



THE FAMILY LAWYER

Official publication of the
Atlanta Bar Association's
Family Law Section

March 2007
Editor: Eileen Thomas
eileen@ethomaslaw.com

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Quote of the Month

"To listen closely and reply well is the highest perfection we are able to attain in the art of conversation."

*Francois de La
Rochefoucauld*

MARTIN S. VARON, VALUATION EXPERT, ADDRESSES THE FAMILY LAW SECTION

By Jon W. Hedgepeth, Hedgepeth & Heredia, LLC

On Thursday, February 8th, Martin S. Varon, Chief Executive Officer of Alternative Resolution Methods, Inc., addressed the Family Law Section's monthly breakfast at the Buckhead Club. Mr. Varon's company provides valuations for businesses, divorcing parties, and estates, tax and accounting services for small closely held businesses and individuals. He works closely

with domestic relations attorneys to help structure equitable after tax settlements for clients while analyzing various alternatives.

Mr. Varon received his BA in Political Science at SUNY at Binghamton where he graduated Phi Beta Kappa. He received his MS in accounting also at SUNY at Binghamton, and he re-

ceived his JD from St. John's University School of Law. Mr. Varon is a Certified Public Accountant in both New York and Georgia, a Certified Valuation Analyst, and an attorney at law, currently in an inactive status with the State Bar of Georgia.

"Valuing companies is both objective and subjective," Mr. Varon began. "It is objective is

because we are looking at financial statements that have hopefully been prepared by CPAs. It is subjective because we have to analyze business risk, economic risk, and industry risk that the company is involved with." "Fair market value is hard to determine," explained Mr. Varon. He defined it as the price in cash equivalent at

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RECENT DECISIONS

By Anita H. Lynn, Anita H. Lynn, PC

In the case of *Page v. Baylard*, S06A1833 (2/05/07), the trial court found the husband in contempt for his failure to pay one-half of the minor child's expenses at a long-term residential preparatory school, which was also a treatment facility. The child had previously become unruly, run away from home, abused drugs and alcohol, and was the subject of delinquency proceedings and juvenile court. The wife had obtained out-patient treatment for the child at Peachford Behavioral Health System as well as additional psychological counseling; the residential long term treatment facility was recommended by a counselor. The child attended the treatment facility for a period of 17 months, for a total cost of \$46,750.00. Pursuant to the terms of the parties' Settlement Agreement, each party was to pay one-half of all reasonable and necessary medical and dental expenses incurred on behalf of the child, which were not covered by insurance. The Agreement further provided that in the event a major expenditure was to be incurred, the husband would be consulted prior to the services rendered, except in an emergency situation. The wife acknowledged that she had not consulted the husband prior to the child's enrollment at the treatment facility. The Supreme Court held that this was a "major expenditure" and that even though it was an

urgent situation, it could not be classified as the type of emergency contemplated under the parties' Agreement since it had been an ongoing problem for several months. Since wife failed to consult with the husband prior to their child's enrollment, she had not satisfied the condition precedent to him being held responsible for one-half of these expenses. The trial court's judgment in the wife's favor in her contempt motion was reversed, as well as the award of attorney's fees. In the dissent, Justice Melton felt that the majority had ignored the public policy underlying O.C.G.A. § 19-7-2, which provides that it is the joint and several duty of each parent to provide for the maintenance, protection and education of their child; taking this policy into consideration, husband should not have been relieved of his duty to pay one-half of his daughter's necessary medical treatment, even in the event of a substantial non-emergency expenditure, unless the Settlement Agreement explicitly and unequivocally provided for such an outcome. Husband could have argued that he should only be responsible for the medical portion of the daughter's treatment versus those services that would be deemed non-medical. Additionally, he should have been able to prove whether or not he could have chosen a different treat-

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which property would change hands with a hypothetical willing and able buyer and a hypothetical willing and able seller, negotiating at arms length in an open unrestricted market where neither is under any compulsion and both have a reasonable knowledge of the facts. "True market value can only really be determined in an open market if you have an ultimate sale." So, logically, if there is no sale, you cannot know exactly what the fair market value is." The problem in family law is that, if one party has a business and the other does not, there is probably not going to be a sale.

Mr. Varon emphasized the importance of financial statements, and he further explained the inherent problems with them as being historical in nature. "An income statement which reports income and expenses for last year or last quarter or last month. A balance sheet, which represents the assets and liabilities and net equity, is as of a point in time, so you're always looking back, and when you're valuing, you are looking for what sort of value can be determined based on future results."

