

# The Family Law Review

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## Jack Turner: Family Lawyer and Patriarch

by Steven C. Steele, Section Chair  
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In the mid-1970s the notion of lawyers restricting their practice to a specialized field was not universally embraced by either the State Bar of Georgia or the Atlanta Bar Association. Nonetheless, to his well-deserved and long recognized credit, Jack Turner clearly saw the need to better teach lawyers both the fundamental and developing principles of family law.

Turner's vision was to create the tool to provide the public with domestic relations lawyers armed with the training, skill, and experience sufficient to competently push domestic relations matters to resolution with calm deliberate speed, less animosity, and a higher level of professionalism.

On behalf of the Family Law Section of the State Bar of Georgia, I am proud to say: I think he did it.

It was my great privilege to sit in on the conversation that Shiel Edlin and Rick Schiffman had with Jack Turner on Oct. 21. I was intrigued to learn more about Jack Turner, founder, husband, father, democrat, Presbyterian, and family lawyer.

In 1977, after he had already formed the Family Law Section of the Atlanta Bar Association, Jack Turner founded and became the first chairman of the Family Law Section of the State Bar of Georgia, able to meet with most of the original eight members of the section in the lunchroom of Atlanta's William Oliver Building. Furthering his vision and objective, he later formed the Atlanta chapter of the American Academy of Matrimonial Lawyers.

Turner is a fourth generation Atlantan and the son of a lawyer. Two months before his graduation from

Atlanta's prestigious Boys High in 1942, he began his class work at Georgia Tech. His many friends included running back, Clint Castleberry, whose jersey number 19 remains the only retired number in Georgia Tech football history. His college education was interrupted by his enlistment in the United States Army. Turner entered the Army as an Infantryman, but based on Army testing, he was assigned to Air Corp navigation school. About two months before D-Day he, like many other soldiers, was reassigned to the infantry. In the Battle of the Bulge, he was wounded and captured as a

prisoner of war, imprisoned at Stalug 11B for about four months until a British bomb assisted his release. He then returned to Fort

Benning before beginning his assignment as a counselor at the Separation Center.

Turner resumed his college education at Emory University, studying year round to earn his Bachelor's Degree in 1947 and his law degree in 1949.

In 1948 he married Francis Burgess, the mother of his four children and his beloved wife of almost 60 years. During his final year as a full-time law student, Jack worked 40 hours each week selling work clothes at Sears.

Turner was admitted to practice law in February 1950 and began his practice with his father. He describes the practice as "graveyard law" – "Like the graveyard, we took what came along" – as did most lawyers in Atlanta. His practice narrowed to torts and domestic relations until the late 1950s when he restricted his practice exclusively to domestic relations matters, the only

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# Editor's Corner

By Randall M. Kessler  
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**H**appy New Year! I hope that you enjoy this first issue of *The Family Law Review* for 2006. As you can see, we are adding new concepts and expanding the scope of the *FLR*. One new feature will be short exposés on Superior Court Judges from around the state - John Lyndon did a great job with the first one. We also are continuing to receive articles on relevant family law topics from experts both within the State of Georgia and from other areas. Thank you to Mary Donne Peters for her excellent contribution on *Daubert*. Thanks also to the guru of military family law, Mark Sullivan, for his article. We also appreciate the contributions by Mary Stearns-Montgomery, David Beaudry and Steve Best.

In upcoming issues please be sure to look for updates on the Child Support Guidelines. Carol Walker was kind enough to submit the first installment of these updates for this issue. Thanks also to Steve Steele, Shiel Edlin, Rick Shiffman and everyone who helped with the piece about our founding father, Jack Turner.

We also are more than happy to publish letters to the editor and we welcome any comments, suggestions or contributions that you may have. Without contributions from the most important people, you, *The Family Law Review* would not be what it is.

Finally, please get your reservations and registrations in as soon as possible for the Family Law Institute in San Destin, Fla. It promises to be an overwhelming success and an experience which we will talk about for years to come. See you in San Destin! **FLR**

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lawyer in Atlanta to do so at the time. As Jack describes the climate: "A lot of lawyers in Atlanta just didn't like it, but it didn't bother me at all. I felt like I could help people."

The Athletic Club was the site of the monthly luncheon meetings of the Atlanta Bar Association. Jack accepted frequent invitations to speak, securing the respect of the bar for his acumen in domestic relations matters.

While, on the one hand, he envisioned a cadre of attorneys well trained in domestic relations and immediately capable of competent assistance to their clients, Jack Turner has cautiously guarded against pushing divorce too hastily or without professional, well-considered reflection on consequences: "I did my very best to get each client to go see a counselor, a psychologist, or psychiatrist to help them answer questions like 'Why did you marry this person? How did you get where you are? In view of these things what are you going to do with your life?' I had made an effort to get the individual client to narrow down what he or she wanted."

He urges lawyers to read *Man's Search for Meaning* by Viktor E. Frankl and *The Art of Loving* by Erich Fromm.

Before no-default divorce, the most commonly asserted ground was cruel treatment, not always provable by truthful testimony. Jack recalls several juries denying a divorce altogether: "I had two cases that I got the other side denied a divorce. Twice, the same person."

His many cases and clients include a wife in a divorce trial in mountainous Fannin County. Jack's client had once remarked to her husband that there were only a few holes in the wormy chesswood paneling of the spacious mountain home. The husband promptly placed more holes in the paneling – made by the bullets fired his revolver. The colorful history of the case is further embellished with cat-of-nine-tail thrashings, a near head-on collision, and a fraudulent transfer of a million dollar short store to cronies of the husband. After Jack subpoenaed the husband's out-of-state para-

**"Jack Turner is the godfather of divorce. He is the most honorable attorney among us." Jonathan Levine**

mour, Jack amused the jury by having the elderly bailiffs repeatedly sound for his defaulting witness as Jack progressed through his presentation of evidence.

During his career, Turner has seen family law change for the better – and for the worse. While the irretrievably broken bond ground has probably lessened perjurious and spiteful testimony aimed at establishing cruel treatment, couples now divorce too hastily. Jack Turner recalls retainers as low as \$100, and he observes that as the practice of law has become more lucrative, the population of the bar has increased. Unfortunately, as the number of lawyers has increased, civility between lawyers has decreased. However, because family lawyers have common problems and interests, he believes that it is still possible to be friends with your colleagues. Changes in tax laws are only a few of the numerous complications of family law over his career. He believes that a *guardian ad litem* is not always necessary but can be a substantial benefit to the children and to resolution of the case, but only if the guardian is well qualified and conscientious. He observes that lawyers are less respected now than they were 50 years ago. He does not like e-mail and fax. "They make things go too fast."

Instead of mediation, lawyers should contact each other early to state their offers of settlement. The lawyers should then confer with their client at length and in private. The developing habit of offers of settlement being stated for the first time at mediation leads to a hurried pace which is fertile ground for mistakes and for unfair resolutions. The objective of mediation appears to be resolution, sometimes at the expense of fairness. In contrast: "When you go to court, fairness is the rule. It is impossible to be completely fair, but you ought to try your damn level best."

To better educate lawyers, Jack began and edited the Family Law Newsletter after he formed the Family Law Section of

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# Current Status of Gifts in a Georgia Divorce

By David J. Beaudry  
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Generally any property acquired during the marriage is subject to equitable division.<sup>1</sup> However as is always the case, there are exceptions to the rule. Any property acquired by either party from a third party during the marriage by gift, inheritance, bequest, or devise remains the separate property of the acquiring party and is not subject to equitable division,<sup>2</sup> unless the appreciation in the asset's value was caused by the direct efforts of a party during the marriage, in which case, any appreciation in the asset's value resulting from the efforts of either party becomes a marital asset subject to equitable division.<sup>3</sup>

However, should the separate property appreciate in value during the marriage solely as a result of market forces, that appreciation remains that party's separate property and is not subject to equitable division.<sup>4</sup> The policy behind these rules is to recognize the contributions of the parties to the acquisition of and any increase to the value of assets during the marriage.<sup>5</sup>

Once a gift has been established the next step is to determine how the property will be treated during a divorce and equitable division of property. Currently there are four general rules on how a gift is treated in the context of a divorce and the equitable division of marital property. The first was mentioned earlier, property acquired by either party from a third party during the marriage by gift is the separate property of the recipient.<sup>6</sup> Second, when a gift is given to the marital couple by a third party, the property is marital and subject to equitable division, absent a contrary intention by the donor.<sup>7</sup> Third, a gift between spouses of property acquired during the marriage is also subject to equitable division.<sup>8</sup>

As a result of the Supreme Court's ruling in *Lerch*, there is now a fourth rule, a gift of separate property by one spouse to the married couple will generally be consid-

ered marital property unless a contrary intent by the donor can be demonstrated. Prior to the Georgia Supreme Court's recent ruling in *Lerch v. Lerch*,<sup>9</sup> for a gift to be excluded from equitable division, the donor had to be a third party, but that changed after the court's ruling.<sup>10</sup> In *Lerch*, the parties lived in a home purchased by husband prior to the marriage. During the marriage husband executed and recorded a gift deed transferring ownership in the home to both parties as "tenants in common" with right of survivorship. The Georgia Supreme Court held that in so doing, husband manifested an intent to transform his separate property into marital property. Because both husband and wife now owned an undivided one-half interest in the property, the entire property should be treated as marital and is therefore subject to equitable division.

The result in *Lerch* reaffirms the longstanding rule that gifts to the marital couple are treated as marital property. The *Lerch* ruling does away with the requirement that the donor be a third party outside of the marriage. However in all transactions between spouses have to meet the requirements for a valid gift under O.C.G.A. § 44-5-80: (1) the donor must manifest a present intent to give the asset as a gift; (2) the recipient must accept the gift; (3) the gift must be delivered, either physically or symbolically;<sup>11</sup> and (4) there must be good consideration.<sup>12</sup> The burden is on the person claiming the gift to prove all elements existed at the time of the transaction.<sup>13</sup> The intent of the donor is paramount. The other elements are easily established once the transfer takes place. In addition, be aware that in some instances, Georgia law establishes that certain transactions between family members of real and personal property are presumed to be gifts.<sup>14</sup>

For a recent application of this rule see *Brock v. Brock*.<sup>15</sup> In *Brock*, the husband received a \$400,000 payment from his

father, who is also the husband's employer, that husband claimed was a gift from his father to the husband solely. The wife alleges that \$400,000 payment was not a gift, but a bonus and was therefore income. It is husband's burden to prove the transaction was a gift. The husband obviously accepted the payment, he received the funds so there was delivery of the gift, and there is adequate consideration. The only issue for the court is whether or not the husband's father intended the funds to be a gift at the time he gave the husband the money. At trial the husband failed to show the payment was intended as a gift. The employer listed the money as compensation on the husband's 1099 form, the husband also listed it as compensation on his federal and state tax returns, and he paid the taxes due on the funds. Brock also contains an excellent discussion on transfers of real property under O.C.G.A. § 53-12-92(c) mentioned in note 14.

