



The Cobb

Family Law Quarterly

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President's Message

By *Wayne Morrison,*
President, Family Law Section, 2014 - 2015

Thanks to all for an exciting first quarter. We were very privileged to have excellent speakers including Holly Tuchman and Elisa Covarrubias from the YWCA, Chief Judge Adele Grubbs and Paula Frederick, General Counsel for the State Bar of Georgia. Concerns regarding summer parenting time and our Standing Order were raised with Judge Grubbs, and the Standing Order was promptly resolved to address an item that could have affected summer vacations for families going through the divorce process. Ms. Frederick provided excellent written materials and arranged for attendees to receive CLE credit at a nominal cost.

Joining me this first quarter are new Treasurer Melanie Brubaker, Secretary Alyson Lembeck and, last but not least, Vice President/President Elect Lawrence "Larry" Cooper. We are fortunate that our Section's Newsletter continues with the same excellent editors Karine Burney and Alyson Lembeck. The Cobb Bar is once again publishing an official Bar Magazine, *Justicia*. I urge all of you to not only read and contribute to our quarterly Newsletter, but to submit articles to *Justicia* as well. As we look forward to an exciting year, we would be remiss to not pause and thank John Gunn, our Immediate Past President and Chandler Bridges, our section's long time Treasurer and photographer extraordinaire.

It is important that our lunches be both informative and cordial. There are always new and better ways we may serve our clients and our community and it is certainly beneficial for us to see and talk with one another in a non-adversarial setting. If there are any suggestions concerning topics and/or speakers, please do not hesitate to contact me. Additionally, if there are any ideas for our annual CLE or for section socials, I urge you to contact me about those matters as well.

I look forward to the coming months and to serving our section.



Wayne Morrison represents clients in all aspects of family law, including Pre and Post - Nuptial Agreements, Divorces, Modification Actions and Contempt Actions. He represents clients in all of the Greater Atlanta Metropolitan Counties. Law & Politics and Atlanta Magazine recognizes Wayne as a "Super Lawyer" in the area of Family Law. Wayne has an AV Preeminent Martindale-Hubbell® Peer Review Rating™ and a "10-Superb" rating in Avvo.com. He earned his B.S. in Finance from Virginia Tech in 1989 and received his J.D. from the University of Georgia in 1996. Prior to attending law school, Wayne was a Financial Analyst for a Fortune 500 company preparing, analyzing, and auditing financial statements.

Business Valuation and Reporting in Matrimonial Disputes

By Marc L. Effron, CPA/CFE, JD, CVA and
Kevin P. Couillard, ASA, CFA

Family law practitioners deal with a host of complexities when resolving matrimonial disputes. Prior to analyzing equitable division, counselors must often develop approaches for temporary support, child custody, visitation, temporary alimony, as well as the onslaught of emotional concerns brought by distraught clients. In high net worth cases, financial considerations soon become paramount. Often the largest financial asset on the marital balance sheet is an interest in a closely held business controlled and operated by the family or single spouse. In these cases, a significant portion of the marital estate and, accordingly, the key to a party's financial future rests on the results of a proper valuation.

In order to resolve the value question, family law practitioners and courts seek the guidance and analysis of trained valuation consultants. It is not unusual for each party to retain their own financial expert to provide the value of the business. In addition to using objective factors, valuers deploy experience and judgment when developing a conclusion of value. It is not unusual for values to be significantly divergent, often times caused by the poor development of the valuation analysis. It is important for legal practitioners to know how valuation standards proffered by valuation organizations operate to provide appropriate guidance in the development and reporting of an appraisal. Legal practitioners have an interest in putting forth a resulting value that will hold as the controlling fact; conversely, putting forth a value that is not well supported could have severe consequences to the counselor and client. In trying to ensure that a value presented by the valuator on behalf of a client withstands scrutiny of opposing counsel, legal practitioners need to be aware of and consider whether the value presented was developed under the standards of the valuation community. This article explores those standards.

Standard-setting appraisal organizations in the U.S. have generally established valuation standards that members are required to follow. Many legal practitioners seem to be aware that the standards allow for exemptions in certain circumstances. However, certainly not all standards can be exempted, and standards applicable to the development of the valuation analysis should always be followed. Valuations are increasingly subject to scrutiny over compliance with standards. A failure to meet appropriate standards can and has had the effect of invalidating an opinion, with potential harsh consequence to the case. Practitioners should ask themselves several questions to determine susceptibility to this risk including the following: Is my expert credentialed and by whom?; What

valuation standards is my expert required to follow based on both his or her credentialing body and the nature of the engagement?; How does one identify whether a calculation of value or opinion of value is sufficient to withstand scrutiny in the litigation process?; What is the litigation exemption and how does it operate? What are the required developmental standards?; What are the required reporting standards?; Will my expert's opinion be rejected by the court?

