the character of our society and we should act accordingly."

The State Bar of Georgia adopted Rule 9-101 to address this concern and "in recognition of the importance of professionalism as the ultimate hallmark of the practice of law. The purpose of this Part is to create within the State Bar a Commission to identify, enunciate and encourage adherence to non-mandatory standards of professional conduct."

On Thursday, January 12, 2023, the Family Law Section of the State Bar of Georgia hosted a judiciary panel for a CLE on professionalism. The panelists, the Honorable Jeffrey S. Bagley of Forsyth County and the Honorable Connie L. Williford of the Macon Judicial Circuit, provided attendees with perspectives on various scenarios of arguably professional ambiguity. Though these judiciaries are at varied levels of experience on the bench, their positions regarding professionalism were remarkably similar. One message range out loud and clear from their responses – how you choose to treat your client, your opposing counsel, and the bench during each of your cases is not only noticed, but it is remembered; and it becomes your reputation and may be passed along to other members of the bench (perhaps even before you actually appear before that judiciary).

From left to right: Ikemesit "Kem" A. Eyo of Reese-Beisbier & Associates, PC, co-host; Connie L. Williford, Judge, Macon Judicial Circuit, co-panelist; Kathleen "Katie" B. Connell of Connell Cummings, LLC, co-host; Jeffrey S. Bagley, Chief Judge, Forsyth County Superior Court

We each have a choice to make each day of our practice: to win at all costs or to practice as a professional. If your preference is to function as a professional, then avail yourself of Part IV of the Georgia Rules of Ethics and Discipline, including abiding at all times by the following responsibilities (found in the preamble of Chapter 1 of Part IV of the Georgia Rules of Ethics and Discipline):

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

[3] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the these rules or other law.

[4] A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the law, the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] A lawyer's professional responsibilities are prescribed in the Georgia Rules of Professional Conduct, as well as by substantive and procedural law. A lawyer also is guided by conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] In the nature of law practice conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict among a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person. The Georgia Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules.

[11] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Georgia Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[12] The fulfillment of a lawyer's professional responsibility role requires an understanding by them of their relationship to our legal system. The Georgia Rules of Professional Conduct, when properly applied, serve to define that relationship.

**Kem A. Eyo has been licensed with the State Bar of Georgia since 2006, is a Senior Associate Attorney with Reese-Beisbier and Associates, P.C., and has been a member of the Family Law Section of the State Bar since 2008. Kem practices solely in the discipline of family law. In addition to representing clients, Kem is a trained mediator and Guardian-ad Litem.*

Endnotes

1. Information from Emily Post Etiquette, including references to the Polk-Lepson Research Group and findings from the group's study, may be found at the following website: https://emilypost.com/advice/is-professionalism-declining.

THE PARENTING COORDINATOR – THE SOLUTION TO THOSE ANNOYING NON-LEGAL ISSUES

*By Erica McCurdy**

Communicating well does not necessarily mean communicating frequently or extensively. A focus on developing protocols for what to say, when to say something, and, most importantly, when not to communicate helps develop a productive, child-focused future relationship. A parenting coordinator (PC) is a professional who works with co-parents to improve communication and reduce conflict. The goal is to help co-parents create a child-focused parallel parenting style.

Unlike attorneys and mediators, parenting coordinators help resolve non-legal differences and ambiguity in parenting plans, and assist co-parents in learning how to make day-to-day child-related decisions with minimal conflict. The PC redirects the parents' focus to the impact of their decision-making on the child/children. This child-centered approach helps co-parents move away from a win-lose mentality and towards a win-for-the-child mentality, where both parties can feel satisfied with the outcome.

The PC reduces the emotional intensity of a conflict by providing a structured and supportive environment for people to express their thoughts and feelings, coupled with a tactical and practical set of protocols to implement. The PC relationship with co-parents focuses on trust, accountability, and goal setting. The powerful questioning and direct communication process means that co-parents can share their perspectives while receiving open and honest feedback.

Streamlining Communication: A parent coordinator teaches co-parents communication skills and strategies. The PC sets protocols that determine when, how, and what to communicate from one co-parent to the other. The PC may also utilize and help teach co-parents to use tools like Our Family Wizard to centralize and structure communication.

Defining Emergencies: The PC works with co-parents to separate the daily running of each household. The PC helps co-parents understand what constitutes an emergency and what information to communicate via email.

Reducing Conflict: The less control one co-parent attempts to exert over the other co-parent's home, the fewer opportunities for conflict exist. The PC helps co-parents move into a parallel parenting framework. Within that framework, structured communication eliminates ambiguity, pressure, and accusation. The PC's oversight of communication and protocols makes it easier for co-parents to work collaboratively, when necessary, with the children's best interests in mind.

Gaining Agreement: Co-parents who readily agree on the details rarely end up working with a PC. The PC's role is non-confidential and generally with limited decision-making authority. The PC can gain agreement from the co-parents, report to all parties, and make recommendations based on management and oversight of communication. The agreements and determinations made by the PC reduce time spent arguing, litigating, or undermining progress. When one co-parent is resistant to change, it may be that the issue is too broad. The PC helps each co-parent identify their most significant issues and then breaks each topic into the smallest possible piece. Small, specific problems are more accessible and often easier to resolve than broad ones. As each minor issue is identified and resolved, the attorneys, mediators, and Guardians ad Litem (GAL) can focus on fixing the more significant matters without the drag of non-legal conflict.

Managing the Parenting Plan: The PC helps manage ambiguity in each parent's interpretation of the parenting plan. Together, the PC helps co-parents resolve parenting plan disputes, thus reducing the time and expense of litigation and minimizing the impact on the children.

Better Outcomes for Children: By reducing conflict and improving communication, a PC can create a more stable and supportive environment for children, leading to better outcomes in terms of academic, social, and emotional well-being.

Lower Overall Case Costs: Parenting Coordinators are usually less expensive than attorneys and GALs. Inserting a PC into a case may help reduce overall costs to the co-parents by providing a less expensive alternative to resolve the non-legal sticky details that can slow or prevent resolution of the legal issues.
Access to Resources: A PC may also be able to connect parents with other resources, such as counseling or support services, which can help them better navigate the challenges of co-parenting.

Functioning as a Neutral: The PC focus is to reduce the impact of conflict on the child/children. As such, the PC does not take sides with either co-parent. PCs are not confidential and share progress with the legal and therapy teams. The PC may also testify to provide the court with insight into obstacles and progress.

Respecting Diversity: Cultural differences often mean that the child/children experience varying parenting styles as they travel from home to home. How each co-parent responds to these differences directly impacts the amount of tension the child/children feel. The PC helps co-parents learn to parallel parent, allowing each co-parent to focus on their child/children during their parenting time.

The PC is valuable in helping co-parents work together effectively to provide the best possible outcomes for their child/children. The frequency of meetings with a PC varies by case. Some co-parents need only a little coaching to establish boundaries and protocols. Other cases require many sessions over an extended period to help with the parenting plan, decision-making, communication, and reduction of their child's exposure to conflict.

** Erica McCurdy is a credentialed coach and parenting coordinator who has been working with people in transition since 2009. Her company, Atlanta Divorce and Parent (www.AtlDiv.com), leverages an experienced team to provide Parenting Coordination, Divorce Coaching, Teen Support Programs, and Career Transition Guidance to those experiencing high-conflict and family change. Erica holds a BBA and MBA, is an ICF Professional Certified Coach, and has CMC (Master Coach), CBC (Business Coach), and YPF (Youth Parent and Family Coach) certifications. Erica has over 3500 practice hours and has been featured as an expert in over 200 publications including Forbes, US News and World Report, Business News Daily, AARP, Entrepreneur.com and more.*

THE FAMILY LAW INSTITUTE AGENDA

FRIDAY, JUNE 2, 2023

7:00 **REGISTRATION OPENS AND BREAKFAST**

7:15 **FIRST-TIMERS' BREAKFAST**

8:00 **OPENING REMARKS**

- Theodore S. Eittreim, Chair, Family Law Section, Co-Chair, 39th Annual Family Law Institute, Eittreim Martin Cutler, LLC, Atlanta, GA
- Karine P. Burney, Vice-Chair, Family Law Section, Co-Chair, 39th Annual Family Law Institute, Burney & Reese, LLC, Atlanta, GA

8:15 **DOS, DON'TS, AND HELPFUL HINTS: ADR IN FAMILY LAW**

- Hon. Rebecca Crumrine Rieder, Resolute Law, Atlanta, GA
- Andy Flink, Flink ADR, Alpharetta, GA
- Hannibal F. Heredia, Hedgepeth Heredia Family Law, LLC, Atlanta, GA
- Pilar J. Prinz, Pilar Prinz, P.A., Atlanta, GA & Santa Rosa Beach, FL
- Christina L. Scott, Covenant Mediation Services, Atlanta, GA

9:15 **VALUATION CONSIDERATIONS - ARE WE ACTIVE OR PASSIVE?**

- Dan Branch, CPA/ABV, ASA, MBA, IAG Forensics & Valuation, Atlanta, GA
- Ansley S. Callaway, CPA, Callaway & Company, Atlanta, GA
- Charles V. Crowe, Eittreim Martin Cutler, LLC, Atlanta, GA
- Deborah S. Gibbon, Gibbon Financial Consulting, Atlanta, GA

10:00 **WE HAVE TRUST ISSUES**

- Jonathan J. Tuggle, Boyd Collar Nolen Tuggle Roddenbery, Atlanta, GA

10:45 **BREAK**

11:00 **NAVIGATING THE APPELLATE WATERS: HOW TO WIN ON APPEAL (Provides trial practice credit.)**

- Hon. E. Trenton Brown, III, Judge, Georgia Court of Appeals, Atlanta, GA
- Kyla S. Lines, Bloom Alexander & Lines, Atlanta, GA
- Hon. Amanda H. Mercier, Vice-Chief Judge, Georgia Court of Appeals, Atlanta, GA
- Hon. Brian M. Rickman, Chief Judge, Georgia Court of Appeals, Atlanta, GA

