

# The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia – Spring 2013



Shared Physical Custody:  
Myths and Misconceptions

# Editors' Corner

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It is unbelievable how quickly time flies. Here we are on the verge of another Family Law Institute that will be spectacular. Jonathan Tuggle has done an amazing job of putting this program together and we look forward to seeing everyone there.



As we know, the Family Law Section, the Bar and the world at large lost a giant recently when Andy Pachman, a long-serving member of the Family Law Section Executive Committee passed away. This is a tremendous loss and Andy and his family will always be in our hearts and minds.

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As for other section news, our same sex legal issues program had record attendance with over 150 lawyers attending, and it was keynoted by former Chief Justice Leah Sears. The Nuts and Bolts seminars have continued to be successful and our section is widely respected throughout the Bar. But most importantly you, our members, will hopefully be getting more and more involved. We appreciate the submissions for the Family Law Review and the wonderful participation on our committees. If you are not involved but want to be more involved, please reach out to one of our committee heads and get involved with committees, whether it is the Diversity Committee, the Membership Committee, the Outside of Atlanta Committee, the Technology Committee, or any other committee that suits your particular interests, please get involved.

We always welcome your suggestions and input and look forward to seeing each of you in Destin this Memorial Day weekend. *FLLR*

IF YOU WOULD LIKE TO CONTRIBUTE  
 ARTICLES TO THE FAMILY LAW REVIEW,  
 OR HAVE ANY IDEAS OR CONTENT  
 SUGGESTIONS FOR FUTURE ISSUES,  
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# Chair's Comments

by Kelly Anne Miles

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Spring has sprung and that always means that the Family Law Institute is almost here! Jonathan Tuggle has put together a fantastic program for this year's 31st annual Institute from May 23 - 25 at the Hilton Sandestin in Destin, Fla. In addition to many, many informative and timely topics, as well as the traditional favorites like "Hot Tips" and Case Law Update, there will be four interactive sessions with panels of judges and the attendees. It promises to be entertaining and enlightening! Jonathan has also scheduled two optional sessions on Thursday and Friday afternoons for those who wish to participate. Eileen Thomas has once again outdone herself in getting sponsors for the Institute. Thanks to all of you who agreed to serve as a sponsor as your dollars really allow us to host a first class Institute. Most important is the many opportunities that the Institute offers to mix and mingle with our colleagues and judges in an informal, relaxed setting. So, if you have not already registered to attend, please hurry and do so by going online to [iclega.org](http://iclega.org).

Our Section is always striving to learn more about the art of practicing family law. For instance, Regina Quick is busy planning the agenda for our Section's annual Family Law Nuts and Bolts Seminars. The seminar will be presented in Savannah on Aug. 23 and in Atlanta on Nov. 22. Hats off to Randy Kessler for a very successful "Same Sex Issues" seminar on March 21, which included former Chief Justice Leah Ward Sears as a keynote speaker. Finally, thank you to John Mayoue, for his hard work, year after year, in putting together the annual "Family and Trial Law Convocation." Each year it keeps getting better and better!

I am thrilled to report that our Section was definitely on the Superior Court Judges' minds during their winter seminar. The Uniform Rules Subcommittee of the judges, consisting of seven judges, met to consider and discuss the suggested changes to the Uniform Superior Court Rules that the Uniform Rules Committee of our Section had recommended to them last summer. Both committees are meeting at the Institute to work on some potential revisions to the Uniform Rules that will, hopefully, result in some positive changes for both the Bench and Bar in our area of practice. I know we are all very appreciative to

our Judges for the time, thought, and consideration that they give to our Section.

Thank you to Rebecca Crumrine for speaking to over 200 fresh, new lawyers at the "Transition into Law Practice Program." Rebecca sharing some information with the attendees on our Section and I have already gotten emails from several of them asking to get involved!

Our Section's second metro mixer was a success! The "mix and mingle" was well attended at Shout on March 13. The best part of attending was meeting new family lawyers and actually having time to get to know them through a real conversation! Thanks to Ivory Brown and Shatoree Bates, yet again, for their energy and enthusiasm in putting together the Section mixers this past year!

We had a record crowd at our Section's Annual Meeting in January. The one hour CLE with the judges was standing room only. Congratulations to our Section's incoming Officers: Jonathan Tuggle, chair; Rebecca Crumrine, chair-elect; and Regina Quick, Secretary. They will do an outstanding job for our Section and I can't wait to see what new heights they take us to!

The responses I received to the blast email I sent to our Section on the passing of our beloved friend, Andy Pachman, was overwhelming. I hope that we all strive to make as much of a positive impact on the lives of others as he did during his short lifetime. In Andy's honor, the annual golf tournament held in conjunction with the Institute will hereafter be known as the Andy Pachman Memorial Golf Tournament. Just the sound of it, makes me smile.

This will be my last "Chair's Comments" in *The Family Law Review* as my year serving you is coming to a close on June 30. It has truly been an honor to represent each of you. Thank you so very much for all of your support, your participation in the Section's activities this year, and for all of your comments. Without any doubt, this Section is the most outstanding group of attorneys in this State, professionally and personally. I especially want to thank my Executive Committee for selflessly giving many, many hours of their time this year on behalf of our Section. It has truly been a year I will treasure for the rest of my life.

Thanks for being a Family Lawyer! *FLR*

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



# Shared Physical Custody: Myths and Misconceptions

by Dr. Linda Nielsen

Is shared physical custody better for children than living with one parent and varying amounts of time living with their other parent – mainly on weekends? Isn't joint physical custody only successful for a small group of well educated, higher income parents who have very cooperative, conflict free relationships – and who mutually agree to share without mediation, litigation or lawyers' negotiations? Since most married mothers do 80 percent of the childcare, after a divorce shouldn't the children live that same proportion of time with her? And should infants and toddlers spend any overnight time with their nonresidential parent in their "tender" years? If not, why not? If so, how much time?

Questions such as these generate a great deal of debate among the judiciary, policy makers and mental health professionals. Unfortunately they also generate myths and misconceptions that are frequently presented as "the research" at conferences and seminars, on the web, or in non-academic articles. At best, these myths far over-reach and exaggerate the findings from only a few of the existing studies. At worst, they have virtually no grounding whatsoever in current research. Either way, misconceptions that are not grounded on a broad spectrum of recent, methodologically sound, statistically significant empirical data have an impact on custody decisions and custody laws. By empirical data I mean research studies where quantitative data has been statistically analyzed and published in peer reviewed academic journals – in contrast to articles where opinions or theories are being presented, often without benefit of peer review. Regrettably we social scientists have done a poor job sharing the empirical research with other professionals or with divorcing parents. As a result, a handful of studies – often outdated or seriously flawed methodologically - are widely disseminated as "the research." In that spirit, this abbreviated overview presents recent research that refutes ten of the most common beliefs related to child custody.

It is better for the children if parenting time is allocated according to the amount of time each parent spent in childcare during the marriage. Since most married mothers do at least 80 percent of the childcare, the parenting time should be allocated accordingly. This perspective, referred to as the approximation rule, is not based on empirical research. This is a debatable opinion - a controversial point of view that has been widely discussed in peer reviewed journals. A full discussion of this debate is provided in Richard Warshak's article in the *Baltimore Law Review*.<sup>1</sup> Several facts must be kept in regard to the approximation proposal. First, most married couples are more equally sharing the parenting time. Employed fathers spend roughly 60 minutes on weekdays with the children while

employed moms spend 90 minutes. This would be the equivalent of 120 overnights with a father after divorce.<sup>2</sup> Fathers under the age of 30 do only 45 minutes less childcare on workdays than mothers do.<sup>3</sup> In two national surveys with 2000 parents, dads spent 33 hours a week with the children and mothers spent 50.<sup>4</sup> Children under the age of 6 require 3 times as much parenting time as older children. And whichever parent gets home from work first or works the fewest hours generally does more of the childcare.<sup>5</sup> The more time the mother works outside the home, the more time the father spends with the children.<sup>6</sup> But the mothers who are most likely to stay home full time with preschoolers are the most poorly educated women who could not earn enough, if working, to pay for child care.<sup>7</sup> Second, married parents' arrangements for their young children are temporary – they are not intended, as are custody orders, to remain in place until the children



turn 18. Third, childcare hours are not synonymous with parenting. The fact that one parent spend more time with the children does not mean that the other parent is doing less parenting or that his or her daily presence is any less beneficial and essential. Infants and toddlers have one primary “attachment figure” to whom they bond more strongly and at an earlier age than they do with their other parent. Given this, they should not be separated from their primary parent for long periods of time –especially not to spend overnight time with their father, except on rare occasion for short periods of time.

The prevailing view among most contemporary attachment researchers and child development experts is that there is not one “primary” attachment figure. Instead, infants form strong attachments to both parents and at roughly the same time. Whatever initial preferences infants might have for one parent disappears by 18 months of age. This is not to say that all researchers agree on this point.<sup>8</sup> Nevertheless, recent empirical research is undermining the traditional beliefs about primary and secondary parents – the belief that an infant’s relationship with the mother is more vital than with the fathers.<sup>9,10,11,12,13,14</sup>

Most infants and toddlers become more irritable or show other signs of maladjustment when they spend

overnight time with their fathers. Given this, there should be little or no overnighing for infants and toddlers. There are only seven studies that have assessed overnighing and non-overnighing infants and preschoolers. None of them found *statistically significant* differences in irritability or other measures of maladjustment related to overnighing per se. Given the confusion and debate on this issue, it is worth providing more details of these studies.

Four studies were conducted 15 to 21 years ago. The first assessed 25 one to five year olds who lived half time with each parent. At the end of one year, those children whose behavior and developmental progress had gotten worse were the ones who had violent, alcoholic, inattentive, or otherwise very dysfunctional parents. The researchers also noted: “The most surprising find was that children below the age of three were able to handle the many transitions in their overnight joint custody arrangements<sup>15</sup>.” The second study included 25 children under the age of two and 120 ages two to five when their parents separated. Four years later, those who had lived 30 percent time with their fathers were better off on all measures of emotional, psychological and behavioral well-being. Moreover 40 percent of those who had not spent overnight time before the age of three with their fathers no longer had any contact with him – a loss that occurred for only 1.5 percent of the overnighing children.<sup>16</sup> The third study compared infants 12–20 months old: those who spent any overnight time with their fathers, those who spent none, and those who lived with married parents. The infants were classified as having a secure, avoidant, ambivalent or disorganized attachment to their mother. A year later 85 percent of them were assessed again. Regardless of family type, the less securely attached infants had mothers who were unresponsive to their needs. And there were no significant differences in attachment classifications between those who overnighed and those who did not<sup>17</sup>. The fourth study included 18 three to five year olds. At the end of two years, those who had lived with their fathers ten days a month were more well adjusted emotionally and no different on social or behavioral adjustment. Moreover, the number living this often with their fathers increased from 25 percent to 38 percent over the two years<sup>18</sup>.

Two studies have been conducted more recently. Interestingly, the one that was not peer reviewed or published in an academic journal before being released by the Australian government has generated considerable attention among mental health practitioners, the legal profession and policy makers. Indeed, it is widely cited as evidence that overnighing is bad for young children. The limitations of this report have been enumerated by a number of internationally renowned researchers<sup>19,20,21,22,23</sup>. For example, the sample sizes in several groups were very small and the vast majority of parents had never been married to each other. Leaving aside its limitations, for children from infancy to age five, there were very few differences between those who never overnighed and those who overnighed. The mean scores were similar on measures of irritability, global health, monitoring their mother, negative response to strangers, developmental





concerns, behavioral problems or emotional functioning and persistence. The four to five years olds who overnighed more than nine nights a month had more attention deficit disorders according to their mothers. But this may very well be linked more to gender than to overnighing. That is, boys were more likely than girls to be overnighing frequently – and boys in the general population are more likely than girls to have attention deficit disorders.<sup>24</sup>

The most methodologically sound study at Yale University is part of an ongoing project. This study assessed 132 children ages two to six whose divorced and never married parents had separated. Of these, 31 percent spent one overnight a week with their fathers, 44 percent more than one and 25 percent none. For the two to four years olds, the overnighers were no different from non-overnighers in respect to sleep problems, anxiety, aggression or social withdrawal. They were, however, less persistent in completing tasks. According to their fathers, but not their mothers, the overnighers were more irritable. Overall then, the differences were small. For the four–six year olds, however, the overnighers had fewer problems than the other children – especially the girls. As the researchers conclude “Overnights did not benefit or cause distress to the toddlers and benefited the four to six year olds” (p. 135).<sup>25</sup>

The final study assessed 24 children ages one to six who overnighed an average of eight nights a month. Almost 55 percent were classified as having an insecure attachment to their mother, which is higher than the average of 33 percent in the general population. Age when the overnights began and parent conflict were not related to the classifications, but mothers’ attentiveness or inattentiveness were<sup>26</sup>. Taken together, these seven studies do not support the assertion that overnighing has a negative impact on infants or preschoolers.

Most children want to live with only one parent and to have only one home. Shared residential parenting is not worth the hassle, according to most children. The vast majority of children who lived with their mothers after their parents divorce disliked having so little time with their fathers.<sup>27,28,29,30,31,32,33,34,35</sup> In contrast, the vast majority who have lived in shared residential parenting families say the inconvenience of living in two homes was worth it – primarily because they were able to maintain strong relationships with both parents.<sup>36,37,38,39,40,41</sup>

When there is high verbal conflict between the parents, children do better when their time with their father is limited. Because more time with their father increases parents’ conflicts, children in shared residential custody are more often caught in the middle of conflicts. With the exception of an ongoing pattern of physical conflict or violence, the vast majority of studies do not support these beliefs. In married and in divorced families, parent conflict is generally related to worse outcomes for the children. However, in regard to custody and conflict, three findings stand out. First, conflict generally remains higher in sole than in shared custody families – especially if the

residential parenting time is not shared. Second, most children are not exposed to more conflict or put in the middle more often in shared parenting families. Third, most children in shared residential custody and those who see their fathers frequently are better off on measures of well-being even when their parents have ongoing conflict. In other words, maintaining strong relationships with both parents helps diminish the negative impact of the parents conflicts.<sup>19,29,42,43,44,45 46,47,48</sup>

The amount of conflict should be a primary factor when deciding how to allocate the parenting time. Unless there is a history of physical abuse or violence, for the reasons just presented, high verbal conflict should not be used as a reason to limit parenting time. Not only can much of this conflict be reduced through parenting programs, but the conflict generally declines by the end of the first year or so after separation. Especially during custody negotiations, conflict is not a reliable predictor of future conflict. Moreover, verbal conflict is generally has fewer negative outcomes for children than having too little fathering time.<sup>49 50,51</sup>

Both parents have to mutually agree to share the residential parenting, otherwise these families will fail. Shared parenting agreements fail if they result from mediation, litigation or legal negotiations. It only succeeds for a small, self-selected group who are very cooperative and have little or no conflict. In the studies that have examined how parents arrived at their shared residential parenting plan, from 20–85 percent of the parents had not initially wanted to share. For many families where the children were successfully living in two homes, the shared parenting plan was a compromise brought about through mediation, litigation, or lawyers’ negotiations.<sup>15,16,18,52,53,54,55,56,57</sup>

Most shared residential families fail. The children end up living with one parent anyway.