Standard-Setting Organizations

There are four main appraisal organizations in the U.S.

- National Association of Certified Valuation Analysts (NACVA)
- American Society of Appraisers (ASA)
- American Institute of Certified Public Accountants (AICPA)
Institute of Business Appraisers (IBA)

These organizations offer valuation credentials which establish minimum levels of education and experience requirements. The credentials determine a minimum level of competence; while each credential attempts to confirm competency, requirements for each credential vary. These organizations have worked to bring consistency, strengthen the profession, facilitate ethical practice, and enhance the quality of valuation services to users by establishing valuation standards. Generally, the professional standards of these organizations can be divided into two main categories:¹ (1) development standards (standards regarding how value is developed) and (2) reporting standards (standards regarding how value is reported). Legal practitioners should be familiar with the credentialing bodies and applicable standards.

Valuation Development Standards

The developmental standards provide minimum criteria for the development of the valuation of a business or business interest. The developmental standards apply whether expressing a conclusion of value or a calculation of value and mandate aspects of the valuation analysis including the valuator's consideration of the expression of value, scope of analysis, data sourcing, use of specialists, acceptable approaches, etc.² The developmental standards also dictate how the valuator defines the engagement through the following:

- Subject to be valued;
- Interest to be valued;
- Valuation Date;
- Purpose and use of the valuation;

- Standard of value;
- Premise of value;
- Intended users;
- Valuation approaches or methods;
- Assumptions, limiting conditions and scope limitations;
- Ownership size, nature, restrictions and agreements;
- Sources of information; and
- Other factors that may influence value when appropriate in the opinion of the [professional]

The developmental standards go on to mandate the types of information that should be obtained by the professional including information related to economic conditions, book value of the enterprise, earning capacity, dividend capacity, intangible components, prior sales, control, liquidity, market comparables, and other available information deemed relevant.

It is critical to the valuation opinion that the developmental standards are followed by the valuation specialist. Since the developmental standards provide the minimum criteria for developing the opinion, any deviation from this minimum criteria puts the opinion at risk.

Recent cases have demonstrated courts reluctance to accept valuations based on a failure to comply with the development standards. In the recent case of *In re Marriage of Hagar*³ the court rejected the valuation because it was merely a computation based on industry "Rules of Thumb" and not based on "judgment" of the valuator. This type of value is clearly prohibited by the developmental standards which state "Rules of Thumb" are acceptable as a reasonableness check, but should not be used as a stand-alone method. Commonly used methods include asset-based, market, income, or a combination of these approaches and are selected based on judgment.

In the case of *In re Marriage of Cantarella*⁴, the court rejected a "preliminary valuation" because the valuator admitted he lacked documentation with which he would typically perform a more complete business valuation. Valuers naturally rely on both written documentation as well as verbal information from representatives knowledgeable about the subject business. Regardless of the form of the information it is important for them to have relevant information that influences value.

Valuation Reporting Standards

The reporting standards provide minimum criteria for the reporting of the valuation of a business or business interest. The reporting standards apply when the professional expresses any conclusion of value or calculated value. The objective of the standard is to ensure consistency and quality of valuation reports. Experienced family law practitioners might note a severe lack of consistency among valuation reports from case to case and for good reason. The consistency element that might be obtained from following a set of reporting guidelines is not mandated. The reporting standards are actually waived for the valuator in the context of a litigation engagement. Specifically the exemption from NACVA reads as follows:

A valuation performed for a matter before a court, an arbitrator, a mediator, or other facilitator, or a matter in a governmental or administrative proceeding, is exempt from the reporting provisions of these standards. The reporting exemption applies whether the matter proceeds to trial or settles. This litigation waiver does not, however, relieve the member from complying with the Developmental Standards and all other standards promulgated by NACVA.⁵

While the reason for this exemption is not discussed in the professional standards, many practitioners have justified the waiver on the grounds that formal reports are not always practical in the context of a fast paced, limited-financial-resource litigation setting. While some valuers choose to follow the reporting standards in the litigation setting despite lack of mandate to achieve the benefits of this best practice, many disregard the standard entirely. What is most often overlooked is that the developmental standards are not waived in the context of litigation. This is an important distinction that cannot be disregarded when placing reliance on a value used in litigation proceedings. In order to understand the distinction we look to the standards themselves.