With regard to the gifting of real property, it is very important to note some particular nuances. For transactions falling under O.C.G.A. § 53-12-92(c), if you can overcome the presumption the transfer was a gift, the statute mandates is the establishment of a purchase money resulting trust in favor of your client. However, if the purpose of the transfer was fraudulent, such as to prevent the property from being reached by creditors, the party may be barred from seeking the imposition of a resulting trust due to the equitable doctrine of unclean hands.<sup>16</sup>

The good news is if the property was considered marital property before the transfer, it will still be considered marital property after the transfer.<sup>17</sup> This is bad news if the subject land was considered a party's separate property before the transaction because not only to you have to overcome the presumption that transaction was a gift, but that you had good faith. **FLR**

## Endnotes

1. White v. White, 253 Ga. 267, 319 S.E.2d 447(1984).
2. Bailey v. Bailey, 250 Ga. 15, 295 S.E. 2d 304 (1982); Payson v. Payson, 274 Ga. 231 (1), 552 S.E.2d 839 (2001).
3. Morrow v. Morrow, 272 Ga. 557, 532 S.E.2d 672 (2000).
4. Halpern v. Halpern, 256 Ga. 639, 352 S.E.2d 753

- (1987) (appreciation of stock shares received as a gift through market forces are not subject to equitable division); Bass v. Bass, 264 Ga. 506, 507, (1994).
5. White v. White, 253 Ga. 267, 319 S.E.2d 447 (1984) (marital property is defined as property acquired as a direct result of the labor and investments of the parties during the marriage).
6. McArthur v. McArthur, 256 Ga. 762, 353 S.E.2d 486 (1987); Bailey v. Bailey 250 Ga. 15 (1982).
7. Braly v. Braly, 244 Ga. 773, 262 S.E.2d 94 (1979).
8. McArthur v. McArthur, 256 Ga. 762, 353 S.E.2d 486 (1987).
9. 278 Ga. 885 (2005).
10. See, e.g., McArthur v. McArthur, 256 Ga. 762, 353 S.E.2d 486 (1987) (for purposes of determining the parties' separate property, gifts consist of gifts from a non-spouse received either before or during the marriage); Avera v. Avera, 268 Ga. 4, 485 S.E.2d 731 (1997) (transfer of the former marital home to wife from irrevocable trust established by husband with himself as trustee is a gift from a third party to wife); Southerland v. Southerland, 278 Ga. 188, 598 S.E.442 (2004) (gifts to wife from her family were wife's separate property).
11. O.C.G.A. § 44-5-80; Cannon v. Williams, 194 Ga. 808(2), 22 S.E.2d 838, 844 (1942).
12. Good consideration for purposes of gift giving can be based on love and affection toward a close relative, or a strong moral obligation supported by a legal or equitable duty. Cannon v. Williams, 194 Ga. 808(2)(d), 22 S.E.2d 838, 844 (1942).
13. Brock v. Brock, 279 Ga. 119, 120, 610 S.E.2d 29, 30 (2005) (citing Whitworth v. Whitworth, 233 Ga. 53 (2) (c), 210 S.E.2d 9 (1974)).
14. O.C.G.A. § 53-12-92(c) (Between a husband and wife, a parent and child, or siblings, the payment of purchase money by one and causing title to vest in the other, there is a rebuttable presumption that the transfer is intended as a gift); O.C.G.A. § 44-5-84 (The delivery of personal property by a parent into the exclusive possession of a child living separately from the parent creates a presumption of a gift to the child); O.C.G.A. § 44-5-85 (Exclusive possession by a child of land owned by the parents, without payment of rent, for a period of seven years, creates a presumption of a gift and conveys title to the child).
15. 279 Ga. 119, 610 S.E.2d 29 (2005).
16. Carden v. Carden, 253 Ga. 546, 322 S.E.2d 226 (1984) (The husband was barred from seeking resulting trust in property he fraudulently transferred to wife during the marriage).
17. Sparks v. Sparks, 256 Ga. 788, 353 S.E.2d 508 (1987) (Property initially acquired as marital is subject to equitable division regardless of a subsequent interspousal transfer)

# Forget About Faxing

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**F**axing is so 1990s! In the technology world, that makes it ancient. Faxing is more time consuming and less efficient than e-mailing. Some of you may still be printing documents so that they can be signed, manually inserted into a fax machine and sent. After a significant degradation in image quality (not to mention wasting paper and loss of staff productivity in both the sending and receiving office), the document arrives at the desk of the recipient (upon manually being delivered by someone in the receiving office).

It is also increasingly likely that the recipient will thereafter have his or her staff scan the fax and store it on the network. This will allow storage in digital format on the recipient's network (and/or in a document management system like Worldox® or Interwoven®). In fact, even the sender may do the same. In that vein, why create paper at all?

## Receiving Faxes

For those of you who insist on keeping the ol' fax machine – the trend in 2006 is to move to online fax services such as E-Fax, J-Fax or TrustFax. Frankly, you are bound to still receive faxes, as not everyone will be as technologically forward thinking as you. Online fax services permit faxing and receiving faxed documents electronically via e-mail. Desktop faxing services save time, natural resources and significantly increase productivity dollars at your office.

Case in point - this writer moved to an online faxing service last year and not only do we not miss the old (ink sucking, paper eating, time consuming) fax machine, but many documents that we receive by fax never even see paper at all. They're simply dropped (by clicking and dragging) into Worldox®, profiled, read on our computer

screen, billed for, and we're done.

And, you will instantly bring the document up on your computer screen in a matter of seconds instead of shouting, "Shirley, where is the Smith file? Did someone file the faxes from last week? Do you know where that piece of paper is?"

Sending an e-mail instead of a fax: With Adobe Acrobat®, or with a variety of knock off products like PDF Create! (low-cost) or CutePDF (free), it is so very easy to take your Word, Excel, Quattro Pro or WordPerfect document and put them into a ready-to-e-mail format.

Be cautious about sending documents in Word or Word Perfect format as the recipient can not only manipulate the received document, but may, in certain circumstances, be able to decipher code behind those documents (what is now known as "meta-data" in MSWord offices).

## Electronic Signatures

Even signatures can be stored and retrieved electronically. A digital copy of the sender's signature can be easily made and inserted into any word processing document before it is converted to PDF by simply signing your name to a piece of paper, scanning it, and storing it on your network as an image.

Alternatively, you can use the Adobe Acrobat digital signature which provides encrypted signature formats which are only available to you and those to whom you give express authority, (which requires the full version of Adobe Acrobat – not a knock-off product and not the free Reader).

Many of you may know that on June 30, 2000, President Bill Clinton signed The Electronic Signatures in Global and National Commerce Act (E-Sign Act) into



law. The E-Sign Act made digital signatures equivalent to written signatures for all electronic documents. And, for the first time in history, a U.S. President signed a bill into law using a digital signature instead of a pen. (Public Law No. 106-229). Georgia codified a similar law (O.C.G.A. §10-12-4) which basically states that records and signatures shall not be denied legal effect or validity solely on the grounds that they are electronic.

### Security Concerns

And, while you may have some security concerns associated with a digital signature stored on your network, the reality is that just about anyone receiving your original signature on paper can scan it in, copy it and store it for themselves. As with most modern security concerns, security is more

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the Atlanta Bar Association. At first he read all the appellate cases, writing digests for the newsletter, then writing, copying, and distributing the newsletter on his own and at his own personal expense. Jack continued as Editor of the newsletter for about 25 years, working most Saturdays until about one year ago, excusing himself from the office on occasional autumn Saturdays to attend Georgia Tech home football games.

For years he also sent a copy of Dan McConaughy's handbook to new Superior Court Judges, always enclosing a note that the gift was on behalf of the Chairman of the Family Law Section of the State Bar of Georgia.

While serving as chairman of the Fulton Democratic Party Jack visited the White House. He names Adli Stevenson as his favorite Democrat.

of a people problem than a technology issue.

### Conclusion

Come into the 21st Century. Abandon the old fax machine, embrace current technology, and make better use of e-mail to save staff productivity time, natural resources and money. Faxing is truly technology that has come and gone. FLR

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He is an active member of Trinity Presbyterian Church, where, in this newly-started phase of his career, he hopes to do more work. With certainty, Jack Turner declares "God is a Presbyterian".

Jack Turner has now closed his law practice of more than 50 years. Very few of us – probably none of us – could accomplish in five careers what Jack Turner has pioneered and achieved in his one, long distinguished career. On behalf of the Family Law Section of the State Bar of Georgia, we thank you, Jack, for our existence. And, from all of us who admire and respect you: Enjoy your retirement. Rest comfortably satisfied that your vision is fulfilled. God bless you Jack Turner. FLR



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The Family Law Section acknowledges and congratulates

*Christopher Olmstead*

on his receipt of the

2005 Professionalism Award

# YLD Family Law Committee Report



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It is with great excitement that I pen the first article on behalf of the YLD Family Law Committee and its younger family lawyers around the state.

As many of you may have read in the last *Family Law Review*, the Young Lawyers Division (YLD) recently created the Family Law Committee in response to the growing number of younger lawyers practicing family law. Whether a product of demand or the practice of family law becoming increasingly “fashionable,” more and more young lawyers seem to be practicing in the area. Having an organization of these younger family lawyers was needed, and the response has been tremendous.

Since its kick-off reception at the 2005 Institute, the committee has grown to more than 60 lawyers and has been active in establishing a network among its members. As we all know, it is almost always more enjoyable to have a case with someone you know. Through the committee, many members have had an opportunity to get to know their contemporaries, both in family law and other areas of practice, and to bring more collegiality to our practice. Most recently, the committee joined forces with the YLD Litigation Committee for a sponsored event at Fuego in Midtown Atlanta which was attended by more than 100 people, including many from outside the metro area. To all associates or younger partners who wish to get involved, the opportunity is there.

Aside from being a resource for its members, the committee continues to focus on giving back to the community. Plans are coming together for a benefit later this year to raise money for a family law-related cause. The event, which will be open to everyone, will include a wine tasting and silent auction at a venue to be determined in Atlanta. We are hopeful that this will become an annual signature event and are



Pia Koslow, Tracie Lurey and Alyson Finkelstein at the 2005 Institute Reception.



Marvin Solomiany, David Marple, Pilar Prinz, Todd Orston and Jonathan Tuggle

inviting participation from anyone with interest.

By far, the most exciting news is the Executive Committee’s recent vote to create a seat on the Executive Committee for the chair of the YLD Family Law Committee. Speaking for all committee members, I would like to thank all the members of the Executive Committee for giving us a voice within the section, particularly Shiel Edlin, who spearheaded that effort. We are honored to be acknowledged and embraced by the section, and we look forward to serving as an active arm providing future leadership. Special thanks as well to *Review* Editor, Randy Kessler, for creating this column, through which we will continue to create awareness for the committee and younger family lawyers around the state.

I look forward to reporting on the activities of the committee, and I welcome any input or suggested topics of interest. *FLR*



# Rules Regarding Admissibility of Expert Testimony

By Mary Donne Peters  
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## Georgia's Law Regarding Admissibility of Expert Testimony Dramatically Changed in 2005

February 2005 brought the most radical changes in Georgia's rules regarding the admissibility of expert testimony in more than 100 years. Legislators replaced the general rule that expert testimony was presumed admissible with a statute that specifically engrafted into the law of Georgia decades of federal decisions mandating that federal judges serve as gatekeepers for expert testimony. However, Georgia's new rules do not merely parrot federal law. With respect to professional negligence actions, and especially medical malpractice suits, Georgia law now incorporates strict new requirements for the admissibility of expert testimony not found in the Federal Rules of Evidence.

### Historical Overview

Prior to February 2005, Georgia statutes provided that the "opinions of experts on any question of science, skill, trade or like questions shall always be admissible...."<sup>1</sup> To admit expert testimony, proponents needed only show that the expert was qualified, the procedure the expert used to arrive at a conclusion had reached a stage of verifiable certainty, and the testimony of the expert was relevant and helpful to the jury. In practice, the expert qualification requirements were minimal, requiring little more than a showing that the expert had gained special knowledge through his education, training, or experience.<sup>2</sup>

In 1982, the Georgia Supreme Court adopted a verifiable certainty test for the admission of expert testimony in Georgia.<sup>3</sup> In doing so, the Court specifically rejected the *Frye* general acceptance test being employed by federal courts and many state courts at that time.<sup>4</sup> The *Frye* test required that the scientific principle or technique used by the expert be generally accepted in

the relevant scientific community before admission of the expert's opinion.<sup>5</sup> The verifiable certainty test, on the other hand, required the trial judge to determine whether the technique or procedure the expert used in arriving at the expert's opinion had reached a stage of verifiable certainty – that is, whether the expert's procedure "rests upon the laws of nature."<sup>6</sup> Once an expert's theory or methodology was admitted into evidence by a number of courts, the trial court could simply judicially take notice of admissibility without engaging in an independent analysis to determine verifiable certainty.<sup>7</sup> Though the verifiable certainty test was in a sense a reliability determination,<sup>8</sup> it never evolved into the kind of reliability analysis employed by Georgia's federal counterpart. In *Orkin Exterminating Company, Inc. v. Carder*,<sup>9</sup> one state court litigant attempted to argue for exclusion of his opponent's expert testimony by relying on *Daubert* factors.<sup>10</sup> However, the trial court refused to apply the *Daubert* analysis and admitted the evidence using the verifiable certainty test.<sup>11</sup>

In February 2005, Georgia's governor signed into law SB3, a "tort reform" package that included the new evidentiary rules for expert witness testimony. Because Georgia's legislature specifically sought to engraft the federal evidentiary rules for experts into Georgia's courts, an under-



standing of the history of the evolution of the federal gatekeeping rules is imperative.