Measured anywhere from 2 to 4 years after divorce, 65–90 percent of these families were still sharing the residential custody.<sup>15,16,18,36,41,56,58,58,59</sup>

The quality of children’s relationships with their fathers is not related to how much time they spend together after the divorce. Fathering time, especially time that is not limited mainly to weekends or to other small parcels of time, is closely associated with the quality and the endurance of the father-children relationship. This kind of fathering time is highly correlated with positive outcomes for children of divorce.<sup>49,60,61,62,63,64,65,66,67</sup>

In considering the large body of recent empirical research that refutes these ten myths, it is worth remembering that people can always find some study that will support each of these beliefs. Some may be based on very old data. Others are methodologically unsound. Sometimes differences that are not statistically significant are reported as “a trend”, or “a difference” or “suggestive of.” To be sure, all studies have certain limitations, including those cited in this review. But by using the social science search engines at university libraries to find the

recent peer reviewed articles in academic journals, we maximize our chances of finding the general consensus among the most respected researchers. By sharing more of this research with legislators, mental health workers, judges and lawyers, children and their divorced parents will be better served. *FLR*

*Dr. Linda Nielsen has been a Professor of Adolescent & Educational Psychology at Wake Forest University in Winston Salem, NC for 36 years. She is the author of five books and dozens of peer reviewed journal articles. Her areas of expertise are shared residential parenting for children of divorce and divorced fathers' relationships with their daughters. Her comprehensive reviews of 30 years of research on shared residential custody have been presented at the Association of Conciliation and Family Courts national conference and the Midwestern Family Law Conference, and published in the American Journal of Family Law and the Journal of Divorce and Remarriage. She is frequently called upon to provide summaries of this research to legislators in America and abroad.*

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# The Five Most Important Tax Rules To Understand In Dividing Retirement Accounts In Family Law Cases

by Matthew L. Lundy

Though retirement accounts regularly appear in family law cases, the tax rules associated with these accounts are often misunderstood. The tax treatment of retirement money can best be understood in light of some relatively straightforward provisions of the Internal Revenue Code (the “IRC”). This article is going to discuss what I believe are the five most important tax rules related to retirement accounts. I believe that an understanding of these rules is critical to properly effectuating property distribution.

## Pension Money is Taxed as Income

### 26 U.S.C. § 72(A)(1) PROVIDES:

Except as otherwise provided in this chapter, gross income includes any amount received as an annuity (whether for a period certain or during one or more lives) under an annuity, endowment, or life insurance contract.

### 26 U.S.C. § 402 (A) PROVIDES:

Except as otherwise provided in this section, any amount actually distributed to any distributee by any employees’ trust described in section 401(a) which is exempt from tax under section 501(a) shall be taxable to the distributee, in the taxable year of the distributee in which distributed, under section 72 (relating to annuities).

### 26 U.S.C. § 402 (E)(1)(A) PROVIDES:

For purposes of subsection (a) and section 72, an alternate payee who is the spouse or former spouse of the participant shall be treated as the distributee of any distribution or payment made to the alternate payee under a qualified domestic relations order (as defined in section 414(p)).

When your client actually liquidates their money, they will be taxed. This goes for your client whether they are the participant or the alternate payee, and there is no way around that. That is one of the two primary tax reasons (the second one is addressed below) for utilizing qualified domestic relations orders and similar orders (referred to herein as “QDROs”) to divide retirement accounts. That is to say, a QDRO shifts tax liability by transferring money from a participant’s qualified account to an alternate payee without the participant incurring any tax liability.

So, if your client has a 401(k), you would never want them to take a withdrawal to pay their spouse/former

spouse money for the purpose of property distribution, because they will be taxed on the distribution, and you cannot contract your way around that. This inability to shift tax liability means that you should almost always tax effect these accounts when weighing their respective value against more liquid assets like cash or regular investment accounts. Further, your client may want to consult with a CPA before making a decision whether to withdraw the money or roll it over.

## The 20 percent Withholding

### 26 U.S.C. § 3405 (c) PROVIDES:

1. In general – In the case of any designated distribution which is an eligible rollover distribution – (A) subsections (a) and (b) shall not apply, and (B) the payor of such distribution shall withhold from such distribution an amount equal to 20 percent of such distribution.
2. Exception – Paragraph (1)(B) shall not apply to any distribution if the distributee elects under section 401(a)(31)(A) to have such distribution paid directly to an eligible retirement plan.
3. Eligible rollover distribution – For purposes of this subsection, the term “eligible rollover distribution” has the meaning given such term by section 402(f)(2)(A).

If your client is to receive money from a qualified defined contribution plan pursuant to a QDRO, or if you are structuring a distribution pursuant to a QDRO to benefit both parties, the payee spouse will be taxed on the distribution. This you should know from the previous section. However, you should also know that the plan administrator is required to withhold 20 percent of any distribution to the payee spouse (not including distributions which are rolled over into another pre-tax qualified plan).

You cannot get around this withholding (unless your roll the money over), so if your goal is to provide your client with immediate cash, then you need to strategize around the withholding. For example, if you want your client to net \$10,000, then your client must be awarded \$12,500. Worth noting, however, is that even though the plan will withhold 20 percent automatically, your client’s tax bracket, inclusive of the distribution, may be higher or lower than the withholding itself. Thus, it may be best to consult with a CPA when structuring the distribution.

## The 10 Percent Penalty

### 26 U.S.C. § 72(t)(1) PROVIDES:

If any taxpayer receives any amount from a qualified retirement plan (as defined in section 4974(c)), the taxpayer's tax under this chapter for the taxable year in which such amount is received shall be increased by an amount equal to 10 percent of the portion of such amount which is includible in gross income.

26 U.S.C. § 72(t)(2)(C) specifically exempts payments to alternate payees pursuant to QDROs from the 10 percent penalty. This is an incredible and underutilized loophole for litigants in a family law case. Instead of depleting cash, they can actually use the family law case as a means to exempt distributions from retirement accounts to pay support and attorney's fees. Thus the cash, which is generally going to be necessary to pay for day-to-day expenses already in place can stay in place for such purposes, while only the retirement account is depleted to pay for litigation expenses. If the parties wish, they can simply liquidate the entire account, not subject to penalty.

If your client has a retirement account, it never behooves them to take a withdrawal versus a distribution pursuant to a QDRO. Of course, this means involving the other party in the case, since only a non-participant can be an alternate payee. It is further worth noting that although you can beat the penalty, you can never beat the normal income taxes associated with distributions.

## Rollover Rules

### 26 U.S.C. § 408(d)(6) PROVIDES:

The transfer of an individual's interest in an individual retirement account or an individual retirement annuity to his spouse or former spouse under a divorce or separation instrument described in subparagraph (A) of section 71(b)(2) is not to be considered a taxable transfer made by such individual notwithstanding any other provision of this subtitle, and such interest at the time of the transfer is to be treated as an individual retirement account of such spouse, and not of such individual. Thereafter such account or annuity for purposes of this subtitle is to be treated as maintained for the benefit of such spouse.

Of particular importance here are the legal implications of this paragraph, versus the practical reality of dividing an individual retirement account ("IRA"). Above, the IRC tells us that all we need is a divorce or separation instrument (see 26 U.S.C. § 71(b)(2)) for a definition of such an instrument). As a practical matter however, no IRA custodian will simply take a final judgment and divide an IRA, the way a plan administrator would take a QDRO and divide a 401(k). At a minimum, the IRA will require a signed letter of instruction and acceptance from each party. Additionally, though not legally required, many

IRA custodians require that a "QDRO" be submitted, even though labeling such an order as a QDRO is a legal misnomer, since QDRO are only valid against qualified plans, qualified under ERISA. Whether or not an IRA custodian has a right to demand such an order is a legal question that is probably ripe for consideration. However, as a practical matter, your client will want to resolve their divorce as fast as possible, so in a domestic relations context, it is only important that you take note of the foregoing and advise your client accordingly.

## Who Must be Taxed on Distributions?

### 26 U.S.C. § 402(b)(2) PROVIDES:

The amount actually distributed or made available to any distributee by any trust described in paragraph (1) shall be taxable to the distributee, in the taxable year in which so distributed or made available, under section 72 (relating to annuities), except that distributions of income of such trust before the annuity starting date (as defined in section 72(c)(4)) shall be included in the gross income of the employee without regard to section 72(e)(5) (relating to amounts not received as annuities).

Thus, parties cannot contract for or against being taxed on distributions. I point this out because I have seen attorneys attempt to provide a payee-spouse with tax-free payments from a retirement account. This is not generally possible. If it is the intent of the parties to provide a payee spouse with a certain dollar amount net of taxes, then the parties must gross up the amount to account for taxes, which should be done in consort with the payee spouse's accountant, if possible.

## Conclusion

When attorneys fail to give due deference to the above laws, they create ambiguous agreements and commit errors leading to client dissatisfaction. As a family law attorney, it is easy to get bogged down in state domestic relations law, and to only brush over the IRC and other relevant federal law related to retirement accounts. When dividing retirement accounts, it is critical to give federal laws the appropriate attention, as these laws have a major impact on the parties' distribution of property. If you do that, and consult with the appropriate third parties, your client should be more than pleased come tax time. *FLR*



*Matthew Lundy is a well-known and respected QDRO attorney. He has a great deal of experience in analyzing and interpreting state and federal law related to retirement account division in family law cases. He works primarily in the complex but finite world of dividing retirement accounts,*

*he has a strong background in general marital and family law, and thus he understands the often sensitive nature of the cases in which he is getting involved, and how dividing retirement accounts plays into the larger picture of a family law case.*

# In Memory of Andrew Ross Pachman

By Nancy F. Lawler

I am honored to share with the members of our section some of my fondest memories of Andy Pachman.

Andy started the practice of law as a commercial litigator in a large firm. When he told his boss he was leaving to practice divorce law, the response was "Are you crazy?." Andy joked about that comment often around the office, referring to himself as "Crazy Andy."

I had the pleasure of practicing law with Andy for the next 12 years of his career. He was fun to be around. Everyone loved to work with him. He was low key and humble. He was also really smart. He never was too busy to help out on any project or answer any questions. Andy could prepare for complex trials while also playing poker on his computer. Usually wining both the trials and the poker games.

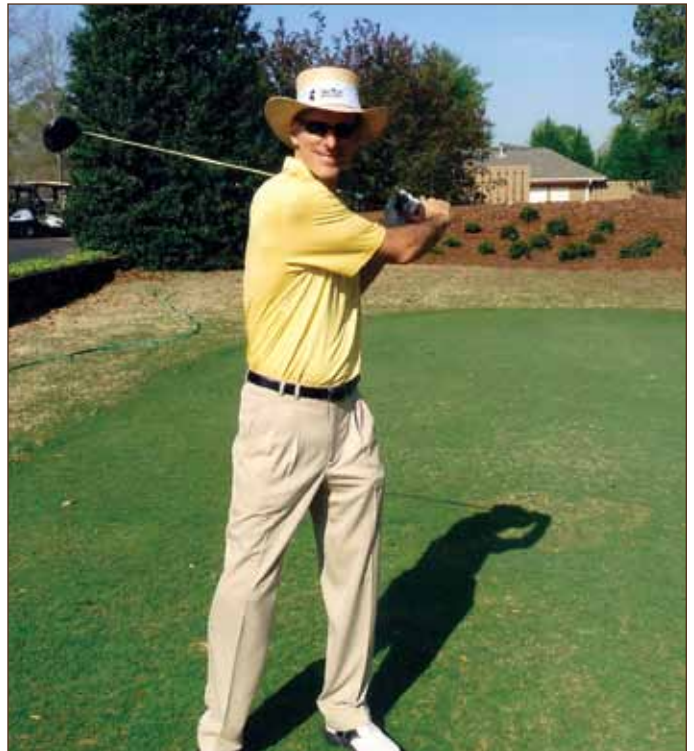
Andy's priority was his family. His greatest pleasure was to spend time with Tara and their two girls, Rylee and Payton. Andy put his family first while also creating a very successful practice.

We have all benefited from the many years and countless hours he spent in leadership roles in our section of the bar. Andy earned the respect of all who were fortunate enough to learn from his legal talents both inside and outside the courtroom. He had many friends because he was a devoted friend in return. Andy's practice flourished because he loved practicing law. But more important to Andy was that his family flourished. He loved that more than anything else.

Andy had a unique sense of calmness. I would describe it as an overwhelming inner peace. Andy's inner strength was on fullest display throughout these last four years. Grace under pressure during his illness. No complaints and no looking back. Moving forward each day steady and sure. Just like the sea turtles he and his girls loved to watch every year at the beach. This wonderful husband, father, friend and lawyer serves as a role model to all of us for a life well lived.

Andy's smile would light up the room.

Let the memories of Andy shine on and on. *FLR*





# Caselaw Update

by Vic Valmus

## Alimony/Property Division

*Gadell v. Oliver*, ADMR, S13A0009 (March 18, 2013)

The parties were married in 1999 and both had children from previous marriages, but did not have any children together. In 2006, the parties were divorced and the Husband was required to pay alimony to the Wife until her remarriage. The Husband also voluntarily agreed to make payments for the benefit of the Wife and children after the Wife's remarriage. The agreement basically required the Husband to pay \$1,200 per month on the first day of the first month following the remarriage of the Wife and each month thereafter with the last payment to be Aug. 1, 2012, if the children are not enrolled as full time students or have not applied for post-secondary education. If the children continued in school, the payments were to continue until Aug. 1, 2015. The Wife remarried in October, 2008, triggering the payments. The Wife died in December, 2009 and the Husband stopped the payments. The administrator of the Wife's estate filed a contempt action against the Husband. The Wife's estate claimed that these payments were part of the property division in divorce and survived the Wife's death. The Trial Court agreed with the Wife's estate, claiming the payments constituted a division of property and required the Husband to make the payments. The Husband appeals and the Supreme Court affirms.

