The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia December 2006

Specific Issues in Muslim Divorce

By Zahra Ayubi
zayubi@brandeis.edu

There are are an estimated four to six million Muslims in the U.S. and approximately 50 thousand reside in the state of Georgia. With the American Muslim population growing, U.S. courts have begun to rule on cases in which parties invoke Islamic law, and Muslim divorce laws in particular. Some courts have supported the use of traditional law or dispute resolution of the involved parties to settle their affairs using their own traditions, if they so desire.[1] Increasingly, judges have made decisions on issues related to religious divorce. These decisions have been, at best, inconsistent from case to case and, at worst, unjust, unduly favoring one party because the information on Muslim divorce law presented by expert witnesses or by one or both parties is incomplete, conflicting or inaccurate.[2] Muslim divorce cases are similar to other American cases in that parties put forward any argument that will further their desired outcome and the usage of Islamic law is one way of doing that.

The most common issues related to Islamic law that emerge in Muslim civil divorce cases are: securing an Islamic divorce for the wife; *mahr* (dower paid directly to the wife or deferred); and division of marital assets and custody according to Islamic law. Often Muslim couples consider civil marriage a separate entity from the *nikah* (Muslim marriage contract) or religious marriage in the "eyes of God." Divorce too can have similar dual, civil and religious, nature for Muslims who do not want civil law to exclusively determine their divorce terms.

Before discussing divorce, I will briefly describe how the *Shari`a* (Islamic law), which is made up of injunctions derived from the Qur'an (revelation) and *hadith* (reports of the Prophet Mohammed's words and actions), can be used to represent different bodies of law. Today many scholars and lay Muslims include in their use of the term "Islamic Law" not just the *Shari`a*, but also *fiqh* (classical jurisprudence derived from *Shari`a* and local customs). Medieval jurists engaged in establishing the laws of *fiqh* expanded upon the Qur'an and *hadith* via four main schools of Sunni thought and two major schools of Shi'i thought. Although there are variations among these schools, contentions that arise in interpreting Islamic law are generally based on questioning the applicability of the classical *fiqh* in modern times because of its diverging doctrines, potentially sexist interpretations of Qur'an and *hadith* and outdated assumptions. It is important to note that Muslims in divorce courts may use the term "Islamic law" to imply verses of the Qur'an, *hadith*, *fiqh*, legislation from their countries of origin, or any combination of these. Although Islamic law is defined by the *fiqh* for many Muslim men and women, some American Muslim women who are concerned with adherence to religion, turn to gender egalitarian interpretations of the Qur'an and *hadith* to establish divorce terms in their favor that are also rooted in religion. However, women who do not have access to egalitarian literature, but insist on settling the divorce using Islamic laws over civil laws, are in danger of acquiescing to sexist interpretations of classical *fiqh*, which men or other women may put forward. It is because of these unresolved differences in interpretation of Islamic law and differences in adherence to Islamic law within the American Muslim community that proposals for establishing Islamic tribunals similar to the *Beit Dins* for Orthodox Jewish communities have become controver-

It is important to note that Muslims in divorce cases may use the term "Islamic law" to imply verses of the Qur'an, *hadith*, *fiqh*, legislation from their countries of origin or any combination of these.

See Muslim Divorce on page 4

Editor's Corner

By Randall M. Kessler
rkessler@kssfamilylaw.com
www.kssfamilylaw.com

As the year comes to a close, we look back at the year that was in Family Law and we look forward to the year that will be. The debate and fight about the new Child Support Guidelines is over and the new law is about to be played out in courtrooms across the state. (Please submit letters or articles to us about experiences you have with the new law.) Our long-awaited joint seminar with the Georgia Psychological Association was a success and the emergence of a vibrant Young Lawyers Division Family Law Committee all led to a successful year for our section, capped by receipt of Section of the Year honors from the State Bar. (Congratulations again to our Immediate Past Chair Steve Steele.)

2007 is upon us and we are off to a great year with hugely successful seminars already under the belt of this year's board. The Nuts & Bolts program in Savannah got great reviews and the child support seminars proved (and continue to prove) to be a vital resource to all practitioners across the state as we struggle with a different set of child support rules than those that have been in place for almost 20 years.

I hope you enjoy this issue of *The Family Law Review* and issues to come. We continue to be fortunate enough to receive submissions from experts across the country and many here in Georgia. Please feel free to submit an article or to recommend a contributor. I also invite you to send me your comments, suggestions, criticisms and ideas for improving the FLR. Have a wonderful, happy, healthy and safe New Year. **FLR**

Inside This Issue

Note from the Chair

By Shiel Edlin
shiel@stern-edlin.com
www.stern-edlin.com

The Guidelines are Coming!

We are on the dawn of a new era in Georgia. This is both an exciting and anxious time for Georgia lawyers and judges. We are in the midst of making the most radical change in the field of family law since *Stokes v. Stokes* hosted the development of equitable division more than 25 years ago. The Family Law Section has taken the lead in training lawyers on the use of the new guidelines. More than 20 of our members have been trained by staff members of the Child Support Commission and have been busy going out to various local bars and seminars training lawyers first hand in the use of the new guidelines. By the time you receive this newsletter the web-based calculator should be in place. While tedious, all of us can quickly learn and adapt to the new Child Support Guideline environment. We all need to become experts in using the web-based calculator and in speaking the jargon of the new guidelines. Come Jan. 1, the bench will be relying upon family law attorneys to help teach them how to use the new guidelines. We need to take the next several weeks and become familiar with and master the new Child Support Guidelines.

If any of you wish to have additional training on the Child Support Guidelines, please have your local bar association contact me and we will arrange a training session. All it takes is a bank of computers and a PowerPoint presentation. As chair of the Family Law Section, I challenge each of you to take the lead in your community so that you, the expert, will be relied upon as the "go to" source for the Child Support Guidelines.

The section has been busy in other areas of family law in the past several months. I have spoken with a study committee of the Georgia House of Representatives regarding the state of family law in general and specifically regarding the issues of custody and child support. I am pleased to report that the legislature relies upon the expertise of members of the section in studying family law issues. A taskforce composed of Debbie Ebel, Dan Bloom, Rebecca Hoelting and Catherine Knight quickly met and drafted proposed changes to the child support statute regarding factors for the Court to consider in determining the best interest of the child. This committee is a great example of what we can do to help our state make changes in the law. Members of the media concerning the new Child Support Guidelines have contacted me and I have given input into the proposed Uniform Superior Court Rules regarding the new guidelines.

On a personal note I want to thank all of you who have encouraged me in my role this year as chairman of the section. We are a vast and diverse group but together we are meeting the challenges of our profession. As I said in my last column, I am so proud to be a family law attorney and to associate with true professionals. We need to continue to work together in helping families resolve the most difficult time of their lives with minimal conflict and acrimony.

Finally, I want to be among the first to wish you all a healthy and happy New Year. **FLR**

Muslim Divorce

Continued from page 1

sial and are seen as potentially unfair to women, even though making Islamic legal claims may be more understood in such a venue.

A common primary Islamic legal concern that arises in civil courts directly from the nature of Islamic divorce law, is securing religious divorce for the wife. *Talaq* is unilateral divorce in which a husband verbally, or in writing, repudiates his wife. Pronouncement of *talaq* is followed by a waiting period for the wife, during which the couple can reconcile and remain married. However once the waiting period expires, a couple is irrevocably divorced. If a husband divorces his wife, then takes her back during the waiting period, only to divorce her again, he may only take her back once more; a third repudiation is irrevocable. American Muslim men seeking divorce are usually able to pronounce *talaq* either before or after the civil divorce process.

By contrast, women have limited access to Islamic divorce. Traditionally, they may declare a *khula* (irrevocable female initiated divorce), but they must elicit consent from their husbands to end the marriage. Alternately they may seek judicial divorce in which a *qadi* (Islamic court judge) can dissolve the marriage on grounds proven by the wife that may include abuse, impotence, insanity or incarceration of the husband.

In the absence of an Islamic court system in the U.S., some women equate a civil divorce decree as an Islamic judicial divorce; others who seek religious divorce, in addition to civil divorce, are able to substitute an imam for a *qadi* by either asking an imam for a religious divorce decree or religious permission to divorce in civil court. But some who believe that Islamic courts and *qadis* cannot be replaced by civil courts or imams, must either convince their husbands to pronounce *talaq* or give consent for *khula* in order to be religiously divorced. Therefore, for some American Muslim women, obtaining a religious divorce becomes a challenge in which divorce attorneys may involve themselves; like in some orthodox Jewish circles where established religious law is followed in addition to civil law, husbands can be reluctant to consent to religious divorce if civil divorce procedures have been initiated by wives—perhaps to keep them in limbo. (In Jewish law this is known as the Agunah problem). Some divorce attorneys have begun to include a stipulation of religious divorce in settlement offers as a potential remedy, but these measures are not always successful.

A second issue of contention is finances. In traditional *fiqh*, there is no concept of marital wealth. Husbands and wives do not share wealth, earnings or inheritance; however, wives are entitled to maintenance from their husbands for their living expenses. Both parties can use this fact of Islamic law during divorce to make very different arguments. Many American Muslim women do financially contribute to the household despite the separation of wealth in Islamic law and view their claims on martial assets as legitimate, but still hold that men's claims on their earnings in the event of divorce unislamic. By the same token, women feel it is unislamic when men ignore laws of *fiqh* and verses from the Qur'an, which indicate that women are entitled to an equitable divorce and compensation.[3] Men's counter argument generally involves the separation of wealth in Islamic law as a reason to ignore any due compensation. Many American Muslim women who claim a right on marital assets either do so because of their own contribution to martial wealth or by citing religious injunctions that entitle them to compensation in return for taking care of the household and child rearing.

The *mahr* can be an extension of disputes over finances. For many women, especially those not earning, the *mahr* signifies security money, which wives keep for themselves even in the event of *talaq* (a woman usually has to return the *mahr* in the event of a *khula*). However, in common practice in the U.S., the *mahr* has not been high enough to function as security money or has been promised, but not paid. Therefore, many women are only able to claim their *mahr* in the event of divorce and have attempted to do so through the civil divorce process. Some men (and women) have misunderstood this common practice to mean that *mahr* is a sum to be paid only in the event of divorce, rather than as a marriage dower to be paid at the wedding. Capitalizing on this misunderstanding of *mahr*, some men have made claims in civil court that the *mahr* is the only sum they are responsible to pay the wife according to Islam, especially if the *mahr* they agreed upon at the time of the wedding was symbolic (such as a gold necklace) or some other low amount. The inaccurate understanding of *mahr* is another example of how misinformation of religious law may be used to dismiss women's legitimate civil and religious claims on marital assets.

Finally, another, but less common, allusion to Islamic law in civil divorce cases involves child custody. Because differences in legal opinion among the schools of *fiqh* are most apparent in this matter and since custody can be contested in a traditional Islamic system, custody battles over children in Muslim divorce cases usually resemble those in other American divorce cases. Litigants using Islamic law for determining custody may dispute over different rulings for male and female children, depending on their respective ages

and when custody transfers from one parent to the other. Regardless of the school of thought, the assumption behind these particular laws is that staying with a particular parent at a particular age is presumed to be in the best interests of the child.