The reporting standards discuss the presentation of the valuator's analysis and support used to derive the conclusion or calculation of value. They essentially require the valuator to document, whether in detail or summary format, the result of conducting a valuation under the required developmental standards. In many instances the process necessary for the valuation professional to comply with the developmental standards is vetted through the act of preparing a report that generally parallels the reporting standards. This is the point in the process where the work that has been performed by the professional is laid out in a logical manner, support is documented, and methodologies, theories, facts and approaches are explained and vetted. In many cases this serves a vital part of

the professional's quality control and review process. This begs the question: Does foregoing the reporting standards in reliance on the litigation waiver increase the risks associated with expressing an opinion of value and also decrease the valuator's, and vicariously the lawyer's, ability to support the opinion of value? One must ask whether foregoing the reporting process saves time because the professional has also foregone the developmental requirements? If the practitioner has not issued a report, but has been diligent in adhering to the developmental standards what have they done to document their work in support of this requirement?

The Slippery Slope

These questions highlight what might be a slippery slope for attorneys who do not require a valuation to adhere to the reporting standards. In many instances we have seen parties come to the settlement table with mere schedules purporting to identify value. Schedules may not include any discussion of the reasoning used to apply broad approaches or key variables used to reach a value conclusion. Schedules may not reveal any indication that the professional made efforts to study or understand the subject industry or entity or whether the professional even identified the proper interest to be valued. The reader is left to guess what assumptions are imbedded in the value and what limiting conditions were present. Without adhering to any sort of documentation or reporting standard the reader cannot readily confirm the validity of the analysis. Oral presentations by the valuator may be able to fill the gaps, however, these opportunities do not always present themselves in a fast-paced litigation setting.

These issues are highlighted in instances where each party has engaged their own valuation professional and each expresses an opinion of value materially different than the other. This could be caused by a multitude of reasons. Some differences are caused naturally by the differences in the valuator's experience and judgment as applied to subjective variables such as the application of future growth rates, while other differences might be caused by more troubling failure to identify and factor in available factual information, failure to apply appropriate valuation approaches, or failure to perform a proper calculation to derive a reasonable capitalization rate, for example. Collapsing attributes into easily applied multiples of value without understanding differences between guideline companies or reconciling with other approaches for greater confidence in the conclusion is another example of what could be material differences.

Conclusion

Determining the value of a closely held business inside the marital estate may be the most important task in defining the financial future for a party to a divorce. Reliance on an opinion of value or calculation of value that was not developed through adherence to the applicable professional standards including both the developmental standards and the reporting standards (whether such mandate is waived in a litigation context or not) creates increased risks that such values will be rejected in the course of resolving cases to a potentially significant detriment of a client.

¹ National Association of Certified Valuation Analysts, Professional Standards 2013.

² NACVA Fundamentals, Techniques and Theory, Ch. 8. Professional Standards, pp. 7-8, dated 1995-2013.

³ In re Hagar, 2010 WL 4807559 (Iowa App.) (Nov. 24, 2010)

⁴ In re Marriage of Cantarella, 2011 WL 86284 (Ca. App. 4 Dist.) (Jan. 11, 2011) (unpublished)

⁵ NACVA Fundamentals, Techniques and Theory, Ch. 8. Professional Standards, Page 11, dated 1995-2013.



Marc L. Effron is founder and managing partner of White Elm Group LLC forensic accounting and consulting firm. Marc is a Georgia CPA, AICPA certified in Financial Forensics and NACVA certified in Valuation. Marc has over 20 years of experience in forensic matters from valuation to partnership disputes to large scale international investigations for Big Four accounting firms.

A significant part of Marc's practice focuses on forensic and valuation issues in matrimonial litigation. Marc also received his JD from Northwestern University School of Law and Undergraduate Business Degree from Emory Goizueta School of Business.



Kevin P. Couillard is an affiliate managing director with White Elm Group LLC and holds over 26 years' experience in valuation and forensic services. Kevin is an Accredited Senior Appraiser certified in business valuation with the American Society of Appraisers and was former president of the Atlanta chapter of the American Society of Appraisers. Kevin also holds a Certified Financial Analyst credential. Kevin received an

MBA in Finance from Georgia State University and a BS in Chemical Engineering from Georgia Tech.

