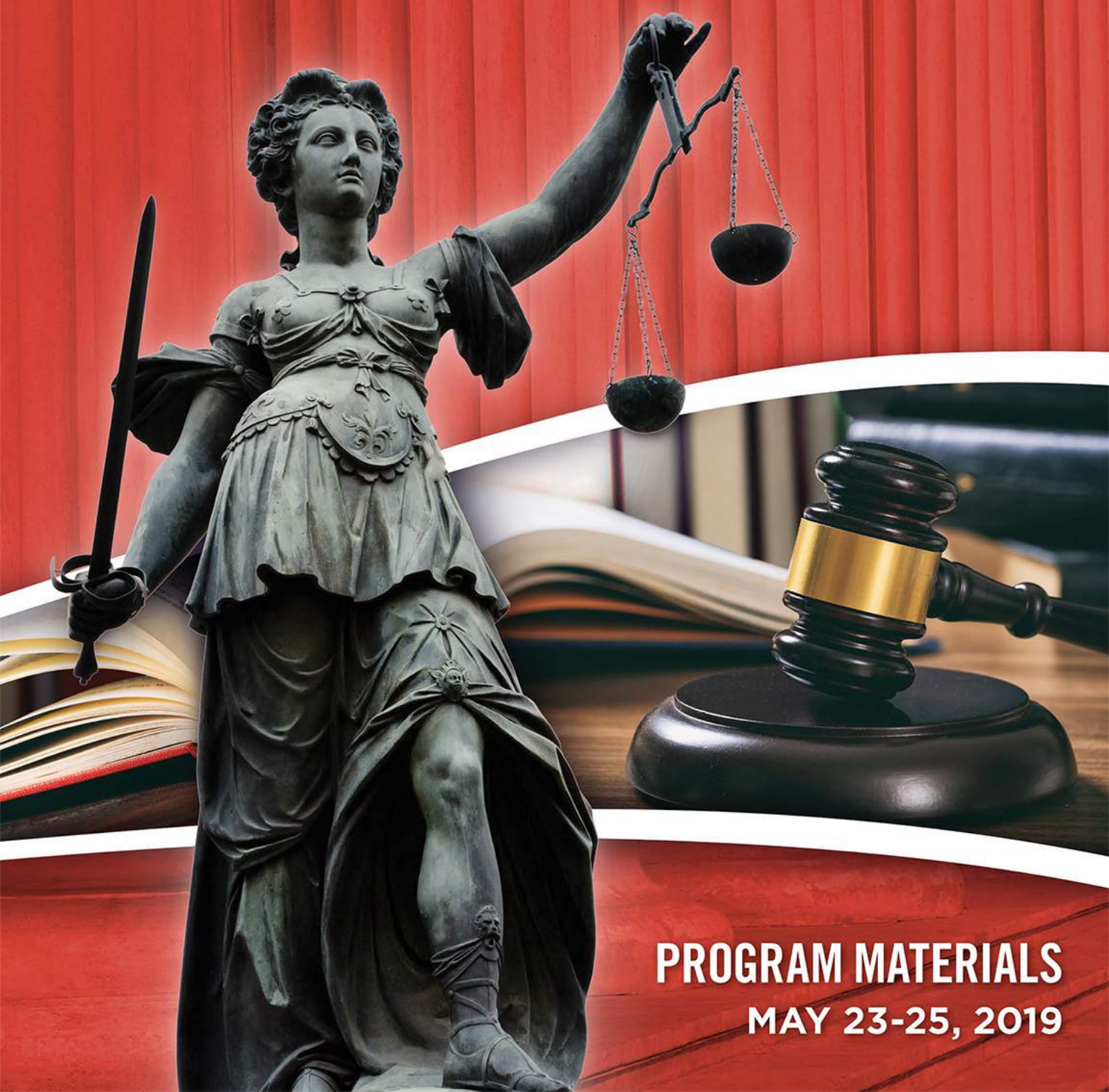
ICLE | 37TH ANNUAL FAMILY LAW INSTITUTE



PROGRAM MATERIALS

MAY 23-25, 2019

Thursday-Saturday, May 23-25, 2019 **ICLE: State Bar Series**

37TH ANNUAL FAMILY LAW INSTITUTE

16.5 CLE Hours

1 Ethics Hour | 2 Professionalism Hours | 3 Trial Practice Hours

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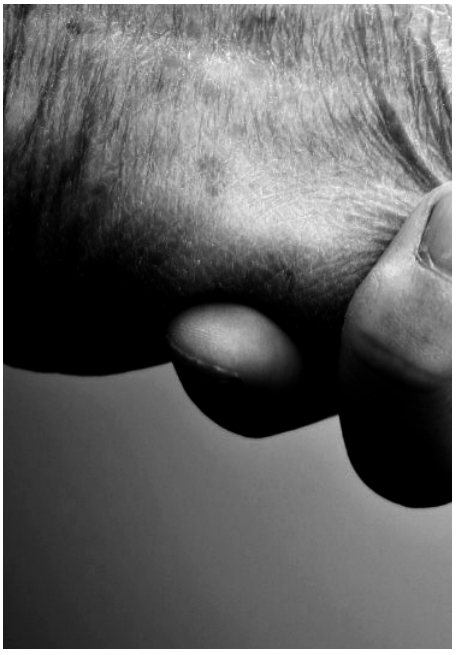
Printed By:

State Bar of Georgia

INSTITUTE OF CONTINUING LEGAL EDUCATION

HOW CAN WE HELP YOU?



Who are we?

SOLACE is a program of the State Bar of Georgia designed to assist those in the legal community who have experienced some significant, potentially life-changing event in their lives. SOLACE is voluntary, simple and straightforward. SOLACE does not solicit monetary contributions but accepts assistance or donations in kind.

How does SOLACE work?

If you or someone in the legal community is in need of help, simply email SOLACE@gabar.org. Those emails are then reviewed by the SOLACE Committee. If the need fits within the parameters of the program, an email with the pertinent information is sent to members of the State Bar.

What needs are addressed?

Needs addressed by the SOLACE program can range from unique medical conditions requiring specialized referrals to a fire loss requiring help with clothing, food or housing. Some other examples of assistance include gift cards, food, meals, a rare blood type donation, assistance with transportation in a medical crisis or building a wheelchair ramp at a residence.

Contact SOLACE@gabar.org for help.

The purpose of the SOLACE program is to allow the legal community to provide help in meaningful and compassionate ways to judges, lawyers, court personnel, paralegals, legal secretaries and their families who experience loss of life or other catastrophic illness, sickness or injury.

TESTIMONIALS

In each of the Georgia SOLACE requests made to date, Bar members have graciously stepped up and used their resources to help find solutions for those in need.

A solo practitioner's quadriplegic wife needed rehabilitation, and members of the Bar helped navigate discussions with their insurance company to obtain the rehabilitation she required.

A Louisiana lawyer was in need of a CPAP machine, but didn't have insurance or the means to purchase one. Multiple members offered to help.

A Bar member was dealing with a serious illness and in the midst of brain surgery, her mortgage company scheduled a foreclosure on her home. Several members of the Bar were able to negotiate with the mortgage company and avoided the pending foreclosure.

Working with the South Carolina Bar, a former paralegal's son was flown from Cyprus to Atlanta (and then to South Carolina) for cancer treatment. Members of the Georgia and South Carolina bars worked together to get Gabriel and his family home from their long-term mission work.

Contact SOLACE@gabar.org for help.

FOREWORD

Dear ICLE Seminar Attendee,

Thank you for attending this seminar. We are grateful to the Chairperson(s) for organizing this program. Also, we would like to thank the volunteer speakers. Without the untiring dedication and efforts of the Chairperson(s) and speakers, this seminar would not have been possible. Their names are listed on the **AGENDA** page(s) of this book, and their contributions to the success of this seminar are immeasurable.

We would be remiss if we did not extend a special thanks to each of you who are attending this seminar and for whom the program was planned. All of us at ICLE hope your attendance will be beneficial, as well as enjoyable. We think that these program materials will provide a great initial resource and reference for you.

If you discover any substantial errors within this volume, please do not hesitate to inform us. Should you have a different legal interpretation/opinion from the speaker's, the appropriate way to address this is by contacting him/her directly.

Your comments and suggestions are always welcome.

Sincerely,
Your ICLE Staff

Jeffrey R. Davis
Executive Director, State Bar of Georgia

Rebecca A. Hall
Associate Director, ICLE

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AGENDA

Presiding:

ivory t. brown, Program Chair, ivory t. brown, p.c., Atlanta, GA

WEDNESDAY, MAY 22, 2019

6:00 **EARLY CHECK-IN**
(All attendees must check in upon arrival.)

7:00 **MOVIE NIGHT**

THURSDAY, MAY 23, 2019

7:00 **REGISTRATION AND CONTINENTAL BREAKFAST**
(All attendees must check in upon arrival. A jacket or sweater is recommended.)

7:15 **BREAKFAST AT TIFFANY'S (1961)**
FIRST TIMER'S BREAKFAST

8:00 **OPENING REMARKS**
ivory t. brown, Program Chair, ivory t. brown, p.c., Atlanta, GA

8:10 **WIZARD OF OZ (1939)**
FACING YOUR FEARS: LIONS AND TIGERS AND BEARS, OH MY!
Bankruptcy, Real Property, Tax and Trusts
Will Rountree, Rountree Leitman & Klein, Atlanta, GA Bankruptcy Section
Aimee D. La Tourette, Schulten Ward Turner & Weiss LLP, Atlanta, GA Real Prop Section
Jason Wiggam, Wiggam Geer, Atlanta, GA Taxation Law Section
Abbey Flaum, Cohen Pollock Merlin Turner, PC, Atlanta, GA Elder and Fiduciary Sections

9:10 **TO KILL A MOCKINGBIRD (1962)**
Considering and Countering Cognitive Bias in our Courts and with our Clients: What it is and Why it Matters
Elizabeth E. Berenguer, Associate Professor & Director of Upper Level Writing, Norman Adrian Wiggins School of Law, Campbell University, Raleigh, NC
Andrea Cooke, BSW, MFT, Developmental Director, The Southern Center for Choice Theory, Macon, GA
Tomieka R. Daniel, Supervising Attorney, Georgia Legal Services Program, Macon, GA
Rebecca A. Hoelting, Hoelting & McCormack, LLC, Atlanta, GA
Teri A. McMurtry-Chubb, Professor of Law, Mercer University, Macon, GA

10:10 **INTERMISSION**

10:20 **WEB OF EVIDENCE (1959)**
Evidence Fundamentals for The Family Lawyer
Michael S. Carlson, Assistant District Attorney, Cobb County, Marietta, GA
Ronald L. Carlson, Fuller E. Callaway Chair of Law Emeritus, University of Georgia School of Law, Athens, GA

11:20 **DOUBLE INDEMNITY (1954)**
Temporary Hearings: Instant Relief or Temporary Insanity: Judges Weigh In
Moderator: E. Noreen Banks-Ware, E.N. Banks-Ware Law Firm, LLC, Lithonia, GA
Hon. Gregory A. Adams, Stone Mountain Judicial Circuit
Hon. Glen A. Cheney, Atlantic Judicial Circuit
Hon. Belinda E. Edwards, Atlanta Judicial Circuit
Hon. Horace J. Johnson, Jr., Alcovy Judicial Circuit
Hon. Randolph "Randy" G. Rich, Gwinnett Judicial Circuit
Hon. Paige R. Whitaker, Atlanta Judicial Circuit

12:00 **INTERMISSION**

12:10 **BRINGING UP BABY (1938)**
The Changing Face of Family: ART, IVF and Surrogacy
Lila N. Bradley, Claiborne Fox Bradley LLC, Atlanta, GA
David B. Purvis, The Manely Firm PC, Savannah, GA

12:40 **THE CHILDREN'S HOUR (1961)**
Same Sex and LGBT Issues in Family Law
William T. "Will" Davis, Naggiar & Sarif, LLC, Atlanta, GA
Donna-Marie P. Hayle, Ney Hoffecker Peacock & Hayle LLC, Atlanta, GA
Elizabeth L. "Beth" Littrell, Southern Poverty Law Center, Atlanta, GA

1:10 **THE ODD COUPLE (1968)**
Custody Considerations and Co-Parenting for the Unmarried Parent: Tips from the Bench, Guardian ad Litem and Counselor
Honorable Amanda S. Petty, Ocmulgee Judicial Circuit
Tamika Hrobowski-Houston, Judicial Officer, Fulton Superior Court
Howard Drutman, PhD, Atlanta North Psychotherapy Center, Roswell, GA
Amy Kaye, Ellis Funk, Atlanta, GA

1:40 **ANATOMY OF A MURDER (1959)**
Ethics and Professionalism: Pressing Issues in Our Practice
Moderator: B. Lane Fitzpatrick, Law Office of Lane Fitzpatrick, Danielsville, GA
Hon. LaTisha Dear Jackson, Stone Mountain Judicial Circuit
Hon. Carol Hunstein, Retired Justice, Georgia Supreme Court
Hon. Robert D. Leonard, II, Cobb Judicial Circuit
Hon. Denise Marshall, Dougherty Judicial Circuit
Hon. Michael Muldrew, Ogeechee Judicial Circuit
Hon. Gail S. Tusan, Atlanta Judicial Circuit
Hon. Holly W. Veal, Flint Judicial Circuit
Hon. Timothy R. Walmsley, Eastern Judicial Circuit

2:20 **INTERMISSION**

2:30 **WITNESS FOR THE PROSECUTION (1957)**
Interlopers in Family Matters: Fraudulent Real Property Transfers and Other Conduct Considerations in Divorce
Leron E. Rogers, Lewis Brisbois Bisgaard & Smith, LLP, Atlanta, GA
Celeste Findlay Brewer, Bell & Washington, LLC, Atlanta, GA

2:50 **THE END**

2:50 **OPTIONAL ACTIVITIES (GOLF, TENNIS, YOGA, SPA)**
For more activities to do with friends and family, please visit website to make your reservations (not included in registration fee): https://rebrand.ly/familylaw-activities

6:30 **WELCOME RECEPTION**

7:00 **CASABLANCA (1942)**
Red Carpet and Opening Night Dinner and Awards Ceremony
(Open to all participants, pre-registration required.)

LegaLetters – TedTalks from the Court of Appeals of Georgia:
Hon. Elizabeth Gobeil, Hon. Steve Goss,
Hon. Ken Hodges, Hon. Todd Markle, Hon. Christopher McFadden
Hon. Brian Rickman

9:00 **OPENING NIGHT PARTY WITH DJ "KP THE GREAT"**

FRIDAY, MAY 24, 2019

6:00 **YOGA ON THE BEACH**
(Registration required.)

7:00 **REGISTRATION AND CONTINENTAL BREAKFAST**

SIGNS OF THE TIMES

8:00 **WHO'S AFRAID OF VIRGINIA WOOLF (1966)**
Evolving into a Tech Savvy Law Firm
T.C. Whittaker II, PwC New Ventures, Atlanta, GA

8:15 **12 ANGRY MEN (1958)**
Bar Necessities: Tips for Handling Client Complaints, Lawsuits and Other Indignities
Megan E. Zavieh, Zaviehlaw, Atlanta, Professional Liability Section

8:55 **THE WOMEN (1939)**
Make New Friends, but Keep the Old: Professionalism and Social Media
Erin H. Gerstenzang, EHG Law Firm, Atlanta, GA

9:55 **INTERMISSION**

CUSTODY CONSIDERATIONS:
THE IMPACT AND IMPORT OF TIE BREAKING DECISIONS

10:00 **INHERIT THE WIND (1960)**
Deciphering Learning Differences and Other Educational Considerations
Hon. A. Gregory Poole, Cobb Judicial Circuit
Dawn R. Smith, Smith & Lake LLC, Decatur, GA

10:30 **THE BAD SEED (1956)**
The Impact of Childhood Trauma and Other Mental Health Matters
Hon. Christopher S. Brasher, Atlanta Judicial Circuit
Sheri T. Lake, Smith & Lake LLC, Decatur, GA
Kim Oppenheimer, PhD, Atlanta Psych Consultants, LLC, Atlanta, GA

11:00 **THE MIRACLE WORKER (1962)**
People with Disabilities: Securing Access on Myriad Fronts
Hon. Joseph H. "Joe" Booth, Piedmont Judicial Circuit
Kurt Lawton, Sarah Floyd Blake, P.C., Augusta, GA
Kristen Lewis, Smith Gambrell & Russell, LLP, Atlanta, Elder, Fiduciary Law Section
Cameo Appearance by Etnie, Canine Assistants Spokes dog**
**Available for one-on-one canine therapy sessions after the presentation.

11:30 **INTERMISSION**

11:35 **CAT ON A HOT TIN ROOF (1958)**
Mental Health, Addiction and Accountability: The Crisis on Our Corners: Changing Courts to Handle Changing Communities
Moderator: Jeff Davis, Executive Director, State Bar of Georgia, Atlanta, GA
Hon. Cynthia C. Adams, Douglas Judicial Circuit
Hon. Verda M. Colvin, Macon Judicial Circuit
Hon. Ann B. Harris, Cobb Judicial Circuit
Hon. Asha F. Jackson, Stone Mountain Judicial Circuit
Hon. T. David Lyles, Paulding Judicial Circuit
Hon. Eric W. Norris, Athens Clark Judicial Circuit
Hon. Kathryn M. Schrader, Gwinnett Judicial Circuit
Hon. R. Ashley Wright, Augusta Judicial Circuit

12:25 **A MAN FOR ALL SEASONS (1966)**
Navigating Religion in Family Law
Aisha Rahman, The Baig Firm, Norcross, GA

12:45 **A STREETCAR NAMED DESIRE (1951)**
The Rush Towards the Robe
High Conflict Personalities in Family Law
Megan Hunter, MBA, CFO, High Conflict Institute, San Diego, CA

1:20 **INTERMISSION**

MATINEE SESSIONS

SESSION A

1:30 **MISTER 880 (1950)**
Funny Money in Family Law: Bitcoin and Crypto Currency
David G. Sarif, Naggier & Sarif LLC, Atlanta, GA

2:00 **IT'S A WONDERFUL LIFE (1946)**
Financial Bootcamp: Advanced
Ansley Callaway, Callaway & Company, LLC, Atlanta, GA
Laurie Dyke, IAG Forensics and Valuations, Marietta, GA
Elizabeth Garrett, Frazier & Deeter, Atlanta, GA
Deborah Gibbon, Gibbon Financial Consulting, Marietta, GA
Sherri Holder, The Holder Group, Marietta, GA
Paul Tigner, Fairshare Financial PC, Atlanta, GA
Brad Whitfield, Coastal Consulting Management Group, Savannah, GA

2:30 **AAML: BRING YOUR FILE**

SESSION B

1:30 **DIVORCE AMERICAN STYLE (1967)**
Child Support: Deviations, Imputing Income and Other Emerging Issues
Lori Anderson, Atlanta Legal Aid, Atlanta, GA

2:00 **A RAISIN IN THE SUN (1961)**
Marketing and Social Media
Sean Ditzel, Abernathy Ditzel Hendrick Bryce, LLC, Marietta, GA
Melanie Fenwick Thompson, Fenwick Thompson & Associates, LLC

2:20 **THE PARENT TRAP (1961)**
Arbitration, Collaboration and Mediation— Tools to Tame the Beast
Divida Gude, Judicial Officer, Fulton Superior Court
Georgia Lord, Radford & Keebaugh, LLC, Decatur, GA
Louis Tesser, Tesser Mediation, LLC, Sandy Springs, GA

2:50 **THE END**

3:00 **GUESS WHO'S COMING TO DINNER (1967)**
Diversity Luncheon (RSVP required)

7:00 **COCKTAIL HOUR AND ENTERTAINMENT:**
SPECIFIC DEVIATIONS

8:00 **KARAOKE NIGHT**

SATURDAY, MAY 25, 2019

6:15 **MEDITATION WALK**

7:00 **REGISTRATION AND CONTINENTAL BREAKFAST**

8:00 **IMITATION OF LIFE (1959)**
When Immigration Law and Family Law Matters Collide
Nilufar "Nilu" Abdi-Tabari, Law Office of Nilu Abdi-Tabari, Roswell, GA
Alpa S. Amin, Georgia Asylum and Immigration Network, Atlanta, GA
Judith Delus Montgomery, Law Office of Judith Delus, P.A., Atlanta, GA
Jesus A. Nerio, Law Office of Jesus Nerio, Atlanta, GA

8:40 **YOURS, MINE AND OURS (1968)**
Trending Topics in Military Law
Patty D. Shewmaker, Shewmaker & Shewmaker LLC, Tucker, GA
Steve P. Shewmaker, Shewmaker & Shewmaker LLC, Tucker, GA
Hon. J. P. Boulee, Stone Mountain Judicial Circuit
Hon. Ural D.L. Glanville, Atlanta Judicial Circuit
Helen W. Yu, Flanagan Law and Mediation PC, Augusta, GA

9:20 **SWEET SMELL OF SUCCESS (1957)**
Managing the Light: Media Management for Your Firm and Client
Randall M. Kessler, Kessler & Solomiany LLC, Atlanta, GA

9:50 **INTERMISSION**

10:00 **ALL THAT HEAVEN ALLOWS (1955)**
Star crossed...it's over easy – Successfully Handling Difficult and Easy Divorces
Laura Wasser, Wasser, Cooperman and Mandles, P.C.;
Founder & CEO it's over easy, Los Angeles, CA

10:40 **THE SNAKE PIT (1948)**
Caselaw and Legislative Update
Courtney Dixon, Atlanta Legal Aid, Atlanta, GA
Samantha Fassett, Johnson Kraeuter, Savannah, GA
Rebecca Salmon, Access to Law, Norcross, GA
Ashley Sawyer, Sawyer Family Law, Roswell, GA

11:20 **THREE FACES OF EVE (1957)**
Personality Disorders and the Family:
Alleviating the Impact of Personality Disorders on Families and Early Intervention in the Personality Development of Children
Frederic Bien, Personality Disorders Awareness Network, Atlanta, GA

11:50 **INTERMISSION**

12:00 **HUSH...HUSH, SWEET CHARLOTTE (1964)**
How to Deal with High Conflict Opposing Counsel and the Future of Family Law
Bill Eddy, High Conflict Institute, San Diego, CA

12:30 **WHO'S AFRAID OF VIRGINIA WOOLF (1966)**
(continued)
Evolving into a Tech Savvy Law Firm
T.C. Whittaker II, PwC New Ventures, Atlanta, GA

1:00 **A STAR IS BORN (1954)**
Law Practice Management and Technology
Design Thinking for Lawyers:
Transform Your Law Practice with UX Design
Zach Pousman, CEO, Helpfully

1:30 **THE END**

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Wizard Of Oz (1939)
Facing Your Fears: Lions And Tigers And Bears, Oh My!
Bankruptcy, Real Property, Tax And Trusts

Presented By:

Will Rountree
Rountree Leitman & Klein
Atlanta, GA

Aimee D. La Tourette
Schulten Ward Turner & Weiss LLP
Atlanta, GA

Jason Wiggam
Wiggam Geer
Atlanta, G

Abbey Flaum
Cohen Pollock Merlin Turner, PC
Atlanta, GA

SELECTED BANKRUPTCY ISSUES FOR THE FAMILY LAW PRACTITIONER

Will Rountree
Rountree & Leitman, LLC
Atlanta, Georgia
404-584-1244

There are six types of bankruptcy cases, each designated by the chapter of the Bankruptcy Code under which the case is filed: A Chapter 7 case is a straight liquidation, which may be filed by either a business or a consumer; Chapter 11 is a reorganization available to both businesses and consumers, although utilized mostly by businesses; Chapter 13 is a consumer reorganization, or payment plan; Chapter 12 is specific to family farmers and fishermen; Chapter 9 is specific to municipalities; and Chapter 15 covers cross-border cases involving debtors and assets located in multiple countries. The relevant chapters for clients generally are Chapters 7, 11, and 13:

Chapter 7 – A Chapter 7 case is a straight liquidation, which can be filed by either a business or a consumer. Individual debtors may be subjected to a "means test" to determine income eligibility for Chapter 7. However, if the majority of the individual's debt is "non-consumer debt," then the means test is not applicable and the individual will qualify for Chapter 7 regardless of income. Examples of "non-consumer debt" include personal guarantees given to creditors of a debtor's business, credit cards or home equity loans used to fund a business, and even personal income tax debt.

Once a Chapter 7 case is filed, a trustee is appointed from the local standing panel of trustees to administer the case. The trustee becomes the owner of all property of the Debtor, except property allowed as exempt in individual cases. Georgia has "opted out" of the federal

exemption scheme provided in the Bankruptcy Code; the Georgia exemptions are encoded at OCGA Section 44-13-100. The vast majority of Chapter 7 filings are "no asset" cases, meaning that the trustee does not administer any assets or make any distributions to creditors. A knowledgeable lawyer generally will not file a case under Chapter 7 if the debtor's equity in any asset exceeds the amount that can be exempted. Most "asset" cases result from the trustee exercising powers to avoid preferences, fraudulent transfers, etc. The typical "no asset" Chapter 7 case lasts approximately 5 months. "Asset" cases can last many years.

Chapter 13 – In a Chapter 13 case, a debtor proposes a payment plan to resolve all or part of the debt from future income over a period of three to five years. The case is administered by a Chapter 13 Trustee, a quasi-governmental office that accepts payments from the debtor, makes distributions to creditors, and generally oversees the case. If the debtor is able to get a plan confirmed at the beginning of the case and complies with all payments and other plan provisions over the three-to-five year life of the plan, then the debtor receives a discharge upon completion. Chapter 13 provides for a "super-discharge," whereby a debtor can discharge categories of debt that cannot be discharged under other Chapters, such as non-support obligations owed to an ex-spouse. *See infra.* NOTE: the Supreme Court held recently that a creditor is bound by a confirmed Chapter 13 plan where the creditor fails to object to confirmation, even if the plan violates statutory protections to which the creditor is clearly entitled. Therefore, it is extremely important that creditors review the Chapter 13 plan and file a timely objection to protect their interests.

Chapter 11 – A Chapter 11 case may be filed by a business, or by an individual whose aggregate secured and/or unsecured debt exceeds the respective limits for filing a Chapter 13 reorganization – currently $1,184,200.00 secured and $394,725.00 unsecured. Unlike a Chapter

7 or 13 case, a trustee is not automatically appointed on the filing of the bankruptcy petition. Rather, there is a presumption that a debtor should remain in control over the administration of the estate. Upon the filing of a Chapter 11 case, the Debtor becomes a "Debtor-in-possession" and continues to operate its business through pre-petition management under court supervision, unless and until the court appoints a Chapter 11 trustee for cause. A Chapter 11 case may be filed to attempt reorganization of the Debtor's business (or personal finances, in the case of an individual) or to attempt an orderly liquidation. In the context of liquidation, a debtor's principals will often choose Chapter 11 over Chapter 7 so as to retain control of the liquidation process and to maximize the value of the estate assets in an orderly wind down of the business. This is a particularly attractive notion to principals who are personally guaranteed on the business debts, and have a personal interest in generating dollars for creditor claims. One of the principal uses of Chapter 11 is to allow the Debtor to sell real or personal property free and clear of liens, with liens attaching to sale proceeds in order of priority. The sale of estate assets free and clear of liens does not require confirmation of a plan, but merely an Order of the Court granted after 21 days' notice to parties in interest. As a practical matter, sales free and clear of liens are utilized far more often than plans of reorganization and liquidation.

A. The Automatic Stay

The most basic element of bankruptcy is the automatic stay of 11 U.S.C. Section 362. When a bankruptcy case is filed, the automatic stay goes into effect immediately to act as an injunction against almost all collection actions against the debtor. However, there are some important exceptions to the automatic stay, particularly in the family law context. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") added

amendments limiting the application of the automatic stay in a number of family law matters. Section 362(b)(2) now provides that the automatic stay does not act as an injuction:

- (A) of the commencement or continuation of a civil action or proceeding--
  - (i) for the establishment of paternity;
  - (ii) for the establishment or modification of an order for domestic support obligations;
  - (iii) concerning child custody or visitation;
  - (iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or
  - (v) regarding domestic violence;
- (B) of the collection of a domestic support obligation from property that is not property of the estate;
- (C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;
- (D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act [42 USCS § 666(a)(16)];
- (E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act [42 USCS § 666(a)(7)];
- (F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act [42 USCS §§ 664 and 666(a)(3)] or under an analogous State law; or
- (G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act [42 USCS §§ 601 et seq.];

11 U.S.C. Section 362(b)(2).

Some of these exceptions to the automatic stay are fairly straightforward, but others can be quite ambiguous. For instance, there is frequently considerable disagreement over whether a particular obligation constitutes a "domestic support obligation" as defined under the Bankruptcy Code. *See infra.* Whether particular property constitutes property of the bankruptcy estate might

also require complex analysis. A bankruptcy court can impose sanctions, including actual and punitive damages, for a violation of the automatic stay. Therefore, it is recommended that a creditor consult bankruptcy counsel before assuming that any of the above-listed exceptions apply.

B. Domestic Support Obligations.

The BAPCPA defined the term "domestic support obligation" in Section 101(14A) of the Bankruptcy Code:

(14A) The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is--

- (A) owed to or recoverable by--
  - (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
  - (ii) a governmental unit;
- (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
- (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of--
  - (i) a separation agreement, divorce decree, or property settlement agreement;
  - (ii) an order of a court of record; or
  - (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
- (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. Section 101(14A).

Debts qualifying as domestic support obligations ("DSOs") are subject to special treatment in a number of bankruptcy contexts. As discussed in the previous section, there are exceptions to the automatic stay for the collection of DSOs. Moreover, DSOs cannot be discharged under any Chapter of the Code, and must be paid in full in order to confirm a plan under Chapter 11, 12 or 13. DSO arrearages receive first priority claim status under Section 507 of the Code, and the debtor must remain current on post-petition DSO payments under Chapters 11, 12 and 13.

Whether a debt qualifies as a DSO is determined under federal bankruptcy law, though state law can be instructive. The Eleventh Circuit has instructed bankruptcy courts to look to the substance of the obligation to determine whether it is actually in the nature of alimony, maintenance, or support. The labels placed on the obligation by the parties or the trial court are not controlling. The party seeking to establish that a debt is a non-dischargeable DSO bears the burden of proof.

Bankruptcy courts' construction of Section 101(14A) has been inconsistent, but the following factors have been considered in determining whether an obligation is actually in the nature of alimony, maintenance or support:

- Disparity in earning capacities;
- Relative business opportunities;
- Physical condition;
- Future financial needs;
- Educational backgrounds;
- Number and age of children;

- Length of marriage;
- Whether the agreement includes a waiver of support rights;
- Whether payments terminate on death or remarriage; and
- Benefits that each party would have received if the marriage had continued.

When drafting agreements and orders, the family law practitioner should:

- Include a detailed discussion of the factors that were considered in arriving at the award, bearing in mind the evidentiary factors that bankruptcy courts consider under Section 523(a)(5) of the Code; and
- Structure payment obligations to be received directly by the other party and to terminate upon death or remarriage.

C. Discharge of Property Settlements and Other Non-Support Obligations

Prior to the BAPCPA, property settlements owed to an ex-spouse could be discharged under certain circumstances. That can now be accomplished only under Chapter 13. Under the other Chapters of the Code, Section 523(a)(15) now prevents discharge of all debts owed "to a spouse, former spouse, or child of the debtor" and that are "incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit." 11 U.S.C. Section 523(a)(15). It is no longer necessary for a creditor to file an adversary complaint to determine the dischargeability of a debt under Section 523(a)(15).

D. Fee Awards

One issue that frequently arises is whether a debtor can discharge attorney fees that were awarded directly to the non-debtor spouse's law firm. Such fee awards are usually found to be in the nature of support and thus non-dischargeable. Even where the award is found not to be in the nature of support, some courts have ruled the award non-dischargeable under Section 523(a)(15). However, the case law is not consistent on this issue, and counsel should be aware that these types of fee awards can be subject to discharge.

With regard to fees that the debtor owes directly to its own attorney, courts have consistently held that these are not domestic support obligations and are dischargeable.

Facing Your Fears: Lions and Tigers and Bears, Oh My!

Real Property Considerations for the Family Law Practitioner

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I. Introduction

In the family law context, real estate primarily comes into play as an asset to be apportioned among the parties as part of the divorce settlement, a practice that family law attorneys are familiar with. However, there are considerations specific to real property that a family law attorney should be cognizant of, both during and after the asset allocation, to help protect their clients and to avoid problems that may arise many years after the divorce is settled.

II. Background

Georgia real property law operates primarily off record title, which provides constructive notice of any and all matters of record in the real estate (aka the "deed") records of the Superior Court of the County where the property lies. There are two important limitations: (i) such records must be properly indexed by the County Clerk, such that they can be located in an examination of the records; and (ii) the record must fall within the chain of title, meaning during a time period when the party to the instrument had an interest in the real property.

Georgia is also a race-notice state, so notice to third parties is effective upon recordation, but the first to record is the first to give such notice. Therefore, if a party does not record a document in the real estate records which effectuates a transfer of interest in real property, there is no notice to third parties. Likewise, if two parties have a competing interest in real property, then the first party to record their instrument has the superior claim (absent statutory claims of superior priority or facts outside the record that may be proven in a suit).

Because of these factors, it is vital that a family law practitioner understand how the real estate records impact a client's claim, and how to place a client's claim on title to real property in the real estate records.

III. Start with a Title Search.

A formal examination and abstract of the real estate records for the property in question, commonly referred to as a title search, is performed by examining the real estate records in the county where the property lies. Title examinations as performed based on name and legal description of the property, not by street address. The title examination will provide a report of any and all matters affecting the property, including outstanding mortgages[1], real estate (ad valorum) taxes, liens which attach to the property, suits against the current owner(s) which may attach to the property, and other types of claims against the property, together with copies of all documents. A title search will also provide copies of all the deeds transferring title to the property, including the most recent deed into the current owners, called the vesting deed. The vesting deed has a few pieces of useful information, including the legal description for the property, and the exact way the owner(s) presented their name on the real estate records.

There are many companies that offer title search services, including both attorney's offices who can provide a legal opinion on the state of title, and non-attorney examiners, who will merely abstract the documents located in the real estate records[2].

While all this information can be very useful for purposes of apportioning the assets and attendant liability of the parties, there is a caveat of caution, which can also be a way to provide additional value to your client. Because title examinations are performed based on name searches,

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[1] The term "mortgage" is used as a colloquial reference throughout this paper. Georgia rarely uses a mortgage deed as a form of security instrument to secure a loan, but instead uses a Security Deed, also called a Deed to Secure Debt, but the real estate community still commonly refers to them colloquially as "mortgages".

[2] *See* O.C.G.A. 15-19-53, which provides that only attorneys may "express, render or issue any legal opinion as to the status of the title to real or personal property." *See also* Hines v. Holland, 334 Ga. App. 292, 296-97, 779 S.E. 2d 63, 68 (2015), holding that the attorney who renders an opinion on title is liable for malpractice for errors in that opinion "even when the defendant attorney does not personally perform. It is therefore recommended that, unless the family law practitioner is comfortable reading a title search, or will not rely on the same, that an attorney's opinion of title be obtained.

many liens, judgments, and other documents that do not include a legal description may be reported which are not actually against one of the owners, but against someone with a similar or the same name. In the real estate closing world, this is often cleared up as part of the closing transaction by a "not-me" Name Affidavit, where the person with the similar name states in the Affidavit that the liens or judgements are not against them. As a family law practitioner, if your client is receiving the property as part of the asset allocation, it can be a good time to get a "not me" affidavit for the party being removed from title and record it along with the deed transferring title, so there is no question later on if and when your client goes to sell the property.

IV. Transfer Ownership in the Real Estate Records

For many litigators, the Final Judgement is the end of the case (at least until an appeal is filed). However, in any case involving the transfer of real property from one party to another, the Order declaring that one party is entitled to the real property is not the end and may be a stumbling block for effectuating the transfer itself. Remember, notice of that award is not effective as to third parties until it is recorded in the real estate records of the County where the property lies.

Instead, a good Final Judgement will declare that title to the real property is vested in one of the parties, and if a transfer of title is required to effectuate such ownership, that the party who is being divested shall execute a deed to convey their interest in the real property to the other party. This may be accomplished via a quit claim deed releasing any and all interest the divesting party has in and to the property.

V. Consider Requiring a Refinance

While the "not me" Name Affidavit can help clear title as to liens or judgments on title that are not against one of the owners, liens (including mortgages) against the actual owners are valid and will remain attached to the property. Since these were often debts that were incurred during

the marriage, the parties should consider how the liability will be allocated after the divorce is completed.

In particular, it is useful to consider whether the mortgage should be refinanced. Although the parties' financial situation may preclude a refinance immediately after transferring title, it is important for the party who is relinquishing title to have their name removed from the mortgage. A quit claim deed will not release a party from any mortgage or other lien that attached to the property by virtue of that person's ownership. Therefore, the person who is losing title to the property will still have personal liability on the mortgage and will be a party to any foreclosure action that occurs as a result of default on the mortgage, despite no longer having an ownership interest in the property.

VI. File Affidavits to Provide Notice of Name Changes

As mentioned previously, title examinations are performed by name search. Therefore, it is very useful to provide notice on the real estate records when an owner's name changes, such as when they take their maiden name after a divorce. An Affidavit of Name Change, with a cross-reference to the vesting deed, can be used to place this notice in the real estate records, and will help simplify the process when they go to sell the property, likely under their new name. If the party is receiving title through a quit claim deed, another alternative is to make sure that the party is recited as "formerly known as" (such as Mary M. Johnson, formerly known as Mary M. Smith). This helps ensure that future title examiners and future real estate attorneys can confirm that this is one and the same person, and not two different individuals.

VII. Take Care of the Pesky Details

Finally, there are technicalities for formatting and execution of a recordable instrument which anyone preparing or filing a deed should be aware of, and details that can trip up non-real estate practitioners.

1) Documents must be formatted correctly to be eligible for recording. Paper must be either letter or legal sized and must contain a 3" margin at the top of the first page[3].

2) Georgia requires original ("wet-ink") signatures on documents conveying title to real property, with the maker signing in front of two additional witnesses[4], one of whom is the unofficial witness, and one of whom is the "official" witness, generally a notary public[5]. Georgia no longer accepts notary acknowledgements (when a party acknowledges to the notary that they are the person who signed and that it is their signature) – instead, the signature must be attested (the notary must actually see the signing of the document and attest that it was signed in their presence).

3) Pursuant to HB 1036, passed in the 2016-2017 Georgia Legislative Session, and effective as of May 8, 2018, Fulton County now requires that the Parcel ID number for the property (or if being subdivided, the parent tract) is shown on the face (first page) of the document. Be sure to clearly label it as "Parcel ID Number".

4) A PT-61 (Transfer Tax Declaration form) is required to be filed with all deeds conveying title to real property. Go to http://apps.gsccca.org/pt61efiling/PT61.asp and follow the directions to complete the form. You will need a mailing address for the Seller (Grantor) and Buyer (Grantee), together with the Map & Parcel Number from the real estate tax records. There is an

[3] *See* O.C.G.A. § 15-6-61(a)(10).
[4] *See* O.C.G.A § 44-14-61.
[5] *See* O.C.G.A. § 44-2-15, which provides that an official witness may be a judge of court of record, a notary public, or a clerk or deputy clerk of a superior court, provided that such clerk or deputy clerk may attest an instrument only in the county where they hold their office.

Exemption to Transfer Tax for "Divorce Based Transfer", but a deed transferring title to real property cannot be filed with the Clerk of Superior Court Real Estate Records without the PT-61 form.

4) Cross-references are helpful, especially to bring matters that may be otherwise "outside the chain of title" into the chain by reference to other documents already in the chain. If something relates to a previously recorded document, include a memo to the clerk to cross-reference your instrument to the book and page provided.

Example:

Note to Clerk: Please cross reference to Warranty Deed at Book 123, Page 456, Bacon County, Georgia records.

5) If a party is signing under Power of Attorney, a copy of the power of attorney which authorizes the party to transfer the real property referenced in the instrument must also be filed in the real property records. If an original is not available, or is not otherwise eligible for recording, a copy may be attached as an exhibit to the instrument signed under that same power of attorney.

6) In Georgia, a Trust cannot hold title to a property, so the grantee of a deed must always list the current Trustee of the Trust and should state "as Trustee" as the party's title[6].

Example:

Invalid: Mary M. Johnson Revocable Living Trust
Valid: Mary M. Johnson, as Trustee for the Mary M. Johnson Revocable Living Trust
Valid (with potentially unintended consequences): A. Devious Crook, Trustee for the Mary M. Johnson Revocable Living Trust

8) HB 288 was passed in the 2018-2019 Georgia Legislative Session, and provides that, beginning on January 1, 2020, most real estate recording fees will be a flat fee of $25.00.

[6] *See* Revised State Bar of Georgia Title Standards, §8.1 (2016): "Subject to the provisions of O.C.G.A. Sections 14-05-46 through -50, when the sole word "Trustee" follows the name of a party to an instrument, and no trust is declared and no beneficiary is named either in the instrument or in any other recorded instrument in the chain of title, the word "Trustee" is merely surplusage and the named person takes title for his own use free from any trust".

37th Annual Family Law Institute: Lights, Camera, Action – Reel to Real Family Law
"Wizard of Oz: Facing Your Fears: Lions and Tigers and Bears, Oh My! Bankruptcy, Property, Tax and Trusts" (Thursday, May 23, 8:10 AM Session)
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Tax problems are more common than you may think. Currently, about 26 million taxpayers are facing a federal or state tax issue. These taxpayers are not criminals; they are regular people with good intentions and a tax issue that is beyond their control. Maybe those individuals are dealing with financial issues, loss of employment, or an illness in their family. Or perhaps they are going through a divorce and are unsure exactly how to file their taxes or who is responsible for the financial obligations now that the family is divided. This paper examines some of the primary tax issues addressed during a divorce or in family law litigation, including liability and payment options.

Tax Considerations in Divorce

For Federal Income Tax purposes, a taxpayer is considered married if he or she is legally married on the last day of the taxable year (December 31). They are unmarried if he or she is divorced prior to the last day of the taxable year. Before the court enters a final divorce decree, an individual should carefully consider how they want to file taxes – the timing of the divorce and filing status can dramatically influence the amount of income tax liability. Who, for example, will claim the children as dependents on their taxes? In previous tax years, spouses could negotiate who would claim the dependency exemption to reduce their income. Under the current Tax Cuts and Jobs Act, the Child Tax Credit provides up to $2,000 relief for taxpayers with qualifying children. (That exemption is phased out if the parent, filing separately, earns more than $200,000 annually). The Tax Cuts and Jobs Act also eliminated the income tax deduction for those who pay alimony and alimony is no longer income to the recipient.

It is important to make sure that any property divisions caused by the divorce do not produce a taxable gain to the parties. Internal Revenue Code Sec. 1041(a) provides that a transfer of property to a former spouse incident to divorce will not cause the recognition of gain or loss by the transferor. A transfer is considered "incident to divorce" if the transfer occurs within one year

after the date on which the marriage ceases or is "related to the cessation of the marriage." To be "related to the cessation of the marriage," the transfer must be made pursuant to a divorce or separation agreement (this includes modification or amendment to the decree or settlement agreement) and no later than six years after the date on which the marriage ended.

Unfiled Tax Returns – Joint and Several Liability

Many married taxpayers choose to file a joint tax return because of the benefits related to this filing status. However, when filing jointly, both of those taxpayers are jointly and severally liable for the taxes as well as any interest or penalties arising from the joint tax return – even if that couple later divorces. (Joint and several liability means that each taxpayer is legally responsible for the entire tax liability). This is true if one spouse earned all of the income, if one spouse improperly claimed deductions/credits, or even if the couple's divorce decree states that one spouse will be responsible for any amounts due on previous jointly-filed tax returns. But there is relief available, in the form of the innocent spouse relief rules.

Innocent Spouse Relief

The Innocent Spouse Relief rules are provisions of the U.S. tax code that allows a spouse/taxpayer to seek legal and financial relief from any penalties resulting from an error(s) made by the other spouse on their joint tax return. (Most commonly, that error is unreported income or inflated deductions). Innocent Spouse Relief provides an individual relief from additional taxes owed due to the other spouse failing to report income, improperly reporting income, or improperly claiming deductions/credits on the joint tax return. To be eligible for this relief, the taxpayer must: 1) have filed a joint return with an erroneous understatement of tax relating directly to his or her spouse, 2) have had no knowledge of this error, 3) apply for relief within two years of the Internal Revenue Service (IRS) initiating collection, and 4) establish that based on all facts and circumstances it is fair to relieve the taxpayer of the tax in question.

Separation of Liability relief provides for the separate allocation of additional tax owed between an individual and his or her former spouse (or current spouse they are legally separated from) when

an item was not properly reported on a joint tax return. The individual is then responsible for the amount of tax allocated to them. This form of relief is also only available if the tax liability at issue resulted from the other spouse failing to report income, improperly reporting income, or improperly claiming deductions/credits on the joint tax return and the requesting spouse had no knowledge of the erroneous item(s).

Equitable Relief is the only type of innocent spouse relief an individual can obtain if the couple jointly filed a tax return but did not pay the tax due when the return was filed. It also may apply when an individual would not qualify for separation of liability or innocent spouse relief for item(s) the other spouse did not properly report on the joint tax return. The IRS applies a multi-factor test when determining whether a taxpayer qualifies for Equitable Relief. Generally, if the taxpayer has more factors in their favor than against, they will be entitled to equitable relief. The factors the IRS consider include: (1) whether the parties are separated or divorced, (2) whether the taxpayer would suffer significant economic hardship if relief is not granted, (3) whether the other party has a legal obligation to pay the tax liability pursuant to a divorce decree or agreement, (4) whether the taxpayer received a significant benefit from the unpaid taxes, (5) whether the taxpayer has made a good faith effort to comply with tax laws after the year at issue, (6) whether the taxpayer knew, or had reason to know, that their former spouse did not intend to pay the taxes, (7) the taxpayer's mental or physical health, and (8) whether the taxpayer was the victim of abuse by their former spouse.

Tax Crimes and Resulting Penalties

Filing tax returns is a detailed and complicated process, and as such, it can be easy for your average taxpayer to make a minor mistake. But there is a difference between accidental errors and intentional ones. There are several actions which the IRS considers tax crimes. An intentionally unfiled tax return is a misdemeanor crime; a person can face criminal charges if their tax return was due within the last six years. Penalties include up to one year in jail and $25,000 in fines for each year the person failed to file the return. Tax fraud, also known as tax evasion, is the purposeful and illegal attempt to evade assessment or payment of a federal tax. This includes affirmatively concealing assets to avoid payment of taxes and filing false returns that omit income or claims

deductions to which the taxpayer is not entitled. Tax fraud is a felony carrying up to three years in prison and $100,000 in fines.

The IRS has a voluntary disclosure program that incentivizes taxpayers to proactively disclose their unfiled or underreported tax liabilities. In exchange for correcting their tax problems for the last six tax years, qualified taxpayers will usually receive immunity from criminal prosecution. The Georgia Department of Revenue has a similar program that provides even greater financial benefits for the taxpayer who discloses their tax issues. The Department of Revenue will normally only require a taxpayer to file the last three years of their missing tax returns or amend if they were already filed, and the state will waive all penalties – regardless of how long the tax returns have not been filed.

Should You Pay Your Tax Liability?

Some individuals who owe tax liability – whether through their own fault or because of their former spouse's actions – may ask themselves whether they should pay those liabilities. Owing a substantial amount of money is a bad enough situation, but owing additional penalties and interest can make those financial hardships even worse. Additionally, the penalties become more severe if the taxpayer does not file on time. With a late filing penalty, the taxpayer is charged 5% per month on the unpaid tax liability for every month the tax return is filed after the deadline. The maximum late filing penalty that can be charged is 25%. The IRS also charges a penalty if a taxpayer's tax liability is not paid in full by the deadline. With the late payment penalty, the taxpayer is charged .5% a month until the unpaid tax is paid in full. This amount is reduced to .25% a month if the taxpayer enters into an installment agreement. The maximum late payment penalty that the IRS can charge is also 25%. If both late filing and late payment apply, the late payment penalty is reduced by 2.5% for a total potential penalty of 47.5%.

The IRS charges interest on any unpaid tax from the due of the tax return until the date the tax is paid in full and any penalties charged until they are also paid in full. The interest rate charged by the IRS is determined quarterly and consists of the federal short-term rate plus 3%. The current interest rate charged by the IRS is 6%.

What If You Cannot Pay Your Taxes?

Even if you cannot pay the IRS the full taxes owed, it is still a good idea to file your return on time – or else face late filing penalties. If you cannot afford one lump sum payment, the IRS offers payment plans (also known as installment agreements). These agreements help make paying delinquent tax liabilities easier by allowing an extended time frame for payment. A taxpayer should request an IRS payment plan if he or she believes they will be unable to pay their taxes owed, in full, within a specific time frame.

If a taxpayer is unable to pay the IRS through a payment plan, it is possible that the taxpayer could qualify to have their tax liability placed into Currently Not Collectible (CNC) status. The IRS will not attempt to collect a tax liability while a taxpayer is in CNC status. However, the IRS will continue to accrue interest and penalties, will file a federal tax lien, and will keep any refunds and apply them to the outstanding debt. In general, the IRS has a statute of limitation of 10 years and 30 days to collect a tax debt from a taxpayer after the assessment of the taxes. After that period expires, the tax liability is usually written off. Many taxpayers who qualify for CNC status will never pay the tax liability in full, and it will be written off in the future once the statute of limitation expires.

An Offer in Compromise (OIC) is an agreement between the taxpayer and the IRS that settles the individual's tax liabilities for less than the full amount owed. Typically, taxpayers will not qualify for an OIC if he or she can pay their tax liabilities in full through an installment agreement or by other means. The IRS will not accept an OIC agreement unless the amount that the taxpayer offers to pay is equal to or greater than the reasonable collection potential (RCP). The RCP is how the IRS measures a person's ability to pay their tax liabilities. The IRS calculates RCP by taking the equity in a taxpayer's assets, discounted up to 20%, plus the taxpayer's ability to repay the IRS on a monthly basis, multiplied by 12. The IRS may accept an Offer in Compromise if: 1) there is doubt that the amount owed can be collected in full (ex: taxpayer owes more in taxes than the value of their income and assets), 2) there is doubt or a genuine dispute as to the correct tax liability, or 3) there is no doubt that the tax liability is accurate and that the full amount can be collected, but

because of exceptional circumstances, requiring a payment in full would be unfair or would create an economic hardship for the taxpayer.

Preventing Tax Liens on Property

An individual with a tax liability who will need to sell their property post-divorce or as the result of family law litigation should be concerned about the prospect of a tax lien. When a person neglects or fails to pay a tax debt over $10,000, the IRS protects its interest in their property (ex: real estate, personal property, other financial assets) by filing a Notice of Federal Tax Lien. This is a public document alerting creditors that the government has a legal right to your property. The lien attaches to all of the taxpayer's current assets as well as future assets acquired during the duration of the lien – which can include business assets and accounts receivable. The Federal Tax Lien (FTL) may limit a person's ability to get credit, although FTLs are generally no longer reported on credit reports.

The easiest way to avoid an FTL is to pay your taxes on time, and in full. But if you cannot pay the full amount, and you owe less than $50,000, you can apply for a Streamlined Installment Agreement (SLIA). Under an SLIA, the taxpayer agrees to a 72-month payment plan via automated direct debits or payroll deductions. In exchange, the IRS will not file an FTL.

The IRS does not immediately file an FTL against a taxpayer once the debt is owed. It is possible to delay the filing of a lien by six months to a year in certain circumstances by understanding how the IRS collection process works and not taking any action(s) that would cause a lien to be filed earlier than normal.

Finally, one can also avoid the filing of an FTL by explaining to the IRS how the filing of the lien would not be in the government's best interest – meaning that the government would collect significantly less from the taxpayer if the lien were filed. For example, if the federal tax lien would jeopardize the taxpayer's employment or professional licensing, the IRS may not file the Federal tax lien as they would stand to collect more if the taxpayer remains gainfully employed.

Whistleblowers

For those who observe or have knowledge of criminal tax activity (whether through their family law litigation or otherwise), the IRS Whistleblower Office will pay money to individuals who "blow the whistle" on others who fail to pay their taxes. The office, established by the Tax Relief and Health Care Act (2006), assesses and analyzes tips received from people who spot tax issues in their workplace or in other situations. Investigators look for specific, credible information about significant tax problems – not tips resulting from personal problems or other minor disputes. If the investigators determine that the tip is credible and the IRS uses the whistleblower's information, that whistleblower may receive an award of up to 30% of the tax penalties collected. Last year (2018), the IRS collected an additional revenue of $1.4B through its whistleblower program. In turn, the office awarded more than $312M to those tipsters.

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Estate Tax Overview

Under the current tax laws, each individual taxpayer may leave an unlimited amount of assets to his or her spouse completely estate tax free and, in 2019, may transfer a total amount of assets valued at up to $11,400,000 (a taxpayer's "gift tax exemption," if used during life, and "estate tax exemption," if used following death) to others.[1] All transfers to non-spouse beneficiaries (e.g. children) above this limit are subject to a gift or estate tax at a current rate of forty percent (40%).[2]

For years, very wealthy families established dynastic trusts to last for several generations in order to continually escape the application of the estate tax to the wealth held therein. In order to ensure that the Federal government would be able to tax wealth as it passes from each generation to the next, Congress imposed a generation-skipping transfer (GST) tax, which taxes any transfers of property above a certain threshold (a taxpayer's "GST exemption") to or for the benefit of individuals more than one generation level below the transferor (e.g. grandchildren and individuals more than 37½ years younger than the transferor). The GST exemption is also $11,400,000 in 2019, but unlike the estate tax exemption, any unused GST exemption may not be inherited by the surviving spouse under the rules for portability (see information re: portability below).

The "Tax Cuts and Jobs Act," signed into law in 2017, increased the gift tax exemption, the estate tax exemption and the GST exemption to their current $11,400,000 levels. Such increased exemptions, however, are scheduled to expire on December 31, 2025. Unless Congress legislates otherwise in the interim, the estate tax exemption and the GST exemption will revert back to 2017 exemptions of $5,000,000 (adjusted for inflation).[3]

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[1] See IRC Sec. 2010(c)(3).
[2] See IRC Sec. 2001(c).
[3] IRC Sec. 2010(c)(3).

Estate planners serve an important role in helping individuals to implement various techniques and strategies to minimize or eliminate their estate, gift and GST tax burdens, while passing assets to their loved ones.

Portability of Estate Tax Exemption

"Portability" is a relatively new addition to the tax law, providing that, to the extent an individual taxpayer fails to "use" up his or her estate tax exemption, the unused estate tax exemption (the "Deceased Spouse Unused Exclusion" or the "DSUE") may be "ported" to the surviving spouse (if any).[4] In other words, if John and Jane are married and John leaves his entire estate to Jane (thereby leaving his entire estate tax exemption untouched), Jane may elect to port John's $11,400,000 of estate tax exemption to herself, thereby providing her with a total exemption of $22,800,000. Portability of the DSUE requires an affirmative election by the executor (or personal representative) of the estate of such deceased spouse.[5] This affirmative election requires not only the cooperation of the executor (or personal representative) of the estate of such deceased spouse, but also the filing of an IRS Form 706 (United States Estate (and Generation-Skipping Transfer) Tax Return), which is typically a very costly return to have prepared.

Since the ability to elect portability can only be beneficial to a surviving spouse and not detrimental to the first deceased spouse's estate (except for the cost associated with the preparation of a Form 706), the inclusion of language addressing portability in marital agreements to require a deceased spouse's estate to cooperate with a surviving spouse who wishes to elect portability, and to manage the cost associated with such a return, can only provide extra value to clients negotiating prenuptial and postnuptial agreements.

The following is an example[6] of such a portability provision:

[4] See IRC Sec. 2010(c)(4).
[5] IRC Sec. 2010(c)(5)(A).
[6] For Example Only; consult with an estate planning attorney for fact-specific language applicable for your client.

Deceased Spouse Unused Exclusion. JANE and JOHN agree that the personal representative of the estate of the first of the parties to die (referred to herein as the "Decedent") will, at the survivor's request, timely file any and all documents necessary to make the election provided in § 2010(c)(5) of the Internal Revenue Code of 1986, as amended by § 303(a) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, the Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, or any similar or corresponding law, for the deceased spousal unused exclusion amount with respect to the Decedent's estate to be available to be taken into account by survivor of the parties and the survivor's estate. Said documents may include, but are not necessarily limited to, an estate tax return for the Decedent's estate even if such estate does not owe any Federal estate tax upon the Decedent's death. If the survivor makes said request and the Decedent's estate would otherwise not be required to file an estate tax return or other necessary documents in order to make the election, the survivor shall make the arrangements for the preparation of said estate tax return (or necessary documents in connection with said election) and pay the cost of preparing said estate tax return or other documentation and all other costs incurred in connection with said election. The Decedent's personal representative shall fully cooperate with the preparation, execution and filing of the necessary documents (including said estate tax return) and shall promptly furnish all documents and information as shall be reasonably requested for that purpose.

Trusts

Fundamentally, a trust is the result of the separation of legal and equitable title in assets.[7] The legal titleholder (known as the "trustee") holds and manages the trust assets for the benefit of the beneficial owner (known as the "beneficiary"). The individual who establishes the trust is referred to as the "grantor," "settlor," or "donor."[8] Trusts are extremely flexible and can serve any lawful purpose.[9] In the estate planning and asset protection arenas, trusts are generally categorized as revocable or irrevocable.

As the name suggests, revocable trusts are trusts ones in which the grantor reserves in himself the right to alter, amend, modify, and revoke the trust during his lifetime. Although such revocable trusts provide no asset protection, revocable trusts afford privacy and serve as a substitute for a Last Will and Testament. Unlike an individual's Last Will and Testament, which must be admitted to probate (and therefore live in the public records), there is no corresponding requirement under Georgia law to provide a copy of the testator's revocable trust to the probate court.

More importantly, revocable trusts serve to avoid probate of the trust assets. Simply put, probate is the process of proving an individual's will under supervision of the probate court in order to marshal the assets titled in his name upon death. Although, with properly drafted estate documents, probate in Georgia is relatively simple and inexpensive, any individual residing in and/or owning real property in a state in which probate is expensive (e.g. Florida), or who has real property located in multiple states should consider the creation of a revocable trust as part of his estate planning. Under a typical scenario, such individual should transfer (retitle) all of his taxable assets to his revocable trust so that, upon his death, all of his property will be owned by his revocable (now irrevocable) trust and no assets will be held in his name, thereby subject to probate. The trustee of the revocable trust will then carry out the dispositive terms of such trust. (As mentioned earlier, the "pour over" Will is important to ensure that any assets that the grantor failed to transfer during life are transferred to such trust by the Executor of his estate.

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[7] See Peach Consol. Properties, LLC v. Carter (278 Ga. App. 273, 275 (2006)).
[8] For purposes of this article, the author will use only "grantor."
[9] O.C.G.A. 53-12-22.

Unlike revocable trusts, irrevocable trusts are trusts in which the grantor does not retain any right to alter, amend, modify or revoke the trust. Assets held by an irrevocable trust are generally protected from the creditors of the beneficiaries of such a trust by means of properly-worded "spendthrift" clauses.[10] Courts, however, will not enforce such clauses if the grantor and beneficiary of the trust are the same individual.[11] That is, although legislators are working to change the laws in Georgia, self-settled trusts currently offer no asset protection to the grantor in Georgia. Only a handful of states provide such protection. In addition to providing no asset protection for self-settled trusts, Georgia also provides no asset protection to trust assets with respect to claims against a beneficiary for alimony and child support.[12] Thus, a beneficiary's child or former spouse may access trusts for the beneficiary's benefit to satisfy their claim for child support or alimony regardless of whether such trust was established and funded by such beneficiary or a third party.

Aside from claims for alimony, the grantor may generally exclude a former (or soon-to-be former) spouse from benefiting from the trust assets. The grantor decides who will be included in the class of beneficiaries and to what degree each person such person will benefit, affording nearly limitless possibilities. Consequently, a properly drafted trust instrument will not only exclude the former spouse from the class of beneficiaries but will also exclude the soon-to-be former spouse from using the trust assets as a resource from which to pay legal fees during the divorce proceedings.

In Gibson, the Georgia Supreme Court faced an issue involving the use of trusts in the family law context.[13] Although the facts in Gibson do not involve self-settled trusts, the case does address an important issue: the extent to which one spouse may transfer assets to an irrevocable trust, thereby diminishing the assets subject to equitable division.

The facts of Gibson are relatively simple:

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[10] O.C.G.A. 53-12-80.
[11] See O.C.G.A. 53-12-80(f).
[12] O.C.G.A. 53-12-80(d).
[13] 301 Ga. 622 (2017).

> Husband established two irrevocable trusts during the marriage. Wife was a beneficiary of such trusts provided that she was married to Husband. Husband was neither a beneficiary nor a trustee of the trusts. Although Husband retained significant assets in his name, he transferred over 50 percent of his property to these trusts. Importantly, Husband did not conceal these transfers from Wife. Until Wife filed for divorce, she was unaware of the existence of, and her beneficial interest in, these trusts. She had only seen an envelope bearing the name of one of the trusts which Husband stated was "for tax purposes." During the divorce proceedings, Wife sought to include the assets of the trust as part of the marital estate, to be subject to equitable division.

The Georgia Supreme Court held that, absent fraud, the trust assets were not a part of the marital estate. The court found important the fact that Husband, although transferring the bulk of his assets, retained a significant portion of his assets. The result may have been different if Husband's transfer of assets would have rendered him insolvent.

When consulting with a client about a potential future divorce, the involvement of an estate planner early on in the process may be a transformative addition in your client's overall financial picture and estate planning.

Estates – Probate, Non-Probate, and Taxable Estates

No discussion of the U.S. estate tax system would be complete without discussing probate estates, non-probate estates and taxable estates. A probate estate consists of all of the assets owned by the decedent in his or her name at death or are payable to the decedent's estate. Examples include the decedent's home (if owned solely in his or her name or owned as a tenant-in-common), bank accounts, and life insurance payable to the decedent's estate. Immediately upon death, these assets become property of the estate. After payment of relevant expenses and debts of the decedent, the probate estate will pass to the beneficiaries in accordance with the terms of the decedent's last will and testament or, if the decedent dies without a valid last will and testament, the applicable state's intestacy statute.

A non-probate estate, on the other hand, consists of all of the assets of the decedent which are not probate assets. Generally, these are assets that pass by beneficiary designation (e.g., life insurance paid to someone other than the decedent-insured) or operation of law (e.g., real property held as "joint tenants with rights of survivorship"). A review of titling and beneficiary designations is important for both estate planners as well as family law practitioners.

Whereas the terms "probate estate" and "non-probate estate" involve property rights and their devolution under state law, a "taxable estate" is a technical term relevant for purposes of computing the decedent's federal estate tax liability. The "taxable estate" is calculated as (i) the "gross estate," increased by (ii) certain lifetime gifts, and reduced by (iii) certain allowable deductions (e.g., marital and charitable estate tax deductions). The "gross estate" includes, inter alia, assets in the probate estate and, to a certain degree, assets in the non-probate estate. Notably, the decedent's "gross estate" may include death benefits payable under life insurance policies on the life of the decedent if the decedent retained sufficient incidents of ownership over the life insurance policies.[14]

Family law practitioners must pay careful attention to the appropriate definition of "estate" in order to avoid confusion related to an individual's "estate" in a marital agreement or settlement agreement.

Year's Support

Year's support is a term used to describe the interest of the surviving spouse and minor children in the decedent's estate. On a basic level, "year's support" is requested by a surviving spouse of a court to provide him or her with "a year's worth of support," as determined in his or her judgment.

Most individuals intend that, in the event of death, his/her assets will pass to his/her spouse, and then, after the death of the surviving spouse, to the children. If, however, an individual who is married with children dies without a will in Georgia, his estate will be divided equally among his

[14] See IRC Sec. 2042.

spouse and children, with the spouse receiving no less than one-third of his estate. If a surviving spouse files a petition for year's support and the children are cooperative, probate assets in the decease spouse's estate may possibly be redirected entirely to the surviving spouse.

Importantly, the right to petition for year's support is, as a matter of state law, in addition to any and all rights the surviving spouse may have under the decedent's last will and testament. Consequently, to prevent the surviving spouse from taking probate property both under the terms of the last will and testament and as an award of year's support, practitioners often include provisions in the last will and testament that force the surviving spouse to elect. Such clauses state that the provisions made for the surviving spouse in the last will and testament are in lieu of year's support.

Priority of Claims

A noteworthy point for family law practitioners relates to the priority of creditors of an estate to be paid. Georgia law[15] provides:

"Claims against the estate of a decedent shall rank in the following order: Year's support for the family;

1) Funeral expenses, whether or not the decedent leaves a surviving spouse, in an amount which corresponds with the circumstances of the decedent in life, including the physician's bill and expenses of the last sickness. If the estate is solvent, the administrator or executor is authorized to provide a suitable protection for the grave of the decedent;
2) The necessary expenses of administration;
3) Unpaid taxes or other debts due the state or the United States;
4) Debts due by the decedent as executor, administrator, or guardian for an estate committed to him as such, or any debt due by the decedent as trustee, when he has had actual possession, control, and management of the trust property;

[15] O.C.G.A. 53-7-91

5) Judgments, mortgages, and other liens created during the lifetime of the decedent, to be paid according to their priority of lien. Mortgages and other liens on specific property shall be preferred only to the extent of such property;
6) Debts due for rent;
7) All liquidated demands, including foreign judgments, dormant judgments, bonds, all other obligations in writing for the payment of money, promissory notes, and all debts the amount due on which was fixed and ascertained or acknowledged in writing prior to the death of the decedent; and
8) Open accounts.

Countless marital and settlement agreements erroneously provide that a payor spouse's obligations may be secured by life insurance but that, if such life insurance is not in place at the time of his or her death, the payee spouse has a "first charge" against the payor spouse's estate. With the above explanation of the different meanings of "estate" and the fact that a payee spouse cannot take first place in the list of creditors to be paid following a deceased spouse's death, it should be clear that alternatives to securing a payor spouse's obligations (e.g. up-front funding of a child support trust) are often necessary.

Life Insurance

Life insurance is often times utilized as a mechanism to secure satisfaction of the financial obligations of the payor spouse in settlement agreements. Often times, however, important details related to life insurance administration remain unaddressed in settlement agreements. For instance, minor children should not be listed as beneficiaries of a life insurance policy. Listing minor beneficiaries will require resorting to the judicial system to claim the death benefits under the life insurance policy and may require the posting of an annual surety bond, thereby reducing the benefits ultimately passing to the beneficiaries. Irrevocable life insurance trusts provide an appropriate alternative to the designation of minors as beneficiaries and may be drafted with significant flexibility. Family law attorneys should consult with estate attorneys when drafting life insurance provisions of a marital or settlement agreement to ensure that all appropriate language and information necessary for the trust drafter to do his or her job is properly worded and included

in such an agreement At a minimum, trust related provisions of a marital or settlement agreement should address trusteeship, beneficiaries, and distribution standards.

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To Kill A Mockingbird (1962) Considering And Countering Cognitive Bias In Our Courts And With Our Clients: What It Is And Why It Matters

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IMPLICIT BIAS: WHAT IT IS AND WHY IT MATTERS TO YOUR PRACTICE

Panelists: Elizabeth Berenguer, Andrea Cooke, Tomieka Daniel, Rebecca Hoelting, & Teri McMurtry-Chubb

I. What is implicit bias?

The term "implicit bias" has become trendy in sophisticated circles. Amongst professionals, academics, and other learned people, the phrase might be tossed about as a new "dirty word" with negative connotations, or it might be used to imply a certain level of enlightened existence. For those who understand it from the negative perspective, it feels like an insult to be told, "you are biased." The reality, however, is that we are all biased; bias is a naturally-occurring cognitive and psychological phenomenon, not an insult. The danger of bias is not that it exists; rather, the danger is that when left unchecked, it can lead to erroneous assumptions, exclusion, unfairness, injustice, and inequality.

To understand what implicit bias is, it is helpful to understand a bit about how the brain operates. In her essay, *The Color of Fear: A Cognitive-Rhetorical Analysis of How Florida's Subjective Fear Standard in Stand Your Ground Cases Ratifies Racism*,[1] panelist Elizabeth Berenguer explains that

> the theory of embodied rationality posits that the human brain cannot process new and abstract information without first connecting it to an existing experience.[2] Existing life experience provides a framework for understanding the meaning of new information. Importantly, we do not just *discover* the meaning of new information—we *construct* it.
>
> Metaphors, stereotypes, heuristics, and biases are the building blocks for constructing reality. Metaphors create neural shortcuts that imply broad meanings

[1] 76 U. Maryland L. Rev.726 (2017).

[2] MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 259 (2002); *see also* Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 280–82 (2011); Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 J. LEGAL WRITING INST. 127, 136 (2008); Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 WILLAMETTE L. REV. 255, 259 (2009).

when mere words or shorter phrases are expressed.[3] For example, the phrase "welfare queen" is a metaphor that carries with it certain implications regarding race, gender, social status, and value.[4] Metaphor is one of the devices by which culturally salient concepts are constructed.[5] Stereotypes often arise from metaphors to provide organized pictures of the world that offer information about entities, relations, objects, and acts.[6] Stereotypes do not just provide information about these groups; rather, they provide the basis for evaluating the value, status, and position of the groups.[7] Heuristics are the devices by which the brain utilizes neural shortcuts such as metaphors and stereotypes to "reduce complex decisions to simpler assessments."[8] At times, the ultimate assessment produces an incorrect or wrong conclusion or decision. A bias exists when those wrong conclusions or decisions are predictable.[9]

II. How does implicit bias appear in the legal context?

For lawyers, the issues of bias are two-fold: pre-law school life experiences and law-related life experiences. As lawyers, we are all biased in certain ways based on our life experiences, and we are also biased in the way we understand legal issues and the law because of the way we have learned the law. In law school, we are taught that "to communicate as a lawyer—to be heard—the writer or speaker must become a member of the culture and community of legal practice."[10] The reality is that when we write legal arguments and orally advocate for our clients, we are "creating and constructing law."[11]

Consider for example the legal syllogism, which are taught is the sine qua non of legal reasoning from the very first day of law school:

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[3] Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 BOSTON C.J.L. & SOC. JUST. 233, 240 (2014) ("[H]uman thought is defined by metaphors.").
[4] *Id.* at 242–43.
[5] Jörg Zinken, *Metaphors, Stereotypes, and the Linguistic Picture of the World: Impulses from the Ethnolinguistic School of Lublin*, METAPHORIK.DE, no. 7, 2004, at 115, 120, http://www.metaphorik.de/en/journal/07/metaphors-stereotypes-and-linguistic-picture-world-impulses-ethnolinguistic-school-lublin.html.
[6] *Id.* at 116.
[7] *Id.*
[8] Richardson & Goff, *supra* note **Error! Bookmark not defined.**, at 298.
[9] *Id.*
[10] Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider,* 103:1 Dickson Law Review 7, 8 (1998).
[11] *Id.* at 22

A. All men are mortal

B. Socrates is a man

C. Therefore, Socrates is mortal

This syllogism defines categories which we must presume to be clear – "men" and "mortal" and it forces us to accept these categories as true. Although we study law chronologically in a way that reveals an evolution of legal thought and malleable categorization, we are not taught to question that categorization. It is often presented as an amorphous, distant process that occurs by learned judges who, *sua sponte*, see the error inherent a certain precedent. We are also taught to check our life experiences at the door. Points of view that differ from accepted categorizations are typically rejected; we are encouraged to replicate existing patterns of thought instead of participating in the evolution of the law.