Contrary to the arguments of the parties, the contested payments are neither in the standard category of alimony or property division. The payments appear to be intended for the support of the Wife's children and not for the Wife herself so they are not alimony. The payments did not appear to fall under the concept of property division because the payments are wholly contingent upon Wife's remarriage and there is no guarantee they would ever be required. Here, the payments are a voluntary contractual obligation agreed upon by the Husband for the benefit of the Wife's children. This Court has previously held that parties can voluntary contract to continue child support payments beyond the age of 18 even though these payments are not required by law. As a voluntary contractual obligation, these payments are the Husband's responsibility following the Wife's death. Therefore, we uphold the Trial Court's ruling based on the principle that the Trial Court's decision be affirmed if it is right for any reason.

## Government Assistance In Gross Income

*Singh v. Hammond*, S12A1576 (March 18, 2013)

The parties were divorced in 2005. Husband was awarded primary custody of the two minor children. In 2009, the Wife filed an action seeking child support and modification of custody. The parties eventually agreed to the Wife having primary custody of the children. In

November 2011, the Gwinnett County Superior Court ruled the Wife should be awarded primary custody and child support. However, as part of its Order, the Trial Court also ruled as long as the Wife receives child support payments from the Husband, she shall not apply for any financial assistance for the children from the government. The Court also established for the purposes of child support the Wife's gross income as \$3,000 per month. The Mother appeals and the Supreme Court affirms in part and reverses in part.

With regards to the limitation of government assistance, the presumptive amount of the child support is calculated based upon the best interests of the children and the parties' present gross incomes at the time the award is set. If there is a substantial change in either parties' financial circumstance the needs of the children, the proper procedure for changing the level of child support is under O.C.G.A. §19-6-15. Here, the Trial Court mandates the Wife shall not apply for any financial assistance for the children from the government as long as she is receiving support payments from the Husband. This has nothing to do with the present financial circumstances of the parties or the needs of the children. Such an effort to make a predetermined finding with respect to a potential future modification is unauthorized and sets a precondition on Mother to continue to receive an existing child support award. This eliminates the statutory requirement that the trial Court receive actual evidence of a substantial change. In addition, it also runs afoul of O.C.G.A. §19-6-1 by not requiring the Trial Court make sure that any child support modification revisions are in the children's best interests.

The Wife also argues the Trial Court erred in determining her average gross monthly income of \$3,000 per month. The record is void of any evidence that the Wife earned an average monthly income of \$3,000. All of the Wife's bank statements show that she made less than \$3,000 per month and there is no evidence presented to show that she could have been earning more money or that she is suppressing or hiding income. There is no evidence in the record to support the conclusion that the Wife's income had been at least \$3,000 per month and it must be reversed. However, the Trial Court's ruling that the Husband's income was \$4,238 and is affirmed because there was at least some evidence to support the Trial Court's findings.

## Habeas Corpus

*Alberti v. Alberti*, A12A1851 (March 25, 2013)

The parties were divorced in 2010 and the Mother was designated the custodial parent of their son. The daughter was born after the divorce and a child support order was entered for both children. In 2011, the Mother filed a Petition of Habeas Corpus in the Superior Court of Columbia County, where the Father was illegally detaining, restraining, and withholding custody of their

minor children under the pretense of a void order of the Juvenile Court of Columbia County. At the conclusion of the habeas hearing, the habeas Court announced it was going to grant the habeas petition and place the children with the Mother. The Father filed a Complaint for Change of Custody and Other Relief in the Superior Court of Columbia County on Sept. 29, 2011. The habeas order was entered on Oct. 5, finding that the parties' rights to their son was granted by the divorce decree; the Father had no custodial rights to the daughter; and required the children be immediately returned to the Mother. The Mother answered the Father's complaint for change of custody and asserted the affirmative defense that the Complaint was barred by reason of O.C.G.A. §19-9-23(c) (1). Following the bench trial, the Trial Court denied the Wife's motion and, in its Final Judgment, found a significant change of condition and awarded primary physical custody of the children to the Father. The Mother appeals and the Court of Appeals affirms.

The Mother argues that the Trial Court erred by overruling her affirmative defense. She contends O.C.G.A. §19-9-23 prohibited the Father's complaint for change of custody, inasmuch as his complaint was filed in response to her petition for habeas corpus. The controlling statute is O.C.G.A. §19-9-23, which states, in pertinent part, that a petition to obtain a change of legal custody of the child must be brought as a separate action in the county of residence of the legal custodian of the child. Section (c) states that no complaints specified in this Code section shall be made as a counterclaim or in any other manner in response to a petition for writ of habeas corpus seeking to enforce a child custody order.

The Mother's position is that O.C.G.A. §19-9-23(c) (1) places an unequivocal restriction on the filing of a complaint in any manner in response to a petition for writ of habeas corpus seeking to enforce a child support order. The Father did what was required and he did not file a counterclaim in response to the Mother's habeas corpus position. Rather, he filed a separate action in the Mother's county of residence which happened to be the same county in which the Petition of Habeas Corpus was filed. Even if it can be said that the Father's decision to file the petition for a change of custody was predicated on the Mother's petition for habeas corpus, the Father's petition was not a forbidden response to the Mother's petition for purposes of O.C.G.A. §19-9-23(c)(1). If the Mother's argument was correct, the Father would have been precluded from ever filing a complaint for a change of custody after the Mother's habeas petition.

## Judicial Notice

*Rymuza v. Rymuza* S12F1507 (Nov. 19, 2012)

The parties were married in 2008 and have no children. In 2009, the husband filed for divorce in Houston County, where the marital residence was located. The wife answered and counterclaimed for divorce. After this, the wife filed a Motion to Dismiss based on reconciliation. A hearing was held and the Trial Court found the parties

had sex after the divorce action was filed and dismissed the Complaint. In July 2011, the wife moved back into the marital residence, and in September 2011 the husband filed again for divorce in Houston County. Husband attempted to serve the wife at the marital residence but was unsuccessful. Internet searches did not find her whereabouts and the husband filed an Affidavit for service by Publication that the wife was concealing her location because of a pending Bibb County warrant for her arrest.

The Court issued an order to allow service by publication and no responsive pleadings were filed on behalf of the wife. Late in November 2011 the wife was arrested in Gwinnett County on the Bibb County warrant and she gave the marital residence as her home address for the bond paperwork. The wife appeared at the final hearing. Her attorney, Davis, had not filed an entry of appearance, but told the Court that he would do so. There were no responsive pleadings filed before the hearing. The parties testified and were cross-examined by both attorneys. The Trial Court found the wife's testimony regarding venue not credible and that the evidence showed venue was proper in Houston County.

In January 2012, the Court entered a Final Judgment and Decree of Divorce finding the wife was subject to jurisdiction and venue in Houston County. The same day, the Court entered an Order denying the Wife's Motion to Set Aside. The Court concluded that all issues other



than the divorce itself were resolved by the Prenuptial Agreement; that agreement was found to be valid and enforceable in the first divorce action; and the wife was estopped from attempting to relitigate those issues. Wife appeals and the Supreme Court affirms.

The Wife contends, among other things, that the Trial Court's Order denying her Motion to Set Aside was based on the erroneous premise that all issues, except venue were decided in the parties' first divorce action. However, the wife has the burden of proving the Trial Court erred. The wife failed to include the necessary materials from the first divorce action in the record on appeal. Because a ruling on the effect of the prior case may be raised on appeal, the record or a portion thereof considered by the Trial Court should be included in the record on appeal if the party wishes to enumerate error on the ruling. However, the Trial Court ruling did not indicate that it was taking judicial notice of the records filed in the first divorce action. Therefore, the wife failed to carry her burden to show error.

### Jurisdiction/Contempt

*Ford v. Hanna* S12A1739 (March 4, 2013)

In 2005, the parties were divorced in Gwinnett County. Hanna (Father) later moved to DeKalb County. In 2011, Ford (Mother) filed a petition in DeKalb County to modify the divorce decree with respect to child support and visitation. At the same time, the Mother also filed a motion in DeKalb County for contempt alleging the Father had failed to pay child support due under the decree. The Father moved the Court to dismiss the motion for contempt for want of jurisdiction and the Court granted the motion. The Court reasoned that contempt of a decree is ordinarily punished only by the Court that granted the decree. DeKalb Court distinguished that *Buckholts* was limited to counterclaims for contempt. The Mother appeals and the Supreme Court reverses.

Contempt of a judicial decree generally is punished only by the Court that rendered the decree. A petition to modify a divorce decree, on the other hand, must be brought in the county in which the Respondent resides even if the decree is originally rendered in another county. In some cases, these principles, applied together will produce anomalous results by which a petition to modify an existing divorce decree may be litigated in one court and a motion to enforce the same existing decree of contempt be litigated in another. To avoid this result, there is an exception in *Buckholts* to the general rule for contempt of a divorce decree. If a Superior Court other than the court rendering the divorce decree acquires jurisdiction and venue to modify that decree, it likewise possesses the jurisdiction and venue to entertain a counterclaim alleging the Plaintiff is in contempt of the original decree. Therefore, the *Buckholts* exception permits a Court with jurisdiction to entertain a petition to modify a divorce decree to also entertain a motion for contempt of that decree, whether asserted as a counterclaim to the petition to modify or as an additional claim by the party seeking the modifications.

### Modification

*East v. Stephens*, S12A1803 (March 18, 2013)

The parties were divorced in 2002 and entered into a Settlement Agreement that required Father to pay to Mother \$125 a week as child support and reimburse the Mother for certain miscellaneous expenses that she incurred for the benefit of the children, including one-half of the minor children's school expenses. The Father later petitioned for a modification and the Trial Court granted the petition, in part, in March 2011, directing the Father to pay \$904 each month for child support. The Order on modification said nothing expressly about the miscellaneous expenses but stated that any and all provisions of the incorporated Settlement Agreement not modified herein shall remain in full force and effect. In 2012, the Mother filed a petition for contempt claiming the Father was in arrearage for non-payment of half of the miscellaneous expenses she incurred for the children. The Trial Court rejected the Father's contention that the 2011 modification superseded his obligation in 2002 and that the issue of the miscellaneous expenses had not been raised in the final modification hearing. The Trial Court stated it did not have jurisdiction to modify the miscellaneous expense provision and the March 2011 modification left the provision of the original decree in full force and effect. The Father appeals and the Supreme Court reverses.

The Father argues, among other things, that he is not required to pay the miscellaneous expenses for the children when the modification order directed him to pay the presumptive amount of child support and made no deviations for miscellaneous expenses. The child support provision applies not only to initial determinations but also to modifications. In this case, the Court entered an interlocutory order covering the obligations of the parties while the petition to modify was pending. The Court directed the miscellaneous expense provision shall no longer apply. This established the Court's authority in this regard and therefore the Trial Court had authority to modify the miscellaneous expense provision.

The Child Support Guidelines must be considered by any court setting child support; are the minimum basis for determining the amount of child support; and shall apply as a rebuttable presumption in all legal proceedings regarding child support responsibilities of the parent. Thus, the Trial Court was required to apply the guidelines to any redetermination of child support. Here, the issue of the deviation for miscellaneous expenses was not raised at the time of the final modification hearing and it was not addressed explicitly in the 2011 modification order. The Court neither found a deviation from the presumptive amount nor specifically addressed the miscellaneous provision other than by a statement that "all provisions of the Divorce Decree not modified are to remain the same." It did not apply the guidelines to the miscellaneous expenses as it was required to do if the Father was to continue to be required to pay such expenses. The only legal construction of the March 2011 modification Order is that it lawfully encompassed and modifies the entire child support obligation.



## Priority Jurisdiction

*Ertter, et al. vs. Dumbar*, S12G0452 (Nov. 19, 2012)

In 2008, the Juvenile Court of Coweta County found a 2-year-old female child to be deprived due to the death of both of her parents. The Juvenile Court placed the child in temporary custody of the maternal grandmother on Oct. 10, 2008. In June 30, 2008, the Juvenile Court gave the grandmother custody of the child until she turns 18 years of age pursuant to O.C.G.A. 15-11-58(i). In August of 2008, the uncle and aunt (Ertter) filed a petition for permanent custody of the child in the Superior Court of Cobb County which, among other things, sought a change in custody from the Juvenile Court's order giving the grandmother long term custody of the child. The Cobb Superior Court found that it was in the child's best interest to give permanent custody to the aunt and uncle. The divided Court of Appeals reversed the judgment of the Cobb County Superior Court, applying the doctrine of priority jurisdiction. The Court of Appeals ruled that the Juvenile Court's Order giving custody to the grandmother prevented the Superior Court from exercising its jurisdiction to award permanent custody of the child to the aunt and uncle. The Supreme Court granted a writ of certiorari, reversed the Court of Appeals, and affirmed the Superior Court ruling.

The doctrine of priority jurisdiction, a version of which is embodied in O.C.G.A. § 23-1-5, is invoked to determine which court with concurrent jurisdiction will retain that jurisdiction. Juvenile and Superior Courts in some situations

have concurrent jurisdiction over temporary custody of children. Here, the principal of priority jurisdiction cannot be invoked because the Juvenile Court does not have jurisdiction over petitions for *permanent* custody. In a deprivation hearing over which the Juvenile Court has exclusive jurisdiction, it may award temporary custody of a child adjudicated to be deprived. However, it does not have authority to award permanent custody without a transfer order from the Superior Court. Therefore, the Juvenile Court's authority to place the child in the custody of a willing and qualified relative is not authority to award permanent custody. Since the Superior Court and the Juvenile Court did not have concurrent jurisdiction over the issue of permanent custody, the Court of Appeals erred in applying the principle of priority jurisdiction.