Life Coaching: Your Client's Co-Pilot on Their Drive Through Change

by Tatiana Daniel



We get lost often - on our way to a party, inside a gardening store, at a parking lot - it happens. And while it happens often, it is nonetheless frustrating and we seldom like to admit that we are lost. So what do we do when this happens? We seek assistance in many ways: through our GPS devices, our phone applications, physical signs that point to that exit or balloons attached to that mailbox, or we call someone. Eventually, we do find our way and all is well in our world again. But what happens when we get lost in our journey in life? What happens when we know that something has to change in order for us to be happy again? What happens when a crucial change happens to us: we get married; we become parents; we get a divorce - how do you adjust to that change? This scenario happens more often than we would like to admit, and when it does, we feel overwhelmed, distraught or lost. Where do your clients turn for help? Life Coaching can answer that call for assistance.

The International Coach Federation (ICF) defines coaching as "partnering with clients in a thought-provoking and creative process that inspires them to maximize their personal and professional potential." Professionally trained coaches know how to listen, observe, and support that go beyond day-to-day techniques

that lack consistency and structure. Unlike consulting, therapy, or mentoring, coaching gives your clients back the steering wheel to their life and it empowers them to answer questions like: After everything I've been through - who am I really? What am I capable of now that life has thrown a monkey wrench at me? How do I embrace the blessings in disguise that this change has brought upon my life? A life coach can help your clients answer all those questions and guide them into creating and sustaining effectible solutions-based thinking that will aim towards bringing consistency and balance back into their life. When dealing with a divorce, it is easy to get overwhelmed quickly with the mental list of all the different ways in which life is changing. During this pivotal time of transition, the role of a professionally trained coach is to help your clients navigate through the key decisions for their future so they can build a new present. Life coaching provides clarity while promoting self-discovery and inspiration to live a life that aligns to your client's real values. Working with a life coach will help your clients get back on their feet sooner so they can assess the next step - what else do I want to accomplish in my life? How do I bring purpose to other areas in my life such as my career or my social relationships? As the dust of the divorce process settles, a life coach will be your client's biggest supporter and assist with alignment, realistic goals and accountability that is conducive to their personal version of success.

Why is all this important? When your clients understand their own life's journey, when they successfully handle a life transition and focus on finding out what it is that drives them, why something is important to them, what they would do for free if money wasn't an issue, what makes them happy - then they know they have found their purpose in life. And when they are in that moment of absolute clarity, when they know who they are and where they are headed, then the world - their world - is truly their oyster. Everything and everyone will start making more sense. Your clients will understand everything that is them and most importantly, they will realize that they do have control over their life and their decisions and then they will truly achieve success and happiness in everything they do.



If your clients are going through a divorce but they are struggling with finding their north and need guidance, or if their divorce is now in the rearview mirror but they are still looking to take their life to the next level, reach out to Tatiana. Whether we work face to face or on the phone, Tatiana is ready to help your clients manifest their highest level of personal growth so they can create a life that is fulfilling, rewarding and balanced. Tatiana works one on one and is committed to provide the support and motivation that they need to get inspired and get results. To learn more about Tatiana or to schedule a complimentary session, please email her at Tatiana@absolutepassion.com or call her at 678-622-2661.

How Should Experts Deal with Lack of Information

By Jeffrey J. Plank, MBA, CVA, CEPA

We have all been there before. You are involved in a contentious divorce case and the other side is not being very forthcoming with information, complicating the discovery process. If a business is involved and you have retained an expert to value the business, this can cause a number of obvious problems. Two recent divorce cases provide guidance on the best course of action for a retained valuation expert.

Chattree v Chattree, Case No. 99337 (OH Ct. App., Dist. 8, Feb. 13, 2014) provides a good example of what works in these circumstances. In this case the husband was totally uncooperative with the wife's expert. The expert requested but was not furnished: (1) access to management for the purpose of management interviews; (2) detail of certain balance sheet and income statement accounts; (3) corporate governance documents and information on significant contractual relationships; (4) details of previous ownership transactions; (5) budgets and/or projections of the company; and (6) organization chart. All the expert had was the company's tax returns and financial statements. His report noted that, since he only had limited access to information, his analysis fell short of valuation standards as set forth in the AICPA's Statement of Standards for Valuation Services No.1, but that the valuation was based on a "reasonable degree of accounting certainty."

The trial court adopted the expert's opinion, for the most part — and an appellate court agreed. The husband's abhorrent conduct prevented the expert from doing his job, but the expert did the best he could with what he had available to him.