### Federal Law Governing Expert Testimony

Prior to the adoption of the Federal Rules of Evidence, federal courts would allow expert testimony on questions that required special experience or knowledge from one skilled in a particular science, art or trade.<sup>12</sup> In *Frye v. United States*, the court required that before expert testimony could be admitted, the scientific principle or discovery from which an expert's deduction was made must have been "sufficiently established to have gained general acceptance in the particular field in which it belongs."<sup>13</sup> The *Frye* test was designed to draw a clear line between experimental and more established scientific principles.<sup>14</sup> For 70 years following the *Frye* decision, the general acceptance test remained the standard for determining admissibility of novel scientific evidence.<sup>15</sup>

*Frye*, however, left many questions unanswered. For example, *Frye* did not define the parameters of the relevant scientific community and it did not identify what degree of consensus would constitute general acceptance.<sup>16</sup> As such, the *Frye* test would often result in excluding relevant, probative evidence.<sup>17</sup> Many commentators criticized the *Frye* test for excluding reliable scientific techniques because they were new and had not yet gained the general acceptance.<sup>18</sup> The *Frye* test concentrated on counting heads, rather than on verifying the soundness of the scientific conclusions.<sup>19</sup>

In 1975, Congress enacted the Federal Rules of Evidence.<sup>20</sup> Rule 702 addresses when expert testimony is admissible and the qualifications of an expert while Rule 703 addresses the facts and data upon which an expert can base his or her testimony.<sup>21</sup> The 1975 version of Rule 702 provided that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

In 1993, the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*<sup>22</sup> addressed the question of whether *Frye's* general acceptance test was superseded by the adoption of the Federal Rules of Evidence.<sup>23</sup> The Court found that Rule 702 did not incorporate the 'general acceptance' standard because the text of the rule did not mention such a standard and a "rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to 'opinion' testimony.'"<sup>24</sup>

In place of *Frye's* general acceptance standard, *Daubert* adopts a new reliability standard. Specifically, the Court found that the Federal Rules required the scientific testimony to be both reliable and relevant.<sup>25</sup> The Court imposed a gatekeeping function on the trial judge to determine at the outset if the reasoning and methodology underlying the expert's testimony is scientifically valid, and if it has been properly applied to the facts at issue in the case.<sup>26</sup> In making this determination, the Court provided a non-exhaustive list of factors a trial court may consider,<sup>27</sup> emphasizing that the reliability inquiry was a flexible one and these factors were not a "definitive checklist."<sup>28</sup>

Two important Supreme Court cases followed the *Daubert* decision. In *General Electric Company v. Joiner*<sup>29</sup> the Court held that an appellate court should not reverse a lower court's evidentiary rulings with respect to expert testimony unless there has been an abuse of discretion; that is, unless the lower court's ruling is manifestly erroneous.<sup>30</sup> Other courts have defined this discretion as not only discretion as to the court's reliability determination, but also discretion as to the method the court uses to determine reliability. The third case in the *Daubert* "trilogy," *Kumho Tire Company, Ltd. v. Carmichael*<sup>31</sup> addressed the question of whether *Daubert's* reliable assessment applied only to scientific testimony or whether it also applied to testimony based on technical or other specialized knowledge.<sup>32</sup> The *Kumho* Court held that *Daubert's* "gatekeeping" obligation also applied to such "non-scientific" testimony.<sup>33</sup>

In 2000, Congress amended Federal Rules of Evidence to incorporate the hold-

ings of the *Daubert* trilogy. Under the revised Rule 702, an expert may testify only if “(1) the testimony is based upon sufficient facts and data, (2) the testimony is the product of reliable principles and methods and (3) the witness has applied the principles and methods reliably to the facts of the case.”<sup>34</sup> The Federal Rules also address the facts and data upon which the expert may rely for the basis of his opinion.<sup>35</sup> Federal Rule 703 provides that an expert may rely on facts or data perceived by the expert or made known to the expert before a hearing or trial.<sup>36</sup> The expert may also rely on facts or data that would be otherwise inadmissible at trial so long as these facts or data are “reasonably relied on by experts in [the expert’s] particular field.”<sup>37</sup> However, the expert may not disclose this evidence as the basis for an opinion unless the probative value of the evidence in assisting the jury to evaluate the expert’s testimony substantially outweighs any prejudicial effect caused by such disclosure.<sup>38</sup>

Today, courts generally apply a three-part test in determining the admissibility of expert testimony. The trial court must find:

- (1) that the expert is qualified to testify competently regarding the matters the expert intends to address;
- (2) the methodology by which the expert reaches his conclusion is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert* and;
- (3) the testimony assists the trier of fact, through applicant of scientific, technical or specialized expertise, to understand the evidence to determine a fact in issue.”<sup>39</sup>

The qualification element considers whether the expert has sufficient specialized knowledge gained by experience, training, skill, or education to testify on the given subject matter. The reliability addresses the sufficiency of the expert’s facts and data, the reliability of the methodology used to reach his opinion, and the reliability of the application of the methodology to the facts of the case. The final element considers the relevance and the helpfulness of the expert’s testimony to the case at hand.

## New Georgia Law Regarding Expert Testimony

In Georgia’s 2005 legislative session, lawmakers adopted sweeping changes to the admissibility of expert testimony in a “tort reform” package known as Senate Bill 3. By passing this bill, the legislature adopted Federal Rules of Evidence 702 and 703 for admission of expert testimony in all civil cases and placed additional restrictions on the admissibility of expert testimony in professional negligence cases, especially medical malpractice cases.<sup>40</sup> Federal Rules 702 and 703 have been incorporated into O.C.G.A. § 24-9-67.1(a) and (b).

Additionally, the new law specifically references and allows Georgia courts to draw from the opinions of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>41</sup> *General Electric v. Joiner*,<sup>42</sup> *Kumho Tire Co., Ltd. v. Carmichael*<sup>43</sup> and other decisions in federal courts in applying the standards enumerated in the statute.<sup>44</sup> The stated intent of the legislature in enacting this legislation is to ensure that in civil cases the courts of Georgia are not viewed as being open to the admission of expert testimony that would be inadmissible in other states.<sup>45</sup>

There is a notable difference between the federal rules and O.C.G.A. § 24-9-67.1. O.C.G.A. § 24-9.67.1(b)(1) provides that the expert’s testimony must be “based upon sufficient facts and data which are or will be admitted into evidence at the hearing or trial.”<sup>46</sup> The italicized portion does not appear in Federal Rule 702.<sup>47</sup> The Georgia legislature appears to require that the expert rely in substantial measure upon admissible evidence in arriving at the expert’s opinion. However, the new rule also seems to contemplate that the expert would be permitted to rely on inadmissible evidence because the rule states that “the facts or data [relied on] need not be admissible in evidence.”<sup>48</sup>

The new statute also provides special qualification requirements for experts testifying in professional malpractice actions.<sup>49</sup> In those cases, expert testimony will be admissible only if it meets the *Daubert* criteria and at the time the negligent act or omission is alleged to have occurred, the expert:

- (1) was licensed by an appropriate regu-

latory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time; and

(2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion to be given as the result of having regularly engaged in:

A) The active practice of the specialty for at least three of the last five years with sufficient frequency to establish an appropriate level of knowledge as determined by the judge; or

B) The teaching of his or her profession for at least three of the last five years as an employed faculty member of an educational institution accredited in the teaching of such profession with an appropriate level of knowledge as determined by the judge; and

C) Is a member of the same profession.<sup>50</sup>

Significantly, experts testifying via affidavit pursuant to O.C.G.A. § 9-11-9.1 must also meet the requirements of the new evidentiary rules for expert testimony.<sup>51</sup> The Federal Rules of Evidence contain no such employment restrictions on the admissibility of expert testimony on medical or professional malpractice testimony.

### **Retroactivity of the New Law Regarding Admissibility of Expert Testimony In Georgia**

In enacting S.B.3, the Georgia Legislature provided that the terms of O.C.G.A. § 24-9-67.1 would become immediately effective upon the bill's approval by the Governor.<sup>52</sup> For pending cases in which experts have been disclosed and have testified during depositions, the new laws would appear to require substitution of experts when the previously designated expert does not meet the new, more stringent requirements. A number of trial court judges in Georgia have refused to apply § 24-9-67.1 in cases that were near the time of trial or otherwise procedurally advanced.<sup>53</sup> In these decisions, the trial courts focused on the impact of the new expert testimony rules in the

application of a particular case and did not analyze the constitutionality of the statute in general.<sup>54</sup>

### **Procedural Concerns Regarding Expert Testimony**

Georgia's new law regarding the admissibility of expert testimony provides that, upon the motion of any party, the trial court may hold a pretrial hearing to determine whether a witness qualifies as an expert and whether the proffered testimony meets the new statutory requirements.<sup>55</sup> If the trial court agrees to hold such a hearing, the hearing and any ruling on the admissibility of expert testimony shall be completed no later than the final pretrial conference contemplated under O.C.G.A. § 9-11-16.<sup>56</sup>

Unlike the Federal Rules, Georgia does not always mandate that parties disclose the existence of experts or the parameters of expert testimony before trial.<sup>57</sup> In Georgia, parties may obtain certain information regarding the identity of an opposing party's expert and the areas and bases of anticipated testimony; however, this information is required to be disclosed only if a party requests this information during discovery.<sup>58</sup>

In practice, when expert disclosures are made in state court proceedings, such disclosures are invariably brief and made by the attorney. Additionally, there is no statute in Georgia regarding when disclosure of experts must occur. Then, in the absence of time limits set forth in specific scheduling orders by trial courts, disclosure of experts may come at any time. Appellate courts in Georgia have ruled that a trial court commits reversible error in refusing to permit a party to present an expert's testimony, even if the expert was not identified during the discovery period.<sup>59</sup>

### **Conclusion**

The new rules regarding the admissibility of expert testimony in Georgia will no doubt be tested in the appellate courts of Georgia for years to come. One thing, however, is certain. Litigation will inevitably become more complex and expensive as lawyers and judges struggle with gatekeeping questions. *FLR*



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## Endnotes

1. O.C.G.A. § 24-9-67
2. See *Manesh v. Baker Equipment Engineering Co.*, 247 Ga.App. 407(2000).
3. See *Harper v. State*, 249 Ga. 519 (1982).
4. See *Harper v. State*, 249 Ga. 519, 525 (1982).
5. See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). See also *Harper v. State*, 249 Ga. 519, 525 (1982).
6. See *Harper v. State*, 249 Ga. 519, 525 (1982).
7. See *Harper v. State*, 249 Ga. 519, 526 (1982).
8. See *Harper v. State*, 249 Ga. 519, 526 n. 10 (1982) (noting that the "always admissible" standard employed in Georgia did not mean that an expert may give his opinion "based on the results of a procedure that has not been proved reliable").
9. *Orkin Exterminating Co., Inc. v. Carder*, 258 Ga.App. 796 (2003).
10. See *Orkin Exterminating v. Carder*, 258 Ga.App. 796, 800 (2003). See also *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993);
11. See *Orkin Exterminating Co., Inc. v. Carder*, 258 Ga.App. 796, 800 (2003). See also *Jordan v. Georgia Power Co.*, 219 Ga.App. 690, 605-05 (1996) and *Orkin Exterminating Co., Inc. v. McIntosh*, 215 Ga.App. 587, 592 for more courts rejecting the adoption of *Daubert* in Georgia courts.
12. See *Frye v. United States*, 293 F. 1013, 1014 (1923).
13. See *Frye v. United States*, 293 F. 1013, 1014 (1923).
14. See *Frye v. United States*, 293 F. 1013, 1014 (1923).
15. See *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 585 (1993).
16. See Henry F. Fradella, Lauren O'Neill and Adam Fogarty, *The Impact of Daubert On Forensic Evidence*, 31 Pepp. L. Rev. 323, 326 (2004.)
17. See Henry F. Fradella, Lauren O'Neill and Adam Fogarty, *The Impact of Daubert On Forensic Evidence*, 31 Pepp. L. Rev. 323, 326 (2004.)
18. See Sarah Brew, *Where the Rubber Hits The Road: Steering The Trial Court Through A Post-Kumho Tire Evaluation of Expert Testimony*, 27 Wm. Mitchell L. Rev. 467, 470 (2000). See also *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 585 (1993) (noting how the merits of *Frye* has been debated.)
19. See Sarah Brew, *Where the Rubber Hits The Road: Steering The Trial Court Through A Post-Kumho Tire Evaluation of Expert Testimony*, 27 Wm. Mitchell L. Rev. 467, 470 (2000).
20. See Sarah Brew, *Where the Rubber Hits The Road: Steering The Trial Court Through A Post-Kumho Tire Evaluation of Expert Testimony*, 27 Wm. Mitchell L. Rev. 467, 470 (2000).
21. Compare FRE 702 with FRE 703.
22. *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 585 (1993).
23. See *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 585 (1993).
24. See *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588 (1993) (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)).
25. See *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 585 (1993).
26. See *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 585 (1993).
27. These factors include whether the theory or technique can be tested, whether the theory or technique has been published and subjected to peer review, the potential rate of error, the existence and maintenance of standards controlling the technique's operation, and whether the technique or theory has been general accepted by the relevant scientific community. See *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993).
28. See *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993).
29. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).
30. See *General Electric Co. v. Joiner*, 522 U.S. 136, 141-42 (1997).
31. See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).
32. See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). The Court in *Daubert* had specifically limited its ruling to testimony based on scientific knowledge. *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 n. 8 (1993) ("Our discussion is limited to the scientific context because that is the nature of the expertise offered here.")
33. See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999).