## UCCJEA

*Lucado v. Caherd*, A12A2065 (March 11, 2013)

The parties were divorced in 2000 in the State of Georgia. Primary physical custody of the minor children was awarded to the Lucado (Mother). In 2004, the Fulton County Superior Court modified the divorce decree. In 2011, the Mother filed the instant petition for modification of visitation in Fulton County Superior Court. Caherd (Father) moved to dismiss the action, claiming Georgia no longer had jurisdiction because the parties were residing in Maryland. The Mother filed a motion for hearing on the matter and the Court had a brief conversation with the Judge in Maryland and entered an order denying the Mother's petition for a hearing and transferred the action to the Circuit Court in Maryland. The Mother appeals and the Court of Appeals reverses.

The parties agree that the instant modification action is governed by O.C.G.A. § 19-9-67 (UCCJEA), which states, in pertinent part, "the Court may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and the Court of another state is a more appropriate form." However, the Court shall consider all relevant factors and pleadings in each of eight categories. Here, the Mother asserts that the Trial Court erred in failing to make specific findings in the record regarding these 8 factors. The Father concedes that the Court did not specifically discuss the 8 factors, but argues that the Court was not required to do so because no party requested that the Court make findings of facts and conclusions of law. The language in O.C.G.A. § 19-9-67 is mandatory and requires the Trial Court to consider and weigh the 8 factors listed therein and therefore it is an abuse of discretion for the Trial Court not to set out specific findings on the record or orally demonstrating the Court has considered all of the factors.

## Void Marriage

*Wright v. Hall*, S12A2026 (Feb. 18, 2013)

Hall (the Mother) was married in 1986 when she was 17 years old. There is no evidence that she divorced her first husband before she had a son by Wright in 1996 and



married Wright (the Father) in 1997. They divorced in 2000 and custody of their son was awarded to the Father. The Mother was to pay \$50 per week in child support and the Father was to pay \$50 a week in alimony. Because these amounts were offset, neither party made any payments. In 2007, the Mother's paternal rights were terminated by the adoption of the Husband's current wife. In 2011, the Wife filed a contempt action, alleging the Husband owed alimony from the date her parental rights were terminated. In response, the Husband filed a Motion to Set Aside the Divorce Decree, contending the Divorce Decree was void because there was no valid marriage. The Trial Court denied the Husband's motion. The Husband appeals and the Supreme Court reverses.

The Wife raised on appeal that the Husband's motion is barred pursuant to O.C.G.A. § 9-11-16(f) in that motions to set aside judgments on grounds other than lack of personal jurisdiction shall be brought within 3 years of the entry of the judgment complained of. However, the expiration of the statute of limitation is an affirmative defense and must be raised in a timely manner. By failing to challenge the Husband's motion as untimely, the Wife waived her statute of limitations defense.

The Husband contends the Trial Court erred in holding that estoppel may validate a divorce decree that terminated a void marriage and that his marriage was void from its inception because she had a spouse from an unresolved marriage. Under O.C.G.A. § 19-4-1, a Superior Court may not grant an annulment of a marriage declared void by law in instances where children are born as a result of the marriage. Instead, the parents may file a petition for divorce. This Court allows this type of void marriage to be considered "valid" for the purpose of protecting the interest and welfare of the children and has upheld the Wife's right to recover alimony for herself and for her child as a necessary remedy. Unlike the previous cases, the Wife is not seeking to recover child support or representing in any way the interests of the child born to her second marriage. Instead she was ordered to pay child support to the Father, the custodial parent. Her parental rights

were terminated in 2007, after the Court determined she had abandoned the child by failing to communicate with the child or pay any support during the previous years. Therefore, we conclude that case law and statutes make an otherwise void marriage "valid" for the purposes of protecting the children of the marriage, but not for the purposes of protecting spousal interests unrelated to the child's interest. Because the Wife was awarded spousal support unrelated to the child's protection or interest, she is not entitled to receive alimony under these circumstances.

## Waiver

*Hamner v. Turpen*, A12A2288 (Jan. 30, 2013)

The parties were divorced in 2002, and in March of 2010 Turpen (Father) filed a Pro Se motion for contempt and notice of mediation against Hamner (Mother) in the Gwinnett County Superior Court. Shortly after, the Mother filed a Complaint for Modification of Custody and Visitation which was also filed in Gwinnett County alleging that she and the minor child are residents of Gwinnett County and that Father resides in Okaloosa, Florida. Mother served Father at his residence in Rabun County. Father filed a Pro Se answer to the Complaint in which he simply denied the allegations that he resided in Florida. At the hearing to consolidated matters in 2011, Father's counsel alleged for the first time that venue was improper in Gwinnett County and moved to transfer to Rabun County where he claimed that he resided there during the pendency of the action. He further stated he had lived in Florida on and off and that he had two residences, one in Rabun County and one in the State of Florida and has regularly been in Rabun County since March 25, 2009, and he returned to live in Florida in October, 2010. The Trial Court granted the Motion and Mother appeals and the Court of Appeals reverses.

Mother contends the Trial Court has no authority to grant the Motion to Transfer because Father waived any defense of improper venue. Improper venue is a defense must be asserted a responsive pleading or by a motion denying before or at the time of the pleading. Improper venue clearly may be waived even in child custody cases. Here, Father did not raise the defense of improper venue until the hearing on the contempt action and Motion to Modify Custody. A general denial to his allegations that he was in Florida is insufficient to raise improper venue as a defense. While pro se Defendants are held to a less stringent pleading standard, he provided nothing in the answer that could be interpreted as a claim that the action should be held in Rabun County where he resided. Therefore, the Trial Court was without authority to grant his Motion to Transfer the action to Rabun County. **FLR**



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# Docs for Division

by Mark E. Sullivan

When you're doing a military divorce case and it comes time to deal with the military retirement benefits, you should know in advance what documents need to be reviewed. This rule applies whether you're the attorney for the servicemember (SM) or retiree, or you represent the spouse or former spouse. You need to have a certain number of "docs" in order to understand the process, the current or prospective retired pay of the member or retiree, and what benefits are available or at risk for the spouse/former spouse.

## Active Duty and Reserve Service

When the individual ("John Doe" in this example) is currently on active duty, you'll need the Thrift Savings Plan statement (see below) and the Leave and Earnings Statement, or LES. The latter provides information on the pay grade of John, his date of initial entry into service, his current pay, his Social Security number and other data which will help in preparation of a military pension division order. The specifics which the LES gives include the following:

1. **NAME:** The member's name in last, first, middle initial format.
2. **SOC. SEC. NO.:** The member's Social Security Number.
3. **GRADE:** The member's current pay grade.
4. **PAY DATE:** The date the member entered active duty for pay purposes in YYMMDD format. This is synonymous with the Pay Entry Base Date (PEBD).
5. **YRS SVC:** In two digits, the actual years of creditable service.
6. **ETS:** The Expiration Term of Service in YYMMDD format. This is synonymous with the Expiration of Active Obligated Service (EAOS).

The LES is issued electronically twice a month to active military personnel. The first LES shows all pay and entitlements for the month. The second LES of the month will not have all required information; if the SM elects to be paid twice a month, the second LES will only show the amount paid along with the basic information. Practitioners should request more than just one LES to ensure they receive all the information.

RC personnel (the RC stands for Reserve Component, which means National Guard and Reserve) will have an annual form called RPAS, or Retirement Points Annual Statement, which shows how many retirement points they have accumulated in that year and in previous years. The RPAS should, but does not always, reflect periods spent on active duty, both annual training, and prior active duty service. Practitioners sometimes get confused when SMs have service in both the active and reserve component.

SMs can obtain this from their branch of service – it's not a public record. You can also get valuable information on what rank the RC member is, when he or she entered military service, and what the monthly pay is for periods of active duty (such as the Annual Training that each RC member serves once a year) by obtaining his or her most recent LES.

## Active-Duty Retirement

If John Doe has already retired from active duty from the armed forces (Army, Navy, Air Force, Marine Corps or Coast Guard), here are the documents which should be available for analysis. They may be obtained either from the retiree or from the federal government:

1. Letter from DFAS showing expected amount of pay and calculations
2. All Retiree Account Statements (RAS) issued since date of retirement
3. Retirement orders
4. All disability rating decision letters from the Department of Veterans Affairs (VA)
5. DD Form 214, (Member Service Record, issued upon discharge). If SM was on active duty in the National Guard, he or she will have an NGB 22, not a DD Form 214
6. Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage, DD Form 2656-1
7. Data of Payment for Retired Personnel, DD Form 2656
8. Forms 1099-R
9. Thrift Savings Plan statements

### LETTER FROM DFAS.

Several months before John Doe retires, he'll get a letter from the retired pay center that shows him exactly how his retired pay is computed, how many years of creditable service were counted, and what amounts are deducted from his total retired pay (such as taxes and SBP premium). Don't expect to find VA waiver information here; John hasn't gotten that yet if he has not yet retired.

### RETIREE ACCOUNT STATEMENT.

This is the retiree's "pay statement." It is issued electronically and a new one is generated on a regular basis, and always when there is any change in regard to one's retired pay – whether it's reduced tax withholding, a change in allotments, or an increase in the VA waiver. Every retiree can access the RAS by using the secure website of the retired pay center. For DFAS (Defense Finance and Accounting Service), which handles all of



the armed services except the Coast Guard, the “MYPAY” secure website address is <https://mypay.dfas.mil>. Signing up for service is easy. Once John Doe is signed up and is looking at the web page, all that is needed is his login ID and password. It takes less than a minute to log in, select the form involved, click on “Printer-Friendly Version,” and then print it. See ATCH 1 for an example.

You can find on the RAS the total amount of monthly retired pay, any mandatory deductions from it (e.g., VA waiver, Survivor Benefit Plan premium) to arrive at taxable retired pay, and the taxes which are withheld from retired pay. It will also show the type of SBP election and the birthdate of the beneficiary. The RAS also shows voluntary allotments and any waiver of retired pay that exists due to receipt of disability compensation from the Department of Veterans Affairs. If the individual cannot or will not produce it, then obtain it from the retired pay center using a release signed by the individual (see ATCH 2 below) or, if he’s uncooperative, a court order or subpoena signed by a judge.

#### **RETIREMENT ORDERS.**

This is a document, usually one sheet of paper, which specifies the facts regarding retirement. It might state, for example, that Major John Q. Doe, SSN 123-45-6789, was retired from the U.S. Army on May 31, 2012. Retirements always take place on the last day of the month, and the first payment arrives a little over a month later – in this case, on July 1, 2012. That’s because you have to survive for the month in order to be entitled to retired pay for it. This document is helpful in tracking down retroactive payments. If the individual retired on 5/31/12 and started receiving retired pay on 7/1/12, then you will be able to determine how many months (or years) he’s been collecting it without sharing any portion with your client, Mrs. John Doe!

#### **DISABILITY RATING DECISION LETTERS.**

Upon retirement, John Doe can visit the nearest VA hospital for a physical. This may result in a notification that he has one or more service-connected disabilities (wounds, illnesses or other medical conditions). The notification is in the form of a letter. The decision letter from the regional office of the Department of Veterans Affairs will tell you what his disability rating is. If it’s less than 50 percent, then there’s a dollar-for-dollar reduction in John Doe’s retired pay, which means a similar lowering of the share apportioned to Mrs. Doe by the court. This will show up on the RAS as a “VA Waiver,” which is entered as a deduction from John Doe’s total retired pay before you get to “taxable income.”

#### **DD FORM 214.**

This is the discharge certificate for John Doe. It shows all dates of his service for his entire career.

#### **DD FORM 2656-1.**

This form is used for election of coverage under the Survivor Benefit Plan (SBP), and it shows what the SM/retiree has chosen. If the divorce is about to occur or has already been granted, this should reflect former spouse coverage so as to protect the flow of funds for Jane Doe,

the ex-wife, after the death of the SM/retiree. If John Doe dies first, Jane can receive 55 percent of his retired pay for the rest of her life if she has “former spouse coverage” and does not remarry before age 55. A former spouse election must be made by John on this form and it must be sent to the retired pay center within one year of the divorce.

#### **DD FORM 2656.**

This form covers the information which the retired pay center, usually DFAS, needs to process continuous payments of retired pay and former spouse payments from the pension.

#### **FORM 1099-R.**

This is the retiree’s equivalent of a W-2 form. The retired pay center issues this at the end of January of each year, covering retired pay for the previous year. John can get this from the secure DFAS website. If he’s not signed up, it comes by mail (just like a W-2 form).

#### **THRIFT SAVINGS PLAN (TSP) STATEMENTS.**

This tax-deferred retirement account is similar to a 401(k) plan. Individuals who participate get a “Thrift Savings Plan Participant Statement,” which can either be an Annual Account Summary or a Quarterly Account Summary. On the bottom of the second page on the right will be found “Form TSP-8” and you can tell if it’s a uniformed services TSP statement (i.e., a military TSP as opposed to a federal civil service TSP statement) by checking on the first page under the account number and



individual's date of birth. You should find "Retirement Coverage: Active Duty."

## Guard or Reserve Retirement

When John Doe has served in the National Guard or the Reserves, then you're dealing with an "RC retirement." As mentioned above, RC stands for "Reserve Component," which means Guard or Reserve service leading to retired pay.

Be careful in using the verb "retire" when referring to RC personnel, since it can have two meanings. One meaning is when John begins to receive retired pay. This is "pay status" for him; it's usually at age 60. Another meaning is the point in time when John stops drilling and applies for retirement. Once this occurs, he's in what is called the "gray area," since the ID cards for these former RC personnel used to be gray.

If John Doe is or was an RC member, then you have a different list to cover. Here are the documents which should be available. You can get them either from John Doe or from the federal government:

1. All Retirement Points Annual Statements (RPAS)
2. Notice of Eligibility (NOE or "20-Year Letter"), sent upon attainment of 20 creditable years of Guard or Reserve service
3. Reserve Component Survivor Benefit Plan (RCSBP) Election Certificate, DD Form 2656-5
4. Application for retirement
5. Retirement orders
6. All disability rating decision letters from the Department of Veterans Affairs (VA)
7. Thrift Savings Plan statements

### RPAS STATEMENTS

These are issued once a year by the Reserves. They show how many AD (active duty), ADT (active duty for training) and IDT (inactive duty for training) points have been accumulated for the year by John Doe. For an explanation on how this works (which is way beyond the scope of this article!), go to: <https://www.hrc.army.mil/tagd/retirementpercent20pointspercent20accountingpercent20systempercent20rpas> or visit the Human Resources Command (HRC) of the Army at [www.hrc.army.mil](http://www.hrc.army.mil), type "AR 140-185" into the search window, then click on "Retirement Points Accounting System." If you want to estimate John Doe's retired pay based on the number of points he acquired (and other factors), go to the above HRC website and type into the search window "retirement points calculator."