Even though Muslims have their own traditions in divorce, Islamic law is cited to various degrees in Muslim divorce cases depending on the religious orientation of the parties involved, or sometimes the number of generations their families have lived in the U.S.; still, many Muslim couples do not discuss Islamic law at all as they feel state laws prevails over religious law. Because pressing Islamic legal claims in civil divorce may work to women's disadvantage, knowing the basic issues in Islamic divorce law and how biased interpretations against women could be easily passed off as a couple's traditional method of settling divorce is important, especially when there are disputes over which set of laws, Islamic or civil, should be applied. **FLR**

Endnotes

1. Asifa Quraishi and Najeeba Syeed-Miller. No Altars: A Survey of Islamic Family Law in the United States. Islamic Family Law US Case Study. (2002) http://www.law.emory.edu/ifl/cases/USA.htm
2. Qaisi, Ghada G. "A Student Note: Religious marriage Contracts: Judicial Enforcement of 'Mahr' Agreements in American Courts" Journal of Law and Religion. Vol. 15, No. 1/2 (2000-2001), 67-81.
3. Verses 2:231, 2:241, 65:2 from the Qur'an

Don't Alter TPO Registry Forms

By Karen Henize Geiger
kgeiger@glsp.org

Did you know that customizing temporary protective orders rather than using the standardized order forms can be detrimental to your family violence clients? When you rearrange or delete paragraphs from the standardized forms, it has the unintended consequence of making the order harder to enter accurately into the Georgia TPO Registry. The TPO Registry is the database that allows law enforcement officers and judges to ascertain whether there are active TPOs between parties. Here are ways you can help make the registry more effective in protecting domestic violence survivors:

1. Do not modify the standardized TPO orders to delete or rearrange paragraphs. While this makes the document more readable and clean, it can result in information being incorrectly input into the registry.

When clerks input the orders into the registry, they are asked to answer questions prompted only by the paragraph number, with no reference to the contents of the paragraph. If you change the contents associated with that number, the clerk may be answering the question incorrectly. This could have serious consequences for the person seeking protection and law enforcement assistance.

NOTE: It is fine to add requests for relief in the petition and order. Just be sure that any additions to the orders be put in the last paragraph of the order ("It is further ordered…") rather than inserted as a new paragraph in the body of the order.

2. Please do not delete those "tacky little pco numbers" under the paragraph numbers in the standardized orders. These numbers are important because they identify the information that must go into the National Crime Information Center (NCIC) system that law enforcement checks for criminal background information when responding to crisis calls. Without these pco numbers, it is possible that the TPO won't be entered into the NCIC properly and that law enforcement won't know about your TPO.

If you have questions about the Georgia TPO registry, please contact Daryl Beggs with the Georgia Bureau of Investigation at 404-270-8464 or DBeggs@gbi.state.ga.us. **FLR**

Karen Geiger is the coordinating attorney for Georgia Legal Service Program's Family Violence Project which represents survivors of family violence throughout the state.

Nuts & Bolts in Savannah Features Large Attendance

By Edward J. Coleman III
edward.coleman@psinet.com

The Family Law Section once again sponsored its annual Nuts & Bolts of Family Law at the Marriott in Savannah on Aug. 25. This seminar is normally held twice each year, typically in August in Savannah and again in September or October in Atlanta. This year the scheduled Atlanta date was pre-empted by the need to schedule a statewide seminar on the Child Support Guidelines (Oct. 13). Edward J. Coleman III of Augusta, secretary of the section, chaired this year's event, which was attended by more than 100 attorneys. The seminar featured the following presentations: 1. Pre-nuptial Agreements–Jonathan Tuggle of Atlanta; 2. Joint custody and relocation–K. Paul Johnson of Savannah; 3. Ethics and Professionalism–Andrew Tisdale of Augusta; 4. *Guardians ad Litem*, The Court's Perspective–Hon. Penny Haas Freesemann, Superior Court of Chatham County; 5. Case Law Update–Marvin Solomiany of Atlanta; and 6. Child Support Guidelines–John Lyndon of Athens.

Tuggle's presentation on Prenuptial Agreements included a survey of the case law since the three-prong test of *Scherer v. Scherer*, 249 Ga. 635 (1982), with a particular emphasis on *Mallen v. Mallen*, 280 Ga. 43 (2005) which he viewed as establishing a new, and lower, threshold for the enforceability of prenuptial agreements. Judge Freesemann's discussion covered both the new Superior Court Rule 24.9 on *guardians ad litem*, the Chatham County guardian program, as well as her personal experiences with guardians; several of her anecdotes highlighted the notion that a *guardian ad litem* cannot effectively do his or her job from a desk, but must hit the pavement, and make personal visits to learn what is going on in a family.

Paul Johnson's remarks on the issue of relocation issues in custody cases, which elicited many questions from the audience, addressed the new rules on the right of a custodial parent to move, how to notify the other party and how to get ready for the inevitable fight in court. Andrew Tisdale gave a thought provoking speech on the ethical issues confronting attorneys and some helpful reminders about how to stand above situational ethics and how to live outside of "competitive consumerism".

Solomiany gave a fast-paced, high-energy and very entertaining talk on the many recent domestic relations cases decided in the last 18 months by our Appellate Courts.

There was much speculation as to the reason for the large attendance, and while all of the speakers made excellent presentations, it was the opinion of some that the presentation on child support guidelines given by Lyndon at least accounted for the fact that the meeting room was still full at 4:30 p.m. on a Friday afternoon. Lyndon's presentation and program materials included, among other things, a two-page summary of the guidelines titled: "Step by Step Process of Calculating Child Support", a laminated copy [signifying its intended frequency of use] of which was also provided to the Superior Court Judges at their seminar in July 2006. Lyndon also provided a draft copy of the child support worksheet and schedules, and overall did an excellent job of simplifying an otherwise cumbersome statute.

As always, the Family Law Section extends its greatest thanks and appreciation to the work of the Institute of Continuing Legal Education, and especially the work of Steve Harper, director of programs, and Brain Davis, director of information and technology. **FLR**

Tribute to Stephen C. Steele:
A Job Well Done

By Catherine Knight
Boyd Collar Knight, LLC

The person who said, "If it is a job worth doing, it is worth doing well," was someone better than most of us mere mortals. We often simply get by, putting out fires in our divorce cases, juggling demanding clients and trying opposing counsel. We are too often simply relieved that the job is done, and can only hope it was done well.

Then, there is the Man of Steele. As you know, Steve Steele is the immediate past chair of the Family Law Section. Under his leadership, we won Section of the Year. And this was no ordinary year.

The Georgia State Legislature gave the Child Support Commission the charge of revising and making Senate Bill 382 a more user-friendly statute, among other daunting tasks. To my knowledge, Steve himself attended virtually every meeting of the subcommittees charged with aiding the commission. He did not just delegate , although he did that well too, rather he personally oversaw the entire process. Steve ensured that section members had a voice, and in certain key ways was instrumental in improving the statute.

Steve also worked with ICLE to successfully coordinate the largest seminar in ICLE history: the child support training on Oct. 13. It was televised live and transmitted to an audience of well more than 1,000. At that event, Steve made a slight gaffe: an off-handed comment (about me not being his secretary), which was a private joke between Steve and me gone awry. (It was actually my fault: Just before going on stage I had again referred to this joke and worried that one of us would surely get sudden Tourette's Syndrome and say something off-color before such a huge live audience.) Perhaps it was the hot, bright lights or the long time in the television make-up chair (where no man feels comfortable), but Steve made this comment as if it could translate to a public joke, which it could not, as soon as he stood up at the podium. In some circles Steve has been harshly criticized for it. I am here to say—forget about it. Anyone who knows Steve well knows that Steve promotes and respects women. He just should not quit his day job and become a stand-up comic.

I have had the privilege of working with Steve this year. It has been inspiring for me to work with someone who truly lives by the adage of a job well done. Each of us in this section owes Steve Steele a huge debt of gratitude for his exemplary service as our chairman. He has been our Man of Steele. Steve, from me personally, and on behalf of all of us in the section: thank you and well done. **FLR**

If you would like to contribute to *The Family Law Review*, please contact the editor, Randall M. Kessler at 404-688-8810 or rkessler@kssfamilylaw.com.

Confessions of a *Guardian ad Litem*

By M. Debra Gold
mdgoldlaw@aol.com

In the last issue of *The Family Law Review* I confessed that I love my job as a *guardian ad litem* (GAL) because it has rewards that make a difficult job worth doing. In this issue, my confession is that I hate my job as a GAL almost as much as I love it. What an interesting struggle this love/hate relationship makes my job. But somebody's gotta do the dirty work!

I hate seeing what parents (and sometimes their attorneys) do to children in nasty, protracted custody battles, all in the name of "the best interests" of the child. It's horrible to hear a child say that she hates her father because he doesn't love her mother, who cries all the time. It's worse to see a 7-year-old be a caretaker for a mother with a drinking problem. It's heartbreaking to hear a 6-year-old say he has secrets he wants me to tell me about his parents, but only if I promise not to tell them. Children get caught in the middle of adults' problems that may wreak havoc on their lives.

As attorneys, it is our duty to counsel clients that their custody battle can leave lasting scars on their children. I believe that most parents think they are doing the right thing. However, in the middle of a custody dispute, it is as if some parents are wearing blinders and their perspective goes south. Some have no clue what it takes to raise children in a household without the other parent, and others fear having to do so. They lose sight of the forest for the trees and winning the battle becomes more important than anything else.

Custody battles are often waged for reasons that boil down to what is in the best interests of the parents rather than what is in the best interests of the children. Whether consciously or unconsciously, parents often react knee-jerk to divorce and fight for custody for wrong reasons. We are all familiar with the parent whose main motive in seeking custody is to hurt the other parent. Hopefully, we steer clear of these clients. I have found that a significant number of custody battles are fueled by the parents' genuine and valid fears of being alone and away from their children. Some clients are ruled by their own control issues, which block their ability to recognize alternatives to their rigid ideas. Others are so bitter, angry and full of hatred that they are driven to win at all costs.

In their emotional upheaval, these parents do not have the ability to step back and take a complete and realistic look at what is best for their children; their own issues cloud their judgment. We, as attorneys, should encourage realistic custody goals, which consider the individual facts and circumstances of each case. Our clients need to be steered to focus clearly on what is best for their children, rather than their own needs. They often have to be reminded of this repeatedly. They need to understand that what is best for their children is not necessarily what is best for them.

Helping our clients develop an awareness of the impact their own issues have on the children is something that we cannot do alone. We cannot fill all of the roles of attorney, therapist and friend to our clients. A mental health professional is an invaluable tool to help clients to understand what is truly best for their children. We should all keep a list of trusted mental health professionals to whom we can refer our clients. We should also keep a list of good books for our clients to read regarding their custody situation. Further, we should be aware of single parent support groups, seminars, workshops and retreats that may benefit our clients. Every little bit helps.

Time is usually the magic elixir. However, the sooner our clients are able to see the impact of their conduct on the children, the sooner they will act to curb such conduct, thereby reducing the negative impact on the children. The lesser the negative impact on the children, the less heartache for everybody involved. And the less heartache, the more I love my job as a GAL. **FLR**

Using the New Child Support Guidelines

By Daryl G. LeCroy
daryl@lecroylaw.com

If you are like me, you have waited till the end of the year to seriously look at the new child support guidelines. After all, we don't need to use them until next year. I began to look at them last August because a good client of mine asked if they would help him. He's currently paying $1,500 monthly for two children. He makes $8,265 per month and his ex-wife makes $5,091 per month for a combined total of $13,356 per month. His gross income is 62 percent of the total, but I felt that it was subject to some adjustments.

First of all, my client has remarried and has a child in his second marriage, so I needed to calculate a "theoretical" child support amount for my client's child at home. Since his second wife does not work outside the home, when I looked at the chart for his income for one child, I found a theoretical child support amount of $1,131 a month. But upon closer examination of the theoretical child support adjustment I found that my client first must prove it would be a hardship for him if it were not allowed. Then he would have to show that the adjustment was somehow in the best interest of the child for whom child support was being calculated. It is therefore a "theoretical child support" provision because it in theory provides some relief for other "qualified" children in the home, but as a practical matter, no one can qualify for its benefits as it is presently worded. It is therefore now only "window dressing" for the guidelines and has no current application. This defect should be addressed and corrected by the legislature.