Law school socializes us to walk and talk like lawyers, but "its effectiveness in 'socializing' law students comes at the price of suppressing"[12] our personal voices. This suppression is especially problematic as it impacts law students who have historically been marginalized by legal language.[13] Often, there is tension between our pre-law life experience biases and our law-related biases, and we inevitably carry these biases with us into practice.

The challenge with how we, as lawyers, think about, write about, and argue about the law and legal issues, is that we accept certain constructs that privilege certain positions, people, and voices over others. In other words, we accept as true the categories and constructs as presented, and it often does not even occur to us to question the veracity of the category or construct itself. Furthermore, outsider perspectives that could ably ask these questions are muted in the law because

[12] *Id.* at 9
[13] *Id.*

the language of law "reflects and perpetuates biases in legal language and reasoning."[14] Regrettably, it "is not just voice [that is lost], but perspective and culture." [15] As a practical matter, when outsider voices are muted, biases in legal language and reasoning are perpetuated while "new language or realities [are simultaneously] suppressed."[16] The net effect is that the law is less rich and diverse than it should be considering the increase in former outsiders like individuals of different races, genders, ethnicities, and sexual orientation who have gained entry into the profession.

To illustrate the point, consider the evolution of the doctrine of separate but equal. In the seminal case of *Plessy v. Ferguson*,[17] the Supreme Court considered the issue. Mr. Plessy was "seven-eighths Caucasian and one-eighth African blood [and] that the mixture of colored blood was not discernible in him."[18] Mr. Plessy argued that he was not colored enough to be required to ride in the colored compartment of the train, and that "and that he was entitled to every right, privilege, and immunity secured to citizens of the United States of the white race."[19] It did not occur to him to argue that a distinction between white and colored races was ludicrous—he simply accepted the existing category and argued that he fit in the "white race" category and not the "colored" category.

Although Justice Harlan, in his dissent, presciently reasoned that "[t]he arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution[,

[14] *Id.* at 20
[15] *Id.* at 22
[16] *Id.*
[17] *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954).
[18] *Id.* 163 U.S. at 541.
[19] *Id.*

and] [i]t cannot be justified upon any legal grounds,"[20] it took nearly sixty years for the Supreme Court to abolish the absurd category of "separate but equal" and recognize that separate can never be equal.[21]

Time and again, implicit bias manifests in the law because the law is designed to perpetuate it, but bias also endures because our own life experiences interfere with our ability to question long-standing and historically unquestioned biases. Panelist Teri McMurtry-Chubb has spent years studying this phenomenon amongst law students. In her legal writing courses she designs problems featuring marginalized participants to which stereotypes adhere to challenge students to question their assumptions about how the law governs the parties and their conflict. What she has discovered is that "student interpretations of legal authorities are an expression of how they view the category or group to which they belong as it relates to the subject of their study."[22]

For example, in the context of a problem involving a legacy college admissions policy, students failed to identify and interpret 'White' as a racial category" even though the U.S. Supreme Court starting with *Bakke v. Regents of University of California* has taken a color-blind approach in its jurisprudence treating all racial classifications as suspect.[23] In a recent blog post on the same topic, Professor McMurtry-Chubb explained that

> [s]tudent attitudes about colorblindness led approximately 85% of them to make legal arguments flawed by bias in the first drafts of their briefs. For example, students representing the claimant analyzed his racial classification, "African American," when the race of the legacy admits, "White," was the racial classification at issue in the lawsuit. Student arguments advanced the notion of color-blindness or the phenomenon of "not seeing color." Moreover, students representing the University argued for diversity as a compelling state interest even though the legacy admissions policy favored White applicants over applicants of color - a losing proposition for the University. Simply, they could only see race or

[20] *Id.* at 562.
[21] *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954).
[22] Teri McMurtry-Chubb, *The Practical Implications of Unexamined Assumptions: Disrupting Flawed Legal Arguments to Advance the Cause of Justice*, 58 Washburn L.J. _____ (forthcoming, 2019).
[23] *Id.*

> ethnicity as anything other than White. These arguments based on biased assumptions led students to make arguments that were incorrect and inconsistent with the major tenets of the *Bakke* decision, and ultimately contrary to their client's interests.[24]

As lawyers, we should care about implicit bias because it interferes with our ability to recognize legal issues and effectively advocate on behalf of clients—inevitably, we replicate biases from our pre-law school life experiences and law-related life experiences as we interpret the law and develop arguments on behalf of clients.

III. Examples of implicit bias in the family law context.

Biased legal frameworks are not a unique feature of United States Supreme Court jurisprudence. Georgia jurisprudence in the context of family law has a number of examples. Consider the cases of *Ormandy v. Odom*[25] and *Bodne v. Bodne*[26]. In 1995, the Georgia Court of Appeals held that the relocation of the primary physical custodian was not a sufficient change in condition to authorize a change in custody.[27] The framework supporting that argument consisted of three categorical assumptions:

1. "the award of custody by a divorce vests the custodial parent with a *prima facie* right"[28]
2. "the trial court should favor the parent having such a right"[29]
3. Only "a change for the worse in the conditions of the child's present home environment rather than any purported change for the better in the environment of the non-custodial parent that the law contemplates under this theory"[30]

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[24] Teri McMurtry-Chubb, *When Having a Heart for Justice is Not Enough*, https://lawprofessors.typepad.com/appellate_advocacy/2019/03/when-having-a-heart-for-justice-is-not-enough.html (last visited May 3, 2019).
[25] *Ormandy v. Odom*, 217 Ga. App. 780 (1995), overruled by *Bodne v. Bodne*, 277 Ga. 445 (2003).
[26] *Bodne v. Bodne*, 277 Ga. 445 (2003).
[27] *Ormandy*, 217 Ga. App. at 440-41.
[28] *Id.* at 440.
[29] *Id.*
[30] *Id.* at 440.

Twelve years later, in a split decision, the Georgia Supreme Court expressly overruled *Ormandy* and abolished the notion that the custodial parent has a *prima facie* right to retain custody.[31] In other words, it completely abolished the analytical framework promulgated in *Ormandy* and replaced with a best interests of the child analysis.[32] The Court was conflicted over this decision, as evidenced by the concurring and dissenting opinions. Justice Benham, with whom Justices Carley and Thompson joined, lamented that "[t]he opinion of the majority . . . abandons clear and workable guidelines for resolving conflicts regarding the custody of children, substituting a vague and undefined overarching principle for specific and objective rules of law which have been a useful part of this State's jurisprudence for many years."[33] The dissent's bias in favor of precedent is obvious and perhaps understandable.

More curious, however, is the dissenting justice's bias in favor of the custodial parent above all else. It admonishes the majority by pointing out that "improvement in the economic opportunity of the custodial parent should not be viewed as a negative factor . . ., but as an enhancement of the welfare of the children involved."[34] It prioritizes the new family unit over the broken family, going so far as to compare the divorced family to Humpty Dumpty.[35] The majority, as more clearly stated by Justice Sears in his concurring opinion, recognizes the fundamentally different perspectives held by the majority and the dissent. Justice Sears notes that "the dissent's focus on the custodial parent's 'new family unit' and its deference to the relocation desires of the custodial parent overlooks the importance of the best interests of the child of the divorced parents, of the child's relationship with the non-custodial parent, and of the interests of the larger family

[31] *Bodne*, 277 Ga. at 447
[32] *Id.* at 446
[33] *Id.* at 448-49 (J. Benham, dissenting)
[34] *Id.* at 451-52 (J. Benham dissenting)
[35] *Id.* at 452 (J. Benham dissenting)

created by divorce."[36] He goes on to criticize the dissent for failing to recognize the significance of the binuclear family and reveals that the dissent's framework would have the effect of making "the non-custodial parent (most often the father) an outsider and to place the custodial parent's interests above those of the child."[37]

These cases demonstrate a tangible shift in a historically-common bias in family law cases, that being that the mother is typically the custodial parent and the father is the outsider. A few years after *Bodne* was decided, the General Assembly amended O.C.G.A. § 19-9-3 to add this language:

> There shall be no presumption in favor of any particular form of custody, legal or physical, nor in favor of either parent. Joint custody may be considered as an alternative form of custody by the judge and the judge at any temporary or permanent hearing may grant sole custody, joint custody, joint legal custody, or joint physical custody as appropriate.

Prior to this amendment, the statute provided that [i]n all cases in which the custody of any minor child or children is at issue between the parents, there shall be no prima-facie right to custody of the child or children in the father or mother. Despite this language prohibiting favoritism of one parent over the other, the legislature found it necessary to add text specifically prohibiting a presumption in favor of either parent. This language reveals that, as a practical matter, courts were being affected by their implicit biases in favor of the mother in child custody cases.

Just this year, the Georgia General Assembly passed another amendment to this very statute, and it is currently awaiting the Governor's signature. This amendment addresses yet another form of implicit bias against blind parents. The amendment would revise subparagraph (a)(3)(I) to prohibit the Court from discriminating against blind parents when considering the

[36] *Id.* at 447 (J. Sears, concurring)
[37] *Id.* at 448 (J. Sears, concurring)

mental and physical health of the parents for custody purposes.[38] What is obvious from this bill is that the legislature is attempting to address implicit bias that has historically harmed blind parents in custody cases.

The law is replete with other similar examples. There can be no question that implicit bias is pervasive and it impacts the way lawyers identify legal issues, frame legal arguments, and advocate on behalf of their clients. For these reasons, it is imperative lawyers gain better understanding of implicit bias and begin learning strategies for interrupting bias.

IV. Strategies for interrupting bias.

In her blog post, Professor McMurtry-Chubb offers hope that implicit bias can be overcome. The students in her study, "with critical pedagogical interventions, teaching methods aimed at problematizing students' biased assumptions, students course corrected their attitudes from color-blind to color-conscious."[39] These interventions consisted of four components:

1. Collaborative thinking groups
2. Consultation with experts
3. Identification of desired outcomes
4. Mapping potential paths to success

These same strategies are useful to practicing lawyers, as well. Attorneys frequently consult with other attorneys and experts regarding their cases. In these discussions, it is important to begin questioning what it is we as attorneys take for granted. We must move beyond the inquiry "what is the judge likely to do?" and also ask "is that the best result in this case?" If it is not the best result, begin to identify the roadblocks, or biases, standing in the way of achieving the best

[38] Blind Person; child custody matters; provisions, 2019 Georgia House Bill 79.
[39] Teri McMurtry-Chubb, *When Having a Heart for Justice is Not Enough*, https://lawprofessors.typepad.com/appellate_advocacy/2019/03/when-having-a-heart-for-justice-is-not-enough.html (last visited May 3, 2019).

result. Is there a legal construct that is standing in the way of achieving the ultimate result like the separate but equal doctrine stood in the way for Mr. Plessy or the recognition of the custodial parent's rights did in *Ormandy*? If so, what is the most effective way to deconstruct the bias and frame the issue and legal arguments?

The dissent in *Bodne* reveals a bit about the desires and preferences of courts – they want "clear and workable guidelines." Bias often lives within clear and workable guidelines because bias permits us to make easy assessments about complex matters just like clear and workable guidelines allow judges to make easy assessments about complex legal problems. When interrupting bias, it is important to not only name the bias, but an alternative framework must be offered as a replacement. In other words, create a new category.

That is exactly what the majority in *Bodne* did. It explicitly rejected the presumption in favor of the custodial parent and held that the issue is not about the rights of the parent. It replaced the biased category with a more egalitarian one: the best interests of the child. It also emphasized that no presumption should apply in favor of or against a move. As a practical matter, however, the courts have a tendency to presume the best interests of the child are best protected by remaining and not moving with the primary physical custodian. In other words, the bias is now pushing in the opposite direction.

Bias pervades every aspect of legal practice. The danger is not that it exists—the danger is that it can blind us to the real issues facing our clients and lead to erroneous assumptions, exclusion, unfairness, injustice, and inequality.

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Presenter Profiles:

Ronald L. Carlson (Fuller E. Callaway Professor of Law, Emeritus, University of Georgia School of Law): Ron Carlson was awarded the Lifetime Achievement Award by the Georgia Trial Lawyers Association, as well as the Federal Bar Association's highest honor, the Earl Kintner Award. The ABA recognized him with the ALI-ABA Harrison Tweed Award, their top award for CLE contributions at the national level. He has received every faculty honor presented by the law school student body at least once: the Student Bar Association Faculty Book Award for Excellence in Teaching, which is now the C. Ronald Ellington Award for Excellence in Teaching, the John C. O'Byrne Memorial Award for Significant Contributions Furthering Student-Faculty Relations and the Student Bar Association Professionalism Award. He was the first Georgia Law professor to receive the Josiah Meigs Award for Teaching Excellence from UGA. He also was awarded the 1987 Roscoe Pound Foundation's Richard S. Jacobson Award, honoring a single national law professor for the teaching of trial advocacy. Professor Carlson was the lead and sole attorney for indigent prisoners in two significant U.S. Supreme Court appeals, *Long v. District Court* (establishing indigent habeas applicant's right to transcript) and *Johnson v. Bennett* (prisoner freed after 34 years of confinement). He is the author of 15 books on evidence, trial practice and criminal procedure, including the book *Carlson on Evidence*, co-authored with son Mike Carlson, which has been cited authoritatively in over 35 Georgia appellate court opinions. Carlson regularly comments on WSB radio on high-profile Georgia criminal cases.

Michael Scott "Mike" Carlson (Chief Assistant District Attorney, Cobb Judicial Circuit; Judge, Georgia Court Martial Review Panel, Incoming Legal Services Director, Georgia Bureau of Investigation): Mike Carlson, who holds an "AV Preeminent" (highest possible) Martindale-Hubbell peer review rating, received his A.B degree from the University of Georgia and his J.D. degree from Washington and Lee University in 1992, where he earned, among other distinctions, the Virginia Trial Lawyers Association Award for his "excellence in demonstrating the talents and attributes of the trial advocate." After first engaging in private practice, where he focused on civil litigation and media law, Carlson has worked as an assistant district attorney since 1997, now as a Chief Assistant District Attorney with the Cobb County District Attorney's Office, having been appointed to that position by Acting District Attorney John Melvin. During his career as a prosecutor, Carlson has successfully handled numerous high-profile cases and appeals, including death penalty trials. An author and frequent speaker on issues of evidence, trial practice, and criminal procedure to Georgia's bench and bar, Carlson has served on the adjunct faculty of Atlanta's John Marshall Law School and Emory University School of Law, and is a mentor and lecturer at the Gary Christy Memorial Trial Skills Clinic at the University Of Georgia School Of Law. In 2015, Governor Nathan Deal appointed Carlson to the Georgia Court Martial Review Panel. Among the professional awards and recognition that Carlson has received include: Faculty Medallion from the Institute of Continuing Judicial Education of Georgia for consistently outstanding presenter ratings; Prosecuting Attorneys' Council of Georgia's J. Roger Thompson (now Thompson-Jones) award for training beginning level prosecutors; selection as a Master in the Joseph Henry Lumpkin Inn of American Court; named by James Magazine as one of "the most influential lawyers in Georgia"; and special recognition from the District Attorneys' Association of Georgia and the Georgia Gang Investigators Association. In May 2019, Carlson is scheduled to begin new employment as Legal Services Director (chief counsel) for the Georgia Bureau of Investigation.

Carlsons on Evidence
Evidence Fundamentals for the Family Lawyer

37th Annual Family Law Institute
Thursday • May 23, 2019
Omni Amelia Island Plantation Resort
Amelia Island, Florida

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37th Annual Family Law Institute
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Today's Presentation

Speaker Introductions

Carlsons on Evidence

Speaker Introductions

- **Presenters**
  - **Ronald L. Carlson**
    - Fuller E. Callaway Professor Emeritus, University of Georgia School of Law
    - 15 books on evidence, trial practice and criminal procedure
    - Article cited in Advisory Committee Notes of FRE's
    - Argued landmark cases before U.S. Supreme Court
  - **Michael Scott Carlson**
    - Chief Assistant District Attorney, Cobb Judicial Circuit
    - Judge, Georgia Court Martial Review Panel
    - Successfully jury tried and Supreme Court argued murder cases under Georgia' New Evidence Code
    - Incoming Legal Services Director, Georgia Bureau of Investigation

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Today's Program

Presentation and Materials

Carlsons on Evidence

Presentation and Materials

- **Evidence Program Goals**
  1. Further Develop "**Code Wide**" Approach
  2. Underscore **Fundamental Principles** of Interpretation
  3. Analyze and Consider **Specific Applications**

Carlsons on Evidence

Presentation and Materials

- Will use experience, scholarship, and mock case scenarios as a vehicle to illustrate rules and cases ***in context***
- Consider objections
- Materials and discussion will feature **New GRE and FRE authority**
- Where no new GA case available, focus placed on **relevant federal and related state** authority
- Using **actual quotes** from cases
  - ***Please hold questions until presentation is concluded***

Carlson on Evidence
Presentation and Materials

- Remain in contact with **lawyers and judges** for key areas of interest
  - ➢ ***WATCH FOR QUESTION FROM FLS***
- Slides and discussion will contain actual **decisions**
- Sometimes only **advance citations** are available
- A few slides may repeat—**please follow the action**

Carlsons on Evidence
Presentation and Materials

- We should encourage debate over what statues, rules and cases "**mean**"
- We should never argue over what statutes, rules and cases "**say**"

- **Therefore we focus on**:
1. Using **actual quotations** from cases and language from the statutes
2. Leaving the **policy determinations** to legislatures and courts
3. "**Content heavy**" presentations

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Georgia's New Evidence Code

Offers of Compromise

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Offers of Compromise

- Following a bench trial for divorce prevailing party **moves for attorneys fees** and seeks to **introduce settlement offers** to establish his liability for attorney fees to prove delays of the opposing party. Opponent objects arguing that, "Offers of **settlement or compromise are per se inadmissible**, particularly in the setting of a divorce case."

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Offers of Compromise

- **24-4-408**
  - (a) Except as provided in Code Section 9-11-68, evidence of:
    - (1) Furnishing, offering, or promising to furnish; or
    - (2) Accepting, offering, or promising to accept
    - a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount **shall not be admissible to prove liability for or invalidity** of any claim or its amount.
  - (b) Evidence of conduct or statements made in compromise negotiations or mediation **shall not be admissible**.

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Offers of Compromise

- **24-4-408**
  - (c) This Code section shall not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations or mediation. This Code section **shall not require exclusion of evidence offered for another purpose**, including, but not limited to, proving bias or prejudice of a witness, negating a contention of undue delay or abuse of process, or proving an effort to obstruct a criminal investigation or prosecution.

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Offers of Compromise

- "Based on this statutory language, we conclude that the **settlement offers were admissible for the purpose of determining whether Wayne's actions constituted delay or abuse of process**… Accordingly, the trial court was permitted to consider these settlement offers when evaluating whether Wayne delayed the proceedings." *Reid v. Reid*, 348 Ga. App. 550 (2019)

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Georgia's New Evidence Code

Nolo Contendere Pleas

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Nolo Contendere Pleas

- On a motion for modification of child custody, proponent of evidences seeks to introduce **certified copies of former spouse's nolo plea** and sentence for family violence battery. **Opponent objects**, "Nolo contendere pleas are not admissible, your honor." Proponent argues, "We are **not offering this for impeachment** purposes, so the plea should be allowed. **He never denied the attack, judge**!"

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Nolo Contendere Pleas

- **24-4-402**
  - All relevant evidence shall be admissible, **except** as limited by constitutional requirements or as **otherwise provided by law or by other rules**, as prescribed pursuant to constitutional or statutory authority, applicable in the court in which the matter is pending. Evidence which is not relevant shall not be admissible.

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Nolo Contendere Pleas

- **17-7-95**
  - (c) Except as otherwise provided by law, **a plea of nolo contendere shall not be used against the defendant in any other court or proceedings** as an admission of guilt or otherwise or for any purpose; and the plea shall not be deemed a plea of guilty for the purpose of effecting any civil disqualification of the defendant to hold public office, to vote, to serve upon any jury, or any other civil disqualification imposed upon a person convicted of any offense under the laws of this state. The plea shall be deemed and held to put the defendant in jeopardy within the meaning of Article I, Section I, Paragraph XVIII of the Constitution of this state after sentence has been imposed.

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Nolo Contendere Pleas

- "The nolo contendere plea is inadmissible because, unlike a guilty plea, a **nolo contendere plea is not an admission by Wilson of having committed the acts** at issue…. Despite Perkins's assertions to the contrary, neither the trial court, nor Perkins in her brief, has **pointed to any exception to OCGA § 17-7-95 (c) that is applicable** here. It follows that the trial court erred in admitting Wilson's nolo contendere plea during the hearing." *Wilson v. Perkins,* 344 Ga. App. 869 (2019)

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Georgia's New Evidence Code

Davis Violations

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Davis Violations

- Opponent of evidence files a motion in limine citing numerous **former Georgia evidence** rules and cases. Proponent replies, focusing on new Georgia authority, and posits that **old law is deficient**. Opponent responds: "**What's the big deal.** Everybody I know has been **using those motions for years**. How dare they infringe on the sovereignty of our honored courts!"

Carlsons on Evidence

Davis Violations

- "Simply stated, *Davis* infractions represent the **inappropriate use of prior Georgia Evidence law to interpret federalized provisions** of Georgia's New Evidence Code and the **failure to reference federal** sources. As we shall see, these violations **contravene a host** of established principles in Georgia law."
  - Carlson & Carlson, *Davis Violations Dissected: "New" Georgia Law and the Crisis in Evidence,* IX John Marshall Law Journal 1 (2015-16)

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Davis Violations

- "[L]lawyers **do this Court no favors — and risk obtaining reversible evidence rulings from trial courts** — when they fail to recognize that we are all living in a new evidence world and are required to analyze and apply the new law. It may be **hard to comprehend that**, when it comes to trials and hearings held after January 1, 2013, the most **pertinent precedent to cite on an evidentiary issue may be a decades-old decision of the Eleventh Circuit**…" *Davis v. State*, 299 Ga. 180 (2016)

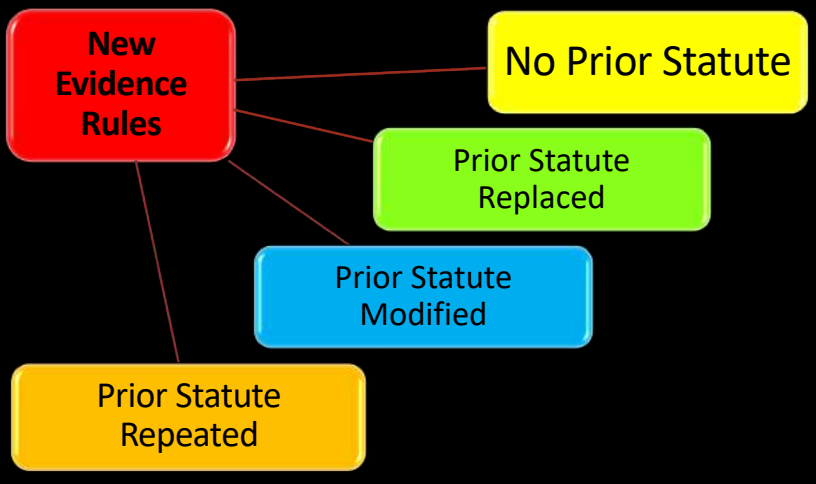
Carlsons on Evidence

Davis Violations

- "Here, **despite our admonition** in *Davis v. State*, 299 Ga. 180 (787 SE2d 221) (2016), the **parties did not brief or argue** the meaning of Rule 606 (b) at the motion for new trial hearing, and the **trial court did not apply** it when addressing the jury-misconduct claim raised in Beck's motion. Similarly, the **parties do not address the new rule on appeal**. The difference between the old and new Evidence Code matters in this case." *Beck v. State*, 2019 Ga. LEXIS 131 (March 4, 2019)

Carlsons on Evidence

Davis Violations



Carlsons on Evidence
Davis Violations

- "But the new Evidence Code does not work in conjunction with the old evidence rules **when the two cover the same territory—it replaces them**." *Chrysler Group LLC v. Walden*, 303 Ga. 358 (2018)

Carlsons on Evidence
Presentation and Materials

- **3 Basic Types of GRE's**
  - **Federalized (vast majority)**
    - No prior Georgia authority but vast federal case law
  - **Hybrid but leaning federal**
    - No prior Georgia authority but vast federal case law
  - **Carried over from former code**
    - Prior Georgia authority may be conflicting and may be impacted by adoption of other rules
    - In the case of "double covered," GASCT has expressed a preference for federalized version

Carlsons on Evidence
Presentation and Materials

- "Rules **401, 402, and 403 overlay the entire** Evidence Code, and are generally **applicable to all evidence** that a party seeks to present…"
Chrysler Group LLC v. Walden, 303 Ga. 358 (2018)

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Georgia's New Evidence Code
Objection Requirements

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Objection Requirements

- Proponent of evidence attempts to introduce testimony from a **witness identifying** a person from a surveillance video as **admissible under Rule 701**. Opponent of evidence objects, "**lack of foundation and traditionally barred from evidence**." Trial judge inquires if there is further detail, or a rule number. Opponent rises, "**We stand on our objection. That is sufficient under the new code**."

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Objection Requirements

- **24-1-103**
  - (a) Error shall not be predicated upon a ruling which **admits or excludes** evidence unless a substantial right of the party is affected and:
    - (1) In case the ruling is one admitting evidence, **a timely objection or motion to strike appears of record, stating the specific ground of objection,** if the specific ground was not apparent from the context; or
    - (2) In case the ruling is one excluding evidence, **the substance of the evidence was made known to the court by an offer of proof** or was apparent from the context within which questions were asked.

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Objection Requirements

- "In denying the motions in limine to exclude Lewis's testimony regarding Watkins's statements, the trial court did not make any express factual findings, but **we can infer from its denial of the motions that it implicitly found** that Watkins's statements were made in the course of and in furtherance of a conspiracy…Kemp and Hogans have **failed to show that these implicit factual findings** are clearly wrong." *Kemp v. State*, 303 Ga. 385 (2018)

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Objection Requirements

- "Where an appellant challenges the **admission of evidence, we are concerned with the sufficiency of the appellant's objection**; here, however, where the appellant challenges the **exclusion of evidence, we are concerned with the sufficiency of the showing** that the appellant, as proponent of the evidence, made at trial." *Williams v. State*, 302 Ga. 147 (2017)

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Georgia's New Evidence Code

Hearsay Rule

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Hearsay Rule

- On the issue of custody, proponent of evidence inquires of parent whether **children have stated with whom they would rather live**. Opponent **objects to hearsay**. Proponent responds, "This a civil domestic matter, judge. The **Sixth Amendment does not apply**, so there is no hearsay violation. Plus a **statement of preference** is not hearsay."

Carlsons on Evidence

Hearsay Rule

- **24-8-801**
  - (c) "Hearsay" means a **statement**, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to **prove the truth of the matter asserted**.

Carlsons on Evidence

Hearsay Rule

- **24-8-802**
  - **Hearsay shall not be admissible** except as provided by this article; provided, however, that if a party does not properly object to hearsay, the objection shall be deemed waived, and the hearsay evidence shall be legal evidence and admissible.

Carlsons on Evidence

Hearsay Rule

- "**OCGA § 24-8-801 (c) defines 'hearsay'**…And **OCGA § 24-6-602** says…'[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has **personal knowledge** of such matter.'…Here, the records custodian knew about the sold ring's TW mark **only through information provided to her by another employee**...Her testimony on that point was therefore inadmissible hearsay..." *Kirby v. State*, 304 Ga. 472 (2018)

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Hearsay Rule

- **Hearsay Classified**
  - **Admissions (801's)**
    - ✓Party Opponent
  - **Statements (803's)**
    - ✓Non-party (available and not available)
  - **Declarations (804's)**
    - ✓Non-party (unavailable)

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Hearsay Rule

- **Hearsay: Admissibility Analysis**
  1. Is the evidence **hearsay**?
  2. Is the evidence admissible for a **non-hearsay purpose**?
  3. Is the evidence subject to an **exemption**?
  4. Is the evidence subject to an **exception**?
  5. Is the evidence only admissible for a **limited purpose**?

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Georgia's New Evidence Code

Prior Consistent Statements

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Prior Consistent Statements

- In the preceding hearing, the judge sustains the hearsay objection. Proponent further argues, "Your honor, we **plan on calling the child** as witness. This means that the parent's testimony is admissible as a **prior consistent statement**." Opponent responds that prior consistent statements are **only admissible after the declarant has been cross-examined**."

Carlsons on Evidence
Prior Consistent Statements

- **24-6-613**
  - (c) A **prior consistent statement shall be admissible to rehabilitate a witness if the prior consistent statement logically rebuts an attack** made on the witness's credibility. A **general attack on a witness's credibility with evidence offered under Code Section 24-6-608 or 24-6-609 shall not** permit rehabilitation under this subsection. If a prior consistent statement is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive, the **prior consistent statement shall have been made before** the alleged recent fabrication or improper influence or motive arose.

Carlsons on Evidence
Prior Consistent Statements

- **24-8-801(d)(1)**
  - (A) An out-of-court statement **shall not be hearsay** if the **declarant testifies** at the trial or hearing, is subject to cross-examination concerning the statement, and the statement is admissible as a prior inconsistent statement or a **prior consistent statement** under Code Section 24-6-613 or is otherwise admissible under this chapter.

Carlsons on Evidence
Prior Consistent Statements

- "Generally speaking, **'(u)nless a witness's veracity has affirmatively been placed in issue**, the witness's **prior consistent statement is pure hearsay evidence**, which cannot be admitted merely to corroborate the witness, or to bolster the witness's credibility in the eyes of the jury.' " *Sullins v. State*, 347 Ga. App. 628 (2018)

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Georgia's New Evidence Code
Hearsay: Medical Diagnosis and Treatment

Carlsons on Evidence

Hearsay: Medical Diagnosis and Treatment

- In a sex abuse case prosecuted during the pendency of a divorce, the child is taken by her mother to the family doctor. During the examination, daughter **describes abuse and identifies** father her abuser. Prosecution calls doctor who testifies that **identity of abuser is pertinent** to treatment. State then asks doctor who daughter identified. Opponent objects, "Judge, this has **never been allowed** in Georgia. **Our 'new' rule is the same** at the old one. Plus, the **child hearsay statute** says the declarant must be available for cross and no one knows where she is. **This is bar complaint material**!"

Carlsons on Evidence

Hearsay: Medical Diagnosis and Treatment

- **24-8-803(4)**

  The following **shall not be excluded** by the hearsay rule, even though the declarant is available as a witness: A

  > **(4)** ***Statements for purposes of medical diagnosis or treatment.*** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment;

Carlsons on Evidence

Hearsay: Medical Diagnosis and Treatment

- "…under Federal Rule 803 (4) generally… **First, "the declarant's motive in making the statement must be consistent with the purpose of promoting treatment[.]**"…**Second, "the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis."**… These two prongs ensure that the hearsay statement has a sufficient guarantee of trustworthiness while excluding statements beyond the scope of the rule." *State v. Almanza*, 304 Ga. 553 (2018)

Carlsons on Evidence

Hearsay: Medical Diagnosis and Treatment

- "This preamble…is a **clear instruction** manual…it is best to read them, and they must be read in order. **First,** the General Assembly stated that the primary **aim of the new Code** was to 'adopt the Federal Rules of Evidence'… **Second,** if a **conflict exists** among the federal appellate courts, we **look to the "decisions of the 11th** Circuit." **Third,** courts are to look to the 'substantive law of evidence in Georgia as it existed on December 31, 2012,' **only when not displaced**…"*State v. Almanza*, 304 Ga. 553 (2018)

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Georgia's New Evidence Code

Bias Impeachment

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Bias Impeachment

- On cross, Proponent inquires of Opponent's **expert witness** about the **amount of her fees** and **how much she makes** from husbands and as opposed to wives in domestic cases. Opponent objects, "**Wealth of the party pilloried judge**. Move to strike."

Carlsons on Evidence

Bias Impeachment

- **24-6-608(b)**
  - Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, **other than…conduct indicative of the witness's bias** toward a party may not be **proved by extrinsic evidence**.

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Bias Impeachment

- **24-6-622**
  - The state of a witness's **feelings towards the parties and the witness's relationship to the parties** may always be proved for the consideration of the jury.

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Bias Impeachment

- "Unlike many other modes of impeachment, **attacks on witness bias** are **constitutionally guaranteed**." *Johnson v. State*, 348 Ga. App. 667 (2019)

Carlsons on Evidence

Bias Impeachment

- "[T]he 'longstanding common law rule' on party wealth does not apply precisely because it is a Georgia **longstanding common law rule that has been abrogated** by 's current evidence statutes." *Chrysler Group LLC v. Walden*, 303 Ga. 358 (2018)

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Georgia's New Evidence Code

McEachern Evidence

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McEachern Evidence

- In a divorce trial, proponent of the evidence seeks to introduce evidence of **post-separation misconduct** on the part of the opposing spouse. Opponent objects, "Judge, this is **McCeachern Evidence**. It has been **inadmissible for years**."

Carlsons on Evidence

McEachern Evidence

- **24-4-404**

  (a) Evidence of a person's character or a trait of character **shall not be admissible for the purpose of proving action in conformity** therewith on a particular occasion, except for…

  (b) Evidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith. **It may, however, be admissible for other purposes**…

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McEachern Evidence

- "A rule allowing only evidence of voluntary post-separation payments as opposed to court-ordered payments would **prevent the jury's giving undue weight to a court's determination of temporary needs and ability to pay** made without a full hearing. However, such a rule would tend to discourage any generous impulse in voluntary payments. **We have determined that evidence of any temporary payments has the potential to confuse and mislead the jury**." *McEachern v. McEachern*, 260 Ga. 320 (1990)

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McEachern Evidence

McEachern v. McEachern

vs.

Davis v. State?

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Georgia's New Evidence Code
Unfair Prejudice Objection

Carlsons on Evidence
Unfair Prejudice Objection

- The McEachern argument continues. Opponent argues, "Judge, this evidence is all **too prejudicial**. If they want it in, opposing counsel needs to **prove to the court that this testimony will not be overly prejudicial**. Furthermore, until the Georgia Supreme Court finally decides this issue, you should **exclude the evidence in an abundance of caution**."

Carlsons on Evidence
Unfair Prejudice Objection

- **24-4-403**
  - Relevant evidence may be excluded if its probative value is **substantially outweighed** by the danger of **unfair prejudice**, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Carlsons on Evidence
Unfair Prejudice Objection

- "The court excluded the evidence of the murder 'out of an abundance of caution.' **Rule 403 provides a list of reasons** authorizing a trial court to exclude otherwise admissible and relevant reasons. **'An abundance of caution' is not** one of those enumerated grounds. Rule 404 (b) is a **rule of inclusion** and Rule 403 is an **extraordinary** exception to that inclusivity…The court's **basis for excluding** the murder **was thus unsound**." *State v. Atkins*, 304 Ga. 413 (2018)

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Georgia's New Evidence Code
Social Media Authentication

Carlsons on Evidence
Social Media Authentication

- Proponent of evidence attempts to introduce **text messages** related to drug use from opposing spouse while his children were at home as well as **Facebook posts** that discredit his testimony. Opponent objects, arguing that **authentication of social media evidence** requires "**live, in-person" testimony** from the webmaster and must be shown to have **come from a particular device**.

Carlsons on Evidence
Social Media Authentication

- **24-9-901**
  - (a) The requirement of authentication or identification as a **condition precedent to admissibility** shall be satisfied by evidence sufficient to support a finding that the matter in question **is what its proponent claims**.

Carlsons on Evidence
Social Media Authentication

- "We also note that **prior to the enactment of Rule 901, our Supreme Court** held that a handwriting exemplar can be any voluntary writing…That precedent is of limited utility, however, because prior to the enactment of the new Evidence Code, **Georgia had no comprehensive authentication statute**...Because OCGA § 24-9-901 closely tracks its federal counterpart, **we look to federal appellate case law** until a Georgia appellate court decides the issue under the new Code. *Cruz v. State*, 347 Ga. App. 810 (2018)

Carlsons on Evidence

Social Media Authentication

- "'[d]ocuments from electronic sources such as the printouts from a website like Facebook *are subject to the* ***same rules of authentication*** *as other more traditional documentary evidence* and may be authenticated through circumstantial evidence'…there was **ample circumstantial evidence** to establish that the messages at issue were sent by Johnson from her phone." *Johnson v. State*, 348 Ga. App. 667 (2019)

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Evidence Fundamentals for the Family Lawyer

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Georgia's New Evidence Code
Expert Witness Parameters

Carlsons on Evidence
Social Media Authentication

- In a termination of parental rights case, proponent of evidence calls **expert on child psychology**, attachment, and bonding to testify concerning whether termination is in the **best interests of the child**. Opponent objects that **no ultimate issue testimony** is allowed. Proponent claims that under Georgia's New Evidence Code, **the ultimate issue objection is a "thing of the past."**

Carlsons on Evidence
Social Media Authentication

- **24-7-704**
  - (a) Except as provided in subsection (b) of this Code section, testimony in the form of an opinion or inference otherwise admissible **shall not be objectionable because it embraces an ultimate issue** to be decided by the trier of fact.

Carlsons on Evidence
Social Media Authentication

- "In addition, the testimony of an expert in the form of an opinion is **not objectionable on the grounds that it embraces an ultimate issue** to be decided by the trier of fact." *In the Interest of R. S. T.*, 345 Ga. App. 300 (2018)

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Georgia's New Evidence Code
Dishonest Act Impeachment

Carlsons on Evidence
Dishonest Act Impeachment

- Proponent cross-examines Opponent's expert witness, "In your deposition, **didn't you admit to being disciplined in grad school falsifying** your time sheets?" Proponent then tries to **introduce disciplinary notice form**. Opponent objects. Opponent objects and moves to strike as **improper impeachment**.

Carlsons on Evidence
Dishonest Act Impeachment

- **24-6-608(b)**
  - (b) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than a conviction of a crime as provided in Code Section 24-6-609, or conduct indicative of the witness's bias toward a party may not be proved by extrinsic evidence. **Such instances may however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness**:

    (1) Concerning **the witness's character** for truthfulness or untruthfulness;

Carlsons on Evidence
Dishonest Act Impeachment

- "As for **Rule 608 (b)**…with certain exceptions, '[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, … may not be proved by extrinsic evidence.'…But such instances may, 'in the discretion of the court, **if probative of truthfulness or untruthfulness, be inquired into on cross-examination** of the witness[ ] … **[c]oncerning the witness's character for truthfulness or untruthfulness**[.]'" *Belcher v. State*, 344 Ga. App. 729, (2018)

Carlsons on Evidence
Dishonest Act Impeachment

- "Under the plain language of this statute, the trial court **properly refused** to allow Daniels to use **extrinsic evidence of the prior statement** for the purpose of attacking Taylor's character for truthfulness." *Daniels v. State*, 824 S.E.2d 754 (Ga.App.2019)

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Evidence Fundamentals for the Family Lawyer

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Today's Presentation
Review

Carlsons on Evidence
Review

- 24-1-1/100's: **GENERAL PROVISIONS**
- 24-2-200's: **JUDICIAL NOTICE**
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Review

- **Modeling of New GRE's**
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Carlsons on Evidence
Review

- **Evidence Program Goals**
  1. Further Develop "**Code Wide**" Approach
  2. Underscore **Fundamental Principles** of Interpretation
  3. Analyze and Consider **Specific Applications**

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Evidence Fundamentals for the Family Lawyer
37th Annual Family Law Institute
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Double Indemnity (1954)
Temporary Hearings: Instant Relief Or Temporary Insanity: Judges Weigh In

Presented By:

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TEMPORARY HEARINGS: INSTANT RELIEF OR TEMORARY INSANITY

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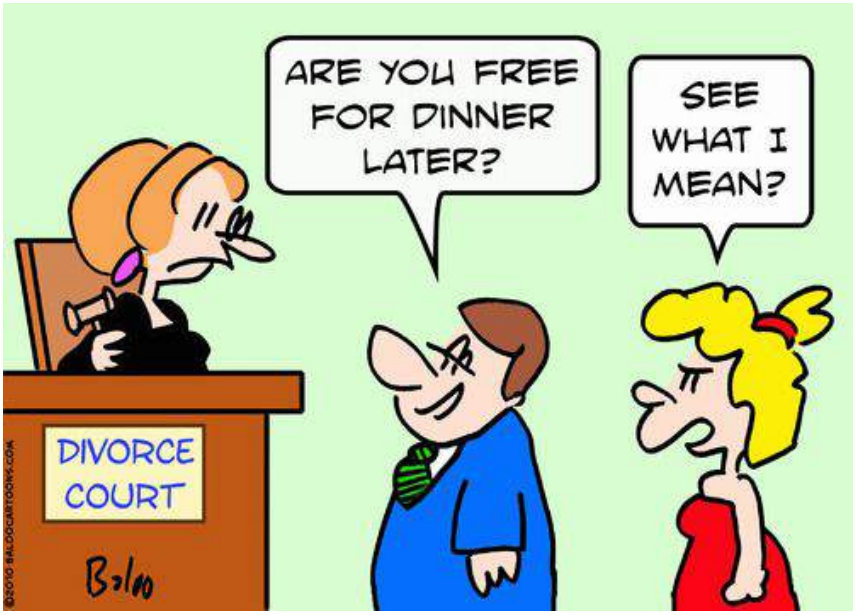
TEMPORARY HEARINGS



Temporary Hearings: Instant Relief or Temporary Insanity

I. The Guiding Tool to move Cases forward –

Scheduling a temporary hearing allows for stability of the family if there is a divorce pending or stability of children if there is a custody or child support matters pending. All parties would like instant relief. He or she believes their case must be addressed yesterday. Most court's resources do not allow for relief as quickly as litigants would like hence the temporary insanity surrounding temporary hearing.

A. Temporary Alimony

O.C.G.A. § 19-6-3. Temporary alimony; petition and hearing; factors considered; discretion of judge; revision and enforcement of order; effect of failure to comply

(a) Whenever an action for divorce or for permanent alimony is pending, either party may apply at any time to the presiding judge of the court in which the same is pending, by petition, for an order granting the party temporary alimony pending the issuance of a final judgment in the case. After hearing both parties and the evidence as to all the circumstances of the parties and as to the fact of marriage, the court shall grant an order allowing such temporary alimony, including expenses of litigation, as the condition of the parties and the facts of the case may justify.

(b) In arriving at a decision, the judge shall consider the peculiar necessities created for each party by the pending litigation and any evidence of a separate estate owned by either party. If the

separate estate of the party seeking alimony is ample as compared with that of the other party, temporary alimony may be refused.

(c) At a hearing on the application for temporary alimony, the merits of the case are not in issue; however, the judge, in fixing the amount of alimony, may inquire into the cause and circumstances of the separation rendering the alimony necessary and in his discretion may refuse it altogether.

(d) On application, an order allowing temporary alimony shall be subject to revision by the court at any time and may be enforced either by writ of fieri facias or by attachment for contempt.

(e) A failure to comply with the order allowing temporary alimony shall not deprive a party of the right either to prosecute or to defend the case.

Ga. Code Ann. § 19-6-3 (Lexis Advance through the 2018 Extra Session of the General Assembly)

The code provides for specific relief in divorces and provides that a party may petition for temporary alimony before the presiding judge which means even if the judge assigned to the case is unable to conduct the hearing, the matter may go before the presiding judge to make a determination on the issue of alimony in a divorce action. There may be local court rules that may preempt the way in which this relief can be obtained, but certainly a party can avail him or herself to said statute to obtain immediate relief which of course helps to stabilize the party without the same resources of his or her spouse. This code section is gender neutral.

What many parties fail to adhere to in defending a request for temporary alimony or spousal support is O.C.G.A. §19-6-3 (c) which provides that the merits of the case are NOT in issue, however the court can inquire into the cause as to why the parties are separated and in the court's discretion may refuse alimony altogether.

In the case of *Jackson v. Jackson*, the "Wife contends the trial court manifestly abused its discretion in denying her claim for alimony because the evidence showed that Husband abandoned his family, failed to support his minor child and caused the marital house to go into foreclosure. However, there was also evidence before the trial court that Wife initiated the parties' separation; that she was gainfully employed and had been so throughout most of the marriage; that she failed to cooperate with Husband in taking steps that would have resolved or alleviated the financial problems

arising out of the parties' separation, especially in regard to the marital home; that Wife had mismanaged marital funds and run up extravagant bills, e.g., a monthly phone bill for herself and the minor child that exceeded $ 900; that she failed to take advantage of low-cost health insurance coverage for the couple's minor child provided by Husband's employer; and that she unilaterally sold or otherwise disposed of Husband's share of the couple's personal property. GA (1) (1) Under these circumstances we cannot conclude that the trial court erred by declining to award Wife any alimony." OCGA §§ 19-6-1 (c), 19-6-5 (a). Jackson v. Jackson, 282 Ga. 459, 460-61, 651 S.E.2d 92, 93-94 (2007)

In this case, the court did grant the Wife temporary alimony, but certainly the same grounds utilized to deny the claim for alimony on a permanent basis could be used to defend or obtain support. The court specifically found that the Wife was gainfully employed and failed to cooperate to take steps to alleviate the financial problems of the parties and mismanaged marital funds. Yes, the court utilized the Wife's conduct in mismanaging funds which is often the case in many marriages and households to deny the claim for spousal support.

There appears to be no specific code section like the above code section relating to temporary alimony for temporary custody. The closest code section to this issue is under O.C.G.A. §19-9-1 which speaks to the court possibly not requiring a parenting plan in a temporary hearing in determining custody on a temporary basis.

B. Temporary Custody

O.C.G.A § 19-9-1. Parenting plans; requirements for plan

(a) Except when a parent seeks emergency relief for family violence pursuant to Code Section 19-13-3 or 19-13-4, in all cases in which the custody of any child is at issue between the parents, each parent shall prepare a parenting plan, or the parties may jointly submit a parenting plan. It shall be in the court's discretion as to when a party shall be required to submit a parenting plan to the court. A parenting plan shall be required for permanent custody and modification actions and in the court's, discretion may be required for temporary hearings. The final order in any legal action involving the custody of a child, including modification actions, shall incorporate a permanent parenting plan as further set forth in this Code section; provided, however, that unless otherwise ordered by the court, a separate court order exclusively devoted to a parenting plan shall not be required.

Ga. Code Ann. § 19-9-1 (Lexis Advance through the 2018 Extra Session of the General Assembly)

The above code section speaks to the court's authority in conducting a temporary hearing to require or not require a parenting plan. In practicing, no specific motion is filed for just alimony or just custody or any specific issue. The nature of the practice is to submit a rule nisi or a notice of hearing on all issues on a temporary basis. The parties must look to local rules to determine the amount of time that will be allowed for a temporary hearing or file a motion and request a specific period for the temporary hearing.

Judge I will be quick, we just need two days for our side -😊

The issue of the time allowed for temporary hearings is certainly worth delving into to see how the various Superior Court judges across the state of Georgia view the amount of time needed to allow needed relief for parties. Does that time differ if parties are Pro Se'?

What is clear is that the U.S.C.R. 24.5 provides for one live witness other than the parties that are before the court.

The rules indicate the following:

Rule 24.5. Witnesses in domestic relations actions.

(A) At temporary hearings the parties involved and one additional witness for each side may give oral testimony. Additional witnesses must testify by deposition or affidavit unless otherwise ordered by the court. Any affidavit shall be served on opposing counsel at least 24 hours prior to hearing.

(B) Except by leave of court, the minor child/children of the parties shall not be permitted to give oral testimony at temporary hearings; such child/children will be excluded from the courtroom or other place of hearing. When custody is in dispute, if directed by the court, minor child/children of the parties shall be available for consultation with the court. At any such

> consultation, attorneys for both parties may be in attendance but shall not interrogate such child/children except by express permission from the court. Upon request, the proceedings in chambers shall be recorded.
>
> Ga. Unif. Super. Ct. 24.5

It is worth noting that this rule does not appear to be applicable to Emergency Hearings or Expedited Hearings which is the new title for obtaining a hearing in less time than just requesting a temporary hearing.

The other code section on custody that speaks to a temporary hearing is O.C.G.A. §19-9-3 which provides for the following:

> **O.C.G.A. §19-9-3** (e) provides that: Upon the filing of an action for a change of child custody, the judge may in his or her discretion change the terms of custody on a temporary basis pending final judgment on such issue. Any such award of temporary custody shall not constitute an adjudication of the rights of the parties.
>
> Ga. Code Ann. § 19-9-3 (Lexis Advance through the 2018 Extra Session of the General Assembly)

Although there is no specific provision of the Custody statute that provides for when a temporary hearing can be requested in an initial determination, this code section specifically provides for a temporary hearing when a modification of custody is filed but specifies that any award of custody shall not constitute an adjudication of the rights of the parties.

There is a specific provision that speaks to a temporary hearing when a child is 11 but not yet 14. Pursuant to O.C.G.A. § 19-9-3(a)(6), the judge may issue an order granting temporary custody to the selected parent for a trial period not to exceed six months regarding the custody of a child who has reached the age of 11 but not 14 years where the judge hearing the case determines such a temporary order is appropriate.

Are there Circuits that allow for exparte custody orders to be entered and then fail to allow an immediate hearing, within 30- 45 days of the custody order being entered? Why would a court provide exparte relief without exigent circumstances like those necessary when a party is seeking a

protective order? This issue should be explored by the council for Superior Court Judges in the state.

C. Temporary Child Support

The need for child support to be established on temporary basis is paramount to welfare of children. Pursuant to O.C.G.A. §19-6-15, this code section governs the standard the court is to utilize in determining child support.

O.C.G.A. §19-6-15 (c) is the only portion of the code section that speaks directly as to temporary support and addresses both temporary and permanent hearings. It provides the following: "The child support guidelines contained in this Code section are a minimum basis for determining the amount of child support and shall apply as a rebuttable presumption in all legal proceedings involving the child support responsibility of a parent. This Code section shall be used when the court enters a temporary or permanent child support order in a contested or non-contested hearing or order in a civil action filed pursuant to Code Section 19-13-4. The rebuttable presumptive amount of child support provided by this Code section may be increased or decreased according to the best interest of the child for whom support is being considered, the circumstances of the parties, the grounds for deviation set forth in subsection (i) of this Code section, and to achieve the state policy of affording to children of unmarried parents, to the extent possible, the same economic standard of living enjoyed by children living in intact families consisting of parents with similar financial means."

Ga. Code Ann. § 19-6-15 (Lexis Advance through the 2018 Extra Session of the General Assembly)

The burning issue for most litigants is the appropriate income to utilize at temporary hearings. What standards does the court utilize to decide on the incomes of the perspective parties and what support is appropriate on a temporary basis. Most attorneys will put all evidence of the non-custodial parent's income and show the standard the children have been accustomed to prior to the separtion

of the parties if they are married. The court does require financial data to be provided as required by

U.S.C.R. 24.2 which provides for the following:

Rule 24.2. Financial data required; scheduling and notice of temporary hearing. Except as noted below, at least 5 days before any temporary or final hearing in any action for temporary or permanent child support, alimony, equitable division of property, modification of child support or alimony or attorney's fees, all parties shall serve upon the opposing party the affidavit specifying his or her financial circumstances in the form set forth herein. In cases involving child support, the worksheet(s) and schedules required by OCGA § 19-6-15 and only as promulgated by the Georgia Child Support Commission shall be completed and served upon the opposing party contemporaneously with the filing of the affidavit required above. In emergency actions, the affidavit, worksheet(s) and schedules may be served on or before the date of the hearing or at any other time as the Court orders.

In cases filed with complete separation agreements or consent orders resolving all issues but the issue of divorce, the parties are not required to serve financial affidavits, unless otherwise ordered by the Court. In cases involving child support, the parties must attach to the proposed final judgment a completed worksheet or worksheets and any applicable schedules. In addition, the separation agreement must include the parties' gross and adjusted incomes.

The Office of Child Support Services is exempt from filing financial affidavits.

Notice of the date of any temporary hearing shall be served upon the adverse party at least 15 days before the date of the hearing, unless otherwise ordered by the Court.

The parties shall serve upon each other the affidavit and worksheet(s) and schedules (where applicable) at least 5 days prior to any mediation or other alternative dispute resolution proceeding.

In any case in which a party has previously served the affidavit, worksheet(s) and schedules and thereafter amends the affidavit or worksheet(s) and schedules, any such amendments shall be served upon the opposing party at least 5 days prior to final hearing or trial.

On the request of either party, and upon good cause shown to the Court, the affidavits, worksheets, schedules, and any other financial information may be sealed, upon order of the Court.

Only the last four digits of social security numbers, tax identification numbers, or financial account numbers shall be included in any document served or filed with the Court pursuant to this rule. No birth date should be included, only the year of birth. See also OCGA § 9-11-7.1.

A Certificate of Service shall be filed with the Clerk of Court certifying proper service of the affidavit required above and worksheet(s) and schedules (where applicable). Each party shall submit to the Court the original affidavit and worksheet(s) and schedules (where applicable) at the time of hearing or trial.

Failure of any party to furnish the above financial information may subject the offending party, in the discretion of the Court, to the penalties of contempt and may result in continuance of the hearing until the required financial information is furnished and may result in other sanctions or remedies deemed appropriate in the Court's discretion.

Notwithstanding the time limits contained in this rule, the Court may decide a matter without strict adherence to a time limitation, if the financial information was known or reasonably available to the other party, or if a continuance would result in a manifest injustice to a party.

This rule provides specific guidelines as to notice. The court could exempt parties from the rules in its discretion. How often does the court allow a temporary hearing to take place in which the appropriate notice provisions and requirements to serve the other side with domestic relations financial affidavit and worksheets are not complied with per the rules.

Are children being adequately supported with our current system to establish support on a temporary basis especially with the number of cases with DHS or pro se' litigants?

II. Conclusion –

The temporary hearing is the prelude to the final show down in any divorce, custody or child support case. Temporary hearings are needed, are necessary and must occur to keep the family, whether by marriage or parties by having children together, stable until the court can make some final determination of the respective cases.

Respectfully Submitted,
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State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

STATE BAR SERIES

Bringing Up Baby (1938)
The Changing Face Of Family: ART, IVF And Surrogacy

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Bringing Up Baby
The Changing Face of Family: ART, IVF, and Surrogacy

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Bringing Up Baby

The Changing Face of Family: ART, IVF, and Surrogacy

1. Introduction

As societal norms change, and as medical science has progressed to assist humans with reproduction, we find people building families in many different ways while the law struggles to 'keep up'. In ancient times, the law developed the principle that *Mater semper certa est*—the mother is always certain, but, *pater semper incertus est*—the father is always uncertain, and therefore, *pater est, quem nuptiae demonstrant*—the father is he to whom marriage points. As we will see, this maxim may not work so well today, but it continues to be important.

From ancient times forward, our history and mythology is filled with stories of people going to extreme lengths to have children. The Bible tells the story of Abraham, his barren wife Sarah, and the servant Hagar. A 4000-year-old Assyrian tablet containing a marriage contract that includes a provision that if the couple cannot produce a child within the first two years of marriage, they will appoint a female slave as a surrogate, who would then be freed from slavery after the birth of a son. In Roman times, families adopted male children to ensure that they had an heir, including Emperor Augustus, who adopted his stepson Tiberius. The Spanish monarchy often relied on surrogates to bring about an heir to the throne.

As medical science began to address infertility, we find the first documented application of artificial insemination in a human in London in the 1770s, progressing to the first successful human pregnancy with frozen spermatozoa reported in 1953. By the 1970s, the sperm bank industry had developed. In 1978, we learned of the first birth of a

child from natural cycle *in vitro* fertilization; in 1983, the first birth from frozen embryo was documented; and 1997 brought the first birth from an embryo created using a frozen egg.

The ABA Model Act Governing Assisted Reproduction [2019], defines "assisted reproduction" as a method of causing pregnancy through means other than by sexual intercourse, which can include (a) intrauterine or intracervical insemination; (b) donation of eggs or sperm; (c) donation of embryos; (d) *in vitro* fertilization; and (e) intracytoplasmic sperm injection. Compiling various reports, it is believed that over 7 million babies have been born using assisted reproductive technologies or ART.

2. The Importance of Marriage

Marriage remains the most significant element in determining parentage and parental rights. Under Georgia law, children born in wedlock are legitimate. O.C.G.A. § 19-7-20(a). The presumption of a child's legitimacy is one of the most firmly established precepts in law. Williamson v. Williamson, 302 Ga. App. 115, 690 S.E.2d 257 (2010). A child's legal father is defined as the man married to the biological mother at the time the child was conceived or born. See O.C.G.A. § 19-8-1(11), although a child's legal father is not necessarily the biological father. See O.C.G.A. § 19-8-1(11).

Georgia courts have made it clear that the presumption of paternity is not merely vanquished or rebutted when the husband is not the biological father. Baker v. Baker, 276 Ga. 778, 783, 582 S.E.2d 102, 105. Instead, the rebuttable presumption is intended to allow for a presumed father to end his child support obligations for a child he wrongly

believed to be biologically his. Id. at 782, 582 S.E.2d at 105.[1] The legitimation statute is silent as applied to mothers who attempt to "enlist the aid of the courts to disturb the emotional ties" existing between a child and his legal father. Id., referencing Ghrist v. Fricks, 219 Ga. App. 415, 465 S.E.2d 501 (1995), overruled on other grounds by Brine v. Shipp, 291 Ga. 376, 729 S.E.2d 393 (2012). The Baker Court concluded the public policy of Georgia will not permit a mother, with knowledge and support of the legal father's relationship with the child, to later try and delegitimate during divorce. Id.

3. Delegitimating

A court may consider not only the biological tie between the petitioning biological father and the child when finding it in the child's best interest to delegitimate. See LaBrec v. Davis, 534 S.E.2d 84, 86-89 (Ga. App. 2000). "Biology is not destiny, and a man has no absolute right to the grant of his petition to legitimate a child simply because he is the biological father." Ghrist at 506. Instead, a court must also consider the controlling authority, analyze the legal effect of prior determinations, assess any delay in the legitimation process, and most importantly, assess the best interest of the child. LaBrec, 534 S.E.2d at 85, 90-91. Rebutting the presumption of legitimacy with clear and convincing evidence is not enough when a party seeks to "delegitimize a legitimate child and to break up an existing legally recognized family unit already in existence." Baker, 582 S.E.2d at 105 (citing Davis v. LaBrec, 549 S.E2d 76 (Ga. 2001)).

[1] Even in such a situation, the Court enumerated the ten-part test a presumed father is required to meet in order to delegitimate a child and stop child support payments. Id. (citing O.C.G.A. § 19-7-54(a), (b)). The Court determined under the facts, had Mr. Baker made such a claim to delegitimize, he would have been denied.

In LaBrec, the Supreme Court of Georgia found that LaBrec, who was not the biological father, had gone through the process of naming himself as the father on the child's birth certificate and obtained a court order legitimating the child as his own in addition to providing financial and emotional support for the child. 549 S.E.2d at 76, 78. The Court held that the trial court had erred when granting the subsequent petition to legitimate on the grounds that the petitioner was the biological father and a fit parent. Id. The Court noted LaBrec's development of a parental relationship with the child: that LaBrec had lived with the child as father and son, he had accepted the full responsibilities of fatherhood, and he had developed deep familial and psychological bonds with the child derived from daily association. Id. at 77. Under these circumstances, the Supreme Court of Georgia held that the best interest of the child standard should determine whether a trial court should grant a biological father's petition to legitimate an already legitimate child, therefore ordering the delegitimation of the child and termination of parental rights of the legal father. Id.

The Court of Appeals has repeatedly declared that it does "not believe that the law allowing the presumption of legitimacy to be rebutted was ever intended to sanction the result sought" when a biological father attempts to delegitimate a child already deemed to be legitimate. Baker, 582 S.E.2d at 505 (citing Ghrist v. Fricks, 465 S.E.2d 501 (1995)). Further, while legitimacy of a child born in wedlock *may* be disputed, the presumption is not easily rebutted because the public policy does not favor delegitimation. Williamson, 690 S.E.2d at 259. Georgia's "public policy of favoring marriage and legitimacy particularly militates against [a biological father]'s right to, in effect, render the legitimate child illegitimate" when the minor child has been loved, provided for, and raised as the child of the husband. Ghrist at 504 (overturned in part

regarding jurisdiction). Trial courts should consider the child's best interests when deciding whether to permit a challenge to the rebuttable presumption of legitimacy. Baker, 582 S.E.2d at 104 (citing Davis, 549 S.E.2d at 77). The Supreme Court of Georgia stated that, "[t]he law allowing the presumption of legitimacy to be rebutted[2] was never intended to sever a child's ties with his or her legal father." Id.

Georgia's superior courts have jurisdiction to assess and terminate the legal parent-child relationship. See O.C.G.A. § 15-11-10 (establishing exclusive jurisdiction over termination of parental rights within the juvenile courts, except such jurisdiction shall not affect superior courts' jurisdiction under Chapters 6 through 9 of the Domestic Relations code sections). Parental power is lost by "a superior court order terminating parental rights of a legal father or the biological father who is not the legal father of the child, in a petition for legitimation," *provided that such termination is in the best interest of such child*. O.C.G.A. § 19-7-1(b)(8). Thus, to grant a petition to delegitimate a child in order to legitimate a child in the name of another man, the court must determine whether termination of the legal father's parental rights is in the best interest of the minor child.

As a result, in order for another man to legitimate an already legitimate child, the court must then find termination of the legal father's rights and relationship to the child to be in the child's best interest. Brine, 729 S.E.2d at 394. The question is not whether

[2] O.C.G.A. § 19-7-20(b) provides (1) legitimacy may be disputed by clear proof that establishes the contrary of the strong presumption in favor of legitimacy; further, when a pregnancy exists at the time of a marriage and where a divorce is sought and obtained on that ground, the child will not be deemed the legitimate child of the husband. The Supreme Court of Georgia seems to distinguish between a presumption being rebutted by not applying at all and delegitimizing a child, based on the facts and circumstances where a child was already recognized as the legitimate child of the husband. Baker, 582 S.E.2d at 104.

legitimation of the child in the name of the biological father is in the best interest of the child. Id.; Baker, 582 S.E.2d at 104.

The Georgia Supreme Court addressed the question of whether termination of the existing parental rights of the husband is in the best interest of the child in Baker v. Baker. 582 S.E. at 102. Baker involved a legal father, who, despite knowing he was not the biological father, made serious and prolonged efforts to maintain his parental relationship with the child. 582 S.E.2d at 102. The parties met and married knowing the mother was pregnant by another man. Id. at 103. The husband provided financial and emotional support to the mother throughout her pregnancy, and throughout the marriage. Id. It was only upon the mother filing her answer for divorce that the issue of the legitimacy of the child was first raised in a request to deny the husband's claim of custody. Id. The biological father then intervened. Id.

On Appeal, the Supreme Court of Georgia recognized the inconsistency within the law regarding the presumption of legitimacy and identified factors to assess whether termination of an existing parent-child relationship is in the best interest of the child. Id. at 104-5. LaBrec, 543 S.E.2d at 86-87. Before terminating the legal father's parental relationship with the minor child, the court should consider his full acceptance and performance of the responsibilities of fatherhood. Id.; LaBrec, 543 S.E.2d at 90-91. As such, the court should consider the father's continuing financial and emotional support of the mother and child from pregnancy, birth, and throughout childhood. Id.; LaBrec, 543 S.E.2d at 91 Additionally, the court should consider the developed parental relationship between the child and his legal father and the deep familiar and psychological bonds with the child from daily association. Id.

4. Donor Conceived Children

Artificial Insemination—sometimes using donated sperm—saw an increase in use by couples seeking children in the 1950s and 1960s as the technique became both more accessible and socially acceptable. Over the years since, artificial insemination using sperm donation, because it is relatively simple and also relatively inexpensive, is probably the most common form of assisted reproduction. In the early years, legislatures scrambled to address issues ranging from adultery to criminal liability for falsifying birth records arising from the increase in births from artificial insemination. Harry S. Chandler, Legislative Approach to Artificial Insemination, 53 Cornell L. Rev. 497 (1968). In 1964, Georgia passed its artificial insemination statute, mirroring the approach taken by many states, as follows: "All children born within wedlock or within the usual period of gestation thereafter who have been conceived by means of artificial insemination are irrebuttably presumed legitimate if both spouses have consented in writing to the use and administration of artificial insemination." See O.C.G.A. § 19-7-21.

Since Georgia passed its artificial insemination statute in 1964, medical science has progressed to enable physicians to retrieve and freeze a woman's eggs, thus making egg donation a possibility. In addition, the increased use of IVF has resulted in people making the decision to donate embryos that remain after the parents have decided that their family is complete. The number of cycles performed using donor embryos increased from 866 in 2006 to 1,700 in 2015 and the number of cycles performed using frozen embryos from donor eggs increased from 5,135 in 2006 to 12,151 in 2015.

Today, the rules applying to artificial insemination with sperm donation vary from state to state and even differ slightly in the ABA Model Act Governing Assisted Reproduction [2019] ("ABA Model Act"), various versions of the Uniform Parentage Act

("UPA"), and the Uniform Probate Code ("UPC"). Generally, these model laws and sperm donor statutes across the U.S. are all in agreement that when a man provides sperm for use by someone other than his wife and has no intent to become a parent, he is a "donor" and is not a legal parent of any resulting child.

Recent updates in some states as well as in the ABA Model Act and the UPA have been passed, making these provisions of law both gender-neutral and marriage-neutral, allowing a second intended parent to consent to the donation and thereby also acquire parental rights to the resulting child conceived through sperm donation by his/her spouse. Earlier versions of these model acts and updated sperm donor statutes only provided protection to husbands consenting to their wives' insemination with donated sperm and required that the sperm donation be overseen by a physician.
When anonymous sperm donors donate to a licensed physician or sperm bank and intended recipients contract with the sperm bank or physician to purchase sperm from an anonymous sperm donor, the lines are pretty clear and the protections to the donor are fairly strong.

Patton v. Vanterpool involved a couple that had filed for divorce in Savannah, Georgia. At the time of filing, they had no children and none were expected. They attended mediation and reached agreement on the dissolution of the marriage and the marital estate. There were still no children and none were expected. Approximately four months after mediation, but before the divorce was final, both parties signed Informed Consent for Dr. Vanterpool to undergo IVF treatment. Above their signatures was a litany of rights and responsibilities, including: "We will accept the newborn child as our own with all the parental rights and responsibilities." On November 10th, Dr. Vanterpool underwent IVF treatment. Four days later, on November 14th, Mr. Patton

presented the mediated agreement to the trial court and a divorce was granted. Six months later, Dr. Vanterpool prematurely gave birth to twins.

Dr. Vanterpool filed to establish Mr. Patton as the legal father of the two children. The trial court granted her summary judgment under OCGA § 19-7-21 which creates an irrebuttable presumption of legitimation for children conceived through artificial insemination during the marriage or within the normal period of gestation thereafter. The Georgia Supreme Court reversed, holding that in vitro fertilization is a distinctly different procedure from artificial insemination and that the General Assembly would have to revise the statute to include in vitro fertilization (or any other procedure other than artificial insemination) if it intended the statute to encompass those procedures. Patton v. Vanterpool, 302 Ga. 253, 806 S.E.2d 493 (2017).

5. Embryo Disposition

One growing area of dispute and thus litigation arising out of assisted reproduction is what to do with embryos created by a couple prior to a divorce or dissolution. In some cases, the lawyers involved in a divorce may not even have known about the embryos when the case was filed. Georgia, like most states, does not have any statutory law addressing the disposition of frozen embryos created through ART, and Georgia's appellate courts have not yet had occasion to consider a case involving such issues. Most states follow a patchwork of legislative and judicial approaches to the various issues arising from the use and disposition of frozen embryos.

There have been just over a dozen cases decided by appellate courts in the United States in which a court was asked what to do with cryopreserved embryos when a divorcing couple could not agree on who would keep and/or use the embryos.

In each of these cases, one person wanted to use the embryos to conceive children and the other did not. For 24 years, the clear trend in these cases was for courts to find a way to prevent embryos from being used to conceive children against the wishes of one of the parties. However, two cases have presented compelling circumstances in which the courts have held in favor of a woman wanting to use the embryos against the wishes of her former male partner.

In Tennessee's 1992 Davis v. Davis case, the Supreme Court of Tennessee held that in the absence of an express agreement between the parties, frozen embryos should be awarded based on a balancing of the parties' relative interests. Davis v. Davis, 842 S.W.2d 588, 604. "Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than the use of the pre-embryos in question." Id. at 600-601. The Davis court found that each of the parties in Davis had an equal constitutional right to procreative autonomy governing their interest in the embryos. Id. at 597. The court held that the embryos were not persons, but that they were property entitled to a special respect as the result of their potential for life. Id. at 604. Finally, the Tennessee Supreme Court opined that if there is an express agreement governing the disposition of the embryos in the event of a divorce, a court should give effect to the parties' intent as expressed in that agreement. Id. at 604.

When intended parents go through IVF treatment and create their embryos, they sign documents with their fertility clinic to document their consent to treatment and, in most situations, to provide instruction to the clinic on the future disposition of the embryos. Typically, the forms instruct IVF patients to choose which box to check from four or five specific choices including: 1) the wife/woman/patient determines what

happens to the embryos; 2) the husband/man/partner determines what happens to the embryos; 3) the embryos will be donated for research; or 4) the embryos will be disposed of by the clinic. Sometimes the choices are more creative, such as dividing vials of embryos between the parties or requiring both parties to agree on the disposition of the embryos at the time of the disposition. However, this portion of the medical consent forms tends to be embedded in a lengthy informed consent document. It would be very unusual for a couple to have an attorney look at the clinic consent forms prior to signing.

The Davis case has become the seminal case in the jurisprudence of embryo disposition. Davis is quoted, although not necessarily followed, in virtually every subsequent case involving disputes over frozen embryos. For twenty years, every case decided by a court of record, using varying legal theories, prevented the person wishing to use frozen embryos from doing so against the wishes of a (former) spouse or partner who does not want to have a child born against his or her wishes. Since Davis, courts have used, essentially, three different models to reach this same result.

Enforcement of the "contract": Four cases, from four different states (TX, OR, NY, WA), have held that unambiguous provisions in IVF consent forms should be enforced as written. The consent forms in two of these cases provided that embryos should be destroyed in the event of separation or divorce. Roman v. Roman, 193 S.W.3d 40, 55 (Tex.App. 2006); In re Marriage of Dahl, 194 P.3d 834, 840 (Or. 2008). The form in another case provided that, in the event the parties were unable to agree on the disposition of the embryos, they would be donated for research to an institution to be determined by the IVF program. Kass v. Kass, 696 N.E.2d 174, 182 (N.Y. 1998).