This brings up the ultimate question: how do you value a business if you can't predict the future? There is a set of documents you need to do this, according to Mr. Varon, which include five years financial statements (balance sheets, income statements); five years of tax returns, a personal financial statement, any recent loan statements, the existence of buy/sell agreements, and any retirement plan documents.

Again, in divorce cases, a sale of the business is generally not contemplated, so when mixed with the emotions inherently involved, it is difficult to ascertain what fair market value is. Mr. Varon went through several case studies including one involving a divorce situation where a landscaper owns his own business. His divorce stance was that he is the business, that his employees will only work for him, that he could dump the business and open a

similar one and that the other spouse could not possibly run such a business. The other spouse's position was that the business provided well for the family for many years, and that, but for the divorce, the other party would be running the business efficiently.

A good valuator will move past the emotion of the parties and try to determine the fair market value based on the definition given earlier and will look at what a hypothetical buyer and seller would do to maximize the benefits for him/her self. "A good hypothetical willing and able seller would not threaten to compete with the buyer, and he would do everything he could to make sure the hypothetical buyer can take over the business and run it. He will set up meetings to make sure the customer base remains in tact, and he would not walk away and open a competing business next door. Likewise, a willing and able buyer is going to look at some of the financial records to see if there is enough cash flow to support not only his salary but also to pay for the debt he is incurring to buy the business. They will look at past and recent operating history to see if there is any indication that the business will continue to run well enough to support the debt service. They will look at the existing relationships with customers to see if the buyer can step into the role of assuming that relationship. They will also consider economic, industry and marketplace situations to see how the competitors look."

**The Following Attorneys have taken on Pro Bono Cases
in December, January and February:**

GALS:

Jon Rotenberg	Eileen Thomas
Amber Patterson	Frank Slover
Laura Mendleson	Andrea Jones
Megan Miller	Debbie Gold
Stacy Sax	Michelle Jordan
Adria Perez	Rachel Elovitz
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Please contact Dawn R. Smith at AVLFF
if you can help next month.

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WHAT'S COMING UP...

March 8, 2007...Family Law Breakfast
 Joshua Berman and Richard Litwin
 Tax Issues - 1 CLE hour available

April 12, 2007...Family Law Breakfast
 Richardson Lynn - Dean, John Marshall Law School

May 5, 2007 - Spring networking Social at Zoo Atlanta
 11:30 am - 3:30 pm

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ment program that may have been less expensive than the one chosen by wife; these arguments could possibly have enabled him to reduce his financial obligation under the terms of the Settlement Agreement, but his obligation should not have been extinguished altogether.

In the case of *Norris v. Norris*, S06A1524; S06X1525 (2/05/07), the Final Judgment obligated the husband to pay the expenses of his son's college education, to be limited by the amount of tuition being charged to an in-State student at the University of Georgia attending the Bachelor's Program. The trial court arbitrarily placed an 11 semester limitation on the husband's obligation, finding that this was "reasonable;" the husband's obligation was terminated for any period of time after the 11 semesters. The wife appealed the trial court's decision on this issue, which was reversed by the Supreme Court since the parties had not agreed to any such time limitation. It was error for the trial court to impose such a limitation. Husband filed a cross appeal, contending that the trial court erred by failing to give him credit for money the child had withdrawn from a Uniform Transfer to Minors account, which was used to pay certain college expenses. The husband had previously raised this issue in an application for discretionary review, which was dismissed by the Supreme Court because it was untimely filed. Consequently, the husband's claim was barred under the doctrine of *res judicata* and his cross appeal was dismissed. In a special concurrence, Justice Melton stated that even though the Final Judgment did not impose a time limit on the husband's obligation to pay, it did limit the husband's obligation to a fixed amount of money, that is, to the "... amount of tuition of an in-State student at the University of Georgia attending the Bachelor's Program,..." Therefore, the husband's obligation to pay for the child's college tuition should have been capped by the amount that it would have cost an in-State student at the University of Georgia to complete the course hour requirements to earn a bachelors degree. Justice Melton felt that the Agreement limited the husband's obligation to a fixed amount of money, but it did not limit the student's choice to complete the program within a specified amount of time. Justice Sears dissented, stating that the divorce Agreement clearly contemplated that husband would only pay for the child to earn a college degree from a program that was no more expensive than the University of Georgia's Bachelor's Program. The Agreement, therefore, provided a means to determine the maximum amount that the husband should pay toward that goal.