12:00 **GEORGIA CHILD SUPPORT: FACTS VERSUS FOLKLORE**

- Kathleen B. Connell, Connell Cummings, LLC, Atlanta, GA
- Hon. Connie L. Williford, Superior Court, Macon Judicial Circuit, Macon, GA

12:30 **WHAT I LIKE (AND DON'T LIKE) ABOUT YOU - VIEWS ON PROFESSIONALISM FROM THE BENCH AND THE BAR (Provides professionalism credit.)**

- Alexander R. Cutler, Eittreim Martin Cutler, LLC, Atlanta, GA
- Hon. Kevin M. Farmer, Superior Court of Fulton County, Atlanta, GA
- Hon. Mark Anthony Scott, Superior Court of DeKalb County (Ret.), Lithonia, GA

1:30 **PRESENTATION OF AWARDS**

2:00 **ANDREW R. PACHMAN MEMORIAL GOLF TOURNAMENT**

6:30 **WELCOME RECEPTION, HOSTED BY HOBSON & HOBSON, P.C.**

8:00 **SPEAKERS' DINNER**

8:30 **AFTER PARTY, HOSTED BY IAG FORENSICS & VALUATION**

THE FAMILY LAW INSTITUTE AGENDA

SATURDAY, JUNE 3, 2023

7:00 **BREAKFAST**

8:00 **CUTTING EDGE ISSUES OF GENDER IN CUSTODY AND PARENTING TIME**

- Daniel Bloom, Bloom Lines Alexander, LLC, Atlanta, GA
- Dawn R. Smith, Smith & Files, LLC, Atlanta, GA
- Cole Thaler, Managing Attorney, Saturday Lawyer Program, Atlanta Volunteer Lawyers Foundation, Atlanta, GA
- McKenzie Wren, SOJOURN, The Southern Jewish Resource Network for Gender and Sexual Diversity, Atlanta, GA

9:00 **USING JURY INSTRUCTIONS IS NOT JUST FOR JURY TRIALS**

- Marvin L. Solomiany, Kessler & Solomiany, Atlanta, GA

9:30 **IT'S GETTING LONELY IN THESE PARTS: THE VANISHING CUSTODY EVALUATOR**

- Hon. Christopher S. Brasher, Chief Judge (Ret.) Fulton County Superior Court, Senior Judge, Superior Courts of Georgia, Atlanta, GA
- Howard A. Drutman, Ph.D., Atlanta Behavioral Consultants, Atlanta, GA
- Kim Oppenheimer, Ph.D., Atlanta Psych Consultants, LLC, Atlanta, GA

10:15 **WHERE IS MY ORDER? PRACTICAL TIPS AND TRICKS FOR HOW TO GET YOUR ORDERS EXECUTED ASAP**

- Roslyn Grant Holcomb, The Grant Group, Atlanta, GA
- Hon. Asha F. Jackson, Judge, Superior Court of DeKalb County, Decatur, GA
- Hon. Pandora E. Palmer, Judge, Superior Court of Henry County, McDonough, GA

10:45 **BREAK**

11:00 **BEING A GAL IS EASY. IT'S LIKE RIDING A BIKE … EXCEPT THE BIKE IS ON FIRE.**

- Aisha Blanchard Collins, Blanchard Collins, LLC, Atlanta, GA
- Brandy Daswani, Brandy Daswani, LLC, Marietta, GA
- Debra M. Finch, Debra M. Finch, PC, Athens, GA
- Amanda Love, The Love Law Firm, Savannah, GA
- David G. Sarif, Naggiar & Sarif, LLC, Atlanta, GA

11:45 **LEGISLATIVE UPDATE**

- Jeremy J. Abernathy, Abernathy Ditzel Hendrick, LLC, Marietta, GA

12:00 **IT'S ME, HI, I'M THE PROBLEM, IT'S ME: ETHICAL PROBLEMS IN FAMILY LAW (Provides ethics credit.)**

- Mark L. Bryce, Bryce Law, LLC, Marietta, GA
- Kelly Anne Miles, Smith Gilliam, Williams & Miles, P.A., Gainesville, GA
- Tina Shadix Roddenbery, Boyd Collar Nolen Tuggle & Roddenbery, LLC, Atlanta, GA

1:00 **RECESS**

1:30 **INCLUSION COMMITTEE LUNCHEON**

6:00 **RECEPTION WITH THE SPECIFIC DEVIATIONS, HOSTED BY BROWN DUTTON & CRIDER LAW FIRM, LLC**

THE FAMILY LAW INSTITUTE AGENDA

SUNDAY, JUNE 4, 2023

7:00 **BREAKFAST**

8:00 **HOME COOKIN' - OUT OF METRO ATLANTA PRACTICE (Provides trial practice credit.)**

- Hon. Lisa G. Colbert, Judge, Superior Court of Chatham County, Savannah, GA
- Jonathan V. Dunn, Jonathan V. Dunn, P.C., Savannah, GA
- David "Whit" Frost, Roach Caudill & Frost, Canton, GA
- Hon. David S. Lyles, Judge, Superior Court of Paulding County, Dallas, GA

9:00 **WHAT DO FAMILY COURT LITIGANTS AND FRANZ KAFKA'S THE TRIAL HAVE IN COMMON? (Provides trial practice credit.)**

- Hon. Bruce R. Cohen, Presiding Family Court Judge, Maricopa County Superior Court, Phoenix, AZ
- Gabriel Goltz, Educational Programs Manager, Arizona Supreme Court, Phoenix, AZ

10:30 **BREAK**

10:45 **CASE LAW UPDATE**

- Hon. Kellie S. Hill, Superior Court of Cobb County, Marietta, GA
- Victor P. "Vic" Valmus, Valmus Law, Marietta, GA

11:30 **SECURITY FOR THE FAMILY LAWYER**

- Christopher Beanland, Wolverine Consultants, LLC, Atlanta, GA
- Kevin J. Rubin, Rubin Family Law, LLC, Atlanta, GA

12:15 **HELPFUL TIPS ON ESTABLISHING AN ALIMONY CLAIM**

- Audrey Shapiro Chapman, Audrey Shapiro Chapman, P.C., Brunswick, GA
- Hon. Anthony Harrison, Superior Court of Glynn County, Brunswick Circuit, Woodbine, GA

1:00 **ADJOURN**

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Friday Night Cocktail Party

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Friday Night After-Party

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Lake Mediation

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Marple Family Law, LLC

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Stephanie Wilson Family Law, L.L.C.

White Elm Group – Forensic Accounting, Valuation, and eDiscovery

Yu Family Law

IMMIGRATION BIAS IN FAMILY LAW PRACTICE

*By Hon. George F. Phelan, Annelise Araujo and Donald G. Tye**

From left: Hon. George F. Phelan, Annelise Araujo and Donald G. Tye

Disclaimer: The opinions expressed herein are those of the authors and do not necessarily reflect nor shall they be attributed to the Massachusetts judiciary, the courts or the legal offices of the authors.

Lawyers and judges who identify as white, cisgender, heterosexual men have long been overrepresented in the family law bar. Meanwhile, immigrants, first-generation Americans, and LGBTQ+ people are appearing before the court more often. The increasing diversity of parties in family court mirrors broader demographic changes in America, and is a positive indicator of equal access to justice.

Still, these shifting dynamics require special attention from family law practitioners, who are more likely than ever to encounter parties with values, experiences and cultural characteristics far different from their own.

The widening cultural gap increases the risk of biases that disadvantage litigants in court, particularly immigrants. Practitioners who fail to account for these differences increase the potential for miscommunication, ineffective legal assistance, inadequate judicial resolutions and appellate scrutiny.

How can we avoid such inequities? The question is rarely asked. When we talk about anti-immigrant bias in family court, we are usually discussing the disadvantages faced by undocumented immigrants. For instance, a judge may find that a mother without legal U.S. residency cannot be a primary caretaker due to the possibility of potential or even imminent deportation, and instead award custody to a less capable parent due to U.S. citizenship or permanent residency. Custody outcomes hinging on immigration status are not necessarily in the child's best interests.

Avoiding this type of bias is critical, but our discussion will focus on a more insidious kind of prejudice, which stems from a lack of familiarity with the immigrant litigants who come before the court. This unconscious bias manifests itself in the professional guidance of lawyers, the rulings handed down by judges, and the administrative hurdles presented by the court itself.

To illustrate how to identify and avoid anti-immigrant bias in family court, we share the following case example — a composite of multiple clients whom we have represented or who have come before our court. After introducing this family, we will share the perspectives of a practicing lawyer, a guardian ad litem and a judge.

The Parties

A husband and wife, both devout Muslims who emigrated from Iran, are seeking a divorce after three years of marriage. They have 2-year-old twins. Both spouses were practicing physicians in Iran. The husband is employed stateside and pays for all the family's expenses. The wife, who speaks only Persian, stays home as primary caretaker to their children. The couple's marriage contract, a feature of many Middle East unions, calls for the husband to pay the wife 300 gold coins.

The husband filed for divorce. The wife, drawing on traditional Muslim views of marriage and the role of

women, does not want the relationship to end. She is so invested in the marriage, she wears her wedding dress to every court hearing, hoping to remind her husband why he chose her.

After separating, the husband continues to live at the family's four-bedroom home in a high-income suburb with excellent public schools. The wife moved to a two-bedroom apartment in a less affluent community. The husband has extended family in the United States; the wife's relatives remain in Iran. The wife has conditional permanent residency valid for two years.

The wife has previously alleged verbal abuse by the husband, though police have never been called to the home. The family court is to consider the husband's request for primary custody. The wife is seeking custody, alimony and child support, along with the option to travel with the children and potentially return to Iran full time. The husband contends the wife is able to work as a doctor in the United States, eliminating the need for alimony or for allocation of travel expenses.

The Lawyers' View

To avoid unintentional bias, lawyers and guardians ad litem (GALs) must seek to understand their clients' needs, experiences and cultural backgrounds, and develop a tailored approach that accounts for these differences.