The fourth case, Litowitz v. Litowitz from the Supreme Court of Washington, contained an interesting twist – the embryos were created from the husband's sperm and donated eggs. Litowitz v. Litowitz, 48 P.3d 261 (Wash.banc 2002). The Washington Supreme Court held that the wife had an equal right to determine the fate of the embryos, despite her lack of genetic connection. Id. at 267, but ultimately relied on the written documents signed at the clinic and upheld the provisions of the informed consents providing that if the couple didn't give specific direction to the IVF program within five years, the embryos would "be thawed out and not allowed to undergo further development" and preventing either of the Leibowitz's from unilaterally using them to bear a child. Id. at 270. The lesson of these cases is that unambiguous language in the medical consent forms likely will be enforced, to the extent that language prevents one of the parties from using the embryos (to conceive a child) against the wishes of the other party.

6. "De Facto" Parent/Equitable Caregiver

H.B. 543 was passed by both the House and Senate of the Georgia General Assembly in 2019 and is, as of the time of drafting this paper, on Governor Kemp's desk for passage. The bill will be codified as O.C.G.A. § 19-7-3.1 and provides a vehicle for a court to determine legal standing for an individual as an "equitable caregiver" of a child in order to confer custody or visitation rights to that person.

In many respects, it mirrors the grandparent custody rights found in O.C.G.A. § 19-7-3. It greatly expands the field of caregivers beyond that of O.C.G.A. § 19-7-3 and seeks to untie the hands of the trial judge who is limited by statutorily proscribed relationships rather than looking at who has actually functioned in a parental capacity to the child. The statute seeks to determine, from the child's perspective, who has

performed the role of a parent to the child rather than whether a specified relationship exists. The Court must find by clear and convincing evidence that the petitioner has" (1) fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life, (2) engaged in consistent caretaking of the child, (3) established a bonded and dependent relationship with the child, the relationship was fostered or supported by a parent of the child, and such individual and the parent have understood, acknowledged, or accepted or behaved as though such individual is a parent of the child, (4) accepted full and permanent responsibilities as a parent of the child without expectation of financial compensation, and (5) demonstrated that the child will suffer physical harm or long-term emotional harm and that continuing the relationship between such individual and the child is in the best interest of the child." H.B. 543, 155th Georgia General Assembly (2019-2020).

7. What about Surrogacy?

Prior to the advent of IVF, when a woman was unable to conceive and carry a pregnancy, a couple's only option was adoption or 'traditional surrogacy.' With traditional surrogacy, now referred to as genetic surrogacy in the ABA Model Act and the UPA, the woman carrying the child also is the child's genetic mother. A genetic surrogacy typically involves a woman agreeing to carry a child for an individual or couple unable to conceive and carry a child themselves. The pregnancy is brought about by artificial insemination, using the sperm of the man who intends to be the father. Georgia—like most states—does not have a law that addresses genetic surrogacy, and the consensus among ART lawyers is not to assert an argument to the courts that anyone other than the birth mother is the legal mother of the child. The Georgia Adoption Code

provides that a legal parent cannot effectively surrender her parental rights to her child prior to the child's birth. Therefore, the biological father of the child must legitimate and the second parent, whether his wife or husband, must adopt the child in order to terminate the birth mother's rights.

With gestational surrogacy, however, the child is conceived through IVF, using gametes from the intended parents or from donors on behalf of the intended parents. The woman carrying the child is not genetically related to the child. The intended parents and the prospective gestational carrier—regardless of whether they are friends, relatives, or recent strangers—go through extensive evaluation and screening required by their IVF clinic following guidelines from the American Society of Reproductive Medicine. The parties enter into a contract to document their intent and agreement regarding the planned medical treatment and procedures, the payment of expenses and compensation related to the plan, and their intent regarding the parental rights and responsibilities to the child. In most states, the intended parents seek a declaratory judgment to confirm their parental rights to the child prior to the birth.

For over 25 years, the Georgia courts, along with the court so most other states, have issued declaratory judgments confirming the parental rights and responsibilities of intended parents to the children being carried on their behalf by gestational carriers and further confirming that the gestational carrier does not have rights or responsibilities to the child that she will be delivering. Still, the law regarding surrogacy can be considered unsettled, and the practice remains largely unregulated. Even in jurisdictions where state statutes provide that surrogacy contracts are unenforceable, intended parents have had success in getting their names listed as parents on the child's birth certificate where the carrier is in agreement.

States with statutory law expressly governing surrogacy include Arkansas, California, Florida, Illinois, Kentucky, Louisiana (only altruistic surrogacy is allowed there), Maine, Nevada, New Hampshire, New Jersey, North, Texas, Utah, Vermont, Virginia, Washington and Washington, DC. States with statutory law referencing but not expressly governing surrogacy include Alabama, Delaware, Iowa, Oregon, New Mexico and West Virginia. States that have case law governing surrogacy include Connecticut, Maryland, Massachusetts, Ohio, Oregon, Tennessee, and Wisconsin.

To date, Georgia has no statutory or case law governing surrogacy, as is also the case in Alaska, Colorado, Hawaii, Idaho, Kansas, Minnesota, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Rhode Island, south Carolina, South Dakota, and Wyoming.

Michigan and New York statutorily prohibit surrogacy. Arizona, Indiana, and Nebraska statutorily prohibit the enforcement of surrogacy contracts but do not prohibit the courts from confirming the parental rights of intended parents.

Questions about the constitutionality and enforceability of gestational carrier agreements have been litigated for over 30 years. In re Baby M, 109 N.J. 396 (1988); Johnson v. Calvert, 5 Cal. 4th 84 (1993); Culliton v. Beth Israel Deaconess Medical Center, 435 Mass. 285 (2001); In re Roberto d.B., 399 Md. 267 (2007). The intended parents have a constitutionally protected right to procreate, and the gestational carrier has a constitutionally protected right to autonomy over her body, medical treatment, and travel. Both the parents have the right to enter into contracts and to waive or compromise their individual rights, within the limits of public policy. The rights of the adults in the surrogacy arrangement should always be viewed and analyzed with a careful consideration of the best interests of the child.

The Committee on Ethics for the American College of Obstetricians and Gynecologists has stated:

> Regardless of the contractual details, however, the pregnant gestational carrier is the only one empowered and enabled to make independent decisions regarding any screening, testing, or procedure that may be indicated during her pregnancy. Such interventions include fetal chorionic villus sampling, amniocentesis, multifetal reduction, pregnancy termination, and invasive or fetal surgery. Similarly, the gestational carrier's decisions regarding the continuation of pregnancy when her health is at risk should take priority over the well-being of the fetus and the desires of the intended parents. Decisions counter to the contract may have financial or legal consequences, and the gestational carrier should be made explicitly aware of this fact and of the specific consequences that may result after a contract breach.[3]

In the very few cases in which a gestational carrier who initially agreed to carry the child of another changed her mind at some point after the pregnancy has commenced, the courts have rejected the argument that the gestational carrier has a Constitutional right to the companionship or parenthood of any child born as a result of the surrogacy. In Johnson v. Calvert, the California Supreme Court rejected such constitutional claims made by a gestation carrier, finding that no "sufficiently strong policy reasons exist to accord her a protected liberty interest in the companionship of the child when such an interest would necessarily detract from or impair the parental bond enjoyed by [the genetic and intended parents]." In 2017, the California Court of

[3] Committee on Ethics, American College of Obstetricians and Gynecologists, Family Building Through Gestational Surrogacy,

Appeals, citing to the earlier Johnson decision, likewise rejected a gestational carrier's claims for constitutional protection of her parental rights over triplets she gave birth to because the surrogacy agreement validly and legally assigned parentage to the intended parent. C.M. v. M.C., 7 Cal. App. 5th 1188 (2017).

8. Conclusion

The ancient standard in issues of paternity was *pater est, quem nuptiae demonstrant* – the husband is the father. But in more modern times, this maxim, and the laws supporting it, have not caught up to the scientific and factually specific circumstances of Georgia families.

Reproductive science has radically changed the number of available avenues for people to build and structure their families. Children born through artificial insemination with donor sperm or by gestational surrogate, as well as children conceived by in vitro fertilization under a number of combinations of surrogacy, donor gametes, and intended parents all present real legal consequences when identifying the parents.

Georgia's case law regarding deligitimation, establishment of paternity, and silence on the issue of surrogacy identifies a pressing need for the legislature to take up these issues. House Bill 543 is just one attempt to remedy the hand-tying effect ancient maxims about genetics and marriage have on custody decisions within the trial courts when modern families that are not structured around marriage or genetic relationships. The ever-changing face of the modern family as a result of reproductive science is making the issue of identifying the parents, once the easiest part of parenthood, the challenge many Georgia families and courts are facing.

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INTRODUCTION

We have seen a lot of progress for the lesbian, gay, bisexual, transgender, and queer ("LGBTQ") community over the last five years. Most notably, the U.S. Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) held that a marriage between two women or two men must be accorded the same treatment which would be given to a man and a woman in the same circumstances. In *Obergefell*, the Supreme Court provides an extensive analysis of the history of the country's treatment of both marriage and homosexuality, emphasizing the importance of marriage and even deeming it a "keystone of our social order." *Id.* at 2594-97, 2601.

Unfortunately, the watershed decision was not followed by legislative action conforming laws that were drafted for different-sex couples to expressly provide for inclusion of same-sex couples. Courts have grappled with how broadly to apply *Obergefell* despite the eloquence of Justice Kennedy's decision, reasoning that "[f]ar from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities…their immutable nature dictates that same-sex marriage is their only real path to this profound commitment," *Id*. at 2594, and noting that marriage "safeguards children and families" by, among other things, providing children raised by same-sex couples "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives" and because it "affords the permanency and stability important to children's best interests." *Id*. at 2600.

The Court's discussion in *Obergefell* provides a plethora of strong arguments for protecting same sex married couples and, by extension, their children. However, it is important to note that the *Obergefell* decision focuses on the right of same sex couples to *marry*, and the rights of the children of same sex couples to have parents who are married. It does not specifically

discuss the many remaining issues faced by LGBTQ families outside the context of same sex marriage, including, but not limited to, defining a parent-child relationship of unmarried LGBTQ parents, how to protect LGBTQ parents lacking a biological connection to a child, or interpreting the gendered language of statutes written prior to the *Obergefell* decision.[1] This paper focuses on just a few of the legal issues faced by LGBTQ families and attempts to provide guidance in navigating the current state of Georgia law and the current political climate of the country.

LANGUAGE MATTERS

Georgia Statutory Language

O.C.G.A. § 19-7-20 addresses the circumstances under which children are deemed legitimate. It creates a rebuttable presumption. Specifically, it provides:

[1] Only one question appears to have a collective resolution, which is of whether a female spouse must be listed on the birth certificate of a child born to her wife (she does), although the question is not entirely settled in all states or in all situations. *See, e.g.*, *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (Arkansas was required to treat female spouses in parity with male spouses where a state law required "husbands" to be listed as "fathers" on birth certificates of children born to their wives where the pregnancy was the result of assisted reproductive technology (A.R.T.) with the husbands' consent). *And see Henderson v. Adams*, 209 F. Supp. 3d 1059, 1076 (S.D. Ind. June 30, 2016) (female spouse must be named as parent on birth certificate of child born to her wife), *amended by* No. 1:15-cv-00220, 2016 WL 7492478 (S.D. Ind. Dec. 30, 2016) ("When the State Defendant created and utilized the Indiana Birth Worksheet, which asks 'are you married to the father of your child,' the State created a benefit for married women based on their marriage to a man, which allows them to name their husband on their child's birth certificate even when the husband is not the biological father. Because of *Baskin* and *Obergefell*, this benefit—which is directly tied to marriage—must now be afforded to women married to women."); *McLaughlin v. Jones*, 382 P.3d 118, 121-22 (Ariz. Ct. App. 2016) ("We disagree … that it would be impossible and absurd to apply [Marital Presumption Statute] in a gender-neutral manner to give rise to presumptive parenthood in Suzan. Indeed, *Obergefell* mandates that we do so and the plain language of the statute, as well as the purpose and policy behind it, are not in conflict with that application.").

(a) All children born in wedlock or within the usual period of gestation thereafter are legitimate.

(b) The legitimacy of a child born as described in subsection (a) of this Code section may be disputed. Where possibility of access exists, the strong presumption is in favor of legitimacy and the proof must be clear to establish the contrary. If pregnancy existed at the time of the marriage and a divorce is sought and obtained on that ground, the child, although born in wedlock, will not be legitimate.

(c) The marriage of the mother and reputed father of a child born out of wedlock and the recognition by the father of the child as his shall render the child legitimate; in such case the child shall immediately take the surname of his father.

The language in this statute implies a biological connection to the child at issue. Section (b) discusses the "possibility of access;" in other words, the likelihood of the mother being impregnated by a man other than her husband. While Sections (a) and (b) of this statute use gender-neutral language focused on marriage, the gendered language in Section (c) coupled with the biological implications of the statute create challenges for LGBTQ families relying on this presumption. If we look at the plain language of the statute, an argument can be made that the child of a married same sex couple born in wedlock is legitimate, and that both parents are legally recognized. In fact, there are many instances of birth certificates in Georgia being issued by the Office of Vital Records with the names of both same sex parents. Many superior court judges have also recognized children born to married same sex parents as legitimate. Unfortunately, we do not yet have case law on point to confirm that the statute extends to same sex couples.

O.C.G.A. § 19-7-21 addresses the legitimacy of children conceived by artificial insemination, and provides as follows:

> All children born within wedlock or within the usual period of gestation thereafter who have been conceived by means of artificial insemination are irrebuttably presumed legitimate if both spouses have consented in writing to the use and administration of artificial insemination.

Notably, this statute uses gender neutral language, and requires that "both spouses" consent in writing to the use of artificial insemination. It also creates an irrebutable presumption of legitimacy. As discussed in more detail below in *Patton v. Vanterpool,* 302 Ga. 253 (2017), Georgia courts have strictly construed the language of this statute to apply only to cases involving artificial insemination, and not to extend to cases involving in vitro fertilization. It is not yet clear how Georgia courts will apply this statute to married same sex couples.

O.C.G.A. § 19-8-40 through O.C.G.A. § 19-8-43 are sections of the adoption code which deal with embryo transfers. The court in the *Vanterpool* case relied on the language of these code sections, which were recently amended by the General Assembly, to justify its decision to strictly construe the meaning of "artificial insemination." O.C.G.A. § 19-8-40 provides the following definitions:

> As used in this article, the term:
>
> **(1)** "Embryo" or "human embryo" means an individual fertilized ovum of the human species from the single-cell stage to eight-week development.
>
> **(2)** "Embryo relinquishment" or "legal transfer of rights to an embryo" means the relinquishment of rights and responsibilities by the person or persons who hold the legal rights and responsibilities for an embryo and the acceptance of such rights and responsibilities by a recipient intended parent.
>
> **(3)** "Embryo transfer" means the medical procedure of physically placing an embryo into the uterus of a female.
>
> **(4)** "Legal embryo custodian" means the person or persons who hold the legal rights and responsibilities for a human embryo and who relinquishes said embryo to another person or persons.
>
> **(5)** "Recipient intended parent" means a person or persons who receive a relinquished embryo and who accepts full legal rights and responsibilities for such embryo and any child that may be born as a result of embryo transfer.

In regards to the parent-child relationship created, **O.C.G.A. § 19-8-41(d)** provides:

> A child born to a recipient intended parent as the result of embryo relinquishment pursuant to subsection (a) of this Code section shall be presumed to be the legal child of the recipient intended parent; provided that each legal embryo custodian and each recipient intended parent has entered into a written contract.

The General Assembly noticeably made efforts to draft progressive, gender-neutral language surrounding parentage under these Code sections. The term "recipient intended parent" is plural, is not limited to one or even two parents, and has no requirement of marriage. It is possible that these Code sections could serve as an example for the General Assembly in revising the language of the more dated Code sections defining parentage, like O.C.G.A. § 19-7-20, to create clear avenues to protect LGBTQ families.

O.C.G.A. § 19-7-46.1 provides a relatively simple process to establish a parent-child relationship, and, applied in a gender-neutral manner, may have application to couples regardless of gender or gender identity. In relevant part, this provision of Georgia law "establishes prima-facie case of establishment of paternity" through the following means:

> (a) The appearance of the name or social security account number of the father, entered with his written consent, on the certificate of birth or a certified copy of such certificate or records on which the name of the alleged father was entered with his written consent from the vital records department of another state or the registration of the father, entered with his written consent, in the putative father registry of this state, pursuant to subsection (d) of Code Section 19-11-9, shall constitute a prima-facie case of establishment of paternity and the burden of proof shall shift to the putative father to rebut such in a proceeding for the determination of paternity.
>
> (b) When both the mother and father have signed a voluntary acknowledgment of paternity in the presence of a notary public swearing or affirming the statements contained in the acknowledgment are true and such acknowledgment is filed with the State Office of Vital

> Records within 30 days of its execution and is recorded in the putative father registry established by subsection (d) of Code Section 19-11-9, the acknowledgment shall constitute a legal determination of paternity, subject to the right of any signatory to rescind the acknowledgment prior to the date of the support order, any other order adjudicating paternity, or 60 days from the signing of the agreement, whichever is earlier. Recording such information in the putative father registry shall constitute a legal determination of paternity for purposes of establishing a future order for support and other matters under Code Section 19-7-51. Acknowledgment of paternity shall establish the biological father, as such term is defined in Code Section 19-7-22, but shall not constitute a legal determination of legitimation pursuant to Code Section 19-7-22.
>
> (c) After the 60 day rescission period specified in subsection (b) of this Code section, the signed voluntary acknowledgment of paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof on the person challenging the acknowledgment. The legal responsibilities of any signatory, including child support obligations, arising from the acknowledgment may not be suspended during the challenge, except for good cause shown.

O.C.G.A. § 19-7-3.1 (HB 543) is a new code section passed during the 2019 Georgia General Assembly pertaining to the rights of "equitable caregivers". In order to establish standing as an equitable caregiver, a Court must establish, by clear and convincing evidence that a person has: (1) fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life, (2) Engaged in consistent caretaking of the child, (3) Established a bonded and dependent relationship with the child, the relationship was fostered or supported by a parent of the child, and such individual and the parent have understood, acknowledged, or accepted

or behaved as though such individual is a parent of the child, (4) Accepted full and permanent responsibilities as a parent of the child without the expectation of financial compensation, and (5) Demonstrated that the child will suffer physical harm or long-term emotional harm and that continuing the relationship between such child and individual is in the best interest of the child.

In order to determine harm, the statute provides several factors that judges must (shall not may) consider including who are the past and present caretakers of the child, with whom has the child formed close psychological bonds and the strength of those bonds, whether competing parties expressed in interest in contacting the child over time, and the child's unique medical and psychological needs. A judge is also permitted to consider and investigate the relationship between a parent of a child and someone claiming to be an equitable caregiver to review whether or not any written agreement existed which showed an intent of the parent to allow the other person to be a caretaker in a parental-type role to the child. If the court deems someone as an equitable caregiver, the court can issue an order establishing custodial and other parental rights such as visitation and child support for the caregiver. Provided however, the statute does not permit an original action if both parties are not separated and the child is living with both parents. Further, a person's designation as an equitable caregiver cannot terminate the parentage of another person.

O.C.G.A. § 19-7-3.1 provides protections for unmarried same-sex partners that previously did not exist under Georgia law. While same sex parties now legally have the right to marry, it is not uncommon that well-established family units exist in the LGBT community absent marriage. These units often include long-term partners and multiple children although the children may be the biological children of only one of the parties. When these family units fracture, and prior to the passage of HB 543, the non-biological parent had no right to petition Georgia courts for a custodial role as they were not immediate family covered by other existing statutes. Unfortunately,

it is not uncommon for the biological parent to use their blood connection to the children as a tool to legally minimize, or even attempt to erase, the non-biological parent from the children's lives. HB 543 now provides an avenue for such a party to seek relief in the Court following dissolution of an unmarried same sex relationship involving children.

Inclusive Language for Family Law Practitioners

Most family law practitioners will encounter LGBTQ issues at some point in their careers. Even if you don't market yourself as an LGBTQ-friendly attorney, using inclusive language can expand your reach for potential clients. Additionally, many of the guidelines for inclusive language for LGBTQ clients can be applied to clients of different races, genders, religious beliefs, etc.

The easiest way to ensure you aren't excluding LGBTQ clients is to examine whether your intake forms are gender neutral. This is typically the potential client's first interaction with you and your firm. Here are some pointers:

- Instead of using the terms "husband" and "wife," try using "Spouse 1" and "Spouse 2."
- Instead of using the terms "father" and "mother," try using "Parent 1" and "Parent 2."
- Consider adding a place on your intake forms where potential clients can indicate their preferred pronouns (*i.e.*, "he/him", "they/their", "she/her").
- Instead of asking for the "sex" of involved parties, ask for the "gender."

In addition to changing the language used in your initial forms, be cognizant of the language you use in your initial meetings with potential clients. Try not to make assumptions about the gender of a potential client's spouse. For example, asking a woman how long she's been

married to her husband, when she is married to a woman, could negatively impact the candor you are working to build with a client at the initial meeting.

Part of inclusivity, particularly for LGBTQ clients, is knowing what you don't know. If you're not sure what the appropriate terminology is, ask your potential client. Give them the space to explain to you how they identify and the terms they use to define their family. Again, try not to make assumptions – we shouldn't assume a woman with a wife identifies as a lesbian. She may identify as bisexual, or queer, or maybe she started with a husband who transitioned after their marriage. Similarly, try to avoid using qualifiers when defining your LGBTQ clients' marriages or relationships. With the *Obergefell* decision, the term "gay marriage" is obsolete. Similarly, referring to your client's involvement in a "same sex relationship" is unnecessary.

With respect to the possibility that one of your clients is transgender, beyond the addition of preferred pronouns on the intake form, there are additional considerations to provide a welcoming environment and competently represent your client. First, think about gender identity as "brain sex" – the sex a person knows to be their truth, and that everyone has a gender identity. The only question is whether the gender assigned to that person at birth – the letter on their birth certificate – aligns with their gender identity. A cisgender person is someone whose gender identity matches the gender that person was assigned at birth,[2] and a transgender person is someone whose gender identity does not match the gender assigned to that person at birth. It is that simple. By incorporating the term cisgender into your vocabulary, or at least conceptualizing that nearly everyone is either cisgender or transgender, you give language and context to a lived privilege

[2] The Oxford English Dictionary describes the word ―cisgender‖ as an adjective and defines it as "Denoting or relating to a person whose self-identity conforms with the gender that corresponds to their biological sex; not transgender." Katy Steinmetz, This is What _ Cisgender' Means, Time (Dec. 23, 2014) <http://time.com/3636430/cisgender-definition/>

most people have never considered or examined.[3] Also, avoid using the phrase "biological" male/female. The most respectful way to refer to a non-cisgender person, in person and in court filings, is by the term they use to identify themselves. Using a "biological sex" caveat is disrespectful and inaccurate (biology includes neuroscience, which includes brain sex).[4] The appropriate way to refer to a transgender woman, for example, is that she is a woman and, where necessary, a woman who was assigned the sex of male at birth.

It is also important to dispense with the idea that transgender people have to undergo any particular procedure or take legal steps in order to be recognized in accordance with their gender identity. One critical misconception about transgender people is that sex ―reassignment surgery, more accurately described as ―sex confirming surgery, (SCS) is an essential part of transition, but that is not the case for all transgender people. Transition is individualized and case-dependent. It generally includes hormone therapy and gender immersion (where a person lives as the gender with which they identify), and, in some cases, SCS or other surgeries that alter internal or external sex characteristics. Hormones, surgeries and other medical procedures that alter physiology to reflect gender are frequently inaccessible and entail costs and risks that not all people can undergo.

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[3] Identifying yourself as a cisgender male or female (if you are) is useful because it helps to break down the idea that transgender people are abnormal or mentally ill. It replaces the harmful binary Normal/Transgender with the much more neutral Cisgender/Transgender.

[4] *See, e.g.*, Jill Pilgrima, et. al, *Far From the Finish Line: Transsexualism and Athletic Competition*, 113 Fordham Intell. Prop. Media & Entm't. L.J., 495, 498 (2003) (citing R. Rhoades & R. Pflanzer, *Human Physiology*, 958-59 (3d ed. 1996)) (explaining that external genitalia is but one determinate of sex, all others occur internally and are rarely assessed. For example, several ways in which gender can be determined include ―chromosomal sex,‖ determined by the presence of X or Y chromosomes and ―phenotypic sex‖ which refers to the presence of anatomical and/or biochemical features such as hormonal dominance. Indeed, there are believed to be up to eight determinates of sex.). *And see* Karen Gurney, *Sex and the Surgeon's Knife: The Family Court's Dilemma . . . Informed Consent and the Specter of Iatrogenic Harm to Children with Intersex Characteristics*, 33 Am. J.L. & Med. 625, 625–26 (2007) ("Recently the importance of the brain's sex as a biological factor influencing sex determination has gained wider recognition.") (citations omitted).

None of the foregoing changes a person's gender identity. Sometimes it is important for the case to know details about your client's gender transition, most times it is not. Ask yourself whether it is, or might be, an issue in the case before asking any private, medical and unnecessary questions about your client's gender identity. If the issue is brought up in legal proceedings, object to relevance and otherwise treat the question as invasive and irrelevant wherever possible.

Keeping your language and assumptions gender neutral is also useful for clients outside of the LGBTQ community. For example, if a woman comes in for a consultation and indicates that she has a husband and children, do you assume she is seeking primary (or at least joint) physical custody of the children, as opposed to a reasonable visitation schedule? Maybe you make a statement like "don't worry, judges in this county rarely take children from mothers." What if the woman is the primary breadwinner for her husband and children? This is a common reality in 2019. What impact would those assumptions have on the client's candor with you? Have you just inadvertently created additional litigation because the client now feels pressured to adopt a position different than what may have been discussed with her soon-to-be ex-husband?

Inclusive language should extend to the pleadings we file with the Court. The argument is often made that, without the use of gendered terms like Mother and Father, it is confusing to distinguish between the parties. However, that is not the case. The Georgia Child Support Worksheet now uses gender neutral language to define the parents. It also uses the parents' names for identification purposes. Similarly, our settlement agreements and parenting plans can be structured to use the parties' last names (or first names if the parties have the same last name) or gender-neutral labels, like Spouse 1/Spouse 2, Parent 1/Parent 2, Petitioner/Respondent, etc. The use of pronouns in settlement agreements and parenting plans may actually serve to confuse issues

for both the parties and the assigned judge when both parties identify with the same gender so it is often best practice to use gender-neutral labels in such cases.

Using the specific language that LGBTQ clients use to define their lives and families creates a safe space and a lasting impression of professionalism.

DEFINING AND PROTECTING LGBTQ FAMILIES

Biological vs. Non-Biological Parent-Child Relationship

A recent holding seems to further restrict how a parent-child relationship is defined when a parent lacks a biological connection to the child. In *Patton v. Vanterpool, 302 Ga. 253 (2017),* the parties were in the midst of divorce litigation when Dr. Vanterpool pursued undergoing in vitro fertilization (IVF) treatment. Mr. Patton agreed to the procedure which used both donor ova and donor sperm. Dr. Vanterpool traveled outside of the country for the IVF procedure. Four days later, a final judgment and decree of divorce was entered. The final judgment reflected that there were no children born as issue of the marriage. After Dr. Vanterpool gave birth as a result of her IVF procedure, she petitioned the court to set aside the final judgment and decree of divorce in order to include the minor child. The trial court ruled in Dr. Vanterpool's favor, granting her summary judgment on the issue of paternity. The Georgia Supreme Court reversed, finding that O.C.G.A. § 19-7-21 applies only to artificial insemination and does not create a presumption of legitimacy in cases of in vitro fertilization.

The potential impact of this case on LGBTQ families is significant. In vitro fertilization is a common method used by LGBTQ parents to conceive. This case finds that those parents utilizing IVF after marriage will need to seek protections elsewhere. The Court in *Vanterpool* seems to leave a door open for establishing legal paternity through O.C.G.A. 19-7-20 in cases with similar

facts, but doesn't provide any practical explanation for such an analysis. *See Patton v. Vanterpool*, 302 Ga. At 257 n. 7. The *Vanterpool* court also seems to be hinting at the need for legislative changes in providing protections for families created through IVF and points to the General Assembly's recent amendments to the adoption code (O.C.G.A. § 19-8-40 *et seq.*).

Trans Parents and Trans Children

There are very few published decisions directly relating to transgender parents or custody disputes between parents raising a gender non-conforming child. Two illustrative cases provide some guidance, though both are highly fact-specific. In *Ferrand v. Ferrand*, 221 So.3d 909 (La. Ct. App. 2016), writ denied, 2016-1903 (La. 12/16/16), 211 So. 3d 1164, the court treated the transgender status of a non-biological father as a relative non-issue. The case involved an unmarried couple, a cisgender female and a transgender man, Vincent. The couple participated in a commitment ceremony in 2003, after which the female partner changed her last name. They decided to raise a family and the mother conceived twins via A.R.T. with anonymous sperm who were born in Louisiana in 2007. Vincent's name was added to the birth certificate and he was known to kids as their father. The couple dissolved their relationship in 2012, after which dad was primary caretaker. After the mother married, she severed contact between the children and their father. Vincent filed a custody action and sought a mental health evaluator for the children. The trial court did not appoint an evaluator and held a trial.

Vincent retained a psychologist who he met with and, separately, who met with the children. The expert testified that the children consider Vincent their dad and that they would suffer

"emotional problems" if their relationship were severed because "[t]his healthy relationship with their father is crucial to their psychological and emotional well-being. And his constant daily presence in their lives is also vital to their well-being." 221 So. 3d at 918. The trial court granted the mother's motion to dismiss the petition, reasoning that Vincent was a non-parent who could not prove that "substantial harm" would flow from granting the "natural" parent sole custody, as set out in state law regarding non-parents seeking custody. *Id.* The appellate court reversed.

The appellate court began its analysis by recognizing that, notwithstanding the statutory language, no appellate case had yet decided a case "where the non-parent is neither biologically nor legally related to the child but has, in essence—together with the biological parent—parented the child, albeit non-traditional, family unit since the child's birth," and that *Obergefell* recognized the dignity of same-sex couples and the need for their children to have stable relationships with both parents raising them. 221 So. 3d at 921. The court then analyzed sister southern state decisions on the question. Considering this bounty of extra-jurisdictional case law, the appellate court ultimately ruled that, "[u]nder the facts of this case, we find that a comprehensive custody evaluation by a court-appointed evaluator is necessary to properly determine whether 'substantial harm' would result to these children if sole custody is granted to [mother]. Further, a comprehensive evaluation may assist the trial judge in his consideration of the children's mental and emotional well-being—*i.e.*, their best interest." *Id.* at 939.

Lessons from *Ferrand*, besides that the analysis contains a treasure-trove of helpful case law for all biological vs. non-biological parenting dispute in sister states, is that it is possible for a southern court to treat the transgender status of a parent as a non-issue – as should you. Ideally, it would not have treated Vincent as though he was in a "same-sex" relationship and would not have needed to identify him as a "biological female." Despite these negatives, the court used the proper

pronouns to refer to Vincent (*i.e*., "he/him/his" and "dad/father") and did not attach any negative connotation to the fact of his transgender status.

One of the few reported cases involving a custody dispute between legal parents in which one parent supported their gender non-conforming child and the other did not is instructive, primarily, as a cautionary tale. In *Williams v. Frymire*, 377 S.W.3d 579 (Ky. Ct. App. 2012), a child, assigned the sex of female at birth, was born to married parents who divorced when the child was two years old. The court granted the mother sole custody. The father moved to modify the custody order based on an email received from the mother announcing that their five year-old child "was transgender and would from then on be considered a boy, wear boy clothing, and be called Bridge. [Mother] also stated that she would begin transitioning [child's] gender from girl to boy and had discussed the matter with [child]'s school. Furthermore, [Mother] would not listen to any challenge regarding this decision." *Id.* at 580.

Evidence presented at the hearing to support the mother's support for the child's transgender status relied, primarily, on the testimony of the child's art therapist who diagnosed the child as having gender identity disorder after the first visit based on information from the mother and, from the child, that she liked wearing Power Ranger outfits "and that she was angry she could not be 'Bridge' all of the time." 377 S.W.3d at 583. The therapist admitted that she did not perform any psychological testing or complete a child behavioral checklist, but "felt confident in diagnosing gender identity disorder after one visit because gender is innate, in her opinion." The father's experts testified about concerns they had based on the child's therapist not having any expertise in the area of gender identity disorder, and about the diagnosis based upon the complexity of the disorder and the child's young age as well as the failure to conduct a psychological evaluation and interview.

Other witnesses testified about the mother's mental health, including that she had pre-existing diagnoses of anorexia nervosa, bulimia nervosa, and bipolar disorder, and that she had previously expressed concerns related to the child's hearing, vision, and speech, and her suspicion of Asperger's Syndrome. The trial court concluded that "girls can prefer male sports, toys, and clothes without being pathologized as something requiring intervention, such as changing her gender for school, sending her to a separate bathroom, or changing her name to a Power Ranger character" and, while not dismissing the possibility that the child might or will have gender identity disorder, it noted that the disorder is extremely rare and that perhaps the child "just does not like the color pink and prefers boy activities, toys, and clothes." 377 S.W.3d at 586. The court ruled that it was in the child's best interest to modify the current custody arrangement from sole to joint custody and designated the father as the residential parent with visitation to the mother. *Id.*

On appeal, the court made no judgment about the diagnosis of gender identity disorder or whether the child had the disorder, but upheld the decision based on the fact that the medical witnesses presented at the hearing did "nothing to establish that the child was properly diagnosed or that the mother was receiving or following competent medical advice," 377 S.W.3d at 590, and that the trial court had "cogently expressed its reasoning" for not believing that the mother was "completely innocent in her acceptance of the medical providers' advice, or that she would be agreeable to what the court might direct her to do with regard to [child]'s best interests." *Id.* at 591.

Lessons from this case include that a practitioner should ensure that expert testimony regarding gender identity includes an expert with particular expertise in gender identity issues who interviews the child personally and repeatedly. And, that if your client has any indices of Munchausen Syndrome by Proxy, that they exercise appropriate restraint in supporting their child so as to avoid being presented as "personally invested" in the diagnosis.

PROACTIVE MEASURES FOR FAMILY LAW PRACTITIONERS

There are many ways we can counsel our LGBTQ clients to protect their families both while they are fully intact and in the event of divorce/separation. Here is a brief list of some of the protections available:

- **Marriage –** Encourage LGBTQ clients to get married. Based on the *Obergefell* decision, this creates strong bases for protection.
- **Prenuptial Agreements –** Useful in defining what should be divided in the event of divorce, particularly for couples who were together for many years prior to the *Obergefell* decision.
- **Custody Agreements –** LGBTQ clients can create parenting plans/co-parenting agreements in the event of divorce/separation.
- **Surrogacy/Donor Agreements –** Vital in ensuring the proper parent-child relationships are created. Georgia also recognizes Petitions for Expedited Order of Adoption or Parentage
- **Birth Certificate –** Both parents should attempt to have their names added to the child's birth certificate, which creates a presumption of parentage in Georgia.
- **Name Change –** Ensuring that the parents have the same last name as the children in LGBTQ families can avoid a number of potential issues with schools, doctor's offices, etc.
- **Adoption –** Georgia law is silent as to adoption by LGBTQ individuals and couples – not for or against
    - Second parent adoption

- **Last Will and Testament** – Designating the other parent as guardian of the children, and if the parties are unmarried, designating that items of personal property will transfer to the surviving partner as opposed to the decedent's living immediate family.
- **Deeds** – If the parties are unmarried but maintain joint ownership of real property, ensure their property is titled as Joint Tenants with Right of Survivorship as opposed to simply Tenants in Common if the parties wish for their property to easily transfer to the surviving partner.
- **Financial Powers of Attorney and Advance Directives for Health Care**
- **Beneficiary Designations** – Advise your same sex clients to ensure they have one another listed as their beneficiary designations on any retirement plans, life insurance policies, etc. especially if they are unmarried and wish for the surviving partner to be their designee.

APPENDIX A

Obergefell v. Hodges

Supreme Court of the United States

April 28, 2015, Argued [*]; June 26, 2015, Decided

Nos. 14-556, 14-562, 14-571, 14-574

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[*] Together with No. 14-562, *Tanco et al.* v. *Haslam, Governor of Tennessee, et al.*, No. 14-571, *DeBoer et al.* v. *Snyder, Governor of Michigan, et al.,* and No. 14-574, *Bourke et al.* v. *Beshear, Governor of Kentucky*, also on certiorari to the same court.

Reporter
135 S. Ct. 2584 *; 192 L. Ed. 2d 609 **; 2015 U.S. LEXIS 4250 ***; 83 U.S.L.W. 4592; 99 Empl. Prac. Dec. (CCH) P45,341; 115 A.F.T.R.2d (RIA) 2015-2309; 25 Fla. L. Weekly Fed. S 472

JAMES OBERGEFELL, et al., Petitioners (No. 14-556) v. RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, et al.VALERIA TANCO, et al., Petitioners (No. 14-562) v. BILL HASLAM, GOVERNOR OF TENNESSEE, et al.APRIL DeBOER, et al., Petitioners (No. 14-571) v. RICK SNYDER, GOVERNOR OF MICHIGAN, et al.GREGORY BOURKE, et al., Petitioners (No. 14-574) v. STEVE BESHEAR, GOVERNOR OF KENTUCKY

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: Costs and fees proceeding at, Motion granted by, in part, Motion denied by, in part, Sub nomine at *Tanco v. Haslam, 2016 U.S. Dist. LEXIS 39403 (M.D. Tenn., Mar. 25, 2016)*

Prior History: **[***1]** ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Deboer v. Snyder, 772 F.3d 388, 2014 U.S. App. LEXIS 21191 (6th Cir.), 2014 FED App. 275P (6th Cir.) (6th Cir. Mich., 2014)

Disposition: *772 F. 3d 388*, reversed.

Case Summary

Overview
HOLDINGS: [1]-Under the Due Process and *Equal Protection Clauses of the Fourteenth Amendment*, same-sex couples have a fundamental right to marry. Laws of Michigan, Kentucky, Ohio, and Tennessee were held invalid to the extent they excluded same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples; [2]-Because same-sex couples can exercise the fundamental right to marry in all states, it follows that there is no lawful basis for a state to refuse to recognize a lawful same-sex marriage performed in another state on the ground of its same-sex character.

Outcome
Judgment reversed. 5-4 decision; 4 dissents.

Syllabus

[614] [*2588]** Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials **[***2]** violate the *Fourteenth Amendment* by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners' favor, but the Sixth Circuit consolidated the cases and reversed.

Held: The *Fourteenth Amendment* requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. *Pp. ___ - ___, 192 L. Ed. 2d, at 619-635*.

(a) Before turning to the governing principles and precedents, it is appropriate to note the history of the subject now before the Court. *Pp. ___ - ___, 192 L. Ed. 2d, at 619-623*.

(1) The history of marriage as a union between two persons of the opposite sex marks the beginning of these cases. To the respondents, it would demean a timeless institution if marriage were extended to same-sex couples. But the petitioners, far **[**615]** from seeking to devalue marriage, seek it for themselves because of their respect--and need--for its privileges and responsibilities, as illustrated by the petitioners' own experiences. *Pp. ___ - ___, 192 L. Ed. 2d, at 619-621*.

(2) The history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages and the abandonment of the law of coverture, have worked **[***3]** deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential. These new insights have strengthened, not weakened, the institution. Changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.

This dynamic can be seen in the Nation's experience with gay and lesbian rights. Well into the 20th century, many States condemned same-sex intimacy as immoral, and homosexuality was treated as an illness. Later in the century, cultural and political developments allowed same-sex couples to lead more open and public lives. Extensive public and private dialogue followed, along with shifts in public attitudes. Questions about the legal treatment of gays and lesbians soon reached the courts, where they could be discussed in the formal discourse of the law. In 2003, this Court overruled its 1986 decision in Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140, which upheld a Georgia law that criminalized certain homosexual acts, concluding laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." **[*2589]** Lawrence v. Texas, 539 U.S. 558, 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508. In 2012, the federal Defense of Marriage Act was also struck down. United States v. Windsor, 570 U.S. ___, 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808. Numerous same-sex marriage cases reaching the federal **[***4]** courts and state supreme courts have added to the dialogue. Pp. ___ - ___, 192 L. Ed. 2d, at 621-623.

(b) The *Fourteenth Amendment* requires a State to license a marriage between two people of the same sex. Pp. ___ - ___, 192 L. Ed. 2d, at 623-634.

(1) The fundamental liberties protected by the *Fourteenth Amendment*s *Due Process Clause* extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. See, *e.g.,* Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S. Ct. 1029, 31 L. Ed. 2d 349; Griswold v. Connecticut, 381 U.S. 479, 484-486, 85 S. Ct. 1678, 14 L. Ed. 2d 510. Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. History and tradition guide and discipline the inquiry but do not set its outer boundaries. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these tenets, the Court has long held the right to marry is protected by the Constitution. For example, Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010, invalidated bans on interracial unions, and Turner v. Safley, 482 U.S. 78, 95, 107 S. Ct. 2254, 96 L. Ed. 2d 64, held that prisoners could not be denied the right to marry. To be sure, these cases presumed a relationship involving opposite-sex partners, as **[**616]** did *Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65*, a one-line summary decision issued in 1972, holding that the exclusion of same-sex couples from marriage did not present a substantial federal question. **[***5]** But other, more instructive precedents have expressed broader principles. See, *e.g.,* Lawrence, supra, at 574, 123 S. Ct. 2472, 156 L. Ed. 2d 508. In assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e.g.,*Eisenstadt, supra, at 453-454, 92 S. Ct. 1029, 31 L. Ed. 2d 349. This analysis compels the conclusion that same-sex couples may exercise the right to marry. Pp. ___ - ___, 192 L. Ed. 2d, at 623-625.

(2) Four principles and traditions demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. The first premise of this Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the *Due Process Clause*. See 388 U.S., at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010. Decisions about marriage are among the most intimate that an individual can make. See Lawrence, supra, at 574, 123 S. Ct. 2472, 156 L. Ed. 2d 508. This is true for all persons, whatever their sexual orientation.

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. The intimate **[***6]** association protected by this right was central to *Griswold* v. *Connecticut*, which held the Constitution protects the right of married couples to use contraception, 381 U.S., at 485, 85 S. Ct. 1678, 14 L. Ed. 2d 510, and was acknowledged in Turner, supra, at 95, 107 S. Ct. 2254, 96 L. Ed. 2d 64. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense. See Lawrence, supra, at 567, 123 S. Ct. 2472, 156 L. Ed. 2d 508.

[*2590] A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See, *e.g.,*Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070. Without the recognition, stability, and predictability marriage offers,

children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples. See *Windsor, supra, at ___, 133 S. Ct. 2675, 186 L. Ed. 2d 808*. This does not mean that the right to marry is less meaningful for those who do not or cannot have children. Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on **[***7]** the capacity or commitment to procreate.

Finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order. See *Maynard v. Hill, 125 U.S. 190, 211, 8 S. Ct. 723, 31 L. Ed. 654*. States have contributed to the fundamental character of marriage by **[**617]** placing it at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. *Pp. ___ - ___, 192 L. Ed. 2d, at 625-629*.

(3) The right of same-sex couples to marry is also derived from the *Fourteenth Amendment*'s guarantee of equal protection. The *Due Process Clause* and the *Equal Protection Clause* are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always **[***8]** co-extensive, yet each may be instructive as to the meaning and reach of the other. This dynamic is reflected in *Loving,* where the Court invoked both the *Equal Protection Clause* and the *Due Process Clause*; and in *Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618*, where the Court invalidated a law barring fathers delinquent on child-support payments from marrying. Indeed, recognizing that new insights and societal understandings can reveal unjustified inequality within fundamental institutions that once passed unnoticed and unchallenged, this Court has invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage, see, *e.g., Kirchberg v. Feenstra, 450 U.S. 455, 460-461, 101 S. Ct. 1195, 67 L. Ed. 2d 428*, and confirmed the relation between liberty and equality, see, *e.g., M. L. B. v. S. L. J., 519 U.S. 102, 120-121, 117 S. Ct. 555, 136 L. Ed. 2d 473*.

The Court has acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See *Lawrence, 539 U.S., at 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. This dynamic also applies to same-sex marriage. The challenged laws burden the liberty of same-sex couples, and they abridge central precepts of equality. The marriage laws at issue are in essence unequal: Same-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this **[***9]** denial **[*2591]** works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians. *Pp. ___ - ___, 192 L. Ed. 2d, at 629-631*.

(4) The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and *Equal Protection Clauses of the Fourteenth Amendment* couples of the same-sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry. *Baker* v. *Nelson* is overruled. The State laws challenged by the petitioners in these cases are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. *Pp. ___ - ___, 192 L. Ed. 2d, at 631*.

(5) There may be an initial inclination to await further legislation, litigation, **[**618]** and debate, but referenda, legislative debates, and grassroots campaigns; studies and other writings; and extensive litigation in state and federal courts have led to an enhanced understanding of the issue. While the Constitution contemplates that democracy is the appropriate process for change, individuals who are harmed need not await legislative action before asserting a fundamental right. *Bowers,* in effect, upheld state action that denied gays and lesbians a fundamental right. Though it was eventually repudiated, men and women **[***10]** suffered pain and humiliation in the interim, and the effects of these injuries no doubt lingered long after *Bowers* was overruled. A ruling against same-sex couples would have the same effect and would be unjustified under the *Fourteenth Amendment*. The petitioners' stories show the urgency of the issue they present to the Court,

which has a duty to address these claims and answer these questions. Respondents' argument that allowing same-sex couples to wed will harm marriage as an institution rests on a counterintuitive view of opposite-sex couples' decisions about marriage and parenthood. Finally, the *First Amendment* ensures that religions, those who adhere to religious doctrines, and others have protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. *Pp. ___ - ___, 192 L. Ed. 2d, at 631-634*.

(c) The *Fourteenth Amendment* requires States to recognize same-sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character. *Pp. ___ - ___, 192 L. Ed. 2d, at 634-635*.

772 F. 3d 388, reversed.

Counsel: Mary L. Bonauto argued the cause for petitioner on Question 1.

Donald B. Verrilli, [*11] Jr.**, argued the cause for the United States, as amicus curiae, by special leave of court on Question 1.

John J. Bursch argued the cause for respondents on Question 1.

Douglas Hallward-Driemeier for the petitioners on Question 2.

Joseph F. Whalen for the respondents on Question 2.

Judges: Kennedy, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Roberts, C. J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined. Thomas, J., filed a dissenting opinion, in which Scalia, J., joined. Alito, J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined.

Opinion by: Kennedy

Opinion

[*2593] Justice **Kennedy** delivered the opinion of the Court.

[1] The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

I

These cases come from Michigan, Kentucky, Ohio, **[***12]** and Tennessee, States that define marriage as a union between one man and one woman. See, *e.g.*, *Mich. Const., Art. I, §25*; *Ky. Const. §233A*; *Ohio Rev. Code Ann. §3101.01* (Lexis 2008); **[**619]** *Tenn. Const., Art. XI, §18*. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the *Fourteenth Amendment* by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

Petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. Citations to those cases are in Appendix A, *infra*. The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit. It consolidated the cases and reversed the judgments of the District Courts. *DeBoer v. Snyder, 772 F. 3d 388 (2014)*. The Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State.

The petitioners sought certiorari. This Court granted review, limited to two questions. *574 U.S. ___, 135 S. Ct. 1039; 190 L. Ed. 2d 908 (2015)*. The first, presented by the cases from Michigan and Kentucky, is whether the *Fourteenth Amendment* requires a State to license a marriage **[***13]** between two people of the same sex. The second, presented by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the *Fourteenth Amendment* requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

II

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

A

From their beginning to their most recent page, the annals of human history **[*2594]** reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, **[***14]** marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 Li Chi: Book of Rites 266 (C. Chai & W. Chai eds., J. Legge transl. 1967). This wisdom was echoed centuries later and half a world away by Cicero, who wrote, "The first bond of society is marriage; next, children; and then the family." See De Officiis 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

[620]** That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here **[***15]** and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided **[***16]** to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for **[*2595]** the rest of time." App. in No. 14-556 etc., p. 38. He brought suit to be shown as the surviving spouse on Arthur's death certificate.

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special **[***17]** needs joined their family. Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their

unmarried status creates in their lives.

Army Reserve Sergeant First Class **[**621]** Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial **[***18]** burden.

The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond.

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. See N. Cott, Public Vows: A History of Marriage and the Nation 9-17 (2000); S. Coontz, Marriage, A History 15-16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, Commentaries on the Laws of England 430 (1765). As women gained legal, political, **[***19]** and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. See Brief for Historians of Marriage et al. as *Amici Curiae* 16-19. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. See generally N. Cott, Public Vows; S. Coontz, Marriage; H. **[*2596]** Hartog, Man & Wife in America: A History (2000).

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many **[***20]** persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness **[**622]** of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. See Brief for Organization of American Historians as *Amicus Curiae* 5-28.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. See Position Statement on Homosexuality and Civil Rights, 1973, in 131 Am. J. Psychiatry 497 (1974). Only in more recent years have psychiatrists and others recognized that sexual orientation is both **[***21]** a normal expression of human sexuality and immutable. See Brief for American Psychological Association et al. as *Amici Curiae* 7-17.

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about

the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986)*. There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996)*, the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers*, holding that laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence v. Texas, 539 U.S. 558, 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508*.

Against this background, **[***22]** the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to **[*2597]** strict scrutiny under the Hawaii Constitution. *Baehr v. Lewin, 74 Haw. 530, 852 P. 2d 44*. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), 110 Stat. 2419, defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife." *1 U.S.C. §7*.

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts **[**623]** held the State's Constitution guaranteed same-sex couples the right to marry. See *Goodridge v. Department of Public Health, 440 Mass. 309, 798 N. E. 2d 941 (2003)*. After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. These decisions and statutes are cited in Appendix B, *infra*. Two Terms ago, in *United States v. Windsor, 570 U.S. ___, 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013)*, this Court invalidated DOMA to the extent it barred the **[***23]** Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples "who wanted to affirm their commitment to one another before their children, their family, their friends, and their community." *Id., at ___, 133 S. Ct. 2675, 186 L. Ed. 2d at 823*.

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other, see *Citizens for Equal Protection v. Bruning, 455 F. 3d 859, 864-868 (CA8 2006)*, the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue **[***24]** in decisions interpreting their own State Constitutions. These state and federal judicial opinions are cited in Appendix A, *infra*.

After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage. See Office of the Atty. Gen. of Maryland, The State of Marriage Equality in America, State-by-State Supp. (2015).

III

[2] Under the *Due Process Clause of the Fourteenth Amendment*, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the *Bill of Rights*. See *Duncan v. Louisiana, 391 U.S. 145, 147-149, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)*. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, *e.g.,* **[*2598]** *Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972)*; *Griswold v. Connecticut, 381 U.S. 479, 484-486, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)*.

[3] The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not

been reduced to any formula." Poe v. Ullman, 367 U.S. 497, 542, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise **[**624]** reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See **[***25]** *ibid.* That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See Lawrence, supra, at 572, 123 S. Ct. 2472, 156 L. Ed. 2d 508. That method respects our history and learns from it without allowing the past alone to rule the present.

[4] The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the *Bill of Rights* and the *Fourteenth Amendment* did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these established tenets, the Court has long held [5] the right to marry is protected by the Constitution. In Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed **[***26]** that holding in Zablocki v. Redhail, 434 U.S. 374, 384, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in Turner v. Safley, 482 U.S. 78, 95, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the *Due Process Clause*. See, *e.g.,* M. L. B. v. S. L. J., 519 U.S. 102, 116, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996); Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 639-640, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974); Griswold, supra, at 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510; Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942); Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923).

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65*, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. See, *e.g.,* **[*2599]** Lawrence, 539 U.S., at 574, 123 S. Ct. 2472, 156 L. Ed. 2d 508; Turner, supra, at 95, 107 S. Ct. 2254, 96 L. Ed. 2d 64; Zablocki, supra ***[***27]***, at 384, 98 S. Ct. 673, 54 L. Ed. 2d 618; Loving, ***[**625]*** supra, at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010; Griswold, supra, at 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e.g.,* Eisenstadt, supra, at 453-454, 92 S. Ct. 1029, 31 L. Ed. 2d 349; Poe, supra, at 542-553, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (Harlan, J., dissenting).

This analysis compels the conclusion that [6] same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court's relevant precedents is that [7] the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the *Due Process Clause*. See 388 U.S., at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010; see also Zablocki, supra, at 384, 98 S. Ct. 673, 54 L. Ed. 2d 618 (observing *Loving* held "the right to marry is of fundamental importance for all individuals"). Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. See Lawrence, supra, at 574, 123 S. Ct. 2472, 156 L. Ed. 2d 508. Indeed, the Court has **[***28]** noted it would be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter

the relationship that is the foundation of the family in our society." *Zablocki, supra, at 386, 98 S. Ct. 673, 54 L. Ed. 2d 618*.

Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." *Goodridge, 440 Mass., at 322, 798 N. E. 2d, at 955*.

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See *Windsor, 570 U.S., at ___ - ___, 133 S. Ct. 2675, 186 L. Ed. 2d at 828*. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. Cf. *Loving, supra, at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010* ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it **[***29]** supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold* v. *Connecticut*, which held the Constitution protects the right of married couples to use contraception. *381 U.S., at 485, 85 S. Ct. 1678, 14 L. Ed. 2d 510*. Suggesting that marriage is a right "older than the *Bill of Rights*," *Griswold* described marriage this way:

> **[**626]** "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose **[*2600]** as any involved in our prior decisions. " *Id., at 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510*.

And in *Turner*, the Court again acknowledged the intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. See *482 U.S., at 95-96, 107 S. Ct. 2254, 96 L. Ed. 2d 64*.

The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." *Windsor, supra, at ___, 133 S. Ct. 2675, 186 L. Ed. 2d at 823*. Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship **[***30]** and understanding and assurance that while both still live there will be someone to care for the other.

[8] As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." *539 U.S., at 567, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

[9] A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925)*; *Meyer, 262 U.S., at 399, 43 S. Ct. 625, 67 L. Ed. 1042*. The Court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the *Due Process Clause*." *Zablocki, 434 U.S., at 384, 98 S. Ct. 673, 54 L. Ed. 2d 618* (quoting *Meyer, supra, at 399, 43 S. Ct. 625, 67 L. Ed. 1042*). Under the laws of the several **[***31]** States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor, supra, at ___, 133 S. Ct. 2675, 186 L. Ed. 2d at 828*. Marriage also affords the permanency and stability important to children's best interests. See Brief for Scholars of the Constitutional Rights of Children as *Amici Curiae* 22-27.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples.

See Brief for Gary J. Gates as *Amicus Curiae* 4. Most States have allowed **[**627]** gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents, see *id.,* at 5. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without **[***32]** the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue **[*2601]** here thus harm and humiliate the children of same-sex couples. See *Windsor, supra, at ___, 133 S. Ct. 2675, 186 L. Ed. 2d at 828*.

That is not to say the right to marry is less meaningful for those who do not or cannot have children. [10] An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago:

> "There is certainly no country in the world **[***33]** where the tie of marriage is so much respected as in America . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace . . . . [H]e afterwards carries [that image] with him into public affairs." 1 Democracy in America 309 (H. Reeve transl., rev. ed. 1990).

In *Maynard v. Hill, 125 U.S. 190, 211, 8 S. Ct. 723, 31 L. Ed. 654 (1888)*, the Court echoed de Tocqueville, explaining that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." Marriage, the *Maynard* Court said, has long been "'a great public institution, giving character to our whole civil polity.'" *Id., at 213, 8 S. Ct. 723, 31 L. Ed. 654*. This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. See generally N. Cott, Public Vows. Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer **[***34]** on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; **[**628]** professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. See Brief for United States as *Amicus Curiae* 6-9; Brief for American Bar Association as *Amicus Curiae* 8-29. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. See *Windsor, 570 U.S., at ___, 133 S. Ct. 2675, 186 L. Ed. 2d at 824*. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of **[***35]** benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes **[*2602]** marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency

with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington v. Glucksberg, 521 U.S. 702, 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997)*, which called for a "'careful description'" of fundamental rights. They assert **[***36]** the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." Brief for Respondent in No. 14-556, p. 8. [11] *Glucksberg* did insist that liberty under the *Due Process Clause* must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right. See also *Glucksberg, 521 U.S., at 752-773, 117 S. Ct. 2258, 138 L. Ed. 2d 772* (Souter, J., concurring in judgment); *id., at 789-792, 117 S. Ct. 2258, 138 L. Ed. 2d 772* (Breyer, J., concurring in judgments).

That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued **[**629]** justification **[***37]** and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. See *Loving 388 U.S., at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010*; *Lawrence, 539 U.S., at 566-567, 123 S. Ct. 2472, 156 L. Ed. 2d 508*.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

[12] The right of same-sex couples to marry that is part of the liberty promised by the *Fourteenth Amendment* is derived, too, from that Amendment's guarantee of **[***38]** the equal protection of the laws. The *Due Process Clause* and the *Equal Protection Clause* **[*2603]** are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. See *M. L. B., 519 U.S., at 120-121, 117 S. Ct. 555, 136 L. Ed. 2d 473*; *id., at 128-129, 117 S. Ct. 555, 136 L. Ed. 2d 473* (Kennedy, J., concurring in judgment); *Bearden v. Georgia, 461 U.S. 660, 665, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983)*. This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the *Equal Protection Clause* and the *Due Process Clause*. The Court first declared the prohibition invalid because of its unequal treatment of interracial couples. It stated: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the *Equal Protection Clause*." *388 U.S., at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010*. With this link to equal protection the Court proceeded to hold **[***39]** the prohibition offended central precepts of liberty: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the *Fourteenth Amendment*, is surely to deprive all the State's citizens of liberty without due process of law." *Ibid.* The reasons why marriage is a fundamental right became more clear and compelling from a full awareness **[**630]** and understanding of the hurt that

resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in *Zablocki*. There the Court invoked the *Equal Protection Clause* as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court's holding that the law burdened a right "of fundamental importance." *434 U.S., at 383, 98 S. Ct. 673, 54 L. Ed. 2d 618*. It was the essential nature of the marriage right, discussed at length in *Zablocki*, see *id., at 383-387, 98 S. Ct. 673, 54 L. Ed. 2d 618*, that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding **[***40]** of the other.

Indeed, [13] in interpreting the *Equal Protection Clause*, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of coverture, see *supra*, at 6, invidious sex-based classifications in marriage remained common through the mid-20th century. See App. to Brief for Appellant in *Reed* v. *Reed*, O. T. 1971, No. 70-4, pp. 69-88 (an extensive reference to laws extant as of 1971 treating women as unequal to men in marriage). These classifications denied the equal dignity of men and women. One State's law, for example, provided in 1971 that "the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her **[*2604]** separately, either for her own protection, or for her benefit." Ga. Code Ann. §53-501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage. See, *e.g.,* *Kirchberg v. Feenstra, 450 U.S. 455, 101 S. Ct. 1195, 67 L. Ed. 2d 428 (1981)*; *Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 100 S. Ct. 1540, 64 L. Ed. 2d 107 (1980)*; *Califano v. Westcott, 443 U.S. 76, 99 S. Ct. 2655, 61 L. Ed. 2d 382 (1979)*; *Orr v. Orr, 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979)*; *Califano v. Goldfarb, 430 U.S. 199, 97 S. Ct. 1021, 51 L. Ed. 2d 270 (1977)* (plurality **[***41]** opinion); *Weinberger v. Wiesenfeld, 420 U.S. 636, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975)*; *Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973)*. Like *Loving* and *Zablocki*, these precedents show [14] the *Equal Protection Clause* can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.

Other cases confirm this relation between liberty and equality. In *M. L. B.* v. *S. L. J.*, the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights. See *519 U.S., at 119-124, 117 S. Ct. 555, 136 L. Ed. 2d 473*. In *Eisenstadt* v. *Baird*, the Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. See *405 U.S., at 446-454, 92 S. Ct. 1029, 31 L. Ed. 2d **[**631]** 349*. And in *Skinner* v. *Oklahoma ex rel. Williamson*, the Court invalidated under both principles a law that allowed sterilization of habitual criminals. See *316 U.S., at 538-543, 62 S. Ct. 1110, 86 L. Ed. 1655*.

In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See *539 U.S., at 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. Although *Lawrence* elaborated its holding under the *Due Process Clause*, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. **[***42]** See *ibid. Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State "cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id., at 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508*.

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the *Equal Protection Clause*, like the *Due Process Clause*, prohibits this unjustified infringement of the fundamental right to marry. See, *e.g.,* *Zablocki, supra, at 383-388, 98 S. Ct. 673, 54 L. Ed. 2d 618*; *Skinner, 316 U.S., at 541,*

62 S. Ct. 1110, 86 L. Ed. 1655.

These considerations lead to the conclusion that [15] the right to marry is a fundamental right inherent in the liberty of the person, and under the **[***43]** Due Process and *Equal Protection Clauses of the Fourteenth Amendment* couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that **[*2605]** same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

IV

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. In its ruling on the cases now before this Court, the majority opinion for the Court of Appeals made a cogent argument that it would be appropriate for the respondents' States to await further public discussion and political measures before licensing same-sex marriages. See DeBoer, 772 F. 3d, at 409.

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots **[**632]** campaigns, as well as countless studies, papers, **[***44]** books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. See Appendix A, *infra*. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.

Of course,[16] the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in Schuette v. BAMN, 572 U.S. ___, 134 S. Ct. 1623, 188 L. Ed. 2d 613 (2014), noting the "right of citizens to debate so they can learn and decide **[***45]** and then, through the political process, act in concert to try to shape the course of their own times." Id., at ___, 134 S. Ct. 1623, 188 L. Ed. 2d at 628. Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as *Schuette* also said, "[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power." Id., at ___, 134 S. Ct. 1623, 188 L. Ed. 2d at 628. Thus, when the rights of persons are violated, "the Constitution requires redress by the courts," notwithstanding the more general value of democratic decisionmaking. Id., at ___, 134 S. Ct. 1623, 188 L. Ed. 2d at 628. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

[17] The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of **[*2606]** the Constitution "was to withdraw certain subjects from **[***46]** the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 638, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943). This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Ibid.* It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers*, a bare majority upheld a law criminalizing **[**633]** same-sex intimacy. See 478 U.S., at 186, 190-195, 106 S. Ct. 2841, 92 L. Ed. 2d 140. That approach might have been viewed as a cautious endorsement of the democratic process, which

had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the *Bowers* Court. See *id., at 199, 106 S. Ct. 2841, 92 L. Ed. 2d 140* (Blackmun, J., joined by Brennan **[***47]** , Marshall, and Stevens, JJ., dissenting); *id., at 214, 106 S. Ct. 2841, 92 L. Ed. 2d 140* (Stevens, J., joined by Brennan and Marshall, JJ., dissenting). That is why *Lawrence* held *Bowers* was "not correct when it was decided." *539 U.S., at 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect—and, like *Bowers*, would be unjustified under the *Fourteenth Amendment*. The petitioners' stories make clear the urgency of the issue they present to the Court. James Obergefell now asks whether Ohio can erase his marriage to John Arthur for all time. April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon. Ijpe DeKoe and Thomas Kostura now ask whether Tennessee can deny to one who has served this Nation the basic dignity of recognizing his New York marriage. Properly presented with the petitioners' cases, the Court has a duty to address **[***48]** these claims and answer these questions.

Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may exercise the right to marry. Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection **[*2607]** between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, **[***49]** romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. See *Kitchen v. Herbert, 755 F. 3d 1193, 1223 (CA10 2014)* ("[I]t is wholly illogical to believe that state recognition **[**634]** of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples"). The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The *First Amendment* ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations **[***50]** to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

V

These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State. As made clear by the case of Obergefell and Arthur, and by that of DeKoe and Kostura, the recognition bans inflict substantial and continuing harm on same-sex couples.

Being married in one State but having that valid

marriage denied in another is one of "the most perplexing and distressing complication[s]" in the law of domestic relations. *Williams v. North Carolina, 317 U.S. 287, 299, 63 S. Ct. 207, 87 L. Ed. 279 (1942)* (internal quotation marks omitted). Leaving the current state of affairs in place would maintain and promote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family **[***51]** or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage—and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing.

As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. See Tr. of Oral Arg. on Question 2, p. 44. The Court, in this decision, holds[18] same-sex couples may exercise the fundamental right to marry in all States. It **[*2608]** follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

[635]** * * *

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these **[***52]** cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

APPENDICES

A

State and Federal Judicial Decisions

Addressing Same-Sex Marriage

United States Courts of Appeals Decisions

Adams v. Howerton, 673 F. 2d 1036 (CA9 1982)

Smelt v. County of Orange, 447 F. 3d 673 (CA9 2006)

Citizens for Equal Protection v. Bruning, 455 F. 3d 859 (CA8 2006)

Windsor v. United States, 699 F. 3d 169 (CA2 2012)

Massachusetts v. Department of Health and Human Services, 682 F. 3d 1 (CA1 2012)

Perry v. Brown, 671 F. 3d 1052 (CA9 2012)

Latta v. Otter, 771 F. 3d 456 (CA9 2014)

Baskin v. Bogan, 766 F. 3d 648 (CA7 2014)

Bishop v. Smith, 760 F. 3d 1070 (CA10 2014)

Bostic v. Schaefer, 760 F. 3d 352 (CA4 2014)

Kitchen v. Herbert, 755 F. 3d 1193 (CA10 2014)

DeBoer v. Snyder, 772 F. 3d 388 (CA6 2014)

Latta v. Otter, 779 F. 3d 902 (CA9 2015) (O'Scannlain, J., dissenting from the denial of rehearing en banc)

United States District Court Decisions

Adams v. Howerton, 486 F. Supp. 1119 (CD Cal. 1980)

Citizens for Equal Protection, Inc. v. Bruning, 290 F. Supp. 2d 1004 (Neb. 2003)

Citizens for Equal Protection v. Bruning, 368 F. Supp. 2d 980 (Neb. 2005)

Wilson v. Ake, 354 F. Supp. 2d 1298 (MD Fla. 2005)

Smelt v. County of Orange, 374 F. Supp. 2d 861 (CD Cal. 2005)

Bishop v. Oklahoma ex rel. Edmondson, 447 F. Supp. 2d 1239 (ND Okla. 2006)

Massachusetts v. Department of Health and Human Services, 698 F. Supp. 2d 234 (Mass. 2010)

Gill v. Office of Personnel Management, 699 F. Supp. 2d 374 (Mass. 2010)

[*2609] ***[**636]*** Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (ND Cal. 2010)

Dragovich v. Department of Treasury, 764 F. Supp. 2d 1178 (ND Cal. 2011)

Golinski v. Office of Personnel Management, 824 F. Supp. 2d 968 (ND Cal. 2012)

Dragovich v. Department of Treasury, 872 F. Supp. 2d 944 (ND Cal. 2012)

Windsor v. United States, 833 F. Supp. 2d 394 (SDNY 2012)

Pedersen v. Office of Personnel Management, 881 F. Supp. 2d 294 (Conn. 2012)

Jackson v. Abercrombie, 884 F. Supp. 2d 1065 (Haw. 2012)

Sevcik v. Sandoval, 911 F. Supp. 2d 996 (Nev. 2012)

Merritt v. Attorney General, 2013 U.S. Dist. LEXIS 162583, 2013 WL 6044329 (MD La., Nov. 14, 2013)

Gray v. Orr, 4 F. Supp. 3d 984 (ND Ill. 2013)

Lee v. Orr, 2013 U.S. Dist. LEXIS 173801, 2013 WL 6490577 (ND Ill., Dec. 10, 2013)

Kitchen v. Herbert, 961 F. Supp. 2d 1181 (Utah 2013)

Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (SD Ohio 2013)

Bishop v. United States ex rel. Holder, 962 F. Supp. 2d 1252 (ND Okla. 2014)

Bourke v. Beshear, 996 F. Supp. 2d 542 (WD Ky. 2014)

Lee v. Orr, 2014 U.S. Dist. LEXIS 21620, 2014 WL 683680 (ND Ill., Feb. 21, 2014)

Bostic v. Rainey, 970 F. Supp. 2d 456 (ED Va. 2014)

De Leon v. Perry, 975 F. Supp. 2d 632 (WD Tex. 2014)

Tanco v. Haslam, 7 F. Supp. 3d 759 (MD Tenn. 2014)

DeBoer v. Snyder, 973 F. Supp. 2d 757 (ED Mich. 2014)

Henry v. Himes, 14 F. Supp. 3d 1036 (SD Ohio 2014)

Latta v. Otter, 19 F. Supp. 3d 1054 (Idaho 2014)

Geiger v. Kitzhaber, 994 F. Supp. 2d 1128 (Ore. 2014)

Evans v. Utah, 21 F. Supp. 3d 1192 (Utah 2014)

Whitewood v. Wolf, 992 F. Supp. 2d 410 (MD Pa. 2014)

Wolf v. Walker, 986 F. Supp. 2d 982 (WD Wis. 2014)

Baskin v. Bogan, 12 F. Supp. 3d 1144 (SD Ind. 2014)

Love v. Beshear, 989 F. Supp. 2d 536 (WD Ky. 2014)

Burns v. Hickenlooper, 2014 U.S. Dist. LEXIS 100894, 2014 WL 3634834 (Colo., July 23, 2014)

Bowling v. Pence, 39 F. Supp. 3d 1025 (SD Ind. 2014)

Brenner v. Scott, 999 F. Supp. 2d 1278 (ND Fla. 2014)

Robicheaux v. Caldwell, 2 F. Supp. 3d 910 (ED La. 2014)

General Synod of the United Church of Christ v. Resinger, 12 F. Supp. 3d 790 (WDNC 2014)

Hamby v. Parnell, 56 F. Supp. 3d 1056 (Alaska 2014)

[637]** Fisher-Borne v. Smith, 14 F. Supp. 3d 695 (MDNC 2014)

Majors v. Horne, 14 F. Supp. 3d 1313 (Ariz. 2014)

Connolly v. Jeanes, 73 F. Supp. 3d 1094, 2014 U.S. Dist. LEXIS 147950, 2014 WL 5320642 (Ariz., Oct. 17, 2014)

Guzzo v. Mead, 2014 U.S. Dist. LEXIS 148481, 2014 WL 5317797 (Wyo., Oct. 17, 2014)

Conde-Vidal v. Garcia-Padilla, 54 F. Supp. 3d 157 (PR 2014)

Marie v. Moser, 65 F. Supp. 3d 1175, 2014 U.S. Dist. LEXIS 157093, 2014 WL 5598128 (Kan., Nov. 4, 2014)

[*2610] Lawson v. Kelly, 58 F. Supp. 3d 923 (WD Mo. 2014)

McGee v . Cole, 66 F. Supp. 3d 747, 2014 U.S. Dist. LEXIS 158680, 2014 WL 5802665 (SD W. Va., Nov. 7, 2014)

Condon v. Haley, 21 F. Supp. 3d 572 (S. C. 2014)

Bradacs v. Haley, 58 F. Supp. 3d 514 (S. C. 2014)

Rolando v. Fox, 23 F. Supp. 3d 1227 (Mont. 2014)

Jernigan v. Crane, 64 F. Supp. 3d 1261, 2014 U.S. Dist. LEXIS 165898, 2014 WL 6685391 (ED Ark., Nov. 25, 2014)

Campaign for Southern Equality v. Bryant, 64 F. Supp. 3d 906, 2014 U.S. Dist. LEXIS 165913, 2014 WL 6680570 (SD Miss., Nov. 25, 2014)

Inniss v. Aderhold, 80 F. Supp. 3d 1335, 2015 U.S. Dist. LEXIS 9697, 2015 WL 300593 (ND Ga., Jan. 8, 2015)

Rosenbrahn v. Daugaard, 61 F. Supp. 3d 862, 61 F. Supp. 3d 862, 2015 U.S. Dist. LEXIS 4018 (S. D., 2015)

Caspar v. Snyder, 77 F. Supp. 3d 616, 2015 U.S. Dist. LEXIS 4644, 2015 WL 224741 (ED Mich., Jan. 15, 2015)

Searcey v. Strange, 81 F. Supp. 3d 1285, 2015 U.S. Dist. LEXIS 7776 (SD Ala., Jan. 23, 2015)

Strawser v. Strange, 44 F. Supp. 3d 1206 (SD Ala. 2015)

Waters v. Ricketts, 48 F. Supp. 3d 1271 (Neb. 2015)

State Highest Court Decisions

Baker v. Nelson, 291 Minn. 310, 191 N. W. 2d 185 (1971)

Jones v. Hallahan, 501 S. W. 2d 588 (Ky. 1973)

Baehr v. Lewin, 74 Haw. 530, 852 P. 2d 44 (1993)

Dean v. District of Columbia, 653 A. 2d 307 (D. C. 1995)

Baker v. State, 170 Vt. 194, 744 A. 2d 864 (1999)

Brause v. State, 21 P. 3d 357 (Alaska 2001) (ripeness)

Goodridge v. Department of Public Health, 440 Mass. 309, 798 N. E. 2d 941 (2003)

In re Opinions of the Justices to the Senate, 440 Mass. 1201, 802 N. E. 2d 565 (2004)

Li v. State, 338 Or. 376, 110 P. 3d 91 (2005)

Cote-Whitacre v. Department of Public Health, 446 Mass. 350, 844 N. E. 2d 623 (2006)

Lewis v. Harris, 188 N. J. 415, 908 A. 2d 196 (2006)

[638]** *Andersen v. King County, 158 Wash. 2d 1, 138 P. 3d 963 (2006)*

Hernandez v. Robles, 7 N. Y. 3d 338, 855 N. E. 2d 1, 821 N.Y.S.2d 770 (2006)

Conaway v. Deane, 401 Md. 219, 932 A. 2d 571 (2007)

In re Marriage Cases, 43 Cal. 4th 757, 76 Cal. Rptr. 3d 683, 183 P. 3d 384 (2008)

Kerrigan v. Commissioner of Public Health, 289 Conn. 135, 957 A. 2d 407 (2008)

Strauss v. Horton, 46 Cal. 4th 364, 93 Cal. Rptr. 3d 591, 207 P. 3d 48 (2009)

Varnum v. Brien, 763 N. W. 2d 862 (Iowa 2009)

Griego v. Oliver, 2014-NMSC-003, ___ N. M. ___, 316 P. 3d 865 (2013)

Garden State Equality v. Dow, 216 N. J. 314, 79 A. 3d 1036 (2013)

Ex parte State ex rel. Alabama Policy Institute, 200 So. 3d 495, 2015 Ala. LEXIS 33, 2015 WL 892752 (Ala., Mar. 3, 2015)

[*2611] B

State Legislation and Judicial Decisions

Legalizing Same-Sex Marriage

Legislation

Del. Code Ann., Tit. 13, §129 (Cum. Supp. 2014)

D. C. Act No. 18-248, *57 D. C. Reg. 27* (2010)

Haw. Rev. Stat. §572-1 (2006) and 2013 Cum. Supp.)