When I looked at the chart for my client and his ex-wife, I found that a typical intact family with a total monthly income of $13,356 spends $2,114 a month on two children. My client therefore has a basic child support obligation (BSO) of 62 percent or $1,311.

Next, when I looked to see if any special circumstances or factors for deviation existed. I found that my client has his older children for 34 percent of the time—a deviation factor which is an adjustment to the BSO.

Shared Parenting

In the final hours before S.B. 382 was passed, the opposition managed to delete the automatic parenting time adjustment from the bill and convert it into a deviation factor. Their hope, no doubt, was that the trial courts might ignore parenting time completely as they frequently did under the old guidelines. However, trial courts and attorneys do have an objective way to address parenting time in an equitable manner.

Since the guideline charts are based upon intact, typical family expenses, and since my client and his ex-wife have an equal duty of support[1], in my client's case, dad should pay mom support for her 66 percent of the time with the children and mom should pay dad for his 34 percent of parenting time.

> Mom's support for dad's 34 percent of parenting time is:
>
> .38 (Mom's % of income) x $2114 (total child cost) x .34 (Dad's % of time) = $273.
>
> Dad's support for Mom's 66 percent of parenting time is:
>
> .62 (Dad's % of income) x $2114 (total child cost) x .66 (Mom's % of time) = $865.

You might observe that these two figures do not add up to $2,114. This is because each parent spends money directly on the children. The difference between these two support amounts is $592 per month, which dad owes mom. When this $592 is subtract-

See Guidelines on page 10

Guidelines

Continued from page 9

ed from dad's BSO of $1,311, the difference is $719, which is dad's parenting time adjustment, or parenting time deviation.

Other credits to which Dad is entitled include 62 percent of mom's tax benefits or 62 percent of $254 which is $157; 62 percent of the $87 dad spends each month on health insurance for his two older children or $54; and 62 percent of the $60 a month he spends on life insurance for the benefit of the two children, or $37 leaving a balance due mom from dad of $344. While such may seem low, dad has significant parenting time; he has another child and wife that he supports; and his ex-wife has significant income plus $254 a month in tax benefits related to the children. This result is in accordance with the new child support guidelines.

All of the above figures are relatively easy to determine, with the possible exception of mom's tax benefit. An accountant or economist might tell you an exact figure, however for a broad range of incomes from about $3,000 to $7,000 gross per month, the child-related tax benefits (extra after-tax income) are between $100 to $130 per month, per child – just based upon the dependency exemptions and child tax credits. When head of household status and earned income tax credits are added, the benefits are even higher. That is, at very modest incomes, the child-related tax benefits can be over 40 percent of gross earned income of a custodial parent. But to keep it simple, an easy way to approach the tax benefit issue is to alternate the obvious exemptions and related child tax credit, allowing the parents to have the deduction for the children in alternate years or allowing them to have a rotation schedule which would reflect each parent's share of combined gross income.

The Most Significant Deviation Factor

Under the old guidelines, no guidance was given to the bench or bar as to how to calculate real numbers from the deviation factors or "special circumstances," therefore the special circumstances were generally ignored. However, now that the new guidelines are coming into effect, advocates for higher child support awards will be far more likely to pay attention to "deviation factors" in their efforts to arrive at higher child support numbers. Lawyers and judges should therefore pay particular attention to parenting time, which is in most cases the most significant deviation factor.

Many attorneys and judges believed or assumed that our old guidelines included consideration of "standard" visitation. They did not. But to prove they didn't required the use of an expert who was familiar with the origins of our old guidelines.

Our new guidelines are different. There is no issue as to whether the guideline chart numbers take in consideration "standard" visitation or any other kind of visitation. They do not. Policy Studies, Inc., the economic consultant used by the Child Support Commission was completely clear that the presumptive cost schedule (the charts) are based on typical costs of intact families and therefore assume no parenting time by an absent parent.

Most custody orders allow dads to have at least 25 percent of the parenting time and to ignore parenting time is to assume the non-custodial parent (read dad) spends no money on the children directly. It is a silly assumption that a parent can care for a child 25 percent of the time and spend no money on the child. No economic study validates any such assumption. A parenting time adjustment such as presented here is appropriate for every case in which the non-custodial parent has parenting time.

Those that have followed the litigation understand that the original drafters of the bill were attempting to build into the formula as many factors as possible so that the outcome might be used directly with a minimum amount of litigation, as specified by the federal mandate. Opponents of the new guidelines were insistent upon deleting significant factors such as parenting time from the formula, in the hopes that the trial courts would ignore such important adjustments as many courts have done with our old guidelines. Shared parenting is NOT a special circumstance nor should it be considered a deviation factor. In fact it is the "policy of the state."[2] Hopefully with the establishment of a Child Support Commission which can recommend needed changes, the important issue of parenting time will be restored to the formula by the legislature for the benefit of all concerned.

Right to Modify

Senate Bill 382 originally provided that a 15 percent or greater reduction was automatically modifiable. Such provision was removed by the opposition, requiring a substantial change in financial circumstances of a parent or in the needs of a child. As a practical matter, since the statute allows a "phase-in" of up to a year when the new child support amount is 15 percent lower, it is clear that the legislature considered a 15 percent change to be a "substantial change in circumstances". In a more perfect world, the opposing factors might have compromised on a 20 percent reduction or even higher. The objective was to create a "bright line" as to a person's right to a modification. The adoption of a necessity to prove a sufficient change opens up an area of litigation, which is not necessary. It's probably

not helpful to our public image either. Can you imagine ten years of appellate decisions about whether a party had a sufficient change to warrant a modification? No wonder the appellate courts are cautious about giving us the right to direct appeal.

In accordance with the federal mandate, which has been ignored by Georgia, child support awards shall be presumptively modifiable after three years and may be modified within three years if a change in circumstances is shown.

The Commission should recommend a change in this part of the law at the first appropriate opportunity.

Needs and Ability to Pay vs. Best Interest of the Child

In their final effort to eliminate any downward deviations of child support, opponents of the new guidelines have inserted the provision that deviations from the presumed support amount must be in the "best interest of the child." The "best interests of the child" standard is appropriate in custody determinations, but is wholly inappropriate in child support calculations. The standard that has been established over decades of case law in most states, including Georgia, is "need and ability to pay."[3] The U.S. Congress and the federal mandate also require this standard. The "needs and ability to pay" standard is in conflict with "best interests of the child."

Federal regulations have always referenced the "best interest of the child" as an appropriate "consideration" in deviations, however, were the parenting time formula included in the guidelines as it should be, it would not be a deviation issue. The current use of the standard in the statute is merely a "spin" to avoid appropriate downward deviations that should have been incorporated into the guideline calculations. The Child Support Commission would be wise to state that any award based on the evidentiary needs of the child and allocated between the parents according to relative ability to pay shall always be deemed to be in the best interest of the child. Such recommendation should be made to the legislature to include such clarification of the best interest standard in the statue during the next legislative session. Any fact-based award that is based upon needs (costs) of the child and equal duty of support (based on proportional resources/income) should always be found to be in the child's best interest. Otherwise, the "best interest of the child" is not a valid legal consideration. If the actual costs of the child as allocated between the parents proportionately is less than the presumptive award, then the "needs and ability to pay" award MUST be found to be in the best interest of the child. Otherwise, the best interest of the child standard is invalid and inappropriate.

The apparent purpose of such insertion was to allow mom's attorney to argue, "How can a downward deviation of child support be in the child's "best interest? No child ever suffered from having more money." The obvious problem with such logic is that child support has a direct impact on second families and laws should not be drafted which favor one group of children over another and create what the Tennessee courts have referred to as "children of a lesser God." This then becomes an Equal Protection issue. The Child Support Commission should make their strongest recommendation that the legislature correct this defect at their earliest opportunity.

Duty of Child Support Commission

The Child Support Commission was directed "[t]o collaborate with the Institute for Continuing Judicial Education, the Institute of Continuing Legal Education, and other agencies for the purpose of training persons who will be utilizing the child support obligation table and child support guidelines." SB 382 § 6(a)(9).

The Child Support Commission has done a remarkable job with the computer application of the new guidelines, but thus far neither the Courts nor the Bar have been given any guidance as to how to deal with the important issue of parenting time. It has in fact been implied that the guideline numbers already include consideration of "standard visitation." They do not.

The Commission should recommend through the ICJE and ICLE that the suggestions contained herein be followed as of Jan. 1, 2007.

The legislature charged the Commission "[t]o make recommendations for proposed legislation." SB 382 § 6 (a)(10).

The Commission should adopt the example outlined in this article that is fair, reasonable, and understandable:

Mom owes Dad:

(her % of total income) x (total child cost) x (dad's % of parenting time) = A

Dad owes Mom:

(his % of total income) x (total child cost) x (mom's % of parenting time) = B

B-A= C, which is dad's net obligation to mom. When C is deducted from dad's BSO, the difference is BSO-C= (PTA) dad's Parenting Time Adjustment (or deviation).

Enter this number on Schedule E, Line 13, of the worksheet[4].

The Commission should recommend that these proposals be codified in 2008 to achieve consistency and economically appropriate awards across the state.

The Child Support Commission was given specific direction by the legislature regarding parenting time:

> The Commission shall have the following duties: "To study the impact of having parenting time serve as a deviation to the presumptive amount of child support and make recommendations concerning the utilization of the parenting time adjustment." SB 382 § 6(a)(13).

With no contrary direction from the Commission, under the new guidelines, judges who ignore the parenting time deviation will order support which is significantly higher than those who follow the recommendations contained herein. The uniformity of orders is one of the paramount objectives of the guidelines.

You can assist the Commission in doing its job by advising them of every case you become aware of in which a parent was not allowed a reasonable parenting time deviation or adjustment. What was the county and case number? Who was the judge? Was it asked for? Was it granted? In what amount was it granted?

What if I just ignore parenting time?

If you are an attorney representing a parent who has visitation or parenting time and you fail to ask for a reasonable parenting time deviation, you could be accused of malpractice.

If you are a judge who ignores or fails to allow a reasonable parenting time deviation, you may be found to have abused your discretion in your clear failure to provide for the child in both households.