Burstein v. Burstein, 2014 IL App (2d), No. 2-13-0098 (February 13, 2014) provides a good road-map of what an expert should NOT do in situations with limited information. In this case, Jay Burstein, a urologist with ownership interests in a real estate holding company and a Urology Center, refused to provide all the requested information on his business. The wife's expert requested, among other documents, tax returns, shareholder agreements and annual financial statements. The husband argued that the buyout agreements between him and the entities where he held ownership interests were sufficient to value his interests. Although the husband did not provide all documents originally requested, he did finally provide audited financial statements, general ledger detail, fixed asset register, and information on accounts payable and accounts receivable. The wife's expert witness testified that he had not received all the documents that he had requested in order to complete his valuation analysis and so could not provide a

fair market value analysis. He testified however that, based on the documents he did receive, he was able to calculate the buyout price of the husband's shares pursuant to the shareholder agreement.

The appellate court determined that despite the husband being uncooperative, the wife's expert could have explored other valuation methodologies (market approach, income approach) with the limited financial information he had. The court found the expert did not do the best job he could under the circumstances. Consequently, the court did its own valuation based primarily on the buyout provisions, and rejected the wife's expert's opinion.



Jeffrey J. Plank, MBA, CVA, CEPA is the Director of Consulting Services for HLB Gross Collins, P.C. In this capacity he oversees all Business Advisory Services at the firm.

He is an expert in the analysis of lost profits damages and the valuation of businesses, business interests, stock options, and tangible and intangible property for litigation, mergers and acquisitions, gift and estate tax planning, dissenting shareholders, Employee Stock Ownership Plans, and financial and tax reporting.

Before joining HLB Gross Collins, P.C. Mr. Plank held senior management positions in Operations and Finance across various industries in organizations that have ranged in size from Fortune 50 to technology start ups.

Secretary's Synopsis

MARCH 19, 2014: THE FOLLOWING NEW OFFICERS WERE APPOINTED:

President: Wayne Morrison

Vice President: Larry Cooper

Treasurer: Melanie Brubaker

Secretary: Alyson Lembeck

Speakers:

Holly Tuchman, *CEO and Executive Director of the YWCA of Northwest Georgia*

Elisa Covarrubias, *YWCA's Director of Sexual Assault and Victim Advocacy Programs*

Ms. Tuchman and Ms. Covarrubias discussed the YWCA's service to Cobb County both as a shelter and through the Court System. Ms. Covarrubias spoke about the partnership between Legal Aid and YWCA. She explained the great success of the shelter and educated the group on the positive statistic that 75% of the women in the shelter move on to permanent housing. The shelter also provides counseling at no cost. There is also a crisis line that is offered through YWCA and it is available 24 hours a day. The crisis hotline number is 770-427-3390. Elisa also explained the TPO process and how YWCA offers 2 legal advocates on staff at the court house. Finally, Ms. Tuchman made mention of their capital campaign and their goal to raise funds to expand and improve their facility.

For more information about YWCA, contact www.ywcanwga.com or Elisa Covarrubias at 770-423-3580 and Holly Tuchman at 770-427-2902.

APRIL 16, 2014: JUDGE GRUBBS, CHIEF JUDGE OF SUPERIOR COURT OF COBB COUNTY

Judge Grubbs gave her advice to the group on a variety of topics. She emphasized the importance of being prepared for court and in the opening statement to tell the Judge the issues in the case and what you want and why. She spoke about keeping your clients on the right path in their testimony to sticking to the issues in the case.

She reminded the group the importance of being on time and being ready to go forward.

Judge Grubb suggested that when preparing, think about how you are going to close and start here and build backwards. Query in preparation, what are we trying to achieve? What is the concept, the issues in the case?

She warned that if final orders do not contain the word "FINAL" the matter may end up on a peremptory calendar.

Judge Grubbs encouraged everyone to use schedule E-- "Non-Specific Deviations" to negotiate child support.

Judge Grubbs will consider Judgment on the Pleadings even if there are children in the case but needs all of the documents. Cobb County does NOT mandate child support addendums.

MAY 7, 2014: PAULA FREDERICK, STATE BAR OF GEORGIA

Ms. Frederick spoke to the group about ethical considerations for family law practitioners. Ms. Frederick educated the section about the increase in bar complaints due to social media and warned the attorneys about posting anything on the internet that could be deemed a breach of any ethical guidelines. She cautioned the group about responding to text messages and emails too quickly or too casually.

There is also an increase in complaints about attorneys diligently responding to emails and phone calls. The rules do not require responses within one hour, but attorneys should respond in a reasonable period of time.