Ill. Pub. Act No. 98-597

Me. Rev. Stat. Ann., Tit. 19, §650-A (Cum. Supp. 2014)

2012 Md. Laws p. 9

2013 Minn Laws p. 404

2009 N. H. Laws p. 60

2011 N. Y Laws p. 749

2013 R. I. Laws p. 7

2009 Vt. Acts & Resolves p. 33

2012 Wash. Sess. Laws p. 199

Judicial Decisions

Goodridge v. Department of Public Health, 440 Mass. 309, 798 N. E. 2d 941 (2003)

Kerrigan v. Commissioner of Public Health, 289 Conn. 135, 957 A. 2d 407 (2008)

Varnum v. Brien, 763 N. W. 2d 862 (Iowa 2009)

Griego v. Oliver, 2014-NMSC-003, 2013 N. M. LEXIS 414, 316 P. 3d 865 (2013)

Garden State Equality v. Dow, 216 N. J. 314, 79 A. 3d 1036 (2013)

Dissent by: Roberts; Scalia; Thomas; Alito

Dissent

Chief Justice **Roberts**, with whom Justice **Scalia** and Justice **Thomas** join, dissenting.

Petitioners make strong arguments rooted in social **[***53]** policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. That position has undeniable appeal; over the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex.

But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what **[**639]** it should be. The people who ratified the Constitution authorized courts to exercise "neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered).

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. **[***54]** In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That **[*2612]** ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire **[***55]** to remake society according to its own "new insight" into the "nature of injustice." *Ante, at ___, ___, 192 L. Ed. 2d, at 624, 631*. As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution "is made for people of fundamentally

differing views." *Lochner v. New York, 198 U.S. 45, 76, 25 S. Ct. 539, 49 L. Ed. 937 (1905)* (Holmes, J., dissenting). Accordingly, "courts are not concerned with the wisdom or policy of legislation." *Id., at 69, 25 S. Ct. 539, 49 L. Ed. 937* (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own "understanding of what freedom is and must become." *Ante, at ___, 192 L. Ed. 2d, at 629*. I have no choice but to dissent.

Understand well what this dissent is **[***56]** about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the **[**640]** people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.

I

Petitioners and their *amici* base their arguments on the "right to marry" and the imperative of "marriage equality." There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes "marriage," or—more precisely—*who decides* what constitutes "marriage"?

The majority largely ignores these questions, relegating ages of human experience with marriage to a paragraph or two. Even if history and precedent are not "the end" of these cases, *ante, at ___, 192 L. Ed. 2d, at 620*, I would not "sweep away what has so long been settled" without showing greater respect for all that preceded us. *Town of Greece v. Galloway, 572 U.S. ___, ___, 134 S. Ct. 1811, 188 L. Ed. 2d 835, 846 (2014*).

A

As the majority acknowledges, marriage "has existed for millennia and **[***57]** across civilizations." *Ante, at ___, 192 L. Ed. 2d, at 619*. For all those millennia, across all those civilizations, "marriage" referred to only one relationship: the union of a man and a woman. See *ante, at ___, 192 L. Ed. 2d, at 620*; Tr. of Oral Arg. on Question 1, p. 12 (petitioners conceding that they are not aware of any society that permitted same-sex marriage before 2001). **[*2613]** As the Court explained two Terms ago, "until recent years, . . . marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *United States v. Windsor, 570 U.S. ___, ___, 133 S. Ct. 2675, 186 L. Ed. 2d 823 (2013)*.

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. See G. Quale, A History of Marriage Systems 2 (1988); cf. M. Cicero, De Officiis 57 (W. **[***58]** Miller transl. 1913) ("For since the reproductive instinct is by nature's gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common.").

The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur **[**641]** only between a man and a woman committed to a lasting bond.

Society has recognized that bond as marriage. And by bestowing a respected status and material benefits on married couples, society encourages men and women to conduct sexual relations within marriage rather than without. As one prominent scholar put it, "Marriage is a socially arranged solution for the problem of getting people to stay together and **[***59]** care for children that the mere desire for children, and the sex that makes children possible, does not solve." J. Q. Wilson, The Marriage Problem 41 (2002).

This singular understanding of marriage has prevailed in the United States throughout our history. The majority accepts that at "the time of the Nation's founding

[marriage] was understood to be a voluntary contract between a man and a woman." *Ante, at ___, 192 L. Ed. 2d, at 621*. Early Americans drew heavily on legal scholars like William Blackstone, who regarded marriage between "husband and wife" as one of the "great relations in private life," and philosophers like John Locke, who described marriage as "a voluntary compact between man and woman" centered on "its chief end, procreation" and the "nourishment and support" of children. 1 W. Blackstone, Commentaries *410; J. Locke, Second Treatise of Civil Government §§78-79, p. 39 (J. Gough ed. 1947). To those who drafted and ratified the Constitution, this conception of marriage and family "was a given: its structure, its stability, roles, and values accepted by all." Forte, The Framers' Idea of Marriage and Family, in The Meaning of Marriage 100, 102 (R. George & J. Elshtain eds. 2006).

The Constitution itself says **[***60]** nothing about marriage, and the Framers thereby entrusted the States with "[t]he whole subject of the domestic relations of husband and wife." **[*2614]** *Windsor, 570 U.S., at ___, 133 S. Ct. 2675, 186 L. Ed. 2d 824* (quoting *In re Burrus, 136 U.S. 586, 593-594, 10 S. Ct. 850, 34 L. Ed. 500 (1890)*). There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way. The four States in these cases are typical. Their laws, before and after statehood, have treated marriage as the union of a man and a woman. See *DeBoer v. Snyder, 772 F. 3d 388, 396-399 (CA6 2014)*. Even when state laws did not specify this definition expressly, no one doubted what they meant. See *Jones v. Hallahan, 501 S. W. 2d 588, 589 (Ky. App. 1973)*. The meaning of "marriage" went without saying.

Of course, many did say it. In his first American dictionary, Noah Webster defined marriage as "the legal union of a man and woman for life," which served the purposes of "preventing the promiscuous intercourse of the sexes, . . . promoting domestic felicity, and . . . securing the maintenance and education of children." 1 An American Dictionary of the English Language (1828). An influential 19th-century treatise defined marriage as "a civil status, existing in one man and one woman legally united for life for those civil and social purposes which are based in the distinction **[***61]** of sex." J. Bishop, Commentaries on the Law of Marriage and Divorce 25 (1852). The first edition of Black's Law Dictionary defined marriage as "the civil status of one man and one woman united in law for life." Black's Law Dictionary 756 (1891) (emphasis **[**642]** deleted). The dictionary maintained essentially that same definition for the next century.

This Court's precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning. Early cases on the subject referred to marriage as "the union for life of one man and one woman," *Murphy v. Ramsey, 114 U.S. 15, 45, 5 S. Ct. 747, 29 L. Ed. 47 (1885)*, which forms "the foundation of the family and of society, without which there would be neither civilization nor progress," *Maynard v. Hill, 125 U.S. 190, 211, 8 S. Ct. 723, 31 L. Ed. 654 (1888)*. We later described marriage as "fundamental to our very existence and survival," an understanding that necessarily implies a procreative component. *Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967)*; see *Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942)*. More recent cases have directly connected the right to marry with the "right to procreate." *Zablocki v. Redhail, 434 U.S. 374, 386, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978)*.

As the majority notes, some aspects of marriage have changed over time. Arranged marriages have largely given way to pairings based on romantic love. States have replaced coverture, the doctrine by which a married man and woman became a single legal entity, **[***62]** with laws that respect each participant's separate status. Racial restrictions on marriage, which "arose as an incident to slavery" to promote "White Supremacy," were repealed by many States and ultimately struck down by this Court. *Loving, 388 U.S., at 6-7, 87 S. Ct. 1817, 18 L. Ed. 2d 1010*.

The majority observes that these developments "were not mere superficial changes" in marriage, but rather "worked deep transformations in its structure." *Ante, at ___ - ___, 192 L. Ed. 2d, at 621*. They did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. If you had asked a person on the street how marriage was defined, no one would ever have said, "Marriage is the union of a man and a woman, where the woman is subject to coverture." The majority may be right **[*2615]** that the "history of marriage is one of both continuity and change," but the core meaning of marriage has endured. *Ante, at ___, 192 L. Ed. 2d, at 621*.

B

Shortly after this Court struck down racial restrictions on marriage in *Loving*, a gay couple in Minnesota sought a

marriage license. They argued that the Constitution required States to allow marriage between people of the same sex for the same reasons that it requires States to allow marriage between people of different races. The Minnesota Supreme Court rejected **[***63]** their analogy to *Loving*, and this Court summarily dismissed an appeal. *Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972)*.

In the decades after *Baker*, greater numbers of gays and lesbians began living openly, and many expressed a desire to have their relationships recognized as marriages. Over time, more people came to see marriage in a way that could be extended to such couples. Until recently, this new view of marriage remained a minority position. After the Massachusetts Supreme Judicial Court in 2003 interpreted its State Constitution to require recognition of same-sex marriage, many States—including the **[**643]** four at issue here—enacted constitutional amendments formally adopting the longstanding definition of marriage.

Over the last few years, public opinion on marriage has shifted rapidly. In 2009, the legislatures of Vermont, New Hampshire, and the District of Columbia became the first in the Nation to enact laws that revised the definition of marriage to include same-sex couples, while also providing accommodations for religious believers. In 2011, the New York Legislature enacted a similar law. In 2012, voters in Maine did the same, reversing the result of a referendum just three years earlier in which they had upheld the traditional **[***64]** definition of marriage.

In all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that same result under their own Constitutions. The remainder of the States retain the traditional definition of marriage.

Petitioners brought lawsuits contending that the Due Process and *Equal Protection Clauses of the Fourteenth Amendment* compel their States to license and recognize marriages between same-sex couples. In a carefully reasoned decision, the Court of Appeals acknowledged the democratic "momentum" in favor of "expand[ing] the definition of marriage to include gay couples," but concluded that petitioners had not made "the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters." *772 F. 3d, at 396, 403*. That decision interpreted the Constitution correctly, and I would affirm.

II

Petitioners first contend that the marriage laws of their States violate the *Due Process Clause*. The Solicitor General of the United States, appearing in support of petitioners, expressly disowned that position before this Court. See Tr. of Oral Arg. on Question 1, at 38-39. The majority **[***65]** nevertheless resolves these cases for petitioners based almost entirely on the *Due Process Clause*.

The majority purports to identify four "principles and traditions" in this Court's due process precedents that support a fundamental right for same-sex couples to marry. *Ante, at ___, 192 L. Ed. 2d, at 625*. In reality, however, **[*2616]** the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937*. Stripped of its shiny rhetorical gloss, the majority's argument is that the *Due Process Clause* gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.

A

Petitioners' "fundamental right" claim falls into the most sensitive category of constitutional adjudication. Petitioners do not contend that their States' marriage laws violate an *enumerated* constitutional right, such as the freedom of speech protected by the *First Amendment*. There is, after all, no "Companionship and Understanding" or "Nobility and Dignity" **[**644]** Clause in the Constitution. See *ante, at ___, ___, 192 L. Ed. 2d, at 619, 626*. They **[***66]** argue instead that the laws violate a right *implied* by the *Fourteenth Amendment*'s requirement that "liberty" may not be deprived without "due process of law."

This Court has interpreted the *Due Process Clause* to include a "substantive" component that protects certain liberty interests against state deprivation "no matter what process is provided." *Reno v. Flores, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993)*. The theory is that some liberties are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," and therefore cannot be deprived

without compelling justification. Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934).

Allowing unelected federal judges to select which unenumerated rights rank as "fundamental"—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges "exercise the utmost care" in identifying implied fundamental rights, "lest the liberty protected by the *Due Process Clause* be subtly transformed into the policy preferences of the Members of this Court." Washington v. Glucksberg, 521 U.S. 702, 720, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (internal quotation marks omitted); see Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint 13 (1986) (Address at Stanford) ("One can conclude that certain essential, or fundamental, rights should exist in any just society. It **[***67]** does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The *Due Process Clause* is not a guarantee of every right that should inhere in an ideal system.").

The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way. The Court first applied substantive due process to strike down a statute in *Dred Scott v. Sandford, 60 U.S. 393, 19 How. 393, 15 L. Ed. 691 (1857)*. There the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so. It asserted that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law." Id., at 450, 19 How. 393, 15 L. Ed. 691. In a dissent that has outlasted the majority opinion, Justice **[*2617]** Curtis explained that when the "fixed rules which govern the interpretation of laws [are] abandoned, and the theoretical opinions of individuals are allowed to control" the Constitution's **[***68]** meaning, "we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." Id., at 621, 19 How. 393, 15 L. Ed. 691.

Dred Scott's holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox, but its approach to the *Due Process Clause* reappeared. In a series of early 20th-century cases, most prominently *Lochner* v. *New York*, this Court invalidated state statutes that presented "meddlesome **[**645]** interferences with the rights of the individual," and "undue interference with liberty of person and freedom of contract." 198 U.S., at 60, 61, 25 S. Ct. 539, 49 L. Ed. 937. In *Lochner* itself, the Court struck down a New York law setting maximum hours for bakery employees, because there was "in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law." Id., at 58, 25 S. Ct. 539, 49 L. Ed. 937.

The dissenting Justices in *Lochner* explained that the New York law could be viewed as a reasonable response to legislative concern about the health of bakery employees, an issue on which there was at least "room for debate and for an honest difference of opinion." Id., at 72, 25 S. Ct. 539, 49 L. Ed. 937 (opinion of Harlan, J.). The majority's contrary conclusion **[***69]** required adopting as constitutional law "an economic theory which a large part of the country does not entertain." Id., at 75, 25 S. Ct. 539, 49 L. Ed. 937 (opinion of Holmes, J.). As Justice Holmes memorably put it, "The *Fourteenth Amendment* does not enact Mr. Herbert Spencer's Social Statics," a leading work on the philosophy of Social Darwinism. *Ibid.* The Constitution "is not intended to embody a particular economic theory . . . . It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution." Id., at 75-76, 25 S. Ct. 539, 49 L. Ed. 937.

In the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents contending that "[t]he criterion of constitutionality is not whether we believe the law to be for the public good." Adkins v. Children's Hospital of D. C., 261 U.S. 525, 570, 43 S. Ct. 394, 67 L. Ed. 785 (1923) (opinion of Holmes, J.). By empowering judges to elevate their own policy judgments to the status of constitutionally protected "liberty," the *Lochner* line of cases left "no alternative to regarding the court as a . . . legislative chamber." L. Hand, The *Bill of Rights* 42 (1958).

Eventually, the Court recognized **[***70]** its error and vowed not to repeat it. "The doctrine that . . . due process authorizes courts to hold laws unconstitutional

when they believe the legislature has acted unwisely," we later explained, "has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa, 372 U.S. 726, 730, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963)*; see *Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423, 72 S. Ct. 405, 96 L. Ed. 469 (1952)* ("we do not sit as a super-legislature to weigh the wisdom of legislation"). Thus, it has become an accepted rule that the Court will not hold laws unconstitutional simply because we find them "unwise, improvident, or out of harmony **[*2618]** with a particular school of thought." *Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563 (1955)*.

Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating *Lochner*'s error of converting personal preferences into constitutional mandates, our modern substantive **[**646]** due process cases have stressed the need for "judicial self-restraint." *Collins v. Harker Heights, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)*. Our precedents have required that implied fundamental rights be "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered **[***71]** liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg, 521 U.S., at 720-721, 117 S. Ct. 2258, 138 L. Ed. 2d 772* (internal quotation marks omitted).

Although the Court articulated the importance of history and tradition to the fundamental rights inquiry most precisely in *Glucksberg*, many other cases both before and after have adopted the same approach. See, *e.g., District Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 72, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009)*; *Flores, 507 U.S., at 303113 S. Ct. 1439, 123 L. Ed. 2d 1*; *United States v. Salerno, 481 U.S. 739, 751, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)*; *Moore v. East Cleveland, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977)* (plurality opinion); see also *id., at 544, 97 S. Ct. 1932, 52 L. Ed. 2d 531* (White, J., dissenting) ("The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."); *Troxel v. Granville, 530 U.S. 57, 96-101, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)* (Kennedy, J., dissenting) (consulting "'[o]ur Nation's history, legal traditions, and practices'" and concluding that "[w]e owe it to the Nation's domestic relations legal structure . . . to proceed with caution" (quoting *Glucksberg, 521 U.S., at 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772*)).

Proper reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. The Court is right about that. *Ante, at ___, 192 L. Ed. 2d, at 628*. But given the few "guideposts for responsible decisionmaking in this unchartered area," **[***72]** *Collins, 503 U.S., at 125, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261*, "an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula," *Moore, 431 U.S., at 504, n. 12, 97 S. Ct. 1932, 52 L. Ed. 2d 531* (plurality opinion). Expanding a right suddenly and dramatically is likely to require tearing it up from its roots. Even a sincere profession of "discipline" in identifying fundamental rights, *ante, at ___ - ___, 192 L. Ed. 2d, at 623-624*, does not provide a meaningful constraint on a judge, for "what he is really likely to be 'discovering,' whether or not he is fully aware of it, are his own values," J. Ely, Democracy and Distrust 44 (1980). The only way to ensure restraint in this delicate enterprise is "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers." *Griswold v. Connecticut, 381 U.S. 479, 501, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)* (Harlan, J., concurring in judgment).

B

The majority acknowledges none of **[**647]** this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades **[*2619]** of precedent and returns the Court to the unprincipled approach of *Lochner*.

1

The majority's driving themes are that marriage is desirable and petitioners desire **[***73]** it. The opinion describes the "transcendent importance" of marriage and repeatedly insists that petitioners do not seek to "demean," "devalue," "denigrate," or "disrespect" the institution. *Ante, at ___, ___, ___, ___, 192 L. Ed. 2d, at 619, 620, 621, 635*. Nobody disputes those points. Indeed, the compelling personal accounts of petitioners and others like them are likely a primary reason why

many Americans have changed their minds about whether same-sex couples should be allowed to marry. As a matter of constitutional law, however, the sincerity of petitioners' wishes is not relevant.

When the majority turns to the law, it relies primarily on precedents discussing the fundamental "right to marry." *Turner v. Safley, 482 U. S. 78, 95, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)*; *Zablocki, 434 U.S., at 383, 98 S. Ct. 673, 54 L. Ed. 2d 618*; see *Loving, 388 U.S., at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010*. These cases do not hold, of course, that anyone who wants to get married has a constitutional right to do so. They instead require a State to justify barriers to marriage as that institution has always been understood. In *Loving*, the Court held that racial restrictions on the right to marry lacked a compelling justification. In *Zablocki*, restrictions based on child support debts did not suffice. In *Turner*, restrictions based on status as a prisoner were deemed impermissible.

None of the laws at issue in those cases purported to change the core **[***74]** definition of marriage as the union of a man and a woman. The laws challenged in *Zablocki* and *Turner* did not define marriage as "the union of a man and a woman, *where neither party owes child support or is in prison*." Nor did the interracial marriage ban at issue in *Loving* define marriage as "the union of a man and a woman *of the same race*." See Tragen, Comment, Statutory Prohibitions Against Interracial Marriage, 32 Cal. L. Rev. 269 (1944) ("at common law there was no ban on interracial marriage"); *post, at ___ - ___, n. 5, 192 L. Ed. 2d, at 666* (Thomas, J., dissenting). Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was. As the majority admits, the institution of "marriage" discussed in every one of these cases "presumed a relationship involving opposite-sex partners." *Ante, at ___, 192 L. Ed. 2d, at 624*.

In short, the "right to marry" cases stand for the important but limited proposition that particular restrictions on access to marriage *as traditionally defined* violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here. See *Windsor, 570 U.S., at ___, 133 S. Ct. 2675, 186 L. Ed. 2d at 852* (Alito, J., dissenting) ("What Windsor and the United States **[***75]** seek . . . is not the protection of a deeply rooted right but the recognition of a very new right."). Neither petitioners nor the majority cites a single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.

[648]** 2

The majority suggests that "there are other, more instructive precedents" informing the right to marry. *Ante, at ___, 192 L. Ed. 2d, at 624*. Although not entirely clear, this reference seems to correspond to a line of cases discussing an implied fundamental "right of privacy." *Griswold, 381 U.S., at 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510*. In the first of those cases, the Court invalidated a criminal law that banned the use of contraceptives. *Id., at 485-486, 85 S. Ct. 1678, 14 L. Ed. 2d 510*. The Court stressed the invasive nature of the ban, **[*2620]** which threatened the intrusion of "the police to search the sacred precincts of marital bedrooms." *Id., at 485, 85 S. Ct. 1678, 14 L. Ed. 2d 510*. In the Court's view, such laws infringed the right to privacy in its most basic sense: the "right to be let alone." *Eisenstadt v. Baird, 405 U.S. 438, 453-454, n. 10, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972)* (internal quotation marks omitted); see *Olmstead v. United States, 277 U.S. 438, 478, 48 S. Ct. 564, 72 L. Ed. 944 (1928)* (Brandeis, J., dissenting).

The Court also invoked the right to privacy in *Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)*, which struck down a Texas statute criminalizing homosexual sodomy. *Lawrence* relied on the position that criminal sodomy laws, like bans on contraceptives, invaded **[***76]** privacy by inviting "unwarranted government intrusions" that "touc[h] upon the most private human conduct, sexual behavior . . . in the most private of places, the home." *Id., at 562, 567, 123 S. Ct. 2472, 156 L. Ed. 2d 508*.

Neither *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is "condemned to live in loneliness" by the laws challenged in these cases—no one. *Ante, at ___, 192 L. Ed. 2d, at 635*. At the same time, the laws in no way interfere with the "right to be let alone."

The majority also relies on Justice Harlan's influential dissenting opinion in *Poe v. Ullman, 367 U.S. 497, 81 S.*

Ct. 1752, 6 L. Ed. 2d 989 (1961). As the majority recounts, that opinion states that "[d]ue process has not been reduced to any formula." Id., at 542, 81 S. Ct. 1752, 6 L. Ed. 2d 989. But far from conferring the broad interpretive discretion that the majority discerns, Justice Harlan's opinion makes clear that courts implying fundamental rights are not "free to roam where unguided speculation might take them." *Ibid.* They must instead have "regard **[***77]** to what history teaches" and exercise not only "judgment" but "restraint." *Ibid.* Of particular relevance, Justice Harlan explained that "laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis." Id., at 546, 81 S. Ct. 1752, 6 L. Ed. 2d 989.

In sum, the privacy cases provide no support for the majority's position, because petitioners do not seek privacy. Quite the opposite, they seek **[**649]** public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. See DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 196, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35-37, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973); post, at ___ - ___, 192 L. Ed. 2d, at 664-667 (Thomas, J., dissenting). Thus, although the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no affirmative right to redefine marriage and no basis for striking down the laws at issue here.

3

Perhaps recognizing how little support it can derive **[***78]** from precedent, the majority goes out of its way to jettison the "careful" approach to implied fundamental rights **[*2621]** taken by this Court in *Glucksberg*. Ante, at ___, 192 L. Ed. 2d, at 628 (quoting 521 U.S., at 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772). It is revealing that the majority's position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process. At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach.

Ultimately, only one precedent offers any support for the majority's methodology: Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937. The majority opens its opinion by announcing petitioners' right to "define and express their identity." Ante, at ___ - ___, 192 L. Ed. 2d, at 618. The majority later explains that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." Ante, at ___, 192 L. Ed. 2d, at 625. This freewheeling notion of individual autonomy echoes nothing so much as "the general right of an individual to be *free in his person* and in his power to contract in relation to his own labor." Lochner, 198 U.S., at 58, 25 S. Ct. 539, 49 L. Ed. 937 (emphasis added).

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own "reasoned judgment," informed **[***79]** by its "new insight" into the "nature of injustice," which was invisible to all who came before but has become clear "as we learn [the] meaning" of liberty. Ante, at ___, ___, 192 L. Ed. 2d, at 624, 624. The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to, and that "it would disparage their choices and diminish their personhood to deny them this right." Ante, at ___, 192 L. Ed. 2d, at 629. Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*. See 198 U.S., at 61, 25 S. Ct. 539, 49 L. Ed. 937 ("We do not believe in the soundness of the views which uphold this law," which "is an illegal interference with the rights of individuals . . . to make contracts regarding labor upon such terms as they may think best").

The majority recognizes that today's cases do not mark "the first time **[**650]** the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights." Ante, at ___, 192 L. Ed. 2d, at 632. On that much, we agree. The Court was "asked"—and it agreed—to "adopt a cautious approach" to implying fundamental rights after the debacle of the *Lochner* era. Today, the majority casts caution aside and revives **[***80]** the grave errors of that period.

One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. Cf. Brown v. Buhman, 947 F. Supp. 2d 1170 (Utah 2013), appeal pending, No. 14-4117 (CA10). Although the majority randomly inserts the adjective "two" in various places, it

offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.

It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices," *ante, at* ***[*2622]*** *___, 192 L. Ed. 2d, at 625*, why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex **[***81]** couple has the constitutional right to marry because their children would otherwise "suffer the stigma of knowing their families are somehow lesser," *ante, at ___, 192 L. Ed. 2d, at 627*, why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry "serves to disrespect and subordinate" gay and lesbian couples, why wouldn't the same "imposition of this disability," *ante, at ___, 192 L. Ed. 2d, at 631*, serve to disrespect and subordinate people who find fulfillment in polyamorous relationships? See Bennett, Polyamory: The Next Sexual Revolution? Newsweek, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, Married Lesbian "Throuple" Expecting First Child, N. Y. Post, Apr. 23, 2014; Otter, Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage, *64 Emory L. J. 1977 (2015)*.

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State "doesn't have such an institution." Tr. of Oral Arg. on Question 2, p. **[***82]** 6. But that is exactly the point: the States at issue here do not have an institution of same-sex marriage, either.

4

Near the end of its opinion, the majority offers perhaps the clearest insight into its decision. Expanding marriage to include same-sex couples, the majority insists, would "pose no risk of harm to themselves or third parties." *Ante, ___, 192 L. Ed. 2d,* ***[**651]*** *at 634*. This argument again echoes *Lochner*, which relied on its assessment that "we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act." *198 U.S., at 57, 25 S. Ct. 539, 49 L. Ed. 937*.

Then and now, this assertion of the "harm principle" sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice's commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of "due process." There is indeed a process due the people on issues of this sort—the democratic process. Respecting that understanding requires **[***83]** the Court to be guided by law, not any particular school of social thought. As Judge Henry Friendly once put it, echoing Justice Holmes's dissent in *Lochner*, the *Fourteenth Amendment* does not enact John Stuart Mill's On Liberty any more than it enacts Herbert Spencer's Social Statics. See Randolph, Before *Roe v. Wade*: Judge Friendly's Draft Abortion Opinion, 29 Harv. J. L. & Pub. Pol'y 1035, 1036-1037, 1058 (2006). And it certainly does not enact any one concept of marriage.

The majority's understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down **[*2623]** democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now. I agree with the majority that the **[***84]** "nature of injustice is that we may not always see it in our own times." *Ante, at ___, 192 L. Ed. 2d, at 624*. As petitioners put it, "times can blind." Tr. of Oral Arg. on Question 1, at 9, 10. But to blind yourself to history is both prideful and unwise. "The past is never dead. It's not even past." W. Faulkner, Requiem for a Nun 92 (1951).

III

In addition to their due process argument, petitioners contend that the *Equal Protection Clause* requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a "synergy between" the *Equal Protection Clause* and the *Due Process Clause*, and that some precedents relying on one Clause have also relied on the other. *Ante, at ___, 192 L. Ed. 2d, at 630*. Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases. It is casebook doctrine that the "modern Supreme Court's treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing." G. Stone, L. Seidman, C. Sunstein, M. Tushnet, & **[**652]** P. Karlan, Constitutional Law 453 (7th ed. 2013). **[***85]** The majority's approach today is different:

> "Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right." *Ante, at ___, 192 L. Ed. 2d, at 629*.

The majority goes on to assert in conclusory fashion that the *Equal Protection Clause* provides an alternative basis for its holding. *Ante, at ___, 192 L. Ed. 2d, at 631*. Yet the majority fails to provide even a single sentence explaining how the *Equal Protection Clause* supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions. See *Northwest Austin Municipal Util. Dist. No. One v. Holder, 557 U.S. 193, 197, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (2009)*. In any event, the marriage laws at issue here do not violate the *Equal Protection Clause*, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' "legitimate state interest" in "preserving the traditional institution of marriage." *Lawrence, 539 U.S., at 585, 123 S. Ct. 2472, 156 L. Ed. 2d 508* (O'Connor, J., concurring in judgment).

It is important to note with precision which laws petitioners **[***86]** have challenged. Although they discuss some of the ancillary legal benefits that accompany marriage, such as hospital visitation rights and recognition of spousal status on official documents, petitioners' lawsuits target the laws defining marriage generally rather than those allocating benefits specifically. The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits. Of course, those more selective claims will not arise now that the Court has taken the drastic step of requiring every State to **[*2624]** license and recognize marriages between same-sex couples.

IV

The legitimacy of this Court ultimately rests "upon the respect accorded to its judgments." *Republican Party of Minn. v. White, 536 U.S. 765, 793, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002)* (Kennedy, J., concurring). That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority's telling, it is the courts, not the people, who are responsible for **[***87]** making "new dimensions of freedom . . . apparent to new generations," for providing "formal discourse" on social issues, and for ensuring "neutral discussions, without scornful or disparaging commentary." *Ante, at ___-___, 192 L. Ed. 2d, at 621-623*.

Nowhere is the majority's extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate **[**653]** regarding same-sex marriage. Yes, the majority concedes, on one side are thousands of years of human history in every society known to have populated the planet. But on the other side, there has been "extensive litigation," "many thoughtful District Court decisions," "countless studies, papers, books, and other popular and scholarly writings," and "more than 100" *amicus* briefs in these cases alone. *Ante, at ___, ___, ___, 192 L. Ed. 2d, at 623, 623, 632*. What would be the point of allowing the democratic process to go on? It is high time for the Court to decide the meaning of marriage, based on five lawyers' "better informed understanding" of "a liberty that remains urgent in our own era." *Ante, at ___, 192 L. Ed. 2d, at 629*. The answer is surely there in one of those *amicus* briefs or studies.

Those who founded our country would not recognize the

majority's conception of the judicial role. They after all risked their lives and **[***88]** fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. And they certainly would not have been satisfied by a system empowering judges to override policy judgments so long as they do so after "a quite extensive discussion." *Ante, at ___, 192 L. Ed. 2d, at 622*. In our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will. "Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unresolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution." Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 700 (1976). As a plurality of this Court explained just last year, "It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Schuette v. BAMN, 572 U.S. ___, ___, 134 S. Ct. 1623, 188 L. Ed. 2d 613, 628 (2014)*.

The Court's accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it. Here and abroad, **[***89]** people are in the midst of a serious and thoughtful public debate on the issue of same-sex marriage. They see voters carefully considering same-sex marriage, casting ballots in favor or opposed, and sometimes changing their minds. They see political leaders similarly reexamining their positions, and either reversing **[*2625]** course or explaining adherence to old convictions confirmed anew. They see governments and businesses modifying policies and practices with respect to same-sex couples, and participating actively in the civic discourse. They see countries overseas democratically accepting profound social change, or declining to do so. This deliberative process is making people take seriously questions that they may not have even regarded as questions before.

When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. In addition, they can gear up to raise the issue later, hoping to persuade enough on the winning side to think again. "That **[***90]** is exactly **[**654]** how our system of government is supposed to work." *Post, at ___ - ___, 192 L. Ed. 2d, at 656* (Scalia, J., dissenting).

But today the Court puts a stop to all that. By deciding this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator observed about another issue, "The political process was moving . . ., not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." Ginsburg, Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*, *63 N. C. L. Rev. 375, 385-386 (1985)* (footnote omitted). Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow **[***91]** citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.

Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right. Today's decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. *Amdt. 1*.

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. *Ante, at ___, 192 L. Ed. 2d, at 634*. The *First Amendment* guarantees, however, the freedom to "*exercise*" religion. **[***92]** Ominously, that is not a word the majority uses.

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student **[*2626]** housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. See Tr. of Oral Arg. on Question 1, at 36-38. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

Perhaps the most discouraging aspect of today's decision is the extent to **[**655]** which the majority feels compelled to sully those on the other side of the debate. The majority offers a cursory assurance that it does not intend to disparage people who, as a matter of conscience, cannot accept same-sex marriage. *Ante, at ___, 192 L. Ed. 2d, at 629*. That disclaimer is hard to square with the very next sentence, in which the majority explains that "the necessary **[***93]** consequence" of laws codifying the traditional definition of marriage is to "demea[n] or stigmatiz[e]" same-sex couples. *Ante, at ___, 192 L. Ed. 2d, at 629*. The majority reiterates such characterizations over and over. By the majority's account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States' enduring definition of marriage—have acted to "lock . . . out," "disparage," "disrespect and subordinate," and inflict "[d]ignitary wounds" upon their gay and lesbian neighbors. *Ante, at ___, ___, ___, ___, 192 L. Ed. 2d, at 628, 629, 631, 633*. These apparent assaults on the character of fairminded people will have an effect, in society and in court. See *post, at ___ - ___, 192 L. Ed. 2d, at 672-673* (Alito, J., dissenting). Moreover, they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's "better informed understanding" as bigoted. *Ante, at ___, 192 L. Ed. 2d, at 629*.

In the face of all this, a much different view of the Court's role is possible. That view is more modest and restrained. It is more skeptical that the legal abilities of judges also reflect insight into moral and philosophical issues. It is **[***94]** more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment. It is more attuned to the lessons of history, and what it has meant for the country and Court when Justices have exceeded their proper bounds. And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition.

* * *

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

I respectfully dissent.

Justice Scalia, with whom Justice Thomas joins, dissenting.

I join The Chief Justice's opinion in full. I write separately to call attention to this Court's threat to American democracy.

The substance of today's decree **[***95]** is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements **[*2627]** it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance. Those civil consequences—and the public approval **[**656]** that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration

of Independence and **[***96]** won in the Revolution of 1776: the freedom to govern themselves.

I

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to. [1] Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work. [2]

The Constitution places some constraints on self-rule—constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments. Forbidden are laws "impairing the Obligation of Contracts," [3] denying "Full Faith and Credit" to the "public Acts" of other States, [4] prohibiting the free exercise of religion, [5] abridging the freedom of speech, **[***97]** [6] infringing the right to keep and bear arms, [7] authorizing unreasonable searches and seizures, [8] and so forth. Aside from these limitations, those powers "reserved to the States respectively, or to the people" [9] can be exercised as the States or the People desire. These cases ask us to decide whether the *Fourteenth Amendment* contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove *that* issue from the political process?

[657]** Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author **[*2628]** of today's opinion reminded us only two years ago (in an opinion joined by the same Justices who join him today):

> "[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." [10]
>
> "[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations." [11]

But we need not speculate. When the *Fourteenth Amendment* was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning **[***98]** of a vague constitutional provision—such as "due process of law" or "equal protection of the laws"—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification. [12] We have no basis for striking down a practice that is not expressly prohibited by the *Fourteenth Amendment*'s text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter *what* it was the People ratified, the *Fourteenth Amendment* protects those rights that the Judiciary, in its "reasoned judgment," thinks the *Fourteenth*

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[1] Brief for Respondents in No. 14-571, p. 14.

[2] Accord, *Schuette v. BAMN, 572 U.S. ___, ___-___, 134 S. Ct. 1623, 188 L. Ed. 2d 613, 628 (2014)* (plurality opinion).

[3] U. S. Const., Art. I, §10.

[4] *Art. IV, §1*.

[5] ***Amdt. 1***.

[6] *Ibid*.

[7] *Amdt. 2*.

[8] ***Amdt. 4***.

[9] *Amdt. 10*.

[10] *United States v. Windsor, 570 U.S. ___, ___, 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808 at 814 (2013*) (internal quotation marks and citation omitted).

[11] *Id., at ___, 133 S. Ct. 2675, 186 L. Ed. 2d 808 at 824*)

[12] See *Town of Greece v. Galloway, 572 U.S. ___, ___-___, 134 S. Ct. 1811, 188 L. Ed. 2d 835, 846 (2014*).

Amendment ought to protect. [13] That is so because "[t]he generations that wrote and ratified the *Bill of Rights* and the *Fourteenth Amendment* did **[***99]** not presume to know the extent of freedom in all of its dimensions . . . . " [14] One would think that sentence would continue: ". . . and therefore they provided for a means by which the People could amend the Constitution," or perhaps ". . . and therefore they left the creation of additional liberties, such as the freedom to marry someone of the same sex, to the People, through the never-ending process of legislation." But no. What logically follows, in the majority's judge-empowering estimation, is: "and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning." [15] The "we," needless to say, is the nine **[**658]** of us. "History and tradition guide and discipline [our] inquiry but do not set its outer boundaries." [16] Thus, rather than focusing on *the People's* understanding of "liberty"—at the time of ratification or even today—the majority focuses on four "principles and traditions" that, *in the majority's view*, prohibit States from defining marriage as an institution consisting of one man and one woman. [17]

[*2629] This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with **[***100]** our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' "reasoned judgment." A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers [18] who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans [19]), or even a Protestant of any denomination. The strikingly unrepresentative character of the body voting **[***101]** on today's social upheaval would be irrelevant if they were functioning as *judges*, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; *they say they are not*. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

II

But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority **[***102]** are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the *Fourteenth Amendment*'s ratification and Massachusetts' permitting of same-sex marriages in 2003. [20] They have discovered in the *Fourteenth Amendment* **[**659]** a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds—minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly—could not. They are certain that the People ratified the *Fourteenth Amendment* to bestow on them the power to

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[13] *Ante, at ___, 192 L. Ed. 2d, at 624*.

[14] *Ante, at ___, 192 L. Ed. 2d, at 624*.

[15] *Ibid*.

[16] *Ante, at ___ - ___, 192 L. Ed. 2d, at 624*.

[17] *Ante, at ___ - ___, 192 L. Ed. 2d, at 624-629*.

[18] The predominant attitude of tall-building lawyers with respect to the questions presented in these cases is suggested by the fact that the American Bar Association deemed it in accord with the wishes of its members to file a brief in support of the petitioners. See Brief for American Bar Association as *Amicus Curiae* in Nos. 14-571 and 14-574, pp. 1-5.

[19] See Pew Research Center, America's Changing Religious Landscape 4 (May 12, 2015).

[20] *Goodridge v. Department of Public Health, 440 Mass. 309, 798 N. E. 2d 941 (2003)*.

remove questions from the democratic process when **[*2630]** that is called for by their "reasoned judgment." These Justices *know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every nation in history until 15 years ago, [21] cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous **[***103]** judgment of all generations and all societies, stands against the Constitution.

The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so. [22] Of course the opinion's showy profundities are often profoundly incoherent. "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality." [23] (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, *is* a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can "rise . . . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era." [24] (Huh? How **[***104]** can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?) And we are told that, "[i]n any particular case," either the Equal Protection or *Due Process Clause* "may be thought to capture the essence of [a] right in a more accurate and comprehensive way," than the other, "even as the two Clauses may converge in the identification and definition of the right." [25] (What say? What possible "essence" **[**660]** does substantive due process "capture" in an "accurate and comprehensive way"? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes. And the *Equal Protection Clause*, as employed today, identifies nothing except a difference in treatment that this Court *really* dislikes. Hardly a distillation of essence. If the opinion is correct that the two clauses "converge in the identification and definition of [a] right," that is only because the majority's likes and dislikes are predictably compatible.) I could go on. The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish **[***105]** this Court's reputation for clear thinking and sober analysis.

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[*2631] Hubris is sometimes defined as o'erweening pride; and pride, we know, goeth before a fall. The Judiciary is the "least dangerous" of the federal branches because it has "neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm" and the States, "even for the efficacy of its judgments." [26] With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the "reasoned judgment" of a bare majority of this Court—we move one step closer to being reminded of our impotence.

Justice Thomas, with whom Justice Scalia joins, dissenting.

The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. The Framers created our Constitution to preserve that understanding of liberty. Yet the majority invokes our Constitution in the

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[21] *Windsor, 570 U.S., at ___, 133 S. Ct. 2675, 186 L. Ed. 2d at 830* (Alito, J., dissenting).

[22] If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity," I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.

[23] *Ante, at ___, 192 L. Ed. 2d, at 625*.

[24] *Ante, at ___, 192 L. Ed. 2d, at 629*.

[25] *Ibid*.

[26] The Federalist No. 78, pp. **[***106]** 522, 523 (J. Cooke ed. 1961) (A. Hamilton).

name of a "liberty" that the Framers would not have recognized, to the detriment of the liberty they sought to protect. Along the way, it rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic. I cannot agree with it.

I

The majority's decision today will require States to issue marriage licenses to same-sex couples and to recognize same-sex marriages entered in other States largely based on a constitutional provision guaranteeing "due process" before a person is deprived of his **[***107]** "life, liberty, or property." I have elsewhere explained the dangerous fiction of treating the *Due Process Clause* as a font of substantive rights. *McDonald v. Chicago, 561 U.S. 742, 811-812, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010)* (Thomas, J., concurring in part and concurring in judgment). It distorts the constitutional text, which guarantees only whatever "process" is "due" before a person is deprived of life, liberty, and property. *U. S. Const., Amdt. 14, §1*. Worse, it invites judges to do exactly what the majority has done here—"'roa[m] at large in the constitutional field' guided only by their personal **[**661]** views" as to the "'fundamental rights'" protected by that document. *Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 953, 965, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)* (Rehnquist, C. J., concurring in judgment in part and dissenting in part) (quoting *Griswold v. Connecticut, 381 U.S. 479, 502, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)* (Harlan, J., concurring in judgment)).

By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority. Petitioners argue that by enshrining the traditional definition of marriage in their State Constitutions through voter-approved amendments, the States have put the issue "beyond the reach of the normal democratic process." Brief for Petitioners in No. 14-562, p. 54. But the result petitioners seek is far less democratic. They ask nine judges on this Court to enshrine their **[***108]** definition of marriage in the Federal Constitution and thus put it beyond the reach of the normal democratic process for the entire Nation. That a "bare majority" of **[*2632]** this Court, *ante, at ___, 192 L. Ed. 2d, at 632*, is able to grant this wish, wiping out with a stroke of the keyboard the results of the political process in over 30 States, based on a provision that guarantees only "due process" is but further evidence of the danger of substantive due process. [1]

II

Even if the doctrine of substantive due process were somehow defensible—it is not—petitioners still would not have a claim. To invoke the protection of the *Due Process Clause* at all—whether under a theory of "substantive" or "procedural" due process—a party must first identify a deprivation of "life, liberty, or property." The majority **[***109]** claims these state laws deprive petitioners of "liberty," but the concept of "liberty" it conjures up bears no resemblance to any plausible meaning of that word as it is used in the *Due Process Clauses*.

A

1

As used in the *Due Process Clauses*, "liberty" most likely refers to "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." 1 W. Blackstone, Commentaries on the Laws of England 130 (1769) (Blackstone). That definition is drawn from the historical roots of the Clauses and is consistent with our Constitution's text and structure.

Both of the Constitution's *Due Process Clauses* reach back to Magna Carta. See *Davidson v. New Orleans, 96 U.S. 97, 101-102, 24 L. Ed. 616 (1878)*. Chapter 39 of the original Magna Carta provided, "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." Magna Carta, **[**662]** ch. 39, in A. Howard, Magna Carta: Text and Commentary 43 (1964). Although the 1215 version of Magna Carta was in effect for only a few weeks, this provision was later reissued in 1225 with modest

[1] The majority states that the right it believes is "part of the liberty promised by the ***Fourteenth Amendment*** is derived, too, from that Amendment's guarantee of the equal protection of the laws." *Ante, at ___, 192 L. Ed. 2d, at 629*. Despite the "synergy" it finds "between th[ese] two protections," *ante, at ___, 192 L. Ed. 2d, at 630*, the majority clearly uses equal protection only to shore up its substantive due process analysis, an analysis both based on an imaginary constitutional protection and revisionist view of our history and tradition.

changes to its wording as follows: **[***110]** "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers or by the law of the land." 1 E. Coke, The Second Part of the Institutes of the Laws of England 45 (1797). In his influential commentary on the provision many years later, Sir Edward Coke interpreted the words "by the law of the land" to mean the same thing as "by due process of the common law." *Id.,* at 50.

After Magna Carta became subject to renewed interest in the 17th century, see, *e.g., ibid.*, William Blackstone referred to this provision as protecting the "absolute rights of every Englishman." 1 Blackstone 123. And he formulated those absolute rights as "the right of personal security," which included the right to life; "the right of personal liberty"; and "the right of private property." *Id.,* at 125. He defined "the right of personal liberty" as "the power of loco-motion, of changing situation, **[*2633]** or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." **[***111]** *Id.*, at 125, 130. [2]

The Framers drew heavily upon Blackstone's formulation, adopting provisions in early State Constitutions that replicated Magna Carta's language, but were modified to refer specifically to "life, liberty, or property." [3] State decisions interpreting these provisions between the founding and the ratification of the *Fourteenth Amendment* almost uniformly construed the word "liberty" to refer only to freedom from physical restraint. See Warren, The New "Liberty" Under the *Fourteenth Amendment*, 39 Harv. L. Rev. 431, 441-445 (1926). Even **[***112]** one case that has been identified as a possible exception to that view merely used broad language about liberty in the context of a habeas corpus proceeding—a proceeding **[**663]** classically associated with obtaining freedom from physical restraint. Cf. *id.,* at 444-445.

In enacting the *Fifth Amendment*'s *Due Process Clause*, the Framers similarly chose to employ the "life, liberty, or property" formulation, though they otherwise deviated substantially from the States' use of Magna Carta's language in the Clause. See Shattuck, The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property," 4 Harv. L. Rev. 365, 382 (1890). When read in light of the history of that formulation, it is hard to see how the "liberty" protected by the Clause could be interpreted to include anything broader than freedom from physical restraint. That was the consistent usage of the time when "liberty" was paired with "life" and "property." See *id.,* at 375. And that usage avoids rendering superfluous those protections for "life" and "property."

If the *Fifth Amendment* uses "liberty" in this narrow sense, then the *Fourteenth Amendment* likely does as well. See *Hurtado v. California, 110 U.S. 516, 534-535, 4 S. Ct. 111, 28 L. Ed. 232 (1884)*. Indeed, this Court has previously commented, "The conclusion is . . . irresistible, that when the same phrase was employed in **[*2634]** the *Fourteenth Amendment* [as was used in the *Fifth Amendment*], it was used in the same sense and with no greater extent." *Ibid*. And this Court's earliest *Fourteenth Amendment* decisions appear to interpret the Clause as **[***114]** using "liberty" to mean freedom from physical restraint. In *Munn v. Illinois, 94 U.S. 113, 24 L. Ed. 77 (1877)*, for example, the Court

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[2] The seeds of this articulation can also be found in Henry Care's influential treatise, English Liberties. First published in America in 1721, it described the "three things, which the Law of *England* . . . principally regards and taketh Care of," as "*Life*, *Liberty* and *Estate*," and described habeas corpus as the means by which one could procure one's "Liberty" from imprisonment. The Habeas Corpus Act, comment., in English Liberties, or the Free-born Subject's Inheritance 185 (H. Care comp. 5th ed. 1721). Though he used the word "Liberties" by itself more broadly, see, *e.g., id.,* at 7, 34, 56, 58, 60, he used "Liberty" in a narrow sense when placed alongside the words "Life" or "Estate," see, *e.g., id.,* at 185, 200.

[3] Maryland, North Carolina, and South Carolina adopted the phrase "life, liberty, or property" in provisions otherwise tracking Magna Carta: "That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." Md. Const., Declaration of Rights, Art. XXI (1776), in 3 Federal and State Constitutions, Colonial Charters, and Other Organic Laws 1688 (F. Thorpe ed. 1909); see also S. C. Const., Art. XLI (1778), in 6 *id.,* at 3257; N. C. Const., Declaration of Rights, Art. XII (1776), in 5 *id.,* at 2788. Massachusetts and New Hampshire did the same, albeit with some alterations to Magna Carta's framework: "[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." **[***113]** *Mass. Const., pt. I, Art. XII* (1780), in 3 *id.,* at 1891; see also N. H. Const., pt. I, Art. XV (1784), in 4 *id.,* at 2455.

recognized the relationship between the two *Due Process Clauses* and Magna Carta, see *id., at 123-124, 24 L. Ed. 77*, and implicitly rejected the dissent's argument that "'liberty'" encompassed "something more . . . than mere freedom from physical restraint or the bounds of a prison," *id., at 142, 24 L. Ed. 77* (Field, J., dissenting). That the Court appears to have lost its way in more recent years does not justify deviating from the original meaning of the Clauses.

2

Even assuming that the "liberty" in those Clauses encompasses something more than freedom from physical restraint, it would not include the types of rights claimed by the majority. In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.

The founding-era understanding of liberty was heavily influenced by John Locke, whose writings "on natural rights and on the social and governmental contract" were cited "[i]n pamphlet after pamphlet" by American writers. B. Bailyn, The Ideological Origins of the American Revolution 27 (1967). Locke described men as existing in a state of nature, possessed of the **[***115]** "perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man." J. Locke, Second Treatise of Civil Government, §4, p. 4 (J. Gough ed. 1947) (Locke). Because that state of nature left men insecure in their persons and property, they entered civil society, trading a portion of their natural liberty for an increase in their security. See *id.,* §97, at 49. Upon consenting to that order, men obtained civil liberty, **[**664]** or the freedom "to be under no other legislative power but that established by consent in the commonwealth; nor under the dominion of any will or restraint of any law, but what that legislative shall enact according to the trust put in it." *Id.,* §22, at 13. [4]

This philosophy permeated the 18th-century political scene in America. A 1756 editorial in the Boston Gazette, for example, declared that "Liberty in the *State of* ***[*2635]*** *Nature*" was the "inherent natural Right" "of each Man" "to make a free Use **[***117]** of his Reason and Understanding, and to chuse that Action which he thinks he can give the best Account of," but that, "in Society, every Man parts with a Small Share of his *natural* Liberty, or lodges it in the publick Stock, that he may possess the Remainder without Controul." Boston Gazette and Country Journal, No. 58, May 10, 1756, p. 1. Similar sentiments were expressed in public speeches, sermons, and letters of the time. See 1 C. Hyneman & D. Lutz, American Political Writing During the Founding Era 1760-1805, pp. 100, 308, 385 (1983).

The founding-era idea of civil liberty as natural liberty constrained by human law necessarily involved only those freedoms that existed *outside of* government. See Hamburger, Natural Rights, Natural Law, and American Constitutions, *102 Yale L. J. 907, 918-919 (1993)*. As one later commentator observed, "[L]iberty in the eighteenth century was thought of much more in relation to 'negative liberty'; that is, freedom *from*, not freedom *to*, freedom from a number of social and political evils, including arbitrary government power." J. Reid, The Concept of Liberty in the Age of the American Revolution 56 (1988). Or as one scholar put it in 1776, "[T]he common idea of liberty is merely negative, and is **[***118]** only the *absence of restraint*." R. Hey, Observations on the Nature of Civil Liberty and the Principles of Government §13, p. 8 (1776) (Hey). When the colonists described laws that would infringe their liberties, they discussed laws that would prohibit individuals "from walking in the streets and highways on certain saints days, or from being abroad after a certain time in the evening, or . . . restrain [them] from working up and manufacturing materials of [their] own growth." Downer, A Discourse at the Dedication of the Tree of Liberty, in 1 Hyneman, *supra*, at 101. Each of those

[4] Locke's theories heavily influenced other prominent writers of the 17th and 18th centuries. Blackstone, for one, agreed that "natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature" and described civil liberty as that "which leaves the subject entire master of his own conduct," except as "restrained **[***116]** by human laws." 1 Blackstone 121-122. And in a "treatise routinely cited by the Founders," *Zivotofsky v. Kerry, ante, at ___, 135 S. Ct. 2076, 192 L. Ed. 2d 83* (Thomas, J., concurring in judgment in part and dissenting in part), Thomas Rutherforth wrote, "By liberty we mean the power, which a man has to act as he thinks fit, where no law restrains him; it may therefore be called a mans right over his own actions." 1 T. Rutherforth, Institutes of Natural Law 146 (1754). Rutherforth explained that "[t]he only restraint, which a mans right over his own actions is originally under, is the obligation of governing himself by the law of nature, and the law of God," and that "[w]hatever right those of our own species may have . . . to restrain [those actions] within certain bounds, beyond what the law of nature has prescribed, arises from some after-act of our own, from some consent either express or tacit, by which we have alienated our liberty, or transferred the right of directing our actions from ourselves to them." *Id.,* at 147-148.

examples involved freedoms that existed outside of government.

B

Whether we define "liberty" as locomotion or freedom from governmental **[**665]** action more broadly, petitioners have in no way been deprived of it.

Petitioners cannot claim, under the most plausible definition of "liberty," that they have been imprisoned or physically restrained by the States for participating in same-sex relationships. To the contrary, they have been able to cohabitate and raise their children in peace. They have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in **[***119]** all States. They have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.

Nor, under the broader definition, can they claim that the States have restricted their ability to go about their daily lives as they would be able to absent governmental restrictions. Petitioners do not ask this Court to order the States to stop restricting their ability to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children. The States have imposed no such restrictions. Nor have the States prevented petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.

Instead, the States have refused to grant them governmental entitlements. Petitioners claim that as a matter of "liberty," they are entitled to access privileges **[*2636]** and benefits that exist solely *because of* the government. They want, for example, to receive the State's **[***120]** *imprimatur* on their marriages—on state issued marriage licenses, death certificates, or other official forms. And they want to receive various monetary benefits, including reduced inheritance taxes upon the death of a spouse, compensation if a spouse dies as a result of a work-related injury, or loss of consortium damages in tort suits. But receiving governmental recognition and benefits has nothing to do with any understanding of "liberty" that the Framers would have recognized.

To the extent that the Framers would have recognized a natural right to marriage that fell within the broader definition of liberty, it would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one's spouse—without governmental interference. At the founding, such conduct was understood to predate government, not to flow from it. As Locke had explained many years earlier, "The first society was between man and wife, which gave beginning to that between **[***121]** parents and children." Locke §77, at 39; see also J. Wilson, Lectures on Law, in 2 Collected Works of James Wilson 1068 (K. Hall and M. Hall eds. 2007) (concluding "that to the institution of marriage the true origin of society must be traced"). Petitioners misunderstand the institution of marriage when they say that it would "mean little" absent governmental recognition. Brief for Petitioners in No. 14-556, p. 33.

Petitioners' misconception of liberty carries over into their discussion of **[**666]** our precedents identifying a right to marry, not one of which has expanded the concept of "liberty" beyond the concept of negative liberty. Those precedents all involved absolute prohibitions on private actions associated with marriage. *Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967)*, for example, involved a couple who was criminally prosecuted for marrying in the District of Columbia and cohabiting in Virginia, *id., at 2-3, 87 S. Ct. 1817, 18 L. Ed. 2d 1010*. [5] They **[*2637]** were each

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[5] The suggestion of petitioners and their *amici* that antimiscegenation laws are akin to laws defining marriage as between one man and one woman is both offensive and inaccurate. "America's earliest laws against interracial sex and marriage were spawned by slavery." P. Pascoe, What Comes Naturally: Miscegenation Law and the Making of Race in America 19 (2009). For instance, Maryland's 1664 law prohibiting marriages between "'freeborne English women'" and "'Negro Sla[v]es'" was passed as part of the very act that authorized lifelong slavery in the colony. *Id.,* at 19-20. Virginia's antimiscegenation laws likewise were passed in a 1691 resolution entitled "An act for suppressing outlying Slaves." Act of Apr. 1691, Ch. XVI, 3 Va. Stat. 86 (W. Hening ed. 1823) (reprint 1969) (italics deleted). "It was not until the Civil War threw the future of slavery into **[***123]** doubt that lawyers, legislators, and judges began to develop the elaborate justifications that signified the emergence of miscegenation law and made restrictions on interracial marriage the foundation of post-Civil War white supremacy." Pascoe, *supra*, at 27-28.

sentenced to a year of imprisonment, suspended for a term of 25 years on the condition that they not reenter the Commonwealth together during that time. *Id., at 3, 87 S. Ct. 1817, 18 L. Ed. 2d 1010*. [6] In a similar vein, *Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978)*, involved a man who was prohibited, on pain of criminal penalty, from "marry[ing] in Wisconsin or elsewhere" because of his outstanding child-support **[***122]** obligations, *id., at 387, 98 S. Ct. 673, 54 L. Ed. 2d 618*; see *id., at 377-378, 98 S. Ct. 673, 54 L. Ed. 2d 618*. And *Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)*, involved state inmates who were prohibited from entering marriages without the permission of the superintendent of the prison, permission that could not be granted absent compelling reasons, *id., at 82, 107 S. Ct. 2254, 96 L. Ed. 2d 64*. In *none* of those cases were individuals denied solely governmental recognition and benefits associated with marriage.

In a concession to petitioners' misconception of liberty, the majority characterizes petitioners' suit as a quest to "find . . . liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex." *Ante, at ___, 192 L. Ed. 2d, at 618*. But "liberty" is not lost, nor can it be found in the way petitioners **[**667]** seek. As a philosophical matter, liberty is only freedom from governmental action, not an entitlement to governmental benefits. And as a constitutional matter, it is likely even narrower than that, encompassing only freedom from physical restraint and imprisonment. The majority's "better informed understanding of how constitutional imperatives define . . . liberty," *ante, at ___, 192 L. Ed. 2d, at 629*,—better informed, we must assume, than that of the people who ratified the *Fourteenth Amendment*—runs headlong into the reality that our Constitution is a "collection of 'Thou shalt nots,'" *Reid v. Covert, 354 U.S. 1, 9, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957)* (plurality opinion), not "Thou shalt provides."

III

The majority's inversion **[***125]** of the original meaning of liberty will likely cause collateral damage to other aspects of our constitutional order that protect liberty.

A

The majority apparently disregards the political process as a protection for liberty. Although men, in forming a civil society, "give up all the power necessary to the ends for which they unite into society, to the majority of the community," Locke §99, at 49, they reserve the authority to exercise natural liberty within the bounds of laws established by that society, *id.,* §22, at 13; see also Hey §§52, 54, at 30-32. To protect that liberty from arbitrary interference, they establish a process by which that society can adopt and enforce its laws. In our country, that process is primarily representative government at the state level, with the Federal Constitution serving as a backstop for that process. As a general matter, when the States act through their representative governments or by popular vote, the liberty of their residents is fully vindicated. This is no less true when some residents disagree with the result; indeed, it seems difficult to imagine *any* law on which all residents **[*2638]** of a State would agree. See Locke §98, at 49 (suggesting that **[***126]** society would cease to function if it required unanimous consent to laws). What matters is that the process established by those who created the society has been honored.

That process has been honored here. The definition of marriage has been the subject of heated debate in the States. Legislatures have repeatedly taken up the matter on behalf of the People, and 35 States have put the question to the People themselves. In 32 of those 35 States, the People have opted to retain the traditional definition of marriage. Brief for Respondents in No. 14-571, pp. 1a-7a. That petitioners disagree with the result of that process does not make it any less legitimate. Their civil liberty has been vindicated.

B

Laws defining marriage as between one man and one woman do not share this sordid history. The traditional definition of marriage has prevailed in every society that has recognized marriage throughout history. Brief for Scholars of History and Related Disciplines as *Amici Curiae* 1. It arose not out of a desire to shore up an invidious institution like slavery, but out of a desire "to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world." *Id.,* at 8. And it has existed in civilizations containing all manner of views on homosexuality. See Brief for Ryan T. Anderson as *Amicus Curiae* 11-12 (explaining that several famous ancient Greeks wrote approvingly of the traditional definition of marriage, though same-sex sexual relations were common in Greece at the time).

[6] The prohibition extended so far as to forbid even religious **[***124]** ceremonies, thus raising a serious question under the ***First Amendment***'s ***Free Exercise Clause***, as at least one *amicus* brief at the time pointed out. Brief for John J. Russell et al. as *Amici Curiae* in *Loving* v. *Virginia*, O.T. 1966, No. 395, pp. 12-16.

Aside from undermining the political processes that protect our liberty, the majority's decision threatens the religious liberty our Nation has long sought to protect.

The history of religious liberty in our country is familiar: Many of the earliest immigrants to America came seeking freedom to practice their religion without restraint. See McConnell, The Origins and Historical Understanding of Free Exercise of Religion, *103 Harv. L. Rev. 1409, 1422-1425 (1990)*. When they arrived, they created their own havens for **[**668]** religious practice. **[***127]** *Ibid.* Many of these havens were initially homogenous communities with established religions. *Ibid.* By the 1780's, however, "America was in the wake of a great religious revival" marked by a move toward free exercise of religion. *Id., at 1437*. Every State save Connecticut adopted protections for religious freedom in their State Constitutions by 1789, *id., at 1455*, and, of course, the *First Amendment* enshrined protection for the free exercise of religion in the U.S. Constitution. But that protection was far from the last word on religious liberty in this country, as the Federal Government and the States have reaffirmed their commitment to religious liberty by codifying protections for religious practice. See, *e.g.,* Religious Freedom Restoration Act of 1993, 107 Stat. 1488, *42 U.S.C. §2000bb et seq.*; *Conn. Gen. Stat. §52-571b* (2015).

Numerous *amici*—even some not supporting the States—have cautioned the Court that its decision here will "have unavoidable and wide-ranging implications for religious liberty." Brief for General Conference of Seventh-Day Adventists et al. as *Amici Curiae* 5. In our society, marriage is not simply a governmental institution; it is a religious institution as well. *Id.,* at 7. Today's decision might change the former, but it cannot change **[***128]** the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.

The majority appears unmoved by that inevitability. It makes only a weak gesture toward religious liberty in a single paragraph, *ante, at ___, 192 L. Ed. 2d, at 634*. And even that gesture indicates a misunderstanding of religious liberty in our Nation's tradition. Religious liberty is about more than just the protection for "religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Ibid.* Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice. [7]

[*2639] Although **[***129]** our Constitution provides some protection against such governmental restrictions on religious practices, the People have long elected to afford broader protections than this Court's constitutional precedents mandate. Had the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition as part of their deliberative process. Instead, the majority's decision short-circuits that process, with potentially ruinous consequences for religious liberty.

IV

Perhaps recognizing that these cases do not actually involve liberty as it has been understood, the majority goes to great lengths to assert that its decision will advance the "dignity" of same-sex couples. *Ante, at ___, ___, ___, ___, 192 L. Ed. 2d, at 619, **[**669]** 625, 633, 635*. [8] The flaw in that reasoning, of course, is that the Constitution contains no "dignity" Clause, and even if it did, the government would be incapable of bestowing dignity.

Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that "all men are created equal" and "endowed by their Creator with certain unalienable Rights," they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.

The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their

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[7] Concerns about threats to religious liberty in this context are not unfounded. During the hey-day of antimiscegenation laws in this country, for instance, Virginia imposed criminal penalties on ministers who performed marriage in violation of those laws, though their religions would have permitted them to perform such ceremonies. Va. Code Ann. §20-60 (1960).

[8] The majority also suggests that marriage confers "nobility" on individuals. *Ante, at ___, 192 L. Ed. 2d, at 619*. I am unsure what that means. People may choose to marry or not to marry. The decision to do so does not make one person more "noble" **[***130]** than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.

humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.

The majority's musings are thus deeply misguided, but at least those musings can have no effect on the dignity of the persons the majority **[***131]** demeans. Its mischaracterization of the arguments presented by the States and their *amici* can have no effect on the dignity of those litigants. Its rejection of laws preserving the traditional definition of marriage can have no effect on the dignity of the people who voted for them. Its invalidation of those laws can have no effect on the dignity of the people who continue to adhere to the traditional definition of marriage. And its disdain for the understandings of liberty and dignity upon which this Nation was founded can have no effect on the dignity of Americans who continue to believe in them.

* * *

Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One's liberty, not to **[*2640]** mention one's dignity, was something to be shielded from—not provided by—the State. Today's decision casts that truth aside. In its haste to reach a desired result, the majority misapplies a clause focused on "due process" to afford substantive rights, disregards the most plausible understanding of the "liberty" protected by that clause, and distorts the principles on which this Nation was founded. Its decision will have inestimable consequences for our Constitution **[***132]** and our society. I respectfully dissent.

Justice Alito, with whom Justice Scalia and Justice Thomas join, dissenting.

Until the federal courts intervened, the American people were engaged in a debate about whether their States **[**670]** should recognize same-sex marriage. [1] The question in these cases, however, is not what States *should* do about same-sex marriage but whether the Constitution answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State.

I

The Constitution says nothing about a right to same-sex marriage, but the Court holds that the term "liberty" in the *Due Process Clause of the Fourteenth Amendment* encompasses this right. Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings. For classical liberals, it may include economic rights now limited by government regulation. For social democrats, it may include the right to a variety of government benefits. For today's majority, it has a distinctively postmodern **[***133]** meaning.

To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that "liberty" under the *Due Process Clause* should be understood to protect only those rights that are "'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg, 521 U.S. 702, 720-721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997)*. And it is beyond dispute that the right to same-sex marriage is not among those rights. See *United States v. Windsor, 570 U.S. ___, ___, 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808, 830 (2013)* (Alito, J., dissenting) .Indeed:

> "In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See *Goodridge v. Department of Public Health, 440 Mass. 309, 798 N. E. 2d 941*. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.
>
> "What [those arguing in favor of a constitutional right to same sex marriage] seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility." *Id., at ___, 133 S. Ct. 2675, 186 L. Ed. 2d 808, 851* (footnote omitted).

For today's majority, it does not matter **[***134]** that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in **[*2641]** the majority claim the authority to

[1] I use the phrase "recognize marriage" as shorthand for issuing marriage licenses and conferring those special benefits and obligations provided under state law for married persons.

confer constitutional protection upon that right simply because they believe that it is fundamental.

II

Attempting to circumvent the problem presented by the newness of the right found in these cases, the majority claims that the issue is the right to equal treatment. Noting that marriage is a fundamental right, the majority argues that a State has no valid reason for denying that right to same-sex couples. This reasoning is dependent upon a particular understanding **[**671]** of the purpose of civil marriage. Although the Court expresses the point in loftier terms, its argument is that the fundamental purpose of marriage is to promote the well-being of those who choose to marry. Marriage provides emotional fulfillment and the promise of support in times of need. And by benefiting persons who choose to wed, marriage indirectly benefits society because persons who live in stable, fulfilling, and supportive relationships make better citizens. It is for these reasons, the argument goes, that States encourage and formalize marriage, confer **[***135]** special benefits on married persons, and also impose some special obligations. This understanding of the States' reasons for recognizing marriage enables the majority to argue that same-sex marriage serves the States' objectives in the same way as opposite-sex marriage.

This understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.

Adherents to different schools of philosophy use different terms to explain why society should formalize marriage and attach special benefits and obligations to persons who marry. Here, the States defending their adherence to the traditional understanding of marriage have explained their position using the pragmatic vocabulary that characterizes most American political discourse. Their basic argument is that States formalize and promote marriage, unlike other fulfilling human relationships, in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere **[***136]** for raising children. They thus argue that there are reasonable secular grounds for restricting marriage to opposite-sex couples.

If this traditional understanding of the purpose of marriage does not ring true to all ears today, that is probably because the tie between marriage and procreation has frayed. Today, for instance, more than 40% of all children in this country are born to unmarried women. [2] This development undoubtedly is both a cause and a result of changes in our society's understanding of marriage.

While, for many, the attributes **[***137]** of marriage in 21st-century America have changed, those States that do not want to **[*2642]** recognize same-sex marriage have not yet given up on the traditional understanding. They worry that by officially abandoning the older understanding, they may contribute to marriage's further decay. It is far beyond the outer reaches of this Court's authority to say that a State may not adhere to the understanding of marriage that has long prevailed, not just in this country and **[**672]** others with similar cultural roots, but also in a great variety of countries and cultures all around the globe.