If you have an opinion regarding these recommendations, you should let your commission members know. Your commission members are:

- Rep. Earl Ehrhart, commission chair and state representative from Cobb County.
  eaeh@facilitygroup.com
- Ms. Joy Hawkins, private citizen, formerly with the governor's office.
  JHawkins@gov.state.ga.us
- Judge Quillian Baldwin, superior court judge, Troup County.
  qbaldwin@troupco.org
- Judge Michael Key, judge, juvenile court, Troup County.
  michael@kmglawfirm.com
- Judge Louisa Abbot, superior court judge, Chatham County.
  labbot@chathamcounty.org
- Mr. Chuck Clay, former state senator, attorney, Marietta.
  cclay@brocklay.com
- Judge Tom Campbell, superior court judge, Cobb County.
  Fax: 404-730-8380
- Dr. John C. Thomas, professor.
  jcthomas@gsu.edu
- Judge Debra Bernes, judge, Georgia Court of Appeals.
  bernesd@gaapeals.us
- Dr. Roger Tutterow, professor.
  Tutterow_RC@Mercer.edu
- Rep. Stan Watson, state representative, Decatur.
  swatson@legis.state.ga.us
- Ms. Sadie Fields, state chairman of the Christian Coalition of Georgia.
  sadie@gachristiancoalition.org
- Sen. Seth Harp, state senator, Columbus.
  sethharp@aol.com
- Ms. Annetta Panatera, private citizen, Marietta.
  annettap@bellsouth.net
- Sen. Joe Carter, state senator, Tifton.
  joseph@josephcarter2004.com

While our new guidelines are not perfect, they are an immense improvement over what we have been using for almost 19 years, and with a balanced Child Support Commission, and a legislature that will listen, we have the framework within which our guidelines may be improved over time. **FLR**

Endnotes

1. O.C.G.A. § 19-7-2. It is the joint and several duty of each parent to provide for the maintenance, protection, and education of his or her child until the child reaches the age of majority, dies, marries, or becomes emancipated, whichever first occurs, except as otherwise authorized and ordered pursuant to subsection (e) of Code Section 19-6-15 and except to the extent that the duty of the parents is otherwise or further defined by court order.
2. O.C.G.A. § 19-9-3(d) It is the express policy of this state to encourage that a minor child has continuing contact with parents and grandparents who have shown the ability to act in the best interest of the child and to encourage parents to share in the rights and responsibilities of raising their children after such parents have separated or dissolved their marriage.
3. O.C.G.A. § 19-6-1(c) (child support "is authorized, but is not required, to be awarded to either party in accordance with the needs of the party and the ability of the other party to pay"); O.C.G.A. § 19-6-15(a) ("the trier of fact shall specify in what amount and from which party the minor children are entitled to permanent support"); O.C.G.A. § 19-6-15(c)(10) ("a party's own extraordinary

needs" may be a special circumstance); O.C.G.A. § 19-6-15(c)(15) ("income of the custodial parent" may be a special circumstance); CSCJ Pattern Jury Instruction nos. II-L (7/91 version) ("Your duty is to allocate resources based upon need and ability to pay") & II-K (3/95 version) ("Child support is a matter for you to fix and determine from the evidence taking into consideration the needs of the children and the parents' ability to pay"); Esser v. Esser, 277 Ga. 97 (2003) ("the trial court [must] . . . determine whether [an agreed child support award] is sufficient based on the child's needs and the parent's ability to pay"); Georgia Department of Human Resources v. Sweat, 276 Ga. 627, 631 (2003) ("'The trial court is obligated to consider . . . the children's needs and the parent's ability to pay'"); Swanson v. Swanson, 276 Ga. 566, 567 (2003) (when "parties enter into a settlement agreement . . . which includes an award of child support, courts remain obligated to consider whether the child support award is sufficient based on the needs of the child and the non-custodial parent's ability to pay"); Betty v. Betty, 274 Ga. 194 (2001); Hoodenpyl v. Reason, 268 Ga. 10, 11 (1997) ("the trial court will be able to make a determination of support that best balances the children's needs and the parent's ability to pay"); Arrington v. Arrington, 261 Ga. 547 (1991) ("The trial court is obligated to consider . . . the children's needs, and the parent's ability to pay"); Walker v. Walker, 260 Ga. 442, 443 (1990) ("The trial court's duty is to allocate resources based upon need and ability to pay"); James v. James, 246 Ga. 233 (1980) (the trial court may order the custodial parent to pay child support to the non-custodial parent to provide for the children's needs on visitation with the non-custodial parent); McClain v. McClain, 237 Ga. 80, 83 (1976) (child support is subject to the court's "wide discretion . . . taking into consideration the needs of the child and the station in life of the parties").

4. There should be a Parenting Time Deviation or Adjustment in every case unless the non-custodial parent has no visitation or parenting time with the minor children.

Support Guidelines

Continued from page 27

refusing to allow the victim of violence to work or to attend school. See Georgia Superior Court, Domestic Violence Benchbook: A Guide to Civil and Criminal Proceedings, 2nd Edition (2006) at C-1 (identifying domestic violence in domestic relations cases).

14. O.C.G.A. § 19-6-15(f)(4)(D) (Gross Income- Reliable Evidence of Income - Willful or Voluntary Unemployment or Underemployment). See also O.C.G.A. § 19-6-15(j) (Involuntary Loss of Income) (considering deviations based upon the involuntary loss of wages).
15. *See* also O.C.G.A. § 19-13-4(a)(6) (discussing the award of child support in protective orders).
16. Nearly one-third of American women (31 percent) report being physically or sexually abused by a husband or boyfriend at some point in their lives. The Commonwealth Fund, Health Concerns Across a Woman's Lifespan: 1998 Survey of Women's Health, May 1999.
17. O.C.G.A. § 19-13-4(a)(6); Baca v. Baca, 256 Ga. App 514. 519 (2002) ("O.C.G.A. § 19-13-4(a)(6) specifically allows the court to award support "as required by law."); Davis-Redding v. Redding, 246 Ga. App. 792, 794 (2000)("In order to achieve this purpose the act gives the trial court the authority to order temporary relief as it deems necessary to protect a person from violence.")
18. O.C.G.A. § 19-6-15(i)(2)(J) (Extraordinary Expenses).
19. O.C.G.A. § 19-6-15(i)(2)(K) (Parenting Time).
20. O.C.G.A. § 19-6-15(i)(3) (Nonspecific Deviations).
21. O.C.G.A. § 19-9-1(a)(2) and O.C.G.A. § 19-9-3(a)(3). O.C.G.A. § 19-9-7 (Visitation).
22. O.C.G.A. § 19-9-1(a)(2)(A) and (B).
23. O.C.G.A. § 19-9-7.
24. Lundy Bancroft and Jay Silvermen, The Batterer as Parent, Assessing the Impact of Domestic Violence (2002).

Leadership and Rainmaking Go Hand in Hand

By Pilar Jolie Prinz
pprinz@cpmas.com

As a younger lawyer, I read everything I can find about rainmaking and how to build a law practice. True, most partners (mine included), will tell you that younger lawyers should devote most of their time to sharpening their legal skills. Yet the reality is that while the route to becoming a better lawyer is fairly straightforward (learn the law, hone your skills, practice, practice, practice), the road to creating your own practice is infinitely less clear. It seems that some people have a knack for rainmaking while others spend their entire practice "working" the business of others. I know which category I'd rather be in; the question is how.

Since I began practicing, I've became involved in several local organizations – the Georgia Association for Women Lawyers, our recently formed Family Law Committee of the Young Lawyers Division, the Inn of Court, and Lawyers Club. But the best rainmaking advice I've received is this: You have to do more than just join an organization; you have to become a leader. Joining is easy – in most cases you just sign up and pay a fee. But leadership requires effort, be it planning, managing a team or balancing a budget. Most people will assume (hopefully correctly) that if you are a competent leader of their organization, you are also competent in your law practice. If you do a good job at something that you do voluntarily on your own time, it stands to reason you'll also do a good job in your profession. When I look at my own practice, a theme is already emerging. The sources from which I have received the most business have been those organizations that I've not only joined, but also become a leader.

If you look around at the "superstars" of our profession, I bet you'll find one element in common: they are leaders. Among the top lawyers in our Family Law Section are presidents of clubs, current and former chairpersons of various bars and committees, and members of the boards of local charities. It might be a chicken or the egg question, but one thing is certain – leadership and rainmaking go hand in hand.

As the year is winding down and you begin to think ahead to next year, I hope you will resolve to become a leader in an area that you enjoy. Not only will you get personal satisfaction from meeting new people and contributing your time, but your business will be better for it. **FLR**

Past Chairs of the Family Law Section

Stephen C. Steele 2005-06
Richard M. Nolen 2004-05
Thomas F. Allgood Jr. 2003-04
Emily S. Bair 2002-03
Elizabeth Green Lindsey 2001-02
Robert D. Boyd 2000-01
H. William Sams 1999-00
Anne Jarrett 1998-99
Carl S. Pedigo 1997-98
Joseph T. Tuggle 1996-97
Nancy F. Lawler 1995-96
Richard W. Schiffman Jr. 1994-95
Hon. Martha C. Christian 1993-94
John C. Mayoue 1992-93
H. Martin Huddleston 1991-92
Christopher D. Olmstead 1990-91
Hon. Elizabeth Glazebrook 1989-90
Barry B. McGough 1988-89
Edward E. Bates Jr. 1987-88
Carl Westmoreland 1986-87
Lawrence B. Custer 1985-86
Hon. John E. Girardeau 1984-85
C. Wilbur Warner Jr. 1983-84
M.T. Simmons Jr. 1982-83
Kice H. Stone 1981-82
Paul V. Kilpatrick Jr. 1980-81
Hon. G. Conley Ingram 1979-80
Bob Reinhardt 1978-79
Jack P. Turner 1977-78

E-Discovery: Are You Finding Documents You Need?

By Amy J. Amundsen
aamundsen@ricelaw.com

Life was simpler years ago. When parties were divorcing, they exchanged paper: bank statements, cancelled checks, credit card statements, photographs, calendars, diary journals, etc. Their lawyers examined how the money was deposited and spent, what their daily activities were, etc. Now, a party responds to discovery requests by stating that they bank online, have no bank statements or cancelled checks, and that they don't keep calendars or journals. What does a family lawyer do to unravel the virtual paper trail?

This article will provide some basic information about collecting the computerized data, analyzing the information obtained, making the data collected authentic and admissible for trial and lastly, providing solutions for parties who fail to reasonably preserve the records. It also describes the pitfalls that lawyers may get themselves into if they just accept the data the client gives them, without asking questions.

Collecting the Computerized Data

At the initial conference with the client, one should discern the technological advancement of each party. Your ability to obtain what you need in this high tech world depends upon your knowledge of a computer's many varied uses and what you ask for.

- Does your client and/or spouse bank on-line or make payments to their creditors via a computer?
- Does your client and/or spouse text message others?
- Does your client and/or spouse use cellular phones? Take pictures with their phones?
- Does your client and/or spouse have palm-held device/ notebook computers?
- Does your client and/or spouse communicate via e-mail? Chat programs?
- What are the usages of the computer by the spouse, ie. Online banking, calendars, addresses, pictures, research, purchases, etc.?
- Does your client and/or spouse have a car computer/navigation system?
- Does your client and/or spouse have access to the other spouse's computer, cellular phone, palm-held device? If so, how?
- Do the parties use TIVO/DVR?

While your client is in your office, you might consider doing a little discovery of your own. Access the Internet and determine what if anything is on MySpace.com, Facebook.com, Friendster.com or any other personal Internet sites that so many Generation Xers and Yers are using. You may learn much more about your client and/or their spouse by using these sites. However, if the client and/or their spouse are not so public with their affairs, then you might Google the parties and/or their businesses. Surprisingly, there are even sites for confessions: such as "MySecrets," "Post Secrets" or "Grouphug." You may not need a private investigator; the spouse may have already provided what you need for an admission of adultery or an admission against party interest.

If you find out that the spouse is communicating electronically, then you need to take three very important steps to protect the evidence.

1. **Protect your client.** You should advise the client to take reasonable steps to preserve records that are subject to discovery throughout the divorce proceeding. TCA 36-4-106 (d)(1-6) requires the parties going through a divorce to maintain their records. A temporary mutual injunction automatically goes into effect upon the filing and serving of a complaint for divorce on all grounds

See E-Discovery on page 16

E-Discovery

Continued from page 15

other than irreconcilable differences. This statute would probably include computerized data, although there has been no reported case on this issue since the statute went into effect in May 2002.

