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THE FAMILY LAWYER

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

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Quote of the Month

"Real integrity is doing the right thing, knowing that nobody's going to know whether you did it or not."

-Oprah Winfrey

JUDGE DEBORAH C. BENEFIELD ADDRESSES FAMILY LAW SECTION

By Jon Hedgepeth, Kessler & Schwartz, P.C.

The Honorable Deborah Benefield of the Clayton County Superior Court addressed the Family Law Section's monthly breakfast on October 13th.

The Judge admitted that some know her better than others, as many practitioners do not find themselves in Clayton County. So the Judge revealed her style, her peculiarities, and her procedure for practicing before her.

The Judge admitted that she is "anal" in the way she does things as a Judge and that she is extremely detail oriented. "If God is in the details, then God is not in family court" proclaimed the Judge.

Judge Benefield said that the problem with speaking to our group is that she feels she is speaking to the best lawyers, and most of her admonitions would be directed at those who are not as meticulous. The Judge warned, "be careful in the representation of our clients in the small matters as well as the large." The Clayton County bench sees bad lawyering in the family law area more often than not. "It's a 'bread and butter' way to make a living as a lawyer, and there are some who don't pay attention to the law, the changes, and the 'niceties' of the law."

Clayton County Superior Court has benefited from the Fulton County Family Law forms. Judge Benefield said that while "most pro se litigants use the forms,… the Clerk will not file them unless they cross out 'Fulton' and add 'Clayton' to them in the heading" and added "but when they get into venue, they forget all about that." Like all jurisdictions, Clayton County is seeing more and more pro se cases on both sides, making the job of the Judges more difficult.

Judge Benefield revealed that she will entertain Motions for Judgment on the Pleadings. The Judge has a checklist, copies of which she

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RECENT DECISIONS

By Melody Z. Richardson

Your client should not expect to take one position with the IRS and a different position with marital assets when it comes to gifts from parents. The Supreme Court of Georgia held that even where the husband and the husband's father testified that $40,000.00 gifted to each spouse in $10,000 increments from both parents to avoid gift taxes was intended to be a gift solely to their son, the husband, the $20,000 gifted to the wife would not be deemed the separate property of the husband. *Hayes v. Hayes,* __ Ga. __ (S05F0738 Oct. 11, 2005)(2005WL2493271). The trial court had held based upon the testimony that all $40,000 gifted to the parties to make improvements to the marital residence was the separate property of the husband, where one check from each parent was payable to the wife. The Court stated "it is impermissible to engage in 'sham transactions designed to camouflage the actual situation.' Equity will not relieve the parties from such sham agreements." The Court also held in that case that economic in-kind benefits which included the employer's contributions for life insurance, medical insurance and a retirement plan were not includable in income for purposes of determining child support, but that $350 that the husband received each month in book royalties was income for purposes of child support.

I acknowledge that I live under a rock sometimes, and I do not mean to project my lifestyle on our loyal readers, but it had totally escaped my attention with all the talk surrounding the new child support guidelines that the General Assembly amended O.C.G.A. § 19-7-22 effective July 1, 2005. Under the amendment, fathers who file a legitimation proceeding can also include claims for custody and visitation in the same action. Subsection f.1 was added as follows:

> The petition for legitimation may also include claims for visitation or custody. If such claims are raised in the legitimation action, the court may order, in addition to legitimation, visitation or custody **based on the best interests of the child standard**. In a case involving allegations of family violence, the provisions of paragraph (2) of subsection (a) of Code Section 19-9-1 shall also apply.

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brought with her, so that we will know what she is looking for prior to granting such a motion. Her clerk will go through the file and check off venue and jurisdiction, as well as whether the parties have attended the seminar for divorcing parents, etc. If everything is correct and included, the Judge will sign the Final Judgment and Decree.

In some of her cases, the Judge has assumed she is dealing with a pro se litigant when there is, in fact, a lawyer. This continues to horrify her. She says "one recurring error is child support termination language, which sometimes can make an obligor liable for support until the 'child' is 56."