In the case of *McCoy v. McCoy*, S06F1570 (2/05/07), the husband moved back into the marital home after the final hearing. He and wife shared the home and engaged in sexual relations on numerous occasions over the next few months, prior to the entry of the Final Judgment and Decree. Approximately 4 months after the final hearing, but before the Final Judgment was issued, the husband wrote the court a letter recounting the ways in which the wife was allegedly mistreating him and urging the court to promptly enter a Judgment. Approximately 3 weeks later, the court issued its Judgment

granting the divorce on the grounds that the marriage was irretrievably broken. The husband was ordered to pay child support within the applicable range for 2 children plus rehabilitative alimony to wife in the form of payment of the mortgage on the marital home. After the Final Judgment was entered, husband filed a motion for new trial alleging for the first time that the parties had reconciled while living together. At the hearing on the husband's motion, both he and wife testified that he had moved back into the marital home solely to avoid foreclosure of the mortgage and that at no time after the final hearing did the parties reconcile their differences or intend to continue in the marriage. The trial court subsequently denied the husband's motion for new trial. In his appeal, the husband contended that the trial court was without jurisdiction to grant the divorce since he and wife had reconciled after the final hearing. The Supreme Court disagreed and held that although cohabitation and reconciliation may be asserted as a defense to a pending divorce, they do not divest the court of its jurisdiction to enter a divorce decree. Reconciliation is a defense to a pending divorce action, but it is not grounds to set aside a previously entered judgment. This defense should be set up prior to the entry of the final verdict. The trial court was authorized to grant the divorce based upon the finding that the marriage was irretrievably broken. Prior to the entry of the Final Judgment, the husband had within his knowledge all facts related to their purported reconciliation, but he failed to bring this evidence to the attention of the court. The Supreme Court held that he could not now complain of a judgment "that his own procedure or conduct procured or aided in causing." *Henley v. Henley*, 217 Ga. 612(124 SE2d 86) (1962). In husband's second enumeration of error, he contended that the trial court erred in awarding child support and alimony in an amount disproportionate to his ability to pay. The Supreme Court found that the trial court had correctly considered the parties' income and other assets, as well as the fact that during the marriage, the husband had prevented the wife from continuing her education while he earned two educational degrees, thereby enhancing his ability to increase his income and suppressing his wife's ability to do the same. As such, the trial court did not abuse its discretion in making the award of child support and alimony.

The Supreme Court addressed the trial court's interpretation of a Settlement Agreement in the case of *Roquemore v. Burgess*, S06A2014 (2/05/07). The parties agreed that the husband would pay the wife \$15,000.00 in consideration for her interest in the marital home and certain businesses. The \$15,000.00 was to be paid from one of three alternative sources: the proceeds from the sale of the home, husband's own funds when and if he so elected, or a life insurance policy. However, the trial court found that the husband should have sold the property within a reasonable time after the divorce and that he had not made a good faith effort to comply with the Decree. In its order, the trial court entered language addressing the value of the property, its appraisal, the listing of the property for sale, and the acceptance of any offer. The husband appealed the trial court's decision, claiming that the trial court had exceeded its authority and that its order amounted to a modification of the divorce Decree and not an interpretation. The Supreme Court agreed with the husband and reversed the trial court's finding of contempt, since there was no explicit requirement in the Agreement that the husband sell the home and no time was specified for the payment of \$15,000.00 to the wife. The cardinal rule of contract construction is to ascertain the intent of the parties at the time they entered into the Agreement. When the Supreme Court analyzed the provisions of the Agreement to reach its conclusion, it found that several parts of the Agreement were at odds with the assump-

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tion that the parties intended the home to be sold. The Agreement provided that the wife would quitclaim her interest in the home to the husband and that he would be responsible for the debt. Also, husband had the right to pay wife her \$15,000.00 before the house sells; payment from the husband's own funds would alleviate his need to sell the home. Additionally, the fact that he was to provide a life insurance policy to secure the payment of the \$15,000.00 indicated that the parties had contemplated that he might not pay her the \$15,000.00 while he was alive. Since the Agreement provided husband with two alternative sources from which he could pay wife her \$15,000.00 independent of the sale of the marital home, it contradicted the wife's assertion and the assumption made by the trial court that the husband was required to sell the home and pay wife from the proceeds. The Supreme Court found that the parties' Agreement could not be interpreted as establishing an intent of the parties that husband be required to sell the marital home and pay wife from the proceeds; accordingly, the trial court creating such a requirement amounted to a modification of the Decree and not an interpretation. Consequently, the trial court's order was reversed.