One common way advocates can fail their clients is by not considering the full scope of their lives. Often, an immigrant litigant's ties to America are only a small part of their story: Many have spouses, children or other close family members back in their home country; they travel home regularly; or they own property abroad. Proceedings that focus predominantly on an immigrant's circumstances in the United States — and do not consider the depth and complexity of the links to their home country — will not serve the best interests of the litigant or the court.

Take another look at our case example. One might assume the couple's U.S. citizen children should remain in America with their father, who can provide the necessary economic and educational resources. Superficial impressions about political ideology alone in the country of origin should not be determinative of custody.

But the wife's family support in Iran, plus her ability to obtain well-paid employment there, must be weighed heavily. The picture is more complex than it first appears.

Advocates can further reduce inequities in family law practice by identifying their own implicit cultural biases, as well as the potential for negative inferences drawn by judges and court staff. Conclusions based on how a person is dressed, their English fluency or their interactions with their children can easily mislead.

There are some common stereotypes that surface in family court, despite dogged efforts to create an environment free of discrimination and prejudice. One example is the assumption that immigrant parties lack education, income and/or the ability to work; in our case, the nonworking wife has more schooling than the judges and lawyers working on her case. Occasionally, these improper assumptions may come from one of the parties in a case — especially when a difference in immigration status or cultural background creates an imbalance of power.

A litigant's undocumented status is often a flashpoint in family cases. To discern whether a claim is legitimate, family law attorneys should consult an immigration lawyer able to accurately describe the litigant's circumstances and the likelihood as well as timing of imminent deportation.

Lawyer-advocates also must be cognizant of what an immigrant party expects from the family court system. Some immigrants come to the United States from countries where due process is routinely denied and legal protections vary according to a person's gender, wealth or social status. We must educate our clients on their rights and the court's processes.

We must also ensure that GALs are well prepared to serve these populations. GALs are regularly appointed by courts in high-conflict custody cases and often have little experience working with immigrant families. But the work they do demands deep cultural sensitivity and an appreciation of different family models.

Whether the GAL is a lawyer appointed to find facts or a mental health professional assigned to conduct a clinical evaluation, it is essential that the investigation be complete, comprehensive and free of cultural bias.

Good test providers should develop their psychometric tools to be fair and valid across cultures. Test items should be written by experts from a broad range of cultural backgrounds and of various nationalities. It isn't enough to simply translate assessments into different languages, because direct translations can miss important cultural nuances.

Again, we turn to our case example. A factfinder who is not culturally sensitive may entertain the bias that an English-speaking household is preferable for the children of the divorcing couple. This view disadvantages the wife, an unquestionably intelligent and capable person who lacks English fluency.

In situations like these, the lawyers and the GAL must work together to understand a litigant's perspective and experience, introducing culturally competent evidence to assist the court in understanding the proper context.

In the U.S. court system, there is a tendency to evaluate cases through the prism of so-called "American" values. Concepts we claim to value highly in our society, such as gender equality, can be used to make unfavorable comparisons to other cultures. This tendency may predispose advocates and judges to draw inaccurate or incomplete conclusions and assumptions about a litigant's own values.

By setting aside our own implicit judgments about the "right" or "wrong" approach to these highly personal subjects, we can learn about our clients, open our minds, and pursue a result that embodies the highest ideals of the family court system.

The Judge's View

Judges and court staff must also leave aside any preconceptions, evaluating each case through the prism of an immigrant litigant's circumstances and experience and avoiding errant conclusions based on their background.

Family court judges bear the responsibility of evaluating each case fairly. Typically, judges are presented with immigration status as a factor in custody determinations and in cases where violence is present. In many other situations, the judge does not know — and may be procedurally constrained from inquiring about — a litigant's immigration status. If an immigrant's counsel finds it appropriate and relevant, counsel may sua sponte identify important cultural considerations relevant to the proceeding, and request that this information be impounded.

Unconscious bias also must be addressed in court-provided services, dispute resolutions, determination of critical factors in a case, and even how we treat and speak to the litigant. Family court judges should champion systemic changes to root out and correct anti-immigrant bias.

For instance: Any temporary protective orders granted should be referred for default review by a country expert, paid for by the court, who should interview the litigant about any cultural or contextual factors bearing upon the case. The results should be available to the family court judge for further hearing within seven days, and any appropriate amendments to the initial order should then be considered.

The country experts should also inform the judge of contextual information such as marriage rights and obligations in the country of origin. Are women regarded as property, and are their movements controlled? How heavily does religion inform the judicial process there? Can other extrajudicial or tribal courts overturn or ignore U.S. court custody orders?

The court has a responsibility to educate itself about the myriad cultural complexities beyond immigration status, but we must consider these crucial factors without allowing bias in the court. Judges must develop a deeper understanding of immigrant experiences and expectations, understanding that some may be skeptical of our judicial process. Additionally, courts must be open to the notion that, despite its resources and safety nets, America might not be the best place to seek resolution of a custody dispute involving immigrant parents.

Returning once more to our case example, we find that the wife, a well-established physician in Iran, does not practice here due to a lack of English-language proficiency. Instead, she is the primary caretaker for her young children. Is that heavy parental lifting more recognized and respected in Iran? Should her request to remove the children with her to Iran be permitted, given her extended family and better employment prospects there? What should a judge think about why

she wears her wedding dress to each court appearance — is she eccentric or relying on a treasured custom? Information the family court judge does not know is critical to the equitable resolution of this dispute. But judges cannot simply search the internet or excavate extrajudicial resources to get informed. Culturally informed GALs and attorney-advocates are critical to a judge's knowledge base. In addition, the judge should encourage and allow motions to appoint cultural experts to testify, and each court should develop a roster of available country experts.

Given that a party's first exposure to family court may be related to domestic violence, judges should insist that restraining order applications be the starting point for expansion of access to interpreter services. This will simplify the process of educating immigrant parties about domestic violence and corollary issues such as custody and support. Specific language translations of these corollary rights should be attached to the restraining order application.

These issues often must be decided under serious time constraints and amid high-volume caseloads. Judges and the court staff who support them must develop the cultural capacity to arrive at the fairest result. In cases of self-represented immigrant litigants, family court judges should appoint a GAL and encourage that the immigrant litigant be informed of cultural issues relative to divorce, custody and domestic violence. If the litigant is represented by counsel, then the judge should order the attorney to present such issues to the court.

By taking these time-intensive but necessary steps, all of us in the family court bar can work together to diminish anti-immigrant bias.

An extended [or adapted] version of this article appeared in Family Advocate Winter 2022 Vol. 44 No. 3 (A.B.A. Family Law Section).

**Hon. George F. Phelan serves in the Massachusetts Probate and Family Court since 2010. He graduated as an evening student from New England School of Law where he served as Senior Editor of the Law Review. He also holds an LLM (tax) from Boston University. In his thirty years legal career, Judge Phelan served as a prosecutor, defense counsel, special assistant U.S. attorney, and solo practitioner specializing in elder clients. He received the MBA Community Service Award and served for six years on the Massachusetts Board of Bar Overseers Disciplinary Committee. Judge Phelan was a faculty member at community college, university and at University of Massachusetts Law School from 1999-2013. He has presented at more than 150 seminars involving diverse subjects as family law, domestic violence, women's rights, taxation and estate planning. Judge Phelan has written and presented for Massachusetts Bar Association, Boston Bar Association, Massachusetts Continuing Legal Education, New England Law Review, and the Association of Family and Conciliation Courts (two national conferences). He co-authored "The United States and Women's Rights in Iraq: Legacy Interrupted" in the Women's Law Journal, Vol 97 No. 1 (2012) and "Culture and the Immigrant Experience: Navigating Family Court" in the Journal of the American Academy of Matrimonial Lawyers, Vol. 32 No. 1 (2019). Judge Phelan served active military duty as an Army JAG officer with assignments at the Demilitarized Zone in Korea and deployments to Operations Desert Storm and Iraqi Freedom where he served with the U.S. Army 82nd Airborne Division. He retired at the rank of full Colonel. His military awards include two Bronze Stars. From 2007 to 2009 he served in Baghdad, Iraq as Rule of Law Advisor on a U.S. State Department Provincial Reconstruction Team. For his work with Iraqi women's rights and civil society groups Judge Phelan received in 2009 from Secretary of State Hillary Clinton the State Department's annual Award for empowering women. Judge Phelan was a non-English speaking immigrant to the United States.*

** Annelise Araujo is the founder and principal at Araujo & Fisher, LLC, in Boston. Attorney Araujo has 16 plus years of practice in immigration and family law, including family-based, employment-based band humanitarian applications. She is the immediate past chair of the New England chapter of the American Immigration Lawyers Association (AILA). She currently serves as a liaison for AILA's National EOIR Committee and the Removal Defense Section Steering Committee. She represents clients before the First, Fifth and Ninth Circuit Courts of Appeals, U.S. District Court for the Districts of Massachusetts, Vermont, and Nebraska, the Immigration Courts, the Board of Immigration Appeals and the United States Citizenship and Immigration Services. She was named a Boston Magazine Top Lawyer for 2021 and 2022. She serves on the Boards of Massachusetts Continuing Legal Education (MCLE) and Pathways for Immigrant Workers, and is a member of the Boston Bar Association Immigration Steering Committee. She is a graduate of University of Toledo College of Law.*

**Donald G. Tye, J.D., MSW, is co-chair of the Domestic Relations Group at Prince Lobel Tye LLP in Boston. He has many years of experience as a trial attorney, guardian ad litem, master, mediator, conciliator and attorney for children, and is a frequent lecturer on divorce and child-related issues at law schools, and bar associations in Massachusetts and nationally. He is a fellow of the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers. He graduated from Tufts, and from Washington University in St. Louis, Missouri, with his Juris Doctor and Master of Social Work.*

CASE LAW UPDATE

*By Vic Valmus**

ARBITRATION

*Brooks v. Brooks; **A22A1377***
(February 6, 2023)

The parties were divorced in 2013 and, pursuant to their Settlement Agreement, the parties agreed to arbitrate any future disputes over the calculation of alimony owed by the husband. The husband retired and dispute arose over the alimony. The husband filed a Petition for Declaratory Judgment. The wife filed an Answer and Counterclaim seeking to compel arbitration. The Trial Court granted the wife's Motion and arbitration occurred before a Senior Superior Court Judge previously chosen by the parties, however, there are no transcripts of the arbitration proceeding in the record. The husband argued that he no longer owed alimony to the wife once he retired, and the wife asserted that the husband continued to owe alimony post-retirement. The arbitrator entered an award to the wife continuing alimony and ordered the husband to pay the arrearage that accrued since his retirement and ordered attorney's fees. The husband appeals and the Court of Appeals affirms.

