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THE FAMILY LAWYER

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W. Ray Persons

Quote of the Month

"The important thing is not to stop questioning."

-Albert Einstein

JUSTICE IN JEOPARDY: RAY PERSONS, PRESIDENT OF THE ATLANTA BAR ASSOCIATION, ADDRESSES THE 19TH ANNUAL FAMILY LAW LUNCHEON HONORING THE JUDGES OF THE FULTON SUPERIOR COURT

By Jon W. Hedgepeth, Hedgepeth & Heredia, LLC



Pictured from left are Section Chair, **John L. Collar, Jr.**, *Boyd Collar Knight, LLC*; **Judge Ural D. Glanville**, *Superior Court of Fulton County*; **Chief Judge Doris L. "Dee" Downs**, *Superior Court of Fulton County*; **W. Ray Persons**, *Atlanta Bar Association President, King & Spalding* and **Judge Bensonetta Tipton Lane**, *Superior Court of Fulton County*.

REPRESENTATIVE EDWARD LINDSEY ADDRESSES FAMILY LAW SECTION BREAKFAST

By Jon W. Hedgepeth, Hedgepeth & Heredia, LLC

Representative Lindsey is a native Atlantan, having graduated from Davidson College and the University Of Georgia School Of Law. He lives in Brookhaven with his wife and our friend and colleague, Elizabeth Lindsey, a shareholder with Davis, Matthews & Quigley, P.C., and their three sons Harman and twins Zack and Charlie. Rep. Lindsey is a founding partner of Goodman, McGuffey, Lindsey & Johnson, LLP, where he practices civil litigation when the legislature is not in session.

Rep. Lindsey has been a leader in the Republican Party serving in numerous capacities over the years including acting as Sonny Perdue's Fulton County Campaign Chairman in 2002. He serves as Vice Chairman of the House Judiciary Republican Caucus and a recent legislative appointee to the Georgia Child Support Commission.

Ray Persons, partner with King and Spalding, and current President of the Atlanta Bar Association, was the keynote speaker for the 19th Annual Family Law Luncheon honoring the Fulton Superior Court judges held on November 8, 2007.

Mr. Persons began by remarking that these are interesting times for the Fulton Superior Court, "a court that, because of the Nichols case, is under intense scrutiny, not just here at home but throughout the land." Mr. Persons speech revolved around courts at the state level and one of the great challenges they face. "You don't have time for me to talk about all the challenges faced by our state courts, and of course, when I say "state courts," I mean courts at the state level versus courts at the federal level," stated Mr. Persons.

Mr. Persons stated that America's judicial system remains unparalleled in its capacity to deliver fair and impartial justice, but that the system is in great jeopardy.

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Rep. Lindsey addressed House Bill 369, the new child custody law which takes effect January 1, 2008, as well as other bills that were previously passed, and what to expect in the coming session. As a background to the bill, Rep. Lindsey served on the Shared Parenting Study Committee in 2006, and there were many concerns as to which way that study committee could go. He gathered together many members of the Family Law Section and also with the State Bar group, and they worked and ended up fashioning a bill that Rep. Lindsey considers a really good bill, since it truly was borne from both lawyers as well as judges that operate in the family law arena, including parents and psychologists. Rep. Lindsey admits that it's not perfect, but he believes they have come a long way, and said "No one got everything that they wanted,

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Our state courts, according to Mr. Persons' statistics, conduct 98% of our country's legal business and that almost 100 million cases are resolved each year by some 30,000 state court judges. Mr. Persons warned that increased political involvement in the judiciary has diminished public trust and confidence in the justice system, and that uncertain resources supporting the courts place burdens on the judiciary's capacity to provide fair and impartial justice. "Indeed, the escalating partisanship and corrosive effects of excessive money in judicial campaigns, coupled with changes in society at large and the courts, themselves, have served to create an environment that places our system of justice, administered by independent and impartial judges, at risk. In short, justice is in jeopardy," warned Mr. Persons.

One factor that Mr. Persons cited that has led to the excessive politicization of our state courts and which jeopardize the American judiciary's role as the template for judicial independence is the increasingly expensive judicial campaigns that involve some of the most partisan and misleading campaign-related speech in the land, usually coming in the form of "issue advertising." Mr. Persons said, "this has become even more pronounced and pervasive in light of the U.S. Supreme Court's decision in *Republican Party of Minnesota v. White*, which struck down those judicial canons that reined in the kind of injudicious, inflammatory and irresponsible campaign promises and criticisms, which are all too common in today's judicial elections."

Mr. Persons pointed out that the United States is relatively unique in having judges stand for election. "Thirty-nine states elect at least some of their judges. Judicial campaigns have evolved from quiet, down-ballot contests to full-blown campaigns with consultants and multi-million-dollar advertising budgets. An Illinois Supreme Court contest in 2004 cost more than 18 of the 34 U.S. Senate contests that year, and candidates for Chief Justice of the Alabama Supreme Court last year raised a total of \$8.2 million" said Mr. Persons.