2. **Seize the data.** You may want to obtain a court order requiring the immediate seizure of the other spouse's computer for the purpose of a forensic analysis of the computer and to review all files stored on the computer, and an injunction preventing the spouse from altering the computer in any form or fashion once served with notice. You might want to file a request for injunctive relief with your complaint, pursuant to TRCP 65.07, that the spouse be enjoined from "deleting, wiping out, destroying, or in any way altering the data in the computer, pending further orders of the court." The compliant should set out that the opposing party typically uses computers, palm-held devices or other electronic systems to communicate with third parties and to transact business and that there is a strong likelihood that the retrievable information would be purged or destroyed once the spouse is served with a complaint and it may not be retrievable.
3. **Perform e-relevant discovery**. You should also file discovery requests on behalf of your client. You may want to ask the other spouse the following questions:
   a. What operating system do you have?
   b. Have you deleted or wiped out anything in the last 12 months? If so, how did you delete it? What was the information deleted?
   c. What are the passcodes, keys and codes to obtain the data information?
   d. Provide all of your e-mail addresses.
   e. Provide all of your network service providers for the Internet, telephone, banking facilities and the location of e-mail files.
   f. Provide all diskettes, e-mails and back-up tapes.
   g. Describe what computer you use and the frequency of use. For what purpose do you use the computer?

If you have not initially obtained a court order to retrieve and inspect the computer, you may want to file a motion to require the production of each spouse's computer for the purpose of a forensic analysis. In some jurisdictions, the court, when confronted with such a request to conduct a forensic evaluation, might appoint a special master, a person having expertise in the area of computers, to implement a particular protocol on how the computer is inspected, forensically copied and the data reviewed. The special master could assist the court in monitoring the volumes of electronic data collected and in protecting the authenticity, integrity and confidentiality of any privileged data. The court should initially allocate the costs of obtaining the electronic data and using the special master. If the motion is granted, the attorneys should seek a protective order to prevent disclosure of any proprietary information and/or personal data from any third parties as disclosure of that data might be privileged communications between attorney and client.

Analyzing the Data

Many of our clients are more sophisticated than we are about the computer and know how to place software on their computers to assist with collecting data. Can the computerized data obtained by your client from their home computer be admissible in court? It depends.

Just like lawyers are careful when a client comes in with a tape recording of the spouse, so should a lawyer be careful of obtaining or using information obtained from a computer disc without first asking questions. Federal and state wiretapping and stored communication laws are being used more frequently to obtain civil judgments and criminal indictments.

In the case of *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976), the Court ruled that a spouse cannot install an electronic listening device to monitor incoming and outgoing telephone calls, without the other party's consent. Jones was indicted for intercepting telephone conversations with his estranged wife and using the contents of the intercepted communications in violation of Title III to the Omnibus Crime Control and Safe Streets Act of 1986 ("Title III"), 18 U.S.C. Sec. 2511 (1) (a) and (d) (1970). The Court ruled, "For purposes of federal wiretap law, it makes no difference whether a wiretap is placed on a telephone by a spouse or by a private detective in the spouse's employ. The end result is the same- the privacy of the unconsenting parties to the intercepted conversation has been invaded. It is important to recognize that it is not just the privacy of the targeted spouse which is being violated, but that of the other party to the conversation as well." *Id.* at 670.

In 1994, the Tennessee legislature passed the Wiretapping and Electronic Surveillance Act. TCA 39-13-601 through 39-13-607 and TCA 40-6-301 through 40-6-311. It specifically provides for monetary damages:

> (a) ...[a]ny aggrieved person whose wire, oral or electronic communication is intentionally intercepted, disclosed or used in violation of TCA 39-13-601

or title 40, chapter 6, part 3 may in a civil action recover from the person or entity which engaged in that violation the following relief:

(1) The greater of:

(A) The sum of the actual damages, including any damage to personal or business reputation or relationships, suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) Statutory damages of one hundred dollars ($100) a day for each day of violation or ten thousand dollars ($10,000) whichever is greater; and

(2) punitive damages; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred. TCA 39-13-603.

In the case of *Robinson v. Fulliton*, 140 S.W. 3d 312 (Tenn. Ct. App. 2003), app. denied, the Court of Appeals found that the trial court lacked statutory discretion to award 'nominal' damages for violation of wiretapping law, and remanded the case. Robinson, the brother of Mrs. Fulliton sued his brother-in-law, Mr. Fulliton, seeking civil damages under the Tennessee wiretapping statute. Mr. Fulliton had been recording telephone conversations of his wife and her brother without their knowledge. Fulliton disclosed the content of the conversations to his attorney who then used the contents of the tapes in the divorce proceeding. The trial court found Mr. Fulliton liable against the brother and awarded Robinson the sum of $500, plus attorney fees and costs. The Court of Appeals reversed and remanded the case, and stated that the legislative's intent was to have $10,000 as a floor, plus punitive damages, plus attorney fees and litigation costs against those violators.

Can a lawyer be civilly and criminally liable for using illegally obtained information? In *United States v. Wuliger*, 981 F. 2d 1497 (6th Cir. 1992), the defendant, a divorce attorney, was convicted of multiple violations of 18 U.S.C. 2510-2520, specifically, under section 2511 (1)(d) for intentionally using the contents of telephone conversations recorded in violation of section 2511 (1) (a) and 2511 (c) for intentional disclosure of contents of wrongfully recorded telephone conversations. In Wuliger, the defendant, an Ohio attorney was representing the husband who intercepted and recorded all of the telephone calls at the parties' residence without his wife's prior knowledge or consent. Husband gave the tapes to the defendant and he used the tapes in the divorce proceeding. Later, when the defendant learned that the tapes were not made with wife's knowledge, the defendant instructed his secretary to transcribe the tapes. The district court fined the defendant $5,000, placed him on probation for two years, surrendered his license and placed him on house arrest. The Court of Appeals reversed and remanded since the court found that it was plain error to instruct the jury that the defendant could be convicted without a finding that he knew or should have known that the recordings of conversations violated the Act.

Is there any situation when a tape recording can be used? Yes, when the tape recording and/or transcript is done by only recording one side of the conversation. In the case of *Mimms v. Mimms*,780 S.W. 2d 739 (Tenn. App. 1989), app. denied, the Court found that husband could record what wife was saying on the telephone because he did not record what the third party was saying. When husband turned on his recording device, wife was inside the garage at the family home and the husband was standing outside of an open window where he could clearly hear by natural means that which wife was stating. At trial, husband testified that the tape recordings was merely memorializing what he had heard. The Court agreed.

One should also be mindful that it is a crime to acquire other person's phone records through false pretenses. This act is called "pretexting" and is illegal, as a violation of the federal wiretapping statute. Therefore, you should be careful if your client produces the spouse's cellular phone bills.

Is there a violation of any law for retrieving Internet records and chat room information? Is there a violation of any law for placing spyware on the home computer? Is there a violation for a spouse to place keystroke software on the home computer that monitors what any user to the computer writes? Congress passed Title III to protect a person's privacy. The Electronic Communications Privacy Act was passed for the primary reason for bringing e-mail, voicemail, and other forms of communications under the umbrella of Title III. Therefore, the Electronic Communications Privacy Act forbids the unauthorized access, on a computer storage device, of anyone's e-mails or other electronic communication without his or her express permission. 18 U.S.C. 2701 through 2711. The criminal punishment for violation of this Act is up to two years in prison and according to Sec. 2707, the relief allowed in a civil action is no less than the sum of $1,000, costs of the action and reasonable attorney fees, and if the violation is willful or intentional, the court may assess punitive damages.

Important questions to ask your client when discussing how the computerized data was obtained:

- Where was the computer when you obtained the information?
- How did you retrieve the information from the computer?

See e-Discovery on page 24

Case Law Update:
Recent Georgia Decisions

By Victor P. Valmus
vpvalmus@mijs.com

Arbitration/Incorporation

***Page v. Page,* S06F1404 (Oct. 2, 2006)**

The parties filed for divorce and the trial court made a determination of custody and the parties stipulated to binding arbitration of all final issues including child support. Both parties appeared for the arbitration hearing on Oct. 10, 2005, but prior to the hearing, they decided to reach their own agreement. The parties did reach an agreement and signed a memorandum of settlement covering all financial issues that day. Shortly after, the wife retained new counsel on Nov. 1, 2005 and filed a motion to set aside settlement agreement. The trial court denied the motion stating that it had no jurisdiction to consider the settlement agreement because the case had been referred to arbitration, and only the arbitrator could consider whether the settlement agreement was valid.

On Dec. 14, 2005, the arbitrator entered an award adopting the terms of the settlement agreement, and on Jan. 6, 2006, the trial court received a letter from the husband requesting the settlement agreement be incorporated into the final decree of divorce. Four days later the trial court signed an order submitted by the husband granting the divorce and incorporating the settlement agreement. There is no indication in the order that the trial court conducted an independent review of either the wife's motion to set aside the settlement agreement or the agreement itself. The Supreme Court reversed and remanded with direction.

It is well established that when incorporating a settlement agreement into a final judgment of divorce, thereby making the settlement agreement the judgment of the Court, the trial court has discretion to approve or reject the settlement in whole or in part. Therefore, it is the ultimate duty of the trial court, not an arbitrator, to determine the propriety of a settlement agreement. In this case, the record failed to properly reflect the trial court's independent review of the settlement agreement or determine whether the contents are within the bounds of the law prior to its incorporation in the final decree of divorce. The trial court erroneously found that it had no power to review the settlement agreement. Also, the record failed to indicate if the trial court conducted an independent review of the issues raised and the wife's motion to set aside the settlement agreement or the settlement agreement itself prior to incorporation of the agreement into the final decree of divorce. Therefore, this Court must reverse the trial court's order and remand the case with instructions that the trial court conducts a review of the terms of the settlement agreement including the amount of child support and the issues raised by the parties.

Contempt

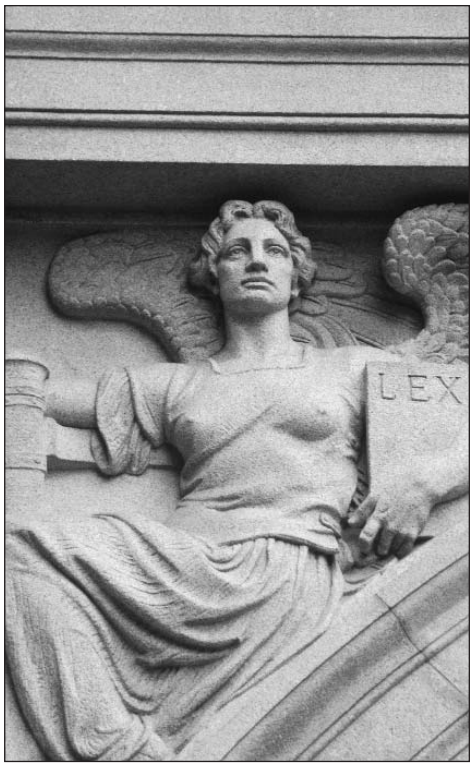
***Smith v. Smith,* S06A0897 (Oct. 16, 2006)**

The parties' divorce action was tried before a jury, and a final judgment and decree on the jury's verdict was entered on June 9, 2003. The final judgment and decree provided a very detailed division of the marital assets. The husband filed a motion for new trial, which was denied on Sept. 25, 2003. The trial court determined the alleged grounds for a new trial to be meritless and the husband's acceptance and benefits under the decree was inconsistent with asking for a new trial. The husband then filed for application for discretionary appeal, which was automatically granted. However, on June 16, 2004, the Superior Court dismissed the husband's appeal for his failure to pay costs. This court denied the husband's application for discretionary appeal from the dismissal.