The husband first argues the Trial Court erred by compelling arbitration. The grant of an application to compel arbitration is not directly appealable but is instead an interlocutory matter. Here, instead of seeking an interlocutory review, the husband participated in arbitration and filed the Petition for Discretionary Review once the arbitration award was confirmed. Therefore, the husband's appeal was proper. The husband argues that the dispute concerns the resolution of an ambiguity in the portion of the Divorce Decree providing alimony. The Decree provides that while the husband is employed, alimony will be paid in the amount equal to 50 percent of the husband's W-2 earnings less federal tax withholdings, state income tax withholdings, Social Security and Medicare. Upon retirement by the husband, alimony will be paid in the amount of 50 percent of the husband's W-2 earnings less federal tax withholdings, state income tax withholdings, Social Security and Medicare less 32.5 percent from all form 1099 and Schedule K1 income. Pursuant to the plain language of the arbitration agreement, the claim is arbitrable and the Trial Court did not err in compelling arbitration.

The husband also argues that the Trial Court erred in confirming the arbitration award. The husband argues that the arbitrator ignored the intention of the parties in interpreting the Divorce Decree because the wife double-dipped for which she received half of his pension benefits and, after retirement, receives an additional 32.5 percent which totals approximately 82.5 percent of his pension and leaves him with very little income. However, sufficiency of the evidence is not a ground to vacate an arbitration award. The husband does not demonstrate a manifested disregard of the law as required in the arbitration code. There is no transcript of the arbitration proceedings in the record and there is nothing in the arbitration award on which this Court could rely to find a manifest disregard of the law. Therefore, this argument fails and there is no basis for vacating the arbitration award.

The husband also argues the arbitrator over-stepped his authority by calculating and awarding an arrearage amount and setting a deadline for it to be paid and by awarding attorney's fees. Over-stepping, like the other grounds for vacating arbitration awards, is very limited in scope. Over-stepping has been described as addressing issues not properly before the arbitrator. Establishing the amount of, and requiring timely payment of, past due alimony sums owed is a remedy which draws its essence from the Settlement Agreement. Even assuming, without deciding, that a Trial Court would be required to first make a contempt finding, the arbitration law is clear that an arbitrator may grant relief that a Trial Court would not be allowed to grant. In addition, the Settlement Agreement clearly permits the arbitrator to award attorney's fees, and the husband does not dispute that the issue of attorney's fees was properly before the arbitrator. The husband argues he over-stepped his authority by awarding attorney's fees in the same Order in which he decided the merits because the Settlement Agreement required such fees to be adjudicated after an award on the merits, but there is no transcript of the arbitration hearing in the record.

The husband cannot show prejudice given that he either acquiesced to the procedure or, due to the

absence of a transcript, failed to demonstrate that he objected to it. The husband also argues that the attorney's fees were impermissible on the basis of O.C.G.A. §13-6-11 and only authorizes fees in contract actions and that this is not a breach of contract case. However, 13-6-11 fees are allowable in other cases – such as equity, tort, and contract cases. Here, the Plaintiff did not show that all three provisions of the statute are present, but only one of the three conditions exist, and the husband does not assert any other reasons why 13-6-11 attorney's fees should not be available in arbitration confirmation generally or on the facts of this case specifically.

CONTEMPT/ABILITY TO PAY

Wright v. Wright; ***A22A1586***
(February 28, 2023)

The parties were married in 2013 and at the time, the husband was incarcerated in prison for nearly 3 decades. He was released on June 29, 2020 and moved into the house where his wife was living. Approximately 5 weeks later, the parties separated, and the wife filed a Complaint for Divorce. A final hearing was held for which the husband did not appear and the wife was granted permanent alimony of $500 per month, $500 to reimburse the payment on the house, court costs of $283, and $1,500 in attorney's fees. The husband, through counsel, filed a Motion of Reconsideration and the wife filed for contempt for failure to pay court ordered monies. A hearing was held where the husband argued that he was improperly served with notice of the contempt and had no ability to pay the court-ordered monies and therefore, his failure to do so was not willful. The Court found that the husband did receive reasonable notice of the contempt action and found him in willful contempt, and the amount of $2,500 and all other previously ordered court expenses were due as of March 29, 2022. The Court set out the parameters where the husband could purge himself of contempt by paying an aggregate total of $3,283.50 approximately 30 days after the hearing. If the husband failed to do so, an arrest warrant would be issued. The husband appeals and the Court of Appeals reverses.

The husband claimed the Court erred because he was financially unable to make the payments and the Court erred by ordering him to be incarcerated given his inability to pay. A civil contempt is a willful disobedience of a prior Court Order, and the burden is on the one refusing to pay to show that he has, in good faith, exhausted all of the resources at his command and made a diligent and bonified effort to comply with the Order. The husband testified that he had a 10th grade education, received a GED, and had been incarcerated for approximately 28 years prior to his release. His rent was being paid by the Homeless Resource Network and the only income he was getting was food stamps every month. He was also HIV positive and receiving medical help from the Homeless Resource Network. He attempted to do some tree work after his release from prison, but his body just couldn't hold up.

Here, there is no evidentiary basis from which the Trial Court could have determined that the husband had the ability to pay the wife $500 per month alimony and the other court ordered amounts. The wife claimed the husband had a Facebook page advertising he owned a business conducting landscaping work, but even if it could be inferred from the Facebook page that the business was in operation by him, finding the profits arrived therefrom were sufficient for the husband to pay $500 each month was sheer speculation. The record is devoid of any evidence authorizing finding the husband had the ability to pay the court ordered amounts. The parties were married during the husband's lengthy incarceration and, upon his release from prison, he faced multiple challenges finding employment including the Covid pandemic and his own serious health complications; and his income is comprised of food stamps and the rent he received from the Homeless Resource Network, who also facilitated his medical care. Therefore, the judgment of contempt is reversed.

FIRST REFUSAL/TOLLING

Guven v. Guven; ***A22A1442***
(January 5, 2023)

The parties were divorced in 2021 and the wife was awarded sole ownership of a partially commercial parcel of real estate and the decree required the wife to sell the property according to a process which states in pertinent part: Upon receipt of any offer by a third party, the husband shall have fifteen (15) days after receipt of the notice to notify the wife whether he is exercising his right of first refusal to purchase the property. In addition, the wife shall not be permitted to purchase the property either directly or indirectly

and she is prohibited from selling the property to any relative by blood, marriage or otherwise. Shortly after the divorce, the wife received a 20-page purchase offer from APCI for $8,000,000.00. The husband received the agreement on January 27, 2022, so his 15-day window to exercise his right of first refusal began on that day and was scheduled to end on February 11, 2022. The husband's counsel emailed the wife's counsel asking for the identity of the members of APCI in light of the Divorce Decree's requirement that the wife not sell the property to a friend or relative. Wife's counsel never released the information. On February 11, 2022, the last day of his option, the husband filed an Emergency Motion for Contempt alleging the wife was possibly connected to the registered agent of APCI and questioned the proposed $8,000,000.00 purchase in light of the recent appraisal of $4,350,000.00.

The Trial Court held a hearing and orally ordered the wife to disclose the members of the APCI. On the hearing on contempt, the Court found the sale to APCI did not violate the terms of the Divorce Decree and held that the husband's time to exercise his right of first refusal would have expired on February 11, 2022 and had not expired because he filed his contempt action on that day, thereby tolling the time for him to exercise that right until the contempt action was resolved. Therefore, the Order provided that the husband could exercise his right of first refusal until 5:00PM on the date of the entry of the Order. Before 5:00PM the day the Order was filed, the husband exercised his right of first refusal. The wife appeals and the Court of Appeals affirms.

The wife argues the Superior Court erred by ruling the husband's February 11, 2022 deadline was tolled by the filing of the contempt motion. She points to the rule that after a Final Divorce Decree, the Trial Court has no authority in contempt proceedings to modify the Final Judgment and Decree of Divorce and therefore was an improper modification of the Decree. The Decree also explicitly provided that in the event of a dispute about the purchase qualifications or terms of the sale, the parties shall bring the dispute to the attention of the Trial Court and the Trial Court shall be the arbiter of the dispute. The Divorce Decree is explicit that disputes be brought to the Court for resolution. This is not a case where the Court improperly attempted to modify the terms of the agreement, but imposed reasonable solutions for contingencies about which the Decree was silent. Considering the lack of transparency regarding APCI, the Court essentially paused the clock on his 15-day right of first refusal. It is unrealistic to suggest that such a process would resolve within 15 days. The Trial Court gave the husband no more time than was allowed by the Decree and the Court's determination was a reasonable clarification because it was consistent with the intent and spirit of the Final Decree.