See Expert Testimony on page 33

# The New Servicemembers Civil Relief Act

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On Dec. 19, 2003, President Bush signed into law the "Servicemembers Civil Relief Act" (SCRA), a complete revision of the statute known as "The Soldiers' and Sailors' Civil Relief Act," or SSCRA. Even for lawyers with no military base nearby, this federal statute is important. There are over 160,000 National Guard and Reserve personnel at present who have been called up to active duty, and over 40 percent of the armed forces serving in Iraq are Reserve/Guard servicemembers. These Reserve Component (RC) military members often come from the big cities and small towns of America, and lawyers need to know their way around the basic federal statute that protects those on active duty. Although previously there was limited coverage by the SSCRA for Guard members, the new Act extends protections to members of the National Guard called to active duty for 30 days or more pursuant to a contingency mission specified by the President or the Secretary of Defense. 50 U.S.C. App. § 511(2)(A)(ii).

Up until the passage of the SCRA, the basic protections of the SSCRA for the servicemember (SM) included:

1. Postponement of civil court hearings when military duties materially affected the ability of a SM to prepare for or be present for civil litigation;
2. Reducing the interest rate to 6% on pre service loans and obligations;
3. Barring eviction of a SM's family for nonpayment of rent without a court order for monthly rent of \$1,200 or less;
4. Termination of a pre-service residential lease; and
5. Allowing SMs to maintain their state of residence for tax purposes despite military reassignment to other states.

The SSCRA, enacted in 1940 and updated after the Gulf War in 1991, was still largely unchanged as of 2003. Congress wrote the SCRA to clarify the language of the SSCRA, to incorporate many years of judicial interpretation of the SSCRA and to update the SSCRA to reflect new developments in American life since 1940. Since many of the Act's provisions are particularly useful (and potentially dangerous) in domestic litigation, the family law attorney should have a good working knowledge of them. Here's an overview of what the SCRA does.

## Stays and Delays

The SCRA expands the application of a SM's right to stay court hearings to include administrative hearings. Previously only civil courts were included, and this caused problems in cases involving administrative child support determinations as well as other agency determinations which impacted servicemembers. Criminal matters are still excluded. 50 U.S.C. App. § 511-512. There are several provisions regarding the ability of a court or administrative agency to enter an order staying, or delaying, proceedings. This is one of the central points in the SSCRA and now in the SCRA – the granting of a continuance which halts legal proceedings.

In a case where the SM lacks notice of the proceedings, the SCRA requires a court or administrative agency to grant a stay (or continuance) of at least 90 days when the defendant is in military service and –

> the court or agency decides that there may be a defense to the action, and such defense cannot be presented in the defendant's absence, or

> with the exercise of due diligence, counsel has been unable to contact the defendant (or otherwise determine if a meritorious defense exists). 50 U.S.C. App. § 521(d).

In a situation where the military member has notice of the proceeding, a similar mandatory 90 day stay (minimum) of proceedings applies upon the request of the SM, so long as the application for a stay includes two things. The first is a letter or other communication that 1) states the manner in which current military duty requirements materially affect the SM's ability to appear, and 2) gives a date when the SM will be available to appear. The second is a letter or other communication from the SM's commanding officer stating that 1) the SM's current military duty prevents appearance, and 2) that military leave is not now authorized for the SM. 50 U.S.C. App. § 522. Of course, these two communications may be consolidated into one if it is from the SM's commander.

### Family Law Sidebar

Pause for a moment to think through the potential impact of this stay provision on the family lawyer and her client. How would this affect an action for custody by the non-custodial dad when mom, who has custody, gets mobilization orders and takes off for Afghanistan, leaving the parties' child with her mother in Florida? How are you going to get the child back when mom's lawyer interposes a stay request to stop the litigation dead in its tracks? If mom has executed a Family Care Plan (FCP), which is required by military regulations, leaving custody with the maternal grandmother, will that document – executed by mom, approved by her commanding officer and accompanied by a custodial power of attorney – displace or overcome a court order transferring custody to dad? Can the court even enter such a custody order given the stay and default provisions of the SCRA? To see how the battle is being joined in this area, take a look at *Lenser v. McGowan*, 2004 Ark. LEXIS 490 (upholding the judge's grant of custody to the mother when the mobilized father requested a stay of proceedings to keep physical custody with his own mother) and *In re Marriage of Grantham*, 698 N.W.2d 140 (Iowa 2005) (reversing a judge's order staying the mother's custody petition when father was mobilized and gave custody via his FCP to his mother).

On another front, think about support.

How does this stay provision affect the custodial dad who suddenly stops receiving child support when his ex-wife is called up to active duty from the Guard or Reserve? When she leaves behind her "day job," her pay stops and so does the monthly wage garnishment for support of their children. How can dad get the garnishment restarted while she's in uniform on active duty? Will the reduction in pay she probably gets result in less child support? Or will her reduced cost of living in the military (how much does it cost to live in a tent outside Bagram Air Base in Afghanistan?) have the opposite result? How can dad move the case forward to establish a new garnishment when he cannot locate her, he might not be able to serve her (if he can locate her), and she probably will have a bullet-proof motion for stay of proceedings if dad ever gets the case to court?

### Additional Stays

An application for an additional stay may be made at the time of the original request or later. 50 U.S.C. App. § 522 (d)(2). If the court refuses to grant an additional stay, then the court must appoint counsel to represent the SM in the action or proceeding. 50 U.S.C. App. § 522(d)(2).

Once again, give this some thought. What is the attorney supposed to do – tackle the entire representation of the SM, whom he has never met, who is currently absent from the courtroom and who is likely unavailable for even a phone call or a consultation if he is on some distant shore in harm's way?

And, by the way, who pays for this? There is no provision for compensation in the SCRA. How would you respond if her honor beckons you to the bench next Monday and says, "Counselor, I am appointing you as the attorney for Sergeant Sandra Blake, the absent defendant in this case. I understand that she's in the Army, or maybe the Army Reserve or National Guard. Whatever. Please report back to the court in two weeks and be ready to try this case."

### Dangers and Defaults

Does a stay request expose a SM to any risks? The SCRA states that an application for a stay does not constitute an appear-

ance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense (including a defense as to lack of personal jurisdiction). 50 U.S.C. App. § 522(c) eliminates the previous concern that a stay motion would constitute a general appearance, exposing the SM to the jurisdiction of the court. This new provision makes it clear that a stay request “does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense.”

Can you obtain a default judgment against a SM? Broadly construing “default judgment” as any adverse order or ruling against the SM’s interest, the SCRA clarifies how to proceed in a case where the other side seeks a default judgment (that is, one in which the SM has been served but has not entered an appearance by filing an answer or otherwise) if the tribunal cannot determine if the defendant is in military service.

A default judgment may not be lawfully entered against a SM in his absence unless the court follows the procedures set out in the SCRA. When the SM has not made an appearance, 50 U.S.C. App. § 521 governs. The court must first determine whether an absent or defaulting party is in military service. Before entry of a judgment or order for the moving party (usually the plaintiff), the movant must file an affidavit stating “whether or not the defendant is in military service and showing necessary facts in support of the affidavit.” Criminal penalties are provided for filing a knowingly false affidavit. 50 U.S.C. App. § 521(c).

When the court is considering the entry of a default judgment or order, one tool that is specifically recognized by the SCRA is the posting of a bond. If the court cannot determine whether the defendant is in military service, then the court may require the moving party to post a bond as a condition of entry of a default judgment. Should the nonmovant later be found to be a SM, the bond may be used to indemnify the defendant against any loss or damage which he or she may incur due to the default judgment (if it should be later set aside). 50 U.S.C. App. § 521(b)(3).

When the filed affidavit states that the party against whom the default order or judgment is to be taken is a member of the armed forces, no default may be taken until the court has appointed an attorney for the absent SM.

If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember. 50 U.S.C. App. § 521(b)(2).

If the court fails to appoint an attorney then the judgment or decree is voidable.

### **Attorney for “The Absent”**

The role of the appointed attorney is to “represent the defendant.” The statute does not say what happens if the SM is, in fact, the plaintiff in a particular domestic case, but undoubtedly this wording is careless drafting. Particularly in domestic cases, it is as likely that the SM would be the plaintiff as the defendant, the petitioner as the respondent, and default decrees are sought against both sides, not just defendants.

The statute does not say what tasks are to be undertaken by the appointed attorney, but the probable duties are to protect the interests of the absent member, much as a guardian ad litem protects the interests of a minor or incompetent party. This would include contacting the member to advise that a default is about to be entered and to ask whether that party wants to request a stay of proceedings. Counsel for the SM should always renew the request for a stay of proceedings, given the difficulty of preparing and presenting a case without the client’s participation.

The statute also leaves one in the dark about the limitations of the appointed attorney. Her actions may not waive any defense of the SM or bind the SM. What is she supposed to do? How can she operate effectively before the court with these restrictions? Can she, for example, stipulate to the income of her client or of the other



party? Can she agree to guideline child support and thus waive a request for a variance? Without elaboration in this area, the Act could mean that she must contest everything, object whenever possible and refuse to make even reasonable stipulations or concessions for fear of violating the SCRA. Such conduct is, of course, at odds with the ethical requirements that counsel act in a professional and civil manner, avoiding undue delay and expense.

### **Default Protections**

If a default decree is entered against a SM, whether the judge complies with the terms of the SCRA or not, the Act provides protections. The purpose of this is to protect those in the military from having default judgments entered against them without their knowledge and without a chance to defend themselves. The SCRA allows a member who has not received notice of the proceeding to move to reopen a default judgment. To do so he must apply to the trial court that rendered the original judgment of order. In addition, the default judgment must have been entered when the member was on active duty in the military service or within 60 days thereafter, and the SM must apply for reopening the judgment while on active duty or within 90 days thereafter. 50 U.S.C. App. § 521(g). Reopening or vacating the judgment does not impair right or title acquired by a bona fide purchaser for value under the default judgment. 50 U.S.C. App. 521(h).

To prevail in his motion to reopen the default decree, the SM must prove that, at the time the judgment was rendered, he was prejudiced in his ability to defend himself due to military service. In addition, he must show that there is a meritorious or legal defense to the initial claim. Default judgments will not be set aside when a litigant's position lacks merit. Such a requirement avoids a waste of judicial effort and resources in opening default judgments in cases where servicemembers have no defense to assert. As part of a well-drafted motion or petition to reopen a default judgment or order, the SM should clearly delineate his claim or defense so that the court will have sufficient facts upon which to base a ruling.

### **Interest Rates**

The Act clarifies the rules on the six percent interest rate cap on pre service loans and obligations by specifying that interest in excess of six percent per year must be forgiven. 50 U.S.C. App. § 527(a)(2). The absence of such language in the SSCRA had allowed some lenders to argue that interest in excess of six percent is merely deferred.

It also specifies that a SM must request this reduction in writing and include a copy of his/her military orders. 50 U.S.C. App. § 527(b)(1). Once the creditor receives notice, the creditor must grant the relief effective as of the date the servicemember is called to active duty. The creditor must forgive any interest in excess of the six percent with a resulting decrease in the amount of periodic payment that the servicemember is required to make. 50 U.S.C. App. § 527(b)(2). The creditor may challenge the rate reduction if it can show that the SM's military service has not materially affected his or her ability to pay. 50 U.S.C. App. § 527(c).

### **Leases, Liens and More**

The SSCRA provided that, absent a court order, a landlord may not evict a servicemember or the dependents of a servicemember from a residential lease when the monthly rent is \$1200 or less. 50 U.S.C. App. § 531(a) modifies the eviction protection section by barring evictions from premises occupied by SMs for which the monthly rent does not exceed \$2,400 for the year 2003. The new Act also provides a formula to calculate the rent ceiling for future years. Using this formula, the 2005 monthly rent ceiling is \$2,534.32.

A substantial change is found in 50 U.S.C. App. § 534. Previously the statute allowed a servicemember to terminate a pre-service "dwelling, professional, business, agricultural, or similar" lease executed by or for the servicemember and occupied for those purposes by the servicemember or his dependents. It did not provide help for the SM on active duty who is required to move due to military orders. The SCRA remedies these problems. Under the old statute, a lease covering property used for dwelling, professional, business,

agricultural or similar purposes could be terminated by a SM if two conditions were met:

- a. The lease/rental agreement was signed before the member entered active duty; and
- b. The leased premises have been occupied for the above purposes by the member or his or her dependents.

The new Act still applies to leases entered into prior to entry on active duty. It adds a new provision, however, extending coverage to leases entered into by active duty servicemembers who subsequently receive orders for a "permanent change of station" (PCS) or a deployment for a period of 90 days or more.