Mr. Persons cited the recent example of the reelection of Justice Carol Hunstein, who, in 2006, was targeted by a national organization who contributed \$1.3 million to the campaign of her opponent, forcing Justice Hunstein to raise over \$1 million in order to defend herself and retain her seat. In what Mr. Persons sees as the greatest irony of all is that the attack was lodged against her record on criminal cases. He pointed out that "she was accused of being soft on crime, which proved out to be a fallacy, but the real motivation was her perceived friendliness toward plaintiffs in tort claims."

Mr. Persons stated that, from an overall perspective, only 30% of all ads sponsored by candidates, interest groups and political parties were traditional ads. "The remaining 70% were attack ads," said Mr. Persons, "which denigrated their opponent and extolled their candidates' adherence to 'family and conservative values,' their protection of 'victims' rights,' and their view that 'small businesses and working people deserve a fair shot in the courtroom'".

Mr. Persons pointed out that, in a nationwide survey of American voters, 71% believe campaign contributions from interest groups affect judges' decisions in the courtroom. "This can only further erode the public's faith in the judicial system because judges are seen as little more than politicians wearing black robes" Mr. Persons said. He went on to say that "this statistic reflects a widespread judgment that elections are appropriate to keep judges accountable to the public they serve. Nevertheless, simply because judges are elected does not mean that this present trend of high-dollar campaigns and attack ads should be permitted to endure."

Mr. Persons suggested that voters receive a guide containing background information on the judicial candidates, which he said is

used in some states to help dilute the power of special interests. He believes that "a better educated public is one major key to fighting special-interest pressure on the courts." The guides would typically include basic biographical information about the candidates, their legal and professional experience, and a short, personal statement from the candidate. Mr. Persons stated that ideally, voter guides should be printed and mailed to every voter, and that in 2004, North Carolina became the first state to do just that.

"Another tool in combating negative judicial campaign ads is the judicial campaign conduct committee." Mr. Persons stated that, while it has no formal enforcement powers, a judicial campaign conduct committee can serve as a deterrent to such negative and inappropriate campaign conduct. "These committees help create a culture and climate in which the expectations of all involved — candidates, political consultants, the bar, interest groups, the media and the public — promote judicious campaigning."

"The time is long overdue for Georgia to give serious consideration to judicial election reform and public funding of judicial races," said Mr. Persons. He went on to add "the time is long overdue for Georgia to have a robust judicial campaign conduct commission. The time is long overdue for Georgia to have some form of judicial evaluation system to improve the public's perception of the accountability of judges. The time is long overdue for Georgia to create an independent commission to address judicial salaries".

Mr. Persons concluded with some profound personal remarks. He said, "I chose to become a lawyer because I was inspired by the work of the lawyers and judges who advanced the cause of civil rights. You see, I came up during a time when a person of my race could not eat at a restaurant, could not use the public restrooms at the courthouse, had to drink from a separate water fountain, could not attend an integrated school, could not try on clothing in a department store and whose parents were not permitted to register to vote without first passing a literacy test. Those literacy tests had such obscure questions as who was Postmaster General in the Harding Administration and what are names of the signers of the Declaration of Independence from Georgia".

Mr. Persons challenged us to remember that the law is a noble profession and is still an exciting and challenging place where you can puncture pomposity and phony rhetoric; where you can challenge conventional wisdom and reject false assumptions. He said, "it is a bastion of independence and the last refuge against scoundrels and charlatans."

We were charged with remembering that we are the defenders and crusaders, the problem solvers and consensus builders, conciliators and dispute avoiders, advocates and adjudicators, and the architects of the legal structures and institutions that affect and protect the lives of us all.

WHAT'S COMING UP...

January 8, 2008 - Family Law Section Breakfast
Dawn Smith, AVLF, "The Role of the Guardian ad Litem"

February 14, 2008 - Family Law Section Breakfast - TBD

February 14, 2008 - Annual Advanced Family Law
Section Seminar

March 13, 2008 - Family Law Section Breakfast - TBD

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but a lot of folks got a lot of improvement over the way things were.” For example, they were able to attain direct appeal for child custody matters that many believed was long overdue.

Rep. Lindsey, with all due respect given to the judges present at the breakfast, felt that judges were given too much autonomy at the trial court level, recognizing that judges rule differently in different districts given similar facts and circumstances. “We just needed more unanimity, and the best way to do that is through direct appeal,” stated Rep. Lindsey.

The second part that they worked on extremely hard was the parenting plans that were put into place. They felt that, by requiring the parties before going to court to put down on paper what it is they are looking for and what they are willing to let the other side do as well, you would have a lot more reasonableness and people coming together, particularly with the *pro se* people, which represent 65 to 70% of the litigants. Rep. Lindsey likes the fact that these plans give the judges the ability to tell the *pro se* litigants to go into a room, work some issues out, and then come back and tell them where the dispute then lies, and then have the judge resolve them. And this part of the bill came to us largely in part because of the judges.