FORUM NON CONVENIENS

McInerney v. McInerney; ***S21A1068***
(March 15, 2022)

The parties were married in 2003 and have 2 minor children and the mother resided in Indiana. She filed a Complaint for Divorce on May 1, 2020 in Byron County, Georgia where the marital residence was located. However, the husband moved to Chatham County just before the wife filed for divorce, the marital residence was sold, and the proceeds were placed in a trust account. The husband's Answer consented to venue and jurisdiction and stated that he resided in Byron County within 6 months of the filing of the Complaint for Divorce. Two months after she filed the divorce action in Georgia, the wife filed a child custody action in Indiana and the parties agreed that Indiana has exclusive jurisdiction over the child custody action. The parties went to mediation to resolve all issues but weren't successful. The husband then filed a Motion to Dismiss the divorce complaint under the doctrine of Forum Non Conveniens pursuant to O.C.G.A. §9-10-31.1(a). A hearing was held on December 30, 2020 in Superior Court granting the husband's Motion and dismissing the Complaint, reasoning that all but the last of the statutory factors weighed in favor of dismissal. The wife appeals and the Supreme Court reverses and remands.

O.C.G.A. §9-10-31.1(a) authorizes the transfer of venue over a case between counties in Georgia when the statutory factors weigh in favor of a transfer, and the statue authorizes a dismissal of actions when a forum outside of Georgia is found to be more convenient based on the application of the same statutory factors. However, the Georgia Constitution provides that divorce cases shall be tried in the county where the Defendant resides, if a residence of this state; if the Defendant is not a residence of this state, then the county in which the Plaintiff resides;

and if the Defendant has moved from the same county within 6 months of the date of the filing of the divorce, if said county was the marital domicile at the time of the separation of the parties, will remain proper. Therefore, while venue in divorce cases is proper in certain constitutionally designated places, the general assembly may statutorily authorize the Superior Court to change venue in those cases and sets forth the certain circumstances in which a party may move the Trial Court to transfer to another proper venue. This also allows the Superior Court to dismiss an action.

The wife argues that the husband cannot move to dismiss the case on these grounds, in good faith, because he chose to sell the marital property and move out of Byron County; he asserted that venue was property in his Answer and Counterclaim; that the Court did not require the husband to present evidence; and several of the factors enumerated improperly shifted the burden on the wife and improperly weighed the statutory factors. However, proper venue is not necessarily the most convenient venue. There are seven (7) statutorily enumerated factors to be considered, the Trial Court held: 1) none of the parties or other relevant witnesses reside in Byron County, no property exists there, and most of the proof pertaining to the case exists in Indiana; 2) witness availability favored Indiana because the parties previously lived there and it was where the custody action was pending; 3) there were no premises to view in Byron County; 4) inadequate evidence was offered to support that the wife's right to pursue her remedy would be compromised by transferring the case; 5) coordination of the divorce and the child custody suit presents unnecessary obstacles giving interplay between child custody and support; 6) there was no local interest in deciding the case because none of the parties resided in Byron County; and 7) the wife was entitled to the traditional deference giving to the Plaintiff's choice of forum.

The wife maintains that the husband should have identified and presented evidence concerning the witnesses who were unwilling to come to Byron County and the cost associated with obtaining their testimony. With regards to the second factor, regarding the availability and cost of compulsory process for the attendance of unwilling witnesses, the Court indicated that instead it considered the availability of witnesses generally. The Court should have determined whether witnesses are unwilling to voluntarily travel to Byron County for trial as opposed to merely being inconvenienced.

With respect to the fourth factor, the Trial Court indicates that the wife's failure to offer adequate evidence that her rights to pursue her remedy would be compromised by transferring the case to Indiana weighed in favor of transfer, but it is the husband not the wife who has the burden of showing that this fourth factor favors dismissal. Though it may often be in the interest of the Plaintiff to produce evidence with respect to the forum inconvenience factors when opposing transfer dismissal, the burden never leaves the moving party.

In reviewing the 7 statutory factors, the Trial Court erred in its legal analysis of the second and fourth factors, and the Trial Court abused its discretion when it exercised judgment that was infected by a significant legal error.

MILITARY RETIREMENT BENEFITS

Smith v. Smith; ***A22A1443***
(January 17, 2023)

The parties were married in 1989 and divorced in 2012. A provision of their initial 2012 Divorce Decree was titled "Military Pensions" which created a formula for which the wife would receive 40percent times the husband's disposable retirement pay at retirement multiplied by the number of months married while the husband was in the military divided by the total number of months the husband was in the military service whether married or not. It also stated that the Court shall maintain jurisdiction to amend or modify this Order to the extent necessary or appropriate to clarify, establish, or maintain the status of this Order as to awarded military retirement payments. In 2015, the parties discovered that the terms must be expressed in years and not months. So, thereafter, the wife filed a Motion to Set Aside or in the alternative to clarify the 2012 Divorce Decree. Thereafter, the Court entered an Amended Divorce Decree which in essence modified the formula from months to years. Sometime after the 2016 Amended Divorce Decree, the husband switched from active naval duty to reservist duty, and retired from the service as a reservist and began to receive retirement benefits.

In 2019, the wife learned of the husband receiving benefits and she filed an application with the Defense Finance and Accounting Services (DFAS) to receive her share from the 2016 Amended Divorce Decree. She was notified shortly after that her application was invalid and that the husband retired as a reservist and his retirement pay was based on the number of points earned, i.e., as a reservist, and therefore, DFAS could not use the formula in the 2016 Order. In January, 2022, the wife filed a motion seeking another modification of the original Divorce Decree, requesting the husband be held in contempt, and claiming she was entitled to reasonable attorney's fees. The wife attached a proposed Order modifying the retirement benefits. The husband filed a response in opposition and also provided a proposed Amended Divorce Decree. After a hearing on the party's respective motions, the Court issued an Amended Divorce Decree striking the provisions at issue and adopting the language used in the husband's proposed Order adding a term that paid a percentage of the husband's retirement pay that he would have earned under a particular hypothetical set of circumstances. The wife appeals and the Court of Appeals reverses and remands.

The wife claims the Trial Court substantively modified the 2016 Amended Divorce Decree rather than merely amending the language such that it complied with the DFAS requirement. Military regulations provided that Divorce Decrees may issue a formula award of retirement benefits or a hypothetical award and provided examples of each. Here, the Trial Court erred by modifying the military benefits to a hypothetical award of retirement benefits rather than a formula award as set forth in both the 2012 and 2016 decrees and, therefore, such a modification was inadmissible because it substantively altered the provisions. One significant difference between the hypothetical award in the 2020 amended decree and the formula award in 2016 decree is that the formula awards factors in the husband's total number of years in the military, whether married or not, as a denominator in the formula to determine the marital share of benefits. In stark contrast, the hypothetical award provides that the wife would be entitled to a flat 40percent of the qualifying benefits presuming the husband served 19 years in the military during the marriage.

Simply put, other than awarding the wife 40percent of qualifying benefits, the Trial Court's 2020 hypothetical award bears almost no relationship to the formula contained in the 2016 Amended Divorce Decree and there is no evidence or analysis in the Court's Order to support a conclusion that the 2020 hypothetical award is equivalent to the 2016 formula award. Therefore, the Trial Court substantially altered the Final Decree and amounted to an unauthorized modification.

MILIRARY RETIREMENT

Torres v. Torres; ***A22A0507***
(July 1, 2022)

The parties were married in 1991 and divorced in 2011. The Settlement Agreement contained a "Retirement Benefits" provision which states: As equitable division of property, the husband shall cooperate with the wife having spousal retirement benefits of the military based upon 18 years of marriage and at the pay grade of E8 using the high 3 retirement computation. A little more than 6 years later, in October, 2017, the husband retired from the military. Soon thereafter, the wife contacted the Defense Finance and Accounting Service (DFAS) to request her portion of the husband's military pension. In response, DFAS stated the Court Order did not provide enough information to calculate the amount of the hypothetical retired pay. It must obtain a certified copy of a clarifying Order which awards the former spouse a fixed dollar amount or a percentage of a member's actual disposable retirement pay. The wife sought a certified copy of the Clarifying Order of the military retirement benefits pay from the trial court. The husband filed a Motion to Dismiss stating that she was requesting modification of the parties' Settlement Agreement. At the hearing, the parties could not remember what the percentage split was, but the husband did not concede that it was a 50/50 split. Neither party presented evidence explaining the marital or spousal portion of the husband's retirement benefits. The Trial Court issued an Order finding that the absence of the agreed upon terms for the percentage split of the pension created ambiguity thus, it had the authority to clarify using parole evidence, stated the parties will equally divide the marital portion of military pension based on the language of the Agreement, and ordered the husband to pay $1,000.00 per month to the wife until DFAS began to pay her directly to cover the arrearage. The husband appeals and the Court of Appeals reverses.

The husband argues that the wife was precluded from seeking relief under O.C.G.A.§9-11-60(g) because she sought a modification rather than the correction of a clerical error. The wife filed a Petition 6 years after the Final Decree and therefore, her options were limited under 9-11-60. In addition, it does not appear in this case that the wife or the Trial Court invoked the Declaratory Judgment Act under O.C.G.A. §9-4-1, et seq. Here, the Trial Court, in denying the husband's Motion to Dismiss, found that the Settlement Agreement contained an ambiguity that could only be resolved by looking to competing evidence of the party's intent. 9-11-60(g) states, in pertinent part, that judgment should be modified only when a clerical error or admission is obvious on the face of the record. Here, the alleged clerical error or admission is not obvious on the face of the record. Here, the evidence does not compel the conclusion that the admission was a clerical error. The Trial Court did much more than supply a missing provision, but ordered the husband to prepare a Military Pension Division Order (MPDO) that equally divided the marital portion of the husband's military pension and made a determination as to how the marital portion of the husband's military pension should be calculated. Neither of these provisions were discussed in the 2010 hearing. The wife argues that the Court may always clarify and interpret its own orders; however, the cases cited by the wife involve the Trial Court's authority to clarify not modify. Therefore, the wife failed to invoke any procedural mechanism to which the Trial Court would be authorized to clarify the Settlement Agreement. Judgment is reversed.

McFadden descents, stating that he would affirm the Trial Court's decision, but would reverse and remand the amount of the arrearage ordered.