As I wrote in *Windsor*:

> "The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects. Past changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.
>
> "We can expect **[***138]** something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come. There are

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[2] See, *e.g.,* Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, D. Martin, B. Hamilton, M. Osterman, S. Curtin, & T. Matthews, Births: Final Data for 2013, 64 National Vital Statistics Reports, No. 1, p. 2 (Jan. 15, 2015), online at http://www.cdc.gov/nchs/data/nvsr/nvsr64nvsr64_01.pdf (all Internet materials as visited June 24, 2015, and available in Clerk of Court's case file); cf. Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics (NCHS), S. Ventura, Changing Patterns of Nonmartial Childbearing in the United States, NCHS Data Brief, No. 18 (May 2009), online at http://www.cdc.gov/nchs/data/databrief/db18.pdf .

those who think that allowing same-sex marriage will seriously undermine the institution of marriage. Others think that recognition of same-sex marriage will fortify a now-shaky institution.

"At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people **[***139]** through their elected officials." *570 U.S., at ___, 133 S. Ct. 2675, 186 L. Ed. 2d 808 at 852* (dissenting opinion) (citations and footnotes omitted).

III

Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also have other important consequences.

It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. *E.g.*, *ante, at ___ - ___, 192 L. Ed. 2d, at 624-625*. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.

Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. *Ante, at ___ - ___, 192 L. Ed. 2d, at 633-634*. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses **[**673]** of their homes, but if they repeat **[*2643]** those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

The system of federalism established by **[***140]** our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, it is likely that some States would recognize same-sex marriage and others would not. It is also possible that some States would tie recognition to protection for conscience rights. The majority today makes that impossible. By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas. Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play. But if that sentiment prevails, the Nation will experience bitter and lasting wounds.

Today's decision will also have a fundamental effect on this Court and its ability to uphold the rule of law. If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate. Even enthusiastic supporters of same-sex marriage should worry about the scope **[***141]** of the power that today's majority claims.

Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed. A lesson that some will take from today's decision is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means. I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation.

Most Americans—understandably—will cheer or lament today's decision because of their views on the issue of same-sex marriage. But all Americans, whatever their thinking on that issue, should worry about what the majority's claim of power portends.

References

U.S.C.S., *Constitution, Amendment 14*

3 Civil Rights Actions P 12B.02 (Matthew Bender)

L Ed Digest, Constitutional Law §§348.5, 525.5;

Marriage § 1

L Ed Index, Homosexuality; Marriage

Rights of, and validity of provisions **[***142]** concerning or affecting, homosexuals, under Federal Constitution--Supreme Court cases. *134 L. Ed. 2d 1047*.

Federal constitutional right to marry--Supreme Court cases. *96 L. Ed. 2d 716*.

Supreme Court's views as to concept of “liberty” under *due process clauses of Fifth* and *Fourteenth Amendments*. *47 L. Ed. 2d 975*.

Supreme Court's views as to the federal legal aspects of the right of privacy. *43 L. Ed. 2d 871*.

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APPENDIX B

Patton v. Vanterpool

Supreme Court of Georgia

October 16, 2017, Decided

S17A0767.

Reporter
302 Ga. 253 *; 806 S.E.2d 493 **; 2017 Ga. LEXIS 896 ***; 2017 WL 4582398

PATTON v. VANTERPOOL.

Prior History: OCGA § 19-7-21. Chatham Superior Court. Before Judge Bass.

Disposition: Judgment reversed.

Case Summary

Overview

HOLDINGS: [1]-O.C.G.A. § 19-7-21, which created an irrebuttable presumption of legitimacy for children born within wedlock or within the usual period of gestation thereafter who were conceived by artificial insemination, did not apply to a child conceived by in-vitro fertilization (IVF); [2]-The legislature was aware of IVF, at least as of 2009 when it passed the Domestic Relations — Guardian — Social Services — Options to Adoption Act, which addressed the custody, relinquishment, and adoption of embryos, O.C.G.A. § 19-8-40, yet it did not change the language of § 19-7-21; [3]-"Artificial insemination" meant the introduction of semen into the uterus or oviduct by other than natural means, whereas IVF involved the fertilization of the ovum outside the body and the subsequent transfer of that embryo into the recipient's uterus.

Outcome
Judgment reversed.

Counsel: *Andrews & Sanders Law Offices, Richard A. Sanders, Jr.*, for appellant.

The Manely Firm, Michael E. Manely, David B. Purvis, for appellee.

Judges: **[***1]** HUNSTEIN, JUSTICE. Hines, C. J., Melton, P. J., Benham, Nahmias, Blackwell, Peterson, and Grant, JJ., concur. Presiding Judge Christopher J. McFadden dissents. Boggs, J., not participating.

Opinion by: HUNSTEIN

Opinion

[*253] **[**494]** HUNSTEIN, Justice.

OCGA § 19-7-21 creates an "irrebuttable presumption" of legitimacy with respect to "[a]ll children born within wedlock or within the usual period of gestation thereafter who [were] conceived by means of *artificial insemination*." (Emphasis supplied.) This appeal presents the question of whether that irrebuttable presumption applies to children so conceived by means of *in vitro fertilization* ("IVF"). We conclude that it does not and reverse the judgment of the superior court.

In January 2014, after approximately three years of marriage, David Patton ("Appellant") filed a complaint for divorce against Jocelyn Vanterpool, M.D. ("Appellee"). During the pendency of the divorce, the parties consented to Appellee undergoing IVF treatment,[1] which would eventually utilize both donor ova and donor sperm; on November 10, 2014, Appellee traveled to the Czech Republic for the IVF procedure. Four days later, on November 14, 2014, a final judgment and decree of divorce was entered in the divorce action. The divorce decree **[***2]** incorporated the parties' settlement agreement, which reflects that, at the time of the agreement, the parties neither had nor were expecting children produced of the marriage.

[495]** Approximately 29 weeks later, on June 6, 2015, Appellee gave birth as a result of the November 2014 IVF procedure. Appellee subsequently moved the

[1] The record suggests that Appellee wanted to have a child but could not undergo the procedure without Appellant's consent.

superior court to set aside the decree of divorce, seeking to include the minor child in the divorce agreement; this motion was denied. Appellee thereafter instituted a paternity action against Appellant, alleging that he gave written, informed consent for IVF and that OCGA § 19-7-21 created an irrebuttable presumption of paternity; Appellee also sought child support. In response, Appellant argued that he did not meaningfully consent to IVF and that, even if he did, OCGA § 19-7-21 is unconstitutional. The trial court sided with Appellee, granting her summary judgment on the issue of paternity. In September 2016, this Court granted Appellant's application for discretionary appeal, asking the parties to **[*254]** address whether OCGA § 19-7-21 applies to children conceived by means of IVF and, if so, whether OCGA § 19-7-21 is unconstitutional.[2]

We are tasked with interpreting the text of OCGA § 19-7-21 to discern whether the irrebuttable presumption **[***3]** created with respect to children conceived by means of "artificial insemination" extends to children conceived by IVF therapy. "A statute draws its meaning, of course, from its text." (Citation omitted.) Chan v. Ellis, 296 Ga. 838, 839 (770 SE2d 851) (2015). Under our well-established rules of statutory construction, we

> presume that the General Assembly meant what it said and said what it meant. To that end, we must afford the statutory text its "plain and ordinary meaning," we must view the statutory text in the context in which it appears, and we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would.

(Citations and punctuation omitted.) Deal v. Coleman, 294 Ga. 170, 172-173 (751 SE2d 337) (2013). Though we may review the "text of the provision in question and its context within the larger legal framework to discern the intent of the legislature in enacting it," Scott v. State, 299 Ga. 568, 571 (788 SE2d 468) (2016), where the statutory text is "clear and unambiguous," we attribute to the statute its plain meaning, and our search for statutory meaning ends. See Deal, 294 Ga. at 173. With these principles in mind, we begin our analysis, applying a de novo standard of review to the judgment of the trial court. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 286 Ga. 731 (2) (691 SE2d 218) (2010).

OCGA § 19-7-21 concerns the parent-child relationship generally, stating as follows: "All children born **[***4]** within wedlock or within the usual period of gestation thereafter who have been conceived by means of artificial insemination are irrebuttably presumed legitimate if both spouses have consented in writing to the use and administration of artificial insemination." At issue here is the term "artificial insemination," which is not defined by statute.[3] Artificial insemination, which has been in use since the late eighteenth century and has been so named since the early nineteenth century, see Kara **[*255]** W. Swanson, Adultery By Doctor: Artificial Insemination, 1890-1945, 87 Chi.-Kent L. Rev. 591 (2012), has been consistently defined as the "introduction of semen into the uterus or oviduct by other than natural means … in order to increase the probability of conception." Webster's Third International Dictionary 124 (1967). See also *Black's Medical Dictionary* 65 (26th ed. 1965) (defining artificial insemination as "the introduction of semen into the vagina by artificial means"); Stedman's Medical Dictionary (28th ed.) (updated Nov. 2014) (defining artificial insemination as "introduction of semen into the vagina other than by coitus"); 59 AmJur2d Parent and Child § 7 ("Artificial insemination is the introduction of semen into the female reproductive tract by mechanical **[***5]** means in order to effect pregnancy without sexual intercourse."); 8 Attorneys Medical Advisor § 83:12 ("Artificial insemination … refers to **[**496]** the artificial injection of semen into the female's reproductive tract."). Thus, as the procedure has been understood for over 150 years, see, e.g., J. Marion Sims, Clinical Notes on Uterine Surgery: With Special Reference to the Management of the Sterile Condition 372 (1866), artificial insemination involves the introduction of *semen* to the female reproductive tract to further the purpose of *in vivo*[4] fertilization of an ovum. See In re Baby Doe, 291 S.C. 389, 353 SE2d 877, 878 (S.C. 1987) ("Artificial insemination is the introduction of semen into the reproductive tract of a female by artificial means."). We conclude, given the history and well-established meaning and use of the term "artificial insemination," that the term is not ambiguous as it is

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[2] Because we conclude that the plain language of OCGA § 19-7-21 has no application here, we pretermit any consideration of the constitutionality of OCGA § 19-7-21.

[3] There is no dispute that the child was born "within the usual period of gestation" following the marriage.

[4] "In vivo" means to "take place in the body," while "in vitro" means "in glass" and refers to an artificial environment rather than the body. *Black's Law Dictionary* 956 (10th ed. 2014).

used in OCGA § 19-7-21.[5] We now must address whether artificial insemination includes IVF.

In vitro fertilization was first described in the 1970s, see Janet L. Dolgin, The Law Debates the Family: Reproductive Transformations, 7 Yale J. L. & Feminism 37 (1995), and involves "[a] procedure [in] **[*256]** which an egg is fertilized outside a **[***6]** woman's body and then inserted into the womb for gestation." Black's Law Dictionary 956 (10th ed. 2014). See also *Stedman's Medical Dictionary* (28th ed.) (online database updated Nov. 2014) (describing IVF as "a process whereby (usually multiple) ova are placed in a medium to which sperm are added for fertilization, the zygote thus produced then being introduced into the uterus with the objective of full-term development"); Gale Encyclopedia of Medicine (2008) (Retrieved October 4, 2017 from https://medical-dictionary.thefreedictionary.com/in+vitro+fertilization) ("In vitro fertilization (IVF) is a procedure in which eggs (ova) from a woman's ovary are removed. They are fertilized with sperm in a laboratory procedure, and then the fertilized egg (embryo) is returned to the woman's uterus."); 8 Attorneys Medical Advisor § 83:14 ("In vitro fertilization (IVF) consists of … fertilization of the oocytes in the laboratory[ ] and the transfer of resultant embryos back to the woman's uterus."). Two of the primary stages of the IVF process involve the *fertilization* of the ovum *outside* the body and the subsequent transfer of that embryo into the recipient's uterus. See Marvin A. Milich, In Vitro Fertilization and Embryo Transfer: Medical **[***7]** Technology — Social Values = Legislative Solutions, 30 J. Fam. L. 875, 876 (1991/1992). (1) To summarize, while artificial insemination involves the introduction of sperm to the female reproductive tract to encourage fertilization, IVF involves implanting a fertilized egg into a female; though each procedure aims for pregnancy, the procedures are distinct, and we conclude that the term "artificial insemination" does not encompass IVF. Other courts have reached this same conclusion.[6] See Finley v. Astrue, 372 Ark. 103, 270 SW3d 849, 850 n. 2 **[**497]** (Ark. 2008) (recognizing a distinction between artificial insemination and IVF); In the Interest of O. G. M., 988 SW2d 473 (II) (C) (Tex. App. 1st Dist. 1999) (concluding that a statute regarding artificial insemination was inapplicable to case involving IVF).

We are unswayed by Appellee's argument that such a plain-language construction of OCGA § 19-7-21 is unnecessarily restrictive. While Georgia law favors legitimation, OCGA § 19-7-21 creates an *irrebuttable presumption*, which is generally disfavored in the law, **[*257]** see Vlandis v. Kline, 412 U. S. 441 (93 SCt 2230, 37 LE2d 63) (1973), and our interpretation maintains the bounds of the plain language of the statute. Further, the irrebuttable presumption of legitimacy in OCGA § 19-7-21 is an exception to the general rule, found in OCGA § 19-7-20 (b), that legitimacy may be disputed, and an expansive reading of OCGA § 19-7-21 would allow the exception to swallow the rule.[7]

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[5] Appellee contends that this Court should adopt the reasoning of Maryland's highest court, which has concluded that the phrase "artificial insemination" is "ambiguous" because there are numerous ways in which artificial insemination may be accomplished. See Sieglein v. Schmidt, 447 Md. 647, 136 A3d 751, 759-761 (Md. 2016). The *Sieglein* decision explains that sperm may be introduced via intrafollicular insemination (injecting semen directly into an ovarian follicle), intraperitoneal insemination (injecting semen into the peritoneal cavity), intratubal/intrafallopian insemination (injecting semen into the fallopian tube) or intrauterine insemination (injecting semen directly into the uterus). Id. at 760, n. 13. The Maryland court also noted that artificial insemination could be used with sperm from a spouse (homologous insemination), commonly known as Artificial Insemination by Husband ("AIH"), *or* from a donor (heterologous insemination), otherwise known as Artificial Insemination by Donor ("AID").

We cannot agree that a decades-old term is rendered ambiguous simply because the procedure may utilize donor sperm or various locations in the female reproductive tract; irrespective of the use of donor sperm or the location of injection, sperm is being introduced to the female reproductive tract for the purpose of encouraging *in vivo* fertilization.

[6] In support of her position that "artificial insemination" encompasses "in vitro fertilization," Appellee points to In re Adoption of a Minor, 471 Mass. 373, 29 NE3d 830 (Mass. 2015), a decision out of the highest court in Massachusetts interpreting MGLA 46 § 4B, which is similar to OCGA § 19-7-21. That decision, however, along with others from that state, including Okoli v. Okoli, 81 Mass. App. Ct. 371, 963 NE2d 730 (Mass. Ct. App. 2012), simply conclude, without significant discussion or analysis, that, under MGLA 46 § 4B, the term "artificial insemination" encompasses IVF. See Okoli, 963 NE2d at 734-735 (equating conception through sexual intercourse, artificial insemination, and IVF because, in each scenario, the "volitional actions" of the putative father resulted in the creation of a child). We do not find these decisions persuasive.

[7] Though Appellee may not establish legitimacy through OCGA § 19-7-21, we do not speak to whether Appellee may

Appellee also **[***8]** contends that when the General Assembly enacted OCGA § 19-7-21 in 1964, that body could not have conceived of the advent of IVF (and related medical advancements) and that a plain-language construction of OCGA § 19-7-21 is at odds with the plain purpose of the statute, which is to legitimate children born by means of reproductive technology. This argument, too, fails.

Although OCGA § 19-7-21 was enacted over 50 years ago — at a time when IVF and various assisted reproductive technologies were not yet developed — recent amendments to other portions of Title 19 make plain that the General Assembly is now well acquainted with the developments in reproductive medicine. In May 2009, the General Assembly passed the "Domestic Relations — Guardian — Social Services — Options to Adoption Act," which amended Chapter 8 of Title 19 to address, among other things, the custody, relinquishment, and adoption of embryos. See Ga. L. 2009, pp. 800-803. OCGA § 19-8-40, which was created by the 2009 Act, defines both embryo and *embryo transfer*, which "means the medical procedure of physically placing an embryo into the uterus of a female." OCGA § 19-8-40 (3). As discussed above, "embryo transfer" is a key component of IVF, and the language employed in the definition of "embryo transfer" tracks the **[***9]** standard definition of IVF. See, e.g., *Black's Law Dictionary* 956 (10th ed. 2014) (defining IVF as "[a] procedure [in] which an egg is fertilized outside a woman's body and then inserted into the womb for gestation").[8]

We presume that, when the General Assembly passed the 2009 Act, it " 'had full knowledge of the existing state of the law and enacted [the Act] with reference to it.' " (Citation omitted.) Fair v. State, 288 Ga. 244, 252 (702 SE2d 420) (2010). Thus, as late as 2009, **[*258]** the General Assembly was aware of the existing language of OCGA § 19-7-21 and was familiar with advances in reproductive technology, yet chose to leave the statute unchanged. Accordingly, this is not a case in which the General Assembly has failed to anticipate scientific and medical advancements, but, instead, the General Assembly has chosen not to act; we must, therefore, presume that OCGA § 19-7-21 remains the will of the legislature.[9]

Judgment reversed. Hines, C. J., Melton, P. J., Benham, Nahmias, Blackwell, Peterson, and Grant, JJ., concur. Presiding Judge Christopher J. McFadden dissents. Boggs, J., not participating.

Dissent by: McFADDEN

Dissent

[498]** McFADDEN, Presiding Judge, dissenting.

OCGA § 19-7-21 contains a latent ambiguity. The ambiguity arose because the General Assembly failed to anticipate subsequent advances in medical **[***10]** technology when it described the class of children under the statute's protection. In resolving that ambiguity we are required to apply a rule that is in our current Code, was in our first Code, can be traced back to Blackstone's Commentaries on the Law of England, and so was part of the "common law and statutes of England in force prior to May 14, 1776 [that, in 1784,] were adopted in this [s]tate by statute." Hannah v. State, 212 Ga. 313, 321-322 (6) (92 SE2d 89) (1956) (citations omitted). Often called the "mischief rule," as Blackstone's Commentaries refer to "the old law, the mischief, and the remedy," see Charles M. Cork III, Reading Law in Georgia 6-8, http://ssrn.com/abstract=2520296 (2014), that rule is now codified at OCGA § 1-3-1 (a): "In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy. …"

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establish legal paternity through other means, such as OCGA § 19-7-20.

[8] It appears that the General Assembly has been familiar with advances in reproductive technologies since as early as the late 1980s. In 1988, the Senate considered a bill that would have amended Chapter 7 of Title 19 to address, among other things, IVF. See SB 493 (1988 Session). In the 1995-1996 session, the House entertained similar legislation. See H.B. 1073 (1996 Session). Likewise, other portions of the 1964 Act have been amended since the development of IVF technology and continue to include the term "artificial insemination" without expansion. See OCGA § 31-10-9 (amended 2005); OCGA § 43-34-37 (amended 2010).

[9] As we have said before, "courts cannot construe [statutes] to force an outcome that the legislature did not expressly authorize." Turner v. Ga. River Network, 297 Ga. 306, 308 (773 SE2d 706) (2015). To the extent that the dissent argues otherwise, it misunderstands OCGA § 1-3-1 and the nature of our role in interpreting statutes. In order to address the legitimacy of children conceived by means of various reproductive technologies other than artificial insemination, the General Assembly will need to act.

That rule directs us to the conclusion that the intention of the General Assembly was to protect children like S., the child in this case. So I respectfully dissent.

1. *Resolution of the latent ambiguity in OCGA § 19-7-21 under OCGA § 1-3-1 (a)*.

Georgia law has long recognized latent ambiguities. "[T]his court has approved Lord Bacon's definition of a latent ambiguity, as one which seems certain and without ambiguity for anything that appeareth **[***11]** **[*259]** upon the deed or instrument, but there is some collateral matter, outside of the deed, that breedeth the ambiguity." *Citizens & Southern Nat. Bank v. Clark, 172 Ga. 625, 630 (158 SE 297) (1931)* (citation and punctuation omitted). In interpretations of contracts, the possibility of latent ambiguities is recognized by statute. *OCGA § 13-2-2 (1)*.

As for interpretations of statutes, our case law recognizes that sometimes "the facts of [a] case[ ] … reveal a latent ambiguity in the language of [a statute]." *Daugherty v. Norville Indus., 174 Ga. App. 89, 90 (329 SE2d 202) (1985)*. In such cases, "[o]ur duty is to consider the results and consequences of any proposed construction and, based upon the particular facts and circumstances of the case, not so construe a statute as will produce unreasonable or absurd consequences not contemplated by the legislature." Id. (citing *State v. Mulkey, 252 Ga. 201, 204 (312 SE2d 601) (1984)*). See *Randolph County v. Bantz, 270 Ga. 66, 66-67 (508 SE2d 169) (1998)* (rejecting Randolph County's argument that it could require its chief magistrate to perform, without compensation, the duties of a clerk of court because the statute that entitled chief magistrates to additional compensation for such services applied only to counties not authorized by local law to hire a clerk, whereas Randolph County was authorized to hire a clerk but preferred to have its chief magistrate do the work for free); *Sirmans v. Sirmans, 222 Ga. 202, 204 (149 SE2d 101) (1966)* (trial court erred in dismissing answer and holding **[***12]** defendant to be in default; although, due to clerk's mistake in calculating costs, defendant did not pay full court costs to open default, it was not legislature's intent to deprive defendant of ability to present defense over "trifling mistake"); *Transworld Financing Corp. v. Coastal Tire and Container Repair, 298 Ga. App. 286, 288-289 (1) (680 SE2d 143) (2009)* (declining to construe term "called for," in law allowing repairman to charge storage fees for vehicles unless "called for" by owner, to extend to owner's "call" to promise to retrieve vehicle; preferring a "reasonable and sensible interpretation to carry out the legislative intent" over the "literal meaning" of the terms); *Gazan v. Heery, 183 Ga. 30, 42-43 (187 SE 371) (1936)* (local legislation requiring the chief judge of the municipal court of Savannah to have practiced law for five years or **[**499]** more held not to prevent the elevation of an associate judge of that court who had served for over ten years, but before that had practiced law for less than two years). See generally Cork, Reading Law in Georgia at 43-47 (discussing cases in which Georgia courts applied mischief rule to construe statutes with latent ambiguities and noting similarity of other cases applying mischief rule in conjunction with absurdity doctrine).
[*260]

Turning to the statute before us, *OCGA § 19-7-21*, it was enacted in 1964. In distinguishing the children who are under its protection **[***13]** from children who are not, it references only children conceived of artificial insemination, which is a type of assisted reproductive technology. Id. S. was conceived by means of in vitro fertilization, another type of assisted reproductive technology that was not developed until a decade later. The statute therefore contains a latent ambiguity: into which category does a child like S. fall? Is a child like S. under the statute's protection or not? The statute must be construed to resolve that latent ambiguity.

Our interpretation of statutes is guided by a series of statutes. The first of these, *OCGA § 1-3-1*, provides in part:

> (a) In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy. Grammatical errors shall not vitiate a law. A transposition of words and clauses may be resorted to when a sentence or clause is without meaning as it stands.
>
> (b) In all interpretations of statutes, the ordinary signification shall be applied to all words, except words of art or words connected with a particular trade or subject matter, which shall have the signification attached to them by experts **[***14]** in such trade or with reference to such subject matter.
> …

OCGA § 1-3-1 directs us to perform two distinct inquiries. *Subsection (a)*, as noted above, is our codification of the mischief rule; it directs us to find the intention of the General Assembly by examining "the old law, the evil, and the remedy." *Subsection (b)* directs our attention to the text, the words in the statute.

The textual analysis required by subsection (b) leads us only to the conclusion that, when the legislature enacted the statute before us, it failed to anticipate medical advances that would be made more than a decade later. But that should not be the end of our analysis. It has long been understood that the nature of our role in interpreting statutes requires more. "The very office of construction is to work out, from what is expressly said and done, what would have been said with regard to events not definitely before the minds of the parties, if those events had been considered." Oliver Wendell Holmes, Jr., The Common Law 237 (1881). "As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and, although their **[*261]** words are by far the most decisive evidence of what **[***15]** they would have done, they are by no means final." Giuseppi v. Walling, 144 F2d 608, 624 (2d Cir. 1944) (L. Hand, J., concurring), aff'd sub nom. Gemsco, Inc. v. Walling, 324 U. S. 244 (65 SCt 605, 89 LE 921) (1945).

The analysis required by subsection (a) clearly directs us to the conclusion that S. does come under the protection of OCGA § 19-7-21. The old law was that a child's legitimacy or illegitimacy at birth turned on biological connection to the father. The evil, or mischief, arose from the fact that artificial insemination, like in vitro fertilization, could use donated sperm: a father therefore could consent to the procedure but later deny the child. The remedy was to authorize binding written consent from the father. S. was conceived of donated sperm. Before her conception, the parties executed a written consent to assure her legitimacy.

Construing OCGA § 19-7-21's reference to artificial insemination to encompass subsequently-developed methods of assisted reproductive technology is consistent with the way Georgia courts have applied the mischief rule in other cases. The Court of Appeals' decision in Daugherty v. Norville Indus., supra, 174 Ga. App. 89, for example, construed a statute that required a party to **[**500]** pay court costs as a precondition for filing a new action after dismissing a prior lawsuit. The plaintiffs in the consolidated cases on appeal failed **[***16]** to pay court costs because the clerk's office erroneously told their attorney that no costs were due. Holding that it was not the intent of the legislature to deny such parties the ability to file their new actions under the statute, the court in *Daugherty* defined "costs" to exclude costs unknown to the party after a good faith inquiry. Daugherty, 174 Ga. App. at 91. Likewise, construing OCGA § 19-7-21 to protect S. involves defining "artificial insemination" to include subsequently-developed forms of assisted reproductive technology.

The majority infers a contrary intent from the General Assembly's failure to amend OCGA § 19-7-21, and in particular from its failure to pass proposed legislation that would have done so. But while inferences about intent behind legislative inaction are no more categorically improper than inferences about the intent behind enacted legislation, inferences from inaction are inherently weaker. The legislative process is difficult by design. It requires an expenditure of finite resources, time, energy, and political capital, to get a bill out of committee and onto the floor of both houses. So when an appellate court frustrates an imperfectly-expressed legislative intent, it is not a satisfactory answer that they **[***17]** can pass another bill. The necessary resources may no longer be available.

[*262] And an inference from inaction is particularly unpersuasive here. Before today OCGA § 19-7-21 had been cited in only two published Georgia opinions, one of them a dissent. Brown v. Gadson, 288 Ga. App. 323, 324, n. 2 (654 SE2d 179) (2007); Noggle v. Arnold, 177 Ga. App. 119, 121 (338 SE2d 763) (1985) (Beasley, J., dissenting). The facts that brought the statute before us today are so unusual that appellant's counsel wisely began his oral argument by telling us that he would not be able to explain the parties' motives. So other priorities or a failure of the issue to come to a legislator's attention are the most probable explanations of the General Assembly's failure to update OCGA § 19-7-21.

The parties have not identified, and I can't think of, any policy reason for choosing to exclude children like S. from the protection of the statute. On the contrary, the law and policy in this state favor legitimating children. See Miller v. Miller, 258 Ga. 168, 169 (366 SE2d 682) (1988); Harrison v. Odum, 148 Ga. 489, 495 (96 SE 1038) (1918).

The majority's construction of the statute provides legitimacy to children conceived of one form of assisted reproductive technology but withholds it from children conceived of another. This reading does not take into account OCGA § 1-3-1's requirement that we examine "the old law, the evil, and the remedy." Under that requirement, we must construe the statute **[***18]** before us to extend its protection to S. and children like her. To hold otherwise would frustrate the manifest intention of the General Assembly.

2. *Status of* OCGA § 1-3-1 (a).

The analysis above presupposes that OCGA § 1-3-1 (a) is still good law — that it still means what is says and says what it means. A casual observer might think it self-evident that OCGA § 1-3-1 (a) is still good law. Its roots are extraordinarily deep, and we have not struck it down.

But that proposition is no longer self-evident. Nationally, the mischief rule has become controversial. It is condemned in a popular and influential treatise under the general heading, "Thirteen Falsities Exposed," and under the topic heading, "The false notion that the purpose of interpretation is to discover intent." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 341, 391 (2012).

That characterization is audacious. Other treatises often suggest that a case or line of cases is wrongly decided or identify the author's preference among conflicting lines of cases. It is one thing for a treatise to be, as Reading Law declares itself, "unapologetically normative." Scalia & Garner, Reading Law at 9. But it is something else entirely to declare that duly enacted statutes and case law **[*263]** binding within its jurisdiction are not law. Reading Law can be read to imply **[***19]** that such statutes and case law should simply be ignored.

[501]** This Court does, of course, have the power to strike down OCGA § 1-3-1 (a). And Reading Law suggests that it would be appropriate for us to do so on the basis that such statutes are invasions of the province of the judiciary. Scalia & Garner, Reading Law at 43-44, 244-245. But "[e]ach state, the District of Columbia, and the United States have a set of laws directing interpreters as to how the legislature wishes its statutes to be construed." Scott, "Codified Canons and the Common Law of Interpretation," 98 Geo. L.J. 341, 350 (II) (2010) (citations omitted). As noted above and detailed below, the Georgia statutes setting out the mischief rule are codifications of common law. And in the last few years this Court has repeatedly embraced our General Assembly's instruction that in construing our new Evidence Code, we follow Eleventh Circuit precedent. See, e.g., Parker v. State, 296 Ga. 586, 592 (3) (a) (769 SE2d 329) (2015).

As for the merits of the mischief rule, Reading Law argues it is a falsity because its foundation is unsound. Reading Law makes some cogent arguments about the perils and possible excesses of inquiries into legislative intent. But its central argument is that the very idea of intention of a legislature — as well as of parties to a contract — is incoherent, that a search for legislative intention is a "search for the nonexistent." Scalia & Garner, Reading Law at 394.

To make this point, **[***20]** Reading Law offers a hypothetical about contract construction. Reading Law describes negotiations over a contract clause setting a deadline: one side prefers forty-five days; the other prefers five; they compromise on "a reasonable time." Scalia & Garner, Reading Law at 391. According to Reading Law, "The lawyer on one side privately told the client that a court would probably say that 30 days would be commercially reasonable; the other lawyer privately told the client that a court would probably say that 48 hours would be commercially reasonable (a week at the outside)." Id. at 391-392. This, we are told, illustrates the proposition that the idea of the necessity of a meeting of the minds is a "myth." Id. at 392.

I question the soundness of this argument. The imagined advice would be unsound. The hypothetical parties compromised on — their minds met on — an indeterminate deadline. Each would be free to argue; neither could be sure of the outcome. More fundamentally, Reading Law's argument conflates the parties' negotiating objectives with their eventual agreement.

Regardless of the soundness of that argument, the more salient question is whether Reading Law's conclusion can be reconciled with the Georgia law we are duty-bound to administer. It cannot. Georgia law differs in a number of respects from Reading Law's prescriptions. **[***21]** **[*264]** See Cork, Reading Law in Georgia at 18 (detailing those differences and identifying as among the most prominent, Reading Law's rejection of legislative intent and its narrow version of the absurdity doctrine). Indeed, for contracts (the specific subject of the above hypothetical), our General Assembly has embraced the idea of intention even more emphatically than for statutes. In the interpretation of contracts, OCGA § 13-2-3 declares, "[t]he cardinal rule of construction is to ascertain the intention of the parties. If that intention is clear and it contravenes no rule of law and sufficient words are used to arrive at the intention, it shall be enforced irrespective of all technical or arbitrary rules of construction." See also OCGA § 13-2-2 (rules of interpretation of contracts, referring three times to the parties' "intention" or "intended" meaning); § 13-2-4 (addressing intention of one party known to the other).

Westlaw searches indicate that OCGA § 1-3-1 (a),

OCGA § 13-2-3, or the principle set out in those Code sections has been cited hundreds, if not thousands, of times by this Court and by our Court of Appeals.[10] Very often the authority cited for the mischief rule is case law rather than statutes. See, e.g., Cox v. Fowler, 279 Ga. 501, 502 (614 SE2d 59) (2005) (citing Carringer v. Rodgers, 276 Ga. 359, 363 (578 SE2d 841) (2003) for the proposition that "[t]he cardinal rule in construing **[**502]** a legislative **[***22]** act, is to ascertain the legislative intent and purpose in enacting the law, and then to give it that construction which will effectuate the legislative intent and purpose") (punctuation omitted); TermNet Merchant Svcs. v. Phillips, 277 Ga. 342, 344 (1) (588 SE2d 745) (2003) (citing Gen. Elec. Credit Corp. v. Brooks, 242 Ga. 109, 112 (249 SE2d 596) (1978) for the proposition that "[w]hen construing statutory phrases, of course, we look diligently for the General Assembly's intention, bearing in mind relevant old laws, evils sought to be addressed and remedies interposed"); Holcim (US), Inc. v. AMDG, Inc., 265 Ga. App. 818, 820 (596 SE2d 197) (2004) (citing Nguyen v. Talisman Roswell, LLC, 262 Ga. App. 480, 482 (585 SE2d 911) (2003) for the proposition that "(t)he cardinal rule of contract construction is to ascertain the intention of the parties") (punctuation omitted); Seaboard Coast Line R. Co. v. Blackmon, 129 Ga. App. 342, 344 (199 SE2d 581) (1973) (citing Barrett & Caswell v. Pulliam, 77 Ga. 552, 554 (1886) and Jenkins v. State, 93 Ga. App. 360 (92 SE2d 43) (1956) for the proposition that in interpreting legislative acts, "the courts shall look diligently for the intention of the General **[*265]** Assembly keeping in view at all times the old law, the evil and the remedy").

The statutes that direct us to consider the intention of the legislature and of the parties to a contract were in the first Georgia Code. Current OCGA § 1-3-1 (a) was Section 5 of the Code of 1863. Current OCGA § 13-2-3 was Section 2719 of that Code. And the mischief rule is older still. A few years after that first Code was adopted, this Court wrote: "The Code directs that statutes be construed with reference to the intention of the **[***23]** legislature, and that the old law, the mischief and the remedy, be considered to arrive at that intention (Code, § 4, par. 9); and such was the rule long before there was any code of laws compiled for this state." Everett v. Planters' Bank, 61 Ga. 38, 41 (1878). See also Forman v. Troup, 30 Ga. 496, 498-499 (1860) ("[O]ur Act of 1854 seems to me conclusive. Look at [the statute in question] by the old rule of construction — the old law — the mischief and the remedy.").

Indeed, the line of Georgia authority for the mischief rule stretches back to Blackstone's Commentaries on the Laws of England and so, as noted above, the mischief rule was a part of the deposit of English common law on which the law of this state was founded. (The rule did not originate with Blackstone; its first appearance was apparently in *Heydon's Case*, 3 Co Rep 7a, 76 ER 637 (1584).)

The mischief rule's earliest recorded appearance in Georgia law was in the second volume of the Georgia Reports. Booth v. Williams, 2 Ga. 252 (1847). There we held, "One of the fundamental common law rules for the construction of remedial statutes is, to consider the old law, the mischief, and the remedy; and it is the business of the Judges so to construe the statute, as to suppress the mischief and advance the remedy. 1 Black. Com. 87." Id. at 254. See also Persons v. Hight, 4 Ga. 474, 501 (1848) (Warner, J., dissenting) (" 'There **[***24]** are three points,' says Blackstone, 'to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy; that is, how the old law stood at the making the Act; what the mischief was for which the Common Law did not provide; and what remedy the Legislature hath provided to cure this mischief. And it is the business of the Judge so to construe the Act as to suppress the mischief and advance the remedy.' 1 Bl. Com. 87.") (emphasis omitted).

But the mischief rule became settled law in Georgia only after vigorous debate. Less than six months after our opinion in *Booth*, Justice Lumpkin criticized the mischief rule in Ezekiel v. Dixon, 3 Ga. 146 (1847), stating that he "never can subscribe" to a doctrine authorizing judges to give statutes "such construction as will not only carry out the mind of the makers, but even to apply the rule to cases which, it is admitted, they did not contemplate, but which, it is **[*266]** supposed, the lawgiver would have provided for, if he had seen fully the mischief and the remedy." Id. at 152. But by 1856, Justice Lumpkin had yielded, albeit reluctantly, to the mischief rule. "I never yielded more reluctantly to any judgment pronounced by this Court, than that of *Booth vs. Williams* **[***25]** ," he wrote; and he **[**503]** went on to make a more general point, "believing it to be the first duty of a Judge, as it is of every good citizen, to yield to authority, I surrendered my individual opinion, especially as the question involved was the construction of a Statute which had been acted upon so long." Worthy v.

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[10] A Westlaw search for "legislature," "legislative," "General Assembly," or "parties" in the same sentence as "intent" or "intended" brings up over 9,500 cases.

Lowry, 19 Ga. 517, 519 (1856).

Seven years later the rule was codified in what is now *OCGA § 1-3-1*.

For the next century-and-a-half the mischief rule was settled law, albeit cautiously applied. For example in 1914 we wrote:

> Seeking secret legislative meanings at variance with the language used is a perilous undertaking which is quite as apt to lead to an amendment of the law by judicial construction as it is to arrive at the actual thought in the legislative mind. 25 R. C. L. 961, § 217. But where an ambiguity exists either because of uncertainty in the meaning of words, conflicts with previous laws, or conflicts between different clauses in the same statute, courts should look beyond the verbiage and discover the intent. While all parts of the statute should be preserved, yet a cardinal rule of construction is that the legislative intent shall be effectuated, even though some verbiage may have to be eliminated. The legislative intent **[***26]** will prevail over the literal import of the words.

Carroll v. Ragsdale, 192 Ga. 118, 120 (15 SE2d 210) (1914) (citing *American Security & Trust Co. v. Commrs. of District of Columbia, 224 U. S. 491 (32 SCt 553, 56 LE 856) (1912)*; *Pickett v. United States, 216 U. S. 456 (30 SCt 265, 54 LE 566) (1910)*; *United States v. Farenholt, 206 U. S. 226 (27 SCt 629, 51 LE 1036, 42 Ct. Cl. 535) (1907)*; *Washington v. Atlantic Coast Line R. Co., 136 Ga. 638 (71 SE 1066) (1911)*; *Youmans v. State, 7 Ga. App. 101 (66 SE 383) (1909)*; *State v. Pay, 45 Utah 411, 146 P 300 (Utah 1915)*). We continued, "The statute must be examined as a whole, and its different provisions reconciled if possible." *Carroll, 192 Ga. at 121* (citing *Cairo Banking Co. v. Ponder, 131 Ga. 708 (63 SE 218) (1908)*; *Roberts v. State, 4 Ga. App. 207 (60 SE 1082) (1908)*; *State v. Burnett, 173 N.C. 750 (91 SE 597) (N.C. 1917)*; *Bd. of Supervisors v. Cox, 155 Va. 687, 156 SE 755 (Va. 1931)*; *Moss Iron Works v. County Court, 89 W. Va. 367, 109 SE 343 (W. Va. 1921)*). We went on to hold, "The general scheme and purpose of the legislation is a proper criterion for the construction thereof." **[*267]** *Carroll, 192 Ga. at 121* (citing *Singleton v. Close, 130 Ga. 716 (61 SE 722) (1908)*; *Pennington & Evans v. Douglas, Augusta & Gulf R. Co., 3 Ga. App. 665 (60 SE 485) (1908)*).

And in 1936, we wrote:

> Though we distinctly disavow any intention to place our decision upon the spirit of the law — for we are endeavoring to confine ourselves to the proper construction of the letter of the law [at issue] considered as a whole[ ] — still there are cases in which the following language taken from Plowden's Commentaries has been properly applicable: "It is not the words of the law, but the internal sense of it, that makes the law; and our law consists of two parts, viz., of body and soul; the letter of the law is the body of the law, and the sense and reason of the law are the soul of the law, quia ratio legis est anima legis. And the law may be resembled to a nut, which has a shell and a kernel within; the letter of the law represents the shell, and the sense of it the kernel; and as you **[***27]** will be no better for the nut if you make use only of the shell, so you will receive no benefit from the law if you rely upon the letter; and as the fruit and profit of the nut lie in the kernel and not in the shell, so the fruit and profit of the law consist in the sense more than in the letter. And it often happens, that when you know the letter, you know not the sense, for sometimes the sense is more confined than the letter, and sometimes it is more large and extensive."

Gazan v. Heery, supra, 183 Ga. at 41-42 (punctuation omitted).

In addition to Plowden's metaphor of a nut, we have adopted Justice Oliver Wendell Holmes's less terrestrial metaphor: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner, 245 U. S. 418, 425 (38 SCt 158, 62 LE 372, T.D. 2634, 15 Ohio L. Rep. 562) (1918)* (citation **[**504]** omitted), quoted in *Everitt v. LaSpeyre, 195 Ga. 377, 379 (24 SE2d 381) (1943)* and *Robbins v. Vanbrackle, 267 Ga. 871, 872 (485 SE2d 468) (1997)* (Carley, J., dissenting). What both metaphors illustrate is that the words used to express an idea are intertwined with that idea, but distinct from it. So the words used to express an idea sometimes, and perhaps always, do so imperfectly.

But Justice Lumpkin was not compelled to surrender his individual opinions. And neither are we. We do not have the **[***28]** authority to ignore the law of this state. But we have the power to change it. We can adopt Chief Judge Dillard's concurring opinion in *Bellsouth **[*268]** Telecommunications, LLC v. Cobb County, 342 Ga. App. 323, 334 (1) n. 16 (802 SE2d 686) (2017)* (Dillard, P. J., concurring):

> [O]ur appellate courts should stop referencing altogether the ethereal fiction of "legislative intent" in the context of statutory interpretation. A judge should not care about what any legislator intended but did not expressly provide for in the statutory text. … [T]he General Assembly can no more tell the judiciary how to generally interpret the law than we can direct them how to legislate.

(Emphasis omitted.) So we can strike down the statutes that adopt the mischief rule. We can strike down the ones that embrace the idea of intent of the parties to a contract. And, with the stroke of a pen, we can disapprove every one of the hundreds, if not thousands of Georgia cases that hold with those statutes. All that we can do. But before we do, what else might fall should give us pause. The roots of that rule and of that idea run deep and wide. It is difficult to foresee, for example, the consequences of undermining every contract case that references intent or meeting of the minds. And undermining the contract and statutory construction **[***29]** cases that reference intent may have implications for trust and estate law in which intent is central. See OCGA § 53-4-55.

Rather than grasp that nettle, we have taken an indirect course. Consistent with Reading Law's declaration that invocations of the mischief rule are not law, but merely repetitions of a false notion, our recent opinions have instead undermined OCGA § 1-3-1 (a). Those opinions suggest that the mischief rule has never been a part of our law:

> But "the legislature's intent is discerned from the text of a duly enacted statute and the statute's context within the larger legal framework." State v. Riggs, 301 Ga. 63, 67 (2) (799 SE2d 770) (2017). "[W]hen judges start discussing not the meaning of the statutes the legislature actually enacted, as determined from the text of those laws, but rather the unexpressed 'spirit' or 'reason' of the legislation, and the need to make sure the law does not cause unreasonable consequences, we venture into dangerously undemocratic, unfair, and impractical territory." Merritt v. State, 286 Ga. 650, 656 (690 SE2d 835) (2010) (Nahmias, J., concurring specially) (punctuation omitted). See also Malphurs v. State, 336 Ga. App. 867, 871-872 (785 SE2d 414) (2016) ("[O]ur concern is with the actual text of statutes, not the subjective **[*269]** statements of individual legislators expressing their personal intent in voting for or against a bill"); Walters v. State, 335 Ga. App. 12, 15 n. 3 (780 SE2d 720) (2015); Day v. Floyd County Bd. of Ed., 333 Ga. App. 144, 150-151 (775 SE2d 622) (2015) (Dillard, J., concurring **[***30]** fully and specially); Rutter v. Rutter, 316 Ga. App. 894, 896 (1) n.5 (730 SE2d 626) (2012); Keaton v. State, 311 Ga. App. 14, 26 n.17 (714 SE2d 693) (2011) (Blackwell, J., concurring in part and dissenting in part).

Gibson v. Gibson, 301 Ga. 622, 631-632 (3) (c) (801 SE2d 40) (2017) (footnote omitted). See also Bellsouth Telecommunications, LLC, 342 Ga. App. at 334 (1) n. 16 (Dillard, P. J., concurring); State v. Riggs, 301 Ga. 63, 67 (2) n. 6 (799 SE2d 770) (2017).

In taking that indirect course we have suggested that one can reconcile OCGA § 1-3-1 (a) with the undertaking in Gibson, supra, and the other recent cases in its line to narrowly confine the scope of consideration of the intention of the General Assembly. See also Bellsouth Telecommunications, LLC, 342 Ga. App. at 334 (1) n. 16 (Dillard, P. J., concurring) ("I realize, of course, that OCGA § 1-3-1 (a) provides that 'in all interpretations of statutes, the courts **[**505]** shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy,' but this statutory directive must be read in conjunction with OCGA § 1-3-1 (b), which provides that 'in all interpretations of statutes, the ordinary signification shall be applied to all words.' ") (punctuation omitted). That reading of OCGA § 1-3-1 (a) violates the principles of textualism to advance the cause of textualism. The only fair reading of OCGA § 1-3-1 (a) is that it is a codification of the mischief rule.

The only fair reading of *Gibson* and the similar cases it cites is that the mischief rule has been quietly excised from our law, that we no longer inquire into "the old law, the evil, and the **[***31]** remedy," and that while OCGA § 1-3-1 (a) is still on the books, it is a dead letter. That is not how we should operate. We should either strike down OCGA § 1-3-1 (a), as well as the statutes that enforce the intent of parties to a contract, and let fall all that must fall with them — or we should faithfully administer them.

I would faithfully administer them — albeit with the perils and temptations of such analysis firmly in mind. Administering OCGA § 1-3-1 (a) here requires us to construe OCGA § 19-7-21 so that S. comes under its protection. So I would affirm.

End of Document

APPENDIX C

SENATE SUBSTITUTE TO HB 543:

AS PASSED SENATE

A BILL TO BE ENTITLED
AN ACT

To amend Article 1 of Chapter 7 of Title 19 of the Official Code of Georgia Annotated, relating to general provisions regarding parent and child relationship generally, so as to provide for equitable caregivers; to provide for standing and adjudication; to provide for a statutory form; to provide for related matters; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Article 1 of Chapter 7 of Title 19 of the Official Code of Georgia Annotated, relating to general provisions regarding parent and child relationship generally is amended by adding a new Code section to read as follows:

″19-7-3.1.

(a) The court may adjudicate an individual to be an equitable caregiver.

(b) An individual seeking to be adjudicated an equitable caregiver of a child under this Code section may establish standing to maintain the action in accordance with the following:

(1) File with the initial pleading an affidavit alleging under oath specific facts to support the existence of an equitable caregiver relationship with the child as set forth in subsection (d) of this Code section. The pleadings and affidavit shall be served upon all parents and legal guardians of the child and any other party to the proceeding;

(2) An adverse party, parent, or legal guardian who files a pleading in response to the pleadings in paragraph (1) of this subsection shall also file an affidavit in response, serving all parties to the proceeding with a copy;

(3) The court shall determine on the basis of the pleadings and affidavits pursuant to paragraphs (1) and (2) of this subsection whether such individual has presented prima facie evidence of the requirements set forth in subsection (d) of this Code section. The

court may in its sole discretion, if necessary and on an expedited basis, hold a hearing to determine undisputed facts that are necessary and material to the issue of standing; and

(4) If the court's determination under paragraph (3) of this subsection is in the affirmative, the party claiming to be an equitable caregiver has standing to proceed to adjudication under subsection (d) of this Code section.

(c) A document substantially in the following form may be used to create a pleading and affidavit for purposes of paragraph (1) of subsection (d) of this Code section:

'IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

A.B.,		
_____	)	
Plaintiff	)	
	)	
v.	)	Civil Action
	)	File no. _____
C.D.,		
_____	)	
Defendant	)	

COMPLAINT

The defendant C.D., herein named, is a resident of _____ (street), _____, (city) _____ County, Georgia, and is subject to the jurisdiction of this court.

As of _____ (date), Plaintiff can fully demonstrate to the court that:

(1) Plaintiff has fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life;

(2) Engaged in consistent caretaking of the child;

(3) Established a bonded and dependent relationship with the child, the relationship was fostered or supported by a parent of the child, and such individual and the parent have understood, acknowledged, or accepted or behaved as though such individual is a parent of the child; and

(4) Accepted full and permanent responsibilities as a parent of the child without expectation of financial compensation.

The facts of the case are:

1. _____

2. _____

3. _____

4. _____

_____ _____

Dated Pro Se Applicant

_____

Address

_____

Address

(CERTIFICATE OF SERVICE)'

'AFFIDAVIT OF PETITIONER

STATE OF GEORGIA

COUNTY OF _____

Personally appeared before me, the undersigned officer duly authorized to administer oaths, _____, who, after having been sworn, deposes, and says as follows:

That my name is: _____

That my address is: _____

These are the facts to support the existence of an equitable caregiver relationship with a child as set forth in subsection (c) of O.C.G.A. 19-7-3.1:

_____ _____

Dated Pro Se Applicant

_____

Address

_____

Address

Sworn to and subscribed

Before me this _____

Day of _____, _____.

_____

Notary public (SEAL)

My commission expires: _____'

(d) In order to establish standing, the court shall first find, by clear and convincing evidence, that the individual has:

(1) Fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life;

(2) Engaged in consistent caretaking of the child;

(3) Established a bonded and dependent relationship with the child, the relationship was fostered or supported by a parent of the child, and such individual and the parent have understood, acknowledged, or accepted or behaved as though such individual is a parent of the child;

(4) Accepted full and permanent responsibilities as a parent of the child without expectation of financial compensation; and

(5) Demonstrated that the child will suffer physical harm or long-term emotional harm and that continuing the relationship between such individual and the child is in the best interest of the child.

(e) In determining the existence of harm, the court shall consider factors related to the child's needs, including, but not limited to:

(1) Who are the past and present caretakers of the child;

(2) With whom has the child formed psychological bonds and the strength of those bonds;

(3) Whether competing parties evidenced an interest in, and contact with, the child over time; and

(4) Whether the child has unique medical or psychological needs that one party is better able to meet.

(f) A court may grant standing on an individual seeking to be adjudicated as an equitable caregiver on the basis of the consent of the child's parent for such individual to have a parental relationship with the child, or on the basis of a written agreement between the individual seeking to be adjudicated as an equitable caregiver and the child's parent, indicating an intention to share or divide caregiving responsibilities for the child.

(g) The court may enter an order as appropriate to establish parental rights and responsibilities for such individual, including, but not limited to, custody or visitation.

(h) This Code section shall not authorize an original action when both parents of the minor child are not separated and the child is living with both parents.

(i) This Code section shall not authorize an original action by an individual whose relationship with the child was established as a result of a proceeding under Article 3 of Chapter 11 of Title 15 and shall not authorize an original action so long as the Division of Family and Children Services of the Department of Human Services has an open child welfare and youth services case involving such child or his or her parent.

(j) The adjudication of a person under this Code section as an equitable caregiver does not disestablish the parentage of any other parent."

SECTION 2.

All laws and parts of laws in conflict with this Act are repealed.

State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

STATE BAR SERIES

The Odd Couple (1968)
Custody Considerations And Co-Parenting For The Unmarried Parent: Tips From The Bench, Guardian Ad Litem And Counselor

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Ocmulgee Judicial Circuit

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Fulton Superior Court

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Roswell, GA

Amy Kaye
Ellis Funk
Atlanta, GA

Tips From The Bench

"They've Got Everything….including a 10 year old daughter who's suing them for divorce."

1.

Remind parties they should have at least one thing they can agree on at the start-wanting the best for their child(ren)

2.

Discourage disparaging the other parent to, or in front of, the child because it is just like telling the child that a part of them is bad.

3.

Except in those rare cases where there are sufficient grounds to contest a legitimation, the attorneys should also be mindful that the parties will have to co-parent this child for years to come. Making the situation hostile or trashing the other party will not be of any benefit to the co-parenting relationship or the litigation process.

4.

Children are innocent in all of this, the parties picked each other and the child had no say. Therefore, it is the responsibility of the parties to shield the child and make process as painless as possible for the child.

5.

Counter negative connotations of the legitimation process. The process should be viewed as a necessary process that potentially gives the child access to an inheritance or other benefits that flow from a parent to a child.

6.

Encourage the parenting seminar as early in the process as possible, especially for unreasonably contentious parties

7.

Parties should be able to demonstrate how their proposed parenting plan works logistically in concert with work schedules, school schedules, childcare and other resources.

8.

A visitation schedule ensures that everyone is on the same page as to the when, where and how of visitation. In turn, the child gets a level of stability and the adults get to plan their lives more effectively.

9.

It is extremely helpful for the attorneys to have a proposed schedule for visitation especially, if there is little to no relationship between the parent and child and there needs to be some form of reunification process.

10.

It is important to be realistic with the client about the possible outcomes of the case.

Hon. Tamika Hrobowski-Houston
Judicial Officer/DV Court Judge
Fulton County Superior Court
Family Division
Atlanta Judicial Circuit

Hon. Amanda Petty
Judge, Superior Courts
Ocmulgee Judicial Circuit

§ 19-7-22. Petition for legitimation of child; requirement that mother be named as a party; court order; effect; claims for custody or visitation; third-party action for legitimation in response to petition to establish paternity

(a) As used in this Code section, the term:

(1) "Biological father" means the male who impregnated the biological mother resulting in the birth of a child.

(2) "Legal father" means a male who has not surrendered or had terminated his rights to a child and who:

(A) Has legally adopted such child;

(B) Was married to the biological mother of such child at the time such child was born or within the usual period of gestation, unless paternity was disproved by a final order pursuant to Article 3 of this chapter;

(C) Married the legal mother of such child after such child was born and recognized such child as his own, unless paternity was disproved by a final order pursuant to Article 3 of this chapter; or

(D) Has legitimated such child pursuant to this Code section.

(b) The biological 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 this state or cannot, after due diligence, be found within this state, the petition may be filed in the county of the biological father's residence or the county of the child's residence. If a petition for the adoption of the child is pending, the biological father shall file the petition for legitimation in the county in which the adoption petition is filed.

(c) A legitimation petition shall set forth the name, age, and sex of the child, the name of the mother, and, if the biological father desires the name of the child to be changed, the new name. If the mother is alive, she shall be named as a party and shall be served and provided an opportunity to be heard as in other civil actions under Chapter 11 of Title 9, the "Georgia Civil Practice Act." If there is a legal father who is not the biological father, he shall be named as a party by the petitioner and shall be served and provided an opportunity to be heard as in other civil actions under Chapter 11 of Title 9, the "Georgia Civil Practice Act."

(d)

(1) Upon the presentation and filing of a legitimation petition, and after a hearing for which notice was provided to all interested parties, the court may issue an order declaring the

biological father's relationship with the child to be legitimate, provided that such order is in the best interests of the child. If such order is issued, the biological father and child shall be capable of inheriting from each other in the same manner as if born in lawful wedlock. Such order shall specify the name by which the child shall be known.

(2) (A) If the court determines by clear and convincing evidence that the father caused his child to be conceived as a result of having nonconsensual sexual intercourse with the mother of his child or when the mother is less than ten years of age, or an offense which consists of the same or similar elements under federal law or the laws of another state or territory of the United States, it shall create a presumption against legitimation.

(B) Notwithstanding Code Section 53-2-3, if the court denies a legitimation petition under this paragraph, the child shall be capable of inheriting from or through his or her father. Notwithstanding Code Section 53-2-4, if the court denies a legitimation petition under this paragraph, the father shall not be capable of inheriting from or through his child.

(C) If there is a pending criminal proceeding in connection with an allegation made pursuant to subparagraph (A) of this paragraph, the court shall stay discovery in the legitimation action until the completion of such criminal proceeding.

(e) A legitimation petition may be filed, pursuant to Code Section 15-11-11, in the juvenile court of the county in which a dependency proceeding regarding the child is pending; provided, however, that if either parent has demanded a jury trial as to child support, that issue of the case shall be transferred to superior court for a jury trial. Such petition shall contain the same information and require the same service and opportunity to be heard as set forth in subsection (c) of this Code section. After a hearing, the juvenile court may issue the same orders as set forth in subsection (d) of this Code section.

(f) A superior court shall, after notice and hearing, enter an order establishing the obligation to support a child as provided under Code Section 19-6-15.

(g) A legitimation petition may also include claims for visitation, parenting time, or custody. If such claims are raised in the legitimation action, the court may order, in addition to legitimation, visitation, parenting time, or custody based on the best interests of the child standard. In a case involving allegations of family violence, the provisions of paragraph (4) of subsection (a) of Code Section 19-9-3 shall also apply.

(h) In any petition to establish paternity pursuant to paragraph (4) of subsection (a) of Code Section 19-7-43, the alleged biological father's response may assert a third-party action for the legitimation of the child born out of wedlock if the alleged biological father is, in fact, the biological father. Upon the determination of paternity or if a voluntary acknowledgment of paternity has been made and has not been rescinded pursuant to Code Section 19-7-46.1, the court or trier of fact as a matter of law and pursuant to the provisions of Code Section 19-7-51 may enter an order or decree legitimating a child born out of wedlock, provided that such is in the best interests of the child. In determining the best interests of the child, the court

should ensure that the petitioning alleged biological father is, in fact, the biological father and may order the mother, the alleged biological father, and the child to submit to genetic testing in accordance with Code Section 19-7-45. Whenever a petition to establish the paternity of a child is brought by the Department of Human Services, issues of name change, visitation, and custody shall not be determined by the court until such time as a separate petition is filed by one of the parents or by the legal guardian of the child, in accordance with Code Section 19-11-8; if the petition to establish paternity is brought by a party other than the Department of Human Services or if the alleged biological father seeks legitimation, the court may determine issues of name change, visitation, and custody in accordance with subsections (c) and (g) of this Code section. Custody of the child shall remain in the mother unless or until a court order is entered addressing the issue of custody.

History Orig. Code 1863, § 1738; Code 1868, § 1778; Code 1873, § 1787; Code 1882, § 1787; Civil Code 1895, § 2494; Civil Code 1910, § 3013; Code 1933, § 74-103; Ga. L. 1985, p. 279, § 2; Ga. L. 1988, p. 1720, § 5; Ga. L. 1989, p. 441, § 1; Ga. L. 1997, p. 1613, § 14; Ga. L. 1997, p. 1681, § 5; Ga. L. 2000, p. 20, § 10; Ga. L. 2005, p. 1491, § 1/SB 53; Ga. L. 2007, p. 554, § 6/HB 369; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2013, p. 294, § 4-24/HB 242; Ga. L. 2016, p. 219, § 2/SB 331; Ga. L. 2016, p. 304, § 3/SB 64.

§ 19-9-3. Establishment and review of child custody and visitation

(a) (1) In all cases in which the custody of any child is at issue between the parents, there shall be no prima-facie right to the custody of the child in the father or mother. There shall be no presumption in favor of any particular form of custody, legal or physical, nor in favor of either parent. Joint custody may be considered as an alternative form of custody by the judge and the judge at any temporary or permanent hearing may grant sole custody, joint custody, joint legal custody, or joint physical custody as appropriate.

(2) The judge hearing the issue of custody shall make a determination of custody of a child and such matter shall not be decided by a jury. The judge may take into consideration all the circumstances of the case, including the improvement of the health of the party seeking a change in custody provisions, in determining to whom custody of the child should be awarded. The duty of the judge in all such cases shall be to exercise discretion to look to and determine solely what is for the best interest of the child and what will best promote the child's welfare and happiness and to make his or her award accordingly.
(3) In determining the best interests of the child, the judge may consider any relevant factor including, but not limited to:

(A) The love, affection, bonding, and emotional ties existing between each parent and the child;

(B) The love, affection, bonding, and emotional ties existing between the child and his or her siblings, half siblings, and stepsiblings and the residence of such other children;

(C) The capacity and disposition of each parent to give the child love, affection, and guidance and to continue the education and rearing of the child;

(D) Each parent's knowledge and familiarity of the child and the child's needs;

(E) The capacity and disposition of each parent to provide the child with food, clothing, medical care, day-to-day needs, and other necessary basic care, with consideration made for the potential payment of child support by the other parent;

(F) The home environment of each parent considering the promotion of nurturance and safety of the child rather than superficial or material factors;

(G) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

(H) The stability of the family unit of each of the parents and the presence or absence of each parent's support systems within the community to benefit the child;

(I) The mental and physical health of each parent;

(J) Each parent's involvement, or lack thereof, in the child's educational, social, and extracurricular activities;

(K) Each parent's employment schedule and the related flexibility or limitations, if any, of a parent to care for the child;

(L) The home, school, and community record and history of the child, as well as any health or educational special needs of the child;

(M) Each parent's past performance and relative abilities for future performance of parenting responsibilities;

(N) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child;

(O) Any recommendation by a court appointed custody evaluator or guardian ad litem;

(P) Any evidence of family violence or sexual, mental, or physical child abuse or criminal history of either parent; and

(Q) Any evidence of substance abuse by either parent.

(4) In addition to other factors that a judge may consider in a proceeding in which the custody of a child or visitation or parenting time by a parent is at issue and in which the judge has made a finding of family violence:

(A) The judge shall consider as primary the safety and well-being of the child and of the parent who is the victim of family violence;

(B) The judge shall consider the perpetrator's history of causing physical harm, bodily injury, assault, or causing reasonable fear of physical harm, bodily injury, or assault to another person;

(C) If a parent is absent or relocates because of an act of domestic violence by the other parent, such absence or relocation for a reasonable period of time in the circumstances shall not be deemed an abandonment of the child for the purposes of custody determination; and

(D) The judge shall not refuse to consider relevant or otherwise admissible evidence of acts of family violence merely because there has been no previous finding of family violence. The judge may, in addition to other appropriate actions, order supervised visitation or parenting time pursuant to Code Section 19-9-7.

(5) In all custody cases in which the child has reached the age of 14 years, the child shall have the right to select the parent with whom he or she desires to live. The child's selection for purposes of custody shall be presumptive unless the parent so selected is determined not

to be in the best interests of the child. The parental selection by a child who has reached the age of 14 may, in and of itself, constitute a material change of condition or circumstance in any action seeking a modification or change in the custody of that child; provided, however, that such selection may only be made once within a period of two years from the date of the previous selection and the best interests of the child standard shall apply.

(6) In all custody cases in which the child has reached the age of 11 but not 14 years, the judge shall consider the desires and educational needs of the child in determining which parent shall have custody. The judge shall have complete discretion in making this determination, and the child's desires shall not be controlling. The judge shall further have broad discretion as to how the child's desires are to be considered, including through the report of a guardian ad litem. The best interests of the child standard shall be controlling. The parental selection of a child who has reached the age of 11 but not 14 years shall not, in and of itself, constitute a material change of condition or circumstance in any action seeking a modification or change in the custody of that child. The judge may issue an order granting temporary custody to the selected parent for a trial period not to exceed six months regarding the custody of a child who has reached the age of 11 but not 14 years where the judge hearing the case determines such a temporary order is appropriate.

(7) The judge is authorized to order a psychological custody evaluation of the family or an independent medical evaluation. In addition to the privilege afforded a witness, neither a court appointed custody evaluator nor a court appointed guardian ad litem shall be subject to civil liability resulting from any act or failure to act in the performance of his or her duties unless such act or failure to act was in bad faith.

(8) If requested by any party on or before the close of evidence in a contested hearing, the permanent court order awarding child custody shall set forth specific findings of fact as to the basis for the judge's decision in making an award of custody including any relevant factor relied upon by the judge as set forth in paragraph (3) of this subsection. Such order shall set forth in detail why the court awarded custody in the manner set forth in the order and, if joint legal custody is awarded, a manner in which final decision making on matters affecting the child's education, health, extracurricular activities, religion, and any other important matter shall be decided. Such order shall be filed within 30 days of the final hearing in the custody case, unless extended by order of the judge with the agreement of the parties.

(b) In any case in which a judgment awarding the custody of a child has been entered, on the motion of any party or on the motion of the judge, that portion of the judgment effecting visitation rights between the parties and their child or parenting time may be subject to review and modification or alteration without the necessity of any showing of a change in any material conditions and circumstances of either party or the child, provided that the review and modification or alteration shall not be had more often than once in each two-year period following the date of entry of the judgment. However, this subsection shall not limit or restrict the power of the judge to enter a judgment relating to the custody of a child in any new proceeding based upon a showing of a change in any material conditions or circumstances of a party or the child. A military parent's absences caused by the performance

of his or her deployments, or the potential for future deployments, shall not be the sole factor considered in supporting a claim of any change in material conditions or circumstances of either party or the child; provided, however, that the court may consider evidence of the effect of a deployment in assessing a claim of any change in material conditions or circumstances of either party or the child.

(c) In the event of any conflict between this Code section and any provision of Article 3 of this chapter, Article 3 shall apply.

(d) It is the express policy of this state to encourage that a child has continuing contact with parents and grandparents who have shown the ability to act in the best interest of the child and to encourage parents to share in the rights and responsibilities of raising their child after such parents have separated or dissolved their marriage or relationship.

(e) Upon the filing of an action for a change of child custody, the judge may in his or her discretion change the terms of custody on a temporary basis pending final judgment on such issue. Any such award of temporary custody shall not constitute an adjudication of the rights of the parties.

(f)

(1) In any case in which a judgment awarding the custody of a child has been entered, the court entering such judgment shall retain jurisdiction of the case for the purpose of ordering the custodial parent to notify the court of any changes in the residence of the child.

(2) In any case in which visitation rights or parenting time has been provided to the noncustodial parent and the court orders that the custodial parent provide notice of a change in address of the place for pickup and delivery of the child for visitation or parenting time, the custodial parent shall notify the noncustodial parent, in writing, of any change in such address. Such written notification shall provide a street address or other description of the new location for pickup and delivery so that the noncustodial parent may exercise such parent's visitation rights or parenting time.

(3) Except where otherwise provided by court order, in any case under this subsection in which a parent changes his or her residence, he or she must give notification of such change to the other parent and, if the parent changing residence is the custodial parent, to any other person granted visitation rights or parenting time under this title or a court order. Such notification shall be given at least 30 days prior to the anticipated change of residence and shall include the full address of the new residence.

(g) Except as provided in Code Section 19-6-2, and in addition to the attorney's fee provisions contained in Code Section 19-6-15, the judge may order reasonable attorney's fees and expenses of litigation, experts, and the child's guardian ad litem and other costs of the child custody action and pretrial proceedings to be paid by the parties in proportions and at times determined by the judge. Attorney's fees may be awarded at both the temporary

hearing and the final hearing. A final judgment shall include the amount granted, whether the grant is in full or on account, which may be enforced by attachment for contempt of court or by writ of fieri facias, whether the parties subsequently reconcile or not. An attorney may bring an action in his or her own name to enforce a grant of attorney's fees made pursuant to this subsection.

(h) In addition to filing requirements contained in Code Section 19-6-15, upon the conclusion of any proceeding under this article, the domestic relations final disposition form as prescribed by the Judicial Council of Georgia shall be filed.

(i) Notwithstanding other provisions of this article, whenever a military parent is deployed, the following shall apply:

(1) A court shall not enter a final order modifying parental rights and responsibilities under an existing parenting plan earlier than 90 days after the deployment ends, unless such modification is agreed to by the deployed parent;

(2) Upon a petition to establish or modify an existing parenting plan being filed by a deploying parent or nondeploying parent, the court shall enter a temporary modification order for the parenting plan to ensure contact with the child during the period of deployment when:

(A) A military parent receives formal notice from military leadership that he or she will deploy in the near future, and such parent has primary physical custody, joint physical custody, or sole physical custody of a child, or otherwise has parenting time with a child under an existing parenting plan; and

(B) The deployment will have a material effect upon a deploying parent's ability to exercise parental rights and responsibilities toward his or her child either in the existing relationship with the other parent or under an existing parenting plan;

(3) Petitions for temporary modification of an existing parenting plan because of a deployment shall be heard by the court as expeditiously as possible and shall be a priority on the court's calendar;

(4) (A) All temporary modification orders for parenting plans shall include a reasonable and specific transition schedule to facilitate a return to the predeployment parenting plan over the shortest reasonable time period after the deployment ends, based upon the child's best interest.

(B) Unless the court determines that it would not be in the child's best interest, a temporary modification order for a parenting plan shall set a date certain for the anticipated end of the deployment and the start of the transition period back to the predeployment parenting plan. If a deployment is extended, the temporary modification order for a parenting plan shall remain in effect, and the transition schedule shall take effect at the end of the extension of the deployment. Failure of the nondeploying parent to notify the court in accordance with

this paragraph shall not prejudice the deploying parent's right to return to the predeployment parenting plan once the temporary modification order for a parenting plan expires as provided in subparagraph (C) of this paragraph.

(C) A temporary modification order for a parenting plan shall expire upon the completion of the transition period and the predeployment parenting plan shall establish the rights and responsibilities between parents for the child;

(5) Upon a petition to modify an existing parenting plan being filed by a deploying parent and upon a finding that it serves the best interest of the child, the court may delegate for the duration of the deployment any portion of such deploying parent's parenting time with the child to anyone in his or her extended family, including but not limited to an immediate family member, a person with whom the deploying parent cohabits, or another person having a close and substantial relationship to the child. Such delegated parenting time shall not create any separate rights to such person once the period of deployment has ended;

(6) If the court finds it to be in the child's best interest, a temporary modification order for a parenting plan issued under this subsection may require any of the following:

(A) The nondeploying parent make the child reasonably available to the deploying parent to exercise his or her parenting time immediately before and after the deploying parent departs for deployment and whenever the deploying parent returns to or from leave or furlough from his or her deployment;

(B) The nondeploying parent facilitate opportunities for the deployed parent to have regular and continuing contact with his or her child by telephone, e-mail exchanges, virtual video parenting time through the Internet, or any other similar means;

(C) The nondeploying parent not interfere with the delivery of correspondence or packages between the deployed parent and child of such parent; and

(D) The deploying parent provide timely information regarding his or her leave and departure schedule to the nondeploying parent;

(7) Because actual leave from a deployment and departure dates for a deployment are subject to change with little notice due to military necessity, such changes shall not be used by the nondeploying parent to prevent contact between the deployed parent and his or her child;

(8) A court order temporarily modifying an existing parenting plan or other order governing parent-child rights and responsibilities shall specify when a deployment is the basis for such order and it shall be entered by the court only as a temporary modification order or interlocutory order;

(9) A relocation by a nondeploying parent during a period of a deployed parent's absence and occurring during the period of a temporary modification order for a parenting plan shall

not act to terminate the exclusive and continuing jurisdiction of the court for purposes of later determining custody or parenting time under this chapter;

(10) A court order temporarily modifying an existing parenting plan or other order shall require the nondeploying parent to provide the court and the deploying parent with not less than 30 days' advance written notice of any intended change of residence address, telephone numbers, or e-mail address;

(11) Upon a deployed parent's final return from deployment, either parent may file a petition to modify the temporary modification order for a parenting plan on the grounds that compliance with such order will result in immediate danger or substantial harm to the child, and may further request that the court issue an ex parte order. The deployed parent may file such a petition prior to his or her return. Such petition shall be accompanied by an affidavit in support of the requested order. Upon a finding of immediate danger or substantial harm to the child based on the facts set forth in the affidavit, the court may issue an ex parte order modifying the temporary parenting plan or other parent-child contact in order to prevent immediate danger or substantial harm to the child. If the court issues an ex parte order, the court shall set the matter for hearing within ten days from the issuance of the ex parte order;

(12) Nothing in this subsection shall preclude either party from filing a petition for permanent modification of an existing parenting plan under subsection (b) of this Code section; provided, however, that the court shall not conduct a final hearing on such petition until at least 90 days after the final return of the deploying parent. There shall exist a presumption favoring the predeployment parenting plan or custody order as one that still serves the best interest of the child, and the party seeking to permanently modify such plan or order shall have the burden to prove that it no longer serves the best interest of the child;

(13) When the deployment of a military parent has a material effect upon his or her ability to appear in person at a scheduled hearing, then upon request by the deploying parent and provided reasonable advance notice is given to other interested parties, the court may allow a deployed parent to present testimony and other evidence by electronic means for any matter considered by the court under this subsection. For purposes of this paragraph, the term "electronic means" shall include, but not be limited to, communications by telephone, video teleconference, Internet connection, or electronically stored affidavits or documents sent from the deployment location or elsewhere;

(14) (A) When deployment of a military parent appears imminent and there is no existing parenting plan or other order setting forth the parent's rights and responsibilities, then upon a petition filed by either parent the court shall:

(i) Expedite a hearing to establish a temporary parenting plan;

(ii) Require that the deploying parent shall have continued access to the child, provided that such contact is in the child's best interest;

(iii) Ensure the disclosure of financial information pertaining to both parties;

(iv) Determine the child support responsibilities under Code Section 19-6-15 of both parents during the deployment; and

(v) Determine the child's best interest and consider delegating to any third parties with close contacts to the child any reasonable parenting time during the deployment. In deciding such request the court shall consider the reasonable requests of the deployed parent.