Ms. Frederick discouraged attorneys from using text messaging to communicate with clients. Also, Facebook postings should not refer to specific details about clients or cases, but should be more general comments. Ms. Frederick also stated that responding to negative feedback on the internet needs to be carefully drafted to not disclose any confidential information. Ms. Frederick emphasized that although attorneys are allowed to represent clients in a limited capacity, they should do so only after having a clear consent form with the client explaining the role of the attorney.

Ms. Frederick provided a comprehensive article to the section which is included herewith. For more information, contact the ethics helpline at 404-572-8720.



Alyson F. Lembeck is a member of the firm of Ellis Funk, P.C., where she exclusively practices family law. Alyson graduated as the Valedictorian from the University of Florida in 1999. She attained her law degree from Emory University in 2002. Alyson is an active member of the Family Law Section of the Cobb Bar Association. Alyson serves as a Guardian ad Litem and Domestic Mediator in Cobb County and is certified in Collaborative Law.

Case Law Update

by Victor P. Valmus

Deviation

McCarthy v. Ashment-McCarthy, **S14F0265** (May 5, 2014)

At the time of the parties' final divorce, both were represented by counsel. Contested issues were argued and resolved at a pretrial hearing that was not transcribed. After the pretrial hearing, the final agreement reached by the parties was read into the record along with the Trial Court's decision on any remaining contested issues regarding custody. Husband and Wife stated under oath that they were in agreement with all the financial decisions and the Husband did not object to the Court's ruling on custody. At that time, both parties agreed to file Letter Briefs to submit the issue of attorney's fees to the Trial Court. Prior to the Court entering the Final Decree, the Husband fired his attorney and argued to the Court that the parties had not reached an agreement. The Wife filed a Motion to Enforce Agreement and contempt and the Trial Court granted the Motion to Enforce the Agreement. As part of the Final Decree, the Husband was required to pay a non-specific upward deviation of child support in the amount of \$288.00. Husband filed several pro se motions. The first motion contained no grounds to set aside at all and the second motion contended the parties never reached a valid agreement and the Wife misrepresented her finances. Neither motion argues the Trial Court failed to follow the requirements of O.C.G.A. § 19-6-15 regarding deviations. The Husband's motions were denied.

Husband appeals and the Supreme Court affirms in part but reverses and remands the attorney fee award.

O.C.G.A. § 19-6-15 mandates that certain findings must be made in writing by the Trial Court prior to any deviation in the statutory child support. Here, the Husband did not raise the issue of the Court's compliance with 19-6-15 in either of his motions or at any other subsequent hearing. The issue was raised for the first time by the Husband on appeal. Therefore, the Husband has waived the Court's review of this issue. This result must be contrasted from cases in which the issue of the Trial Court's compliance with 19-6-15 was brought to the Trial Court's attention by the parties prior to the filing a notice of appeal.

The Husband also argues that the Trial Court erred in awarding attorney's fees and challenges two awards of attorney's fees. The first was the Trial Court's award of \$2,550.00 to the Wife for the cost of the motion to enforce. The second was the Trial Court's award of \$12,580.00 to the Wife for attorney's fees incurred in her main

divorce proceeding. The Court specified the award of \$2,550.00 was made pursuant to O.C.G.A. § 9-15-14 as the Husband lacked substantial justification and refused to honor the prior agreement that the parties had reached in open Court and therefore the Husband's argument lacked merit. With regards to \$12,580.00 in attorney's fees on the divorce case, the record shows the parties agreed to submit the issue of these fees to the Trial Court by a letter brief. The Wife originally requested fees pursuant to O.C.G.A. § 19-6-2. Here, the Trial Court did not indicate the basis of its authority for awarding the attorney's fees and stated it was awarding the fees based upon the ruling in *Haley v. Haley*. In *Haley*, the attorney's fees were part of the parties' contract and allowed the Trial Court to exercise discretion to consider whatever factors it found to be relevant to determine if one party was entitled to attorney's fees. The parties in this case had no attorney's fees clause in a separation agreement on which the Trial Court could rely. Here, there was no agreement to leave the issue of attorney's fees to unfettered discretion of the Trial Court. Therefore, the \$12,580.00 must be vacated and remanded to the Court for the proper findings of fact.

Election

Driver v. Sene, **A14A0303** (May 6, 2014)

The parties had three minor children, ages 17, 15, and 12. Father petitioned the Court to modify child support and visitation of all three children based upon the election of the 17 and 15 year old. Several hearings were held and interim orders were issued. A Guardian Ad Litem was appointed and recommended it was in the 15-year-old's best interest to remain with the Mother. After hearing all of the evidence and talking with the children, the Trial Court agreed with the Guardian's assessment and determined that primary custody of the 15 and 12 year old would remain with the Mother and 17-year-old would be with the Father. Father was ordered to pay \$5,000.00 toward Mother's attorney's fees.