HRC no longer mails the annual or revised AHRC Form 249-2-E to Reserve soldiers. Soldiers must visit the "My Record Portal" at the secure HRC website to view and print their own personal copy of the annual points statement, AHRC Form 249-2-E. For additional assistance, soldiers may contact the Human Resource Service Center at 1-888-

276-9472. HRC does not maintain a record of National Guard Retirement points. NG soldiers maintain their own personal copy of NGB 23, and they submit it along with their retired pay packet when applying for retired pay to ensure that the NGB 23 is placed in their records.

AR 140-185 governs the awarding and crediting of retirement points. Additionally, Department of Defense Instructions 1215.7 and 1215.9, as well as Department of Defense Financial Management Regulation Volume 7A, Chapter 1, and AR 140-1 provide retirement point regulatory guidance for the military services.

National Guard soldiers have their retirement points recorded in a separate retirement point accounting system. Upon retirement, NG soldier points are not automatically fed into RPAS. NGB Form 23 is used as a record of the NG duty performed by a soldier. Before a former or retired member of the National Guard can start to draw retired pay, he or she must submit a retired pay certification packet (including a summary of all retirement points earned while in the NG) to the HRC Retired Pay Office. Upon certification of retired pay, HRC forwards the certification to DFAS.

### NOE

The "20-Year Letter," as this form letter is commonly called by those in the Guard or Reserve, signifies the milestone of 20 creditable years of service. In addition, it requests a decision on what a married SM will do regarding a survivor annuity, known as the Survivor Benefit Plan (see below).

### DD FORM 2656-5

This form is where John Doe makes the decision on his survivor annuity. There are three options for Survivor Benefit Plan coverage for married RC members:

- Option A - John can choose deferred decision (meaning he wants to wait until he attains pay status to decide);
- Option B - John can select deferred coverage (payments to Jane would start at "pay status," usually age 60); or Option C - John can select immediate coverage.

The first two options require Jane Doe's written consent.

### APPLICATION FOR RETIREMENT

This is John's request to stop drilling and be transferred to the Retired Reserve. It means that he will no longer be accumulating points toward retirement. Unless John decides to take a discharge (which is infrequent), which would mean that he's not subject to recall and his pay grade and years of service are frozen, he'll be paid – upon attainment of pay status – according to his pay grade at that time, not at the time he applies for retirement.

### RETIREMENT ORDERS

See above under "Active-Duty Retirement."

### DISABILITY RATING DECISION LETTERS

See above.

**THRIFT SAVINGS PLAN (TSP) STATEMENTS**

See above.

(Note: If John is already in pay status, then you would want to obtain the RAS and Form 1099-R, as with an active-duty retiree).

**Concluding Comments**

Forget your umbrella? Don't let the "paper tiger" rain on your parade! All these papers can be your next "Excedrin headache!" If you don't do this type of case often, you should consider associating co-counsel or a consultant. Sometimes the "sidekick" you hire will be a Guard or Reserve judge advocate; sometimes you'll want to reach out to a military retiree who used to be a JAG officer. Wherever you go, remember that the duty to obtain competent co-counsel is an ethical requirement. A consultant for your next military case will:

- Know the statutes (the Uniformed Services Former Spouses' Protection Act, or USFSPA, found at 10 U.S.C. 1408; the Survivor Benefit Plan, found at 10 U.S.C. 1447-1455; and the numerous military retirement sections in the U.S. Code);
- Understand the rules (the DODFMR, or Department of Defense Financial Management Regulation, and the parallel regulations for Coast Guard, Public Health Service and National Oceanographic and Atmospheric Administration, or NOAA);
- Know the law in other states (some states have NO cases or statutes on such issues as who pays for SBP, what the SBP benefit level is, and division of accrued leave; knowing what other states are doing in these areas can provide useful guidance for your trial judge);
- Have examples (samples of such documents as the Leave and Earnings Statement, the Retiree Account Statement or the TSP Quarterly Statement, so you can provide these to the other side when the opposing party professes ignorance about what document you're talking about); and
- Know the ropes (have contact points within DFAS and other federal agencies who can answer questions). *FLR*



Mark Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, N.C. and is the author of *The Military Divorce Handbook* (Am. Bar Assn., 2nd Ed. 2011) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Sullivan has been a

board-certified specialist in family law since 1989. He works with attorneys and judges nationwide as a consultant and an expert witness on military divorce issues in drafting military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com.

ATCH 1 – Retiree Account Statement (first page)

RETIREE ACCOUNT STATEMENT					
STATEMENT EFFECTIVE DATE DEC 16, 2005		NEW PAY DUE AS OF FEB 01, 2006		SSN 123-45-6789	
PLEASE REMEMBER TO NOTIFY DFAS IF YOUR ADDRESS CHANGES Major John Q. Doe, USAF (Ret.) 123 Green St. Apex, NC 27511-1234				DFAS-CL POINTS OF CONTACT  DEFENSE FINANCE AND ACCOUNTING SERVICE US MILITARY RETIREMENT PAY PO BOX 7130 LONDON KY 40742-7130 COMMERCIAL (216) 522-5955 TOLL FREE 1-800-321-1080 TOLL FREE FAX 1-800-469-6559 myPAY <a href="https://myPay.dfas.mil">https://myPay.dfas.mil</a> 1-877-363-3677	
PAY ITEM DESCRIPTION					
ITEM	OLD	NEW	ITEM	OLD	NEW
GROSS PAY	2,746.00	2,746.00	FTW	191.31	209.05
VA WAIVER	391.30	473.04	ALLOTMENTS/BONDS	40.00	40.00
SBP COSTS	178.28	178.28	NET PAY	1,744.11	1,844.63
TAXABLE INCOME	1,975.42	2,093.68			
PAYMENT ADDRESS			YEAR TO DATE SUMMARY (FOR INFORMATION ONLY)		
DIRECT DEPOSIT			TAXABLE INCOME: 1,975.42 FEDERAL INCOME TAX WITHHELD: 191.31		
TAXES					
FEDERAL WITHHOLDING STATUS: SINGLE			TOTAL EXEMPTIONS: 01		
FEDERAL INCOME TAX WITHHELD: 209.05			SURVIVOR BENEFIT PLAN (SBP) COVERAGE		
SBP COVERAGE TYPE: SPOUSE AND CHILDREN		ANNUITY BASE AMOUNT:		2750.50	
SPOUSE COST: 176.78		55% ANNUITY AMOUNT:		1,512.77	
CHILD COST: 50		40% ANNUITY AMOUNT:		1,100.20	
		SPOUSE DOB:		12 DEC 1945	
		CHILD DOB:		13 MAR 1996	
THE ANNUITY PAYABLE IS 55% OF YOUR ANNUITY BASE AMOUNT UNTIL YOUR SPOUSE REACHES AGE 62. AT AGE 62, THE ANNUITY MAY BE REDUCED DUE TO SOCIAL SECURITY OFFSET, OR UNDER THE TWO-TIER FORMULA, THAT REDUCTION MAY RESULT IN AN ANNUITY THAT RANGES BETWEEN 40% (\$100.20) AND 55% (\$12.77) OF THE ANNUITY BASE AMOUNT. THE COMBINATION OF THE SBP ANNUITY AND THE SOCIAL SECURITY BENEFITS WILL PROVIDE TOTAL PAYMENTS FROM DFAS AND THE SOCIAL SECURITY ADMINISTRATION OF AT LEAST 55% OF YOUR BASE AMOUNT. THE ACTUAL ANNUITY PAYABLE IS DEPENDENT ON FACTORS IN EFFECT WHEN THE ANNUITY IS ESTABLISHED.					

ATCH 2 – Release

**PRIVACY ACT RELEASE FORM**

**DATA REQUIRED BY THE PRIVACY ACT OF 1974 (5 U.S.C. 552A).** AUTHORITY: Title 5 U.S.C. 552, Title 5 U.S.C. 552a, Title 5 U.S.C. 551, DoD 5400-7-R, and DoD 5200.1-R. PURPOSE: To obtain and maintain information upon which to base a reply or inquiry. ROUTINE USES: Data may be provided under any of the DoD "Blanket Routine Uses" published at <http://privacy.defense.gov/notices/>. Disclosure: Voluntary; however, if you fail to provide all the requested information DFAS may not be able to fulfill your request in a timely manner.

I authorize the federal government, and any agency or department thereof, to release the following documents to [ATTY NAME, ADDRESS]:

[list documents here] \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Date \_\_\_\_\_

Signature \_\_\_\_\_ Social Security Number \_\_\_\_\_

Printed Name \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_

Home Telephone \_\_\_\_\_ Work Telephone \_\_\_\_\_

Date of Birth \_\_\_\_\_



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# Terminating Marital Settlement Agreements Under The Copyright Law

by Ivan Hoffman

The matters discussed in this article are speculative. There are no reported cases to look to which are on “point.”

## Here is the situation

Songwriter, screen writer, director of film or television shows, recording artist, painter, writer or similar creative party (for simplicity in this article, all such creative parties are called “author”) owns rights in and to certain works. These rights can be rights of copyright or rights in contracts whereby the author relinquished his or her copyright rights in exchange for contract payments such as royalties, fees, advances and the like. The works can be musical compositions, sound recordings (provided they were first recorded after Feb. 15, 1972), books, works of art, screen plays and similar works.

As things would go in this “hypothetical,” the author and his or her spouse get divorced. (Would that it were only a “hypothetical.”) As part of the divorce contest, the spouse claims rights in those said copyright or contract rights and, pursuant to a property settlement agreement approved by the court, the spouse is granted rights in and to the said copyrights or contract rights.

However, depending upon the facts and circumstances of the given case, the transfer, in the form of the said agreement, by the author of rights in and to the said copyrights or contract rights may be subject to being “taken back” in whole or in part by either the author or the children or subsequent spouse of the author. And even if the said agreement is not terminable, the rights to terminate transfers that may have been made by the author (or in some instances by others) may be exercised by parties other than the spouse to whom the rights were transferred, operating as a de facto termination of the divorced spouse’s rights at least as to those agreements. Whether this is so or not depends upon the operation of the federal copyright law on that transfer to the spouse. In particular, the said law contains several instances in which those rights may be able to be taken away from the spouse who received those rights in the divorce settlement agreement.

These situations are very fact-specific and complex in analysis. Below are some, but certainly not all, of the examples. See if any of these fit your or your client’s scenario.

## Scenario 1

If the copyrights that were transferred were first registered in the United States before Jan. 1, 1978, then those copyrights were subject to the “old” copyright law regarding renewal rights. Before that date, copyrights

existed for 2 separate terms: an initial term of 28 years and then a renewal term that previously was also 28 years but, effective Jan. 1, 1978, was extended to 47 years and is now 67 years. For the sake of simplicity in a very complex situation, I will leave out of this article issues related to the need to file renewal copyright applications for some of these copyrights.

So the scenario plays out this way: the divorce settlement covered these “old” copyrights and after the divorce, the renewal terms arose.

Seventeen USC Section 304 of the copyright law provides which parties are entitled to renew the copyright into the renewal term. For the sake of this article, the relevant section is below:

- C. In the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work —
  - i. the author of such work, if the author is still living,
  - ii. the widow, widower, or children of the author, if the author is not living,
  - iii. the author’s executors, if such author, widow, widower, or children are not living, or
  - iv. the author’s next of kin, in the absence of a will of the author, shall be entitled to a renewal and extension of the copyright in such work for a further term of 67 years.

Federal cases interpreting this statute have called the rights of the transferee (in this instance, the spouse to whom the rights were transferred by the settlement agreement) in and to the renewal rights, as merely an “expectancy.” *Marascalco v. Fantasy, Inc.*, (1990, CD Cal) 953 F.2d 953, cert. denied (1992) 504 US 931. This has been interpreted to mean that if the author entered into an agreement in which the rights to the renewal copyrights were granted to another party, if the author is alive at the commencement of the renewal period, that grant will be held valid since only the author has the right to the renewal term but that right is subject to the rights of the transferee party as contained in the transfer agreement. In such an instance, it is likely that the spouse to whom the rights were transferred would retain the renewal rights to such copyrights.

However, if the author died prior to the commencement of the renewal period, federal law pre-empts state law including, presumptively, the divorce settlement agreement approved by the state court. That has been the ruling in cases dealing with a testator’s wishes conflicting with the federal law. *Broadcast Music, Inc. v. Roger Miller Music, Inc.*, 396 F.3rd 762 (6th Cir, 2005); *Larry Spier, Inc. v. Bourne Co.*, 953 F2d 774

(2nd Cir. 1992). If that same argument is extended to divorce agreements, that may mean that if the author died prior to the commencement of the renewal period, the transfer of renewal rights to the past spouse in the divorce settlement agreement might be ineffective during the renewal period since federal law provides that the children of the author are the only parties entitled to the renewal rights. The spouse who received these copyrights in the settlement agreement is, by definition, not the widow or widower because of the divorce although there may be a new spouse who would thus be the widow or widower if the author and this new spouse were married at the time the author died. In *Saroyan v. William Saroyan Foundation*, 675 F. Supp. 843, 844 (S.D.N.Y. 1987) the Court ruled that a bequest of renewal rights to a trust was not effective because the testator had died before the renewal rights had vested.

As a practical matter, since renewal rights issues apply only to pre-Jan. 1, 1978 copyrights as indicated above, any renewal terms will of necessity have started no later than Dec. 31, 2005 (i.e. Dec. 31, 1977 is the last date of copyright for “old” copyrights, to which you add 28 years to get the date of the onset of the renewal term). In *Stone v. Williams* (970 F.2d. 1043), the Court held that a daughter of Hank Williams had the right to claim the renewal rights even though her claim was very late in being presented but she could not recover money for the exploitation of the compositions preceding the 3 year limitations period. However, in *Tomas v. Gillespie*, 385 F Supp 2d 240, 73 (S.D.N.Y. 2005), the Court barred the action to assert renewal rights because those rights arose beyond the 3 year statute of limitations.