It also adds a new provision allowing the termination of automobile leases (for business or personal use) by SMs and their dependents. Pre service automobile leases may be canceled if the SM receives orders to active duty for a period of 180 days or more. Automobile leases entered into while the SM is on active duty may be terminated if he or she receives PCS orders to a location outside the continental United States or deployment orders for a period of 180 days or more. 50 U.S.C. App. § 535.

### Conclusion

The family law attorney, perhaps even more than the general practitioner, needs to know and understand the SCRA for those occasions when a military member is one of the parties to the litigation. Mobilizations and deployments affect mothers and fathers, wives and husbands, and separated partners who are in the Reserves, on active duty and in the National Guard. They will have an impact on income, visitation, family expenses, cus-

tomodial care for children, mortgage foreclosures, garnishments, and many other domestic issues.

The best source of quick information on the SCRA is "A Judge's Guide to the Servicemembers Civil Relief Act," found at the website of the Military Committee of the ABA Family Law Section, [www.abanet.org/family/military](http://www.abanet.org/family/military). An extended treatment of the SCRA and family law issues may be found in Sullivan, "Family Law and the Servicemembers Civil Relief Act," "Legal Considerations in SCRA Stay Request Litigation: The Tactical and the Practical," *Divorce Litigation*, Vol.16/Number 3, March 2004. Also see Sullivan, "The Servicemembers Civil Relief Act: A Guide for Family Law Attorneys," in Brown and Morgan, 2005 Family Law Update, pp. 23-54 (Aspen Publishers 2005). The Army JAG School's SCRA guide will be published and posted on-line shortly, taking the place of the SSCRA guide which is presently available (and still quite useful in understanding and interpreting the statute). This can be found at the School's website, [www.jagcnet.army.mil/tjaglcs](http://www.jagcnet.army.mil/tjaglcs). Click on TJAGLCS Publications, then scroll down to Legal Assistance, and then look for the publication, which is JA 260. FLR



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If you have not looked at the Superior Court Rules in a while, they may be worth review.

You may not be aware that the new Superior Court Rules contain the Guardian Ad Litem Rules and a couple of proposed forms. Take a look!

# Case Law Update: Recent Georgia Decisions

By Sylvia A. Martin, Esq.  
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## Child Support

### *Dial v. Dial*, 279 Ga. 767 (2005)

During the parties' marriage, an unrelated child came to live with the parties. The child's mother gave to the wife a document that stated that the mother was giving the wife full legal guardianship and power of attorney over the child. The document further stated that the mother was aware that the parties and child would be relocating to Atlanta, Ga. This document was signed and notarized by the mother and the wife. There was never any court action taken regarding the guardianship or adoption of the child, nor was this document ever filed with a court. The parties never had any children of their own during their marriage.

Several years later, the parties separated and divorced. The trial court ordered the husband to pay child support for the above-mentioned child, basing its decision on the holding in *Wright v. Newman*, which held that a trial court could hold the husband in that particular case responsible for child support based upon the theory of promissory estoppel. However, in the *Wright* case, the father had affirmatively taken on the responsibilities of fatherhood, including listing himself on the child's birth certificate and allowing the child to believe that he was the child's natural father. In the *Dial* case, the husband never made any assertion of paternity or adoption, nor did he do any act that could be construed as a promise to assume all legal obligations toward the child. Thus, on appeal, the Supreme Court reversed the trial court's decision to order the husband to pay child support.

### *Hayes v. Hayes*, 279 Ga. 741 (2005)

The Supreme Court found that the trial court was not required to include husband's in-kind benefits provided by his employer in calculating his gross income

for purposes of determining child support. The wife contended that O.C.G.A. § 19-6-15 required the trial court to include such in-kind benefits. The Supreme Court noted that said code section does not require the inclusion of such benefits and that it is in the trial court's discretion to do so. The opinion does not state what husband's in-kind benefits were, but such benefits were not included in husband's gross income for income tax purposes, and the benefits were not for daily personal living expenses, such as housing or car allowances.

Thus, the Supreme Court found that those factors supported the trial court's decision not to include husband's in-kind benefits in determining his child support. The Supreme Court found that the trial court erred, however, in failing to include in husband's income the monthly income he received in book royalties. The Supreme Court held that O.C.G.A. § 19-6-15 requires the trial court to include compensation for personal services and all other income when calculating a payor's total gross income to be considered for child support. (The rest of the opinion in this case is reported in Marital/Separate Property section below.)

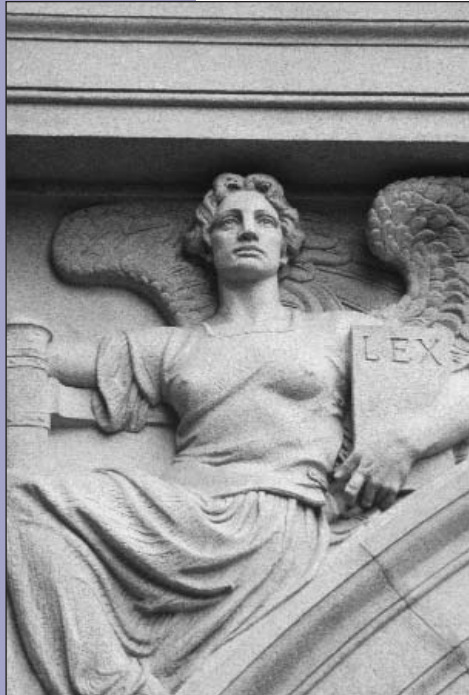
## Custody

### *Taylor v. Taylor*, S05F1412 (12/01/05)

Husband and wife married in May, 2003; their child was born in November 2003;



they separated in January 2004 and filed for divorce. They entered into a settlement agreement whereby husband agreed to terminate his parental rights as to the child in



return for no child support obligation. After the agreement was signed but before the divorce was finalized, husband had a DNA test performed which proved he was the natural father of the child. As a result, he changed his mind and did not want to terminate his parental rights. At the hearing to enforce the agreement brought by wife, the trial court expressed reluctance to enforce the agreement as it was not in the best interest of the child, but the court perceived its

obligation to enforce the agreement regardless.

The Supreme Court reversed and remanded for another hearing, stating that under Georgia law a trial court has the absolute authority to disregard any agreement between the parties in making an award of custody since the best interest of the child is the controlling factor. The opinion closed with a moving quote: "In so holding, we echo the words spoken by this Court 120 years ago: The breaking of the tie that binds [parent to child] can never be justified without the most solid and substantial reasons, established by plain proof. In any form of proceeding, the sundering of such ties should always be approached by courts with great caution and with a deep sense of responsibility." Words to practice by.

### **Grandparent Visitation**

*Ormond v. Ormond*,  
274 Ga.App. 869 (2005)

During the parties' divorce action, the maternal grandfather of the minor children and his wife filed a petition to intervene and seek custody or visitation with the

children. The parties entered into a settlement agreement whereby father had physical custody of the children, and mother had visitation with them every other weekend. At the trial on the grandparents' petition, the father testified that he did not object to the children visiting with the grandparents but that he did object to them having court-ordered visitation. The mother also testified that she had no objection to her father and stepmother visiting with the children but that she did not agree for them to have court-ordered visitation. The mother stated that she believed the children to be too young to be taken out of the state without her to visit with the grandparents. Over the parents' objections, the trial court awarded the grandparents visitation with the children one weekend each month in lieu of one of mother's weekends. The trial court found that there was clear and convincing evidence that it was in the best interest of the children for the grandparents to have such visitation. However, the trial court stated in its findings that it was not required to find by clear and convincing evidence that the children's health or welfare would be harmed by not having visitation with the grandparents because the trial court viewed the mother's testimony as agreeing to the visitation and the father's testimony as not objecting to the visitation as long as it occurred over the mother's weekends.

The Court of Appeals reversed the trial court as the evidence clearly showed that the parents objected to any court-ordered visitation. The Court of Appeals stated in its opinion that O.C.G.A. § 19-7-3(c) [the grandparent visitation statute] requires the trial court to find not only that the visitation is in the best interest of the children but also that the health or welfare of the children would be harmed if such visitation is not granted. Since the trial court clearly stated in its order that a finding that the health or welfare of the children would be harmed without the visitation was not required in this case, such finding was contrary to Georgia law and was reversed.

### **Long Arm Jurisdiction**

*Anderson v. Deas*,  
273 Ga.App. 770 (2005)

Mother and father lived together and

had a child in Maryland. Mother and child moved to Georgia; father stayed in Maryland. Father filed a custody action in Maryland. Later, mother filed two custody actions in two different counties in Georgia (Fulton and DeKalb). The courts in Fulton and DeKalb counties dismissed mother's actions due to the pending Maryland action. While in Maryland, father made phone calls to the mother and child in Georgia of a threatening nature. Mother filed in Georgia for a protective order under the family violence act. The trial court declined to proceed, finding that Maryland had continuing child custody jurisdiction.

On appeal, the mother argued that the Georgia courts should have exercised temporary emergency jurisdiction under the UCCJEA and the PKPA. The Court of Appeals upheld the trial court's finding that there was no true emergency that required the Georgia court to exercise jurisdiction as the mother had custody and possession of the child in Georgia. While the father's telephone calls would have been considered terroristic threats, which is a felony in Georgia, the trial court lacked jurisdiction over the father to proceed with the family violence matter. The family violence act provides that when a nonresident defendant is involved, the court must find personal jurisdiction over the defendant provided in O.C.G.A. § 9-10-91 (2) or (3), which is Georgia's long arm statute. The opinion has a discussion of the difference between the "Illinois rule" and the "New York rule."

The Court of Appeals ultimately concluded that neither rule was relevant in this particular case. The court found that in order to exercise jurisdiction over a nonresident defendant in a family violence action, the nonresident defendant must either commit a tortious act or omission within this state; or commit a tortious injury in this state caused by an act outside of the state if the defendant does business or has regular contacts with Georgia. In this case, the tortious act occurred outside of the state (where the call was made), and the tortious injury occurred inside the state (where the mother received the call). Because there was no evidence whatsoever that the father had minimum contacts with

Georgia, the Georgia court could not exercise jurisdiction over him.

## **Marital/Separate Property**

### ***Hayes v. Hayes*, 279 Ga. 741 (2005)**

Husband's parents provided significant funds for the downpayment and improvements for the parties' marital residence. Specifically, husband's parents gave \$3,500 for the downpayment and \$40,000 for improvements to the home. To give the parties the \$40,000, each parent wrote a check for \$10,000 to each party as gifts.

The trial court found that all of said funds were husband's separate, nonmarital property. The evidence at trial regarding the \$3,500 downpayment was conflicting as to whether said money was a gift to both parties or a gift only to husband. The Supreme Court found that the trial court was authorized to find that it was a gift only to husband. Regarding the \$40,000, at trial the husband and his father both testified that the entire \$40,000 was intended to be a gift solely to the husband, and that the \$20,000 was given to the wife solely to avoid gift tax consequences that would have occurred had they written checks to husband for the entire amount. The Supreme Court found that the trial court erred in designating the wife's \$20,000 as husband's separate property. Equity will not relieve the parties from a sham transaction, and the testimony of the husband and his father established that husband and his parents were engaged in a sham transaction. The parents were attempting to hide the actual tax situation by giving part of the gift to the wife, thereby attempting to camouflage the transaction from the IRS. For this reason, the Supreme Court held, the trial court erred in ruling the entire \$40,000 was part of husband's separate estate.

### ***Rabek v. Kellum*, 279 Ga. 709 (2005)**

The husband was employed as an air traffic controller by the Federal Aviation Commission. He participated in the Federal Civil Service Retirement System pension and thus did not participate in social security. The wife was employed in the private sector, participated in her employer's pension plan and also in social security. 42 U.S.C. § 407 provides that state

courts are precluded from considering an individual's social security retirement benefits as marital property, and as a result, social security benefits are not subject to equitable division. At the conclusion of the parties' divorce trial, the court awarded an equal division of the parties' retirement assets, exclusive of the wife's social security retirement benefits pursuant to federal law.

On appeal, the husband argued that a portion of his civil service pension should be characterized as being provided "in lieu" of social security, separated out from the total amount and not considered for equitable division, just as if such funds were actually social security retirement benefits. The husband relied on a case in Pennsylvania styled *Cornbleth v. Cornbleth*, 580 A.2d 369 (Pa. 1990), wherein the Pennsylvania court found that a portion of a federal civil service employee's pension could be characterized as "hypothetical" social security benefits, and such value would be excluded from the marital estate. The Supreme Court in the *Rabek* case found that husband's argument is an issue of first impression in Georgia. The Court upheld the trial court's ruling because husband failed at trial to provide evidence of a specific value that he claimed should have been deducted from his pension and imputed to be his hypothetical social security benefits. *Editorial note:* it is this writer's opinion that the Supreme Court showed interest in the husband's argument but was constrained to rule in his favor due to husband's failure to provide a specific value that should be imputed to be his social security benefit.