Father appeals and the Court of Appeals affirms and reverse and remands the attorney fee award.

The Father argues that the Superior Court erred by failing to grant custody of his 15 year old son based upon his election. Under the current version of the statute, the election of a child 14 or older to live with one parent over the other is presumptive. The Superior Court may override the election if it determines that placing the child in the custody of the selected parent is not in the child's best interest. Here, the 15-year-old was diagnosed at a young age with a developmental disorder that is treated with a complicated regimen of medication, specialized education, therapy, and counseling and the parents disagreed on certain aspects of his care. The Trial Court also noted in its Final Order that neither party requested to make findings of facts and therefore simply concluded that it

was in the 15-year-old best interest that the Mother be awarded primary physical custody of the child. Since the Father did not make a request for findings of fact, he therefore cannot object to any omission in the Final Order.

A Trial Court faced with a Petition for Modification of Child Custody is charged with exercising its discretion to determine what is in the child's best interest. In this case, there was some evidence that the 15-year-old's election was not sincere. At the Court's interview of all three children, they all almost said the exact words in each interview. Therefore, based on the evidence at hearing and the Trial Court's consideration of the child's best interest and no request for findings of fact, we cannot say the Trial Court abused its discretion denying the Father's Petition to Change Custody of the 15-year-old despite the election to live with his Father.

The Father also argues the issue of who carries the burden of proof of a material change in condition. O.C.G.A. § 19-9-3(a)(5) does provide that the parental selection of a child 14 or older may constitute a material change warranting modification, but the statute does not provide that the election mandates a custody change. The child's election is a factor to be considered, but not the only factor.

Motion for New Trial

Hoover v. Hoover, **S14F0236** (April 22, 2014)

The Wife filed for divorce and requested a jury trial. The Court bifurcated the proceeding hearing the issue of child custody first in a bench trial and reserving the issues of equitable division of property, alimony, and child support for the jury. After the bench trial, on June 15, 2012, the Trial Court issued a Court Ordered Parenting Plan which granted joint physical custody and legal custody of the minor children. An Amended Parenting Plan was entered on June 26, 2012, which was titled Second Order Amending June 15, 2012, Parenting Plan. Prior to the jury trial, a Settlement Agreement resolving all of the financial issues in the case was reached and the Trial Court entered a Final Judgment and Decree of Divorce on February 14, 2013. In addition to referencing the Settlement Agreement, the Final Judgment referenced the three Orders relating to the Parenting Plan and stated these Orders are incorporated herein and made part of this Final Judgment and Decree of Divorce. The Wife filed a Motion for New Trial on the custody issues on March 14, 2013, within 30 days of the day the Final Decree was entered. The Trial Court granted the Husband's Motion to Dismiss the Wife's Motion for New Trial because the Court Ordered Parenting Plan was entered on June 15, 2012 and thus was untimely.

Wife appeals and the Supreme Court reverses.

Pursuant to O.C.G.A. § 5-5-40(a), a Motion for New Trial must be filed within 30 days of entry of the Final Judgment, unless otherwise provided by law. When more than 1 claim for relief is presented in an action, the Court may direct the entry of a Final Judgment as to one or more but fewer than all of the claims, only upon an express determination that there is no just reason for delay and upon an express direction for the entry of Judgment. In absence of such determination and direction, any order or other form of the decision however designated, which adjudicates fewer than all the claims, shall not terminate the action as to any of the claims. In this case, neither the original Court Ordered Parenting Plan nor the two subsequent Orders amending the Parenting Plan include an express determination and direction making it a Final Judgment. The original Parenting Plan was not a final judgment as illustrated by the fact that the Trial Court twice amended it.

As in this case, child custody issues are ancillary to the divorce action and the determination of child custody does not transfer the case into a child custody case. The underlying subject matter is still the divorce action and its resulting Final Decree so the appropriate method for appeal is by the application for discretionary appeal. The fact that an order entered in a divorce action makes a determination as to child custody does not, without more, make the order a final judgment for the purposes of determining the time in which a motion for a new trial must be filed. Determination of child custody in this case became final at the time the Final Judgment and Decree of Divorce was entered. Even though the Wife's Motion for New Trial obviously referred to the bench trial on child custody issues it was timely filed within 30 days of the date of the Final Judgment in the case.