On Oct. 14, 2004, the wife filed an application for contempt alleging the husband's failure to make certain payments and transfers of property required by the decree. A hearing was held for which the Superior Court acknowledged the husband's failure to comply with the provisions of the decree but found him not in contempt because his non-compliance was excused by reasons of impossibility and/or illegality and a reasonable desire for clarification. The court expressly found, *inter alia*, that the 50 percent award of the husband's IRA to the wife ($5,976.27) had been depleted making strict compliance impossible and causing an award to be made in an alternative form; that the husband did not then, or since the decree, make the awarded $291,000 division of the lump sum marital assets to the wife within the 60 days. Strict compliance with this provision was also impossible, and instead, the husband was required to pay this amount from his interest in monthly payments as directed in the contempt order. The VHX stock awarded to the wife did not exist or have any value as of the date of the trial, therefore, transfer of stock was impossible; that the parties did not own any shares of PSSI stock as of the date of trial and therefore, transfer of that stock was also impossible; that 32.5 percent of the husband's Biomedical Disposal, Inc. stock was awarded to the parties' son was void and unenforceable; that the $2,000 per month award as supplemental alimony to the wife constitutes support for an adult child was therefore void and unenforceable.

The court also found the husband was in arrears in alimony payments, but because of the confusion associated with the decree and because of the husband's financial circumstances, he was not in contempt on that issue. The husband also was initially ordered to pay $7,500 in attorney's fees and a subsequent order was directed for him to pay $53,000 in attorney's fees. The husband was allowed to deduct the $7,500 from the $53,000 attorney's fees for a principal balance in attorney's fees remaining of $45,500. The Supreme Court reversed and remanded.

The Supreme Court stated that the trial court lacks the authority to modify the terms of a divorce decree in a contempt proceeding, and it appears that the Superior Court did far more than refuse to find the husband in contempt because of purported difficulties in compliance with the decree and it substantially modified the decree. The Superior Court, *inter alia*, nullified the award of stocks to the wife and son as well as the monthly supplemental alimony to the wife. It significantly reduced attorney's fees awarded to the wife. It altered payments of the wife's share in the husband's IRA and the wife's lump sum award on the stated basis that the husband's strict compliance with the mandates of the decree was impossible. It appears that strict compliance by the husband was apparently rendered impractical largely by the husband's own hand. His lifestyle choices depleted the funds that constituted the awards and thus the husband plainly benefited from his violations of the decree.



The husband argues that the Superior Court was within its authority to nullify certain provisions of a decree, such as the award of supplemental alimony and of stock to the children, because they are void against Georgia law. Even assuming argunedo that the cited provisions were erroneously made, that does not render the provisions of the judgment void and the judgment is not void so long as a court of competent jurisdiction entered it. The Supreme Court went on to state that a judgment, which is erroneous, but not void, might be attacked only by a direct appeal or by motion to set aside the judgment. Here, the husband forfeited his automatic granted appeal of the decree by failure to pay costs, and he never moved to set aside the decree. The contempt proceeding was not the vehicle to alter the decree.

Custody Modification

Moses v. King, A06A1249 (Sept. 27, 2006)

The mother filed an action for contempt in 2004 for the father's failure to pay child support. In December 2004, the court found the father to be $16,500 in arrears in child support payments. The court ordered him incarcerated pending the payment of $5,000 and set up a payment schedule to pay off the amount of arrearage. The following day, the father filed a *pro se* complaint for modification of child support and change of

custody. Among other things, the father claimed that certain circumstances had changed in that the mother had become irresponsible and failed to provide adequate care for the child; had several (four same sex) domestic partners of which the most recent one was residing in the household with the child; DFCS had been contacted by the Gwinnett County School System regarding marks on the child; the child was in continuous company of gay and lesbian adults and the child's grades had dropped since the mother was awarded primary physical custody requiring the child to change schools.

After a hearing, the trial court awarded primary physical custody of the child to the father and ordered the mother to pay child support. The trial court's order stated that the change of custody was not based on sexual preference, but the trial court did find there was a change of circumstance in the number of the relationships the mother was engaged in and the fact that the mother was now living with a partner outside of marriage. It was the trial court's position that there should be no cohabitation or meretricious relationships outside the presence of marriage. The trial judge indicated that women and men that are not married are not to live together in the presence of a child. The judge found that living in a meretricious relationship in front of the child was a significant change of circumstance. The mother filed a motion for new trial, which the trial court granted in part and denied in part. It was granted in part to allow the minor child to speak in open court or in judge's chambers with a court reporter present. The Appeals Court reverses and remands with direction.

The trial court has authorized and modified custody awards upon a showing of new and material changes in the conditions and circumstances subsequently affecting the interest and welfare of the child. Proof must show both a change in conditions and an adverse effect on the child or children. If the trial court finds there has been a material change in condition, then it is authorized to modify the custody if it is in the best interests of the child or children. Here, the trial court concluded there had been a substantial change in conditions and circumstances since the mother had at least two partners within the last several years one of which currently resided in the home and that the father was married and lives in a four-bedroom home that provides a more stable environment of the child. However, there is no evidence in the record that the facts are new or that they demonstrated a material change in circumstances.

Here, the father was already married when the wife was granted primary physical custody in 2002 at a modification hearing. There was also evidence that the mother's relationship with other women was a primary issue at the original custody hearing and it appears that the mother is in a more stable relationship now than she was at the time of the original custody award. With respect to the mother's cohabitation, Georgia Appellate Courts have held that a parent's cohabitation with someone, regardless of that person's gender, is not a basis for denying custody or visitation absent evidence that a child was harmed or exposed to inappropriate conduct. There was no finding that the change circumstances in any way adversely affected the child.

Default

Hammack v. Hammack, S06A0762 (Oct. 2, 2006)

The husband filed a complaint for divorce on Jan. 14, 2005. The wife executed an acknowledgment of service on March 17, 2005, but did not return it to the husband's attorney until late April. The husband's attorney filed it with the clerk of the court on April 29, 2005. On June 13, 2005, the wife served the husband with an answer and counterclaim for divorce. The following day, the husband notified the wife that a final judgment and decree of divorce had been entered on June 6, 2005 following a final hearing on an uncontested domestic relations calendar. Wife moved to set aside the final judgment based upon Uniform Superior Court Rule 24.6. The trial court concluded that the final judgment was authorized under Uniform Superior Court Rule 24.6(b) because it was entered more than 46 days after service of the complaint. Therefore, the trial court denied the wife's motion to set aside. The Supreme Court affirms.

The Uniform Superior Court Rules are to be read in conjunction with substantive law, and in case of a conflict, the Superior Court Rules must yield to the sub-

stantive law. The rules of pleadings under the Civil Practice Act apply to actions for divorce, alimony and child custody except that no judgment by default will be taken in such cases. While there is no judgment by default in divorce cases, this rule means that in divorce cases where no defensive pleadings are filed, it is incumbent upon the trial court to hear evidence in support of the plaintiff's grounds for divorce and make an affirmative finding that the grounds are legal and are sustained by proof.

Uniform Superior Court Rule 24.6 provides in pertinent part that uncontested divorce actions may be heard at any time agreeable to counsel and the court and is subject to the following rules: (a) by written consent of the parties to a hearing a divorce may be granted at any time 31 days after service of filing of the acknowledgment of service; and (b) an unanswered action, a divorce may be granted at any time 46 days after service unless time for a response has been extended by a court order. O.C.G.A. §9-11-40(a) provides "all civil cases including divorce and all other domestic relations cases shall be triable any time after the last day upon which defensive pleadings were required to be filed. Therefore, the Supreme Court held the trial court was authorized to grant a divorce on June 6, 2005, which was 30 days from the time an answer would have been due. Although the trial court appears to have based its result on interpretation of the Uniform Superior Court Rules, rather than on statutory law, this court will confirm a judgment so long as is "right for any reason."

Joinder and Fraudulent Conveyance

Moore v. Moore, et al. , Minshew v. Moore, et al., Moore v. Crisp Farms, Inc. et al and Crisp Farms, Inc. v. Moore, et al., NOS. S06F0927, S06F0928, S06F0929, S06F0930 (Sept. 18, 2006)

In 2003, the husband brought a divorce action against the wife and filed an answer and counterclaim for divorce. The wife later moved to add Crisp Farms, Inc. and Amy K. Minshew as third party defendants. The wife filed an amended answer and counterclaimed setting forth claims of fraudulent conveyance and conversion against the third parties. The trial court granted the motion and subsequently realigned the parties making the wife the plaintiff and the remaining three the defendants and declining to award any additional jury strike to the husband. The Trial Court also denied third party defendant's motion for summary judgment and Ms. Minshew's motion for separate trial. At trial, the court directed a verdict for Crisp Farms. The jury made a finding with regards to alimony, equitable division of property and found that the husband made fraudulent conveyances to Minshew and awarded the wife $28,733.50 against her. The trial court entered a final judgment of divorce on the jury's verdict. The Supreme Court affirmed.

O.C.G.A. §9-11-21 states that "at any stage of the action and on such terms as are just, the trial court has discretion to realign the parties as by changing the status of a party from the defendant to the plaintiff." The trial court stated that both parties sought a divorce and equitable division of marital assets, but the wife made additional claims and had the burden of proof regarding alimony, adultery, attorney's fees and fraudulent transfers. Therefore, the wife had a significantly heavier burden of proof than did the husband.

The husband argues that the trial court erred by granting the wife's motion to add Crisp Farms as third party defendant because there were not any marital assets to be ferreted out of the corporation. However, if one party to a divorce alleges fraudulent conveyance of property were used to defeat that party's rights, joinder of additional parties involved in the alleged fraud is proper in order to facilitate a complete resolution of the issues. The husband also argues that the trial court erred by not allowing him additional preemptory strikes. However, the husband has not identified any portion of the record showing that he ever objected specifically to the number of strikes.

The husband also contends that the trial court erred in denying his motion to strike a prospective juror who was a client of the wife's attorney in an ongoing litigated matter. However, this court has been reluctant to extend the automatic disqualification rules for jurors beyond the statutory prohibited relationship and, in criminal cases, full- time law enforcement officers and employees of the prosecutor's office. This court has confidence that the trial court can ascertain whether a juror is partial because of any type of relationship of the parties and the concern that an automatic disqualification will open the door to the expansion of the per se rule of other numerous categories.

Case Number S06F0928 - Ms. Minshew argues that the trial court abused discretion in denying her motion for a separate trial for the purpose of avoiding prejudice from the appearance of alleged adulterer and his paramour at the divorce trial together. Severance of issues for trial pursuant to O.C.G.A. §9-11-42(b) is generally within the discretion of the Trial Judge and will not be reversed on appeal absent and clear manifest abuse of discretion. Here, evidence of close relationship is relevant in determining the level of scrutiny to which an alleged fraudulent conveyance must be subjected and, because the adulterous relationship between the husband and Ms. Minshew would be admissible at a separate trial, she has not shown any prejudice to herself.

Legitimation

Veal v. Veal, S06F1460 (Oct. 16, 2006)

The child at issue, "H," was born April 10, 1997. The husband was present at H's birth and the husband's name was on the birth certificate, but both parties knew that he was not the biological father of the child. The parties were married on May 31, 1997, and had three other children during the marriage. The parties reached a divorce settlement, which was incorporated into the final decree of divorce on Oct. 30, 2003, and made custody and visitation arrangements for the three children of the marriage but made no mention of "H". In 2004, the husband filed a motion to set aside the final decree of divorce on the grounds that it was void for failing to address custody and visitation with respect to "H". The trial court reopened the case and on Oct. 31, 2005, the court found there had been a change of circumstances affecting the welfare of "H" and awarded full custody to the husband. The Supreme Court reverses.

The husband contends that he never initiated any legitimating procedures in the case such that "H" was legitimated under O.C.G.A. §19-7-20(c) that states "the marriage of the mother and the reputed father of the child born out of wedlock and the recognition by the father of the child as his shall render the child legitimate." However, this code section does not provide a means for a stepparent to legitimate a child. Therefore, we find the husband does not qualify as a reputed father under the statute.