The next part of the bill dealt with expediting the process. “Everyone believes that a child left in limbo is probably the worst thing that can happen to a child, particularly if you have to go all the way through to a contested hearing,” said Rep. Lindsey. So there is now a provision that requires a judge, upon request from either party, to issue his or her order within thirty days in writing, laying out specific findings of fact and conclusions of law.

The next area they felt was important enough to turn into law dealt with binding arbitration. Rep. Lindsey and his committee felt that, if the parties wanted to use an expedited process and not air their dirty laundry in public, then perhaps that is a good thing.

In addition to the above, the new law addresses the fourteen-year-old election. Rep. Lindsey said “we have limited the right of election to every two years, and, in addition to that, where the standard before was to look at the parent to see if he was unfit, we now have the best-interest-of-the-child standard for the court to look at, so we place the focus back on the child and limited the number of times that the child can use that revolving door.”

Lastly, the bill addressed the issue of attorney fees to level the playing field. Rep. Lindsey believed “there was a loophole in existing law that did not allow the issuance of attorney fees in child custody fights, modifications in particular, and we have closed that loophole.”

Briefly, Rep. Lindsey addressed a few other laws that affect our domestic practice. One dealt with the juvenile courts. One particular aspect of the juvenile courts and DFACS made no sense whatsoever. Rep. Lindsey stated that “essentially, DFACS could recommend a plan to the court, but the court was required to look at the plan, read the plan, study the plan, but wasn’t allowed to overrule the plan, which did not make any sense.” Now, there will be periodic review by the juvenile court judges and allow them to call for a hearing and, if necessary, to overrule the decision of DFACS regarding the placement of a child.” This puts the judges back in control and give proper oversight of DFACS.

The next bill dealt with HB 497, dealing with adoption. The existing law before July 1, 2007 was that the father of an unborn child could not surrender his parental rights until the birth of the child, which has led to a lot of problems and slow-downs in the adoption process. Under the new bill, the father can surrender his parental rights at

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FAMILY LAW ISSUES AND THE DELTA AIR LINES BANKRUPTCY

Jack M. Martin, Benefits Law Group, P. K. Kessler, P. C.

Attorneys representing clients seeking or having obtained a divorce from a spouse employed by Delta Air Lines, Inc. as a pilot or flight officer have had a tidy little bundle of issues left on their doorsteps as a result of the confirmation of Delta’s plan of reorganization earlier this year. These issues involve possible claims by these clients for a portion of monies distributed to the pilots and flight officers in 2007 (with another distribution set for 2008) as part of Delta’s plan of reorganization, as well as possible efforts by pilots and flight officers to have their child support obligations modified as a result of wage concessions made by the current pilots and flight officers (the “Pilots”) as part of the restructuring of Delta in its Chapter 11 proceedings. Readers should note that this article deals only with the bankruptcy settlement between currently employed Pilots and Delta and not with the separate bankruptcy settlement between retired pilots and flight officers and Delta.

A brief history of these events might serve to illuminate (but probably not enliven) the subject matter for readers. In 2006, the Air Line Pilots Association (“ALPA”), the collective bargaining unit representing the current Pilots, agreed that, among other things, they would not object to the termination of the Delta Pilots Retirement Plan (the “Pension Plan”), a defined benefit plan qualified under Section 401(a) of the Internal Revenue Code of 1986, as amended, and the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). The Pilots also agreed to forego making certain claims in Delta’s bankruptcy proceeding with respect to the Pension Plan and Delta’s obligations under that plan. Delta, in return for these and other concessions by the Pilots, agreed to allow the Pilots a general unsecured claim in Delta’s bankruptcy proceeding in the amount of \$2,100,000,000 (the “ALPA Claim”) and to deliver to the Pilots \$650,000,000 of promissory note(s) upon confirmation of Delta’s plan of reorganization by the United States Bankruptcy Court. Delta’s plan of reorganization (with the agreed upon provisions affecting the Pilots) was confirmed by the Bankruptcy Court on April 30, 2007. Delta emerged from bankruptcy protection effective on or about May 1, 2007.

ALPA, as might be expected, controlled the ALPA Claim and established a process whereby the aggregate ALPA Claim amount was allocated among the Pilots on the basis of a model developed by ALPA. As events developed, each Pilot had the option to sell the Pilot’s allocated share of the ALPA Claim or to have the Pilot’s claim share satisfied with newly issued shares of Delta common stock as part of Delta’s plan of reorganization. Not surprisingly, all but a very small number of Pilots elected to sell their allocated share of the ALPA Claim for a discounted cash amount rather than to exchange their share of the ALPA Claim for new Delta stock. Those Pilots making the decision to sell their share of the ALPA Claim clearly did not let hope triumph over experience.