In the case of *Webb v. Watkins*, A06A2178 (2/01/07), the mother of a child born out of wedlock filed a petition to establish paternity. The father timely responded and admitted that he was the child's father and requested leave of court to legitimate the child. The trial court entered a final order, declaring the child to be the father's legitimate child and requiring the father to pay child support in the amount of \$3,000.00 per month, based upon his monthly income of \$21,666.66. Shortly after the final order was entered, the father lost his job and fell into arrears. The trial court found him in willful contempt for failure to pay child support and ordered him to pay the arrearage and an award of attorney's fees to the mother. In his appeal, the father contended that the trial court erred by finding him in willful contempt for nonpayment of his child support. The Court of Appeals disagreed with the husband, finding that there was evidence in the record to support the trial judge's determination that he had willfully disobeyed the trial court's order. At the time of the contempt hearing, the husband owned a watch valued in excess of \$8,000.00 plus he owned a home in which he had equity of more than \$7,000.00. Also, he had transferred to his ex-girlfriend a one-half interest in her one million dollar home that she had previously quitclaimed to him at the time their cohabitation began. Therefore, the trial court had met the standard of "any evidence" to support its finding of contempt and was authorized to find that the father had willfully violated his child support obligation. The Court of Appeals did reverse the award of attorney's fees to the mother, since the trial court failed to state the statutory basis under which the award was made. The father was entitled to an evidentiary hearing upon due notice and the opportunity to confront and challenge the value and need for the legal services claimed. On remand, the mother would have the burden of showing her attorney's fees and the reasonableness of these fees.

In the case of *Bailey v. Bailey*, A07A0610 (01/31/07), the father was granted custody of the parties' only child in their divorce action in Fulton County. The mother later moved to Douglas County; the father subsequently filed a complaint in Douglas County to modify her visitation rights. Before she answered the complaint, the mother filed a petition in Fulton County (where the father and child resided) seeking a change in custody to her. The Fulton court dismissed the action, *sua sponte*, reasoning that the mother's request would be better heard in Douglas County where the custody arrangements were already being litigated by the father. The mother

did not appeal this order. She subsequently filed an answer and counterclaim in the father's Douglas County case in which she sought a change in custody. The father moved to dismiss the mother's counterclaim or to have it transferred to Fulton County pursuant to O.C.G.A. § 19-9-23, which provides that a complaint seeking a change of custody must be filed as a separate action in the county of residence of the legal custodian. The court in Douglas County did not grant the motion to dismiss or transfer the counterclaim but instead transferred the entire case to Fulton County finding that, pursuant to O.C.G.A. § 19-9-62 (a), Fulton County had exclusive, continuing jurisdiction over custody. The Fulton County clerk assigned a new civil action file number to the case. In Fulton County, the father then asked the court to dismiss the mother's counterclaim pursuant to O.C.G.A. § 19-9-23. The court denied the motion and found that the father had waived this issue by asking the Douglas County court to transfer the mother's counterclaim to Fulton County. At trial, the father's petition for modification of visitation was denied and the mother's counterclaim was granted; she was awarded custody of the child. In his enumeration of error, the father claims that the trial court erred in denying his motion to dismiss the mother's counterclaim. The mother claims that the father waived this issue by failing to raise the matter earlier and by moving the Douglas County court, in the alternative, to transfer her counterclaim to Fulton County. The Court of Appeals disagreed with the mother's reasoning. A party can waive the provisions of O.C.G.A. § 19-9-23 by action or words, but the father did not do so in these proceedings. Even though he did not raise this matter as a defense in his pleadings, he was not required to do so since a counterclaim does not require an answer and automatically stands denied. O.C.G.A. § 9-11-12 (b) provides that "if a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief." Accordingly, the father was allowed to raise this matter in a motion prior to trial. Even though the father asked the Douglas County court to dismiss the mother's counterclaim or, in the alternative, to transfer it to Fulton County, he did not waive this issue. He had sought the transfer in the alternative when the primary relief he requested was the dismissal of mother's counterclaim. Seeking alternative relief did not constitute a waiver of his right to the primary relief. Additionally, Douglas County did not grant his secondary relief, since the court failed to transfer the counterclaim as the father had requested but instead transferred the entire case to Fulton County, *sua sponte*. As such, the mother's claim did not appear in Fulton County as a separate action but as an impermissible counterclaim. Furthermore, even consenting to the transfer of a case containing an illegal counterclaim did not waive the father's right to challenge the mother's failure to bring the counterclaim as a separate action. The mother claimed that since she had initially tried to assert the change of custody as a separate action in Fulton County, she was properly allowed to pursue it as a counterclaim to the Douglas County case, especially since the entire action ended up in Fulton County anyway. However, the mother ignored the fact that she had failed to appeal the Fulton County order dismissing her action. The mistaken dismissal of her case in Fulton County did not excuse the mother from appealing that ruling nor did it authorize her to pursue her case as a counterclaim, especially where statutory and case law are so definitive that such a counterclaim is impermissible. Consequently, the trial court erred in denying the father's motion to dismiss the counterclaim. Also, that portion of the judgment granting the mother's counterclaim for a change in custody was reversed.