Judge Benefield emphasizes detail and technicalities or "technologies" as she says they say in Clayton County. One example the Judge gave was in a criminal case. She took her usual copious notes during the State's portion of the trial, and the State apparently failed to prove venue. At the conclusion of the State's case, the Defense made, and the Judge granted, a directed verdict for the Defendant. The State argued with her, but she stood firm that venue was not proven, and the Defendant walked. The State's attorney called the local newspaper and suddenly the Judge was deemed a "friend of [the]child molester, letting people off on 'razor thin technologies.'" The Judge admitted missing the day in law school when "technologies" were taught. The gist is, we all need to pay attention to details, and should not assume we have done everything vital to a case. In the Judge's example, the attorney's carelessness had a devastating result. How could that be with good lawyering? "It's the small stuff that causes litigation," said the Judge. She added, "if we don't get it right, either we will be fixing it in the future, or the appellate court will be trying to fix it for us or sticking it to us, depending on how they decide."

More attention needs to be given to adoptions. "It seems like anyone getting out of law school feels qualified to do an adoption" said Judge Benefield, often with devastating results. Since, the statute is confusing and requires attention to detail, the Judge uses a checklist for every kind of adoption (step parent, 3rd party, etc.). She has her law clerk go through the list to make sure everything is done properly beforehand to be sure no one has to leave disappointed. The Judge explained that "the problem was that the parties and child would come, all dressed up, cameras present, and [she] would realize at the last minute that something was not done properly." She did not want to see a news story about a child being taken out of the arms of the adoptive parent because she did not do something right or that the lawyer did not do something right. Judge Benefield emphasized that "it is our moral, legal and ethical obligations to make sure it is done right."

In Agreements or Final Orders after a trial, attention to detail is paramount. In fact, she will deny some Final Orders or Agreements unless and until the necessary specificity is included so that they may be enforced at a later time. The Judge said that "lawyers are intentionally making future work for themselves."

The Judge praised Fulton County for its innovations. "We want to know how we can do things better." The Judge admitted that jury trials in domestic cases are rare in Clayton county. In her thirteen years on the bench, she has tried one or two to a jury. She added that "[she] ha[s] started mediating rather than trying cases." "After the call of the calendar,[she] will meet with the parties in the jury room, give them time to discuss the case and let them tell [her] what the client wants," added Judge Benefield. She will tell them that, if the facts come out that way, she will rule a particular way. The attorneys will go back and talk with their clients and bring the next case back. On a typical trial calendar, the Judge will have about four files going on at once. "This gives the attorney's clients a taste of reality," says Judge Benefield. The Judge said that this method has worked out very well, and that she has a lot fewer trials as a result, and, at a minimum, it starts the parties talking.

The Judge will not consider a Guardian ad Litem report without the Guardian present if the parties want to examine the Guardian's report. Judge Benefield said "it's basic due process. As a lawyer, I look at things with a jaded eye. In Clayton, we are just appointing Guardians ad litem who are lawyers. It is daunting to decide something against what the experts have said."

Judge Benefield rarely sets a temporary hearing in cases without children unless there are extraordinary circumstances. Even to get on a trial calendar she has a checklist. The Judge has never walked on the bench without looking through every file. She will know as much about the case without having talked to the client.

The Following Attorneys have taken Pro Bono Cases this past month:

Divorce:
Denise Allen
Josie Siemon

GAL:
Cate Fienning
Shawna Woods
Robert Cullen
Tara McNaull
Kimberly Haynes
Joe Farrell
Nora Kalb Bushfield
Ray Carpenter
Carmen Rojas Rafter

THANK YOU!!!

Please contact Dan Bloom at AVLF if you are able to take on a Pro Bono Case

LETTER FROM THE CHAIR

I would like to take a minute and thank a number of people who continue to contribute to this Newsletter and make this publication possible. First of all, thank you to Eileen Thomas who continues to stay on top of everyone, especially me, to ensure that articles are turned in timely and keeps this publication going. Thank you also to Tanya Herrera, our Section liaison with the Atlanta Bar. Not only does Tanya work with Eileen to produce this Newsletter, she makes sure that the breakfast meetings continue to go off without a hitch and provides many more helpful insights into the workings of the Bar. Everyone should take a few minutes to thank each of these individuals for everything they continue to do the next time you see them.