(B) Any pleading filed to establish a parenting plan or child support order under this paragraph shall be identified at the time of filing by stating in the text of the pleading the specific facts related to the deployment and by referencing this paragraph and subsection of this Code section;

(15) When an impending deployment precludes court expedited adjudication before deployment, the court may agree to allow the parties to arbitrate any issues as allowed under Code Section 19-9-1.1, or order the parties to mediation under any court established alternative dispute resolution program. For purposes of arbitration or mediation, each party shall be under a duty to provide to the other party information relevant to any parenting plan or support issues pertaining to the children or the parties;

(16) Each military parent shall be under a continuing duty to provide written notice to the nondeploying parent within 14 days of the military parent's receipt of oral or written orders requiring deployment or any other absences due to military service that will impact the military parent's ability to exercise his or her parenting time with a child. If deployment orders do not allow for 14 days' advance notice, then the military parent shall provide written notice to the other parent immediately upon receiving such notice; and

(17) A military parent shall ensure that any military family care plan that he or she has filed with his or her commander is consistent with any existing court orders for his or her child. In all instances any court order will be the first course of action for the care of a child during the absence of a military parent, and the military family care plan will be the alternative plan if the nondeploying parent either refuses to provide care for the child or acknowledges an inability to provide reasonable care for the child. A military parent shall not be considered in contempt of any court order or parenting plan when he or she in good faith implements his or her military family care plan based upon the refusal or claimed inability of a nondeploying parent to provide reasonable care for a child during a deployment.

History Ga. L. 1913, p. 110, § 1; Code 1933, § 74-107; Ga. L. 1957, p. 412, § 2; Ga. L. 1962, p. 713, § 2; Ga. L. 1976, p. 1050, § 3; Ga. L. 1978, p. 258, § 3; Ga. L. 1982, p. 3, § 19; Ga. L. 1984, p. 22, § 19; Ga. L. 1986, p. 1000, § 2; Ga. L. 1990, p. 1423, § 1; Ga. L. 1991, p. 1389, § 1; Ga. L. 1993, p. 1983, § 1; Ga. L. 1995, p. 863, § 6; Ga. L. 1999, p. 329, § 4; Ga. L. 2000, p. 1292, § 2; Ga. L. 2004, p. 780, § 3; Ga. L. 2007, p. 554, § 5/HB 369; Ga. L. 2011, p. 274, § 3/SB 112; Ga. L. 2017, p. 632, § 2-10/SB 132.

The Odd Couple

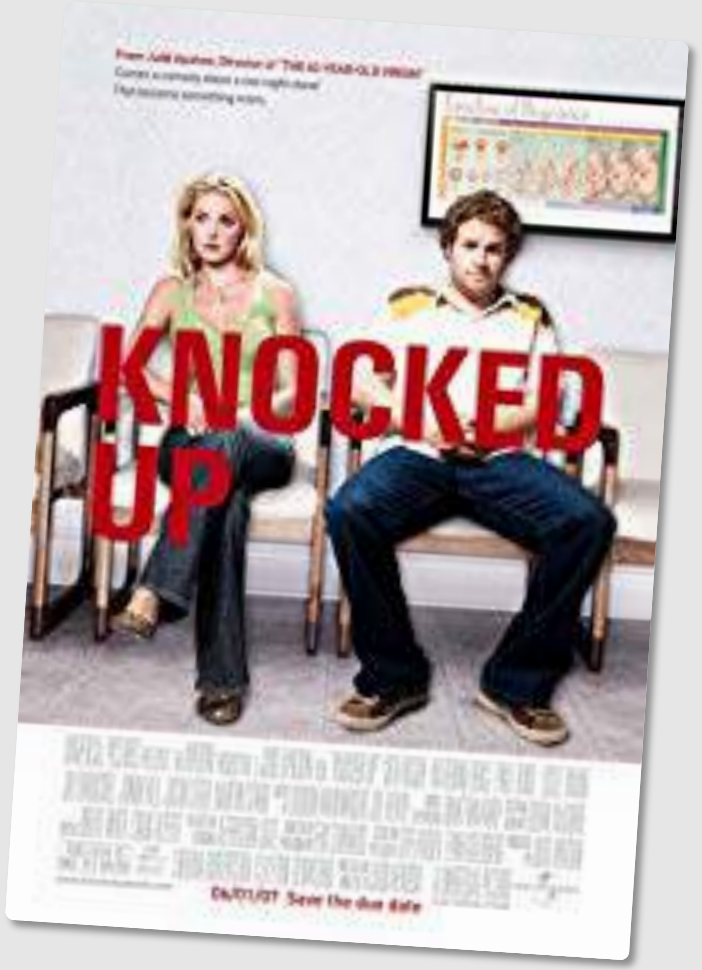
Custody Considerations and Co-Parenting for the Unmarried Parent

- Hon. Amanda S. Petty, Judge Ocmulgee Judicial Circuit Superior Court, Gray, GA
- Hon. Tamika B. Hrobowski-Houston, Judicial Officer, Fulton County Superior Court, Atlanta, GA
- Amy L. Kaye, Attorney/GAL, Ellis Funk, P.C., Atlanta, GA
- Howard Drutman, Ph.D., Psychologist (Forensic & Clinical Psychology), Atlanta Behavioral Consultants, Roswell, GA

“Knocked Up”

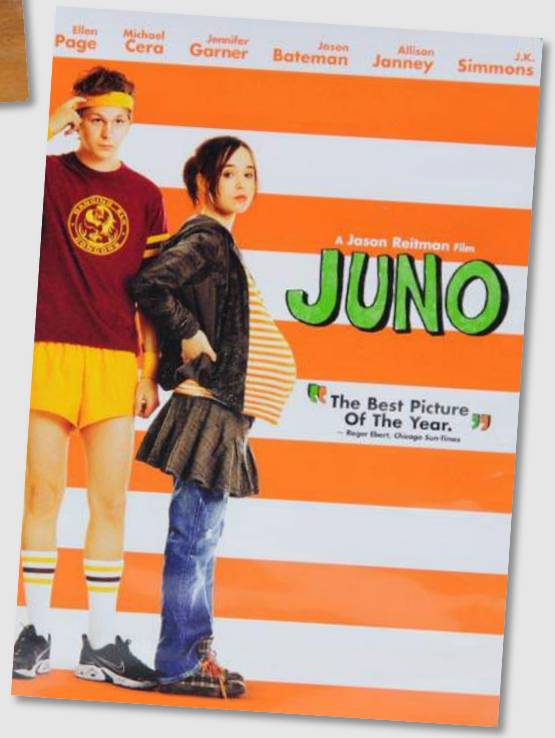
The tale of a one-night stand or short-term relationship

- Virtually no meaningful relationship prior to conceiving the child
- Little understanding of each other’s background
- Need to help the couple learn about each other’s values, traditions, and philosophy of parenting.
- Legitimation
- Need to deal with child support and possibly parenting time



“16 and Pregnant”

The tale of children having children

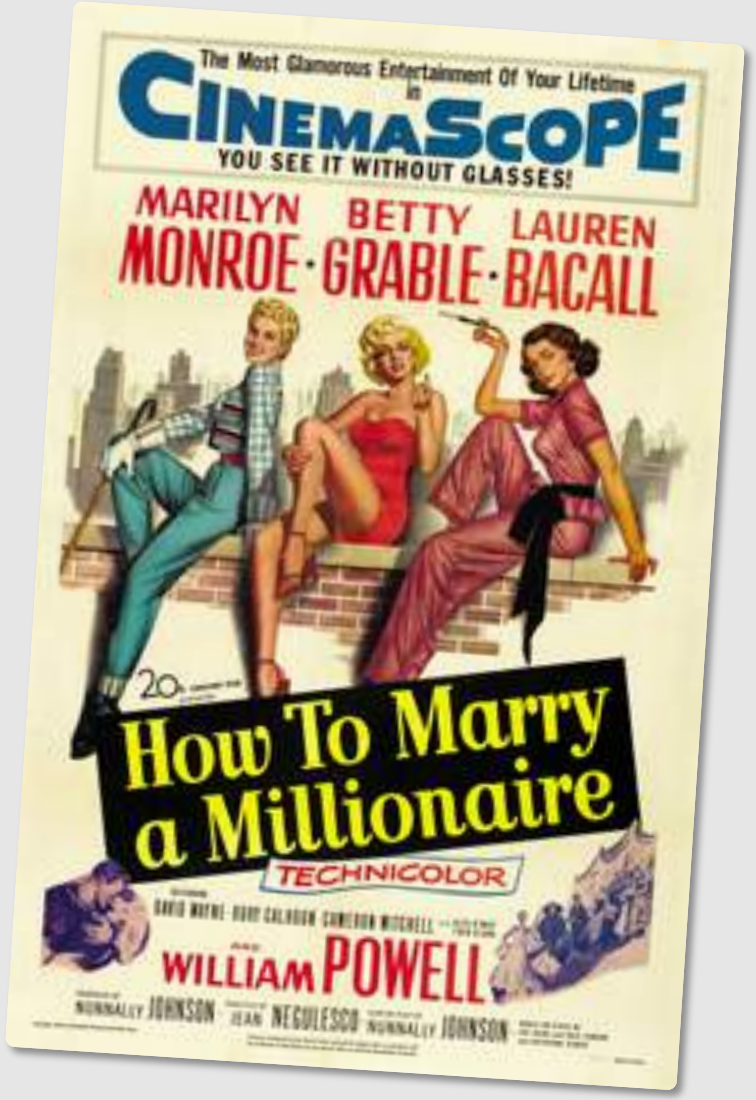


- These are kids having kids.
- No means of independence. They must rely on parents, grandparents, family and friends for financial support, assistance, and parental advice
- They often have conflicts between their own teen needs and desires and the needs of their child
- They must navigate their own relationship as they try and co-parent
- Legitimation

"How to Marry a Millionaire"

The sad search for the ultimate sugar daddy or sugar momma

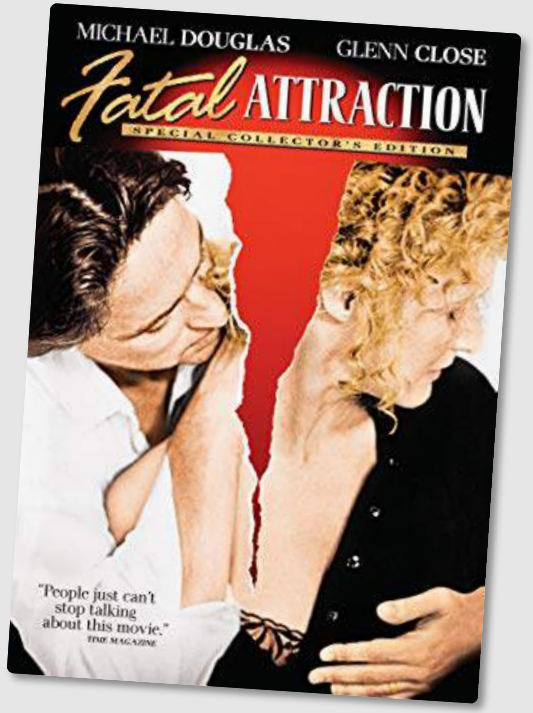
- This relationship often involves a power differential (financial, educational, social status)
- One party may have lots of money, while the other is financially dependent
- Often seen with celebrities (entertainers, athletes, etc.) and/or with one partner significantly older than the other partner
- Risks of domestic violence secondary to the power differential
- Legitimation

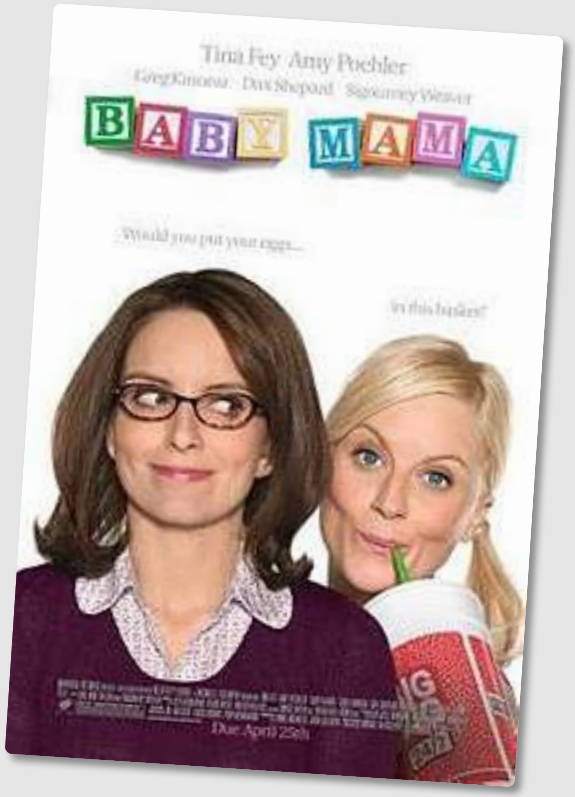


Miscellaneous

Tales of relationship variations

- Disturbed relationship with domestic violence and excessive passion
- Surrogacy
- Polyamory



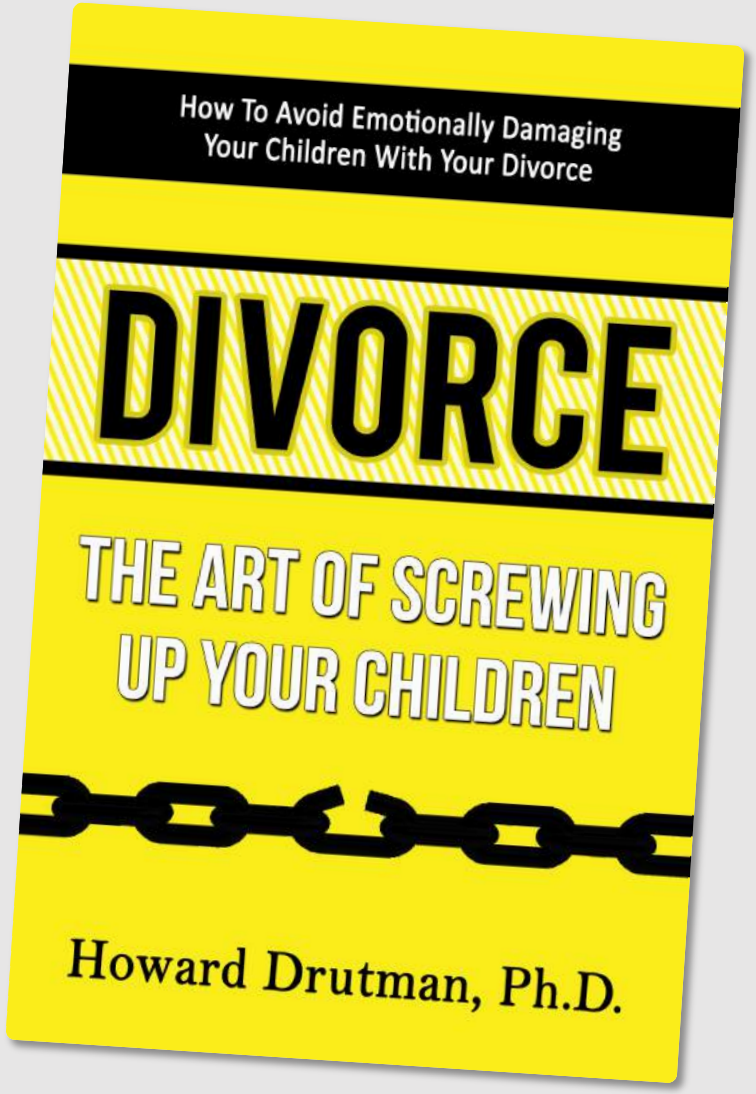


"Divorce: The Art of Screwing Up Your Children"

The tale of a shameless plug

- **Di*vorce: The Art of Screwing Up Your Children*** is a delightful tongue-in-cheek reprimand to parents who lose sight of their children's welfare while waging war with an ex. But it is more than that. In addition to learning how to screw up your kids, Dr. Drutman shows parents how to do things right. For parents who seem blind to the harm they inflict on their children, this book delivers a needed blast of awareness with enough humor to help the medicine go down.
  - Dr. Richard A. Warshak, author of ***Divorce Poison: How to Protect Your Family From Bad-mouthing and Brainwashing***. Clinical Professor, UT, Southwestern Medical Center

A great read for you and your clients



RULES FOR THE GAL

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Georgia Uniform Superior Court Rule 24.9 Annotated governs a Guardian ad Litem ("GAL") in Georgia.

Georgia Uniform Superior Court Rule 24.9 Annotated sets forth the rules for a Guardian ad Litem ("GAL") in Georgia. Rule 24.9. 1. addresses the appointment of a GAL, and provides that a GAL can be appointed to assist in a domestic relations case by the superior court judge assigned to hear that particular case, or otherwise having the responsibility to hear such case. This rule provides that the appointing judge has the discretion to appoint any person as a GAL so long as the person so selected has been trained as a GAL or is otherwise familiar with the role, duties, and responsibilities as determined by the judge. The Rule further provides that the GAL may be selected through an intermediary.

Subsection 2 of Rule 24.9 sets forth the required qualifications of a GAL. This Rule provides that a GAL shall receive such training as provided by or approved by the Circuit in which the GAL serves. This training should include, but not be limited to, instruction in the following subjects: domestic relations law and procedure, including the appropriate standard to be applied in the case; domestic relations courtroom procedure; role, duties, and responsibilities of a GAL; recognition and assessment of a child's best interests; methods of performing a child custody/visitation investigation; methods of obtaining relevant information concerning a child's best interest; the ethical obligations of a GAL, including the relationship between the GAL and counsel, the GAL and the child, and the GAL and the court; recognition of cultural and economic diversity in families and communities; base child development, needs, and abilities at different ages; interviewing techniques; communicating with children; family dynamics and dysfunction, domestic violence and substance abuse; recognition of issues of child abuse; and available services for child welfare, family preservation, medical, mental

health, educational, and special needs, including placement/evaluation/diagnostic treatment services.

It is important to note that the GAL does not represent the child. Instead, Subsection 3 of rule 24.9 provides that "The GAL shall represent the best interests of the child." This Rule further provides that the GAL is an officer of the court and shall assist the court and the parties in reaching a decision regarding child custody, visitation and child-related issues. Should the issue of child custody and/or visitation be tried, the rule states that the GAL shall be available to offer testimony. The Rule further specifies that the GAL holds a position of trust with respect to the minor child at issue, and must exercise due diligence in the performance of his/her duties. The rule also provides that the GAL should be respectful of, and should become educated concerning, cultural and economic diversity as may be relevant to assessing a child's best interests.

Subsection 4 of Rule 29.4 prescribes the duties of a GAL, and provides as follows:

> "By virtue of the order appointing a GAL, a GAL shall have the right to request all records relating to the minor child maintained by the Clerk of the Court in this and any other jurisdiction, other social and human service agencies, the Department of Family and Children Services, and the Juvenile Court. Upon written release and/or waiver by a party or appropriate court order, the GAL shall have the right to examine all records maintained by any school, financial institution, hospital, doctor or other mental health provider, any other social or human services agency or financial institution pertaining to the child which are deemed confidential by the service provider. The GAL shall have the right to examine any residence wherein any person seeking custody or visitation rights proposes to house the minor child. The GAL may request the court to order

> examination of the child, parents or anyone seeking custody of the child, by a medical or mental health professional, if appropriate. The GAL shall be entitled to notice of, and shall be entitled to participate in all hearings, trials, investigations, depositions, settlement negotiations, or other proceedings concerning the child."

While the duties of the GAL are set forth in this Superior Court Rule 24.9(4), it is imperative that the duties, and perhaps more importantly the rights given to the GAL to perform those duties, be spelled out clearly in the Order appointing the GAL.

The first sentence of this Rule gives the GAL the right to request records relating to the minor child held by the courts or social and human service agencies, including DFACS records. In actual practice, however, obtaining those records is not always easy, but it is helpful to be able to cite to the fact that this Rule does expressly give the GAL the right to the records. While this Rule entitles the GAL to the DFACS records, it is also helpful to include this right to the records in the Order appointing the GAL. In practice, it is often helpful to reference this Rule and the language of the Order appointing the GAL when requesting records. Nevertheless, DFACS will sometimes also request a separate Order from the Judge before releasing records.

The second sentence of this Rule deals with getting school, medical and financial records relating to the child which are deemed confidential, and provides that the GAL can get those records "upon written release and/or waiver by a party or appropriate court order…" Having the parents sign a global release at the outset of the case may help avoid problems later in the case when a party may later object to specific records the GAL may be requesting. It is also beneficial to have strong language in the Order appointing the GAL giving the GAL the right to all records. Nevertheless, despite a global release and despite strong language in an Order, many healthcare providers will still require that the parent sign the provider's own

specific release for the release of that healthcare provider's records. With regard to school records, it seems all schools have different policies. When requesting records or access to school personnel, some schools may have the GAL work through the attorneys for that particular school system, while other schools want all communication to go through the principal or some other administrator at the school, and other schools allow the GAL to communicate directly with teachers. It is good practice to contact the school and determine their particular policies and practices for providing information. Ideally, the GAL will ultimately be able to have direct communication with the teachers and counselors at the school who have dealt with the children and also interacted with the parents.

This Rule next provides that the GAL has the right to examine any residence wherein any person seeking custody or visitation proposes to house the minor child. While parties do not typically dispute the right of the GAL to visit their home, a dispute may arise over whether the GAL can visit unannounced. Most parties are certainly going to show the GAL a well maintained home during a planned visit, but the GAL may see something very different if he or she shows up unannounced. Even at a planned visit, the GAL may be surprised what they find if they look more deeply, such as opening the refrigerator, cabinets or closets in the home. It is also interesting to note how comfortable the child appears to be in the home and what the child himself or herself elects to show you or tell you about while in the home. It is also informative to note how the child may interact with the parent in the familiar surroundings of their home. It is also good practice, however, to try to talk to the child away from the home where a parent is present, whether that is outside in the yard, taking a walk around the block, or meeting the child in the GAL's office or some other location to get a chance for the child to talk with out possible concern that a parent is listening.

This Rule also provides that the GAL may request that the court order an examination of the child, parents, or anyone seeking custody of the child by a medical or mental health professional. It is interesting to note that it does not say that the GAL can seek an examination of someone seeking visitation. Often as a GAL, we may seek psychological evaluations or custody evaluations. It is important to note that with a psychological evaluation, the psychologist will typically conduct psychological testing and provide test results, but usually will not provide specific feedback as to how to interpret those test results. A custody evaluation, on the other hand, will typically include the psychological testing and then the application of those results to the custody determination. A custody evaluator usually also speaks to collateral witnesses, and therefore, it is often important for the GAL to coordinate efforts and work closely with the custody evaluator so as not to duplicate efforts and unnecessarily increase the fees. Working in coordination with a psychological or custody evaluator can be helpful for the GAL and allow the GAL to provide a more thorough recommendation and report given the psychological insight provided by the psychological expert evaluator.

A GAL may also order drug and/or alcohol testing or evaluation of the parties. It is good practice for the GAL to have a thorough understanding of the different types of tests available in order to determine what testing is most appropriate for a particular case. It is also good practice for the GAL to seek professional guidance in determining the appropriate testing to be administered and protocol to be followed and then how to determine the test results received.

Finally, this Rule provides that the GAL shall be entitled to notice of, and shall be entitled to participate in all hearings, trials, investigations, depositions, settlement negotiations

and other proceedings concerning the child. Hearings and trials are further discussed in rule 7 below. With regard to depositions, while the GAL clearly has the right to attend, the GAL needs to determine if there is a reason to attend the actual deposition (i.e., it may be helpful to observe the party's demeanor) or if it is more cost effective to simply read the deposition transcript. Counsel for the parties often have opinions as to whether the GAL should attend or just review the transcript. Attendance at settlement negotiations, including mediation, can also raise interesting issues. While this Rule expressly states that the GAL shall be entitled to participate in mediation, some attorneys raise the issue that they do not want the GAL present and participating at mediation because they do not want the GAL to know settlement offers being made. In accordance with section 8(d) of this Rule 24.9, however, the GAL is to be informed of any settlement and has the right to object. The question then arises as to how to reconcile this section 4 that provides that the GAL is entitled to participate in the settlement negotiations. Section 4 says the GAL has the right to participate, but does not say that the GAL must participate, so the GAL could, at the request of counsel, not agree not to attend mediation, with the understanding that if a settlement is reached that the GAL does not feel is in the best interest of the child, the GAL can then object. Alternatively, a GAL may take the position that it is in the best interest of the child/children for the case to settle, and, therefore, the GAL wants to participate in mediation to try to help foster settlement. Often the parties and their counsel also want the GAL to participate in mediation to help the parties work towards a settlement. However, if a party or counsel does not want the GAL present, then arguably the GAL may instead be inhibiting settlement by insisting that he or she participate. This must be addressed on a case by case basis.

Rule 29.4 (7) addresses the role of the GAL at Hearing and Trial. This Rule provides that it is expected that the GAL will be called as the Court's witness at trial unless otherwise directed by the Court, and further provides that the GAL shall be subject to examination by the parties and the court. In accordance with this Rule, the GAL is qualified as an expert witness on the best interest of the child(ren) in question. The GAL may testify as to the results of the GAL's investigation, including a recommendation as to what is in a child's best interest. Although allowed by some Judges, the rule states that the GAL shall not be allowed to question witnesses or present argument, absent exceptional circumstances and upon express approval of the Court.

Different Judges handle GALs differently at trial, so it is incumbent on the GAL to determine the rules, preferences and protocol of the Judge prior to trial. For example, some Judge have the GAL sit through the entire trial and hear from the GAL at the end of the trial in case anything presented at trial may impact the GAL's final recommendation, while other Judges hear from the GAL at the outset of the trial and then excuse the GAL. While the heading of this Rule mentions hearings and trials, the first sentence only addresses trial. While most Judges have the GAL at all trials and hearings, some Judges do not have the GAL at temporary hearings, but instead have the GAL issue a temporary report prior to the hearing. While not expressly stated in this Rule, it is generally accepted that the GAL can testify as to hearsay (i.e., what the GAL has been told by witnesses). This may stem from the fact that the rule provides that the GAL is qualified as an expert witness, or the fact that the rule provides that "the GAL may testify as to the foundation provided by witnesses and sources, and the results of GAL's investigation." Arguably, what the GAL has been told by witnesses, which is technically hearsay, is that permissible foundation and investigation.

This Rule provides that the GAL shall be subject to examination by the parties and the court. It is good practice for the GAL to have a comprehensive file with detailed notes of the investigation conducted and all witnesses spoken to so that the GAL is prepared for what may be a rigorous examination by counsel and the Judge. It is also good practice for the GAL to be prepared to explain his or her thought process and rationale in coming to the ultimate recommendation.

ANATOMY OF A MURDER (1959)
Ethics and Professionalism: Pressing Issues in Our Practice

Presented By:

Moderator: B. Lane Fitzpatrick
Law Office of Lane Fitzpatrick
Danielsville, GA

Hon. LaTisha Dear Jackson
Stone Mountain Judicial Circuit

Hon. Carol Hunstein
Georgia Supreme Court

Hon. Robert D. Leonard, II
Cobb Judicial Circuit

Hon. Denise Marshall
Dougherty Judicial Circuit

Hon. Michael Muldrew
Ogeechee Judicial Circuit

Hon. Gail S. Tusan
Atlanta Judicial Circuit

Hon. Holly W. Veal
Flint Judicial Circuit

Hon. Timothy R. Walmsley
Eastern Judicial Circuit

ESCORTING YOUR CLIENT DOWN THE RED CARPET: Hot tips from the Director's Chair

37th Annual Family Law Institute, Amelia Island
Ethics and Professionalism Panel - May 23, 2019

Judge Gail S. Tusan (Ret.)
Atlanta Judicial Circuit

"WHAT'S LOVE GOT TO DO WITH IT" (1993)

- Help your Neutral to Understand Your Client's Station of Divorce
- Building Trust
- Allow your Mediator to do his/her/their thing
- Process – Homework. Opening. Information Gathering. Structuring. Clarifying. Tasking and focusing. Reaching (Partial/Full) Agreements
- Decision Trees
- Counsel, please check your frustration and pack your patience

"WHY DID I GET MARRIED?" (2007)

Custody

One of the main issues in this celebrity divorce scandal involved custody of the children.

Jeff and MacKenzie Bezos finalize divorce making her the 4th richest Woman in the World with 35 billion dollar settlement

Finances

Equitable Division

Trivial Issues and Plots

Kris Humphries delayed the divorce proceedings because he wanted Kim Kardashian to publicly admit that the relationship was not real, rather it was "intended to boost ratings for 'Keeping Up With the Kardashians.'"

Emotional Rollercoasters

"THE SQUID AND THE WHALE" (2005)

- **Custody agreements must be in the best interest of the children's interests**
- **Know your judge's leanings**
- **Manage your client's expectations**
- **Base your offers on past performance and realistic adjustments in child rearing responsibilities**

"IT'S COMPLICATED" (2009)

- Good faith disclosures
- Have a financial expert on standby
- Differentiate between your client's needs and wants – BUDGET/DRFA
- What are the economic breaking points for the family – debt, taxes, refinancing
- Don't let your client cave in and agree to a disastrous, unenforceable financial arrangement due to fatigue or impatience

"THE WAR OF THE ROSES" (1989)

- Valuations
- Inventories and Inspections
- Mortgage and Account Balances
- Separate Property
- Pot, Pots, Pans and Plots – "Cut! You are killing the Director"

"THAT'S A WRAP!"

- Take time to memorialize the agreement
- Decide who will prepare it and by when
- Assess if there any other next steps
- Dissuade your clients from celebrating too soon!

"THAT'S A WRAP!"

Hon. Gail S. Tusan (Ret.)
Mediator | Arbitrator |Special Master
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State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

STATE BAR SERIES

Witness For The Prosecution (1957)
Interlopers In Family Matters: Fraudulent Real Property Transfers And Other Conduct Considerations In Divorce

Presented By:

Leron E. Rogers
Lewis Brisbois Bisgaard & Smith, LLP
Atlanta, GA

Celeste Findlay Brewer
Bell & Washington, LLC
Atlanta, GA

INTERLOPERS IN FAMILY LAW MATTERS: FRAUDULENT REAL PROPERTY TRANSFERS AND OTHER CONDUCT CONSIDERATIONS IN DIVORCE

2019 Georgia Family Law Institute
May 23, 2019

Presented by:

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INTERLOPERS IN FAMILY LAW MATTERS: FRAUDULENT REAL PROPERTY TRANSFERS AND OTHER CONDUCT CONSIDERATIONS IN DIVORCE

GENERAL CONSIDERATIONS

In practicing family law and in handling divorce and separate maintenance cases regularly, some of us have encountered situations when threats have been made by one spouse to the other to transfer real property in the hopes that the other spouse will lose their right to make a claim to the property as part of the marital estate. Often those statements will cause the other spouse to seek counsel and proceed to file for divorce or separate maintenance. Sometimes they are idle threats. However, there are times when transfers of real property are made when there has been no advance warning that such a transfer is even contemplated.

Needless to say, the best time for us to become involved is prior to the time that a transfer takes place. Upon filing the divorce action many counties require that the Standing Order be filed at the time the case is initiated and that the Order be filed as part of the case and served on the Defendant. In other counties you may have to request the Standing Order in your Complaint or responsive pleading. "Each party to a divorce or

separate maintenance action is hereby enjoined and restrained from selling, encumbering, trading, contracting to sell, or otherwise disposing or removing from the County, and of the property belonging to the parties except in the ordinary course of business."

This language is similar to language found in O.C.G.A. § 19-1-1(b)(4) which reads as follows: Upon filing of any domestic relations action, the court ***may*** issue a standing order in such action which . . . enjoins and restrains each party from selling, encumbering, trading, contracting to sell, or otherwise disposing of or removing from the jurisdiction of the court, without the permission of the court, any of the property belonging to the parties except in the ordinary course of business or except in an emergency which has been created by the other party to the action." (emphasis supplied).

We at least hope that clients heed our advice as well as the direction of the Standing Order, but past history sometimes dictates otherwise. Transfers of real property to a third party while the divorce is pending and after the other party has been served with process and a copy of the Standing Order is an easier problem to resolve than transfers which take place prior to the filing.

On a separate note, clients can further be protected by filing a Lis Pendens in deed records which would put any potential purchaser on notice that a divorce is pending and a certain parcel of real estate is in dispute.

THE BIGGER PROBLEM

The more serious problem occurs when transfers of property occur prior to the time that a divorce or separate maintenance action is filed. In Georgia "[a] bona fide purchaser for value is protected against outstanding interests in land of which the purchaser has no notice." O.C.G.A. §§ 23-1-16 and 23-1-20. O.C.G.A. § 23-2-34 further states that equity will grant relief as between the original parties or their privies in law, in fact, or in estate, except bona fide purchasers for value without notice." The bottom line is that bona fide purchasers for value are protected.

The ultimate goal in attempting to place a value on the marital estate is so that it can be equitably divided. The last date on which assets may be considered by the court is when the divorce is granted. *Friedman v. Friedman, 259 Ga. 530, 384 S.E.2d 641 (1989).* The goal is to make sure that all of the assets are in the marital state so equitable division can be addressed as well as the other financial obligations of the parties.

Transfers that are made with the intent of decreasing the value of the marital estate may be set aside. A party might know of the transfer prior to filing, but often the property transfer is not discovered until discovery takes place during the divorce. These conveyances may be set aside under the Uniform Voidable Transaction Act ("UVTA"). O.C.G.A. § 18-2-70. Prior to July 1, 2015, these transfers were governed by the Uniform Fraudulent Transfer Act. ("UFTA").

O.C.G.A. § 18-2-74(a)(1) contains the following language: "A transfer made or obligation incurred by a debtor is voidable as to a creditor whether the creditor's claim rose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay or defraud any creditor of the debtor..."

O.C.G.A. § 18-2-71(4) defines creditor as a person who has a claim, regardless of when the person acquired the claim, together with any successors or assigns. A claim is defined as a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured. O.C.G.A. § 18-2-71(3).

A person's spouse is considered a creditor or potential creditor under Georgia law and can also be considered to have a claim. However the claim for fraudulent transfers must be made during the pendency of the case and may be waived. *Armour v. Holcombe et al., 288 Ga. 50, 701 S.E.2d 169 (2010).*

The Process

When a divorce is pending it seems that two motions need to be filed to protect against a possible improper transfer of marital property. Once you are able to determine what property is involved and who the grantees are two (2) motions should be filed. The grantees need to be joined as parties to the action so a motion should be filed in that regard. Joinder is justified pursuant to O.C.G.A. § 9-11-18(b). Joining the parties gives the court authority to void the transfers if the court finds that they were fraudulent. The other would be a Motion to Set Aside the Fraudulent Conveyance. *Shah v. Shah, 270 Ga. 649, 513 S.E.2d 730 (1999).* Note however, that the remedy is limited to setting aside the conveyance rather than monetary damages.

Statute of Limitations

The action must be brought within four years after the transfer was made or the obligation was incurred, or, if later, within one year after the transfer or obligation was or could

reasonably been discovered by the claimant. O.C.G.A. § 18-2-79(1).

Factors to be Taken Into Consideration

O.C.G.A. § 18-2-74(b) outlines the factors the court may take into consideration when determining whether a transfer of marital property was fraudulent and/or whether the transfer should be void, thus returning the property into the marital estate for equitable division. These factors are as follows:

(1) The transfer or obligation was to an insider;

(2) The debtor retained possession or control of the property transferred after the transfer;

(3) The transfer or obligation was disclosed or concealed;

(4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) The transfer was of substantially all the debtor's assets;

(6) The debtor absconded;

(7) The debtor removed or concealed assets;

(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

The above are known as the badges of fraud. Under the provisions of the UVTA a party does not have to prove all eleven (11) in order to establish the fraudulent conveyance.

The claimant must prove their case by a preponderance of the evidence.

Standard of Proof

In order to prevail on a claim for a fraudulent transfer claim the following must be shown: 1) the spouse is a creditor within the UVTA; 2) the transfer was done with intent to hinder, delay or defraud the spouse; and 3) the spouse is asserting the fraudulent transfer claim within the statute of limitations.

Georgia Supreme Court Case

Gibson v. Gibson, 301 Ga. 622, 801 S.E.2d 40 (2017).

Although Gibson did not deal with the issue of transfers of real property, many principles outlined in the opinion are applicable here. Several interesting points are raised. We would like to call your attention to the following: 1) ownership of an asset is controlled by how it is titled, and the concept of marital property does not apply unless and until a divorce is filed; and 2) provided additional confirmation that a spouse should be considered a creditor under the Uniform Fraudulent Transfer Act ("UFTA") which was in effect at the time the case was tried rather than the UVTA.

With All That Being Said

After looking at everything some factors, each case stands on its own facts. Most instances, such issues as (1) the timing of the transfer; (2) relationship of the parties at the time of the transfer; (3) whether the consideration transferor received was fair market value; and (4) did the transferor hide the proceeds of the transfer will weigh heavily into the determination. In light of the flexibility that the courts have relative to determinations of O.C.G.A. § 18-2-74(b), the end result will be based on the facts of your case.

*******Practical considerations**********

State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

STATE BAR SERIES

Who's Afraid Of Virginia Woolf (1966) Evolving Into A Tech Savvy Law Firm

Presented By:

T.C. Whittaker II
PwC New Ventures
Atlanta, GA

You can't manage what you don't measure

3 'need to haves' to manage your law firm

pwc

3 'need to haves' to manage your law firm

1 **Need to start with the end.**
Know what you should measure.

2 **Need to have data.**
Determine how to get the data.

3 **Need to connect the dots.**
Correctly interpret the data.

1. Need to start with the end.

1

Attorney workload & utilization

- How many hours are your lawyers working?
- How much of that time was spent on billable hours?
- When should you hire?

30% Is the average amount of time lawyers spend on billable hours

49% of firms failed to meet their annual targets for billable hours in 2017

3rd "Spending too much time on administrative tasks and not enough practicing law" is the third most significant challenge lawyers face

Sources:
Clio's 2018 Legal Trends Report
Altman Weil's most recent Law Firms in Transition survey
Survey by Thomson Reuters

1. Need to start with the end.

2

Discounting

- How much are you discounting?
- How does that affect firm profitability?
- Ultimately, how does discounting impact cash collections?

36% of firms always or often discount their fees for clients

71% discount due to empathy for the client

Source: Altman Weil's most recent Law Firms in Transition survey

1. Need to start with the end.

3

Fees Collected vs. Fees Generated

- Am I actually collecting on what I bill out?
- When you invoice the same day the job is completed (as opposed to waiting two-plus weeks for your billing cycle) you are almost 1.5x more likely to get paid.

84% of all invoices are paid

63% of invoices are paid on time (within 30 days)

18% If you haven't been paid within 90 days, only 18% of those invoices get paid

Sources:
Forbes.com Small Business Invoicing
Due.com Guide to Invoicing

1. Need to start with the end.

4

Matter Velocity

- Net matters for your firm over a time period (current + new – closed)
- Fees invoiced for every active matter
- Matter velocity is telling you the health of your firm – if it's growing or shrinking.
- Look at quantity and dollars TOGETHER, and over a period of time.

1. Need to start with the end.

5

Average $ case value

- Total Fees/Total Matters and looking at this over a period of time
- Am I working on the most valuable things? Where should I focus my dollars/resources?
- Of the different practice types, matters, customers, which ones are most profitable for my firm? Am I spending most of my time on profitable areas?
- You may have a goal on more profitable customers, but where do you start?

25% Of lawyers say they are highly satisfied with their goals

23% Are confident they can measure their success in working toward their goals

43% Of law firms agree that improving data insights and reporting is an important priority

2. Need to have data.

- Know what inputs go into your KPIs
- Once you know what data you need – go and find the data!
- What systems do I need to put in place?
- What do I need to review on a regular basis?

3. Need to connect the dots.

Utilization

How do I know what my people are working on? When should I hire? What level should I hire at? Can I shift work between my teams?

Discounting

Is my firm giving discounts? Or is the response, "I am pretty sure that we do give discounts but have no real insight into how this looks across my firm..."

Collections

How much am I actually collecting versus what I billed and what I worked on?

One of the most important KPIs to any law firm. At the end of the day, it all comes back to cash and this KPI tells you how you are doing where it matters.

Matters

How is the health of my firm? Are we growing or shrinking? Are we expanding (not just in total amount of matters but in $$ as well). Will we be able to handle the additional workload (hiring needs, etc.)?

Spend

Where should I be spending my money and time? Where will I see the most ROI? What practice type? What case or matter type? Which attorney(s)?

Business intelligence to the rescue

Help improve decision making by transforming data into insights

Insights = Informed decisions

- Identify new business opportunities
- Increase operational efficiency
- Cut costs

Informed decisions = Improving firm's performance and profitability

Let the business intelligence tool do the work for you!

- Broad and unbiased view on spending
- Holistic view of your operations (i.e. is my firm growing)
- Real-time visibility

State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

STATE BAR SERIES

12 Angry Men (1958)
Bar Necessities: Tips For Handling Client Complaints, Lawsuits And Other Indignities

Presented By:

Megan E. Zavieh
Professional Liability Section

BAR NECESSITIES: TIPS FOR HANDLING CLIENT COMPLAINTS, LAWSUITS AND OTHER INDIGNITIES

MAY 24, 2019

PRESENTED BY:
Zavieh Law
Megan Zavieh
Ethics & State Bar Defense Attorney

Zaviehlaw

MEGAN ZAVIEH

Megan Zavieh focuses exclusively on attorney ethics, representing attorneys facing State Bar disciplinary action and providing tools for lawyers to defend themselves through ethics investigations and prosecutions. She also provides resources to practicing lawyers to structure their firms to minimize their ethics exposure. She writes about ethics at CaliforniaStateBarDefense.com, Lawyerist.com and AttorneyatWork.com.

Megan is a mother of four, an avid Spartan racer, and a distance runner. She earned her JD from Boalt Hall of the University of California, graduating Order of the Coif. She is admitted to the United States Supreme Court, and the state courts and several Federal district courts of California, New York, New Jersey and Georgia.

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"LAWYERS AREN'T INFALLIBLE"
12 ANGRY MEN

HOW CAN RELATIONSHIPS GO WRONG?

- **Angry client**

HOW CAN RELATIONSHIPS GO WRONG?

- Angry client
- **Bar complaint**

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HOW CAN RELATIONSHIPS GO WRONG?

- Angry client
- Bar complaint
- **Malpractice action**

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HOW CAN RELATIONSHIPS GO WRONG?

- Angry client
- Bar complaint
- Malpractice action
- **Court sanctions**

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WHY DID I RECEIVE A LETTER OF INVESTIGATION?

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Some Precipitating Event has Occurred:

- Complaint submitted to the Bar by your client, opposing party, opposing counsel, or other interested party, e.g., an estate beneficiary
- A judge or arbitrator before whom you have appeared believes you have committed an offense

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Some Precipitating Event has Occurred:

- Self-reporting of rule violations, criminal charges or convictions, judicial sanctions, discipline in other jurisdiction
- Trust account violation reported by bank

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COMPLAINT

- Most common reason we think of for the Bar to investigate is a complaint from a client

REFERRED BY COURT

- Courts can also refer matters to the State Bar

REFERRED BY COURT

- Conduct in a case or in courtroom
- Conviction of attorney

Fee arbitrator can also refer matter where attorney does not pay arbitration award

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TRUST ACCOUNT VIOLATION

- Bank that holds IOLTA account will report to State Bar when there is an overdraft or NSF check

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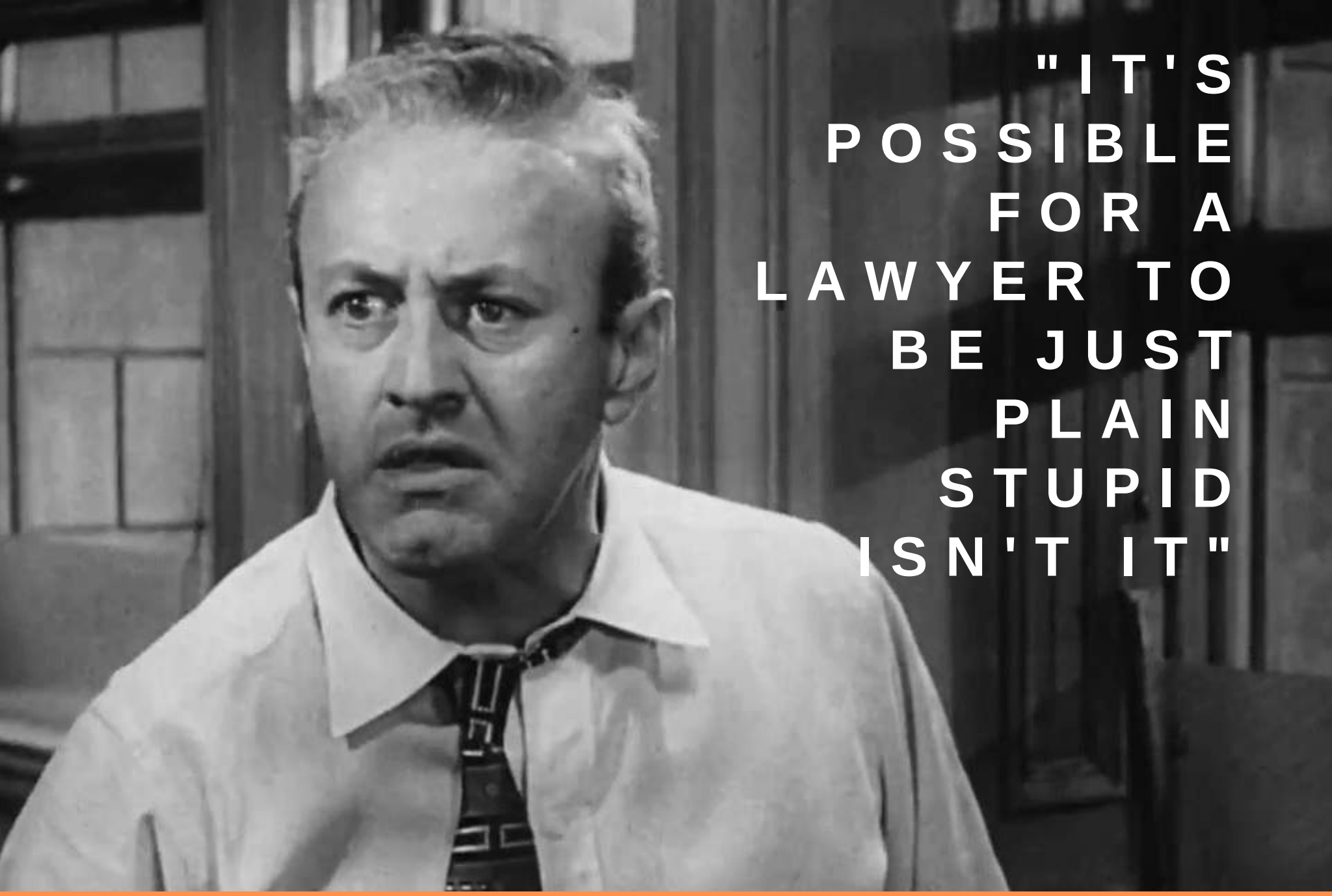

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DO NOT IGNORE THE STATE BAR

- Underlying investigation requires response or it will not get resolved in your favor
- Typical depressed or substance dependent attorney (1) does not open the letter or (2) opens but ignores the letter

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WHAT TO DO

- Open the letter
- Read the letter

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WHAT TO DO

- Open the letter
- Read the letter
- **Calendar the deadline**

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CALENDAR THE DEADLINE

- Do **not** let the deadline pass without contact with the Bar

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WHAT TO DO

- Open the letter
- Read the letter
- Calendar the deadline
- **Consult counsel**

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"I'D ASK ANOTHER LAWYER"

CONSULTING COUNSEL: FINDING HELP

Where to find counsel:

- Association of Professional Responsibility Lawyers (APRL)
- Referral from other attorneys - we all know someone who faced discipline

CONSULTING COUNSEL: FINDING HELP

Where **NOT** to find counsel:

- Lawyer friends who do not do discipline work

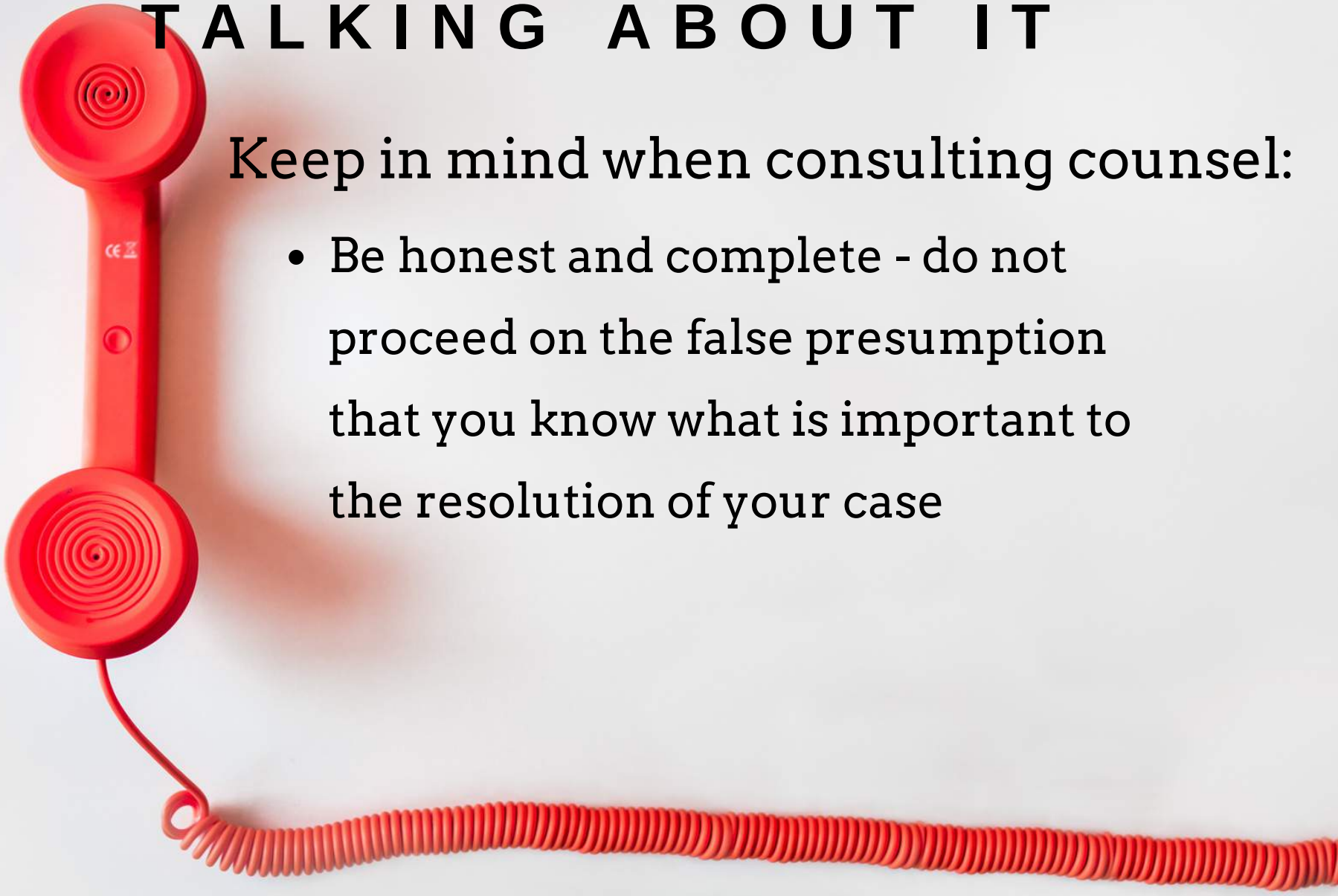
CONSULTING COUNSEL: TALKING ABOUT IT

Keep in mind when consulting counsel:

Extent of your obligations to client:

- Client as complaining witness waives privilege to a certain extent
- Non-client as complaining witness = no waiver of privilege by your client
- Discuss duties to client with counsel

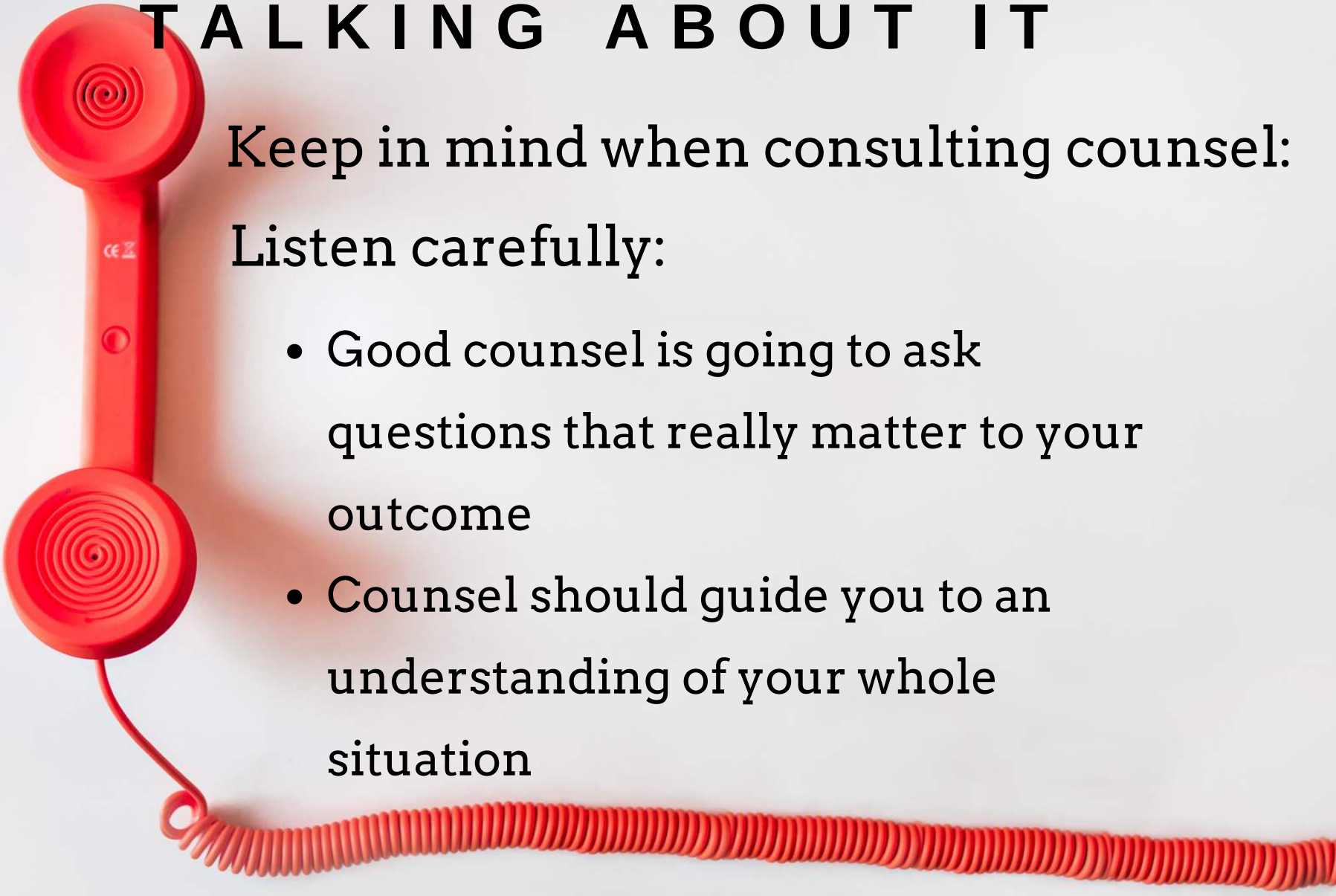
CONSULTING COUNSEL: TALKING ABOUT IT



Keep in mind when consulting counsel:

- Be honest and complete - do not proceed on the false presumption that you know what is important to the resolution of your case

CONSULTING COUNSEL: TALKING ABOUT IT

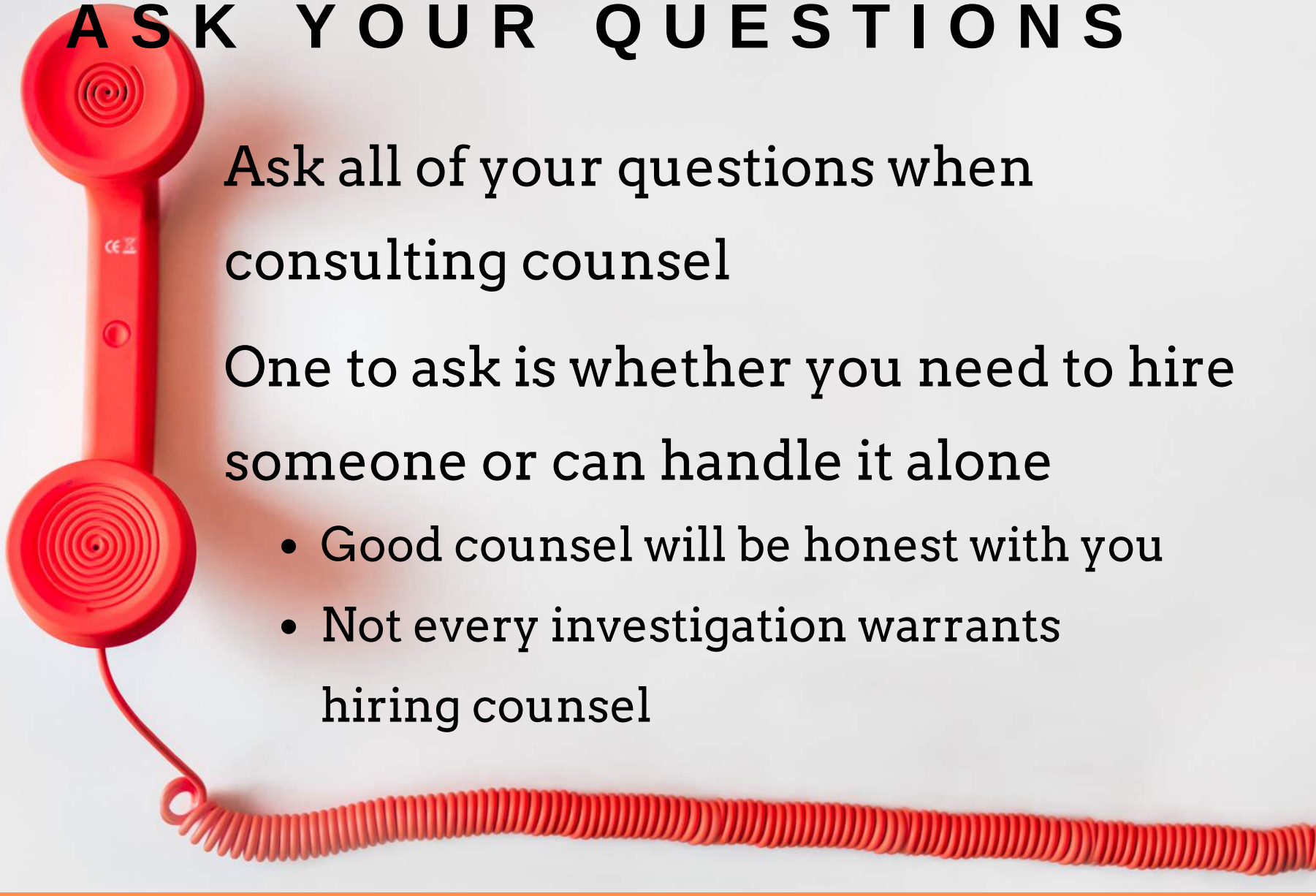


Keep in mind when consulting counsel:

Listen carefully:

- Good counsel is going to ask questions that really matter to your outcome
- Counsel should guide you to an understanding of your whole situation

CONSULTING COUNSEL: ASK YOUR QUESTIONS



Ask all of your questions when consulting counsel

One to ask is whether you need to hire someone or can handle it alone

- Good counsel will be honest with you
- Not every investigation warrants hiring counsel

WHAT TO DO

- Consult counsel
- **Evaluate entirety of situation with your counsel**

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"THINK OF ALL
THE FACTS, EVEN
THE SMALL ONES"

EVALUATING YOUR SITUATION

Certain factors can complicate your situation:

- Admission in multiple jurisdictions/agencies
- Prior discipline history (even minor discipline)
- Multiple complaints pending together
- Significance of actual harm to client

EVALUATING YOUR SITUATION

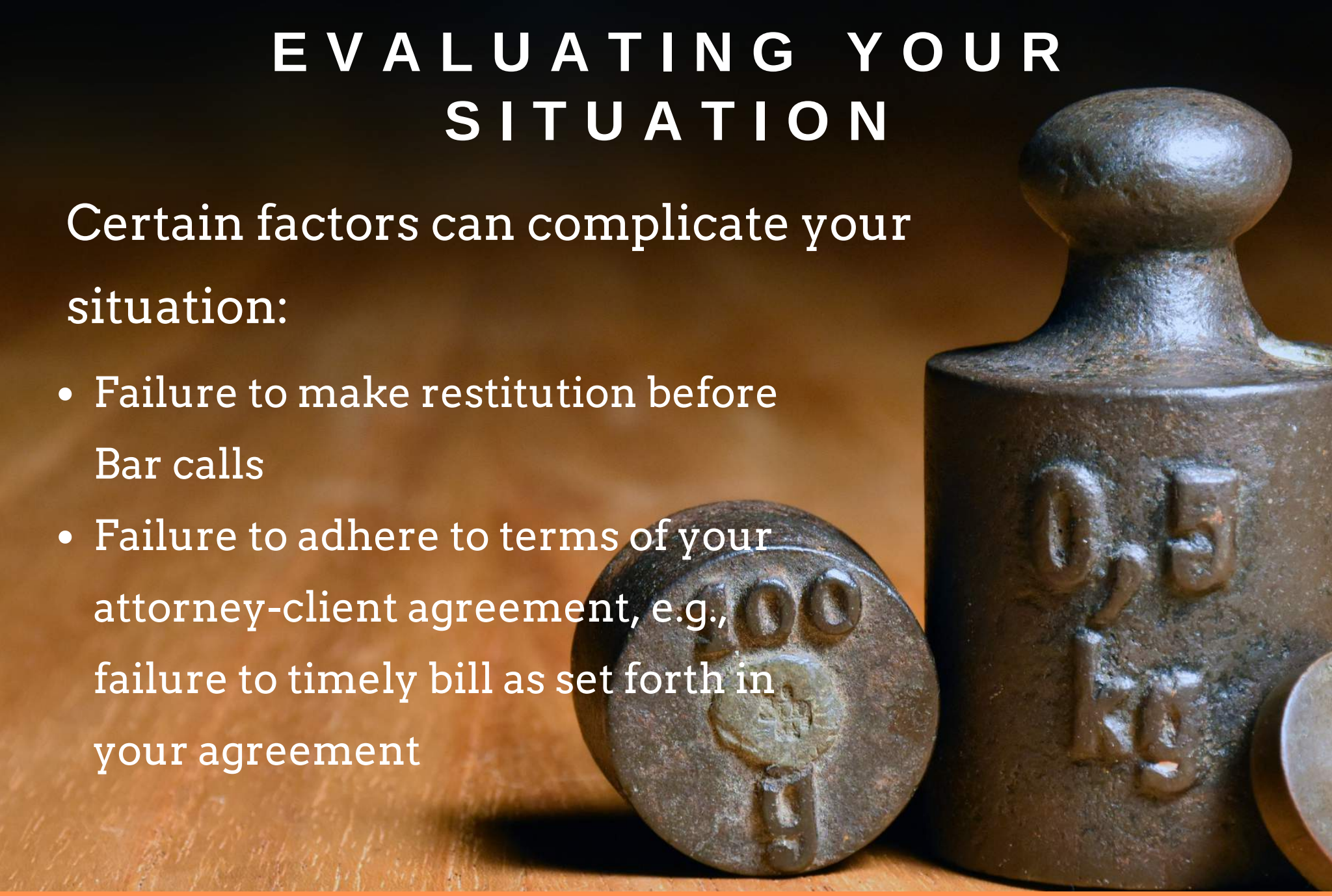
Certain factors can complicate your situation:

- Mental or physical infirmities
- Substance abuse or dependency
- Inability to account for client money
- Comingling funds
- Taking unearned fees from trust account

EVALUATING YOUR SITUATION

Certain factors can complicate your situation:

- Failure to make restitution before Bar calls
- Failure to adhere to terms of your attorney-client agreement, e.g., failure to timely bill as set forth in your agreement



WHAT TO DO

- Consult counsel
- Evaluate entirety of situation with your counsel
- **Choose counsel, self-representation, or limited scope representation**

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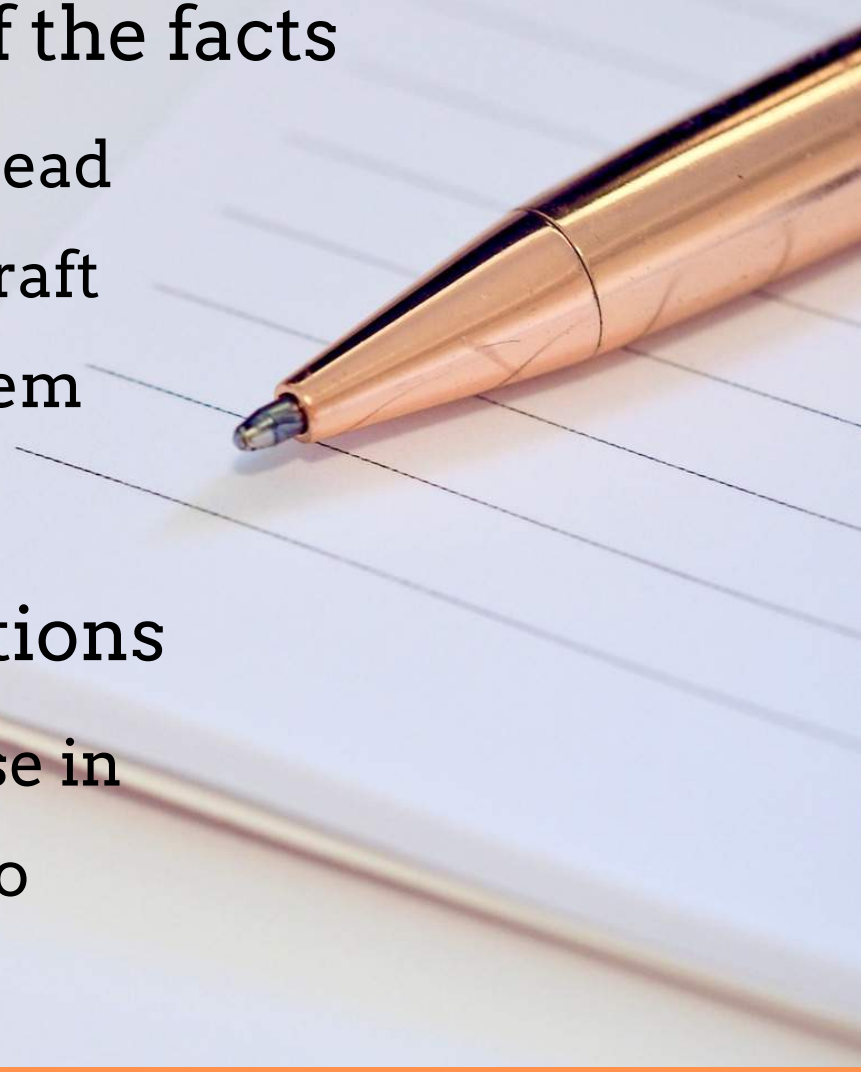
WHAT TO DO

- Consult counsel
- Evaluate entirety of situation with your counsel
- Choose counsel, self-representation, or limited scope representation
- **Draft a narrative response**

DRAFTING YOUR NARRATIVE



Provide **complete** statement of the facts

- Have an uniformed third party read it and ask every question your draft raises - then revise to answer them
- Keep privilege issues in mind

Answer all the State Bar's questions

- If a question does not make sense in light of the facts, explain that - do not ignore the question

DRAFTING YOUR NARRATIVE

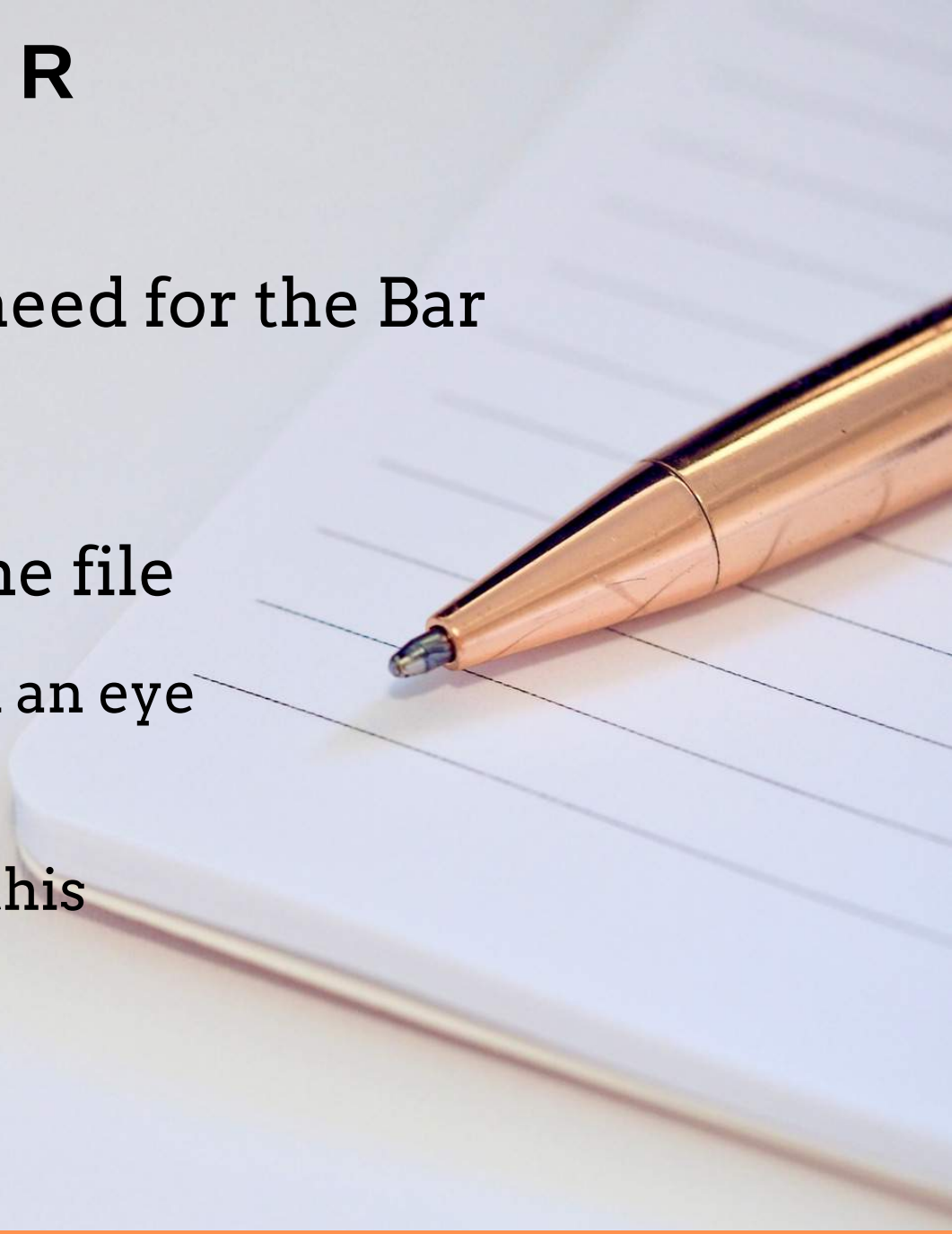
- Do not insult the complaining witness
- Be extraordinarily civil and polite
- Do not be defensive
- Explain your side of the situation
- Offer to make yourself available for follow up

DRAFTING YOUR NARRATIVE

Your goal is to avoid the need for the Bar to follow up

You want them to close the file

- Review your response with an eye on this goal
- Ask others to review it for this purpose



DRAFTING YOUR NARRATIVE

Points to remember:

- This is not civil litigation nor criminal proceeding with attendant rules and processes
- You will not find sample responses due to confidentiality

WHAT TO DO

- Consult counsel
- Evaluate entirety of situation with your counsel
- Choose counsel, self-representation, or limited scope representation
- Draft a narrative response
- **Compile the file**

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COMPILING THE FILE

Provide every document requested by the State Bar unless:

- To do so would violate duty to client (including privilege)
- Document does not exist (explain this to Bar)
- Extraordinary voluminous and irrelevant (explain this to Bar and offer to provide anyway)

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COMPILING THE FILE

Combatting disorganiztion:

- Many attorneys facing Bar complaints are disorganized (creating issues leading to complaint)
- Get help early on to gather the documents
- Remember to pull paper and electronic files

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COMPILING THE FILE

Make the production easy to use

- Treat the Bar like a law clerk you want to impress
- Bates number, organize, label, explain documents

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WHAT TO DO

- Consult counsel
- Evaluate entirety of situation with your counsel
- Choose counsel, self-representation, or limited scope representation
- Draft a narrative response
- Compile the file
- **Get it to the Bar on time**

MALPRACTICE ACTION

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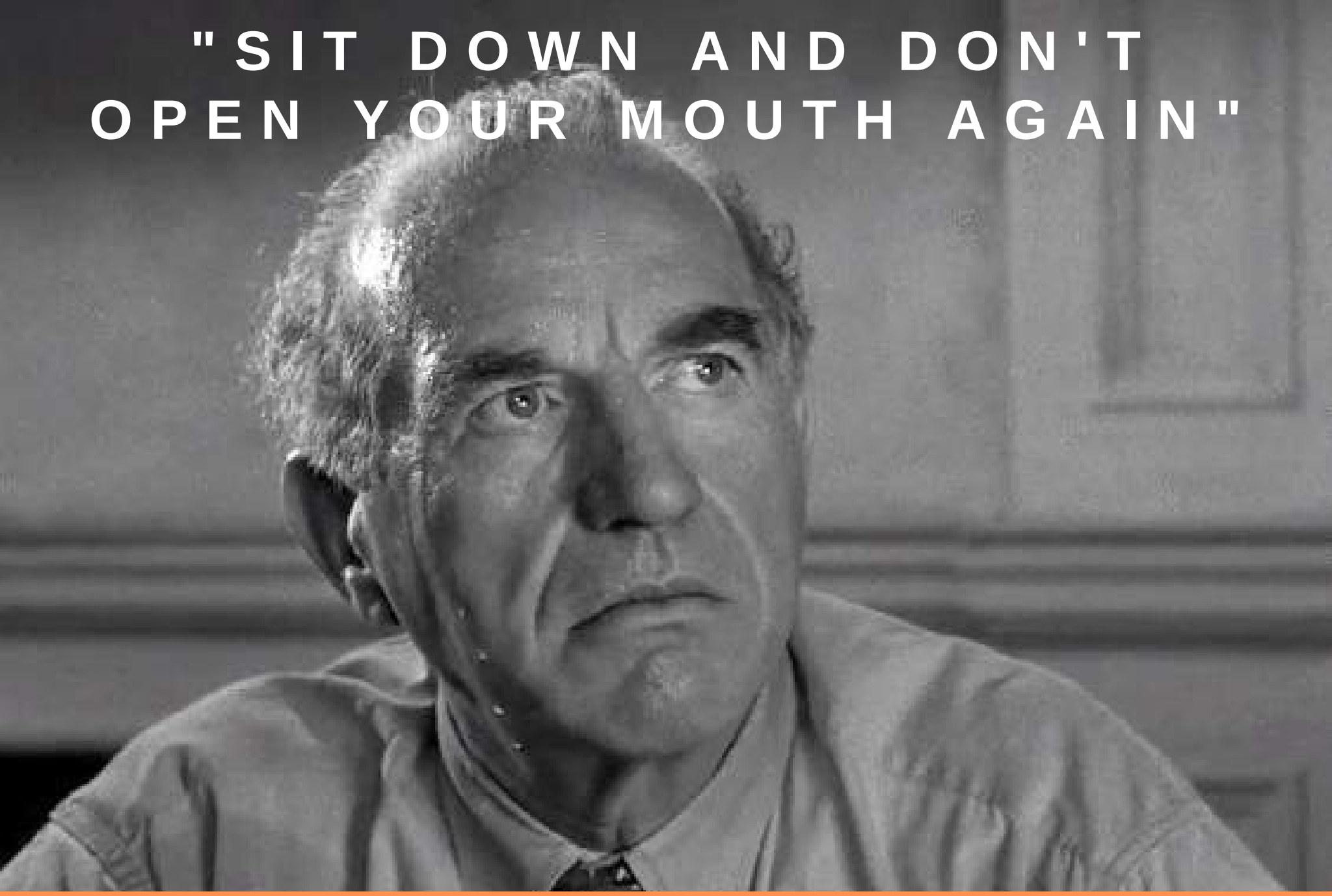
"SIT DOWN AND DON'T
OPEN YOUR MOUTH AGAIN"

REPORT TO INSURANCE

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COURT SANCTIONS

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PLACATING ANGRY CLIENTS

- Address them where they are
- Get help from colleagues
- Try to rectify situation
- Do not ask not to file Bar complaint

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AVOID GETTING HERE NEXT TIME

- Identify what went wrong
- Fix it!
- Stay organized
- Implement office procedures
- Have counsel on standby

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Selected Articles on Dealing with Broken Relationships and Bar Complaints

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WHY AND HOW TO RECTIFY BROKEN CLIENT RELATIONSHIPS

March 29, 2018 Megan Zavieh California State Bar Defense, Resources One comment

At some point, every lawyer will have a disgruntled client. Maybe their expectations could never be met. Maybe they simply didn't understand the process or what could reasonably be anticipated. Maybe the lawyer failed to communicate or even to perform. Whatever the reason, eventually, a client is going to be upset.