Unquestionably, one of the critical requirements for the viability of Delta’s Plan of reorganization was the termination of the Pension Plan and the cessation of the funding obligation the Plan’s continuation imposed on the company. Delta was particularly concerned with ending a Pilot’s right under the Pension Plan to elect to receive one-half of the Pilot’s accrued benefit under the Pension Plan in the form of a lump sum payment, a benefit feature which Delta believed had caused, and would continue to cause,

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any time after conception, which they hope will expedite the adoption process.

Coming up in 2008, Rep. Lindsey does not expect to see any major overhaul in the child support law, as the general consensus among the senate is to let things lie for a while. He said “there is likely to be some tweaking to the law, possibly regarding the appropriateness of the guidelines when it comes to low income families, but, other than that, I don’t expect to see a whole lot this year.”

House Bill 115 was brought up again, which would loosen the requirements for taking the Georgia Bar, which makes no sense and would lower our standards to that of the lowest standards in the country. “We’ve been able to stop it for the last three years, and we need your help to stop it again this fourth year,” appealed Rep. Lindsey.

House Bill 119 addresses wages for judges. Rep. Lindsey agrees that we need to do justice by our judges, particularly our trial judges, whose salaries are way below par if you compare judicial salaries around the country. It has already passed the house and is pending in the senate.

Finally, Rep. Lindsey addressed one of his own bills, which deals with judicial election reform. He thought that “this is something I think will take the long-haul for us to fix, but anyone who witnessed the Supreme Court election last year between Mike Wiggins and Justice Hunstein knows that the present way we do things is broken, and we need to fix some things both in terms of the creeping partisanship that exists within these judicial races.” He also pointed out the need to deal with the independent committees that circumvent campaign finance laws and pour millions of dollars into judicial races with little ability to trace the money back to the original source. “We as lawyers need to take a look at our role in these races and whether our role is where it ought to be in terms of making large contributions to a judge as opposed to contributing to a committee to elect the judge and then coming before that judge shortly thereafter,” said Rep. Lindsey

Rep. Lindsey encouraged us to contact him with concerns we have and to go to the legislature. We are down to 22 members of the Georgia House out of 180 with an actual law license, and, of that, 13 or 14 are actually practicing lawyers, and, of that, no more than 6 actually go into a court room. When it comes to understanding the legal system, we are stretched thinly. “It is fairly simple to get involved, and, in all candor, a small number of people can make a difference.” He said; “if I get a call from 2 people, it’s an issue. When I get a call from 4, it’s a problem. When I get a call from ten people from within my district on a particular issue, it’s a crisis and I’d better do something about it.”

Rep. Lindsey encouraged direct contact with your legislative representative. He gave the audience his cell phone number and also encouraged e-mail contact with him at (elindsey@gmlj.com).

Shelley Senterfitt and Andrea Knight are delighted to announce that Alice W. Limehouse has joined Senterfitt & Knight, LLC as Of Counsel. Alice shares the firm’s focus on family law matters. She is also a member of the Collaborative Law Institute of Georgia.

RECENT DECISIONS

By Anita H. Lynn, Attorney at Law

In the case of *Alejandro v. Alejandro*, S07F0743 (09/24/07), the Husband alleged that the trial court erred by failing to find as fact that the cause of the divorce was the Wife’s adultery. Both parties had committed adultery, plus there was evidence that the Husband had physically harmed the Wife. There was also evidence that the dissolution of the marriage was caused by the Husband returning to Ohio to work with his father. It was not error for the trial court to determine that adultery was not the cause of the dissolution of the marriage; the trial court’s factual findings will be upheld if there is any evidence to support them. Additionally, the Supreme Court held that it was not error for the trial court to award sole custody of the children to the Wife even though she was the “defaulting party;” the trial court properly based custody upon the best interests of the children. The trial court had properly considered both parents to be suitable primary physical custodians, yet assigned primary physical custody to the Wife; there was no evidence that the trial court had abused its discretion. Also, there was no merit to Husband’s contention that his court ordered obligation to pay a specific debt violated O.C.G.A. § 19-6-1(b), which states that alimony shall not be awarded to a party whose adultery caused the divorce – even if the payment of this debt is considered alimony rather than an equitable division of property, the trial court had determined that adultery was not the cause of the divorce. The Supreme Court also held that an award of attorney’s fees to the Wife was not in violation of O.C.G.A. § 19-6-1(b). Also, it is not error to hold the Husband responsible for payment of the Wife’s student loans as an equitable division of property; the trial court based its findings on this issue upon the Husband’s promise to the Wife’s father that he would pay his Wife’s student loans if she left college without graduating. Husband also alleged as error the award to Wife of 100% interest in the marital home, again contending that Wife’s adultery should have been considered. The record reflects that the trial court had properly considered the parties’ conduct. A trial court has broad discretion to divide marital property. The trial court also has the right to determine whether funds advanced to the parties by the Wife’s grandparents were in the nature of a gift or a loan; there was evidence in the nature of Wife’s testimony to support the court’s finding. Additionally, the Husband’s income was in dispute; the trial court sits as the finder of fact and the determination of income frequently involves resolving conflicts in evidence. The trial court’s determination of the Husband’s gross income was upheld based upon the evidence. The Husband’s final enumeration of error concerned the trial court’s award to Wife of 50% of any and all retirement plans maintained by the Husband, claiming there was no evidence presented at trial of any retirement accounts. On motion for new trial, the Husband did not present any evidence that the retirement funds actually existed; therefore, even if the trial court’s provision on this issue was unwarranted, the Husband failed to show any harm arising from its inclusion in the divorce Decree.