### **Prenuptial Agreements**

#### ***Mallen v. Mallen*, 622 S.E.2d 812 (Ga. 2005)**

The primary issue in the parties' divorce action was whether their prenuptial agreement was valid and enforceable. The pertinent facts surrounding the execution of the prenuptial agreement were as follows: the parties had lived together for four years before marriage; wife got pregnant before the marriage; husband asked wife to sign a prenuptial agreement nine or ten days before their planned wedding; husband had an attorney prepare the agreement, wife was not represented by counsel; wife

claimed husband said the agreement was a mere formality and that he would always take care of her; wife had a high school education and was working as a restaurant hostess at the time; husband had a college degree and owned 80 percent of a successful business; wife's net worth at the time was \$10,000, and husband's net worth was \$8,500,000. The agreement gave wife four years of alimony, \$2,900 per month, and each party would keep whatever assets he/she brought into the marriage and accumulated during the marriage. The parties were married for 18 years and had four children before filing for divorce. At the time of divorce, husband's net worth had grown to \$22,700,000. The trial court found the prenuptial agreement to be valid and enforced the agreement. The Supreme Court examined the trial court's ruling by applying the three factors required in *Scherer*.

Wife claimed there was fraud, duress and nondisclosure of material facts which would make the agreement unenforceable.

Wife's basis for claiming fraud was that husband had promised to take care of her, which was an inducement to her to sign the agreement; and that by virtue of their engagement, wife and husband had a confidential relationship which excused her from the duty to verify husband's statement. The Court held that Georgia does not recognize a confidential relationship between persons who had promised to marry. Further, the Court stated that *Scherer* does not impose a requirement to act in the utmost good faith, as required of persons in confidential relationships. The Court further found that wife could ascertain from the clear terms of the agreement that her rights in the event of divorce would be very limited, and husband's alleged promise to take care of her was not an actionable promise. Thus, the Court rejected wife's claim for fraud.

Wife claimed she was under duress to sign the agreement as she was led to believe that the marriage would not take place unless she signed. The Court had previously held that the insistence on a prenuptial agreement as a condition to marry did not amount to duress. The Court also noted that there was nothing in the record to prove that wife's free will was

overcome by the threat of not signing the prenuptial agreement. The fact of wife's pregnancy was not enough because prior to husband's proposal of marriage, wife was in an abortion clinic ready to abort the fetus.

Wife claimed that on husband's financial statement attached to the agreement he failed to disclose his income, although he did disclose all of his assets and the value of his business. The Court found that the exclusion of husband's income was not material as his financial statement clearly showed that he was a wealthy individual with substantial income-producing assets, and that wife was well aware that he had substantial income as she had enjoyed his standard of living for four years prior to marriage.

Wife claimed that it would be unconscionable to enforce the agreement due to the disparity in the parties' respective financial situations and work experience. The Court stated that the agreement was not rendered unconscionable simply because it perpetuated the already existing disparity between the parties' estates. The Court also found that wife did not suffer from any delusion, and so the disparities between their financial status and business expertise did not meet the definition of unconscionable.

Wife claimed that husband's increased net worth by \$14 million during the marriage was a substantial change in circumstances such that it would render enforcement of the agreement unfair and unreasonable. The Supreme Court, since the ruling of *Scherer*, had not addressed the issue of what changes in circumstances might render a prenuptial agreement unfair and unreasonable. The Court found that a key element in consideration of whether circumstances have changed is foreseeability of such change. The Court concluded that the wife was familiar with husband's financial circumstances from living with him for four years before marriage, and she should have anticipated that his wealth would grow over the years of marriage. The Court found that since the continued disparity in the parties' financial circumstances was "plainly foreseeable" from the terms of the prenuptial agreement, then wife could not rely on such growth of assets as a change

in circumstances that would render the agreement unfair. Thus, the Supreme Court upheld the trial court's enforcement of the prenuptial agreement.

## Setoff of Support Obligations

*Fuller v. Fuller*,  
279 Ga. 805  
(2005)

The temporary order required the husband to pay \$10,000 to the wife. Prior to the filing of the divorce, the wife had increased the parties' equity line to \$5,000 and withdrew all of the money, all without husband's consent. Further, after the divorce was filed,

the wife converted to her own use two checks sent to husband totaling \$7,636.50, also without husband's consent. The wife never accounted for any of said funds. The husband failed to pay wife the \$10,000, and at the hearing on wife's contempt action for failure to pay said amount, the husband argued that due to wife's use of the above funds, husband was entitled to a setoff. The trial court denied wife's contempt motion and did not find husband in contempt, finding that husband was due to a setoff because of the following: wife's "self-help;" wife's continued refusal to account for said funds; and husband's substantial compliance with the temporary order. Wife argued that that a spouse obligated to pay support is not entitled to a setoff; and that the equity line funds were obtained prior to the filing of the divorce and were discussed at the temporary hearing. The Supreme Court upheld the trial court's decision and found that the facts in this case warranted a setoff to husband of the funds converted by wife as an exception to the general rule of no setoffs against support obligations. *Editorial note:* the opinion in this case on the issue of setoff is not compelling to this writer. Either some pertinent facts were left out of the opinion, or the Court is bending far the rule of no setoffs against support obligations. FLR



# Status of Child Support Legislation

## *As of commencement of session, Jan. 9*

By Carol Ann Walker  
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The child support bill which was passed and signed into law as House Bill 221 has undergone changes after being signed by the governor. It has been reintroduced in the legislature in the 2006 session as Senate Bill 382. You may review the status of this legislation by going to [www.legis.state.ga.us/](http://www.legis.state.ga.us/) and requesting SB382.

Some of the changes to the legislation, as passed and as reintroduced are as follows:

- The Georgia Schedule of Basic Child Support Obligations is attached. This schedule was recommended by the Georgia Child Support Commission on Dec. 19, 2005.
- There have been specific changes to the deviation categories, including high income; self-support reserve for low income parents; provisions for vision or dental insurance; consideration of the child and dependent care tax credit; and provision for a non-custodial parent's payment of a mortgage.
- The provisions for jury trial determinations of child support have been modified.

- The parenting time adjustment has been substantially changed to include new definitions of parenting time units, which can include days or overnight visitation. The number of parenting time units for the parenting time adjustment has been reduced.

This is not an exhaustive list of all the changes to HB221. There will most likely be more changes. The Family Law Section suggests that you follow the progress of this bill through the legislative session by accessing it through the Georgia General Assembly website stated above.

Please save the date of April 27, 2006. The Institute of Continuing Legal Education plans a full day seminar on the child support guidelines which will be available statewide. FLR

*Carol Walker is a sole practitioner in Gainesville, Ga., who has a substantial practice in family law. She has been a member of the Executive Committee of the Family Law Section for several years and has spoken on numerous occasions to the bench and bar on topics of family law.*

## 2006 Family Law Institute

We are pleased to announce that the 2006 Family Law Institute will be held May 25-27 at the Sandestin Hilton in Destin, Florida.

For the first time ever, the Family Law Section of the State Bar will be meeting jointly for the first two days with the Georgia Psychological Association. Dr. Nancy McGarrah and Shiel Edlin are co-chairing this conference. The well renowned author and speaker, Dr. Joan Kelly, will present at this seminar on the issues of relocation and parental alienation. A mock trial detailing the essentials of a custody case will also take place. This will be an exciting educational and entertaining experience.

On May 27, Tina Shadix Roddenbery and Carol Walker will present the essentials of the new child support guidelines. Also, John Mayoue will discuss recent developments in family law and Bob Boyd will present an ethics update. As always, we will be having receptions each night with the normal abundance of shrimp. We look forward to seeing you all in Florida!



# Courts, Counties, Claims and Counterclaims: A Quick Venue and Jurisdiction Checklist

by Mary Stearns-Montgomery  
Stearns-Montgomery & Associates

**W**e all know that the Superior Courts in Georgia maintain subject matter jurisdiction over most family law issues. And most of us know the answers to basic jurisdiction and venue questions.

But every once in a while, an unusual fact pattern arises; a situation that causes us to stop and wonder – where do I file the petition? Or, is a counterclaim proper or am I required to file a separate action?

What follows is a checklist of the basic and the more unusual venue issues. While most of this will not be news to the majority of readers, it may be useful to have all the information in one place for quick reference.

The author relies almost exclusively upon and gives great deference to that indispensable, highly regarded mainstay of the Georgia family law lawyer's practice, Dan E. McConaughy's *Georgia Divorce, Alimony and Child Custody*, 2005 edition.

## Defining Residence and/or Domicile<sup>1</sup>

Questions of venue often depend on the residence or domicile of one or both of the parties.

Domicile requires actual residence and the intent of remaining there indefinitely. Therefore, a person may have several residences, but only one domicile.

For this article, as with most Georgia statutes and case law, residence and domicile are used interchangeably, but the intended meaning is domicile.<sup>2</sup>

Once a domicile is established, it does not change until a new domicile is acquired. Relocation is not necessarily a change of domicile, especially if the relocation is temporary.

Relevant evidence of domicile includes factors such as church membership, tax office records, tax returns, vehicle registration, voting records.

## Establishing Personal Jurisdiction<sup>3</sup>

Once a Court establishes jurisdiction over the parties, the Court retains jurisdiction in the event that the respondent changes his/her domicile during the proceeding.

## Establishing Venue<sup>4</sup>

Venue is determined at the time the action is filed, even if the respondent moves after filing but before s/he is served if there is a reasonable period of time between filing and service.

## Divorce Actions<sup>5</sup>

### Subject Matter Jurisdiction<sup>6</sup>

Georgia Superior Courts maintain exclusive jurisdiction over divorce actions.

### Personal Jurisdiction<sup>7</sup>

Personal jurisdiction over a respondent is not required if the petitioner seeks only a divorce and an award of property located in Georgia.

To grant a petition seeking alimony, child support, and/or an award of property located outside Georgia, the Court must have personal jurisdiction over the respondent.<sup>8</sup>

In those divorce cases, personal jurisdiction over a resident respondent may be perfected by an acknowledgement of service or personal service of the summons and complaint.<sup>9</sup>

Personal jurisdiction may be obtained over a nonresident respondent using the domestic relations long arm statute<sup>10</sup> in cases where the respondent previously resided in Georgia or maintained a marital

residence in Georgia and where the respondent has minimum contacts with the State of Georgia sufficient to satisfy due process.<sup>11</sup>

A nonresident respondent may intentionally or inadvertently waive a valid defense of lack of personal jurisdiction.<sup>12</sup> Otherwise, the petitioner may consider filing in the respondent's state.

### ***Venue***<sup>13</sup>

If both parties reside in Georgia, venue always is proper in the county where the respondent resides.

However, another option exists for the petitioner if s/he resides in the marital residence county and the respondent has moved from that county (to another county, state or country). In that case, the petitioner may file in the marital residence county if it has been less than six months since the parties separated.

When choosing between venues, the petitioner and his/her attorney should consider the distance or convenience of the forums, special rules or local custom in each forum, the bench, location of records and evidence, and the location of any prior litigation between the parties.

If the petitioner is a nonresident of Georgia, then s/he may file in the Georgia county where the respondent has resided for at least the preceding six months.<sup>14</sup> In doing so, the petitioner submits to the personal jurisdiction and venue of the Court.

If the petitioner resides on a United States military base in Georgia for at least one year, s/he may file in any county adjacent to the base.<sup>15</sup>

If the respondent does not reside in Georgia, then venue is proper in the county where plaintiff resides.<sup>16</sup>

However, if the petitioner seeks a money judgment (e.g., spousal support, child support), then the Court must have personal jurisdiction over the respondent. Otherwise, the Georgia court has only *in rem* jurisdiction over the marriage and the real and personal property located in the state and to determine custody.<sup>17</sup>

### ***Custody***<sup>18</sup>

#### ***Subject matter jurisdiction***

The Superior Court has jurisdiction; however, in certain cases, the Juvenile Courts has concurrent jurisdiction to hear custody matters.<sup>19</sup>

#### ***Personal Jurisdiction***<sup>20</sup>

Generally, the Uniform Child Custody Jurisdiction and Enforcement Act (UCC-JEA) should be consulted for venue and jurisdiction questions.<sup>21</sup>

However, any conflicts will be controlled by the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A.<sup>22</sup>

The International Parental Kidnapping Crime Act should also be consulted when appropriate (18 U.S.C. § 1204).<sup>23</sup>

#### ***Venue***<sup>24</sup>

Generally, venue for custody modification actions lies in the county of the legal custodian of the child.

#### ***Counterclaims to custody or visitation modification***

When a nonresident files for custody or visitation modification, the respondent may NOT file a counterclaim for custody or visitation modification.<sup>25</sup> Rather, the respondent to the original case must file a separate custody or visitation modification action in the petitioner's county.