MODIFICATION/DUE PROCESS/ JUDICIAL OFFICER/DEVIATION

Perrie v. Sticher; ***A22A1429***
(January 25, 2023)

The parties were divorced in November, 2011 and had one minor child. In January, 2022, Sticher (Father) petitioned to modify custody and child support and the case was assigned to a judicial officer. The parties attended a 30-day status conference and entered a Consent Temporary Order where the husband would have primary physical custody. The judicial officer ordered the parties to attend a 60-day status conference and ordered Perrie (Mother) to undergo a forensic evaluation prior to the 60-day status conference.

However, the Order did not indicate which issues would be addressed at the 60-day conference. At the 60-day conference, the judicial officer issued a Final Custody Order in which it struck the mother's pleadings, because she did not undergo the forensic psychological evaluation as ordered, awarded the father sole legal and physical custody of the party's minor child, and reserved the remaining issues for a final hearing. The mother obtained a new attorney, filed a Motion for Continuance a day before the final hearing, and filed a Motion Pursuant to Superior Court Rule 1000-4 the day before the hearing. At the final hearing, the judicial officer issued a Final Order regarding child support and the de facto custodial arrangement which the parties were voluntarily operating under, ordered the parties each to pay one-half of the extracurriculars, education and unreimbursed medical expenses as well as half the cost of the medical insurance. The Court also awarded the father $20,000 in attorney's fees. The mother appeals and the Court of Appeals reverses and remands.

The wife claimed the Trial Court erred in awarding physical and legal custody to the father because they failed to provide her notice of the substantive issues to be tried at the 60-day status conference and without considering the best interests of the child. Here, the Trial Court issued an Order directing the parties to attend the 60-day conference. However, the Court did not state that it intended to address the issues of custody at this conference. Therefore, the mother was not notified of the issues to be heard at the conference. Additionally, there is nothing in the Court Order or in the Appellate record demonstrating that it found a material change of circumstances and the Court's rationale underlying its ruling is not clear. A change of custody may be granted only if a new and material change of circumstances has happened that affects the child. Therefore, that part of the Order is vacated and remanded.

The mother also argued the Trial Court erred by not granting her request, under Rule 1000-4, to have the Superior Court Judge preside over the parties' final hearing. However, Rule 1000-4.3 states that to be effective, objections to the judicial officer presiding

over the matter must be served on all parties at least 5 business days prior to the scheduling or at least 5 business days prior to the date a matter shall be ripe for a ruling or adjudication. Because the mother's Rule 1000-4 Motion was filed the day before the parties' final hearing, it was untimely and the Trial Court's failure to grant the mother's Motion was not in err.

The mother also argues the Trial Court erred in modifying child support without making the findings of fact or entering the Child Support Worksheets. Here, the Trial Court found that, based on the sharing of custodial time, each party was to pay one-half of the child's extracurricular, education, and unreimbursed medical expenses in addition to one-half of the cost of the health insurance for the child. The Trial Court did not provide any reasoning for the amount awarded or how this award was in the minor child's best interest and, therefore, failed to comply with the statutory requirements for a deviation from the presumptive amount of child support. This part of the Order is vacated and remanded.

The mother also argues the Trial Court erred in awarding the father attorney's fees because the Trial Court failed to properly support its award with adequate findings. Here, the record does not contain any evidence to support the amount of the fee award, and this part of the Order is vacated and remanded.

MODIFICATION/GROSS INCOME/ TRAVEL DEVIATION/PRIVATE SCHOOL

Nelson v. McKenzie; ***A22A0199***
(June 28, 2022)

Shortly after the parties divorced, the mother relocated to Illinois and the father remained in Georgia. As part of the modification hearing, the parties entered into a Modified Parenting Plan and the Trial Court established modified child support but did not include the father's long-term incentive pay in the calculation of gross income awarded $784.17 downward travel related deviation and a non-specific deviation for private school. The mother appeals and the Court of Appeals reverses and remands.

The mother first argues that the Trial Court incorrectly calculated the father's gross income by not taking into consideration his employer's long-term incentive plan (LTIP). In 2018, 2019, and 2020, he received equity grants consisting of approximately $75,000.00 worth of company stock. In 2019, it totaled $26,000.00 and in 2020 it totaled $129,000.00. The father testified that he currently has no vested interest in LTIP and thus no portion of the LTIP is actually available for child support purposes. However, the Trial Court, in considering gross income, shall include all income from any source before deductions of taxes. Thus, even if the award of the LTIP is discretionary and the withdrawal of those funds may be time and circumstance dependent, it is clear that the LTIP is a periodic source and a very recent source of income for the father and therefore, the Trial Court erred by not considering the father's LTIP when calculating his gross income.

Regarding the relocation and downward deviation, in the parties' original Parenting Plan, the father had every other weekend and split holidays. In the Modified Permanent Parenting Plan, he would no longer get every other weekend, but instead would have holiday visitation and summer visitation. The Court granted the father a downward deviation in child support by $784.17 for travel expenses. However, the Trial Court mistakenly failed to consider the father's travel expenses in the context of the Modified Parenting Plan that alters the father's visitation schedule. Therefore, that part of the downward deviation is reversed and remanded to evaluate such a deviation in light of the Modified Parenting Plan.

With regards to the private school deviation, the father was previously paying approximately $1,500.00 in day care expenses per month. The child aged out of day care in 2018 and the mother enrolled her in the British International School of Chicago, which is approximately $25,000-$35,000 per year, and requested an upward deviation in child support. The father testified that this tuition was a significant burden and believed there were less expensive alternatives available. The Trial Court concluded that, as a non-specific deviation, the father should continue to pay $1,500.00 per month towards the private education, which would only cover approximately 51.6 percent of the school. The mother argues the Trial Court erred by treating the cost of the private school education as a non-specific deviation when the cost should be treated as a specific deviation for extraordinary educational expenses. So, at issue here, is whether the Trial Court was permitted to treat the cost of the child's private school as a non-specific

deviation when the Child Support Guidelines expressly characterizes extraordinary educational expenses as a specific deviation. The Supreme Court has indicated there is no hard and fast rule against such a practice in a case where the Trial Court exercised its discretion to craft an equitable balance between parents in a split parenting arrangement. Here, the Order offers no insight into the Trial Court's decision to use a non-specific deviation over the specific deviation and the Court agreed with the mother that the Trial Court's use of a non-specific deviation to permit the father to continue to pay the same dollar amount that he paid towards daycare without any analysis or explanation other than a passing notation that the child's private school is costly is arbitrary. This is not to say the Trial Court must require the father to pay the mother's choice of schools no matter the cost. The plain language of the specific deviation for extraordinary medical expenses reflects that such deviation must be appropriate to the party's financial abilities and to the lifestyle of the child if the parents and the child were living together. This part is reversed and remanded.

MODIFICATION/MATERIAL CHANGE

Maxwell v. Johnson; ***A22A0750***
(October 11, 2022)

The parties were never married, but Johnson (father) legitimated the child in 2011. In 2016, the father petitioned for a modification of the Parenting Plan but was denied and was affirmed on appeal. There was another modification petition filed in 2018, but there are no documents in the record. Then on March 19, 2022, the father filed the current Petition for Change of Custody. Following the hearing, the Trial Court granted the father's Petition and in doing so, the Court maintained the award of joint legal custody, but changed primary custody to the father and awarded visitation to the mother on the 1st, 3rd, and 5th weekends of the month. The mother appeals and the Court of Appeals reverses.

To modify a previous Custody Order, it has to be based upon a showing of a change in any material conditions or circumstances of a party or the child. Up to 2016, there had been no such material change of circumstance. As part of the Trial Court's decision, there was an in-chambers conversation with the child who was days away from being 13 years of age. Both parties and counsels waived their presence. The Court mentioned the child's desire to spend more time with the father and he had mature reasoning. Here, the Trial Court made clear that it was not controlled by the child's desires, but it found his wishes persuasive. However, the parental selection of a child who has reached the age of 11, but not 14 years, shall not in and of itself constitute a material change of condition or circumstances in an action seeking a modification or change of custody of that child. While the facts determined by the Trial Court could certainly support the child's desires, nothing in the record established that these facts constitute a material change of circumstances. The Court also concluded that the mother was cohabitating with the boyfriend who, when exercising visitation with his own children, resorted to using a relative's home because of the space issues at the mother's home.

As for the father's home, the Court found that he was in a stable marriage with 2 children and that the father lived in a neighborhood surrounded by friends. As a result, the Court concluded that the child's desires to live in the father's home was in his best interest because of the sense of security, proximity to friends and family, and his bond with the father and half-siblings. However, the mother had been cohabitating with the same boyfriend since the 2016 Petition to Modify the Custody Arrangement and she testified that they had been together for 4½ years at the time of the final hearing. Further, there was no evidence that the boyfriend's presence negatively impacted the child. As to evidence regarding the child's friend group and the existence of additional support systems though their families, all of the testimony established that these same friends and families have relations dating back more than 6 years to when Johnson and his wife moved to their home. Accordingly, this too was not a new or material change in circumstances.

The Court also included that the child made good grades in his existing private school, which was supported by the record. The Court further found that the father had taken an active role in the child's education and engaged with the child about grades when he sees the child's grades slip. Nevertheless, nothing in the record shows that either fact was a new situation or a material change in circumstances. The record showed that the child spent most of his time living with his mother and there was no evidence that he no longer enjoyed

attending his school or was otherwise struggling in his current school due to being in her care. The Court also found that the mother had been less than malleable towards the father and on occasion the Court finds the mother has acted petty and unreasonable towards the father regarding visitation which had a negative impact on the child. But there was evidence showing that both before and after the Courts 2016 denial of the father's Motion to Modify Custody, the father and his wife had married and had welcomed new babies together, but the mother had not given the father any extra time with the child on those occasions. The father also asked for 3 alternative days during a 2-week period in the summer and she advised such days would not work for her. As to the lack of providing extra visitation days on 3 specific occasions, there was no showing that this was a new material change in circumstances as this happened over the course of many years and two of the three instances happened prior to 2016. Thus, the facts the Trial Court referenced as supporting the child's desires did not constitute a material change of circumstances, as it appears these situations have been ongoing for years even prior to the Trial Court's 2016 determination that a material change in circumstances had not occurred. Additionally, to the extent the Trial Court made a best interest of child determination before first finding there was a material change of circumstances, it erred in doing so.