In the case of *Hammond v. Hammond*, S07F0917 (09/24/07), the Wife contended that the trial court erred in awarding custody of the parties’ two minor children to Husband. The trial court has broad discretion in awarding custody, focusing on the best interests of the child; the Supreme Court will not interfere with the trial court’s decision absent a clear abuse of discretion – it is not an abuse of

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an acceleration of the number of Pilots who would seek early retirement in order to receive the benefit of the lump sum payment. A Pilot's right to receive a lump sum payment under the Pension Plan had been suspended in 2005 as a result of the Pension Plan's entering into a "liquidity shortfall" under ERISA and its regulations. Delta estimated that the "liquidity shortfall" would end no later than October 1st of 2006 and therefore maintained that the Plan had to be terminated in order to avoid a "run" on the Plan by Pilots seeking early retirement, which in turn would have imposed severe additional funding requirements on Delta and, according to Delta, have made exiting from Chapter 11 impossible. The termination of the Pension Plan would also subject the monthly fixed benefits to be paid to Plan participants at retirement to the benefit limits imposed by the Pension Benefit Guaranty Corporation for terminated plans for which the PBGC becomes trustee and assumes payment responsibility.

However, after ALPA negotiated the amount of the ALPA Claim, external events intervened (providentially, some might say) to make the ALPA Claim more valuable than it might otherwise have been expected to be at the time it was negotiated. In the fall of 2006, while Delta was negotiating settlements with its many and varied creditors, US Airways made an unsolicited offer to acquire Delta. Implicit in the US Airways offer was the threat of a hostile takeover that could be implemented by US Airways acquisition of sufficient claims of creditors to give US Airways control of Delta. Consequently, one of the effects of the US Airways offer was to increase the potential value to speculators of creditor claims (such as the ALPA Claim) that could be satisfied with stock of the reorganized Delta. Due in part to the US Airways offer, the market value for Delta general unsecured claims increased between the time the ALPA Claim was negotiated and a claims sale process approved by the bankruptcy court was allowed to proceed. Although, in the end, the US Airways offer went by the wayside, the existence of the offer and other then prevailing market conditions allowed the ALPA claim to be sold for \$60.05 on the dollar, rather than a lower number that was likely contemplated when the claim was originally negotiated. Based on what is known about the circumstances of the sale, it is not unreasonable to expect that ALPA received in excess of \$1,000,000,000 in cash from the sale of the ALPA Claim on behalf of the Pilots.

The proceeds received from the sale of the ALPA Claim were distributed to the Pilots in May and June of 2007 in accordance with each Pilot's allocated share of the ALPA Claim. Each Pilot's allocated share of the ALPA Claim sale proceeds was distributed in the form of a combination of (i) a contribution of approximately \$45,000 to the Pilot's account under the Delta Family Care Savings Plan (the "DFCSP") for the current DFCSP plan year, and (ii) a cash distribution on an after-tax basis of the remainder of the Pilot's allocated share of the ALPA Claim sale proceeds.

The \$650,000,000 in promissory notes was also issued by Delta to the Pilots after Delta's emergence from Chapter 11. The notes were, in turn, apparently sold and/or discounted with the after-tax proceeds from the sale/discount of the notes being allocated to the Pilots in accordance with a separate (and much more complex) allocation formula established by ALPA. A portion of the note sale proceeds was distributed to the Pilots in early September of 2007. The balance of a Pilot's share of the note proceeds (approximately \$ 46,000) is expected to be contributed to each Pilot's account under a qualified

defined contribution plan such as the DFCSP or the Delta Pilots' Defined Contribution Plan in the first quarter of 2008 for the 2008 plan year.

The first issue presented by the settlement between the Pilots and Delta is whether spouses of a Delta Pilot currently involved in divorce proceedings should be entitled to a share of the monies received by the Pilot as a result of the above-described transactions. It would seem a straightforward proposition that these monies (including the contributions to qualified retirement plans) should be considered marital assets to be divided among the parties in proportion to the marital interest of each party. The monies contributed and remaining to be contributed to Delta's qualified plans would be divided pursuant a qualified domestic relations order ("QDRO") to the extent the parties agreed that a divorcing spouse should receive a portion of a Pilot's account balance under those plans.