## Scenario 2

This scenario also deals with “old” copyrights, i.e. those registered before Jan. 1, 1978. Even if the author was alive at the time of the commencement of the renewal period, the transfer represented by the settlement agreement may



still be terminable under a given set of circumstances. This is the “second bite at the apple.” The first of these circumstances is if the settlement agreement was executed before Jan. 1, 1978.

The same section of the copyright law further provides in part as follows:

- C. Termination of Transfers and Licenses Covering Extended Renewal Term. — In the case of any copyright subsisting in either its first or renewal term on Jan. 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before Jan. 1, 1978, by any of the persons designated by subsection (a)(1)(C) of this section, otherwise than by will, is subject to termination under the following conditions:
1. In the case of a grant executed by a person or persons other than the author, termination of the grant may be effected by the surviving person or persons who executed it. In the case of a grant executed by one or more of the authors of the work, termination of the grant may be effected, to the extent of a particular author’s share in the ownership of the renewal copyright, by the author who executed it or, if such author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author’s termination interest.
  2. Where an author is dead, his or her termination interest is owned, and may be exercised, as follows:
    - A. The widow or widower owns the author’s entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author’s interest.
    - B. The author’s surviving children, and the surviving children of any dead child of the author, own the author’s entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author’s interest is divided among them.
    - C. The rights of the author’s children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author’s children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.
    - D. In the event that the author’s widow or widower, children, and grandchildren are not living, the author’s executor, administrator, personal representative, or trustee shall own the author’s entire termination interest.
  3. Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was



originally secured, or beginning on Jan. 1, 1978, whichever is later.

What the above sections mean is that, at a time commencing 56 years from the date of the original copyright (in this example, 56 years from Jan. 1, 1978 is not relevant) and during a five year window commencing at that time, the transfer to the divorced spouse may be subject to being terminated by the author if the author is alive or, if the author is deceased, by the children of the author (again, the original transferee is by definition not the spouse, although there may be a new spouse who would then be the widow or widower if the parties were married at the time the author died).

So let me give an example. Copyrights in 1960 and, as part of the divorce agreement, the author's copyrights are transferred to the spouse. 56 years from 1960 is 2016. During a five year window commencing on the date of the respective copyrights in 2016, it is possible that the author, if the author is still alive or if not alive, the author's children and widow/widower, may be able to terminate the transfer to the original spouse. (What seems likely is that those parties can terminate the grant to other parties the author made, to the exclusion of the divorced spouse.) Appropriate notice must be given no later than two years nor earlier than 10 years prior to the effective date of termination.

Again, for simplicity sake, I have not discussed the other potential parties who may be statutory successors.

Further, the statute provides that no agreement, including possibly a divorce settlement agreement, that purports to give up these rights, is likely to be held valid. Section 304 goes on to state:

5. Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

### Scenario 3

In this scenario, the copyrights that are involved in the divorce settlement have first been copyrighted after Jan. 1, 1978. As to these copyrights, there were no longer any renewal rights involved and copyrights last for the life of the author plus originally 50 and now 70 years.

That said, however, there are provisions that allow for the termination of a transfer made after Jan. 1, 1978. 17 USC Section 203 provides in part:

- a. Conditions for Termination. — In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after Jan. 1, 1978, otherwise than by will, is subject to termination under the following conditions:
  1. In the case of a grant executed by one author, termination of the grant may be effected by that author or, if the author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest. In the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it; if any of such authors is dead, the termination interest of any such author may be exercised as a unit by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's interest.
  2. Where an author is dead, his or her termination interest is owned, and may be exercised, as follows:
    - A. The widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest.
    - B. The author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them.
    - C. The rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.
    - D. In the event that the author's widow or widower, children, and grandchildren are not living, the author's executor, administrator, personal representative,



or trustee shall own the author's entire termination interest.

3. Termination of the grant may be effected at any time during a period of five years beginning at the end of 35 years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of 35 years from the date of publication of the work under the grant or at the end of 40 years from the date of execution of the grant, whichever term ends earlier.

Thus, under these provisions, various scenarios can arise and among these scenarios are below. For the sake of simplicity for these scenarios, I will again omit a discussion of the other potential statutory successors and posit that a settlement agreement was entered into Jan. 1, 1980 (round numbers are easier to do the arithmetic) and further posit that the 35 year from the date of execution of the grant provision applies and not the 40 years. In such an instance, the right to terminate the transfer exists during a five year window commencing Jan. 1, 2015, subject to the notice and other provisions in the statute. Two sub-scenarios may apply:

1. If the author is alive at the time of 35 years from the Jan. 1, 1980 settlement agreement.

In this instance, the author may be able to terminate the transfer, subject to the notice and other requirements of the statute.

2. If the author is not alive at the time of 35 years from January 1, 1980 settlement agreement.

In this instance, the children of the author (again, the transferee spouse is not the widow or widower but there may be a new spouse who is the widow or widower if the parties were married at the time the author died) may be able to terminate the transfer, subject to the notice and other requirements of the statute.

As with the section 304 termination, these rights cannot be given away until they vest in the appropriate party.

As you will note, in both sections, the "transfer" needs to have been "executed." If there was no marital settlement agreement per se and the transfer took place via court judgment, then perhaps there is no agreement to terminate. If the court judgment merged all the provisions of the agreement, perhaps there is no agreement to terminate. There may be other reasons why the divorce agreement itself may not be terminable. But again, even if the divorce settlement agreement is not in itself terminable, to the extent that parties other than the divorced spouse have termination rights, any agreements that the author (or in some instances other parties) entered into regarding copyright rights could be terminated only by those parties and since the divorced spouse is not one of those parties, this can have the effect of terminating the divorced spouse's rights in those agreements.

## Some Important Things To Be Alert For

- There are significant issues related to copyrights and community property but since Georgia is not a community property state, I will omit a discussion of those issues from this article.
- The above rights do not apply where the original creation was done as a work made for hire. 17 USC Section 304 (a) (i) (B). (Read "Work Made For Hire Agreements" on my site. Click on "Articles for Writers and Publishers.") In such an instance, all rights including all renewal rights, belong solely to the party commissioning the work made for hire. So, for example, if a film director did his or her work as a work made for hire, which is common in the film and television industries, the renewal rights and termination of transfer issues do not arise insofar as the relationship between the creator and the said commissioning party. The commissioning party is deemed the "author" of the work and thus the above rights do not apply to the creative party.
- Keep in mind that all this is quite speculative since much of the copyright law in regard to these matters has not been tested in the courts.

## Conclusion

As you might expect, all this is extremely fact-specific and a detailed analysis is required in each instance to see whether any rights exist.

Consult an experienced intellectual property attorney as well as a divorce attorney about these matters. **FLR**

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# Breaking Free, Being Heard:

## A DOMESTIC VIOLENCE SURVIVOR'S RIGHT TO AN INTERPRETER IN GEORGIA COURTS

by Jana J. Edmondson-Cooper

Domestic violence survivors who have limited English proficiency (LEP) have a right to an interpreter in temporary protective order (TPO) cases under the family violence act. LEP petitioners and respondents have a statutory right to a free court-appointed foreign language when necessary.<sup>1</sup> Likewise, hearing impaired litigants and witnesses also have a specific statutory right to an interpreter<sup>2</sup> and parties in all types of cases who cannot afford an interpreter have a right to equal access to the courts under Title VI, which can include a court provided interpreter.<sup>3</sup>

### I. Domestic Violence Survivors Have a Right to Interpreters in TPO cases in Georgia Without Cost.

- A. O.C.G.A. § 15-6-77(e)(4) requires that an interpreter be appointed in TPO cases when necessary.

The Violence Against Women Act, requires that in exchange for accepting substantial federal funding available for domestic violence services, states must have a statutory prohibition against charging court fees to domestic violence victims.<sup>4</sup> Georgia's statutory exemption from courts costs is at O.C.G.A. § 15-6-77(e)(4). Also included in that section is the requirement that survivors:

*shall be provided with a foreign language or sign language interpreter when necessary for the hearing on the petition. The reasonable cost of the interpreter shall be paid by the local victim assistance funds as provided by Article 8 of Chapter 21 of this title. The provisions of this paragraph shall control over any other conflicting provisions of law. . . .*

Georgia agencies receive millions of dollars in federal funding for services for domestic violence survivors, including funding for law enforcement, courts, prosecution, victim assistance, legal services, domestic violence agency services, visitation centers, and transitional housing based on assurances that Georgia complies with federal law and does not charged court fees to domestic violence survivors.

- B. DV 101 - Representing LEP Victims of Domestic Violence

Batterers are primarily motivated by the power and control gained by committing acts of domestic violence against their victims. The batterer may exercise power and control of the victim emotionally, physically, financially and/or spiritually. The most dangerous time for a victim is when the victim attempts to leave the relationship and the batterer starts to lose control. From 2003 through 2012, at least 1,203 Georgians lost their lives

due to domestic violence.<sup>5</sup> Georgia was recently ranked 10th in the nation for its rate of men killing women.<sup>6</sup> Firearms were the cause of death in 76 percent of the domestic violence fatalities, in 2012.<sup>7</sup> However, the good news is that studies show that court issued Protective Orders are effective in stopping domestic violence. In one study, half (50 percent) of victims experienced no violations of the TPO in the 6 months following the order.<sup>8</sup> For victims who did experience violations, every type of violence was significantly reduced.<sup>9</sup> Victims living in rural areas experienced more barriers to obtaining orders and to the enforcement of orders than victims living in urban areas.<sup>10</sup> These studies show that victims need the protection of the courts, and those who receive legal services are much better protected from the dangers of family violence.

- C. What is Limited English Proficiency (LEP)?

A survivor with limited English proficiency is one who speaks a language other than English as her primary language and/or who has a limited ability to read, speak, write, or understand English. The term "LEP" includes individuals who are hearing impaired as well. As an attorney, you may find yourself representing clients who are LEP. For adequate representation, clients must be able to communicate effectively with their attorneys, the courts, and any other relevant parties. Bilingual attorneys should be aware that it is often unwise to wear the hats of both advocate and interpreter for a hearing/trial. Wearing both hats can present ethical conflicts of interest.<sup>11</sup>

Victims face endless barriers in escaping violence. They must have enough money to support themselves and their children. To start a new life, they need transportation, day care for children, housing, medical insurance, a job, or some way to support themselves. On top of these barriers, if you add immigration status, cultural barriers, or limited English proficiency, it is a cause for celebration when we are able to help a survivor to start a new life without violence.

- II. Appointment and Compensation of the Interpreter: Cases other than TPOs.

- A. Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 requires that all recipients of federal funding make reasonable efforts to provide LEP persons with meaningful access to their programs and services at no cost. This includes federal and state courts of law as well



as administrative forums.<sup>12</sup> It was not until 2000 that federal agencies and federal financial recipients seriously began to address LEP compliance. On August 11, 2000, President Clinton issued Executive Order 13,166,<sup>13</sup> which had two main purposes. First, the Executive Order provides guidance to all recipients of federal funds administered by the respective agency. Second, the Executive Order requires federal agencies to develop an internal LEP policy compliant with Title VI and the Executive Order. The latter did not create any new obligations or duties; rather, it was a mechanism for enforcing preexisting obligations.

#### B. Obligations to Provide Interpreters under Georgia Law

The Supreme Court of Georgia has held that an interpreter must be appointed for those who cannot communicate effectively in English in criminal cases.<sup>14</sup> In *Ling*, the Court also reminded courts that meaningful access to justice must be provided in all Georgia courts, including civil courts, for persons who are limited English proficient in order to comply with federal law. Specifically, the Court's opinion states that "vigilance in protecting the rights of non-English speakers is required in all of our courts."<sup>15</sup>

The Supreme Court of Georgia Rules on Use of Interpreters for Non-English Speaking and Hearing Impaired Persons in Georgia (Interpreter Rules) make it clear that the responsibility of finding and appointing an interpreter falls on the court and not on litigants or attorneys.<sup>16</sup> In its March 8, 2012, letter to the North Carolina Administrative Office of the Courts (AOC), the U.S. Department of Justice (DOJ) concluded that budget constraints do not excuse a federal funding recipient's failure to provide LEP individuals with meaningful access to court operations in a case.<sup>17</sup>

The Interpreter Rules state that the local courts shall be responsible for developing and testing various approaches of compensation that are consistent with guidelines set by the Georgia Commission on Interpreters (Commission) and Georgia law, until such time as the Commission implements a unified, statewide system.<sup>18</sup> Attorneys at Georgia Legal Services Program have developed a set of standard pleadings, including a Motion for Interpreter and a supporting brief.<sup>19</sup> These pleadings formalize the request for an interpreter and are often helpful in educating the court on current federal and state laws requiring that LEP clients have meaningful access to the courts.