The husband continues to argue citing Baker v. Baker that the presumption of legitimation arose due to his actions, namely his presence at the child's birth, the placement of his name on the child's birth certificate, the parties' subsequent marriage and his treatment of "H". However, the Baker case is distinguishable in that the biological mother and her husband were married at the time of the child's birth thus creating a legal presumption of legitimacy in making the husband the legal father of the child. In the present case, however, the husband and wife were not married at the time of H's birth, thus the husband never became H's legal father. The Supreme Court went on to state that this was an unfortunate outcome of the case and the husband should have established legal ties with "H" through the formal adoption process, which is designed to protect the interest of all parties involved.

Prenuptial Agreement

Chubbuck v. Lake, S06F0676, (Oct. 2 2006)

The parties executed a premarital agreement on July 9, 2001 and married five days later, separated three months thereafter and obtained a judgment and decree of divorce in July 2003 following a jury trial. The judgment incorporating the jury verdict awarded the marital house and its contents to the wife and required her to pay the husband $41,000. Prior to trial, the trial court ruled that the parties' premarital agreement was unenforceable because it did not meet the statutory requirement that it be witnessed by two persons with the agreement having been signed only by the parties and a notary public for whom executed the document. The trial court ruled that the unenforceable agreement could not be introduced into evidence and the jury would be instructed there was no enforceable agreement. During the trial, over the wife's objection, the trial court permitted testimony concerning the existence and content of the premarital agreement with the understanding that it would not be referred to as a premarital agreement but as a document the parties had executed prior to their marriage. Both parties testified that the premarital document provided for the husband to receive a minimum of $41,000 should the parties divorce. The Supreme Court reverses and remands.

The Supreme Court was unable to find any cases in which an ante nuptial agreement made in contemplation of divorce had been ruled void and unenforceable for a reason other than a failure to live up to the criteria set out by this court in Scherer v. Scherer. O.C.G.A §19-3-63 states, "every marriage contract in writing made in contemplation of marriage must be attested by at least two witnesses." The trial court's ruling that this statute applied to the ante nuptial agreement made in contemplation of divorce has not been made a subject of this appeal. Under the unusual circumstances of this case, which limits the court to review the affect of the legal ruling but not the merits of the legal ruling, the court concluded that once the trial court determined the ante nuptial agreement was void and unenforceable, the existence of the agreement and the contents were not to be considered by the fact finder. Therefore, the trial court erred in permitting testimony of the contents of the prenuptial agreement the parties had executed.

Special Set Hearing

Coleman v. Coleman, S06A0954 (Oct. 16, 2006)

Wife filed a petition for divorce in 2000 seeking an equitable division of property, custody of the child, child support, alimony and attorney's fees. The husband answered the petition and filed a counterclaim. Neither party appeared for the special set final hearing. The trial court conducted a pretrial conference with counsel and entered an order setting the case again for a final hearing providing specifically that "each party seeking redress from this court must be

present at said time in order to be granted any redress from this court." Husband obtained a certificate of immediate review and filed an interlocutory appeal of that order. The Supreme Court reverses and remands.

The husband asserts that the trial court erred by issuing an order in which it stated that it would not grant any redress of the parties if they chose not to be present at the final divorce hearing. Trial courts are vested with broad discretion in conducting trials, but neither the order under review here nor the record in the case demonstrates an exercise of such discretion by articulating a basis for the decision. In the instant case, this court cannot determine whether the trial court has exercised discretion and the proper remedy is to remand the case to the trial court to enter an order that articulates the basis for decision in such manner as to permit appellate review.

UCCJEA/Modification

Upchurch v. Smith, S06A1099 (Oct. 2, 2006)

The parties were divorced in Fulton County in 1999. The final divorce decree awarded the parties joint legal and physical custody of the two minor children and named the father as primary custodial parent. Shortly after, the mother received primary physical custody of the children by consent agreement that was not incorporated into the Fulton County Court Order until 2002. By that time, the mother and the children had been residing in Cobb County for more than six months. The father petitioned for change of custody in July 2002 and filed his modification action in Cobb County. The petition for modification was denied in February 2004. The mother, with the children, moved to California in August 2004 and a month later, the father filed this action in Fulton County to modify custody and child support. The mother answered challenging improper jurisdiction and venue and her case was moved to Cobb County because it was her county of residence prior to her move to California. Fulton County granted the motion to transfer and denied the request for certificate of immediate review. After a hearing in Cobb County, the father's petition to modify custody and support was denied. The Supreme Court affirmed.

Under the UCCJEA at O.C.G.A. §19-9-62(a), the Court recognizes that its continuing jurisdiction lies in the court of this state which has made a child custody determination consistent with O.C.G.A. §19-6-61 until a court of this state determines that no pertinent party has a significant relationship with the state, that substantial evidence concerning the child's welfare is no longer available in the state or there is a judicial determination that no pertinent party presently presides in this state. The Supreme Court determined that the Cobb County Court's Feb. 4, 2004 order qualified as a child custody determination under O.C.G.A. §19-9-62(a). It is undisputed that the mother and the children had resided in Cobb County for more than six months prior to father's filing of the 2002 modification action and therefore Cobb County was the proper venue for that action. Therefore, under the UCCJEA Cobb County had exclusive continuing jurisdiction over child custody determination and the proper venue for the modification of that determination was Cobb County.

Wrongful Death

Baker v. Sweat, et al. A06A0892 (Oct. 13, 2006)

The parties were married on Feb. 10, 1971. Shortly thereafter, they separated and were involved in an on and off relationship for the next few years. In the spring of 1975, the wife left and moved in with her mother and the husband did not know where she lived. The husband did not attempt to find out nor did he know that she was three or four months pregnant at the time. The minor child, Bobbie Jo, was born Sept. 24, 1975. When Bobbie Jo was two months old she had a stroke and was hospitalized for more than a year. The wife called the husband to tell him about their daughter and that she was sick and in the hospital. According to the father, this was the first time he learned that he had a child. The father never paid any hospital expenses, birthing expenses or extended hospitalization expenses and rarely visited the child. The parties were divorced in the spring of 1977, and in the final decree of divorce, the mother received full custody of Bobbie Jo. The agreement was silent regarding child support and visitation. The father never attempted to modify the divorce decree to allow visitation with Bobbie Jo, he never paid any child support, never sent any cards or gifts, never paid for additional medical care even though the father was employed during most of the period and he could have paid child support and medical expenses.

On Aug. 23, 2002, Bobbie Jo was a passenger in the mother's car when she lost control, hit a tree and

Bobbie Jo later died as a result of the injuries. The father first learned of Bobbie Jo's death from a relative about a week or two after the accident, but did not attempt to find out how Bobbie Jo died, where she was buried, nor did he visit her grave, pay for any of the medical expenses resulting from the accident or pay any of the funeral or burial costs. A few months later, the father learned that the administrator of Bobbie Jo's estate had settled the claim from the accident from the mother's insurance and he also learned as Bobbie Jo's father, he might be entitled to some of the proceeds. The record shows that the settlement with the insurance company was for $25,000. The father filed an action for wrongful death against the mother and the mother's insurance company as defendants. Defendants moved for summary judgment. The Superior Court found as a matter of law that there was clear and convincing evidence that the father had relinquished his parental rights by failing to support, visit or establish a relationship with Bobbie Jo during her lifetime and therefore lacked standard to maintain an action for her wrongful death and dismissed the father's complaint. Appeals Court affirms.

Under O.C.G.A. §19-7-1(c) and 51-4-4, "when a child (either a minor or sui juris) dies as a result of a homicide or negligence, and the child did not leave a spouse or children, the child's parents have the right to recover for the full value of the child's life." Under O.C.G.A. §19-7-1(b)(3), a parent may lose his or her parental power by failing to provide necessities for the child or by abandoning the child. In order for the trial court to find abandonment, there must be clear and convincing evidence of an actual desertion, accompanied by an intention to sever entirely the parental relationship. The Appeals Court found that all of the husband's claims or excuses lack merit and the husband lacks standing to prove his wrongful death claim. **FLR**

Victor P. Valmus is an associate at Moore Ingram Johnson & Steele, LLP, in Marietta, Ga., and he can be reached at vpvalmus@mijs.com.

E-Discovery

Continued from page 17

- Did you know the password? How did you know it?
- Whose computer is it? Who bought it? Who uses it?
- Does your client and his/her spouse share a single account?
- Was the e-mail obtained opened or unopened when it was retrieved?

If your client obtained the computerized data by placing spyware or keystroking recording software on a computer that is not used by the family (only by one spouse in a private office), an attorney should not view or use any of its contents. If you do, you may be subject to criminal and civil liability. 18 U.S.C. Sec. 2511, 2520, 2701 and 2707. Unlawful Interception of Wire, Oral or Electronic Communications and Stored Communications Act.

There must be a determination that the party had an "expectation of privacy" with his/her computer before liability attaches for a violation of Title III. Unopened e-mail, while it is on the Internet service provider (ISP)'s mail server, may be viewed as a violation of the Act, because the intended recipient has not read it. However, in some jurisdictions, after the targeted recipient opens the e-mail, and the e-mail is stored on the hard drive or another area, it may not be a violation of the Act. Given that Tennessee is in the 6th Circuit and has one of the most restrictive interpretations of the Wiretapping Statute, it would appear that the Court would not distinguish between stored communications from those in transit. The more appropriate course of action is to either obtain consent from the parties, court order, or subpoena (which requires notice) the computerized data.

How do you know whether such spyware or keystroke recording software is on your client's computer? Ask an expert. A Certified Computer Examiner (CCE) is a person who is well trained in the area of forensic computers and can capture what is on the computer and is also trained to analyze the data. The CCE collects data and maintains the integrity and authenticity of the information retrieved.

It is important to have your client meet with the CCE so the client can inform the CCE what software has been placed on the computer. In addition to learn about your client's computer, the CCE can also determine whether the data collected from the other party's computer has been tampered with, deleted or wiped clean by a software system, such as R Write. The CCE may be able to retrieve hidden data through the metadata, or retrieve the ghost or residual data that might not necessarily get saved, but can remain on the computer for years. The CCE might find photographs,

address books, calendars and other information stored in the computer; all of which you were unaware.

Making the Data Reliable and Authentic to be Admissible

Pursuant to TRE 401 and 901, all evidence must be reliable and authentic. To ensure the integrity of the evidence, one must be able to show the Court that the data retrieved from the computer was obtained in a lawful manner, i.e., the data was gained through consent of the parties, through discovery, subpoena or court order.

If the data was received through discovery, it needs to be produced in a useable readable format to the extent that the data was created or received by the other party. The e-mails and any attachments should be provided in that same sequential format.

The CCE must maintain a well-documented chain of custody and follow industry-established procedures for collection, preservation and documentation of the data obtained from the computer. Abrams, Steven M. and Philip C. Weis, "Knowledge of Computer Forensics is Becoming Essential for Attorneys in the Information Age", Journal, February 2003.

You will want to know whether the CCE made an exact copy of the data in the computer or other electronic device. Step one is that the CCE used a write-blocking device to image the drive. If the investigator simply copies from a Microsoft Windows environment, it may not be acceptable because Windows automatically writes and updates the time and date stamps on each file. *Id.* at p. 12. Step two is that the CCE made the copy in a forensically sterile environment, i.e., that all data was transferred and copied from the computer with a software wiping program to ensure that all data from the drive was transferred and copied. It is possible that if the wrong software is used, not all data will be transferred and copied. The last step is for timesaving measures. The CCE utilizes forensic tools to identify a particular file. You may want to ask the CCE to identify and flag certain types of files such as 'e-mail', 'encrypted files', 'deleted files', 'spreadsheets', or ask for specific keywords such as 'pornography', 'sex', 'money laundering'. *Id* at p. 13 and 14.