There also exist several issues concerning former spouses of Pilots that family law practitioners must carefully consider:

- Whether a former spouse who received an interest in a Pilot's retirement benefit prior to the bankruptcy settlement between Delta and the Pilots is entitled to a portion of the proceeds received by a Pilot under the terms of that bankruptcy settlement?
- Whether a former spouse might be entitled to some of the proceeds received from one portion of the bankruptcy settlement, but not to proceeds from another portion the sale of the ALPA Claim (e. g., would the former spouse have a viable claim with respect to the Pilot's allocated share of the note sale proceeds, but not to the ALPA Claim proceeds or, alternatively, not to the proceeds contributed on the Pilot's behalf to qualified retirement plans of Delta)?
- Whether the former spouse acquired rights in the ex-spouse's retirement benefits at a time that might disqualify the former spouse from rightfully claiming a portion of the settlement proceeds received by the ex-spouse Pilot?
- What, if any, is the significance of the "soft" freeze of the Pension Plan in 2004 and the "hard" freeze in 2006, as such events relate to a possible claim by a former spouse?
- What, if any, is the relationship of the payment and receipt of the settlement proceeds to any other concessions made by the parties (i.e., the Pilots and Delta) in the bankruptcy settlement (i.e. did the parties make concessions of rights and benefits under the bankruptcy settlement in exchange for consideration other than the payment of the monetary amounts mentioned above)?
- What are a former spouse's rights if a Pilot did not choose to sell the Pilot's allocated share of the ALPA Claim, but instead elected to receive Delta stock?
- How may a claim by a former spouse be most effectively and efficiently asserted?

Practitioners representing former spouses of Pilots may also have to defend attempts by Pilots to reduce their child support obligations under Georgia's recently revised child support guidelines (the "Guidelines"). Efforts to reduce child support obligations may be expected to be based on an argument that the wage concessions made by the Pilots as part of the bankruptcy settlement justify a reduction in a Pilot's child support obligations, notwithstanding a

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Pilot's receipt of the significant amounts distributed to the Pilot as part of the bankruptcy settlement. The successful prosecution of such a claim would, in part, be dependent on a more restrictive interpretation of what properly constitutes "income" under the Guidelines.

The critical analyses that family law practitioners will have to make in their representation of spouses and former spouses of Pilots will involve the nature of the rights and benefits that a participant in a defined benefit plan such as the Pension Plan derived from participation in that plan, the nature of the rights under the Pension Plan awarded to a former spouse pursuant to a QDRO, and the relationship of the elements of the bankruptcy settlement to the consideration received by the Delta Pilots. Retirement plans such as the Pension Plan and participants' rights under such plans represent some of the most complex technical issues that family law practitioners confront, and family law practitioners may be reluctant to undertake client claims with respect to such plans or the rights conferred by the plans. However, given the significance of the consideration received by many Pilots as part of the bankruptcy settlement, practitioners representing spouses and former spouses of Pilots should thoroughly investigate and analyze the various claims that their clients might possibly pursue. © 2007

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discretion if there is any evidence to support the trial court's decision. In the case at bar, even though the Husband worked the late shift and is not spending enough time with the children, an award of custody to the Husband prevented disruption of the children's schooling by allowing them to remain in the Husband's school district, plus Husband's mother and grandmother assisted with the care of the children and the children were relatively well adjusted. Given this evidence, it could not be said that the trial court's decision was totally unsupported or that the trial court had abused its discretion in awarding custody to Husband. In Wife's second enumeration of error, she contended that the Husband's testimony concerning the termination of his overtime income was not credible; however, an appellate court cannot reweigh the facts or assess the credibility of witnesses, both of which are reserved for the finder of fact. In response to the Wife's third enumeration of error, the Supreme Court held that it was improper for the trial court to include in Wife's gross income child support that she received as a result of a previous marriage for a child who was not the subject of the instant case. Child support payments received by a parent for the benefit of a child of another relationship shall not be included in gross income. This holding is consistent with the new child support guidelines, O.C.G.A. § 19-6-15(f)(2)(A). Wife also contended that the trial court improperly classified property as marital versus non-marital. The finder of fact is charged with the responsibility of determining whether and to what extent a particular item is a marital or non-marital asset and then exercising its discretion to divide the marital property equitably. In the Final Judgment and Decree, there were no findings of fact that could have clarified the rationale used by the trial court to reach its decision. A Superior Court is not required to make findings of fact in a non-jury trial unless one of the parties requests that the court do so prior to the entry of the written

judgment. In the case at bar, neither party asked the trial court to make findings of fact. Therefore, the Supreme Court could not say whether the trial court had erred in equitably dividing the marital property of the parties. Lastly, the Wife contended that the trial court erred by failing to grant her an award of attorney's fees; the Supreme Court found no abuse of the trial court's discretion. (See O.C.G.A. § 19-6-2(a)(1)).