Georgia attorneys have had guidance on language access and interpreter use since 2001. In 2003, the Court created the Georgia Commission on Interpreters, whose mission is to provide interpreter licensing and regulatory and education services

for Georgia courts so they can ensure the rights of non-English-speaking persons. The Commission has since amended the Rules, with the Supreme Court adopting the latest amendments in May 2011.<sup>20</sup>

Recognizing that mere bilingualism does not qualify an individual to be an efficient interpreter, the Interpreter Rules further state that interpreters should be appointed or hired with preference for a "Certified" interpreter. If a "Certified" interpreter is unavailable, then an interpreter who is recognized by the Commission as "Registered" or "Conditionally Approved" should be used. As a last resort, a telephonic or other less qualified interpreter should be used.<sup>21</sup> To find a qualified interpreter in Georgia, please visit the "Locate an Interpreter" section found on the homepage of the Commission's website.<sup>22</sup>

### Practice Tips for Working with an Interpreter

#### *Before the Client Meeting*

- Discuss confidentiality - explain to the interpreter that she is prohibited from sharing the content of conversations with a third party
- Proper positioning (varies depending on forum)
  - ▶ Attorney should face the client
  - ▶ Interpreter generally sits next to or behind the client

#### *During the Meeting*

- Allow for introductions between the client and interpreter
- You and the interpreter should greet the client together
  - ▶ Remember, the interpreter works for the attorney
- Speak directly to the client in the *first* person (do not say "Ask her to tell me . . .")
- *Do not* address the Interpreter
- Discuss confidentiality – explain to the client that the interpreter's presence does not destroy attorney-client privilege
- Ensure that everything is interpreted
- Be clear:
  - ▶ Use concise, simple sentences
  - ▶ Ask one question at a time
  - ▶ Avoid using slang or jargon
  - ▶ Explain legal terms in plain language
  - ▶ Check for understanding (Nodding from your client is not a guarantee that she understands)

## During a Hearing/Trial

- Follow all of the suggestions above
- Attempt to arrive early to the courtroom to show your client where she will stand and where the interpreter will probably be standing
- Ask the judge whether she has a place that she prefers for the interpreter to stand in her courtroom

## Remember . . .

- Using a qualified interpreter provides you the opportunity to *focus on the issues* and not the language barrier
- Interpreters and translators *interpret/translate ideas*, not just mere words
- Fluency in a language *does not equal* competency in the *terms of art* for your field/practice area
- Title VI and the Georgia Supreme Court Rules governing interpreter use in Georgia require an interpreter, as needed, in all court proceedings – *criminal and civil*
- This includes all “*critical phases*” of the entire litigation process
- O.C.G.A § 15-6-77(e)(4) – Right to interpreter in Title 19 domestic violence cases
- O.C.G.A §§ 24-6-652, -654 – Right to interpreter for the hearing-impaired
- When an interpreter is working as an agent of the attorney, the presence of the interpreter does not automatically waive the attorney-client privilege.<sup>23</sup> *FLR*



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### (Endnotes)

1 See O.C.G.A. § 15-6-77(e)(4) (2012). (4) No fee or cost shall be assessed for any service rendered by the clerk of superior court through entry of judgment in family violence cases under Chapter 13 of Title 19 or in connection with the filing, issuance, registration, or service of a protection order or a petition for a prosecution order to protect a victim of domestic violence, stalking, or sexual assault. A petitioner seeking a temporary protective order or a respondent involved in a temporary protective order hearing under the provisions of Code Section 19-13-3 or 19-13-4 shall be provided with a foreign language or sign language interpreter when necessary for the hearing on the petition. The reasonable cost of the interpreter shall be paid by the local victim assistance funds as provided by Article 8 of Chapter 21 of this title. The provisions of this paragraph

shall control over any other conflicting provisions of law and shall specifically control over the provisions of Code Sections 15-6-77.1, 15-6-77.2, and 15-6-77.3.

2 *Id.* §§ 24-6-652, -654 (2013).

3 As of 2012, of Georgia’s 9,033,700 residents, 520,700 have limited English proficiency. Migration Policy Institute tabulations from the US Census Bureau’s pooled 2009-2011 American Community Survey (for the United States and states, except Wyoming and Puerto Rico) and 2007-2011 ACS (for counties, plus Wyoming and Puerto Rico), Table B16001 “Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over,” available through American FactFinder at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>. Data were compiled by Joseph Russell, Jeanne Batalova, and Chhandasi Pandya of MPI.

4 42 U.S.C. § 3796gg-4 and -5

5 2012 Georgia Domestic Violence Fatality Review Annual Report, p. 29, available at [http://www.gcfv.org/index.php?option=com\\_content&view=article&id=85&Itemid=9](http://www.gcfv.org/index.php?option=com_content&view=article&id=85&Itemid=9) (last visited April 5, 2013)

6 *Id.*

7 *Id.*

8 Logan, T.K., R. Walker, W. Hoyt, T. Faragher, The Kentucky Civil Protective Order Study: A Rural and Urban Multiple Perspective Study of Protective Order Violation Consequences, Responses, and Costs (pdf, 183 pages), Final report to the National Institute of Justice, 2009, NCJ 228350.

9 *Id.*

10 *Id.*

11 See *id.* R. 1.7(a) & cmt. 11 (providing additional guidance regarding non-litigation conflicts).

12 See 42 U.S.C. § 2000d (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

13 Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 11, 2000).

14 *Ling v. State*, 288 Ga. 299, 300-01, 702 S.E.2d 881, 883 (2010).

15 *Id.* at 302, 702 S.E.2d at 884.

16 Interpreter Rules, App’x A, Unif. R. for Interpreter Programs, § VII.

17 DOJ Letter to NC Admin. Office of the Courts, at 3 (Mar. 8, 2012), available at [http://www.justice.gov/crt/about/cor/TitleVI/030812\\_DOJ\\_Letter\\_to\\_NC\\_AOC.pdf](http://www.justice.gov/crt/about/cor/TitleVI/030812_DOJ_Letter_to_NC_AOC.pdf).

18 Interpreter Rules § V.

19 Private attorneys volunteering with the Georgia Legal Services Program may access these pleadings by visiting [georgiaadvocates.org](http://georgiaadvocates.org).

20 Interpreter Rules, App’x A, § II (emphasis added). The following rules apply to all criminal and civil proceedings in Georgia where there are non-English speaking persons in need of interpreters. See also *Ling v. State*, 288 Ga. 299 (702 SE2d 881) (2010). All other court-managed functions, including information counters, intake or filing offices, cashiers, records rooms, sheriff’s offices, probation and parole offices, alternative dispute resolution programs, pro se clinics, criminal diversion programs, anger management classes, detention facilities, and other similar offices, operations and programs, shall comply with Title VI of the Civil Rights Act of 1964.

21 Interpreter Rules, App’x B.

22 Georgia Commission on Interpreters, <http://w2.georgiacourts.org/coi> (last visited Nov. 8, 2012).

23 Georgia Code of Responsibility for Interpreters, Standard X, available at [http://www.georgiacourts.org/files/INTERPRETERS\\_percent20RULES\\_FINAL\\_07\\_03\\_12.pdf](http://www.georgiacourts.org/files/INTERPRETERS_percent20RULES_FINAL_07_03_12.pdf).

*This article is adapted from the following article: Edmondson, Jana J., “Working with an Interpreter: Providing Effective Communication & Ensuring that Limited English Proficient Clients Have Meaningful Access to Justice,” Georgia Bar Journal (February 2013) available at [gabar.org](http://gabar.org)*

# Handling Georgia Divorce Cases Ethical Perils In Divorce Practice

by Donald A. Weissman

Persons going through the process of divorce are motivated by fear, anger, lack of self esteem, depression and other emotional elements which, without professional guidance, substantially impair their ability to make accurate and appropriate decisions. As lawyers, our role is to keep the relationship professional and yet convey genuine concern and interest in their case while maintaining professional detachment and objectivity. It is not easy. Stepping over the line is not uncommon, although the ethical elements are clearly defined in the Georgia Rules of Professional Conduct. The reported decisions of our highest court reflect disbarments, suspensions and public reprimands when lawyers make grievous mistakes. The field of family law offers fertile ground for the conception of professional missteps.

It is a well known axiom that “no person can serve two masters.” You would think that as lawyers we would know better than to try to represent both parties in a divorce case or, even worse, identify ourselves as representing one party while we reassure the other party that we will do no harm and that your client is only being fair. Code of Professional Responsibility, Rule 1.7 and 1.8.

## 1. You Can't Represent Both Sides

It is not uncommon to learn that both parties went to the same lawyer who listened to everything, made recommendations and suggestions as to how to resolve issues and then drafted documents which were, ultimately, made the subject of a final order. The lawyer has committed a major ethical breach. It is simply not acceptable for such to occur. Calling yourself a mere scrivener is not going to save you from an ethics complaint.

So, what should a lawyer do? First, the lawyer should, in writing, inform both parties that he or she cannot represent both of them and that anything discussed with one party cannot be disclosed to the other party. The lawyer should not undertake representation of either party if he or she has received information from both parties. Neither good faith, ignorance or the amount of the fee can compensate for

the consequences of a wrong decision. I invariably tell prospective clients that I cannot represent both sides and that any advice that I give to this person is not necessarily the same advice that I would give to the other party. When I become engaged, I then notify the other party, in writing, that I represent the spouse and that they should secure counsel. I do not even feel comfortable suggesting who they should seek out.

Although we deal with *pro se* litigants all the time, we are bound to do certain things to protect them against the system, with which they may not be familiar. Thus, all communications should be sent to them as and when sent to the court. They should be given timely notice of all hearings and trials. If the court sets a hearing for one purpose, it is not okay to try and expand the proceeding simply because the *pro se* litigant does not understand what is going on. See *Hackbart v. Hackbart*, 272 Ga. 26 (2000) where the trial court was reversed for making an award of child support in an undefended case when the Plaintiff had not included such in the prayer for relief.

## 2. Use the System Fairly

Rule 3 of the Code of Professional Responsibility deals generally with your role as an advocate. It is our duty to represent our clients zealously. However, that does not allow us to make allegations or accusations which lack merit or which are designed purely to “poison the well” (Rule 3.1) or to deliberately slow the case down as, for example, when our client is getting money or the use of property which is likely to end when the case is over (Rule 3.2); or misrepresent the facts or the circumstances to the court, including what efforts you made to keep the other side properly informed concerning the case (Rule 3.3) or to act unfairly in the

presentation of the case (Rule 3.4).

An unwritten element of this ethical rule arises when the other party is unrepresented and thus may not learn of an important development in the case. Taking advantage of such a circumstance is not the way to win judicial friends or influence appellate courts. See *Green v Green*, 263 Ga. 551 (1993). It is just as bad when the other party is represented

1. You Can't Represent Both Sides
2. Use the System Fairly
3. You Can't Charge a Contingent Fee and You Should Charge and Collect a Fair Fee
4. Communicate With Your Client
5. No Hanky Panky
6. It's Their File
7. Adequate Counsel
8. Stick It Out
9. Screw Ups
10. The Bottom Line



but, because of an atmosphere of trust and cooperation and justifiably believing that the case would be settled, may have been lulled into not filing defenses. Taking advantage will last only until the decision in your client's favor gets reversed. See also, *Melcher v. Melcher*, 274 Ga. 711 (2002).

It is ethically, professionally and diplomatically wiser to notify the other party. If not, you risk losing the client and the case. More and more tribunals will expect us to demonstrate that we have acted fairly and honorably in dealing with the opposing party. The lawyer who seeks to short circuit the process is increasingly at risk.

Family law litigation is often characterized by the unequal distribution of available financial resources and information concerning the core issues. Consequently, a common tactic is for the party with the financial ability and/or information to make it unduly troublesome, expensive and time consuming for the other party to obtain complete discovery with the goal of discouraging informed consideration of the issues, upon which the outcome is frequently determined.

Interrogatories and Requests for Documents, fairly standardized in actual application, are utilized routinely; and depositions, both audio and video, are common. Each of these discovery devices have been and are routinely abused by lawyers engaged in the practice of Family Law.

Because the Uniform Rules of the Superior Court (Rule 5), the Code of Civil Procedure (O.C.G.A., §§ 9-11-26 through 9-11-37) and the Code of Professional Responsibility (Rule 4.3) each address some specific element of this endemic problem, it is useful to remind lawyers that the first comment following Rule 3.4 of the Code of Professional Responsibility puts discovery abuse right up there with other more overt ethical prohibitions.

Although our appellate courts have not directly addressed the various ways in which lawyers can cross the line during discovery, the Supreme Court of South Carolina has. *In the Matter of Anonymous Member of the South Carolina Bar*, 346 S.C. 177, 552 S.E.2d.10, 2001 S. C. Lexis 152 (2001). This opinion clearly declares that conduct which is unethical. It illustrates just how and in what manner lawyers abuse the discovery process during depositions.

Discovery abuses are routinely addressed in our trial courts. See *Rice v. Cannon*, 283 Ga. App. 438. 641 S.E. 2d. 562 (2007) where the case was dismissed because the party did not appear for a deposition; relying on the mistaken belief that filing a motion for a protective order suspended the obligation. It did not.

Lawyers who are unethical in the discovery phase of a family law case are simply making themselves and their clients vulnerable to punishment or the loss of credibility by the judge who has the duty to deal with the case. The rewards simply do not outweigh the risks to the client and to the lawyer.

### **3. You Can't Charge a Contingent Fee and You Should Charge and Collect a Fair Fee**



Divorce litigation is time-consuming. Setting a “flat fee” is, at least, unwise and may result in the payment of a fee which is later deemed ethically unreasonable. Charging for services which you do not perform is unethical. Make a written contract providing for charges of your time. Keep time records and charge accurately for your time. Do not pad your bill. Be careful about charging lawyer rates when you serve as a secretary, messenger, mail carrier or engage in other non-professional activities. Send regular statements so that the client knows and understands what they are paying for and disclose all charges, expenses and fees.

Clients who are desperate and have no ready funds often suggest that they will pay the lawyer out of the award that the lawyer gets and that the lawyer can charge “anything” that he or she wants. Avoid the temptation. The client did not mean it. He or she was not thinking clearly and if you succumb to that suggestion you are not acting either in the best interests of the client or in your own best interests. State Disciplinary Board Ruling no. 36. That is not, however, the same as a contingent fee for collecting past due child support or alimony. Those are fixed financial obligations. State Disciplinary Board Ruling no. 47.

Clients pay for family law services in cash (occasionally); by check (frequently) and these days by debit or credit card. Regardless of the method of payment your obligations are the same. Charge fairly for the service; do not overcharge or make false charges; put all of the money in the appropriate account (see Formal Advisory Opinion no. 91-2); and recognize that when fees are put on credit or debit cards through a system set up in your office, there will be a merchant fee; usually a percentage of the amount charged. You should decide whether this cost is to be absorbed by your office or whether it is to be passed on to the client. Either way, the agreement with your client should spell it out.

Also, keep in mind that if credit cards are used, there will be a delay in access to the funds and thus a window exists for the client to rethink the engagement decision. In such circumstances your merchant account may be debited for the charge. Thus, before you withdraw funds you should confirm that you are authorized to do so. A comprehensive and well written discussion on this subject appears in the *Family Advocate*, ABA Section of Family Law, Fall 2009, Vol. 32, No. 2, pp. 8 and 45.

## 4. Communicate With Your Client

Keeping your client informed as to the progress of your representation is not only smart business but, actually, an element of your ethical responsibility. Your client must make informed decisions. Your client must have the information far enough in advance to think about what is happening next. Your client becomes a more effective client and you become a more effective lawyer when you do not keep your client in the dark. Your postage expense is nominal compared to the time wasted trying to explain something that is about to happen when your client is unprepared. Plan meetings ahead of court appearances, depositions, settlement conferences, mediation and the like. Clients want you to guide them through the process. There are substantial written materials that can be presented to clients to educate them as to what is happening. Do not let them participate when they – and you – are unprepared. Incidentally, it is a good policy to send your client a copy of everything received in your office and everything that originates with your office.