Parenting Plan / Transportation

Williams v. Williams, **S14A0510** (April 22, 2014)

After the parties' divorce, the Husband filed two motions, one to modify custody and reduce child support and the other to hold the Wife in contempt. Both cases were consolidated into one hearing. In the Court's order regarding visitation, the Trial Court stated the stepmother shall provide transportation for the minor child to school on Mondays but if the stepmother commits any driving offenses, then the transportation agreement will cease and the stepmother shall not be allowed to transport the minor child. The Court awarded \$2,000.00 in attorney's fees to the Wife as part of the child custody action.

Husband appeals and the case is affirmed in part, reversed in part, and remanded with direction.

The Trial Court's limitation of the ability of the Husband's new wife to drive the parties' child appears to be abuse of discretion.

The Wife testifies that she heard that the Husband's new wife was taking medication and was worried about her ability to drive, but this testimony was speculation. None of the testimony constitutes actual evidence supporting the Trial Court's decision. In addition, although the Trial Court indicated its desire to limit the interaction between the Wife and the Husband's new wife, this concern has no bearing on the propriety of allowing the Husband's new wife to drive the parties' child around town when there would be no interaction with the Wife.

The Husband contends the Trial Court's Order modifying visitation failed to include a Parenting Plan. However, the Trial Court's Order explicitly states that all the terms and conditions of the original Parenting Plan entered in the underlying divorce action not modified herein shall remain in full force and effect unless same conflicts with this Order. Therefore, the Trial Court's ruling in this case does in fact contain a Parenting Plan

The Husband also argues the Trial Court admitted from its Final Order a change in the weekend visitation mutually agreed upon by the parties. This contention is supported by the transcript. In fact, both Husband and Wife testified that they were already following the Friday through Monday schedule and both parties wished to continue it. In addition the Trial Court's Order indicates the stepmother may drive the child to school on Monday mornings. Therefore, the provision makes little sense if the Trial Court was not contemplating the Husband retain custody through Monday morning. Therefore, to the extent the Order reflected the Husband's visitation would end on Sunday night it was not a valid exercise of the Trial Court's discretion but a mistake in reciting a matter agreed upon by the parties.

The Husband also contends the Trial Court erred in awarding \$2,000.00 in attorney's fees to the Wife as part of the child custody action. The Order states Husband and Wife had made a motion for attorney's fees and that it is hereby ordered that the Wife recover \$2,000.00 of attorney's fees from the Husband. There is no statutory basis given, no statutory language used and no findings of fact are presented. As a result, there is no way to be certain whether the Trial Court awarded fees based on O.C.G.A. §19-9-3(g) or some other statute. Therefore, the award of fees is vacated or remanded for statements of statutory basis of fee as well as any other required supporting facts.



Victor P. Valmus is a partner with Moore Ingram Johnson & Steele, LLP. Vic received his B.S. from Kennesaw State University and his J.D. from University of Georgia School of Law, Order of the Coif, in 2001. His primary focus area is family law with his office located in Marietta. Vic is also a member of the Charles Longstreet Weltner Family Law Inn of Court.

Editors' Comments

by Karine P. Burney and Alyson F. Lembeck

We want to welcome our new officers, and thank them for their continued support of this publication. For those that attended the State Bar Family Law Institute over Memorial Day weekend, I am sure you will join us in congratulating Hylton Dupree, Esq. on receiving the prestigious Joseph T. Tuggle, Jr., Professionalism Award, after a memorable introduction by the Honorable A. Gregory Poole. The award was certainly well deserved. We hope everyone has a wonderful and safe summer, and please let us know if you have any ideas or thoughts on future submissions.



Karine P. Burney is an partner with Kessler & Solomiany, LLC, where she exclusively practices family law. Karine received her B.A. from the University of Michigan in 2002, and her J.D. from Loyola University – Chicago School of Law in 2005. Karine is a member of the Charles Longstreet Weltner Family Law Inn of Court, the State Bar of Georgia Family Law Section, and the Cobb County Family Law Section.



Alyson F. Lembeck is a member of the firm of Ellis Funk, P.C., where she exclusively practices family law. Alyson graduated as the Valedictorian from the University of Florida in 1999. She attained her law degree from Emory University in 2002. Alyson is an active member of the Family Law Section of the Cobb Bar Association. Alyson serves as a Guardian ad Litem and Domestic Mediator in Cobb County and is certified in Collaborative Law.

The opinions expressed within the Cobb Family Law Quarterly are those of the authors and do not necessarily reflect the opinions of the Cobb County Bar Association, the Family Law Section, the Section's executive committee or the editors of the Cobb Family Law Quarterly.