In the case of *Jackson v. Jackson*, S07F0945 (09/24/07), a temporary order of support was entered. Husband was subsequently found in willful contempt of the Order and ordered to pay Wife's attorney's fees. At the final hearing, the trial court declined to award Wife alimony but required Husband to continue making payments due under the earlier contempt ruling; the trial court also declined to award Wife additional attorney's fees. In Wife's first enumeration of error, she claims that the trial court improperly excluded conduct evidence as it pertained to her claim for alimony; she argued that her credit rating had been damaged due to the marital residence going into foreclosure and sums that she allegedly expended for the support of the parties' minor child prior to the filing of the petition. Even though Wife contended on appeal that these two items were relevant to the trial court's determination of her claim for alimony as "conduct evidence," the transcript established that the evidence was not presented to the trial court for this purpose; the issue was raised when her counsel presented evidence of the foreclosure's negative effect on her credit. The trial court had commented on its lack of relevance; at that point, no objection was made to the exclusion of the evidence. The trial court refused to allow in depth testimony by the Wife based on relevance, not on any erroneous legal theory. Additionally, Wife had acknowledged that a list of "monies sought for reimbursement" included these two items, and her counsel had argued to the trial court that she was entitled to "everything on that sheet." As such, Wife failed to demonstrate that the trial court did not weigh these items when it considered her claim for alimony. The Supreme Court also found meritless the Wife's contention that the trial court's refusal to allow her to claim child support expenses incurred prior to the filing of the divorce violated her equal protection rights. In response to another enumeration of error, the Supreme Court found that the Wife failed to demonstrate that the trial court did not weight these items when it considered her claim for attorney's fees; thus, there was no merit to this enumeration of error. Wife also claimed that the trial court abused its discretion in denying her alimony based upon the Husband's alleged abandonment, his failure to support the minor child, and allowing the marital home to go into foreclosure. There was evidence that Wife had initiated the separation, she was gainfully employed and had been so throughout most of the marriage, that she failed to cooperate with Husband to alleviate the financial problems arising out of their separation, she mismanaged marital funds and ran up extravagant bills, she failed to take advantage of low cost health insurance coverage for the parties' minor child, and she unilaterally disposed of the Husband's share of the couple's personal property. Under these circumstances, the Supreme Court could not conclude that the trial court erred by declining to award Wife alimony. Wife also contended that the trial court improperly denied her claim for attorney's fees pursuant to O.C.G.A. § 19-6-

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2. At trial, both parties had presented evidence regarding their respective financial conditions. In light of that evidence, the Supreme Court could not find any abuse of the trial court's discretion in declining to award attorney's fees to Wife. Husband's alleged unwillingness to settle the divorce proceedings was irrelevant to the issue of whether attorney's fees should be awarded. The Wife also contended that the trial court had issued its ruling before the expiration of the time period during which it gave her attorney the right to submit an affidavit detailing the amount of fees Wife had incurred; however, because the trial court declined to award Wife any attorney's fees, she was unable to show that she was harmed by the entry of the trial court's ruling prior to the expiration of the deadline. In a footnote, the Supreme Court addressed Wife's right to attorney's fees under O.C.G.A. § 9-15-14, since her argument tended to implicate that such an award may be appropriate. The final disposition of the divorce proceedings did not preclude the consideration of any potential claim by Wife for such fees, since she had the right to make a request by motion no later than 45 days after the final disposition of the action. However, she made no such request. In the absence of any pretrial motion by Wife for attorney's fees under O.C.G.A. § 9-15-14, she could not show how the trial court erred by failing to consider evidence in support of such a claim. In Wife's final enumeration of error, she contended that the trial court failed to rule on her second motion for contempt, even though she had testified at trial that Husband was current on his payments. The trial court had made express provisions in the divorce Decree requiring the Husband to fulfill the obligations he had accrued under the temporary support order. As such, there was no reversible error. In Wife's final enumeration of error, she testified at trial that the marital home had been foreclosed upon and she speculated, without adducing any evidence, that a shortage might exist for which she may be held responsible. Wife contended that the trial court erred by failing to address the marital residence in its final order. A party cannot complain of an error induced by his or her own conduct; a plaintiff has the burden to prove damages in a manner sufficient to allow the court to "estimate them with reasonable certainty free from speculation, conjecture and guess work." (See *Song v. Brown*, 255 Ga. App. 562, 564 (565 SE2d 884) (2002).