However, a nonresident who files for custody or visitation modification DOES submit to jurisdiction for a counterclaim for contempt or child support modification.<sup>26</sup>

### ***Child Support***<sup>27</sup>

#### ***Subject Matter Jurisdiction***

The Superior Courts maintain exclusive jurisdiction regarding child support claims brought pursuant to divorce actions.<sup>28</sup> However, the juvenile court may award child support as part of certain other custody proceedings.<sup>29</sup>

#### ***Personal Jurisdiction***

However, the Uniform Interstate Family Support Act (UIFSA)<sup>30</sup> and Uniform Reciprocal Enforcement of Support Act (URESAs)<sup>31</sup> should be consulted before proceeding.

#### ***Venue***

Generally, venue lies in the county where

respondent resides.<sup>32</sup>

## **Legitimation<sup>33</sup>**

### ***Subject Matter Jurisdiction***

The juvenile courts have jurisdiction concurrent with the Superior Courts.<sup>34</sup>

### ***Personal Jurisdiction***

Because the petitioner must be the father of the illegitimate child, he voluntarily submits to the jurisdiction of the court.<sup>35</sup>

### ***Venue***

Venue is proper in the county of child's mother or other party having legal custody or guardianship of the child.<sup>36</sup>

If the child's mother or legal custodian/guardian resides out of state or cannot be found within Georgia after due diligence, then venue is proper in the county of the father's residence or county of child's residence.<sup>37</sup>

If an adoption action is pending regarding the child, then venue is proper in the county where the adoption petition was filed.<sup>38</sup>

## **Habeas Corpus<sup>39</sup>**

### ***Subject Matter Jurisdiction***

In addition to the Superior Courts, the probate courts have concurrent jurisdiction.<sup>40</sup>

### ***Personal Jurisdiction***

After the Court reviews the petition and issues a writ, the respondent may be compelled to produce the child. It is not necessary to issue a summons. Personal service must be attempted, but is not required.<sup>41</sup>

### ***Venue***

Venue is proper in the county where the person who allegedly is "unlawfully detaining" the child resides, whether the child is located in that county or not.<sup>42</sup> The petition may be filed in either the Superior Court or the probate court.<sup>43</sup>

### ***Counterclaims***

The petitioner does not submit to the jurisdiction of the Court when filing for a writ of habeas corpus; thus, no counterclaim may be made to a habeas proceeding.<sup>44</sup> The respondent cannot seek

to change custody or visitation. The respondent must file a separate action in the appropriate venue.

## **Adoption**

### ***Subject Matter Jurisdiction***

The Superior Courts have exclusive jurisdiction except to certain cases where jurisdiction may be granted to the juvenile courts.<sup>45</sup>

### ***Personal Jurisdiction***

Various forms of notice to biological and/or legal parents are required depending upon the type of adoption. The adoption statutes should be consulted.<sup>46</sup>

### ***Venue***

Venue lies in the county of residence of the adoptive parent(s) or adult to be adopted. However, upon a showing of good cause, the Superior Court of the county of the child's domicile or the county in which any licensed child-placing agency to whom a child has been surrendered is located may, in its discretion, allow the petition to be heard in that court.<sup>47</sup>

## **Paternity<sup>48</sup>**

### ***Subject Matter Jurisdiction***

The state courts have jurisdiction concurrent with the Superior Courts.<sup>49</sup>

### ***Personal Jurisdiction***

Notice must be provided to the biological/legal mother.

### ***Venue***

Venue lies in the county where the alleged father resides, unless he is a non-resident. In that case, venue lies in the county where the child resides.<sup>50</sup>

## **Temporary Guardianship<sup>51</sup>**

### ***Subject Matter Jurisdiction***

The probate courts have jurisdiction to grant temporary guardianships; however, the probate courts will transfer a request to dissolve the guardianship to the juvenile or Superior Courts if there is an objection to the dissolution.<sup>52</sup>

### ***Personal Jurisdiction***

The petitioner submits to jurisdiction.

The natural guardian(s) of the minor child must be given notice of the petition and an opportunity to be heard.

### **Venue**

Venue is proper in the county of the petitioner who has actual physical custody of a minor in need of a guardian.<sup>53</sup>

### **Contempt<sup>54</sup>**

#### ***Subject Matter Jurisdiction***

Every court has the power to enforce the orders it issues.<sup>55</sup>

#### ***Personal Jurisdiction***

In a proceeding initiated by the contempt application, personal service upon the respondent is required. In the case of a pending action, service upon the other party's attorney of record is proper.<sup>56</sup>

### **Venue**

For contempt, venue is always correct in the court that issued the original order. However, venue may be proper in another county as well.

### **Contempt Venue Quiz**

For example, where would you file a petition that contains an application for contempt as well as a custody or child support modification claim?

Assume the original divorce decree was in County A, petitioner now resides in County B and respondent resides in County C?

There is no question that County A is an appropriate venue for the contempt application.<sup>57</sup> County C would be the correct venue for the custody or child support modification action.<sup>58</sup> Are two separate filings required?

The answer is no. In these cases, venue for the combined modification action and contempt application is appropriate in the county where venue lies for the non-contempt claim – in this example, County C.<sup>59</sup>

In a 1999 case, the Georgia Court of Appeals found that “in the context of divorce and alimony cases to depart from the general rule that a contempt action must be brought in the offended court. We now hold that where a superior court other than the superior court rendering the origi-

nal divorce decree acquires jurisdiction and venue to modify that decree, it likewise possesses the jurisdiction and venue to entertain a counterclaim alleging the plaintiff is in contempt of the original decree. Such a change is necessary to ensure that in the bitter battles which too often follow divorce, neither spouse is legally left at the mercy of the other.”<sup>60</sup>

### **Counterclaims**

No counterclaim may be filed in response to an application for contempt because it is a proceeding ancillary to the underlying or original action rather than a new action.

Therefore, the Civil Practice Act provision for counterclaims does not apply.

However, the converse is not true. The respondent may bring a contempt counterclaim to any other action filed by the petitioner.

### **Improper Venue**

What if an action is filed in the wrong venue? The respondent may raise the defense of improper venue in his/her responsive pleadings and request that the case be transferred pursuant to the Uniform Transfer Rules.

If the respondent fails to raise the issue of improper venue, the defense may be waived.<sup>61</sup>

In the case of uncontested divorce, the respondent may voluntarily waive any objection to the improper venue by affidavit.<sup>62</sup> FLR

*Ms. Stearns-Montgomery has specialized in family law practice in the metro-Atlanta area for nearly 17 years.*

### **Endnotes**

1. McConaughy's Georgia Divorce, Alimony & Child Custody, 2005 edition, Chapter 6; O.C.G.A. §§ 19-2-1 through 19-2-5.
2. *Stewart v. Stewart*, 195 Ga. 460 (1943).
3. McConaughy Sections 6:5-6:7.
4. McConaughy Section 6:8.
5. McConaughy Chapter 6.
6. McConaughy Sections 6:2-6:4.
7. McConaughy Sections 6:5-6:6.

8. McConaughey Section 6:2.
9. McConaughey Section 6:5.
10. O.C.G.A. § 9-10-91.
11. McConaughey Section 6:6.
12. O.C.G.A. § 19-11-12 (h)(1).
13. McConaughey Section 6:8.
14. O.C.G.A. § 19-5-2.
15. O.C.G.A. § 19-5-2.
16. *Id.*
17. O.C.G.A. § 19-9-1(a); § 19-6-14; McConaughey Section 19:3.
18. McConaughey Chapters 19, 21, 22 and 23.
19. O.C.G.A. § 15-11-28(c); McConaughey Chapter 22.
20. McConaughey Sections 25:46-25:62.
21. O.C.G.A. §§ 19-9-40 to 19-9-51, 19-9-61 to 19-9-70, 19-9-81 to 19-9-97, and 19-9-101 to 19-9-104.
22. McConaughey Section 25:63.
23. McConaughey Section 25:64.
24. McConaughey Section 21:3.
25. O.C.G.A. § 19-9-23; McConaughey Sections 21:1, 21:3, 25:44, 25:45.
26. Houck v. Houck, 248 Ga. 419 (1981); Yount v. Mulle, 266 Ga. 729 (1996); Varn v. Varn, 242 Ga. 309 (1978).
27. McConaughey Chapters 8 (temporary), 11 (permanent) and 14 (enforcement).
28. McConaughey Sections 6:2-6:4.
29. O.C.G.A. § 15-11-28 (c).
30. McConaughey Sections 14:27-14:35.
31. McConaughey Section 14:23.
32. O.C.G.A. § 19-6-26.
33. McConaughey Sections 11:28-11:30.
34. O.C.G.A. § 15-11-28 (e).
35. McConaughey Section 11:29.
36. O.C.G.A. § 19-7-23 (a).
37. *Id.*
38. *Id.*
39. McConaughey Chapter 20.
40. McConaughey Section 20:2.
41. McConaughey Section 20:3
42. McConaughey Section 20:2.
43. O.C.G.A. § 9-14-4.
44. McConaughey Section 20:2.
45. O.C.G.A. § 19-8-2 (a).
46. Refer to O.C.G.A. Title 19, Chapter 8.
47. O.C.G.A. § 19-8-2(b)(1).
48. McConaughey Sections 11:23-11:27.
49. O.C.G.A. § 19-7-40(a); McConaughey Section 11:24.
50. O.C.G.A. §§ 19-7-42, 19-7-41; McConaughey Section 11:24.
51. McConaughey Sections 25:69.
52. McConaughey Section 25:69.
53. McConaughey Section 25:69.
54. McConaughey Sections 14:1-14:17.
55. O.C.G.A. § 19-6-4.
56. McConaughey Section 14:3.
57. O.C.G.A. § 19-6-4.
58. Article VI, Section II, Paragraph VI of the Constitution of the State of Georgia, O.C.G.A. § 19-9-23(b),
59. Corbett v. Corbett, 236 Ga. App. 299 (1999).
60. *Id.* at 300.
61. O.C.G.A. § 9-11-12(h)(1).
62. Williams v. Williams, 259 Ga. 788 (1990); See form affidavit, McConaughey Section 27:27.

## Bylaw Changes:

The Executive Committee is proposing the following changes to the bylaws of the Family Law Section of the State Bar of Georgia:

1. *The number of members on the Executive Committee has increased and it will include the editor of the newsletter and the chair of the Young Lawyers Division Family Law Committee.*
2. *Notice of a proposed meeting may be provided by e-mail.*

# Q&A: Judge Steve C. Jones

## Superior Courts, Western Circuit

Conducted by John F. Lyndon  
jlyndon@lawlyndon.com

**Q:** Judge Jones, how long have you been a superior court judge?

**A:** For 10 years. I was sworn in on Nov. 17, 1995.

**Q:** And I know in terms of your background, that you were with the Athens-Clarke County District Attorney's office and then you were a municipal court judge in Athens before you were appointed to Superior Court. So, what contact had you had with the area of family law prior to becoming a superior court judge?

**A:** Not a whole lot. Before I became an assistant district attorney I was director of a child support recovery unit for Athens and Oconee Counties, but it was more along the lines of establishing paternity and enforcing support payments rather than the issues that I deal with now.

**Q:** What percentage of your case load do you estimate now are family law cases?

**A:** I think my case load now is 35 to 45 percent family law cases.

**Q:** Judge, I know you have been very interested in family law during the period of time that you have been on the bench. What is it about family law that you find particularly interesting?

**A:** Well, I think the issues are interwoven with the other cases I receive. A broken family can result in future criminal cases

and civil cases as well. Also, I think that as a judge I can have more effect, or impact, in family law matters than in cases like personal injury that follow a routine process through settlement or trial with little involvement on my part. Whereas, in the family law cases the judge is more directly involved and I think I have more opportunities to do good and have a positive impact.

**Q:** Well I know, or at least I assume that hearing these cases day in and day out as you do. . .how do you keep from just becoming numb or jaded to these fact patterns that are just constantly being presented to you?

**A:** Well, you may have five custody cases in a two-week period, but they are all different. In other words, it's not just a set situation, and the issues are so important to all the parties involved that you want to make sure you do your best job. To do your best job, you have to stay on top of it to make sure you understand the facts and that you are not treating it in a routine way. In 10 years I can't say I've had two family law cases that have been exactly the same. My interest and concern for these situations is there. Now as far some of the things you hear and some of the feelings some people come in to court with, you have to keep the right perspective. You don't want to get to the point where you start treating people like they're stereotypes.

**Q:** How do you deal with the emotional fallout that is taking place in your courtroom?



**A**: Well, I understand when we start the case that the parties are going to be emotional and they are going to say things and do things that they wouldn't normally say. I have had cases where people have told me things about the other spouse that they would never say in public, but they are highly emotional at that time. On the other hand, I expect the lawyers and myself to maintain a professional demeanor at all times.