RELOCATION/EXTRACURRICULAR ACTIVITIES

Wiggins v. Rogers; ***A23A0110***
(March, 2023)

The parties were divorced in 2017 in Cobb County. The parties had a 50/50 custodial arrangement of one child, born in 2011, and no one paid child support. In September, 2020, the mother filed a Motion for Emergency Temporary Hearing in Paulding County because of the mother's concerns about an incident during virtual schooling when the child was in the father's custody and was left home unsupervised. The Court granted the mother temporary primary physical custody. At the final hearing, the mother testified that her new home in Paulding County was approximately 30 miles from the father's home in Cobb County and that the drive had adversely affected the child's mood, focus, and school performance, and, since the temporary physical custody with the mother, the child experienced a huge improvement with her behavior and school performance and received compliment letters from teachers, honor classes, honor chorus and was excited about participating in extracurricular activities. The Final Order awarded the mother primary physical custody, finding material change of circumstances and that it was in the best interest of the child that the mother be awarded primary custody, and ordered the father to pay $1,054.00 in child support and to pay one-half of the extracurricular activity expenses. The father appeals and the Court of Appeals affirms in part and reverses and remands in part with direction.

The father argues the Trial Court erred in awarding the mother primary physical custody because no evidence supported the material change of circumstances and there was no evidence discontinuing the split custody arrangement was in the child's best interest, and the court awarded the mother primary physical custody based solely upon her relocation to Paulding County. Relocation of one parent alone does not constitute a material change of circumstances. Evidence that a child is doing poorly in school constitutes some evidence of a material change of circumstances that adversely affects the child. In addition, difficulty in maintaining a shared custody arrangement can amount to an adverse change in condition also affecting the welfare of the child. Here, there was some evidence that supports the Trial Court's findings that there had been a material change and was not based solely upon the relocation of the mother.

The father also argues the Trial Court erred by requiring him to pay half of the child's extracurricular expenses without making a necessary finding of facts to justify deviation. Pursuant to O.C.G.A.§19-6-15(i)(2)(j)(ii), if a fact finder determines that the full amount of the special expenses described in the division of the extracurricular activities exceeds 7 percent of the basic child support obligation, the additional amount of special expenses shall be considered as a deviation to cover the full amount of the special expenses and must be included in schedule E of the Child Support Worksheets. Here, the Court ordered the father to pay half of the child's extracurricular expenses and made no factual finding to support the deviation, nor was it included on schedule E. On remand, the Trial Court should determine whether the parameters have been met for a specific deviation where the expenses are

above 7 percent of the basic child support obligation and supply written findings of facts.

The mother argues that the requirement of the father to pay half of the extracurricular expenses should be affirmed because he expressly consented to it at the final hearing. However, the general rule is that the action of a party does not waive the Trial Courts compliance with mandated findings. The only exception to the general rule is where a Trial Court enters a Child Support Order without the requisite findings of facts and the former spouse thereafter files a Motion for New Trial and does not raise the failure of the Order to contain such findings. In those circumstances, the lack of written findings of facts are reviewed for the first time on appeal and that issue is deemed waived. Here, the father did not file a Motion for New Trial. Affirmed in part and reverse and remanded with directions in part.

VA BENEFITS/LUMP SUM

Boomer v. Boomer; ***A23A0393***
(March 14, 2023)

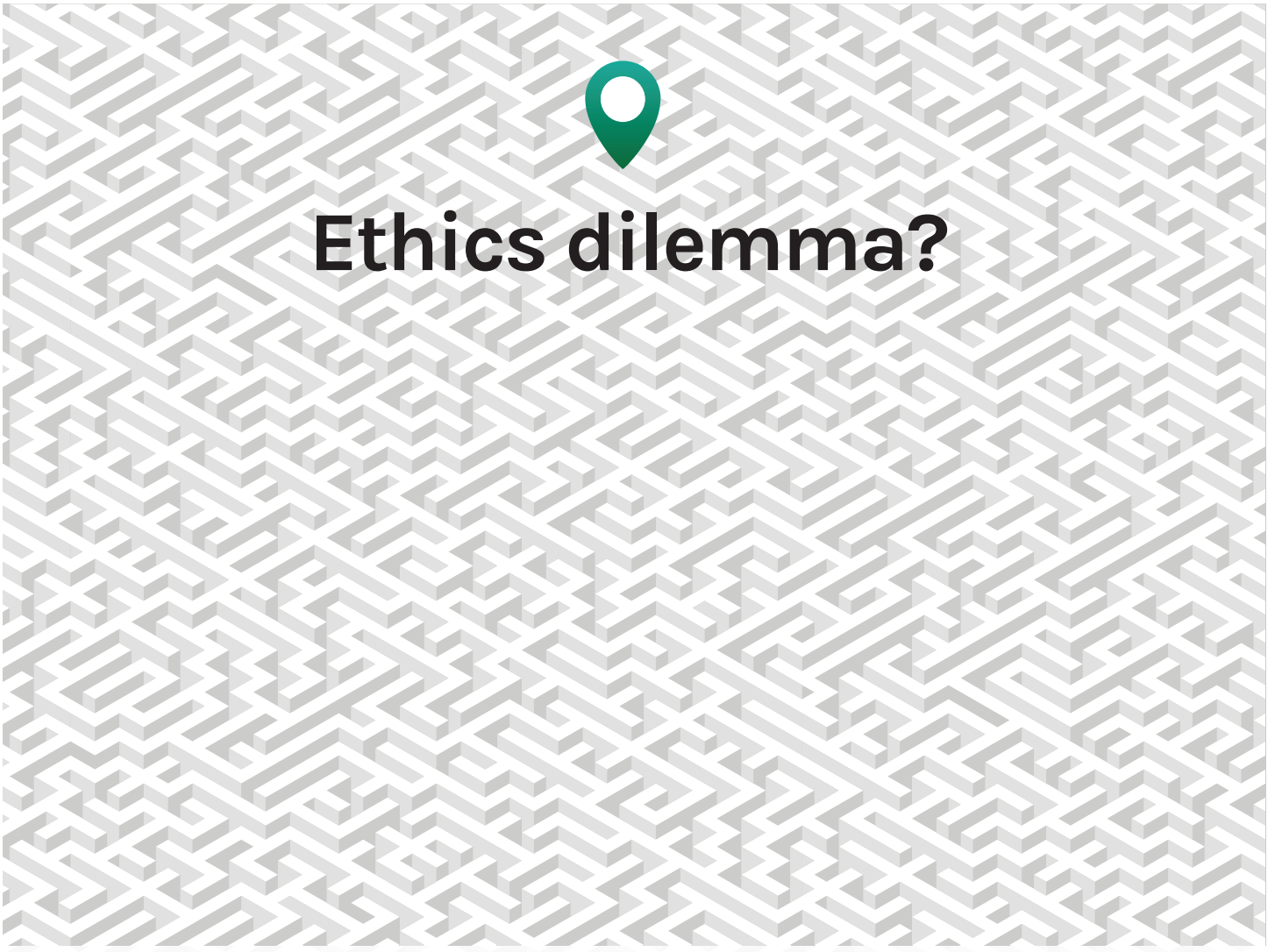
The parties were married in May, 2016. In June, 2017, the husband received a lump sum award of $130,237.30 for retroactive VA disability benefits. At the time, the wife handled the husband's finances and had access to his bank account. Two days after the husband received the lump sum VA benefit, the wife transferred, with the husband's authorization, $60,000.00 from the bank account to her separate bank account. The money was intended to be used for various expenditures for both parties, including the purchase of $20,000.00 worth of stock. Ten days later the wife transferred another $50,000.00 from his bank account to her bank account, this time without the husband's authorization, and the wife never returned the money to the husband. In March, 2019, the wife filed for divorce, seeking equitable division of property. Following a 2-day hearing, the Trial Court issued a divorce decree. The Court found the wife improperly appropriated $70,935.26 from the husband's lump sum VA benefits, which consisted of $20,935.26 that she deposited into her investment account, over which the husband had not authorized, and $50,000.00 she transferred elsewhere. The Court ordered the wife to pay the husband $70,935.26 as equitable division of marital property. The wife filed a Motion for New Trial which was denied. The wife appeals and the Court of Appeals affirms in part and reverses and remands in part.

The wife challenges the Trial Court's ruling that the husband's lump sum VA payment was non-marital property and argues that the Court should have looked at Georgia's analytical approach and that at least part of the award was marital property. The party seeking a division of contested property has the burden of proving that it is a marital asset. Property does not become a marital asset simply because one of the spouses obtains it during the course of the marriage. For example, a personal injury settlement, to the extent it represents compensation for pain and suffering and loss of capacity, is peculiarly personal to the party who receives it and is not a marital asset, however, the settlement that represents compensation for medical expenses or loss wages during a marriage will be considered a marital asset. Whether some or all of the lump sum VA disability benefit received while married may be considered a marital asset or separate estate is a case of first impression for the Georgia Appellate Courts. Under federal law, VA benefits shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whether, either before or after the receipt by the beneficiary, citing 38 USC § 5301. Courts and several other jurisdictions have determined that the anti-attachment clause prohibits categorizing VA benefits, including lump sum retroactive benefits, as a marital asset. This Court finds these decisions to be persuasive and holds that the Trial Court properly concluded the husband's VA disability award was non-marital property. Therefore, the ruling rests on federal law and we do not address the wife's contention that the application of Georgia's analytical approach would lead to a different result.