In analyzing and verifying e-mails, the CCE should trace and track the e-mails. It is important to have more than a copy of the e-mail, because the header could be forged by changing the 'from' and 'reply to' fields or the e-mail may have been sent to other individuals through a BCC (blind carbon copy) feature. Thus, the CCE may need to investigate further to get the 'complete' picture of that e-mail, i.e., the point of origin, the sending computer's internet address, each recipient's internet address, etc. *Id* at p. 14.

Providing Solutions When the Data is Destroyed

You should act quickly to preserve computer data. Your prompt actions may be helpful to your client's case. If the other spouse destroys computerized data, despite a court order, you can seek a ruling from the court that there be a negative inference that the evidence destroyed would have been favorable to your client. The innocent party should also seek attorney fees, costs to litigate the motion and recover the data and the cost of the certified computer examiner used. Pursuant to TRCP 37, you may file a motion for sanctions and a motion in limine that seeks an order from the Court to dismiss the claim or defense of the opposing party who destroyed the evidence and prohibit the testimony of that party on those issues. Lastly, if the data destroyed was financial documents, you should file a Petition to hold the other party in contempt of court for the destruction of these financial records. The temporary mutual injunction, provided for in TCA 36-4-106 (d)(1-6) requires the parties to maintain the financial records throughout the divorce proceeding.

Just because we live in a world of immediate accessibility does not make it easier to obtain documents from your client and/or your client's spouse. Be mindful of the pitfalls of getting data off of a computer when a client finds 'data' on a computer.

As attorneys, we are required under Rule 1.1 of the Rules of Professional Conduct to deliver competent representation to our client. "Competent representation requires legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Rule 1.1. We have a duty to advise clients of the appropriate protocol to preserve documents, a duty to use more cost efficient means to review the documents and a duty to understand how to ask for and uncover powerful pieces of electronic evidence. **FLR**

The author would like to thank Ted Scott, CCE, who reviewed and provided assistance with this article. You may reach him at tedscott@mail.com.

Amy J. Amundsen is a partner with the Memphis law firm of Rice, Amundsen & Rogers, PLLC. She has been board certified as a Family Law Specialist by both the National Board of Trial Advocacy and the Tennessee Commission on Continuing Legal Education and Specialization. She was president of the Tennessee Bar Association Family Law Section; president of the Memphis Bar Association Family Law Section; and serves as chair of the Tennessee Bar Association Publication Alimony Bench book.

Best Interest of the Child:
The New Child Support Guidelines Standard

By Wendy J. Jerkins and Vicky O. Kimbrell
Georgia Legal Services Program

Discretion, guided by the best interest of the child standard, permeates the new child support guidelines that become effective in Georgia on Jan. 1, 2007. Thus, the complicated mathematical worksheets and electronic calculators being developed and distributed to determine child support will result in a presumptive amount of support. That amount is then subject to increase according to the best interest of the child and the circumstances of the parties.[1]

Routinely, children are the economic losers after divorce. The stated underlying public policy of the new statute is to assure that, to the extent possible, children are financially protected after the parents divorce.[2] As Justice Leah Ward Sears commented, after divorce the children often bear the brunt of the economic insecurity that threatens their well being. "Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes."[3]

In all, three new standards emerge to warrant an award of child support different than the amount determined under the mathematical worksheets to be used under the guidelines. The three standards set out in the statute are:

1. Best Interest of the Child[4]
2. Unjust or Inappropriate[5]
3. Minimally Adequate[6]

Standards Controlling the Child Support Guidelines

Two of the standards set forth above are absent in the previous guidelines, namely: "best interest of the child" and "minimally adequate." The new guidelines repeat the "best interest of the child" standard throughout the statute.[7] The old statute appeals directly to equitable principles only once when it refers to the guidelines resulting in an "unjust or inappropriate"[8] award of child support. The new statute specifically sets out the fact-finder's responsibility to go outside of the guidelines where the "[a]pplication of the Presumptive Amount of Child Support would be unjust or inappropriate."[9] Any deviations must be expressly set forth by the fact finder in written findings of facts.[10]

Finally, the new guidelines establish a minimum floor for child support. "No Deviation in the Presumptive Amount of Child Support shall be made which seriously impairs the ability of the Custodial Parent to maintain minimally adequate housing, food, and clothing for the Child being supported by the order and to provide other basic necessities, as determined by the Court of the jury."[11]

Low Income Parents

For the non-custodial parent who seeks a "low income" deviation, the new statute requires the fact-finder to "determine if the Non-custodial Parent will be financially able to pay child support and maintain at least a minimum standard of living." However, these considerations do not override the fact finder's responsibility to assure the "minimally adequate" floor that may require an upward deviation or ignoring the parent's request for a "low income" deviation.[12]

Similarly, the fact-finder must examine the employment (or underemployment) status of the custodial and non-custodial parent. The statute requires the fact-finder to ascertain the reasons and the reasonableness of the parent's occupation and the benefit of those choices to the child.[13] The inquiry regarding the parent's current occupational status includes the employment, the educa-

tional, and the training history of the parent; the parent's assets (including personal and real property); the parent's health; and the parent's role as caretaker.[14]

Domestic Violence as a Factor in Determining Child Support Award

Concerns regarding domestic violence must necessarily be a part of the calculations when determining child support and custody.[15] Nearly one third of women report being abused by a husband or boyfriend during their lives.[16] The family violence act specifically authorizes a trial court to award temporary child support "as required by law."[17] Issues regarding child support deviations based on domestic violence–although not specifically addressed in the new child support statute– fall within one of the miscellaneous catchall criteria for deviations, to wit: "Extraordinary expenses,"[18] "Parenting Time,"[19] and "Nonspecific Deviations."[20]

The court must consider family violence in determining child custody.[21] Where the court has made a finding of family violence, the statute requires that the court "shall consider as primary the safety and well-being of the child and of the parent who is the victim of family violence" and "shall consider the perpetrator's history of causing physical harm, bodily injury, assault, or causing reasonable fear of physical harm, bodily injury, or assault to another person."[22] As the non-custodial parent, the perpetrator of violence may be subject to more restrictions on visitation.[23] Similarly, the batterer may bear the brunt of the visitation costs and additional expenses because of the abuse. The custodial parent may require more financial support from the non-custodial parent to cope with the consequences of the abuse.[24]

Each lawyer will be required to understand and be able to work through the mechanical mathematical formulas by using either the paper worksheets or the electronic calculators. More importantly, however, effective advocacy under the new guidelines will require a good grasp of the law, persuasive presentation of the evidence, and a clear understanding of the new equitable standards that guide this law.

Endnotes

1. O.C.G.A. § 19-6-15(c)(1) ("The rebuttable Presumptive Amount of Child Support provided by this Code section may be increased according to the best interest of the Child for whom support is being considered. . . .")
2. O.C.G.A § 19-6-15(c)(1) (The rebuttable Presumptive Amount of Child Support provided by this Code Section may be increased. . . to achieve the state policy of affording to children of unmarried parents, to the extent possible, the same economic standard of living enjoyed by children living in intact families consisting of Parents with similar financial means.)
3. Leah Ward Sears, A Case for Strengthening Marriage, The Washington Post, October 30, 2007, at A17.
4. O.C.G.A. § 19-6-15(c)(1) (Applicability and required findings); O.C.G.A. § 19-6-15(c)(2)(E)(iii) Applicability and required findings; O.C.G.A. § 19-6-15(i)(1)(A) (Grounds for Deviation - General Principles); O.C.G.A. § 19-6-15(i)(1)(B)(iii)(II) (Grounds for Deviation - General Principles); O.C.G.A. § 19-6-15(i)(2)(A) (Specific Deviations - High Income); O.C.G.A. § 19-6-15(i)(2)(H) (Specific Deviations - Mortgage); O.C.G.A. § 19-6-15(f)(5)(C) (Adjustments to Gross Income - Theoretical Child Support Orders); O.C.G.A. § 19-6-15(i)(3) (Nonspecific Deviations).
5. O.C.G.A. § 19-6-15(c)(2)(E)(iii) (Applicability and Required Findings); O.C.G.A. § 19-6-15(i)(1)(B)(iii)(I) (Grounds for Deviation - General Principles).
6. O.C.G.A. § 19-6-15(i)(1)(C) (Deviation Floor); O.C.G.A. § 19-6-15(i)(2)(B)(I) (Specific Deviations - Low Income).
7. O.C.G.A. § 19-6-15(c)(1) (Applicability and Required Findings); O.C.G.A. § 19-6-15(c)(2)(E)(iii) (Applicability and Required Findings); O.C.G.A. § 19-6-15(i)(1)(A) (Grounds for Deviation - General Principles); O.C.G.A. § 19-6-15(i)(1)(B)(iii)(II) (Grounds for Deviation - General Principles); O.C.G.A. § 19-6-15(i)(2)(A) (Specific Deviations - High Income); O.C.G.A. § 19-6-15(f)(5)(C)(Adjustments to Gross Income - Theoretical Child Support Orders).
8. "A written finding or specific finding on the record for the award of child support that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case." O.C.G.A. § 19-6-15(b) (2005).
9. O.C.G.A. § 19-6-15(i)(1)(B)(iii)(I) (Grounds for Deviation - General Principles). See O.C.G.A. § 19-6-15(c)(2)(E)(iii) (Applicability and Required Findings) (requiring the fact-finder to make specific findings detailing how the child support guidelines would be unjust or inappropriate considering the relative ability of each parent to provide support).
10. O.C.G.A. § 19-6-15(c)(2)(E) (Applicability and required findings).
11. O.C.G.A. § 19-6-15(i)(1)(C) (Deviation Floor). See also O.C.G.A. § 19-6-15(i)(2)(B)(i) (Specific Deviations - Low Income) ("Under no circumstances shall the amount of child support awarded to the Custodial Parent impair the ability of the Custodial Parent to maintain minimally adequate housing, food, and clothing and provide for other basic necessities for the child being supported by the court order ").
12. O.C.G.A. § 19-6-15(i)(2)(B)(i) (Specific Deviations - Low Income).
13. O.C.G.A. § 19-6-15(f)(4)(D)(i-vi) (Gross Income- Reliable Evidence of Income - Willful or Voluntary Unemployment or Underemployment). This inquiry may benefit the parent whose income and earning capacity may be suppressed as a direct result of the intentional acts of the other parent. For example, the perpetrator of violence

See Support Guidelines on page 13

Family Law Section Executive Committee

Executive Committee Officers

Shiel Edlin, Chair
shiel@stern-edlin.com
www.stern-edlin.com

Kurt A. Kegel, Vice Chair
kkegel@dmqlaw.com
www.dmqlaw.com

Edward J. Coleman III, Secretary/Treasurer
edward.coleman@psinet.com

Randall M. Kessler, Editor
rkessler@kssfamilylaw.com
www.kssfamilylaw.com

Marvin L. Solomiany, Assistant Editor
msolomiany@kssfamilylaw.com
www.kssfamilylaw.com

Pilar J. Prinz, YLD Family Law Committee Chair
pprinz@cpmas.com
www.cpmas.com

Stephen C. Steele, Immediate Past Chair
scs@mijs.com
www.mijs.com

Members-at-Large

K. Paul Johnson
pauljohnson@mpjattorneys.com

John F. Lyndon
jlyndon@lawlyndon.com

Andrew R. Pachman
apachman@ltzplaw.com

Carol Ann Walker
cawlaw@bellsouth.net

Karen Brown Williams
thewilliamsfirm@yahoo.com

Family Law Section
State Bar of Georgia
Randall M. Kessler, Editor
104 Marietta St, NW
Suite 100
Atlanta, GA 30303

NON-PROFIT ORG
U.S. POSTAGE
PAID
ATLANTA, GA
PERMIT NO. 1447