**Q**: I assume that the biggest mistake that lawyers make in coming into a courtroom in a family law case is not being prepared. Other than that, what do you see as the biggest mistakes that lawyers make when they show up in your court room about to present evidence in some sort of family matter?

**A**: One thing that concerns me is when lawyers cannot control their clients. The lawyer is trying to present the case, while the client is constantly telling them, "You need to ask this question, or you need to go back and do this or that." The client is on the stand and the lawyer has already prepared the questioning but the client just starts off on another narrative. Or, the lawyers asks one question and the client answers another question, or the client on cross examination tries to make the other lawyer look bad, and you and I both know that's not going to happen with an experienced lawyer. So the client ends up making himself look stupid.

Also, I think a lawyer needs to know how to read your judge. There are certain things lawyers should look out for, for example, the judge is indicating, "I have a handle on this, lets move to something else." I've seen lawyers too many times get on an issue. . . I have the issue down, I know what it is, I know what you are trying to say and they just keep going there, when I need them to tell me about another issue and give me some evidence. But they sometimes have a road map already set and they can't detour from it and they end up three or four hours later, with three or four other issues left up in the air.

**Q**: So, controlling your client and being able to watch clues from the judge in

terms of the direction that the court would want you to take in terms of the testimony.

**A**: That's right. Being prepared when you get there, knowing the facts in your own case, and knowing the law as it applies to your case. Those things are very important.

**Q**: If you had the power to change one area of family law, is there any particular area in which some change would be beneficial to the litigants in this system?

**A**: I think the temporary hearings sometimes are really not productive, because the lawyers have not had a great amount of time to know the case and therefore what they are giving me is not good information for me to base my decision on. But on the other hand I understand that you've got two emotional people, sometimes with children involved, and decisions have to be made quickly about who is going to have temporary possession of the house, and what kind of support is appropriate. So I understand that the lawyers have to get in front of the judge as quickly as possible if they can't work out something on a temporary basis, but there are times when I feel like I am not getting all of the information I need at that early stage and I'm being asked to make a decision on incomplete information.

**Q**: Have you seen a reduction in the number of jury trials that are taking place in divorce cases during the 10 years you have been on the bench?

**A**: Not really, it's about same. I probably average maybe two divorce jury trials a year.

**Q**: Two divorce jury trials a year - so you never have been in a situation where you have been trying a lot of jury trials?

**A**: Not in divorce cases. In the 10 years, maybe one year I had about four. Most of the time, the lawyers just want a bench trial.

**Q**: How often are you trying bench trials in divorce cases as a final trial?

**A**: Well that's different, I probably do 15 to 20 of those a year, maybe more than that.

**Q**: The Supreme Court has had the pilot project in effect for several years now. It seems to me that superior court judges are paying more attention to their family law cases now. Would you agree?

**A**: I don't think I better comment on that. However, I will say that I am in favor of continuing the pilot project. For one thing, the litigants know that they have another avenue if they do not agree with a decision, a way of saving this is not the end of it. Also, we, the judges, are getting more direction from the Supreme Court on issues like equitable division as a result of the pilot project. And as a judge, one thing I always want from the appellate courts is direction.

**Q**: One of the laws that I've taken issue with during the entire time I've practiced law is the fact that the trial court cannot award attorney's fees in actions for modification of custody unless you bring it under Section 9-15-14. And I assume the basis for this is they don't want to discourage people from coming into court seeking a change of custody, if that's in the best interest of the children. But do you have any opinion on that, as to whether or not the courts should be able to award attorney's fees in the court's discretion when a modification for custody is litigated?

**A**: I like the way it is now, simply because I think you do have a remedy to pursue if it really is just frivolous. I think if you get to a point where a person has to start paying attorney's fees it might prevent somebody from seeking a modification of custody that really should be filed.

**Q**: It's my understanding that the legislature this term may be taking up the issue of whether or not we should continue with the law that allows 14-year-olds to choose their custodial parent. Do you have any opinion on this?

**A**: I don't think a 14-year-old should be able to choose who they want to live with. That is giving a lot of authority to a

child who is still really a child and has not developed all the maturity they need. On the other hand, they have developed probably enough to know, "Well, if I play this one this way I may get what I want." I've always had problems with a 14-year-old having the right to say "I want to be with this one or that one," unless the other party is unfit.

**Q**: In Atlanta and Augusta I know there are family law courts. We don't have that in the Western Judicial Circuit. How do you feel about this issue? Are you in favor of family law courts, or against them, or neutral?

**A**: I think we should have family law courts throughout the state of Georgia. Let's think about it, John. One of the most important aspects of a judge's job is dealing with family cases. I've talked with judges from other states and told them we handle criminal law, personal injury, family law, and adoptions, and they say "You do all that?" A family law court enables the judge to spend the proper amount of time needed and develop the expertise to do it the right way, because we are dealing with families, we are deciding who will get a house that the people have been living in for twenty-five years together, or how much child support is going to be paid for a child that is going to have an effect on that child's life for a long time to come.

Sometimes you are trying to do this while you are getting that murder case ready at the same time. That's a lot to do and there can't be room for error when you try to balance all those balls. You have the expertise in what you do, because this is the main thing you concentrate on, and you do it very well. Well, a family law court would allow a judge to develop that same kind of expertise, put the time in it, and make better decisions. Better decisions mean we enable people to live better lives. I've always thought we should have family law courts statewide.

**Q**: Do you have any suggestions as to how attorneys might improve their oral arguments to you or the written briefs that are submitted on various issues to you?



**A**: As in an oral argument, get to the point. I always say, if it's in your brief, don't repeat it to me in oral argument, because I am going to read the brief. So if you are simply going to repeat yourself in your oral argument, you will not have enhanced anything or provided me any more information. If you sent in a brief, try and tell me something not in your brief or at least if you're going to talk about what's in your brief, be able to tell me why this leads to something else. I like the oral argument because I have the opportunity to ask questions about what I have already read in the brief. And when I ask these questions, it is not helpful if you go off on other tangents instead of giving me the information I am looking for.

**Q**: So, again, read the judge and pay attention to the signals?

**A**: Pay attention to the judge, listen to the questions or the statements the judge is making.

**Q**: You are very involved in the Athens community, but is there something about Judge Steve Jones that the general community does not know that you would like to share with us?

**A**: Well, my wife Lillian and I keep goats. I enjoy getting away from the office when I can at the end of the day or on the weekend, going out and getting on my tractor, clearing land, and just getting out there. Those goats are low maintenance. If I make a good ruling they like me, if I make a bad ruling they like me. And I may get in trouble now. . . I named those goats after United States Supreme Court justices, and I better not tell you those names, some of those folks are still on the bench. **FLR**

## Expert Testimony

*Continued from page 13*

34. See FRE 702.

35. See FRE 703.

36. See FRE 703.

37. See FRE 703.

38. See FRE 703.

39. *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 562 (1999). See also *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775 (11th Cir. 2004); *United States v. Frazier*, 387 F.3d 1244 (11th Cir. 2004); *Hudgens v. Bell Helicopters*, 328 F.3d 1329 (11th Cir. 2003); *Williamson Oil Co., Inc. v. Phillip Morris USA*, 346 F.3d 1287 (11th Cir. 2003); *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001); *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307 (11th Cir. 2000); *Quiet Technology DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333 (11th Cir. 2003); *Maiz v. Virani*, 253 F.3d 641 (11th Cir. 2001); *Allison v. McGhan Medical Corp.*, 184 F.3d 1300 (11th Cir. 1999).

40. The admissibility of expert testimony in criminal cases remains unchanged. O.C.G.A. § 24-9-67, which provided that opinion testimony of experts on questions of science, skill and trade shall always be admissible, was amended by adding the words "[i]n criminal cases" to the beginning of its text. The 2005 General Assembly added a new statute, O.C.G.A. § 24-9-67.1, which specifically addresses the admission of expert testimony in all civil cases.

41. 509 U.S. 579 (1993).

42. 522 U.S. 136 (1997).

43. 526 U.S. 137 (1999).

44. See O.C.G.A. § 24-9-67.1(f).

45. See O.C.G.A. § 24-9-67.1(f).

46. O.C.G.A. § 24-9-67.1(b)(1) (emphasis added).

47. Compare O.C.G.A. § 24-9-67.1(b)(1) with FRE 702.

48. O.C.G.A. § 24-9-67.1(a).

49. See O.C.G.A. § 24-9-67.1(c).

50. O.C.G.A. § 24-9-67.1(c). Medical doctors and doctors of osteopathy may testify against each other if they otherwise meet the requirement of the statute. Doctors who regularly supervised nurses and other medical support staff during three of the past five years preceding the alleged negligence may testify to the standard of care of the nurses or other medical support staff; however, nurses and other support staff may not testify against doctors. *Id.*

51. O.C.G.A. § 24-9-67.1(e).

52. See § 15(a), Senate Bill 3.

53. See *e.g.*, Order of the Hon. Melodie H. Clayton, Mason et al. v. Home Depot U.S.A. et al., State Court of Cobb County Georgia, (Civ. Act. No. 97-A-5105-1, February 21, 2005).

54. See *e.g.*, Order of the Hon. Melodie H. Clayton, Mason et al. v. Home Depot U.S.A. et al., State Court of Cobb County Georgia, (Civ. Act. No. 97-A-5105-1, February 21, 2005).

55. O.C.G.A. § 24-9-67.1(d).

56. O.C.G.A. § 24-9-67.1(d).

57. See R.R.C.P. § 26(a)(2)(b), which sets for the requirement of the designation of experts and the pretrial disclosure of anticipated testimony in the form of an expert request signed by the expert before trial.

58. See O.C.G.A. § 9-11-26(b)(4)(A)(i), which permits parties to discover the identity of any expert witness which the adverse party expects to call at trial; the subject matter upon which the expert is expected to testify; the substance of the facts and opinions.



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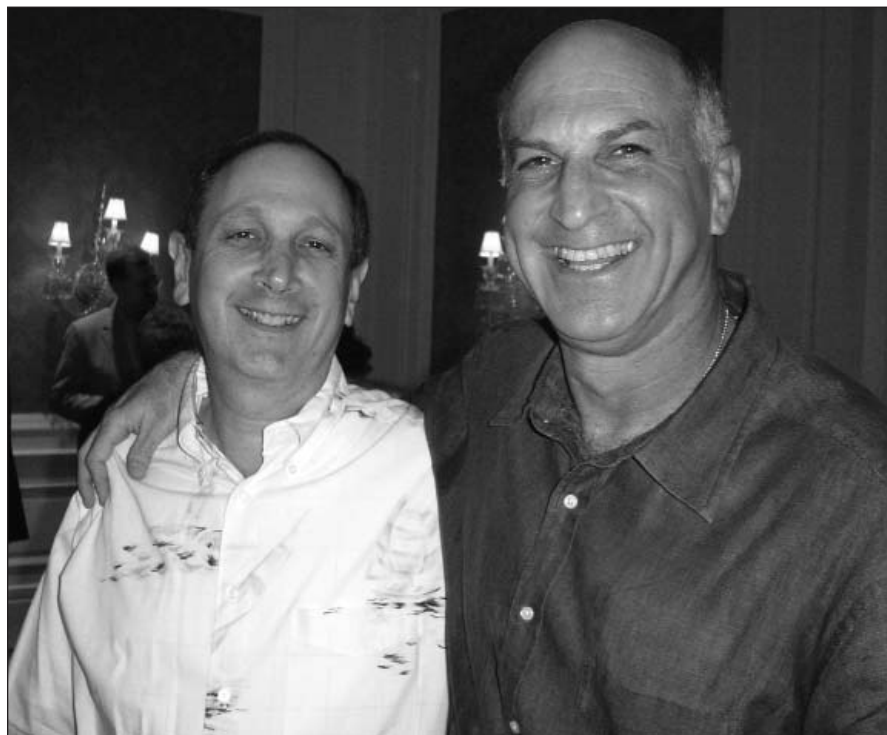
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# Scenes from Past Family Law Institutes



Judge Michael Karpf of Savannah and Leslie Cohn of Columbus, Ga.



Above: Cobb County Superior Court Judge Mary Staley and Past Section Chair Bob Boyd

Right: Randy Kessler and Sandy Bair



## Coming Soon in an Upcoming Issue

*Summary of State Statutory Positions Regarding Child's Preference of Custodian* by John F. Lyndon

*Private Investigations* by Jim Persinger

*Engaging a Business Valuation Expert* by Miles Mason

**Save the date of April 27, 2006!**

The Institute of Continuing Legal Education is planning a full day seminar on the child support guidelines, which will be available statewide.

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