On another note, I would like to bid a final farewell, but not good-bye, to Jack Turner. As many of you may know, Jack has recently announced his retirement. When I was a younger lawyer practicing family law in Atlanta, I consider myself to have been truly fortunate to have had the pleasure to get to know Jack on both a personal and professional level. On a personal level, Jack is always ready with a kind word; on a professional level, let's just say that I appreciate having had the opportunity to learn some of the "tricks of the trade" through first hand experience. Look forward to seeing you around Jack!

And, I look forward to seeing each of you at our upcoming breakfast meetings and our luncheon in November.

Thanks to everyone for continuing to make this a great Section!

Kurt A. Kegel
Section Chair

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(Emphasis added). The statute was also amended to address the March 10, 2003 decision of *Holmes v. Traweek,* 276 Ga. 296, 577 S.E.2d 777 (2003), which held that the portion of the legitimation statute providing that a putative father could petition for legitimation of a child in the county of the father's residence, when different than the county of residence of the mother, conflicted with the state constitutional provisions for venue in civil actions, and thus ruled that portion of the statute was unconstitutional. The new venue provision states:

> A father of a child born out of wedlock may render his relationship with the child legitimate by petitioning the superior court of the county of the residence of the child's mother or other party having legal custody or guardianship of the child; provided, however, that if the mother or other party having legal custody or guardianship of the child resides outside the state or cannot, after due diligence, be found within the state, the petition may be filed in the county of the father's residence or the county of the child's residence. If a petition for the adoption of the child is pending, the father shall file the petition for legitimation in the county in which the adoption petition is filed.

Thanks to Judicial Officer Meg Dorsey for enlightening me. Thanks also to the General Assembly for doing away with the requirement that two separate actions must be filed for legitimation and custody.

COLLABORATIVE CORNER

By Susan Hurst

The Power of Positive Thinking

Litigators are trained negative thinkers. Law school prepares lawyers to look for the flaws, to see the downsides, to predict the worst-case scenarios, in order to properly protect clients. The practice of family law thrives on negative thinking. Rejected, angry spouses come into attorneys offices seeking pit bulls to carryout their bloodiest revenge fantasies. They thrive when their advocate exposes their betrothed's hidden agendas and reveals the subversive methods that the "other side" will use to prevail. They marvel when their counsel identifies with their outrage, the injustice in their lives and when they promise to make the client's cause their own.

So they expect discovery, interrogatories, depositions, surveillance, inflammatory correspondence and they believe they are winning so long as their side is the loudest. Equally intense is their shock, when their advocate shifts to language of settlement, conciliation, resolution and peace. Since settlement discussions are inevitable in almost every case, many feel betrayed at this juncture and question the loyalty of their champion attorney.

Clients in Collaborative Practice do not experience this dramatic shift in representation. Since the contractual commitment of the Collaborative process is settlement, Collaborative Practitioners speak the language of settlement from the outset. They are committed to find resolution and conciliation. Thus, they model positive thinking for their clients. Remarkably, the mere practice of positive thinking and belief in settlement facilitates the goal of settlement.

Lawyers and mediators have long known that to settle a case, the players need to believe that they can and will achieve resolution, if they work hard enough through the difficult issues. Therapists and clinicians have long known the psychological and health benefits derived from positive thinking. At the four-way Collaborative meeting (settlement conference), affirmatively stating to all representatives and clients that, "we are here to resolve our issue today and we expect to reach a settlement," goes a long way to making the goal realized. Similarly, negative thinking, along the lines of "we can't settle this case we will never get anywhere with them," dramatically decreases the possibility of success.

Modeling positive behavior and positive thinking for clients during one of the most negative times of their lives, teaches them that they can move forward, beyond and past the anger. It facilitates resolution of the case and resolution of the pain of the divorce. Collaborative Practice sanctions and encourages positive thinking from the outset and throughout the resolution process.

What's Coming Up...

Thursday, November 17 - Family Law Luncheon
Thursday, November 17 - Child Support Guidelines & Other Issues for Middle Income Divorce Clients

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Family Law Section Luncheon Honoring Fulton County Superior Court Judges
with guest speaker,
Presiding Justice, Carol W. Hunstein
Supreme Court of Georgia

Thursday, November 17, 2005 at noon
Georgia Railroad Depot
$20 pre-registered; $25 at door

Name ______________________________

❒ Yes, I would like _____ reservation(s) at $20 each ($25 at door).

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❒ Please charge AMEX/VISA/MC

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