MESSAGE FROM THE CHAIR

As I begin yet another missive I find myself hearing your inward groans of “oh no, here she goes again!”

Sorry, but I cannot help it as next month (or this month depending on when the newsletter goes out) is PRO BONO MARCH MADNESS MONTH!

The month is chock full of training and volunteer opportunities. In one month the Atlanta Bar CLE and Pro Bono Committee are offering 11 seminars supporting various Atlanta-based pro bono projects. Many of the seminars are directly tied to family issues. You can register online at www.atlantabar.org.

March 2nd is the One Child One Lawyer seminar, March 7th is Family Law for the Low Income Client, one of the largest group with unmet legal needs, March 16th is the Truancy Intervention Project, March 21st is the Grandparent/Relative Caregiver Project, and March 30th is Guardian Ad Litem Training, all of which can benefit each of us in our private practices as well. The fees range from \$30.00 - \$50.00. You can't find trainings or CLEs for less than that.

I challenge each of the larger “boutique” domestic firms to compete with one another to see how many associates, or better yet, partners, will attend one of these seminars. I challenge each of us individually to find the time to take at least one of the seminars.

Speaking of selfless, I want to thank Randy Kessler for once again putting on the “Love Hurts” Seminar for the section in February. Randy also put together an art auction which raised a tiny bit of money to be donated by our section to charity.

Finally, please mark MAY 5th on your calendars to celebrate with us at the Atlanta Zoo. Our section will co-host a zoo party with the Hispanic Bar Association and the Family Section of the Younger Lawyer's Division of the State Bar. It will be an early afternoon event with food and fun so make plans to bring your families. Given the type of work we do, this event offers an opportunity to relax and socialize with one another and to meet members of other bar organizations.

See you at Pro Bono March Madness,
Lauren

PRO BONO MARCH MADNESS

Opportunities for Family Law Members

Grandparent/Relative Caregiver Project

This project needs more volunteers – please consider it when making your choice.

Presented by Atlanta Legal Aid Society

Wednesday, March 21, 2007 from 1:00 pm - 4:15 pm

3 CLE hours, including 1 Professionalism

The Grandparent/Relative Caregiver Project trains private attorneys to conduct adoptions for the growing number of grandparents and other relatives who are raising children in the place of absent or deceased parents. Relative caregivers, many of whom are retired and living on fixed incomes, often struggle to care and provide for the new members of the household. Through an adoption, many of the problems the relative caregivers face, such as enrolling children in school and obtaining adequate medical care for the children, can be remedied. This training will provide you with the information and forms needed in an adoption from the first meeting with the client through the final adoption hearing. A typical relative adoption takes about 25 hours of work over a 6 month period.

Guardian Ad Litem Training

Presented by Atlanta Volunteer Lawyers Foundation

Friday, March 30, 2007 from 8:30 am - 5:00 pm

7 CLE hours, including 1 Ethics and 1 Professionalism

The Guardian ad Litem Program provides the judges of Fulton Superior Court with trained Guardians ad Litem to represent the best interests of minor children who are the subject of contested custody actions in their courts. Training includes presentations on the nuts and bolts of family law; the role of a Guardian ad Litem; the stages of child development; the pros and cons of various custody arrangements; the effects of domestic violence on children; the ethical issues faced by a Guardian ad Litem; and how to present findings to the court. This volunteer lawyer opportunity is perfect for non-litigators and litigators alike.

SAVE THE DATE

Please join the Atlanta Bar Association Family Law Section,
Georgia Hispanic Bar Association and the Family Law Committee, Young Lawyers Division of the State Bar of Georgia at
ZOO ATLANTA

on May 5, 2007 from 11:30 am until 3:00 pm
for their joint Spring Networking Social.

There will be something for everyone - networking, good food and plenty of time
to tour the zoo. We look forward to seeing you there!

Atlanta Bar Association
The Family Lawyer 752.06.008
400 International Tower
229 Peachtree Street NE
Atlanta, GA 30303-1601

Family Law Section Breakfast
Speakers: Joshua Berman and Richard C. Litwin
“Tax Issues in Family Law”

Thursday, March 8, 2007 at 7:30am
The Buckhead Club, 3343 Peachtree Road
\$15 pre-registered; \$18 at door
Add \$5 to receive 1 CLE hour

Name _____

Yes, I would like _____ reservation(s)
at \$15 each (\$18 at door).

Check Enclosed

Please charge AMEX/VISA/MC

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