## 5. No Hanky Panky

Our clients are particularly vulnerable. They confide intimate details of their life, thoughts and feelings. We may learn more about our client's needs, desires and weaknesses than any professional outside of the mental health field. Client's may transfer their emotional needs to us. If we use the frailties of our clients to take advantage of them we lose objectivity and become part of the problem. We then become vulnerable to attacks by the court, the opposing party, and our clients. Our clients, in particular, are substantially harmed by such events. They feel seduced, betrayed or worse. They may suffer long term emotional consequences for which you, as a practitioner who stepped over the line, must take responsibility. You cannot confuse your professional role with your personal needs and desires.

## 6. It's Their File

I know that the law provides for an attorneys lien which can be exercised by keeping your client's papers and file.



However, that lien right yields to the ethical prohibition of denying to a client a file which may be needed by the client or by the next lawyer in the chain. Yes, I know you are owed a fee and that you may not collect it. But, the business of being a lawyer is secondary to the ethical obligation to not allow the client to be harmed.

Formal Advisory Opinion no. 87-5 (86-R1) states, in essence, that it is unethical for a lawyer to withhold the client's file as security for the payment of unpaid legal fees and expenses. The opinion clearly places the right of the client to have the file above your right to secure your lien. This opinion, first rendered in 1986, is must reading. Incidentally, liens do not attach to child support payments. *Law Office of Tony Center v. Baker*, 185 Ga. App. 809 (1988); see also *Swift, Currie, McGhee & Hiers, LLP. V. Henry*, 276 Ga. 571 (2003); *Mary A. Stearns, P.C. v. Williams Murphy*, 263 Ga. App. 239 (2003), where the lawyer (as should have been anticipated) lost the case, the file, the respect of the client and gained a lot of unwanted notoriety.

Furthermore, since you have received information in confidence and since the file is that of the client, you do not have the right to bad mouth the client to others without a need to know concerning any outstanding financial or other issues. Thus, for example, enlisting a close friend of both the client and the lawyer to assist the lawyer in collecting an unpaid bill is unethical and could generate a Bar complaint if, to do so, confidential information was disclosed as a means of bringing pressure on the client. See Rule 1.6 Code of Professional Conduct; Formal Advisory Opinion 07-1.

## 7. Adequate Counsel

Any licensed attorney in good standing with the State Bar of Georgia is legally authorized to represent a party in a family law matter. But, should you handle such a matter? You are ethically obligated to bring professional competence and skill to the representation of particular clients. Your ignorance of the rules, the cases, the laws or the more subtle attitudes which affect this emotionally-charged and daunting type of litigation will not help if you foul up through a lack of understanding of what you are doing.

Here are some common sense rules:

- a. If you don't know what you are doing, affiliate with or refer the client to someone who does know. Experimenting with the lives, property and future of your client is unethical and, even worse, stupid.
- b. If you don't know what to do next, don't guess. Your client does not have the right to intercept and open mail addressed to the other party; to charge on the other party's credit; to wire tap or eavesdrop on the other party's private conversations or, in some instances, to examine, print and use materials kept on the other party's personal computer. In each of these instances, criminal penalties attach. It is unethical to advise or condone violation of the criminal laws in the pursuit of representation.

- c. If you don't understand or are not familiar with the law or the rules of the court, get educated. The Family Court Division in Fulton County has a separate set of rules which supplement the Uniform Rules of the Superior Court. Both appellate courts have rules controlling everything from the timing of motions to the size of type in a brief. Statutes and laws set forth very specific deadlines and bar dates. Learn 'em now and save grief or learn 'em later and weep.

deadline, failing to calendar a hearing, not filing discovery on time, not gathering critical facts, etc. are all matters which must be disclosed to the client. Your problems will only multiply if the client is kept in the dark and, sadly, many of the punishments received by lawyers involve the failure to disclose some significant adverse event missed by the lawyer. Don't hide. It won't go away. Failing to disclose bad news is not acceptable. It can lead to reprimands, suspension and even disbarment.

## 8. Stick It Out

For gosh sakes, don't abandon your client. Yes, I know you haven't been paid for the work that you have done and yes, I know that the case is set for trial and you will be spending a lot of time and energy to get ready. However, the rules of our profession require putting the interest of the client first. Don't attempt to withdraw at the last moment. The client might well object and the judge, with or without objection, may decline to honor your application. Give yourself and your client the opportunity to plan ahead.

## 9. Screw Ups

Despite everything, you may screw up. Things happen. And if Murphy's Law has any meaning, it will happen at the worst possible time. So, don't make it worse. If it involves professional liability, contact your insurer. Moreover, you are obligated to promptly inform your client about adverse matters, even if it is your fault. Missing a

## 10. The Bottom Line

The ethics of our profession are comprehensive and should be studied diligently.

Following ethical guidelines, however, is fairly simple. If it doesn't sound right, don't do it. Incidentally, if you have any questions about the implications of the relationship, you may find it useful to examine West's *Georgia Digest, 2d Series, Attorney and Client*. You may recognize some of the people who learned from their mistakes only after a published decision. Hopefully, it will not be any of us who read this. **FLR**



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RANDALL MARK KESSLER .....	2011-12	HON. MARTHA C. CHRISTIAN .....	1993-94
KENNETH PAUL JOHNSON .....	2010-11	JOHN C. MAYOUE .....	1992-93
TINA SHADIX RODDENBERY .....	2009-10	H. MARTIN HUDDLESTON .....	1991-92
EDWARD COLEMAN .....	2008-09	CHRISTOPHER D. OLMSTEAD .....	1990-91
KURT KEGEL .....	2007-08	HON. ELIZABETH GLAZEBROOK .....	1989-90
SHIEL EDLIN .....	2006-07	BARRY MCGOUGH .....	1988-89
STEPHEN C. STEELE .....	2005-06	EDWARD E. BATES JR. ....	1987-88
RICHARD M. NOLEN .....	2004-05	CARL WESTMORELAND .....	1986-87
THOMAS F. ALLGOOD JR. ....	2003-04	LAWRENCE B. CUSTER .....	1985-86
EMILY S. BAIR .....	2002-03	HON. JOHN E. GIRARDEAU .....	1984-85
ELIZABETH GREEN LINDSEY .....	2001-02	C. WILBUR WARNER JR. ....	1983-84
ROBERT D. BOYD .....	2000-01	M.T. SIMMONS JR. ....	1982-83
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CARL S. PEDIGO .....	1997-98	HON. G. CONLEY INGRAM .....	1979-80
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# Meet the Newest Cobb County Juvenile Court Judge Jeffrey Hamby

by Wayne Morrison

There is uncertainty and excitement concerning upcoming revisions to Georgia's Juvenile Code. Additionally, as of Jan. 1, 2013, Cobb County has welcomed a new Juvenile Court Judge, Jeffrey Hamby. Jeff Hamby was chosen by the Cobb County Superior Court Judges to fill the vacancy created with Judge Gregory Poole's election to the Cobb County Superior Court Bench. Hamby generously agreed to discuss some of his experiences on the Bench and certain viewpoints of the Juvenile Court of Cobb County and his judgeship.

Hamby has lived in Cobb County since he was 11 years old, having graduated from John McEachern High School in Powder Springs. He received his undergraduate degree from Georgia State University in 1982 and in September of that year, entered the founding class of the Georgia State University School of Law, graduating in May of 1985. Those who have practiced in and around Cobb County know Hamby as a distinguished family-law attorney, Guardian ad Litem and mediator. His interest in the law dates back to college and his working for a sole practitioner prior to starting law school, performing any and all jobs asked of him (from mowing the yard at the law office to writing briefs). For the past several years, he has considered the thought of serving Cobb County as a Juvenile Court Judge, thinking of the Court as a great opportunity to help families and children in his home county.

Speaking about the overhaul to the juvenile justice system, Judge Hamby discussed the added emphasis on placing non-violent youth offenders in community based programs. Hamby cited statistics estimating an annual cost of \$90,000 to keep a youth offender behind bars compared to an estimated annual cost of approximately \$30,000 for non-secured treatment (therapy, counseling, programs, etc.) Additional changes include a greater emphasis on drug treatment and mental health counseling, with a goal of helping non-violent children to become successful, contributing adults. Judge Hamby forwarded statistics from 2012 showing that the Juvenile Court of Cobb County dealt with 2,951 cases involving delinquent acts, accounting for approximately 60 percent of the Court's case load, the remaining 40 percent being "civil" in nature. These delinquent matters involve acts for which, if committed as adults, would most likely result in criminal prosecution. Pursuant to the new code, Juvenile Court Judges would have increased flexibility/discretion in determining the level (and sometimes length) of sanctions.

When asked about challenges that he faces on the Bench, he discussed the rapidity required of him in moving from case to case and specifically in moving between civil and criminal matters. During the morning hours,

Hamby hears traffic cases on Mondays, criminal matters on Tuesdays and Thursdays, deprivation matters on Wednesdays and reserves Fridays for specially set matters (generally, termination of parental rights cases or lengthy deprivation matters involving DFCS).

Each afternoon, detention hearings are conducted, with charges either being dismissed outright or with a finding of probable cause sufficient to bind the case over for hearing. Being the "rookie" on the Bench, he presides over the traffic calendar and is the designated "gang member" Judge, having assigned to him those delinquent/unruly cases involving a child with alleged or known gang affiliation.

Traffic offenses (which account for 11 percent of the Juvenile Court case load) are those involving drivers ticketed before they reach age 17. Deprivation cases (which account for approximately 18 percent of the Juvenile Court case load) are those involving children who have been abused or neglected by their parents or other adults responsible for their care. In all deprivation cases, a Guardian ad Litem is appointed (per statute) to represent the interest of the child/children. The majority of these cases are initiated by the Department of Family and Children Services (DFACS) but some are private cases brought by family members interested in caring for the children themselves or in finding alternate placement for deprived/neglected children. Judge Hamby explained that in such instances the focus of the Juvenile Court is generally on keeping a family together (or on "reunification" if the family has been separated for a time). To that end, the Court often maintains a supervisory role and monitors case plans (via review hearings, etc.) designed to preserve or reunite families.

As to the civil cases, Hamby has been very impressed with the high quality of Guardian ad Litem's and Court Appointed Special Advocates (CASA's) who appear in his courtroom. Regarding the criminal matters, he speaks highly of the probation officers, their compassion (but firmness) in dealing with their assigned child/children, and their knowledge of the child's family and special circumstances.

His experience as a family-law attorney, as a Guardian ad Litem, and as a mediator exposed him to many different and unfortunate circumstances involving children and their





# Mediation Session Going South? Try Some of These Tips!

by Andy Flink

**W**e've all experienced mediations where everything seems to be moving along smoothly and the... WHAM! We hit a major roadblock and our work is thrown into turmoil. Perhaps we realize when we walk in the room for the first time that our day is not going to be very productive. In either case, or in situations where we know a full agreement will not be reached, we need to find ways to make the session beneficial. Here are some tools I've used to avoid impasse, keeping in mind that some mediations simply are not meant to settle on any level.

## The Let's Try This for Awhile (Temporary) Agreement

Implementing arrangements that parties can try for a defined period of time allow a trial run without a long term commitment. For instance, giving mom and dad time to test a proposed schedule might provide better answers for them in determining a more reasonable and realistic permanent arrangement. This is valuable when parties are hesitant to agree based on their fear of the unknown. Turning perceptions into reality can also benefit the children by demonstrating this schedule not only affects parents, but the kids as well.

## The Let's at Least Agree On a Few Things (Partial) Agreement

In sessions where there are multiple issues, solving most but not all of them can help parties narrow future items to be more easily resolved at a later date. In one recent case the parties came to the table with 14 specific issues, 13 of which I was able to reach agreement. That left only one item to resolve (albeit the major issue of child support) but their attention was then focused on that single item for another day and a different perspective. Taking the noise out of the channel is critical to helping parties get closer to reaching a full agreement - they'll make more informed and better decisions when they are not distracted by several smaller issues at the same time.

## Switch Things Up

When you have been negotiating for hours and the session is starting to bog down, taking a moment to break or changing the standard setup of the session can work wonders. One step I always take when parties become stagnant is to either meet alone with the attorneys or, in less frequent cases, alone with the parties. Mediators and attorneys need to know when to change the dynamics in order to shift the focus of where we have been to where we need to go. I am constantly surprised at how much I can learn in these breakout sessions. Fortunately if you have to

take this step there is truly no downside – you'll either start to make progress or stay right where you were.

## Focus on the Good

Even the most combative parties have something they agree on. In contested custody cases I always try to get the parents to acknowledge that each of them, disagreements aside, both love and care deeply about their children. Shifting the battle from me against you to us against the issues and making it about what is truly in the children's best interests can alter a session. Can't find anything the parents can agree on about their kids? In joint session ask each of them to show you pictures or videos of their children. This always changes the tone of the room.

## Food

Providing something for parties to eat and drink as a mediation session wears on can be of monumental benefit to everyone. This is especially true in cases that occur in courthouses where food options are at a minimum. Bringing snacks, ordering in, doing whatever you need to in order to keep your brain and everyone else's functioning at the highest level possible is paramount to making informed decisions. Cases that settle because everyone is hungry, fed up and tired typically won't stand the test of time.

Using different techniques that we have in our mediation arsenal are critical to assisting parties in a session move in a positive direction. While the case may not reach a full agreement, helping them achieve some level of progress is ultimately what makes mediation such an important step in their dispute. There are some days where nothing seems to work, but implementing these and other ideas mean we've given it our all, which in the end, is why we do what we do.....and why we love what we do. **FLR**



*Andy Flink is a trained mediator and arbitrator. He is familiar with the aspects of divorce from both a personal and professional perspective, and is experienced in business and divorce cases. He has an understanding of cases with and without attorneys. Flink is founder of Flink Consulting, LLC, a full service organization specializing in business and domestic mediation, arbitration and consulting.*

*At One Mediation, he serves as a mediator and arbitrator who specializes in divorce and separation matters and has a specific expertise in family-owned businesses. He is a registered mediator with the state of Georgia in both civil and domestic matters and a registered arbitrator.*



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