In the case of *Scarborough v. Scarborough*, S07A0971 (09/24/07), the Supreme Court held that the father was entitled to a credit against his child support obligation for the Social Security retirement benefits being paid directly to the mother for the benefit of the children. In the parties' divorce Settlement Agreement, they did not address the receipt of future Social Security retirement benefits or the impact this receipt would have on the father's child support obligation. There was no reference in the parties' Agreement to the father's impending retirement benefits or the corresponding receipt of the minor child's benefits. The Supreme Court distinguished *Scarborough*, *supra*, with the case of *Koch v. Martin*, 270 Ga. 419 (510 SE2d 520) (1999), in which the non-custodial parent's disability benefits were already being paid on behalf of the children at the time the parties entered into a Settlement Agreement. The Agreement in *Koch* did not make any special provision concerning the disability payments, and it was, therefore, assumed that the parties had taken the presence of the current payments into account when they calculated the non-

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The Following Attorneys have taken Pro Bono cases:

GALs:

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Miriam Arnold-Johnson	Jon Rotenberg
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Herman Tunsil	Maria Baratta
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Debra Gold	Catherine Knight
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Divorces:

Jennifer Watts
Teresa Lazzaroni
Regina Edwards
John Collar
Regina Edwards
Rob Wellon
Kate Marks

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custodial parent's child support obligation. In the case at bar, no such security benefits were either due or payable, so it cannot be assumed that the parties considered these payments in the future nor did the father forego any right to a credit for payments that were not yet in existence. The Court also noted that under the new child support guidelines at O.C.G.A. § 19-6-15(f)(3)(A), benefits received under the federal Social Security Act by a child on the obligor's account shall be counted as child support payments and applied against the final child support order to be paid by the obligor for the child. This statute codified the law on the subject as recognized in previous cases. Any cases that suggest the receipt of social security benefits cannot be credited to satisfy a child support obligation are hereby overruled.

In the case of *Arnold v. Arnold*, 282 Ga. 246 (2007), the parties' Settlement Agreement was incorporated into the Final Judgment. Before the Decree was entered, the Husband filed a motion to set aside, claiming that the Agreement disproportionately divided his military retirement income and that child support was incorrectly calculated. He later amended the motion to include allegations of newly discovered evidence of Wife's adulterous conduct, non-disclosure of assets, and Wife's repudiation of the Agreement based upon her failure to comply with its terms. The trial court denied the Husband's motion to set aside. A trial court has the discretion in a divorce action to approve or reject an Agreement in whole or in part. Absent an abuse of discretion, the trial court's decision will be affirmed. The Wife's noncompliance did not constitute a repudiation of the Agreement, even though it may have subjected her to contempt for her alleged failure to pay a debt. The Husband had read the Agreement and voluntarily signed it, and he testified that he understood the affect of its provisions. Further, there was no evidence that the parties had misrepresented their assets or that the Agreement was obtained by fraud. The trial court properly received evidence and considered the parties' arguments, reviewed the Agreement, found it within the bounds of the law, and incorporated it into the Final Judgment and Decree. The order denying the motion to set aside was affirmed.

In *Miller v. Miller*, 282 Ga. 164 (2007), a Final Judgment and Decree of Divorce was entered, but the trial court reserved the right to review the parties' submissions concerning eligibility for and reimbursement of certain government benefits allegedly obtained improperly. Since this order left other issues for determination by the trial court, it constituted an interlocutory and not a final order. Therefore, the applicant was required to follow the interlocutory appeal procedures set out in O.C.G.A. § 5-6-34(b). Justice Carley dissented from the majority opinion, arguing that the provisions referenced in the Final Judgment and Decree of Divorce do not require the trial court to take any further action. The provisions simply required the parties to determine their eligibility for certain government benefits, reimburse any improperly received benefits, and "make a return to the trial court of their determination and proof of any reimbursement within ninety (90) days of the entry of the Final Judgment and Decree." No issues remained to be resolved; the Decree had disposed of all issues in the case, even though the trial court had only reserved the right to enforce it.

In *Haley v. Haley*, 282 Ga. 204 (2007), the parties settled a child

support modification action in which the Husband agreed to increase his child support payments. The issue of Wife's claim for attorney's fees was reserved – the parties agreed to submit this issue to the trial judge for a decision. The trial court determined that the Wife had "prevailed" on her child support modification action and awarded her attorney fees. The Husband claimed that the trial court erred in awarding her fees, contending that her claim was controlled by O.C.G.A. § 19-6-19(d). The Supreme Court disagreed and found that her claim for fees was based upon the parties' contract and not on this code section. Their Settlement Agreement made no reference to O.C.G.A. § 19-6-19(d); therefore, the trial court was authorized to exercise its discretion to consider whatever factors it found to be relevant to determine whether or not the Wife was entitled to fees, including whether she was the prevailing party. Under the facts of this case, the Supreme Court concluded that the trial court did not err in determining that the Wife was the prevailing party or in awarding her attorney fees. In a special concurrence, Justice Hunstein agreed that the trial court was authorized to award Wife attorney's fees under the Settlement Agreement provisions. "... this resolution renders dicta any discussion of O.C.G.A. § 19-6-19(d), ..." Justice Hunstein wrote separately to reject the dissent's position that an award of fees to the Wife was inappropriate under that statute. Modification proceedings resolved by settlement rather than by trial are not singled out for any different treatment under O.C.G.A. § 19-6-19(d). She disagreed with the dissent's claim that trial courts are prohibited from awarding attorney's fees under this code section to parties who prevail in modification proceedings resolved by settlement rather than by trial.

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