The wife also contends that evidence was also insufficient to support the Trial Court's finding that she misappropriated $70,935.26 from the husband's lump sum payment. The husband's testimony, that the wife withdrew $50,000.00 from his bank account and kept it without his authorization, was corroborated by the party's bank statements showing the $50,000.00 withdrawal and corresponding deposit was also sufficient to support the Trial Court's finding to that effect and affirms that part of the ruling. The Trial Court also found that the wife misappropriated an

additional $20,935.26. However, the husband testified that the $60,000.00 that he authorized the wife to withdraw was to invest in stocks. The wife testified that she deposited $20,000.00 from the money that the husband authorized her to withdraw into a joint investment account. There were 2 brokerage accounts admitted into evidence that showed that the investment account in the wife's name had a balance of $15,850.15 three days after she filed for divorce on March 31, 2019 and had a zero balance on July 30, 2019. The evidence was sufficient to show only that Joseph made a gift of $20,000.00 to the marital estate for the party's joint use and/or investment. Also, on review, the record reveals no basis for the Trial Court's additional $935.26.

Therefore, the case is remanded to recalculate the marital estate subject to equitable division by including in the estate the $20,000.00 earmarked for investment in the stocks and explain the basis, if any, for its addition of $935.26 to that amount. Here, the ruling is not intended to limit the scope of the Trial Courts inquiry on remand, in so far as any additional issues may be relevant to the equitable division of the recalculated marital estate, including the extent to which the wife may have withdrawn marital assets in the investment account during the pendency of the divorce. Equitable division of marital property doesn't necessarily mean an equal division, but rather a fair one.



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State Bar of Georgia

"HELP – I MISSED THE BOAT!" THE SURVIVOR BENEFIT PLAN OPEN SEASON

*By Mark E. Sullivan**

• SBP – WHAT'S THAT?

One of the time limits in the military divorce process is the one-year deadline for the Survivor Benefit Plan, or SBP. Since this survivor annuity pays 55% of the selected base amount to the surviving spouse/former spouse, adjusted annually for inflation, it can be a significant measure of protection if the servicemember (SM)/retiree dies before the beneficiary. But the SBP election must be registered with the retired pay center within one year of the divorce.

The one-year deadline is often missed because the parties and their attorneys are unaware of this SBP time limit. If there is no timely election of SBP, then it's lost – a big problem for the retiree's former spouse in a military divorce case, since payment of the military pension stops when the retiree dies, thus terminating the former spouse's share of the retired pay. Overlooking this important deadline can also give rise to a malpractice claim.

• OPEN SEASON – A LIFELINE FOR THE FORMER SPOUSE

A new law provides a possible solution to the "missed SBP" issue. Last December, Congress enacted a statute which opens the door to obtaining SBP when "John Doe," the SM/retiree, has not enrolled a spouse or former spouse in the program. The statute is called the Survivor Benefit Plan Open Season, and it's contained in the 2023 National Defense Authorization Act (NDAA). We're in the "Open Season" window right now; the time for the SM/retiree to apply ends January 1, 2024.

This amendment to the SBP statutes provides potential SBP coverage for:

* retirees receiving retired pay, and
* eligible servicemembers or former members who are awaiting retired pay who were not enrolled in SBP or RCSBP (Reserve Component Survivor Benefit Plan) as of December 22, 2022.

In general, a SM/retiree who enrolls during the SBP Open Season will be required to pay retroactive SBP premium costs which would have been paid if he had enrolled at retirement (or enrolled at another earlier date, depending on his family circumstances).

• RESOURCES, LINKS AND OVERVIEW

A general overview of the SBP Open Season program can be found at: https://www.dfas.mil/RetiredMilitary/newsevents/newsletter/December2022-SBPOS23/.

The details are in a notice at the Defense Department's "Military Compensation" page: https://militarypay.defense.gov/Benefits/Survivor-Benefit-Program/.

You can also see important information in a notice entitled "NDAA 2023 Survivor Benefit Plan (SBP) Open Season," which may be found at: https://www.dfas.mil/RetiredMilitary/provide/sbp/SBP-Open-Season-NDAA2023/. This web page includes a link to "SBP Open Season Enrollment - Frequently Asked Questions," as well as a link to the Enrollment Information and the "Letter of Intent" which the servicemember/retiree completes in order to apply.

This is a voluntary election of "Open Season SBP," and it cannot be imposed by a court ordering John Doe to "Make that Open Season application or else!"

Here is a general outline of the process for the servicemember/retiree:

1) He downloads and saves the LOI and completes it.
2) He submits i, using the information shown on the documents.
3) DFAS sends him a cost estimate, and he works out an arrangement for payment of the cost. This can be in a lump-sum amount, a partial lump sum with subsequent monthly payments, or a "payment plan."
4) The retired pay center confirms the enrollment.

Each one-time buy-in arrangement and premium is unique. The SBP costs are based on individual factors and data, such as the ages of the parties, who is the older one, and the age differential. Estimated costs are provided as soon as John Doe submits a Letter of Intent.

How long does it take from beginning to end? The Defense Finance and Accounting Service (DFAS) advises that the normal time for processing an application (through the LOI) is thirty days from when the retired pay center receives a valid, completed, and signed Letter of Intent.

• COURT-ORDERED SBP

Some cautious former spouses, reluctant retirees, or wary servicemembers might raise a concern about the requirement that the Open Season application be voluntary and not coerced by a court order that imposes the requirement to apply for this one-time opportunity. Many military divorce cases contain a divorce decree, a court order, or a settlement agreement that is incorporated into the dissolution, requiring the election of former-spouse SBP coverage. Does that prior court ruling mean that John Doe may not elect Open Season SBP due to the previous court order in the case?

The answer is at Q12-13 in the "Frequently Asked Questions" mentioned above. The text contains a reference to an election to opt into the Open Season SBP being voluntarily made, and not subject to a court order requiring Open Season enrollment. In response to a question about whether the individual can be required to enroll in "Open Season SBP," the answer DFAS provides makes it clear that it's not just any previous court order; it's a current court order requiring Open Season participation which is involved.

Here is the statutory section:

(3) Election must be voluntary. - An election under subsection (a) or (b) is not effective unless the person making the election declares the election to be voluntary. An election under subsection (a) or (b) to participate or not to participate in the Survivor Benefit Plan may not be required by any court.

Sections (a) and (b) in this text refer to SBP Open Season enrollment, not to a previous court order that required SBP coverage for a former spouse. So, a SM/retiree's Open Season SBP election cannot be compelled by a court order. But this doesn't mean that a SM/retiree cannot make a voluntary election, acting pursuant to a previous divorce settlement (from months or years ago) which specifically required him to elect SBP coverage for his spouse/former spouse.

• QUESTIONS AND ANSWERS

Nothing is very simple in the world of military pension division. Here are some questions and answers that may help to clarify the Open Season for SBP:

Q: My ex-spouse elected a LOW amount for the SBP base. Can the Open Season statute fix that?
A: No – the statute does not address raising the basis for SBP. The highest amount for the SBP base is the full retired pay of the servicemember/retiree. The bottom is $300 per month. The court order or the separation agreement should define the SBP base.

The problem with divorce settlements which do not specify the SBP base amount is illustrated in a 2018 Michigan case, *Weatherford v. Bayless*, 2018 Mich. App. LEXIS 2504 [unpublished opinion]. The parties married July 1986, and they executed a consent order for divorce in January 2010 which required the ex-wife to get half of the disposable retired pay of her former husband, a rear admiral, and to be assigned as the former-spouse beneficiary of his SBP within one year of the decree of divorce. There was no mention of the SBP base amount.

The former husband elected a base amount of $300/mo., which would mean only $165/m for the former wife upon his death -- "a precipitous drop," according to the Court of Appeals opinion, from the current $3,000 which the ex-wife was receiving as half of his disposable retired pay. The ex-wife filed suit in 2014 to enforce the parties' January 2010 divorce consent judgment. The trial judge ordered the former husband to elect the ex-wife for full former-spouse SBP coverage based on his full retired pay. Unfortunately, there is no way that he could have made that election after his retirement, so it's unclear what remedy, if any, she obtained to replace the low amount of SBP coverage… perhaps a policy of life insurance.

Q: My former wife, after her retirement from the Navy, selected her new husband as the SBP beneficiary. The divorce decree said that I was supposed to be the SBP beneficiary after the dissolution. Is this statute the answer to my prayers? Can it be used to ditch the new husband and replace him with me, the "military spouse" during the entire term of my ex-wife's service?
A: No – there is no indication in the Open Season statute that the law allows for swaps and replacements for the designated SBP beneficiary (the new husband in this case). This problem, and the one above (the level of SBP coverage and the minimum base) would need to be sent to the appropriate Board for Correction of Military Records to try to persuade the Board that the relief requested is needed to prevent "an injustice" pursuant to 10 U.S.C. 1552.

Q: My ex-wife and I have agreed to get rid of SBP; we think it's too costly and it doesn't fit our needs. Can the Open Season statute help us?
A: Yes. The statute allows the servicemember/retiree to get rid of coverage (with spouse/ex-spouse consent). See the instructions and links above to find out about how to discontinue coverage.

• CONCLUSION

If the Open Season process is successful, then it will certainly bring peace of mind to the parties regarding the death benefit for the former spouse and the SBP coverage which has been obtained when it was thought to be lost. And it would eliminate the need to apply to the Board for Correction of Military Records, with the expected waiting time of about two years, to try to get the records of the servicemember/retiree changed to lock in SBP coverage.

**Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina, and is the author of THE MILITARY DIVORCE HANDBOOK (Am. Bar Assn., 3rd Ed. 2019) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law for over 30 years. He works with attorneys nationwide as a consultant on military divorce issues and in drafting military pension division orders. He can be reached at 919-832-8507 and at mark.sullivan@ncfamilylaw.com.*

Endnotes

1. The pay center is the Defense Finance and Accounting Service for the Army, Navy, Air Force and Marine Corps. The Coast Guard Pay and Personnel Center services retired pay for members of the Coast Guard and the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration.
2. The statute is also known as Public Law 117-263. "SBP Open Season" is found at Section 643.

Child Support Worksheet Helpline

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