The question becomes, what is the lawyer to do about it?

The answer is simple. Fix it.

Why Fix It?

Lawyers are humans. We can't help but get defensive, angry, and want to argue back to an upset client. After all, if their expectations were never reasonable, how is it the lawyer's fault that they weren't met?

The “why” is quite simple. The cost of not fixing it is potentially huge, and the relative cost of fixing it will always be small in comparison.

The cost may be your pride. You may have to simply suck it up and apologize when you don’t think you should have to.

The cost may be financial. You may need to refund earned fees that you know you should never have to return. But it might be the cost of making it right.

The potential problems a disgruntled client can cause can be huge. They can complain to the State Bar, potentially costing you tens of thousands of dollars in defense costs. They may sue you for malpractice, also costing money (even if they lose). The diversion of resources and stress involved in defending yourself are tremendous.

How?

Find out what your client needs from you. It might not be what you think. They may want their money back, or an apology. Maybe they want something intangible that you can provide. Maybe an additional service would make it right, or pro bono representation of a friend. You won’t know until you ask.

Then do what it takes to make it right. This isn’t a settlement agreement type of deal. This is human relationships — treat your client as a human who needs something from you, and smooth things over so that the relationship can end in peace.

ON BALANCE

Attorney Misconduct — Time to Tattle?

By Megan Zavieh

Reporting another lawyer's misconduct can bring on a mix of emotions. If the other lawyer is your adversary and you've been battling in the gutter, a bar complaint may be exactly what you wish on this person.

Lawyers know a lot of lawyers, though, and we get a lot of insight into each other's lives through our professional and personal interactions. There are likely many lawyers you'd rather not report to the bar, knowing that a bar complaint is a ticket to havoc being wreaked on a lawyer's life.

So *are* you obligated to report another lawyer if you know about an instance of attorney misconduct? To learn the answer, you'll need to check your state's rules. In many jurisdictions, the answer is yes, you *must* report misconduct about which you *know*. However, whether failure to report is itself an ethics violation varies from state to state. Moreover, in some jurisdictions reporting is only encouraged but not required.

Plus, what exactly does it mean to "know" about the attorney's misconduct? You may have a suspicion, or you might have actually witnessed the misconduct. If you think another lawyer has committed unethical conduct, check your state's rules for the details of your obligations to make sure you don't compound the misconduct with a violation of your own.

Do You Have to Report? The Model Rule and Variations

ABA Model Rule 8.3(a) states:

> "A lawyer who *knows* that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, *shall* inform the appropriate professional authority." (Emphasis added.)

Other parts of the rule have similar language about reporting judges committing misconduct and provide safeguards for attorney-client privileged information.

As of 2009, all states except California had adopted the Model Rules in whole or in part. That does not mean, however, that those 49 have exactly Model Rule 8.3 on their books. Each state has the ability to modify the Model Rules as it sees fit when adopting them, and many have.

Texas, for example, modified the wording of the Model Rule. Its Rule 8.03(a) states that:

> "A lawyer *having knowledge* that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority." (Emphasis added.)

It then has a completely original (as in, not in the Model Rule) Section (c), which allows the reporting attorney who "knows" or "suspects" that the violating attorney's actions are a result of chemical dependency, alcohol, drugs or mental illness to report the attorney to "an approved peer assistance program" instead of the disciplinary authority. The rule then imposes the reporting obligation on the assistance program.

In another variation, Georgia's version of Rule 8.3 took out the mandatory "shall" and inserted the permissive "should," thus encouraging but not requiring reporting.

Then there's California, which has not adopted the Model Rules and has affirmatively chosen not to include a reporting requirement. In that state, a lawyer may not assist a violation (Rule 1-120), nor may he enter into an agreement under which he agrees not to report a violation of the rules (Rule 1-500) or under which he agrees to withdraw a bar complaint (Business & Professions Code 6090.5), but he is not obligated to report misconduct.

Can You Be Sanctioned for Not Reporting?

Sometimes, yes. The ABA Model Rule uses the mandatory language that a lawyer "shall" report violations. Failure to abide by the rule is sanctionable. In states that have adopted this mandatory language, failure to report misconduct is itself an ethics violation. It would be a terrible result to be disciplined for failure to report someone else's violation.

However, in some states, Georgia being one, it is not an affirmative violation to fail to report. In its Rule 8.3, Georgia explicitly states: "There is no disciplinary penalty for a violation of this Rule."

Georgia also makes an excellent point in its comments to the rule as to why reporting violations is a good idea. It says, "An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense."

May You Report Under Confidentiality Rules?

There is not much to prevent a lawyer from reporting misconduct to the authorities. The two biggest issues of which to be aware are unsurprising. First, an attorney may not violate his confidentiality obligations. Rules requiring reporting recognize this duty and provide an exception based on it, and even without an explicit exception attorneys are required to meet this duty first.

Second, the reporting attorney must ensure she is meeting the complaint standards for the state in which she is reporting. In California, for instance, it is a misdemeanor to file a false and malicious state bar complaint. (See California's Business & Professions Code 6043.5.)

As long as you meet these basic standards, reporting apparent misconduct is the safest route from an ethics perspective.

Proceed with Your Eyes Open

When faced with a question of whether to report, the best course of action is to carefully review your jurisdiction's rules, the standards applicable to filing a bar complaint, and the information you will have to reveal to file one. Ensure that you are meeting your mandatory obligations both to report (if applicable) *and* to protect confidential information. Then make your reporting decision accordingly.

Megan Zavieh *focuses her practice exclusively on attorney ethics, providing full and limited scope representation to attorneys facing state bar disciplinary action, and providing guidance to practicing attorneys on questions of legal ethics. She has been representing attorneys facing disciplinary action before the California State Bar since 2009 and is admitted to practice in California, Georgia, New York and New Jersey, as well as in Federal District Court and the U.S. Supreme Court. She blogs at California State Bar Defense and is a contributor at Lawyerist.com. Megan currently serves on the Executive Committee of the Solo and Small Firm Section of the State Bar of California.*

HOW TO PROPERLY RESPOND TO A CALIFORNIA STATE BAR COMPLAINT

January 22, 2019 Robin Bull California State Bar Defense Leave a comment

Being on the receiving end of a California State Bar complaint is angering, scary, and intimidating. Yet, as a lawyer, it's important that you know hot to properly respond. Failure to use a proper response can make defending the allegations made against you even more difficult. In this post, you're going to learn about how to properly respond if you receive a California State Bar complaint.

Before You Respond

Before you prepare your response, it's vital to read the entire ethics complaint filed against you. Think about how you'd act if this document were filed against one of your clients. You'd take the time to read the entire thing before you decided on a course of action.

As a lawyer, it is important that you recognize exactly what the California State Bar complaint alleges. The knee-jerk reaction is that the complaint must have been filed

by a client (or former client) who was upset by something you said, did, or the results of their matter. More often than not, that's not the cause.

So, again, first read the entire complaint.

Related: Why and How to Rectify a Broken Client Relationship

Next, contact your malpractice insurance provider. They should know about the ethics complaint. Look over your policy. Do you have coverage that will determine which attorney you hire if the matter becomes too much for you to handle on your own?

Get into an Objective State of Mind

As you prepare to respond to a California State Bar complaint, it's important that you're in an objective state of mind. This is, by far, the most difficult part of drafting your response. You must distance yourself from the emotions you're experiencing. You do not want to shoot from the hip and fire off an overly-aggressive, angry reply. That sort of response could very well be used against you. So, do whatever it is that you do that gets you focused and objective.

Related: How to Help Your Family Deal with Your Malpractice Suit [PODCAST]

Review the Rules Related to the Allegations Made Against You

Reviewing the rules related to the allegations will help you better understand what's happening. Then, you need to make sure you understand the entire context. The Playbook is a vital resource that can help you locate the rules related to the allegations as well as explain the context. It can also help you understand what you're facing all the way from the investigation process through the appeals process.

Talk with an Ethics Defense Lawyer Even If You Plan to Represent Yourself

At this stage of planning your response, you may be thinking about representing yourself. In many instances, that's totally fine. However, there are a lot of factors that you should consider before you decide to do that. The best way to do this is to talk with an ethics defense lawyer. Zavieh Law provides both partial and full scope

representation for lawyers fighting a California State Bar complaint. We'd be happy to talk with you about the important factors that should impact how you respond and whether you need a lawyer.

Draft Your Response

Always keep your response deadline in mind. This will help you plan your response. If necessary, ask for extra time. Keep the emotion out of your response. Only address what needs to be addressed. Zavieh Law can help you plan a proper response that gives you the best possible opportunity to defend against the allegations.

Related: Privilege Waiver: How Does It Affect a State Bar Complaint?

Here When You Need Us

If you're under investigation by the California State Bar, Zavieh Law is here to help. You can schedule your consultation online.

If you receive an ethics complaint from the California Bar and you're not sure where you should start, check out The State Bar Playbook. This is Megan's interactive and easy to use guide (and community!) that will help guide you through the process from receipt of the complaint all the way through the appeals process!

Responding to an Ethics Complaint: A How-To Guide

By Megan Zavieh on March 4th, 2013

Every year, ethics boards receive thousands of complaints. The California State Bar alone received over 16,000 ethics complaints in 2011, a number that represents about 7% of California's active lawyers. At some point in your legal career, one of those complaints could be against you.

Here's how to handle an ethics complaint, if you wind up the subject of one.

What you should not do

If a complaint is filed against you, there are several tempting but totally unhelpful responses to avoid.

Do absolutely nothing and hope it will go away

You will no doubt think the complaint is bogus. You will likely believe that the complaining witness has no case against you, and you expect the prosecutor to see that too. You think that, if you do nothing, the complaint will vanish and your life will go on as usual. So you bury it, possibly unopened, in a pile of junk mail and hope it will go away. Or maybe you just put it on your to-do list and never get around to it. Either way, the result will be the same.

Much as you would like for an ethics complaint to vanish, that is not going to happen. You may bury it on your desk, but the prosecutor's investigator will not bury it on hers. She reports to her superiors on her cases, and yours will not be forgotten.

Instead, the investigator will look at the complaint, the documents the complaining witness provided, and any other documents she can obtain. She may subpoena your trust account records, pull court filings, interview witnesses, and build a case against you, all while the prosecution's notice lies buried in your paper pile.

When the prosecuting attorney gets your file on his desk in just a few short months, he will see you have done nothing to cooperate in the investigation. Since you have an obligation to cooperate in ethical investigations, he will add an additional charge against you for failure to cooperate. Since this charge is independent of the original complaint brought against you, you can be prosecuted for failing to cooperate even if you win on the underlying ethics complaint.

Shoot from the hip and respond angrily and defensively

You read the complaint and get very upset. Obviously, your former client has completely misunderstood the legal representation and the relationship between you. He also lied about what you did. You sit down and bang out an angry response in which you not only defend yourself but also denigrate your former client as a ne'er do well who never appreciated how hard you worked for him and whose own conduct is to blame for the poor results achieved in his matter. You send it off without bothering to re-read it or to get someone else to look it over.

When the prosecution adds this letter to its arsenal, your angry response will be seen for exactly what it is: an emotional and defensive tirade. It will be treated accordingly.

Dump your file on the investigator and hope it overwhelms her

Notices from the prosecutor's investigator typically include a request for "all correspondence" between you and your former client, and "notes, memoranda and/or other documents" pertaining to the case. Basically, your entire client file could be considered responsive.

So, you copy it all (in its current, possibly disorganized state) and send it off with no page numbers, no index, no useful guide to the confusion. You envision the investigator receiving this full banker's box (or two or three) and either (a) being completely overwhelmed to the point of closing your file, or

(b) becoming convinced that since you produced such a volume of paper, you must have performed competently.

Of course, neither of those reactions is at all likely. Prosecutors do not close files simply because they do not want to wade through the paper. The investigator will be irritated by your response, and that could impact the inquiry unfavorably, but she is not going to close your file. It is her job to go through your response in detail, and that is what she will do. Moreover, the person to whom you send those boxes has no authority to close the inquiry. She investigates; she does not rule.

As to paper equaling competency, we all know that just is not true.

Plus, in your haste to copy and send, you may not have taken attorney-client privilege into account, and you may have now just committed another violation and proven that you are not competent.

So if you shouldn't bury the complaint hoping it will vanish, relegate it to the bottom of your to do list, fire off an angry and defensive response, or send the investigator your entire file, what exactly should you do?

What you should do

Consider whether you want to hire counsel

You may want to handle your ethics complaint yourself, but is a good idea to have someone do it for you. Consider your resources, including the time it will take you and the money it will cost you to hire someone to do it for you, and think about whether having representation is right for you.

You have several options when it comes to hiring counsel for an ethics complaint. You can hire an ethics defense lawyer to do all of the work necessary to present your defense, or you can hire a dedicated defense lawyer on a limited-scope basis. A limited scope attorney will assist you to the extent you request, while you take a very active role in your own defense. You can draft your own responses for your lawyer to review, or you can work in tandem with the attorney to craft your defense.

You can also hire a lawyer who does not specialize in ethics defense to work on your case. This is not the best option for reasons that should be obvious, though it is sometimes the choice of attorneys who do not have the financial means to hire dedicated ethics defense counsel and have a friend or colleague willing to take on the matter *pro bono*.

Deal with the emotional fallout

Absent dead nerves and a heart of steel, reading the letter informing you of an ethics complaint will make you defensive beyond belief, angry to the core, and probably unable to concentrate or sleep. You must address the emotional aspects of the complaint head-on. Distance yourself emotionally, accept that it is happening to you, meditate or do yoga or practice deep breathing — whatever it is you need to do to make yourself right with it. You have just been put in the shoes of every client who has ever been sued, and it is your turn to take the same advice you usually give to your clients.

Read the complaint letter in its entirety

If a client was sued and sent you the complaint, the first thing you would do is read it, probably several times. Doing this with an ethics complaint where you are the target can hurt, and it will make you angry, but you have to know what you're dealing with. Plus, the letter's contents may actually surprise you. The list of gripes you heard from your client may not be the same things you see in the ethics complaint.

If you have malpractice insurance, notify your carrier

Perhaps you already did this if you could see that the complaining witness was heading toward a complaint or malpractice suit. If not, do it now. Read your policy, too, as some carriers have specific coverage for ethics complaints which can make the decision to hire counsel a simple one.

Read the rules

Get familiar with the process. In some states, the discipline process is handled by a specialized court. In others, it is handled by the state courts. Find out how it is done in your state, and get the rules (most are online). Yes, it is litigation, but it is a special world unto its own. Do not assume that the rules you know from traditional litigation will be the same.

Plan your response

You have a deadline, so start from there and work backwards. If you can get extra time, get it. Consider whether you are hiring counsel or not, and factor in extra time for your portion of the work (either drafting your response in its entirety or assisting your lawyer in doing so). The emotional punch will almost certainly increase the time you need to complete your part of the work. True, you might be able to draft a solid answer to a complaint for a client in a single block of hours, but you will definitely not be able to work on your own response that way.

Draft your response or meet with your attorney to draft it

You know what a good brief looks like. Make your response to the complaint letter look like a good brief — detailed, well-written, and complete. The prosecutor's investigation letter may not cite rules that they allege you violated, but your response should cite rules with which you know you complied. You can probably see from reading the letter what types of charges they are contemplating. For example, you may see phrases like "failure to act competently," "failure to maintain communication with your client," "failure to act in a timely manner." Cite your state's rules and explain how you fulfilled your obligations. If you have affirmative defenses, e.g., you withdrew from representation by following proper procedures, explain what you did and how you complied with the rules. Make your response as complete as possible so that the prosecutor has to do no further research to find in your favor.

(No, the prosecutor is not likely to stop researching and investigating, but give them enough information so that when they do dig in, all they find are the same authorities you've already cited, and they come to the same conclusions you've stated.)

Accept that this may go on for months, and you cannot allow it to take over your life

You must still continue to meet your obligations to your other clients and to live your daily life. Consider it an unwelcome lesson in being a litigation party. It will make you relate better to your clients

Consider the effects on your overall practice

There are many questions to ask yourself about the impact of the complaint on your existing practice. Are the potential charges of a type you will need to disclose to your current clients? Will you need to stop taking on new clients? Can you effectively serve your clients while this complaint is pending?

It may be too early to tell, since the prosecutor has not presented draft charges at this point, but keep the future in mind. If charges are filed, they will become public at some point. They may even be linked to your online profile at the state bar's website. If the charges say you failed to return phone calls, that is one thing, but if they say you stole money from your client, you need to consider the ramifications. Plan now for the eventuality. If you are in a partnership, talk to your partners about taking over your cases if it becomes necessary. If you are solo, reach out to friends in the same practice area who might be able to step in should they be needed. Our tendency is to keep everyone from knowing about an ethics complaint, but the fact is that you must plan. Do not compound your troubles by prejudicing additional clients with your handling of the case.

If you might have to refund fees, plan now

Set money aside to pay them, no matter how you assess the merits of the complaint. If nothing else, setting aside the money to pay back disputed fees puts you in a better position at the time of settlement talks. If it turns out you don't have to refund fees, you can celebrate with the funds.

Honestly assess your practice

Consider whether the same type of complaint might be on the horizon with any other clients, and address them now. Put any potentially-disgruntled clients at the top of your list and tend to them. Put systems in place to correct any shortcomings in your office — make sure phone calls get returned, bills get out on time, deadlines are met, and sources of irritation for clients and opposing counsel are eliminated. I will address more ways to prevent ethics complaint in another post.

As with all litigation, there are no guarantees in the disciplinary process. However, a well-planned response has a much better chance of being successful than no response, or an ill-advised one. Be careful and thoughtful, and take steps to ensure that this is your *only* ethics complaint.

State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

STATE BAR SERIES

The Women (1939)
Make New Friends, But Keep The Old: Professionalism And Social Media

Presented By:

Erin H. Gerstenzang
EHG Law Firm
Atlanta, GA

Erin H. Gerstenzang May 2019

Introduction

The digital age has introduced seemingly limitless efficiencies and opportunities for small law practices. In the realm of advertising, attorneys can now reach out to and directly communicate with potential clients through the internet in ways the legal community would never have dreamed possible even just 10 years ago.

Accompanying these incredible advancements are challenges that lawyers similarly could not have anticipated before now. Ever-multiplying social platforms have eroded barriers between personal and professional content.

Politicians campaign from their private Facebook accounts, appellate judges share personal information on Twitter, and law firms have Instagram accounts.

Some lawyers are discovering countless benefits from blending their personal and professional feeds, while others fail to strike the right note. The rules of professionalism and personal discourse continue to evolve at a break-neck speed making it challenging to keep up, especially when it comes to online conduct.

When Done Right Social Media is an Invaluable Tool

When done right, social media is an invaluable tool for attorneys who are looking to grow their influence, reputation and client base.

In 2014, Daniel Wallach (@wallachlegal) was a relatively unknown small law attorney in Florida with 200 Twitter followers. One day, he started talking about 'Deflategate' online. As you may recall, the Deflategate scandal plagued the NFL and the New England Patriots, who were discovered deflating the game balls to gain a competitive advantage. Because Daniel did a lot of appellate work, he was very comfortable picking apart and explaining cumbersome legal filings about the case to the public.

In less than a year he went from 200 Twitter followers to 14,000 followers and became a regular commentator on news and sports shows. He is now known

as a national expert in sports law. When asked about his popularity that soared seemingly overnight, he remarked:

> I've gone from the occasional interview or the occasional quote to almost a daily basis of seeing my name in newspapers across the country, and that was unforeseeable a year ago.

Andrea Evans, Patent attorney @EvansIPLaw (fun fact - Andrea is a Georgia Tech and Spelman Grad 🤩) has a similar story of Twitter-fame which she has brilliantly harnessed to build a national reputation. After spending more than a decade at the US Patent and Trade Office, she opened up her solo practice. Like most lawyers starting their firm, she was worried about how clients would find her?

She did not expect the answer to be Twitter. Somewhat by accident, she started growing a following on Twitter in response to her posting about the patent implications of products being pitched on the show Shark Tank. Reporters spend a lot of time on Twitter, and it didn't take them very long to find her. Soon Andrea began fielding requests for regular TV appearances and comments about patent issues. Given her extensive experience and visibility on Twitter, her practice snowballed, and she became a patent law celebrity who now travels the country, making TV appearances and meeting with clients.

Not surprisingly, Andrea Evans is a big proponent of lawyers using social to build their business:

> How can you not benefit? You can be the best lawyer and graduate from the best law school, but if potential clients do not know that you exist, your practice will never grow or thrive. Social media is a free resource that can be used to expand and grow your brand which in turn will grow your practice! Clients like working with skilled attorneys they know, like and trust. Social media can be used to nurture and foster relationships.

Andrea Evans on How Social Media Can Nurture and Foster Relationships in the Legal Industry

Use Caution When Responding to Online Reviews

Online reviews, much like referrals, are social proof of the type of experience a client can expect to have with your law firm. Receiving an unfair negative review can have an inordinate impact on a law firm. While lawyers may be very comfortable responding to conflicts in a courtroom, generally speaking, they are wholly ill-equipped, emotionally, to respond to these, often vicious and unwarranted attacks online.

Betty Tsamis, an Illinois attorney, learned this lesson the hard way. She made national news when her client filed a bar complaint after Tsamis responded, somewhat emotionally, to her client's negative review on AVVO.

She initially contacted the client directly and asked him to remove the review. The client promised to take down the review if she refunded his fee. In hindsight, a $1,500.00 refund was probably the least expensive way she could have resolved the matter. Instead of exercising restraint and refunding the fee, she lashed out at him online, and in so doing, revealed the fact that he had beaten up a fellow female coworker.

> I dislike it very much when my clients lose, but I cannot invent positive facts for clients when they are not there. I feel badly for him, but his own actions in beating up a female co-worker are what caused the consequences he is now so upset about.

Tsamis had to hire an attorney to handle the complaint, alleging that she had violated Rule 1.6(a) governing the confidentiality of client information.

> **ABA Rule 1.6 Comment 5**
> Rule 1.6 applies not merely to matters communicated in confidence by the client but also to all information gained in the professional relationship, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

It took more than a year to resolve the Tsamis case with a public reprimand. The damage to her online reputation is immeasurable. Tsamis' case continues

to be discussed nationally among legal ethicists and bloggers, along with more traditional news channels. It is difficult to Google her name without being overwhelmed by the sheer volume of articles written about her online response to her client's review.

One of the important lessons to be learned from Tsamis' experience is that responding to these reviews without careful consideration often only escalates an already precarious situation. In most instances, the attorney would be far better served by a different, more measured approach. In Tsamis' case, she would have likely had much more peace of mind and ultimately saved a lot of money in attorney's fees if she had simply refunded the $1,500.00 fee as the client had initially requested.

That is sometimes easier said than done. Lawyers abhor the notion of refunding fees - both for emotional and financial reasons. However, in many cases, the cost of returning even a hard-earned fee is much less taxing than dealing with the aftermath of a negative online review.

As demonstrated by the Tsamis case, responding to negative online reviews can be very dangerous for attorney practitioners – primarily because nearly any response will implicate the rules governing client confidentiality. In this respect, the rules seem to put attorneys at a disadvantage since they are prohibited from responding to, what are at times unfounded criticism.

Erin H. Gerstenzang May 2019

Do Not Solicit Fake Reviews

The rules governing attorney conduct prohibit reviews by people who falsely claim to have been represented by your firm.

> "Astroturfing" - the act of trying to boost one's image online with fake comments, paid-for reviews, made-up claims and testimonials.

There are at least two rules that speak to this type of practice which govern false statements made by or on behalf of attorneys.

ABA Rule 7.1 - Communications Concerning a Lawyer's Services
A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

ABA Rule 8.4(c) - Misconduct
It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

There are other regulatory agencies that are paying attention to fake online reviews. In particular, the New York Attorney General has, and continues to prosecute businesses who engage in these types of advertising practices.

Bias on Social Media

There are plenty of lawyers making headlines these days for sharing hateful, bigoted and biased content. For example, one lawyer posted on his FaceBook page a "photo of three beer cans with white hoods surrounding a brown beer bottle. The bottle was hanging by the neck from a refrigerator rack. The caption read Ku Klux Coors." ABA Journal, Jan. 2019.

> Norm Pattis told the Connecticut Post he posted the photo because he heard that Facebook censored it from a friend's page. He reposted it to see whether it was true, and Facebook took it down.

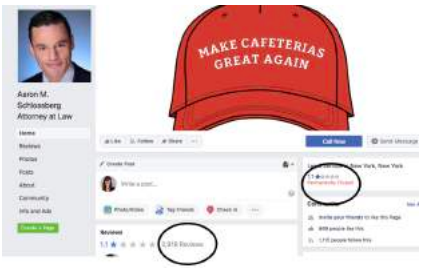
Id.

Benjamin Pavone exercised similar judgment in calling a female judge a "succubus" in a filing which was reported to the California Bar by the Fourth District Court of Appeal for "manifesting gender bias."

> The notice of appeal signed by Mr. Pavone on behalf of plaintiff referred to the ruling of the female judicial officer as "succubustic." A succubus is defined as a demon assuming female form which has sexual intercourse with men in their sleep. We publish this portion of the opinion to make the point that gender bias by an attorney appearing before us will not be tolerated, period.

Fourth Appellate District, Feb. 28, 2019

And of course, there is Aaron Schlossberg, who was captured on film in the middle of a bigoted rant upon hearing employees of a restaurant speak Spanish.



> Schlossberg was caught on a video last week complaining that employees at a midtown Manhattan restaurant were speaking Spanish to customers, even though, "It's America." He also threatened to call U.S. Immigration and Customs Enforcement "to have each one of them kicked out of my country."
>
> "If they have the balls to come here and live off my money—I pay for their welfare. I pay for their ability to be here. The least they can do—the least they can do—is speak English," he said in the video.

ABA Journal, May 2018

It is not just private attorneys who find themselves in trouble. In New Orleans, Sal Perricone, a former prosecutor, was disbarred for online comments made using pseudonyms. He posted 100 to 200 anonymous comments at the New Orleans Times-Picayune that referenced cases that were being prosecuted by his office. He would often complain about the process and insult those he deemed culpable parties:

> The sad part of all this is that Bill is preventing his siblings from pleading guilty and cooperating, thus exposing them to more prison time. Additionally, local defense attorneys are just milking these cases

> for their own ego gratification and financial enrichment. Something is sick about our system. -May 22, 2009, 9:40 p.m.

The disbarring Court strongly disapproved of Perricone's conduct and did not find his claims of PTSD compelling as it related to explaining his conduct. They sharply criticized his behavior, noting:

> In this age of social media, it is important for all attorneys to bear in mind that the vigorous advocacy we demand of the legal profession is accepted because it takes place under the neutral, dispassionate control of the judicial system. As the Court in Gentile wisely explained, a profession which takes just pride in these traditions may consider them disserved if lawyers use their skills and insight to make untested allegations in the press instead of in the courtroom.
>
> Respondent's conscious decision to vent his anger by posting caustic, extrajudicial comments about pending cases strikes at the heart of the neutral dispassionate control which is the foundation of our system. **Our decision today must send a strong message to respondent and to all the members of the bar that a lawyer's ethical obligations are not diminished by the mask of anonymity provided by the Internet**.

Supreme Court of Louisiana, Dec. 2018

Unconscious Bias

As professionals and business owners lawyers should be cautious about expressing or supporting bias for many reasons. First, no one wants to be the next Schlossberg. As he painfully demonstrated, alienating large segments of the population, or even just a few professionally significant people can be career-ending.

Second, as lawyers, we have the privilege of belonging to a profession that (for better or worse) has social influence, and with that privilege comes responsibility. People listen when lawyers talk. Of course, this is easy to forget - if you a lawyer. That is because to lawyers, other lawyers seem ordinary. But to non-lawyers, they are perceived as community leaders, and what they say, support, and share on social media matters.

Despite social media's potential to connect many different kinds of people with one of another, the reality is that most individuals have cultivated social channels that are filled with other people who are just like them. This is what is known as living in a "bubble." Of course, bubble-based groups have been a part of life since human civilization emerged, not only in our digitally connected lives. However social media has enhanced the bubble effect by making it easier to build a homogenous network.

> Living in bubbles is the natural state of affairs for human beings. People seek out similarities in their marriages, workplaces, neighborhoods, and peer groups. The preferred sociological term is "homophily"—similarity breeds affection—and the implications are not all positive. White Americans have 90 times more white friends than they have black, Asian, or Hispanic friends, according to one analysis

> from the Public Religion Research Institute. That's not a description of a few liberal elite cliques. It's a statistic describing the social networks of 200 million people. America is bubbles, all the way down.

The Atlantic, Jan. 2017

Social media reinforces unconscious bias by reflecting the attitudes and beliefs of those who are likeminded, and therefore likely to share the same biases. Our modern digital landscape is an echo chamber, since we interact online with people who are so similar to ourselves — similar educational background, and mostly one's own race, ethnicity, class, and political agreements.

The Bubble Creates Blind Spots that Intention Can Counteract

One simple way to counteract the bubble is to join or follow social feeds that are run by people who are not like you. Look for people who have different backgrounds, are a different age, gender, race or class. Adding new voices and ideas to a social feed can start making a difference on day one.

Another easy-to-implement practice is to avoid negative content whenever possible. Negative messaging or content is far more likely to invite scandal, unwanted attention, and criticism.

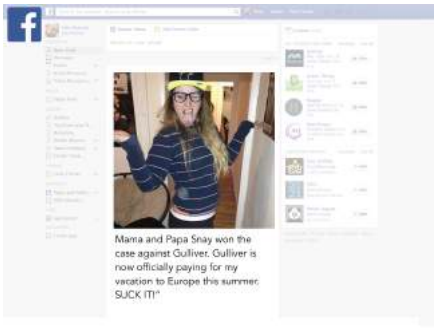
For example, Rep. Matt Gaetz (R-Fla.) who is being investigated by the Florida Bar for his Tweet in connection with Michael Cohen's testimony to Congress. The night before Cohen was scheduled to testify, Gaetz tweeted:

> Hey @MichaelCohen212 — Do your wife & father-in-law know about your girlfriends? Maybe tonight would be a good time for that chat. I wonder if she'll remain faithful when you're in prison. She's about to learn a lot.

Within hours of posting, Gaetz apologized and deleted the tweet. Gaetz had failed to fully appreciate the implications of the federal witness intimidation statute prior to tweeting.

Do Not "Friend" Your Client and Advise Your Client Not to Discuss Case on Facebook

Your client may inadvertently waive his attorney-client privilege normally applied to confidential communications if he talks about your representation on social networking sites. In *Lenz v. Universal Music Corp*. (N.D. Cal. Nov. 17, 2010) the court held "[w]hen a client reveals to a third party that something is 'what my lawyer thinks,' she cannot avoid discovery on the basis that the communication was confidential." Id.



In one Florida case, a plaintiff was required to return $80,000 because he violated the confidentiality clause of the settlement of his age discrimination case when e had shared the happy news with his collet-aged daughter. She immediately posted the result on FaceBook on that same day. The defendant quickly learned of this posting and the money was returned.

Conclusion

As Charley Moore, of Rocket Lawyer, said at the 2017 TECHSHOW keynote panel, "customers are already changing how they consume legal services." Even if you, the attorney, are not spending much time on social media - don't make assumptions about your clients based on your own behavior.

Instead of avoiding social media, lawyers should be investing time to learn how to use this resource to grow a practice, build a reputation and stay relevant in the modern world.

State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

STATE BAR SERIES

Inherit The Wind (1960)
Deciphering Learning Differences And Other Educational Considerations

Presented By:

Hon. A. Gregory Poole
Cobb Judicial Circuit

Dawn R. Smith
Smith & Lake LLC
Decatur, GA

ISSUES RELATED TO SPECIAL NEEDS CHILDREN IN CUSTODY AND CHILD SUPPORT CASES

Judge A. Gregory Poole
Cobb County Superior Court

Dawn R. Smith
Smith & Lake, LLC

CHILDREN WITH DISABIITIES

NUMBER OF STUDENTS IN GEORGIA:
1,506,291

NUMBER OF STUDENTS WITH DISABILITIES:

167,642

11.1% OF ALL STUDENTS IN GEORGIA

13% OF STUDENTS WITH DISABILITIES NATIONWIDE

CHILDREN WITH DISABILITIES BY CATEGORY

3.9 % SPECIFIC LEARNING DISABILITIES (5.2%)

1.77% OTHER HEALTH IMPAIRED (1.7%)

1.57% SPEECH LANGUAGE IMPAIRMENT (2.3%)

1.12% INTELLECTUAL DISABILITY (.94%)

.9% EMOTIONAL DISTURBANCE (.8%)

.85% AUTISM (.99%)

Importance of Early Intervention

- *A British study released in 2013 showed that children's literacy and math levels at age seven were predictive of their overall earnings at the age of 42.*
- *Children who are not reading on grade level by the end of 3rd grade struggle in every class, year after year, because over 85 percent of the curriculum is taught by reading.*

Importance of Early Intervention

- *Third graders who cannot read on grade level today are on track to be our nation's lowest income, least skilled citizens. Reading is a prerequisite for most adult employment, continued personal achievement, and for a continued democracy. And sadly, some states use their elementary students' reading failure rates to predict future prison sizes.*

FEDERAL AND STATE SERVICES FOR CHILDREN WITH DISABILITIES

- *INDIVIDUALS WITH DISABILITIES IN EDUCATION ACT ("IDEA") - - Enacted in 1975 - meant to ensure that children with disabilities from birth to 21 have an opportunity for a free and appropriate public education.*
- *BIRTH - 3 YEARS OLD - IDEA services provided by Babies Can't Wait - identification, evaluation and services for children with developmental delays and chronic health conditions.*
- *3-21 YEARS OLD - Local School Systems must provide free and appropriate public education in least restrictive environment.*

SCHOOL SYSTEM CHILD FIND OBLIGATION

- School District must locate, identify and evaluate all children with suspected disabilities
- Obligation exists regardless of the severity of the disability and whether there has been a formal diagnosis
- Obligation exists even if child advancing grade to grade
- Mandate applies to all children who reside in state including children in private schools, homeless children, highly mobile children and children who are wards of the state

CASE WITH CHILD WHO SEEMS TO BE HAVING ACADEMIC, SOCIAL, EMOTIONAL DIFFICULTIES

- Has child been referred for an evaluation by the school system? Referral can be by parent, pediatrician, social worker, court, etc.
- Once referred, evaluation must be in ALL AREAS OF SUSPECTED DISABILITY
- Once evaluation complete, school system must meet with parents to determine if child has disability and needs special education services

WHAT ARE SPECIAL EDUCATION SERVICES?

- *Specialized instruction in mainstream classroom, resource classroom, self contained class room, special school, residential school*
- *Related Services needed for a child to benefit from special education including:*
  - *Speech language instruction, occupational therapy, physical therapy, psychological services, audiology, interpreting services, rehabilitation services, recreational therapy, medical services for diagnostic purposes, nursing services, etc.*

INDIVIDUAL EDUCATION PROGRAM

- *"IEP" is the blueprint for the child's education in a given year.*
- *Includes evaluation results, child's strengths and weaknesses, goals and objectives for learning.*
- *Details setting for education and services received.*
- *Developed collaboratively with parents through complicated and time-consuming process.*

STANDARD FOR DETERMINING IF CHILD GETTING WHAT THEY NEED FROM SCHOOL

- *Free and appropriate public education ("FAPE")*
  - *Free means free. Can't require parents to pay or access insurance.*
  - *Appropriate does not mean school has to maximize child's potential. Standard is did school district provide basic floor of opportunity.*
  - *If school district cannot provide what child needs, they can be required to place the child privately.*
  - *Education does not only include academics.*

BEST INTEREST ANALYSIS O.C.G.A. §19-9-3

- *(C) The capacity and disposition of each parent to give the child love, affection, and guidance and to continue the education and rearing of the child;*
- *(D) Each parent's knowledge and familiarity of the child and the child's needs;*
- *(J) Each parent's involvement, or lack thereof, in the child's educational, social, and extracurricular activities;*

BEST INTEREST ANALYSIS O.C.G.A. §19-9-3

- *(K) Each parent's employment schedule and the related flexibility or limitations, if any, of a parent to care for the child;*
- *(L) The home, school, and community record and history of the child, as well as any health or educational special needs of the child;*
- *(M) Each parent's past performance and relative abilities for future performance of parenting responsibilities;*

PHYSICAL CUSTODY AND CHILD WITH SPECIAL NEEDS

- *Is there a need to minimize transitions and disruptions in daily routines - particularly during school years?*
- *Small alterations and transitions can result in disruptive behavior or regression.*
- *Are behavior protocols and/or life skills protocols being executed consistently between the two households and across settings?*
- *Who can get child to therapies and additional appointments? Who has equipment?*

PHYSICAL CUSTODY AND CHILD WITH SPECIAL NEEDS

- *Can both parties follow special diet?*
- *Can parents lift, feed, toilet, bathe child?*
- *Who has modified home environment for therapeutic, sensory, safety, and other needs of child?*
- *Do both parents consistently give child medications?*
- *Do parents use same communication systems with child?*

LEGAL CUSTODY CONSIDERATIONS

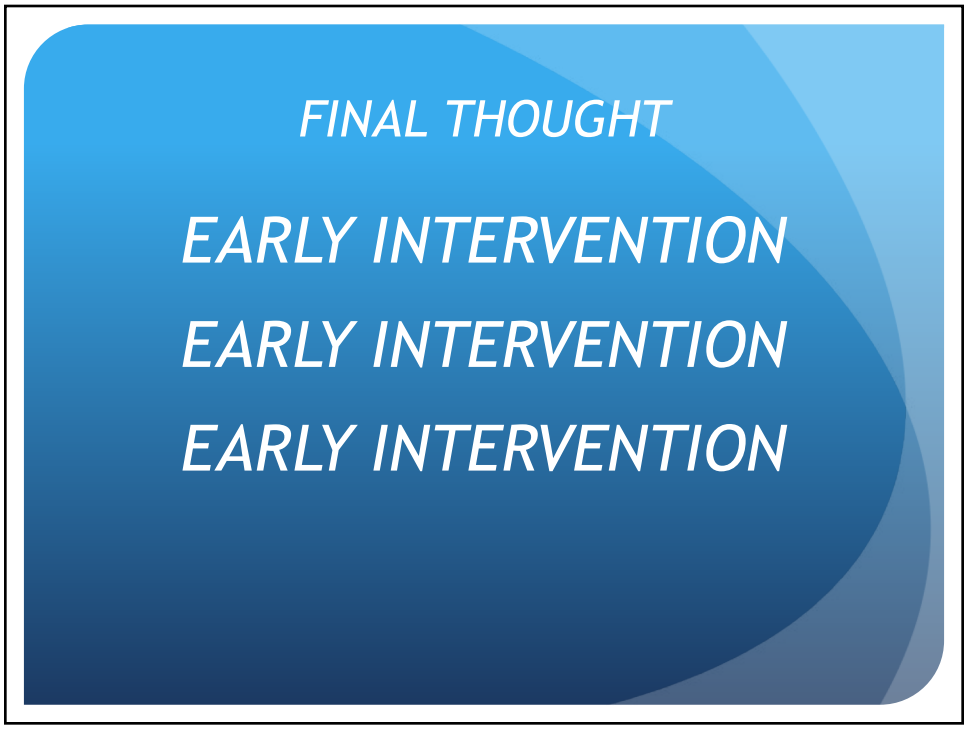
- *Parents must be able to put aside disagreements and come to agreement on therapeutic and medical issues.*
- *If past interactions indicate decisions where painstaking, conflict-ridden and time-consuming, valuable time could be wasted for child.*
- *United front at IEP is essential. School districts, already strapped for resources, will not feel compelled to agree on the most advantageous array of services where parents can't even agree.*

CHILD SUPPORT CONSIDERATIONS

- *Extraordinary Expenses - O.C.G.A. §19-6-15(i)(2)(J) - only actually occurring expenses and has limitation of "extreme economic hardship."*
- *Extraordinary Educational Expenses - Can specifically include "special needs educations" that goes above and beyond the basic floor of opportunity.*
- *Special Expenses for Child-Rearing - Could include social skills training, special needs camps, food for diets, etc. Only if exceeds 7% of basic child support obligation.*
- *Extraordinary Medical Expenses - Only in cases of extreme economic hardship and can include expenses of parents or child.*

CHILD SUPPORT CONSIDERATIONS

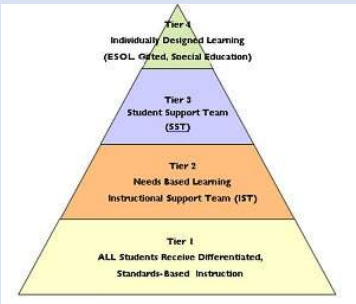
- *Parenting Time Deviation - Consider when nature of disability requires child to be in the custody of primary caregiver for more than is typical.*
- *Adjustment to Gross Income of Primary Caregiver - Increased burden of special needs child may present barriers to employment or career advancement. Special needs child care is very expensive and hard to come by.*


FINAL THOUGHT
EARLY INTERVENTION
EARLY INTERVENTION
EARLY INTERVENTION

SPECIAL EDUCATION AT A GLANCE

CHILD FIND

- Obligation to locate, identify and evaluate
- Must locate all children suspected of being disabled in geographic area
- Pyramid of Interventions requires progress monitoring



EVALUATION

- Request evaluation immediately and in writing
- Ask for Consent to Evaluate Form during any meeting
- 60 Days from Consent to Eligibility
- Evaluate in "all areas of suspected disability"
- Evaluation assessments include:
  - Psychological
  - Occupational Therapy
  - Speech Language
  - Functional Behavioral
  - Vocational
  - Assistive Technology

ELIGIBILITY

- 13 Categories of Eligibility
- Disabled AND in need of special education
- Eligibility based upon evaluation, data and information from any relevant source
- Category does not determine services or placement
- SDD Eligibility limited to children under 7

PLACEMENT

- Instruction and services based on "present levels of performance" (PLOP)
- Challenges addressed through goals and objectives
- Related services support the goals
- Modifications ensure access
- Supplementary aids support the instruction
- Must be placed in "least restrictive environment" that is appropriate

BUILDING AN IEP

Discuss PLOP to establish needs and strengths → Special considerations (i.e. Behavior, Medical, Communication) → Goals & Objectives: Specific, measurable with mastery stated → Modifications, Supplementary Aids, Related Services, Testing Accommodations supported by need stated in PLOP and G&O → Placement in the least restrictive environment using the maximum range of supplementary aids and services

Parents have right to meaningfully participate in the IEP Process. Parents rights include:

- Notice of Meetings
- Prior Written Notice of Decisions
- Access to Records
- Independent Evaluations
- Dispute Resolution Process

SPECIAL EDUCATION ACRONYMS AND DEFINITIONS

CHILD FIND TERMS

SST – Student Support Team
Progress Monitoring – Monitoring Progress
Refer for Evaluation – Precedes obtaining consent
Consent for Evaluation – Triggers 60 day time limit for initial evaluation
Special Education – *Unique and individualized instruction* provided at no cost to parents.

EVALUATION COMPONENTS:

1) Cognitive; 2) Achievement; 3) Learning Processes; 4) Adaptive; 5) Social/Emotional

EVALUATION TERMS

ABA – Applied Behavioral Analysis
FBA – Functional Behavioral Analysis
IEE – Independent Education Evaluation
RTI – Response to Intervention
WJ – Woodcock – Johnson (Assessment)
WISC – Wechsler Intell. Scale for Children
VMI – Dev. Test of Visual Motor Integration
BASC – Beh. Assessment System for Children
ABAS – Adaptive Beh. Assessment System
ABLLS – Assess. of Basic Lang. and Learning Skills

ELIGIBILITY TERMS

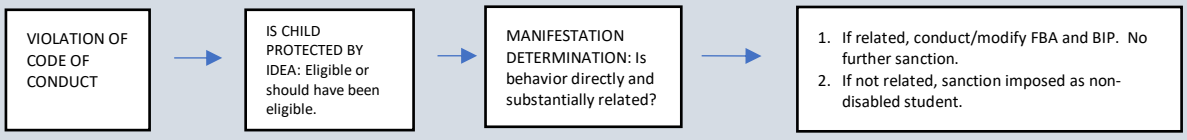
ADD/ADHD - Attention Deficit/ Hyperactivity
ASD - Autism Spectrum Disorders
EBD – Emotional/Behavioral Disorder
HI – Hearing Impaired
ID – Intellectual Disability (MID, MOID, SID)
ODD – Oppositional Defiant Disorder
OHI – Other Health Impaired
OI – Orthopedic Impairment
SLD – Specific Learning Disability
TBI – Traumatic Brain Injury
VI – Visual Impairment

PLACEMENT

AT – Assistive Technology
BIP – Behavior Intervention Plan
FAPE - Free Appropriate Public Education
IAES – Interim Alternative Educational Setting
IEP – Individualized Education Plan
LRE – Least Restrictive Environment
OT – Occupational Therapy
PT – Physical Therapy
SLP – Speech Language Therapy
VR – Vocational Rehabilitation

Under *Endrew F.*, schools must offer "an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

DISCIPLINE**



** Does not apply to incidents involving weapons, drugs or substantial bodily injury.

State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

STATE BAR SERIES

The Bad Seed (1956)
The Impact Of Childhood Trauma And Other Mental Health Matters

Presented By:

Hon. Christopher S. Brasher
Atlanta Judicial Circuit

Sheri T. Lake
Smith & Lake LLC
Decatur, GA

Kim Oppenheimer, PhD
Atlanta Psych Consultants, LLC
Atlanta, GA

THE IMPACT OF CHILDHOOD TRAUMA AND OTHER MENTAL HEALTH MATTERS

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What is Trauma?

Trauma Definitions

DSM 5

"the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others."

Van der Kolk

"For human beings, the best predictor of something becoming traumatic seems to be a situation in which they no longer can imagine a way out; when fighting or fleeing no longer is an option and they feel overpowered and helpless."

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What is Trauma?

Types of Trauma

- Family Violence
- High conflict between parents or caregivers
- Physical abuse
- Sexual abuse
- Emotional abuse
- Mental illness
- Substance Abuse
- Parent incarceration
- Political climate
- Repeated foster care placements
- Physical or Emotional Neglect
- Bullying
- Fear/Worry about immigration status
- Community violence
- Poverty
- Health issues in family

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Adverse Childhood Experiences (ACEs)

ADVERSE CHILDHOOD EXPERIENCES (ACES) CAN LEAD TO:

- Life-long susceptibility to stress
- Psychological and psychiatric disorders
- Negative consequences for physical health
- Addictive behaviors
- Lower educational achievement
- Lower economic achievement

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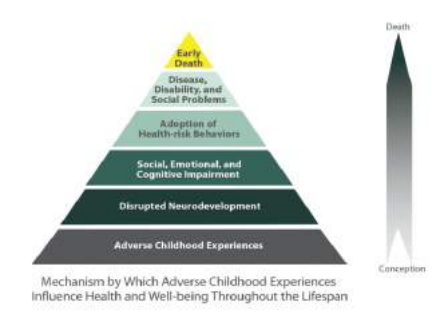
Adverse Childhood Experiences (ACEs)

ACEs

ACEs refer to any event that exceeds an individual's coping capacity, the result of which are feelings of helplessness, hopelessness, and loss of control.



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Adverse Childhood Experiences (ACEs)

Putative Factors Mediating ACEs

- Maladaptive coping mechanisms
- Chronic, major, unrelieved stress
- Epigenetics

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Adverse Childhood Experiences (ACEs)

Effects on the Brain

Research examining brain-behavior relationships suggests that early trauma results in structural changes in the brain, increases stress hormones, and recalibrates the brain's alarm system.

The interaction of genes and experiences literally shapes the circuitry of the developing brain and is critically influenced by the mutual responsiveness of adult-child relationships, particularly in the early childhood years.

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Adverse Childhood Experiences (ACEs)

Early Development

A child's ability to learn to cope with stress is affected by the coping mechanisms of the mother during pregnancy and the impact of adverse events is greatest on developing fetuses, infants, and toddlers.

Developmental trauma significantly affects major social roles, including marital relationships and parenting behavior.

In response to developmental trauma, the child copes through fight, flight, or freeze responses.

Fight responses include irritability, difficulty in being soothed or comforted, anger, or rage; flight responses include denial, repression, withdrawal, isolation, and avoidance behaviors; freeze reactions are dissociative in nature.

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Adverse Childhood Experiences (ACEs)

ACE STUDY

- 1997 Kaiser Permanente study
- 17,337 Adult Subjects (volunteers)
- Middle class individuals with insurance
- Has been replicated many times
- SAMHSA list of replication studies: https://www.samhsa.gov

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Adverse Childhood Experiences (ACEs)

ACE RISK FACTORS EVALUATED

Abuse & Neglect

- Emotional abuse
- Physical abuse
- Sexual abuse
- Neglect: Physical

Family Dysfunction

- Incarcerated relative
- Mother treated violently
- Mental illness
- Parental divorce

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Adverse Childhood Experiences (ACEs)

ACE STUDY RESULTS

- 10% of participants reported being verbally abused as a child
- Over 25% reported being physically abused
- 12% of the sample reported witnessing their mother being physically abused
- Approximately 28% of women and 16% of men reported having been sexually abused
- 23.5% were exposed to alcohol abuse as a child
- 18.8% were exposed to mental illness as a child
- 87% of adults experienced two or more traumatic events during childhood
- 11% of adults reported five or more traumatic events during childhood
- Only one-third of participants reported no ACEs

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Adverse Childhood Experiences (ACEs)

CHILDHOOD TRAUMA: THE CONSEQUENCES

2 ACE Factors means . . .

- 1.5 times more likely to smoke
- 4 times more likely to be an alcoholic
- 2.9 times more likely to use illicit drugs
- 2.3 times more likely to miss more than 14 work days
- 0.9 times more likely to have diabetes
- 2.4 times more likely to be depressed for 2 or more weeks per year
- 3 times more likely to have attempted suicide

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Adverse Childhood Experiences (ACEs)

CHILDHOOD TRAUMA: THE CONSEQUENCES

4 ACE Factors means . . .

- 2.2 times more likely to smoke
- 7.4 times more likely to be an alcoholic
- 4.7 times more likely to use illicit drugs
- 5.5 times more likely to miss more than 14 work days
- 1.6 times more likely to have diabetes
- 4.6 times more likely to be depressed for 2 or more weeks per year

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Adverse Childhood Experiences (ACEs)

CHILDHOOD TRAUMA: THE CONSEQUENCES

- Individuals with **6** Adverse Childhood Experiences (ACEs) have a life expectancy, on average, of 20 years less than an individual with no ACEs.
- The average pediatrician will see 2-4 children with an ACE score of **4** or more each day

Andrew Garner MD, PhD FAAP – American Academy of Pediatrics, Ohio

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Adverse Childhood Experiences (ACEs)

NOTICING TRAUMA – PHYSICAL SIGNS*

- Tension/pain (headaches, back pain, chest pain)
- Hyperarousal
- DSM PTSD symptoms (flashbacks, nightmares)
- Panic attacks
- Hypersensitivity to light, sound, smell, touch, or taste
- Feeling fatigued or drained

*Gina Ross – "Beyond the Trauma Vortex; Into the Healing Vortex"

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Adverse Childhood Experiences (ACEs)

NOTICING TRAUMA – EMOTIONAL SIGNS

- Intense, unpredictable, and irrational emotions
- Dramatic mood swings
- Uncontrollable feelings of fear and rage or terror
- Profound feelings of hopelessness and helplessness
- Disruption of the usual sense of safety and predictability

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Adverse Childhood Experiences (ACEs)

NOTICING TRAUMA – MENTAL SIGNS

- Confusion and disorientation
- Inability to learn and concentrate
- Paranoid beliefs and obsessive negative thoughts
- Tendency to become more radical and more intolerant of differences
- Loss of ability to reason and be reasonable
- Losing interest in activities
- Self-blame
- Becoming cynical and disenfranchised

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Adverse Childhood Experiences (ACEs)

NOTICING TRAUMA – BEHAVIORAL

- Turning away from/cutting off from resources
- Acting out, impulsive, or risky behaviors
- Addiction/substance abuse
- Social isolation
- Depression
- Perfectionist or OCD-like behaviors to regain sense of control

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Adverse Childhood Experiences (ACEs)

NOTICING TRAUMA – SOCIAL

- Feeling powerless and isolated in the social order
- Rage/anger turned against society
- Mistrust or hatred of society

NOTICING TRAUMA – SPIRITUAL

- Losing a sense of humanness
- Deep feelings of shame in relation to spirit
- Disbelief or rejection of a higher power
- Misplaced feelings of pride that result in callousness and lack of compassion

NOTICING TRAUMA – FAMILY AND COLLECTIVE

- Violence and abuse
- Extreme polarization of beliefs and emotions against "groups"
- Distortion of collective narrative
- Growing intolerance of differences

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Why Consider ACEs in Family Law

- When an attorney demonstrates an understanding of trauma, client is more apt to exchange relevant information (TRUST).
- Help clients engage and create their own goals and make progress toward these goals (BUY-IN)
- A client's trauma history may impact parenting style; how does the attorney respond?
- It takes more time to prepare clients who have experienced ACEs for alternative dispute resolution, depositions, court, etc.
- Your clients are most likely parenting in the way in which they were parented unless that have consciously chosen differently.
- When you listen, validate, teach, acknowledge strengths of "dysfunctional" parents, you enable them to give you what you need to help them in the best manner.

(adapted from Family Law Forum (Fall 2014; J. Jeske, M.L. Klas)

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ACE Implications for Family Law

- Environments, practices and policies must be designed to reduce possibility of re-triggering stress reactions
- Environments must promote safety; clients should not feel afraid or isolated or trapped
- Open sharing of information essential (client feels heard, resulting in validation and ability to participate)
- Recognition that people experience different types and levels of trauma; most people must process their trauma
- Clients have the right to privacy and self-determination
- Don't share others traumatic stories; you can re-trigger
- Share Words of Wisdom: This is a chapter in your life; You are in control of beginning and ending it; How many pages do you want?

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Interviewing with a Trauma Informed Lens

- Client's trauma experience may be abnormal but her response to that experience is not abnormal.
- Family law professionals must become more Trauma Informed (TI) including knowing mental health practitioners who provide TI care, e.g., Cognitive Behavioral Therapy.
- It is key that Family Law Professional shows client her respect for boundaries and privacy.
- Instilling hope is a major part of the family law process; repeating that there is hope and it will get better is key.
- Try to instill a sense of safety and predictability in a world where a trauma experience has derailed this client.
- Initial presentation may change drastically if safety producing trust can be established.

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Interview Tips: Client w/Trauma Past

- Seat client with view of door.
- Let client know there is NO judgment in your notes.
- You are writing about client and the case.
- Clarity, transparency and giving more information may lessen degree of trauma in client who experienced ACEs.
- Try to slow client down to encourage more cohesive info.
- Eye contact; enough so client feels listened to but does not feel intimidated (not intense or staring)
- Softer tone of voice works better with traumatized clients.
- Try not to walk behind the client – may arouse hypervigilance; sit at eye level with client.

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Interaction Tips for Clients with Trauma

- Let client lead and have measure of control.
- Give client choice over agenda or time of meeting but set boundaries and be clear about time limits.
- If client seems fearful of interview or court ask, "What makes you afraid?"
- Voice tone is crucial – understanding not accusation.
- If client is on phone, make sure children are not able to hear conversation.
- Repeat what client has said to arrive at shared narrative.
- Be aware that many of the children involved in family law legal proceedings have increased levels of traumatic stress because they have parents or caregivers who have been exposed to multiple categories of ACEs as well.
- Your AWARENESS of TI care is essential to stop the cycle.

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Interviewing Tips: Children with Trauma

- Establish rapport.
- Ask general questions about child.
- Ask general questions about family.
- Ask focused questions about topic of concern.
- Reassure without telling child how she feels.
- Offer breaks.
- Close respectfully.

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Interviewing Tips: Children with Trauma

- Ask open-ended questions.
- Who/what/where/how/when, NOT why.
- Limit Yes/No and multiple choice questions and always follow with an open-ended question.

- Examples:
  - ”Tell me about the day the police came to your house.”
  - “Just tell me what you remember.”
  - “Tell me one part you remember.”
  - “Now I want to ask you some questions about that day.”
  - “Tell me everything you remember about that day from the time you got up.”
  - “Where were you when _____?”
  - “How do you know _____?”
  - ”Did you see _____. Tell me about that.”

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Interviewing Tips: Children with Trauma

RE-EXPERIENCING: I CAN'T GET IT OUT OF MY HEAD

- Repetitions of the trauma in:
  - ❖ Dreams
  - ❖ Thought
  - ❖ Behavior
  - ❖ Play
  - ❖ Flashbacks

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Interviewing Tips: Children with Trauma

RE-EXPERIENCING: I CAN'T GET IT OUT OF MY HEAD

- Questions:
  - ❖ Some of the kids I talk to think about what happened at school. Tell me about that for you.
  - ❖ Some of the kids I talk to think about it night, like when they're in bed. Tell me.....
  - ❖ Some of the kids I talk to get pictures in their head. Tell me....
  - ❖ How about dreams. Are you having any dreams? Tell me... How about any bad dreams? Did you have that dream one time or more than one time.
  - ❖ You know you're not in any trouble in this room? Tell me about the time you _____ with your sister.
  - ❖ Has there ever been a time when you felt like it was happening again? Tell me....

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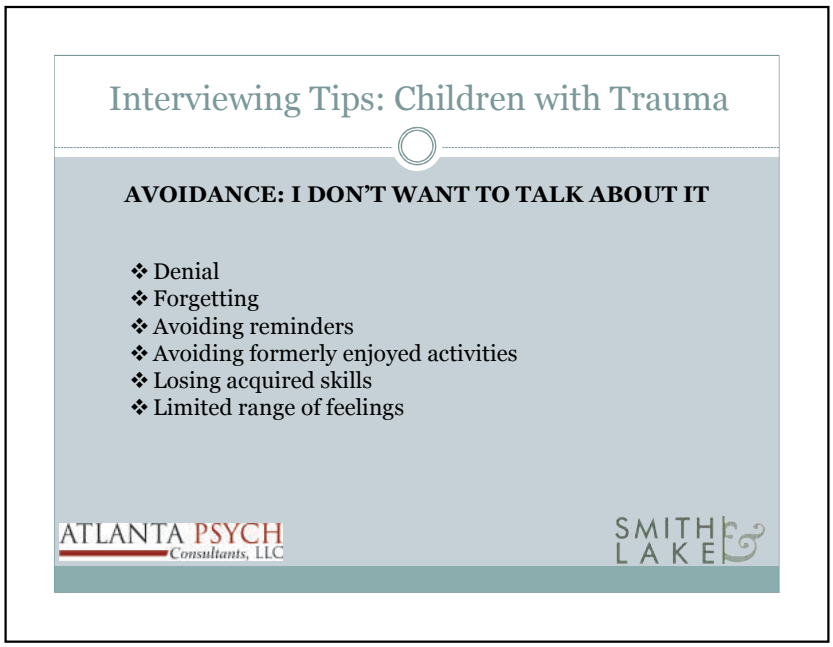
Interviewing Tips: Children with Trauma
AVOIDANCE: I DON'T WANT TO TALK ABOUT IT
❖ Denial
❖ Forgetting
❖ Avoiding reminders
❖ Avoiding formerly enjoyed activities
❖ Losing acquired skills
❖ Limited range of feelings
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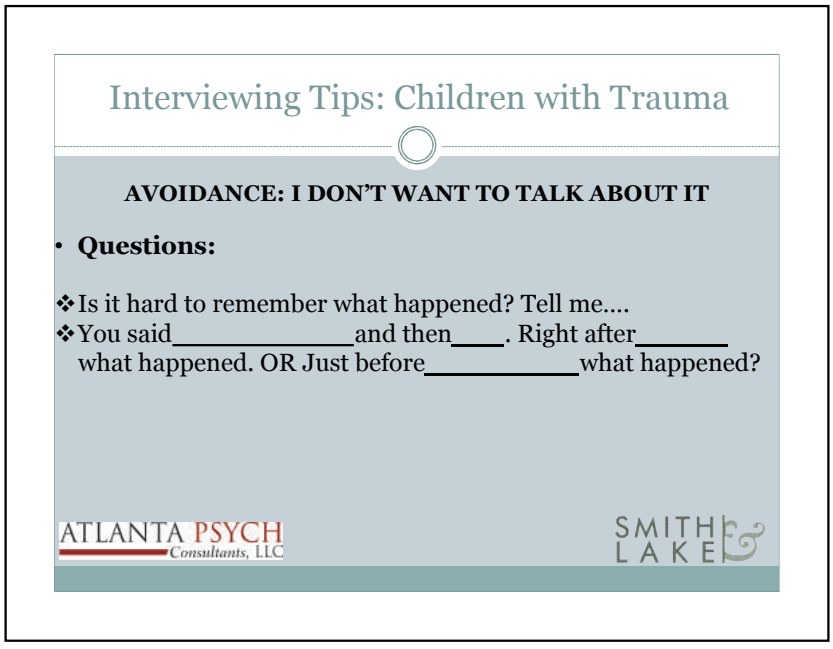
Interviewing Tips: Children with Trauma
AVOIDANCE: I DON'T WANT TO TALK ABOUT IT
• Questions:
❖Is it hard to remember what happened? Tell me....
❖You said_____and then____. Right after_____
what happened. OR Just before_____what happened?
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Interviewing Tips: Children with Trauma

INCREASED AROUSAL

- ❖ Sleep problems
- ❖ Exaggerated startle response
- ❖ Hypervigilance
- ❖ Elevated pulse/blood pressure
- ❖ Affective responses

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Interviewing Tips: Children with Trauma

INCREASED AROUSAL

- Questions:
  - ❖ Tell me how you feel in your body when you think about_____.
  - ❖ Tell me how your heart feels.
  - ❖ Tell me how your tummy feels.
  - ❖ Do you notice anything else about your body?
  - ❖ What is happening in your body right now?
  - ❖ Tell me all about going to sleep at night.
    - ➢ Trouble falling asleep?
    - ➢ Waking up in the middle of the night?
    - ➢ Bad dreams?
    - ➢ Seeing/feeling things or someone in the room?
  - ❖ Look for signs of hypervigilance
    - ➢ I noticed you looked all around the room when you came in. Tell me about that. What were looking for?

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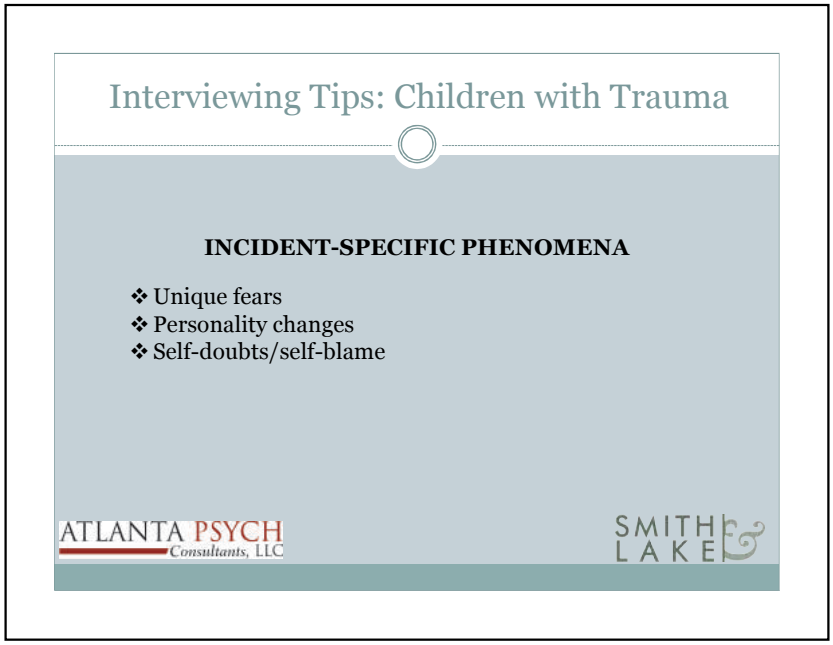
Interviewing Tips: Children with Trauma
INCIDENT-SPECIFIC PHENOMENA
❖ Unique fears
❖ Personality changes
❖ Self-doubts/self-blame
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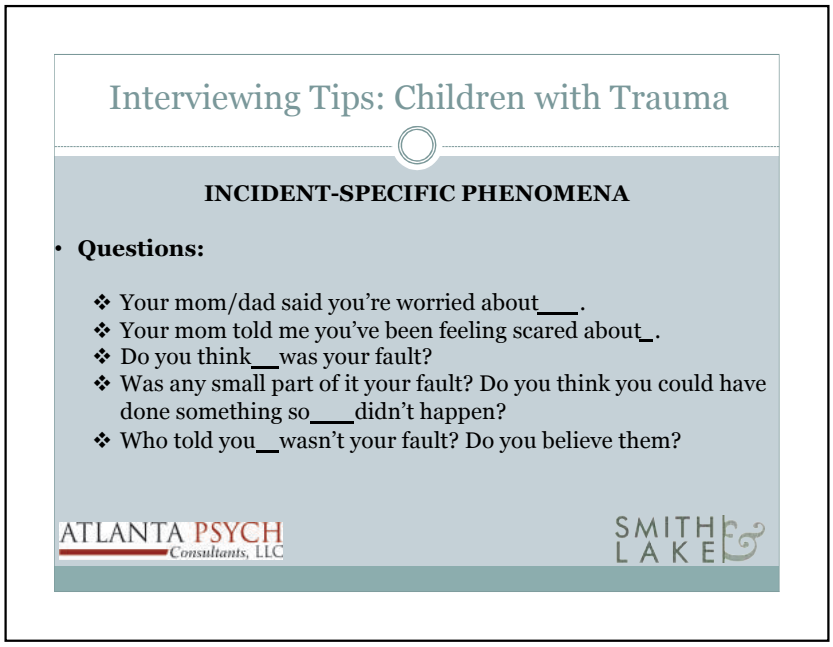
Interviewing Tips: Children with Trauma
INCIDENT-SPECIFIC PHENOMENA
• Questions:
❖ Your mom/dad said you're worried about___.
❖ Your mom told me you've been feeling scared about_.
❖ Do you think__was your fault?
❖ Was any small part of it your fault? Do you think you could have done something so___didn't happen?
❖ Who told you__wasn't your fault? Do you believe them?
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Interviewing Tips: Children with Trauma

THE NATURE OF TRAUMATIC MEMORIES

- May be fragmented
- May be indelibly imprinted in child's mind
- May be primarily sensory
- May be told from perspective of age at time of event
- May be encoded visually and not verbally
- May be encoded behaviorally and not verbally
- May produce new disclosures
- May be overwhelming
- May induce dissociation

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Interviewing Tips: Children with Trauma

THE NATURE OF TRAUMATIC MEMORIES

- **Questions:**
  - ❖ Elicit perceptual details
    - ➢ "Tell me what you saw when_."
    - ➢ "Tell me what you heard when_____."
    - ➢ "Tell me what color the_____was."
    - ➢ "Tell me how the____smelled."
  - ❖ Don't be afraid to ask for graphic details
    - ➢ "Tell me about the blood ."
    - ➢ "What did you see when she was lying on the floor?"
    - ➢ "What was the last sound your mom made?"
    - ➢ "How did you feel when you were tied up?"

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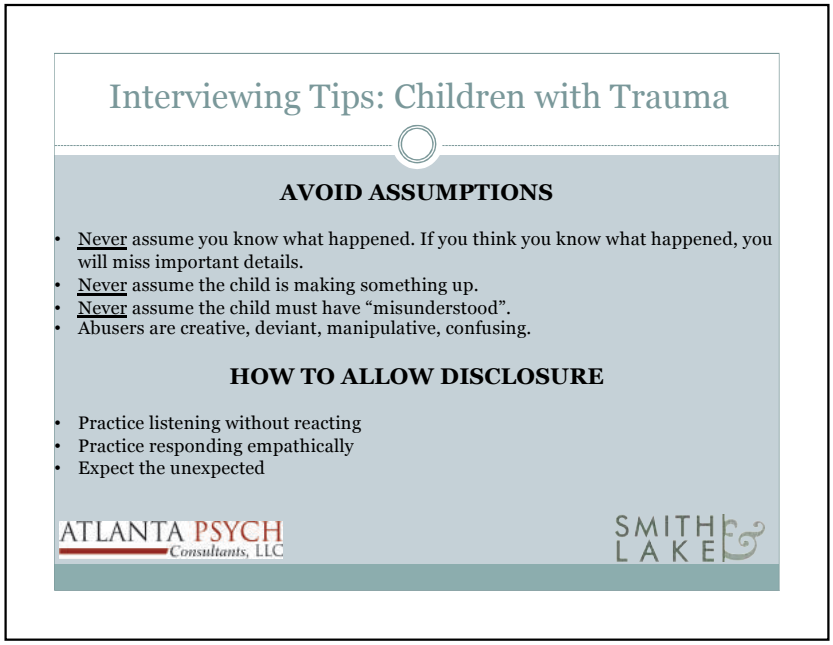
Interviewing Tips: Children with Trauma
AVOID ASSUMPTIONS
Never assume you know what happened. If you think you know what happened, you will miss important details.
Never assume the child is making something up.
Never assume the child must have "misunderstood".
Abusers are creative, deviant, manipulative, confusing.
HOW TO ALLOW DISCLOSURE
Practice listening without reacting
Practice responding empathically
Expect the unexpected
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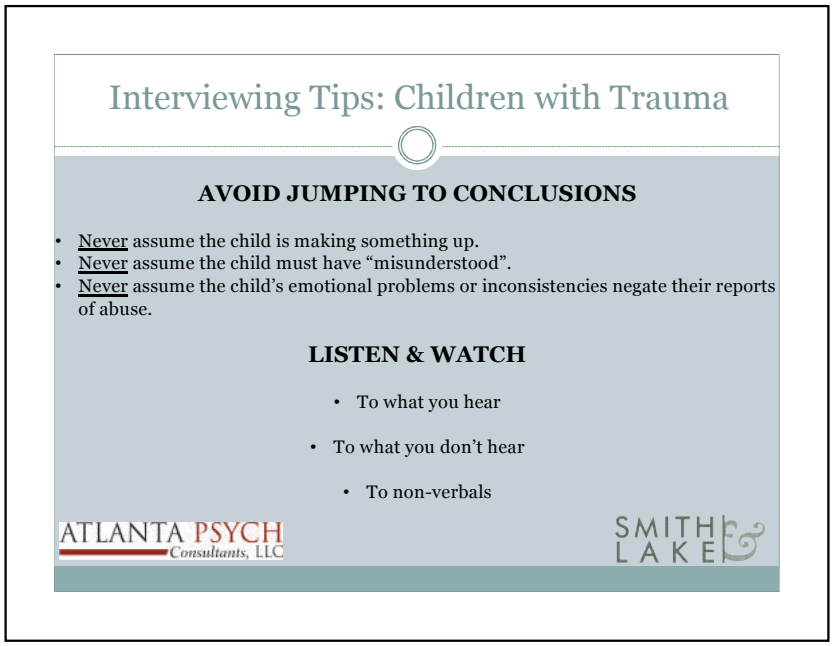
Interviewing Tips: Children with Trauma
AVOID JUMPING TO CONCLUSIONS
Never assume the child is making something up.
Never assume the child must have "misunderstood".
Never assume the child's emotional problems or inconsistencies negate their reports of abuse.
LISTEN & WATCH
To what you hear
To what you don't hear
To non-verbals
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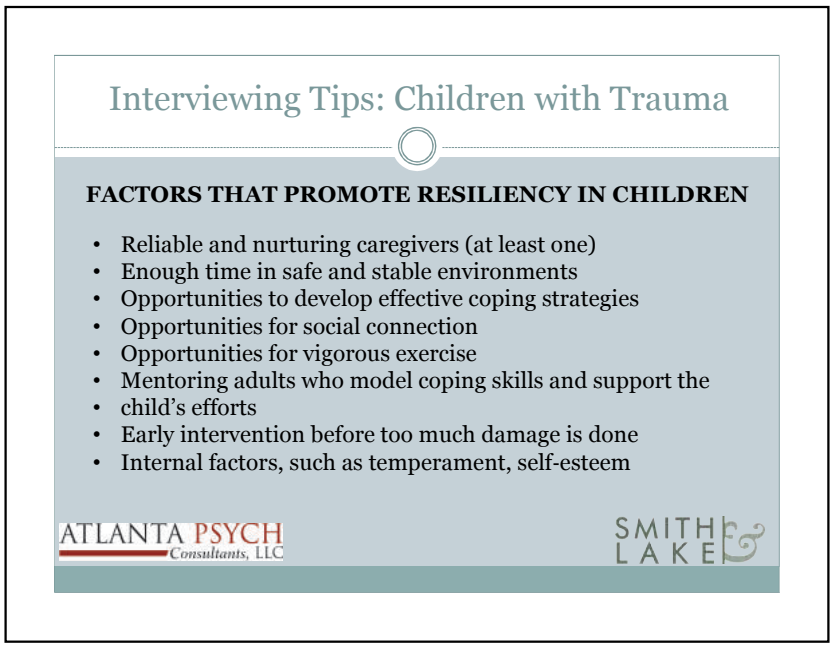
Interviewing Tips: Children with Trauma
FACTORS THAT PROMOTE RESILIENCY IN CHILDREN
• Reliable and nurturing caregivers (at least one)
• Enough time in safe and stable environments
• Opportunities to develop effective coping strategies
• Opportunities for social connection
• Opportunities for vigorous exercise
• Mentoring adults who model coping skills and support the
• child's efforts
• Early intervention before too much damage is done
• Internal factors, such as temperament, self-esteem
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Adverse Childhood Experiences: Biopsychosocial Implications from Infancy through Adulthood

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Child Custody Solutions, LLC

Sheri T. Lake, Esq.
Smith & Lake LLC

This article considers the impact of childhood trauma among our clients and their children in our practice as family law practitioners. A growing body of research has made it increasingly apparent that childhood trauma, or what the scientific community identifies as "adverse childhood experiences" (ACEs), is a critical public health issue. ACEs are potentially traumatic experiences and events, ranging from abuse and neglect to living with an adult with a mental illness. They can have negative, lasting effects on health and well-being in childhood or later in life. However, more important than exposure to any specific event of this type is the accumulation of multiple adversities during childhood, which is associated with especially deleterious effects on development. Why should an understanding of childhood trauma and ACEs matter to the family law practitioner? As advocates for a spouse and/or a parent, it is imperative that we consider the impact of childhood trauma on our client's behavior and mental health in the context of a family law matter in order to assess what accommodations and support might be necessary to best protect our client's best interests. Likewise, the impact of childhood trauma on the children who are the subject of family law litigation must always inform our practice, whether as advocates for their parents or as advocates for the children themselves.

I. What are Adverse Childhood Experiences?: Biopsychosocial Implications from Infancy through Adulthood

In 1997, Kaiser Permanente set out to study the biological, psychological and social impact of childhood trauma on adults. 17,337 adult volunteers participated in the study. Generally, those participating in the study were middle class individuals with insurance. Since then, the study has been replicated many times. You can learn more about such studies at the Substance Abuse and Mental Health Services Administration ("SAMHSA") website https://www.samhsa.gov/.

ACEs have a profound effect on a child's biopsychosocial development and subsequent well-being across his or her life span (Felitti, 2016; Schore, 2003; van der Kolk, 2014). ACEs refer to any event that exceeds an individual's coping capacity, the result of which are feelings of helplessness, hopelessness, and loss of control.[1] Examples of ACEs include physical or emotional neglect, physical or sexual abuse, family violence, witnessing violence, divorce, a parent being imprisoned, substance abuse, mental illness, bullying, community violence, poverty, repeated foster care placements, among others. In the landmark Kaiser Permanente study examining the relationship of childhood trauma and adult morbidity and mortality, the results suggested that ACEs are quite common (Felitti, Anda, Nordenberg, Williamson, Alison, Spitz, Edwards, Koss, & Marks, 1998). For example, 10% of participants reported being verbally abused as a child and over 25% reported being physically abused. Twelve percent of the sample reported witnessing

[1] See the "ACE Questionnaire" on Pages 9-10 hereinbelow for assessment of childhood trauma.

their mother being physically abused. More strikingly, approximately 28% of women and 16% of men reported having been sexually abused as a child (van der Kolk, 2014). According to the ACE findings, 87% of adults experienced two or more traumatic events during childhood, with 11% of adults reporting five or more (van der Kolk, 2014). Only one-third of participants reported no ACEs (van der Kolk, 2014).

Traumatic experiences that occur in childhood underlie many psychological and psychiatric disorders, health conditions, and addictive behaviors (Felitti, 2016). The effect on an individual's well-being is significantly and proportionally impacted by the number adverse events during childhood. For example, an individual with two ACE factors is four times more likely to be an alcoholic; 2.9 times more likely to use recreational drugs; 2.4 times more likely to report symptoms of major depressive disorder, and three times more likely to have attempted suicide compared to individuals with no adverse events in their background. Adults who have four or more risk factors are 7.4 times more likely to be alcoholic and 4.7 times more likely to use recreational drugs compared to those with no childhood trauma. The correlation between addiction and ACE is approximately .80. Individuals with six or more ACE factors have a 46 times greater risk of becoming intravenous drug users than those with an ACE score of zero. Compared to those with no adverse events, adults with four or more ACEs are 5.5 times more likely to be depressed with the prevalence rate of depression 66% in women and 35% in men compared to 12% for those with an ACE score of zero (van der Kolk). Furthermore, women in the study were queried regarding adult sexual assault. The results indicated that those with no trauma history had a 5% prevalence rate of having been raped; those with four or more ACEs had a prevalence rate of 33% (van der Kolk, 2014). ACEs affect the rates of major health problems as well. Individuals with an ACE score of six or above have a 15% greater chance of having a serious medical condition such as chronic pulmonary disease, heart disease, and liver disease than those with an ACE score of zero. In addition, their risk of cancer is twice that of their counterparts without a childhood history of traumatic events (van der Kolk, 2014). Individuals with six or more ACEs die almost twenty years earlier compared to those with an ACE score of zero (Felitti, 2016). Overall, these statistics indicate that traumatic life events in childhood have a dramatic influence on an adult individual's physical and psychological health.

The mechanisms of action by which traumatic events take their toll are a burgeoning area of research. In general, the putative factors mediating ACEs and outcome fall into three general categories: (1) Maladaptive coping mechanisms, such as smoking, drinking, overeating, and illicit substance abuse, behaviors in which the individual engages to diminish the anxiety and depression created by childhood trauma. These behaviors become habitual attempts to self-regulate and self-medicate negative affect. For example, stress is a psychological and biological event, which innervates other bodily systems. Adverse events experienced while in utero increase levels of stress hormones (cortisol) in the placenta, which has a significant impact on the fetus' developing brain. Subsequently, children are more likely to have learning disorders, behavioral disorders, and ADHD, which predisposes the individual to addiction. (2) Chronic, major, unrelieved stress that triggers the brain to release neurochemicals that create inflammatory changes in the body that ultimately leads to organ degeneration and failure. (3) Epigenetics, which refers to the effect of environmental influences on the function of the gene. In short, positive and negative experiences turn on or off various centers, receptors, and neurotransmitters in the brain leading to increased vulnerability for various disorders and disease states (Felitti, 2016). Research examining brain-

behavior relationships suggests that early trauma results in structural changes in the brain, increases stress hormones, and recalibrates the brain's alarm system. The architecture of the brain is constructed through an ongoing process that begins before birth, continues into adulthood, and establishes either a sturdy or a fragile foundation for subsequent health, learning, and behavior. The interaction of genes and experiences literally shapes the circuitry of the developing brain and is critically influenced by the mutual responsiveness of adult-child relationships, particularly in the early childhood years. (Mate, 2016).

Infants are genetically predisposed for connection and attachment with their primary caregiver (Hesse, Main, Abrams, & Rifkin, 2003). An infant seeks proximity to an attachment figure, initially the mother, who serves as a secure base for future exploration and relationships. To form a primary attachment bond, the caregiver needs to anticipate and provide for the infant's basic needs, including soothing, nurturing, and vocalizing. Endorphins, which are endogenous morphine-like substances, modulate attachment. They are released in the mother's brain when she cuddles and soothes her baby. Similarly, endorphins in the infant's brain are released in response to being held. Thus, a biological and social communication system develops between infant and mother. The more responsive the infant's primary caregiver, the deeper the attachment and the greater likelihood of the child forming healthy interpersonal relationships, developing the capacity to self-soothe, and being able to regulate his or her affect (Schack, 2016; van der Kolk, 2014). These characteristics describe secure attachment. Research has demonstrated that when an infant feels secure in his or her attachment, physiologic metrics such as heart rate, respiration, and hormone levels are low and steady (van der Kolk, 2014). Neglectful, harsh, or unpredictable responsiveness on the part of the primary caregiver can lead to significant deficits in psychological and social functioning, described as insecure, ambivalent, or disorganized attachment. When the infant's distress is ignored, punished, or both, the child reacts with elevated heart and respiration rates and increased levels of cortisol (van der Kolk, 2014). Attachment is not permanently ruptured by occasional occurrences of mis-attunement. However, a repetitive and cumulative pattern of impaired responsiveness to an infant's emotional, psychosocial, and/or physical needs disrupts the infant's ability to navigate the first developmental task life; that is, learning to trust versus learning to mistrust (Erikson, 1959), resulting in fear, anxiety, hypervigilance, and impaired bonding from the ongoing stress. However, since infants have the capacity to form multiple attachments; stress can be mitigated, and bonding will occur with another attachment figure who provides comfort and is attuned to the baby's needs.

According to Schore (2003), the sensitive period critical to a child's capacity to cope with stress is from approximately twenty-five weeks gestation through the first two years of life. "The early social environment, mediated by the primary caregiver, directly influences the final wiring of the circuits in the infant brain that are responsible for the future social and emotional coping capacities of the individual" (p.112). A child's ability to learn to cope with stress is affected by the coping mechanisms of the mother during pregnancy (Mate, 2016) and the impact of adverse events is greatest on developing fetuses, infants, and toddlers. For example, research with EEGs has demonstrated post-partum depression in mothers can be detected by examining the brains of their six-month-old babies (Dawson, Klinger, Panagiotides, Spieker, & Frey, 1992). In addition, bonding between the caregiver and infant shapes the maturation of the right prefrontal area of the brain, which regulates positive and negative emotions (Schore, 2003). Prolonged social stress from neglect or abuse leads to insecure or disorganized attachment in the infant and adversely

affect the brain's maturation, impacting a child's inability to regulate affective, motivational, and cognitive functions (Schore, 2003). Impaired attachments become perceived as threats and are internalized in infancy and early childhood, thereby setting in motion long-term dysregulation of affect, an inability to self-soothe, and poor impulse control. Consequently, these children are more prone to have learning disorders, behavioral disorders, and ADHD, all of which predispose the individual to addictive behaviors during adolescence and adulthood (Mate, 2016).

There is mounting evidence that interpersonal trauma occurring early in a child's life, often referred to as developmental trauma, significantly affects major social roles, including marital relationships and parenting behavior. Research suggests that parents who have their own ACE history tend to have inadequate or dysfunctional parenting skills that perpetuate the intergenerational cycle of trauma and abuse (Larkin, Felitti, & Anda, 2014). Studies have shown that parenting can be difficult for individuals who have ACEs due to decreased executive functioning that governs self-regulation (Conn, Jee, Briggs, Szilagyi, Manly, & Szilagyi, 2018). In addition, mothers with a history of ACEs tend to have limited emotional availability during mother-infant interactions, impaired parenting skills, higher levels of child neglect, low self-confidence as a parent, greater use of corporal punishment, and lack of emotional control in parenting situations compared to mothers without developmental trauma (Lomanowska, Boivin, Hertzman, & Fleming, 2017). Subsequently, children who grow up neglected or abused by a parent tend to be less equipped in their own parenting role. They are more likely to engage in behaviors that perpetuate adverse parenting styles such as impaired attunement, inadequate responsiveness, and/or difficulties in setting consistent boundaries for their children. Thus, developmental trauma is intergenerationally transmitted through a complex web of behavioral and biological factors.

In response to developmental trauma, the child copes through fight, flight, or freeze responses (van der Kolk, 2014). Fight responses include irritability, difficulty in being soothed or comforted, anger, or rage; flight responses include denial, repression, withdrawal, isolation, and avoidance behaviors; freeze reactions are dissociative in nature. In children and adults, reactions to ACEs become reflexive and may be triggered by a variety of interpersonal stimuli, such that the individual perceives and interacts with the world in a constant state of alarm. As this state of hyperarousal and hypervigilance progresses into adulthood, the symptoms of developmental trauma are consistent with diagnostic criteria for Borderline Personality Disorder; that is, difficulties regulating affect; poor impulse control; fear of abandonment; unstable sense of self; unstable interpersonal relationships; suicidal gestures and threats; and stress-related paranoid ideation or dissociation. Divorce and custody litigation may trigger developmental trauma. A trauma-informed approach to interviewing family members considers that everyone in the system may be easily retraumatized and takes steps to avoid iatrogenic harm.

II. How Might Trauma Manifest in Our Clients and in Children?

As set out above, the causes of trauma are various, and, likewise, the symptoms are innumerable. However, there are some basic signs of trauma that you can look out for in your clients and in the children whose best interests are at issue. Being aware and attune to these symptoms can alert you to clients and children who may need accommodations or additional supports.

A. Physical Signs

- Tension/pain (headaches, back pain, chest pain)
- Hyperarousal
- Post-Traumatic Stress Disorder symptoms (flashbacks, nightmares)
- Panic attacks
- Hypersensitivity to light, sound, smell, touch, or taste
- Feeling fatigued or drained

B. Emotional Signs

- Intense, unpredictable, and irrational emotions
- Dramatic mood swings
- Uncontrollable feelings of fear and rage or terror
- Profound feelings of hopelessness and helplessness
- Disruption of the usual sense of safety and predictability

C. Mental Signs

- Confusion and disorientation
- Inability to learn and concentrate
- Paranoid beliefs and obsessive negative thoughts
- Tendency to become more radical and more intolerant of differences
- Loss of ability to reason and be reasonable
- Losing interest in activities
- Self-blame
- Becoming cynical and disenfranchised

D. Behavioral Signs

- Turning away from/cutting off from resources
- Acting out, impulsive, or risky behaviors
- Addiction/substance abuse
- Social isolation
- Depression
- Perfectionist or OCD-like behaviors to regain sense of control

E. Social

- Feeling powerless and isolated in the social order
- Rage/anger turned against society
- Mistrust or hatred of society

F. Spiritual

- Losing a sense of humanness
- Deep feelings of shame in relation to spirit
- Disbelief or rejection of a higher power
- Misplaced feelings of pride that result in callousness and lack of compassion

G. Family and Collective

- Violence and abuse
- Extreme polarization of beliefs and emotions against "groups"
- Distortion of collective narrative
- Growing intolerance of differences

III. How Should Family Law Attorneys Accommodate for Clients Who Have Experienced Childhood Trauma?

- Environments, practices and policies must be designed to reduce possibility of re-triggering stress reactions
- Environments must promote safety; clients should not feel afraid or isolated or trapped
- Open sharing of information essential (client feels heard, resulting in validation and ability to participate)
- Recognition that people experience different types and levels of trauma; most people must process their trauma
- Clients have the right to privacy and self-determination
- Don't share others traumatic stories; you can re-trigger
- Share Words of Wisdom: This is a chapter in your life; You are in control of beginning and ending it; How many pages do you want?

ACE Questionnaire (Felitti, V. J., Anda, R. F., et al, 1998).

While you were growing up, during your first 18 years of life:

1. Did a parent or other adult in the household **often** ... Swear at you, insult you, put you down, or humiliate you?

   or
   Act in a way that made you afraid that you might be physically hurt?

   Yes ____ No____

2. Did a parent or other adult in the household **often** ... Push, grab, slap, or throw something at you?

   or
   Ever hit you so hard that you had marks or were injured?

   Yes ____ No____

3. Did an adult or person at least 5 years older than you

   e**ver...**
   Touch or fondle you or have you touch their body in a sexual way?
   or
   Try to or actually have oral, anal, or vaginal sex with you?

   Yes ____ No _____

4. Did you **often** feel that...

   No one in your family loved you or thought you were important or special?
   or
   Your family didn't look out for each other, feel close to each other, or support each other?

   Yes ____ No ____

5. Did you **often** feel that ...

   You didn't have enough to eat, had to wear dirty clothes, and had no one to protect you?
   or
   Your parents were too drunk or high to take care of you or take you to the doctor if you needed it?

   Yes ____ No ____

6. Were your parents **ever** separated or divorced?

   Yes ____ No____

7. Was your mother or stepmother:

   Often pushed, grabbed, slapped, or had something thrown at her?
   or
   Sometimes or often kicked, bitten, hit with a fist, or hit with something hard?
   or
   Ever repeatedly hit over at least a few minutes or threatened with a gun or knife?

   Yes ____ No ____

8. Did you live with anyone who was a problem drinker or alcoholic or who used street drugs?

   Yes____ No ____

9. Was a household member depressed or mentally ill or did a household member attempt suicide?

   Yes ____ No ____

10. Did a household member go to prison?

    Yes _____ No _____

Your ACE Score:

Now add up your "Yes" answers: ____

References

Conn, A., Jee, S. H., Briggs, R., Szilagyi, M. A., Manly, J. T., & Szilagyi, P. G. (2018). Parental perspectives of screening for adverse childhood experiences in pediatric primary care. *Families, Systems & Health,* 1, 62-72.

Dawson, G., Klinger, L. G., Panagiotides, H., Spieker, S., & Frey, K (1992). Infants of mothers with depressive symptoms: Electroencephalographic and behavioral findings related to attachment status, *Journal of Development and Psychopathology,* 4, 67-80.

Felitti, V. J., Anda, R. F., Nordenberg, D., Williamson, D. F., Spitz, A. M., Edwards, V., Koss, M. P., Marks, J. S. (1998). Relationships of childhood abuse and household dysfunction to many of the leading causes of death in adults: The adverse childhood experiences (ACE) study. *American Journal of Preventive Medicine,* 14*,* 245-258.

Felitti, V. J. (2016). Addiction, Trauma, and Adverse Childhood Experiences (ACEs): The Neuroscience behind Developmental/Attachment Trauma and Adverse Childhood Experiences, PESI Publishing and Media, Inc.

Hesse, E., Main, M., Abrams, K. Y., Rifkin, A. (2003). Unresolved states regarding loss or abuse can have "second generation" effects: Disorganization, role inversion, and frightening ideation in the offspring of traumatized, non-maltreating parents. Solomon, M.F. & Siegel, D. J. (Eds.) *Healing Trauma: Attachment, mind, body, and brain*, NY: Norton.

Larkin, H. H., Felitti, V. J., & Anda, R. F. (2014). Social work and adverse childhood experiences research: Implications for practice and health policy. *Social Work in Public Health*, 29, 1-16.

Lomanowska, A., Boivin, M., Hertzman, C., & Fleming, A. (2017). Parenting begets parenting: A neurobiological perspective on early adversity and the transmission of parenting styles across generations. *Neuroscience*, 342, 120-139.

Mate, G. (2016). Addiction, Trauma, and Adverse Childhood Experiences (ACEs): The Neuroscience behind Developmental/Attachment Trauma and Adverse Childhood Experiences, PESI Publishing and Media, Inc.

Schack, M. L. (2016). Addiction, Trauma, and Adverse Childhood Experiences (ACEs): The Neuroscience behind Developmental/Attachment Trauma and Adverse Childhood Experiences, PESI Publishing and Media, Inc.

Schore, A. N. (2003). Early relational trauma, disorganized attachment, and the development of a predisposition to violence. Solomon, M.F. & Siegel, D. J. (Eds.) *Healing Trauma: Attachment, mind, body, and brain*, NY: Norton.

Van der Kolk, B. A. (2003). Posttraumatic stress disorder and the nature of trauma. Solomon, M.F. & Siegel, D. J. (Eds.) *Healing Trauma: Attachment, mind, body, and brain*, NY: Norton.

Van der Kolk, B. A. (2014). *The body keeps score: Brain, mind, and body in the healing of trauma.* NY: Penguin.

The Miracle Worker (1962)
People With Disabilities: Securing Access On Myriad Fronts

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This outline will review the various types of Special Needs Trusts that serve as the cornerstone for securing the future of persons challenged by disabilities; the types of government benefits and programs that can be accessed and preserved with proper Special Needs Trust planning; the most common challenges (and solutions) encountered in Special Needs Trust planning; and the newest tool in the planner's arsenal: the ABLE account.

I. THE "SPECIAL NEEDS" OF PERSONS WITH DISABILITIES

A. The scope of the population with disabilities

1. There are an estimated **one billion people with disabilities** in the world, according to a 2011 report published by the World Health Organization. *See* World Health Organization & World Bank Group, "World Report on Disability" (2011).[1] This represents 15% of the world's population. Thus, it is not an overstatement to conclude that "Everyone knows someone with a disability." (In March 2018, Apple, Inc. issued a press release regarding its development of several new "emojis" to better represent the vast number of individuals with various disabilities.) The *International Classification of Functioning, Disability and Health* uses the term "disability" as an umbrella for impairments, activity limitations and participation restrictions. A report issued by the United States Census Bureau concluded that in 2010, approximately **56.7 million of the 303.9 million people in the U.S. civilian non-institutionalized population, representing 18.7% of this group**, reported a disability. *See* Matthew W. Brault, "Americans With Disabilities: 2010," *Current Population Reports*, P70-131, U.S. Census Bureau, Washington, D.C., Issued July 2012 (available at https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html (last visited January 10, 2019)). Another 4.1 million institutionalized people (*i.e.* in correctional institutions or nursing homes) have disabilities, but were not included in the Brault report.

a. The Brault report divided the universe of disabilities into (i) seeing, hearing and speaking limitations, (ii) upper and lower body limitations, (iii) cognitive, mental and emotional functioning limitations, and (iv) difficulties with "Activities of Daily Living" or "Instrumental Activities of Daily Living." Persons age 15 and older with disabilities in these categories were further assigned to one of three "disability domains."

(1) "Communicative" disabilities, including blindness; visual impairments; deafness; hearing impairments; difficulty having speech understood.

(2) "Mental" disabilities, including learning disabilities; intellectual disabilities; developmental disabilities; Alzheimer's disease, senility or dementia; another mental or emotional condition that seriously interferes with everyday activities.

(3) "Physical" disabilities, including required use of a wheelchair, cane, crutches or walker; difficulty walking a quarter of a mile, climbing one flight of

[1] http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf.

stairs, lifting a 10 pound object, grasping objects or getting out of bed; activity limitations caused by arthritis or rheumatism; back or spine problems; broken bones or fractures; cancer; cerebral palsy; diabetes; epilepsy; head or spinal cord injury; heart trouble or atherosclerosis; hernia or rupture; high blood pressure; kidney problems; lung or respiratory problems; missing limbs; paralysis; stiffness or deformity of limbs; stomach or digestive problems; stroke; thyroid problems; tumor, cyst or growth. Brault report, at 2.

b. Another recent report issued by the U.S. Census Bureau, and also authored by Matthew W. Brault, analyzed school-aged children with disabilities. Of the 53.9 million **school-age children** (aged 5 to 17) in the U.S. civilian non-institutionalized population, 2.8 million, or **5.2%, were reported to have a disability** in 2010. *See* Matthew W. Brault, "School-Aged Children With Disabilities in U.S. Metropolitan Statistical Areas: 2010," *American Community Survey Briefs*, U.S. Census Bureau (Nov. 2011).[2]

(1) That report incorporates the definition of "child with a disability" set forth in the **"Individuals with Disabilities Education Act" of 2004 ("IDEA")**, 20 U.S.C. §§ 1400-1482, which includes a child who has "intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . ., orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities; and who, by reason thereof, needs special education and related services." 20 U.S.C. § 1401(3)(A).

(2) In April 2016, the Centers for Disease Control and Prevention issued a report which included a finding that the prevalence of **Autism Spectrum Disorder ("ASD") has risen to 1 in every 68 births** in the United States. ASD is 4.5 times more common among boys (1 in 42) than among girls (1 in 189). *See* Christensen DL, Baio J, Braun KV, et al. "Prevalence and Characteristics of Autism Spectrum Disorder Among Children Aged 8 Years – Autism and Developmental Disabilities Monitoring Network, 11 Sites, United States, 2012."[3] A 2018 study concluded that the estimated prevalence of children in the U.S. with a "parent-reported" diagnosis of ASD is now one in 40.[4]

B. The "special needs" of persons with disabilities

1. The term **"special needs" has no universally accepted definition**, but this author uses the term to refer to the broad consequences of a person's disabling condition and the resultant life circumstances, challenges and opportunities that ensue therefrom. These needs can range from intensely personal physical requirements, to the consequences of a person's inability to secure employment and wages sufficient to be self-supporting, to occasions for improving the quality of life of the person with the disability. The term thus necessarily means something different for each person with a disabling condition.

a. However, the Medicaid programs of various States are increasingly attempting to limit the scope of the term "special needs" to those that are related solely to the "treatment" of a person's disability. *See*, *e.g.*, *Lewis v. Alexander*, 685 F.3d 325, 334-35 (3d Cir. 2012). The Court in that decision held that such attempted limitations on the types of "special needs" that can be funded by a Special Needs Trust are constitutionally impermissible and preempted in light

[2] http://www.census.gov/prod/2011pubs/acsbr10-12.pdf.

[3] https://www.cdc.gov/mmwr/volumes/65/ss/ss6503a1.htm.

[4] http://pediatrics.aapublications.org/content/142/6/e20174161.

of Congress's intent in enacting the federal legislation that blesses the broader use of Special Needs Trusts, as described in Section III, *infra*.

2. Providing appropriately for the special needs of persons with disabilities has emerged as a challenging and complex multidisciplinary task over the past twenty years. Estate planning attorneys and allied professionals have an insatiable appetite for knowledge and direction in this emerging area. Even law students still roaming the hallowed halls of the country's law schools are increasingly eager for academic training in "elder law" and special needs planning. Nevertheless, there are still vast numbers of attorneys and allied professionals who know "just enough to be dangerous" about how best to address the myriad needs of families trying to secure the future of their loved ones with disabilities. This outline will highlight the major challenges, and solutions, which attorneys and allied professionals typically encounter when advising clients with special needs issues.

II. DO NOT DISINHERIT THE BENEFICIARY WITH SPECIAL NEEDS

A. Disinheritance is an outdated and incorrect approach

1. Estate planners who recommend the disinheritance of a beneficiary with a disabling condition often do so because they are unfamiliar with Special Needs Trust planning. Although they have a vague understanding that it is inadvisable for a variety of reasons to make an outright gift or bequest to a person with a disability, many traditional estate planning professionals are reluctant to develop new expertise in this complex emerging area of the law. Rather than developing a proficiency in this area, or aligning themselves with co-counsel who can provide the necessary expertise, they recommend that the beneficiary with special needs be disinherited and provided for informally by other family members, typically adult siblings.

a. Estate planning attorneys are increasingly held liable for legal malpractice for their lack of proper advice on how best to address the special needs of a beneficiary with a disability. *See, e.g., Board of Overseers of the Bar v. Brown*, Maine Supreme Court Docket No. Bar-01-6 (Oct. 25, 2002).[5]

B. Do not leave the share of the person with special needs to another family member to manage informally

1. Able-bodied family members may claim that they are willing and able to manage on an informal basis the funds designated for the beneficiary with special needs. However, such a **precatory arrangement** cannot typically be legally enforced. The donee of the funds could maliciously withhold the benefits of the designated funds from the intended beneficiary, leaving the beneficiary with no legal recourse (and no funds to pursue any remedies).

a. Even **well-intentioned** family members may ultimately fail to manage designated funds for the benefit of the intended beneficiary with special needs.

(1) If the donee of the designated funds **commingles the assets** with his own, and thereafter (i) files for bankruptcy, (ii) becomes party to a divorce proceeding and a subsequent equitable division of property, (iii) has a judgment lien recorded against his property, or (iv) fails to pay his tax liabilities and becomes subject to a tax lien, the funds designated informally for the beneficiary with special needs could be dissipated entirely. These are but a few of the most **common creditor traps** that defeat the intention of clients trying to secure the future of beneficiaries with special needs.

[5] http://www.courts.state.me.us/opinions_orders/opinions/documents/Bar-01-6%20Brown.htm.

(2) A similar result could ensue if the donee of the funds set aside informally for the beneficiary with special needs **predeceases** him and (i) dies intestate with heirs-at-law that include persons other than the intended beneficiary, or (ii) dies testate but fails to make proper arrangements in the Will for the ongoing management of the funds for the benefit of the intended beneficiary. Since an estimated 65% of the population dies intestate, this is another very common flaw in a client's plans to provide informally for beneficiaries with special needs.

III. SPECIAL NEEDS TRUSTS ARE THE CORNERSTONE OF PLANNING FOR A BENEFICIARY WITH A DISABILITY AND RESULTANT SPECIAL NEEDS

A. Types of Special Needs Trusts

1. The universe of Special Needs Trusts can be divided into two main categories: **"first-party" (also sometimes referred to as "self-settled")** Special Needs Trusts (*i.e.* funded with assets belonging to the beneficiary, or to which the beneficiary is legally entitled), and **"third-party"** Special Needs Trusts (*i.e.* funded with assets derived from someone other than the beneficiary).

a. For purposes of drafting Special Needs Trusts, the term "special needs" is often used interchangeably with the terms "supplemental needs" or "supplemental care." Advisors and planners differ widely in their usage of these terms, and there is no generally accepted "best practice" in this regard. As will be discussed below, whichever term is chosen must be **contrasted with providing for the beneficiary's "support" and "maintenance."**

b. The vast majority of Special Needs Trusts are **designed to preserve the beneficiary's eligibility for the various "means-tested" government benefit** programs for which a person with disabilities may qualify (discussed in Section IV, *infra*). This author often uses the term "Supplemental Care Special Needs Trust" to refer to this type of trust. In contrast, a Special Needs Trust could also theoretically be drafted as a "Support Special Needs Trust," but doing so would render the beneficiary ineligible for such "means-tested" programs. Consequently, this outline is devoted to a discussion of how Supplemental Care Special Needs Trusts serve as the cornerstone of securing the future of beneficiaries with special needs.

B. First-Party Special Needs Trusts

1. As part of the OMNIBUS BUDGET RECONCILIATION ACT OF 1993 ("OBRA '93"), Congress specifically authorized the creation of a single-beneficiary Special Needs Trust to be **funded with assets belonging to the beneficiary**, the statutory requirements for which are set forth in 42 U.S.C. § 1396p(d)(4)(A). While several States have statutory provisions that parallel the federal statute authorizing first-party Special Needs Trusts, most do not.

a. In addition to this federal statute, there are two additional primary sources of guidance regarding the validity and effectiveness of Special Needs Trusts: (i) the **Social Security Administration ("SSA") Program Operations Manual System (referred to hereinafter as "POMS")**, and (ii) the various State Medicaid Manuals. The vast majority of POMS provisions relevant to Special Needs Trusts are set forth in POMS SI 01120.200, 01120.201, 01120.202, and 01120.203. (The POMS are available on-line at http://policy.ssa.gov.) **These POMS were substantially updated in April 2018, and all cites thereto in this outline reflect those updates.** The United States Supreme Court, in *Washington State Department of Social & Health Services v. Guardianship of Keffler*, stated that the POMS "warrant respect." 537 U.S. 371, 385 (2003). A federal district court also recognized and reiterated the proposition that "[a]lthough the POMS is a policy and procedure manual that employees of the Department of Health & Human Services use in evaluating Social Security claims, and does not have the force and effect of law, it is nevertheless

persuasive." *Davis v. Secretary of Health and Human Services*, 867 F.2d 336, 340 (6th Cir. 1989). Thus, **practitioners ignore the POMS at their peril.**

2. The **federal statutory requirements**, and related POMS provisions, for a **first-party Special Needs Trust** include the following.

a. First Statutory Requirement. The trust is established by (*i.e.* through the actions of) a **permissible Settlor**, including (i) an adult beneficiary who retains mental capacity notwithstanding his disability (only for trusts established on or after December 13, 2016); (ii) the legal Guardian of the Property or Conservator of the beneficiary, *e.g.* in the case of a minor or an incapacitated adult who meets the relevant threshold under State law for the appointment of a Guardian or Conservator; (iii) a parent or grandparent of the beneficiary; or (iv) a court.

(1) N.B. **"The Special Needs Trust Fairness Act"** was signed into law on December 13, 2016 to allow a mentally competent, yet disabled, beneficiary to establish his own first-party Special Needs Trust. *See* Title V, Section 5007 ("Fairness in Medicaid Supplemental Needs Trusts") of the 21ST CENTURY CURES ACT, P.L. No. 114-255. The SSA's POMS were updated in April 2018 to reflect this statutory change to 42 U.S.C. § 1396p(d)(4)(A). *See* POMS SI 01120.203.C. If the adult beneficiary has previously granted a Power of Attorney to a third party which authorizes the establishment and funding of a first-party Special Needs Trust with the beneficiary's assets, the SSA will now allow the attorney-in-fact, acting as agent for the beneficiary, to serve as the Settlor of the trust. *See* POMS SI 01120.203.B.9 and C.2.a and 3.

(2) N.B. Prior to December 13, 2016, the SSA took the position that **a mere "agent" of the beneficiary** could *not* serve as the Settlor of a first-party Special Needs Trust. Thus, a person serving as attorney-in-fact for the beneficiary under a Power of Attorney could *not* establish a first-party Special Needs Trust for the benefit of the principal, and this was a frequent basis for disqualifying the beneficiary for means-tested government benefits. *Id.*

(3) Notwithstanding the unambiguous provisions of the federal enabling statute regarding the authority of "**a parent or grandparent**" to establish and fund a first-party Special Needs Trust, the SSA has taken the position that a parent or grandparent **must also have *independent legal authority*** over the beneficiary's assets, *e.g.* as a court-appointed Conservator or pursuant to a Power of Attorney. *See* POMS SI 01120.203.B.l.9 and SI 01120.203.C.3. **Absent such authority**, a parent or grandparent may also establish the trust as a **"seed trust,"** which is funded with a nominal amount of their own funds, and then augmented with the beneficiary's assets by someone who has authority over those assets. *See* POMS SI 01120.203.B.1.7, and SI 01120.203.C.2.b.

(4) In the case of a first-party Special Needs Trust established through the actions of a court, the creation of the trust must be ***required* by a court order**, **not merely approved**. *See* POMS 01120.203.B.8. The creation of the trust cannot have been completed before the court order is issued. "Court approval of an already created special needs trust is not sufficient . . . The court must specifically either establish the trust or order the establishment of the trust." *Id.*

b. Second Statutory Requirement. At the time the trust was established, the beneficiary of the trust is "disabled" within the meaning of the Social Security Act, 42 U.S.C. § 1382c(a)(3), *i.e.* unable to engage in any **substantial gainful activity ("SGA")** by reason of any medically determinable physical or mental impairment, or combination of impairments, which can be expected to result in death, or which has lasted, or can be expected to last, for a continuous period of not less than twelve months. *See* 20 C.F.R. § 416.905. *See* POMS SI 01120.203.B.4. If the beneficiary is under the age of 18, "disability" is defined as a medically

determinable physical or mental impairment, or combination of impairments, that causes **marked and severe functional limitations**, and that can be expected to cause death, or that has lasted, or can be expected to last, for a continuous period of not less than twelve months. *See* 20 C.F.R. § 416.906. However, if such a minor is able to engage in SGA, he will not meet the definition of disabled.

(1) For 2019, the **income threshold evidencing a person's ability to engage in SGA** is $1,220/month. For a person who is blind, the SGA threshold is $2,040/month in 2019. *See* U.S. Social Security Administration, Cost-of-Living Adjustment (COLA).[6] For purposes of a determination of SGA, a person's gross earnings *excludes* (i) unreimbursed out-of-pocket "impairment related work expenses" (*e.g.* attendant services, modifications to a vehicle used to transport the person to work), and (ii) the value of any work subsidies or support.

c. Third Statutory Requirement. The trust is **irrevocable**.

(1) While the federal enabling statute does not expressly require a first-party Special Needs Trust to be irrevocable, both the SSA and State Medicaid programs **require irrevocability**. *See, e.g.*, POMS SI 01120.201.D.2 and SI 01120.200.D.2.

(2) Even if a Special Needs Trust contains an express irrevocability provision, beware the impact of esoteric common law doctrines such as the "Rule in Shelley's Case," the "Doctrine of Worthier Title," the "Doctrine of Merger," or the "Settlor-Sole Beneficiary Rule," the application of which can cause the trust to be deemed *revocable* under State law. *See, e.g.*, POMS SI ATL 01120.201. *See also* Mary F. Radford & Clarissa Bryan, *Irrevocability of Special Needs Trusts: The Tangled Web That is Woven When English Feudal Law is Imported Into Modern Determinations of Medicaid Eligibility*, NAELA Journal, Vol. VIII, No. 1 (Spring 2012).

(3) POMS SI 01120.200.D.3 (as revised in April 2018) added new language to recognize the widespread abolishment of such common law doctrines: "When a trust is established for a beneficiary who is a minor, or if a court has ordered the establishment of a trust for an incompetent beneficiary, assume (absent regional instructions and subject to the NOTE), that it is acceptable for "the estate of the beneficiary" to be named as the residual beneficiary without causing the trust to be considered revocable." [The referenced "NOTE" merely provides that "policies regarding grantor trusts may or may not apply in your particular State."]

d. Fourth Statutory Requirement. The trust is for the ***sole benefit*** of the beneficiary.

(1) While the federal enabling statute uses only the phrase "for the benefit of" the beneficiary, the States and the SSA have effectively required that **a stricter "sole benefit" standard** be utilized when evaluating first-party Special Needs Trusts. *See, e.g.*, POMS SI 01120.203.B.6. This "sole benefit" requirement derives from the "asset transfer rules" which apply to persons who transfer assets as a way of qualifying for means-tested government benefits, including Supplemental Security Income and Medicaid, discussed *infra* in Section IV. The transfer of a person's assets to a first-party Special Needs Trust is an exempt transfer, and not subject to a transfer penalty, only if the trust is "solely for the benefit" of the trust beneficiary. *See* 42 U.S.C. § 1382b(c)(1)(C)(ii)(IV) and § 1396p(c)(2)(B)(iii) and (iv). Thus, POMS SI 01120.203.B.6 and SI 01120.203.I.1, Step 3, assert the position of the SSA that the "sole benefit" standard applies to first-party Special Needs Trusts, notwithstanding the contrary language of the federal enabling statute.

[6] https://www.socialsecurity.gov/news/press/factsheets/colafacts2019.pdf.

The concept of "sole benefit" is further defined in POMS SI 01120.201.F, and currently constitutes a major battleground for those who draft and administer Special Needs Trusts.

e. Fifth Statutory Requirement. The beneficiary is under age 65 when the trust is established and funded with the beneficiary's assets. *See* POMS SI 01120.203.B.2.

(1) If the trust was established prior to the date that the beneficiary attains age 65, the trust continues to qualify even after he attains age 65. *See* POMS SI 01120.203.B.2.

(2) However, it is **not permissible to make additions** to, or augmentations of, a first-party Special Needs Trust after the beneficiary attains age 65. This does not include interest, dividends or other earnings on trust principal deposited prior to the beneficiary's 65th birthday. Similarly, annuity payments, support payments, and Survivor Benefit Plan payments (*see infra* at Section IV.A.1.a.(2)(e)(A)) that are payable to a first-party Special Needs Trust pursuant to an **irrevocable assignment** to the trust prior to the beneficiary's 65th birthday will not constitute "additions" even if the payments continue after age 65. *See* POMS SI 01120.203.B.3.

f. Sixth Statutory Requirement. Upon the death of the beneficiary (or an earlier termination event), medical assistance providers (*i.e.* **Medicaid,** but not the SSA) **will be reimbursed** from any property remaining in the first-party Special Needs Trust (*if* any remains) up to the total amount of medical assistance benefits paid on behalf of the beneficiary under one or more State Medicaid plans during his lifetime. *See* POMS SI 01120.203.B.10.

(1) This last statutory requirement has resulted in the often-used monikers of **"Payback Trust"** or **"Medicaid Payback Trust"** for a first-party Special Needs Trust authorized by 42 U.S.C. § 1396p(d)(4)(A). Such Special Needs Trusts are also often called **"(d)(4)(A) Trusts."**

(2) The **only disbursements** that may be made from a first-party Special Needs Trust after the beneficiary's death and **before satisfaction of the Medicaid payback**, are (i) taxes due from the trust to the state or federal government as a consequence of the beneficiary's death, and (ii) reasonable fees associated with the "administration of the trust estate," including an "accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust." *See* POMS SI 01120.203.E.1.

(3) Specifically ***excluded*** **as permissible pre-payback** disbursements are taxes due from the beneficiary's estate other than those arising from the inclusion of the trust assets in the beneficiary's gross estate; inheritance taxes due from residual beneficiaries of the trust; payment of debts owed to third parties; **funeral expenses**; and payments to any residual beneficiaries. *See* POMS SI 01120.203.E.2.

(a) Thus, the first order of business for the Trustee of a first-party Special Needs Trust is to secure pre-need, pre-paid arrangements for the beneficiary's burial or cremation and related mortuary, crematory and funerary services to be held as an asset of the trust.

(4) Courts were initially split regarding the scope of the "total amount" that must be paid back to Medicaid. *See, e.g., In the Matter of Ruben N.*, 55 A.D.3d 257 (App. Div., 2d Dept. 2008), which initially held that Medicaid should be paid back only for assistance paid after the Special Needs Trust was established. *In the Matter of Abraham XX, Deceased v. State of New York*, 11 N.Y.3d 429 (2008), next held that Medicaid should be reimbursed for assistance paid even before the Special Needs Trust was established. Subsequently, the earlier opinion and order in *Ruben N.* were recalled and vacated, citing *Abraham XX*, allowing the State to recover the **cost of**

care provided over the course of the plaintiff's entire lifetime. *In the Matter of Ruben N.,* 71 A.D.3d 897 (App. Div., 2d Dept. 2010).

(5) Provisions of the SSA's POMS issued after the decisions noted above take the position (not surprisingly) that Medicaid's payback **"cannot be limited to the period after the establishment of the trust**." *See* POMS SI 01120.203.B.10.

(6) In the **context of a personal injury claim** that yields a recovery (verdict or settlement) for the beneficiary of a (d)(4)(A) Special Needs Trust, before the trust can be funded, Medicaid must first be reimbursed for those medical benefits paid for the beneficiary prior to the establishment of the trust for medical care necessitated by the wrongful acts that generated the recovery. However, the U.S. Supreme Court held in 2006 that this **"pre-trust lien"** may be satisfied only from that portion of the recovery that is specifically allocable to past medical expenses and costs. *See Arkansas Department of Health & Human Services v.* ***Ahlborn***, 547 U.S. 268 (2006).

(a) In 2013, Congress **legislatively overruled the *Ahlborn*** decision in § 202(b) of the BIPARTISAN BUDGET ACT OF 2013 (Joint Resolution, 113th Congress, H.J. Res. 59; Public Law No. 113-67), effective October 1, 2014. However, implementation was delayed twice, most recently by § 220 of the MEDICARE ACCESS AND CHIP REAUTHORIZATION ACT OF 2015 (U.S. House, 114th Congress, H.R. 2; Public Law No. 114-10, § 220, 129 Stat. 87, 154 (2015)), delaying implementation through October 1, 2017.

(b) However, a mere four months later, in February 2018, the **anti-*Ahlborn* legislation** described in Paragraph (a), above, was **"permanently" and retroactively repealed** as part of the BIPARTISAN BUDGET ACT OF 2018 (H.R. 1892, 115TH CONGRESS), Section 53102 ("Third Party Liability in Medicaid and CHIP."). Subsections (b)(1) and (c)(3), provide as follows:

> "(b)(1) REPEAL. Effective as of September 30, 2017, subsection (b) of section 202 of the BIPARTISAN BUDGET ACT OF 2013 (Public Law 113-67; 127-Stat. 1177; 42 U.S.C. 1396a note) (including amendments made by such subsection) is repealed and the provisions amended by such subsection shall be applied and administered **as if such amendments had never been enacted**."
>
> "(c)(3) EFFECTIVE DATE; TREATMENT. The repeal and amendment made by this subsection shall take effect as if enacted on September 30, 2017, and shall apply with respect to any open claims, including claims pending, generated, or filed, after such date. The amendments made by subsections (a) and (b) of section 202 of the BIPARTISAN BUDGET ACT OF 2013 (Public Law 113-67; 127 Stat. 1177; 42 U.S.C. 1396a note) that took effect on October 1, 2017, are null and void and section 1902(a)(25) of the Social Security Act (42 U.S.C. 1396a(a)(25)) shall be applied and administered **as if such amendments had not taken effect on such date**."

(7) If a first-party Special Needs Trust will terminate prior to the actual death of the beneficiary, *e.g.* in the event that the beneficiary recovers from his disability and no longer meets the SSA's definition of "disabled," POMS SI 01120.199.F.1. sets forth the following requirements for approved **"early termination"** provisions: (i) the Medicaid payback is satisfied after payment of certain allowable trust administrative expenses (*i.e.* state or federal taxes due as a consequence of the termination of the trust, and reasonable fees and expenses associated with the termination and "wrapping up" of the trust); (ii) the beneficiary (and no other entity or person)

receives all remaining trust funds; and (iii) the power to terminate the trust early is held by someone other than the beneficiary.

(8) The Medicaid payback amount (whether paid at the beneficiary's death or some earlier time) is calculated based on the **actual Medicaid rate** for expenditures for the beneficiary during his lifetime (which is significantly lower than private-pay rates for the same services), and does *not* include an "interest" component (which amounts to an **interest-free loan** from the government). The Trustee is well advised to review the details of the alleged payback amount with those persons who were intimately involved in the beneficiary's healthcare plan, as frequent (and significant) errors abound in Medicaid record-keeping.

(9) If the beneficiary during his life has received Medicaid benefits from more than one State, POMS SI 011210.203.B.10 specifies that the **"trust must provide payback for any State(s) that may have provided medical assistance under the State Medicaid plan(s) and not be limited to any particular State(s) . . . ."** The 2018 revisions of the POMS now clearly authorize a *pro rata* allocation of the property remaining in a first-party Special Needs Trust if the remaining assets are insufficient to satisfy fully the claims of all of the State Medicaid Plans which have provided medical assistance to the beneficiary during his lifetime. "If the trust does not have sufficient funds upon the beneficiary's death to reimburse in full each State that provided medical assistance, the trust may reimburse the States on a *pro rata* or proportional basis." POMS SI 01120.203.B.10.

g. Additional POMS Requirements. The provisions of POMS SI 01120.203.B also apply to a first-party Special Needs Trust established on or after December 13, 2016. *See* POMS SI 01120.203.C.4, referencing POMS SI 01120.203.B.2 through SI 01120.203.B.6, SI 01120.203.B.8 and SI 01120.203.B.10. A first-party Special Needs Trust must also pass muster under POMS SI 01120.201 and POMS SI 01120.200.D.1.a, to determine if it is a countable resource. *See* POMS SI 01120.203.A, 01120.203.B.1, 01120.203.C.1, and 01120.200.A.1.

(1) In addition to the issue of irrevocability, discussed at Section III.B.2.C, *supra*, POMS SI 01120.200.D.1.a and 01120.200.D.1.b.2 effectively require the inclusion in the trust agreement of a **spendthrift clause that is valid under state law**, to preclude the beneficiary from selling his beneficial interest in the trust for cash that can then be used for his food or shelter needs, *i.e.* his "support and maintenance." POMS SI 01120.200.B.13 sets forth the SSA's understanding of a spendthrift clause. Best practice dictates the inclusion of a spendthrift clause prohibiting both voluntary and involuntary transfers of the beneficiary's interest in the first-party Special Needs Trust.

3. In addition to the first-party Special Needs Trust authorized by 42 U.S.C. § 1396p(d)(4)(A), 42 U.S.C. § 1396p(d)(4)(B) authorizes a limited-use Trust designed to receive and distribute any income of the beneficiary which exceeds the "income cap" prescribed by a State for Medicaid long-term care eligibility (*i.e.* nursing home Medicaid). *See* additional discussion in Section IV.A.1.c.(3).(a), *infra*. These trusts are also known as **"Miller Trusts"** or **"Qualified Income Trusts."** The requirements for a valid "(d)(4)(B)" trust include the following:

a. The trust must be irrevocable and established for the benefit of the beneficiary by himself, his legal Guardian or Conservator, or an attorney-in-fact acting under a Power of Attorney that grants express authority to establish such a trust.

b. The Trustee may be anyone willing to serve as such (including a nursing home), other than the beneficiary.

c. The trust property can consist solely of the beneficiary's income, such as pension benefits, Social Security benefits, investment income and the like. No other assets or resources may be deposited to the trust.

d. All income deposited to the trust must be fully utilized by the end of the following month for permissible purposes only, including payments for (i) the beneficiary's "share of cost" for nursing home expenses (or the covered expenses of the beneficiary under certain other community-based "classes of assistance" of the State Medicaid program); (ii) the beneficiary's "personal needs allowance;" (iii) approved "diversions" to a community spouse or dependent children; or (iv) medical expenses of the beneficiary or a community spouse that are not covered by Medicaid. Notably *excluded* as permissible expenditures are the fees of professional advisors, bank service fees, or any non-medical living expenses (*e.g.* mortgage or rent).

e. Upon the death of the beneficiary (or other earlier termination events), any funds remaining in the trust must be paid to the State Medicaid program.

f. A Miller Trust/Qualified Income Trust is *not* considered an excluded trust for SSI eligibility purposes. However, some States may exclude these trusts from counting as a resource for Medicaid eligibility purposes. *See* POMS SI 01120.203.F.

C. Third-Party Special Needs Trusts

1. There is **no specific federal statutory authority** for the creation of a third-party Special Needs Trust (*i.e.* one that is funded with assets that do not belong to the beneficiary). However, the POMS published and maintained by the SSA do specifically address third-party Special Needs Trusts. *See, e.g.*, POMS SI 01120.200.A.1.b, POMS SI 01120.200.B.16. **The POMS applicable to first-party Special Needs Trusts (including POMS SI 01120.201 and SI 01120.203) do not apply to third-party Special Needs Trusts. *See* POMS SI 01120.201.A.2.**

2. Third-party Special Needs Trusts are not subject to most of the federal statutory requirements mandated for first-party Special Needs Trusts, described in Section III.B, *supra*. POMS SI 01120.201.A.2 (among other sections) now clearly states that the POMS which apply to first-party Special Needs Trusts (including POMS SI 01120.203 in its entirety) do not apply to third-party Special Needs Trusts. Thus, most importantly, ***there is no Medicaid payback for a third-party Special Needs Trust*** that is drafted properly from the outset. Consequently, as a general matter, **third-party funds should never be added to a first-party Special Needs Trust, which could unnecessarily subject those funds to the Medicaid payback required for first-party Special Needs Trusts.** Furthermore (i) anyone can serve as the Settlor of a third-party Special Needs Trust; (ii) the beneficiary need not meet any particular definition of "disabled;" (iii) there is no age limitation on the beneficiary or the timing of funding the trust; and (iv) the beneficiary need not be the sole beneficiary of the trust. The POMS do require that the trust be **irrevocable as to the Beneficiary**, *i.e.* the beneficiary cannot hold the right to revoke or terminate the trust or to use the trust funds for his support or maintenance under the terms of the trust. *See* POMS SI 01120.200.D.1.a, 01120.200.D.2 and POMS SI 01120.201.D.1. **"If an individual does not have the legal authority to revoke or terminate the trust or to direct the use of the trust assets for his or her own support and maintenance, the trust principal is not the individual's resource for SSI purposes."** ***Id.***

a. Drafters are advised to include a **valid spendthrift clause** in the trust agreement that prohibits the beneficiary from transferring or selling his beneficial interest in the trust, and prohibits involuntary transfers (*e.g.* to the beneficiary's creditors), thus precluding those avenues for accessing trust assets for the beneficiary's support and maintenance. *See* POMS SI 01120.200.B.13, and 01120.200.D.1.a, and SI 01120.200.D.1.b.2.

3. Third-party Special Needs Trusts may be established ***inter vivos*** *(i.e.* during the Settlor's life), including as part of his estate plan (*e.g.* under a Revocable Living Trust that serves as a Will substitute), or under the Settlor's Will as a **testamentary** trust.

a. However, if the Settlor's spouse is the intended beneficiary of a third-party Special Needs Trust, 42 U.S.C. § 1382b(e) requires that the trust be created under the Settlor's Will (and *not* pursuant to a Will substitute such as a Revocable Living Trust) in order to be disregarded as an "available" or "countable" resource to the spouse for purposes of eligibility for means-tested government benefits (discussed in more detail in Section IV, *infra*).

D. <u>"Pooled" Special Needs Trusts</u>

1. In addition to the single-beneficiary first-party Special Needs Trust authorized by 42 U.S.C. § 1396p(d)(4)(A), described in Section III.B., *supra*, OBRA '93 also authorized the concept of a "pooled" Special Needs Trust, with a separate first-party sub-account established for the sole benefit of a beneficiary with a disability. 42 U.S.C. § 1396p(d)(4)(C) (and related POMS provisions) set forth the following **statutory requirements for a first-party sub-account with a pooled Special Needs Trust (often also referred to as a "(d)(4)(C)" Special Needs Trust).**

a. First Statutory Requirement. A pooled Special Needs Trust must be **"established and managed by a non-profit association**." POMS SI 01120.203.D.1. POMS SI 01120.203.D.3 defines a non-profit association as "an organization established and certified under a State nonprofit statute." As of January 2011, tax-exempt status is no longer required of the non-profit association.

b. Second Statutory Requirement. First-party sub-accounts with a pooled Special Needs Trust must contain the assets of individuals who are **"disabled"** as defined by 42 U.S.C. § 1382c(a)(3) (discussed in Section III.B.2.b, *supra*), at the time the sub-accounts were established. POMS SI 01120.203.D.2.

c. Third and Fourth Statutory Requirements. The pooled Special Needs Trust must maintain a **separate first-party sub-account** for the **sole benefit** of each beneficiary with a disability, but may pool the assets of the separate sub-accounts for purposes of investment and management. *See* POMS SI 01120.203.D.1, 4 and 5.

d. Fifth Statutory Requirement. A separate first-party sub-account with the pooled Special Needs Trust must be **established by** (i) the beneficiary's legal Guardian of the Property or Conservator; (ii) the beneficiary's parent or grandparent; (iii) a court; or (iv) the beneficiary himself (or his attorney-in-fact acting under a Power of Attorney). (In contrast, as noted in Section III.B.2.a., *supra*, only since December 13, 2016 has it been permissible for the beneficiary of a first-party (d)(4)(A) Special Needs Trust to serve as the Settlor of his trust.) POMS SI 01120.203.D.1. and 01120.203.D.6.

e. Sixth Statutory Requirement. To the extent that the pooled Special Needs Trust does not retain any amounts remaining in a separate first-party sub-account upon the beneficiary's death, such assets must be used to **reimburse Medicaid** (but not the SSA) up to the total amount of medical assistance benefits paid on behalf of the beneficiary during his lifetime under one or more State Medicaid plans, *i.e.* not just after the sub-account is established. *See also* POMS SI 01120.203.D.8. "If the trust does not have sufficient funds upon the beneficiary's death to reimburse each State that provided medical assistance, the trust may reimburse the States on a *pro rata* or proportional basis." *Id.* POMS SI 01120.203.E.1 describes the few permissible pre-payback expenses that are allowable.

(1) POMS SI 01120.199.F.2 sets forth modified requirements for an acceptable **"early termination"** provision applicable to a beneficiary's first-party sub-account with a pooled Special Needs Trust. The requirements described in Section III.B.2.f.(2), *supra* (*i.e.* for first-party Special Needs Trusts), need not be satisfied in the context of a pooled Special Needs Trust if the early termination provision only allows for the transfer of an account from one qualified pooled Special Needs Trust to another. However, no funds may be retained by the first pooled Special Needs Trust if the termination of the beneficiary's account occurs during his life rather than by virtue of his death.

f. There is **no express statutory limitation on the age** of a beneficiary of a first-party sub-account with a pooled Special Needs Trust, *i.e.* a first-party sub-account may theoretically be established with a pooled Special Needs Trust even if the beneficiary is 65 or older (in contrast to a (d)(4)(A) Special Needs Trust, as described in Section III.B.2.e., *supra*). However, many States choose to impose a **penalty for the uncompensated transfer** of the beneficiary's assets to the pooled Special Needs Trust after the age of 65 if the beneficiary wishes to qualify for Medicaid long-term care (*i.e.* nursing home) coverage, or for certain long-term care services rendered in the community. *See* 42 U.S.C. § 1396p(c)(1)(B)(i)-(ii), (c)(1)(G), (e)(1), (f), POMS SI 01120.203.D.1 and POMS SI 01150.121.

(1) The United States Court of Appeals for the Third Circuit has recently held that the attempt by the Commonwealth of Pennsylvania to impose an age limitation on the persons who can establish an account with pooled Special Needs Trusts authorized by 42 U.S.C. § 1396p(d)(4)(C) (*i.e.* prohibiting beneficiaries who are 65 years of age or older) violates federal law and is thus preempted. *See Lewis v. Alexander*, 685 F.3d 325 (3d Cir. 2012).

g. Additional POMS Requirements. A first-party sub-account with a pooled Special Needs Trust must also pass muster under POMS SI 01120.200.D.1.a to determine if it is a countable resource. POMS SI 01120.203.D.1.

h. A separate sub-account with a **pooled Special Needs Trust** may also be established with assets derived from a **third-party**. While the beneficiary of a third-party sub-account with a pooled Special Needs Trust must still meet the government's definition of "disabled," (which is not required for the beneficiary of a third-party Special Needs Trust, as described, *supra*, in Section III.C.2), (i) there is no restriction on who can establish the third-party account; (ii) the beneficiary's age does not limit the timing of the establishment or funding of the account; and (most importantly) (iii) **there is no Medicaid payback with a third-party sub-account.**

i. A pooled Special Needs Trust is typically governed by a **"Master Trust Agreement"** that applies to all of the separate sub-accounts. A separate sub-account is established by completing a **"Joinder Agreement,"** which usually does not require the involvement of an attorney (one of the most popular aspects of this option). This is a very cost-effective option for a beneficiary who has too many assets to maintain his eligibility for means-tested government benefits, but not enough to warrant the expense of creating or maintaining a custom-drafted first-party or third-party Special Needs Trust.

j. Prior to December 13, 2016, a first-party sub-account with a pooled Special Needs Trust was often **the only option** for a beneficiary who (i) had no living parents or grandparents, (ii) was "disabled" but mentally competent and thus could not qualify for a legal Guardian or Conservator, (iii) could not convince a court to serve as the Settlor of a (d)(4)(A) Special Needs Trust, and/or (iv) was age 65 or older.

2. Supreme Court Review? On June 12, 2012, the United States Court of Appeals for the Third Circuit held that the Medicaid program administered in the Commonwealth of

Pennsylvania could not impose additional criteria for the exemption of pooled Special Needs Trusts authorized by 42 U.S.C. § 1396p(d)(4)(C). *See Lewis v. Alexander*, 685 F.3d 325 (3d Cir. 2012). Pursuant to the federal preemption doctrine, the Court struck down the following elements of a Pennsylvania statute that purported to impose additional qualification criteria over and above those set forth in the federal statute: (i) a restriction on the amount of funds in a deceased beneficiary's account that can be retained by the pooled Special Needs Trust; (ii) a requirement that expenditures from a beneficiary's account must be "reasonably related" to the beneficiary's needs; (iii) a requirement that the beneficiary's special needs could not be met without the funds in the beneficiary's account; (iv) a definition of "special needs" that limits permissible disbursements to "items, products or services . . . related to the treatment of the beneficiary's disability;" and (iv) a restriction limiting beneficiaries of a pooled Special Needs Trust to those under 65 years of age.

a. The Court held that "Congress intended that special needs trusts be defined by a specific set of criteria that it set forth and no others. We base this upon Congress' choice to provide a list of requirements to be met by special needs trusts. The venerable canon of statutory construction— *expressio unius est exclusio alterius*—essentially says that where a specific list is set forth, it is presumed that items not on the list have been excluded. . . . Absent an explicit statement or a clear impression that States are free to expand the list, *expressio unius* leads us to conclude they are not." *Id*. at 347.

b. Earlier in its decision, the Court concluded that "in determining Medicaid eligibility, States are **required to exempt any trust meeting the provisions** of 42 U.S.C. § 1396p(d)(4)." *Id*. at 344. The Third Circuit's holding that "42 U.S.C. § 1396p(d)(4) imposes mandatory obligations upon the States" is contrary to the position of the Second Circuit in *Wong v. Doar*, 571 F.3d 247 (2d Cir. 2009), and the Tenth Circuit in *Keith v. Rizzuto*, 212 F.3d 1190 (10th Cir. 2000), which held that 42 U.S.C. § 1396p(d)(4) **does not mandate that the States exempt special needs trusts meeting its criteria**. *Id.* at 343. On January 14, 2013, the United States Supreme Court denied a Petition for Writ of Certiorari, thus leaving intact the Third Circuit's decision. *See* 133 S.Ct. 933 (2013). This issue is thus **ripe for a review by the United States Supreme Court**.

E. "Sole Benefit" Trusts

1. 42 U.S.C. § 1396p(c)(2)(B)(iii) and (iv) (Medicaid) and § 1382b(c)(1)(C)(ii)(IV) (Supplemental Security Income) exempt from transfer penalties (for purposes of *the transferor's* eligibility for Medicaid and SSI) any amounts transferred to a trust "solely for the benefit of" (i) the transferor's child (of any age) who is blind or "disabled" (within the meaning of the Social Security Act), or (ii) any person under the age of 65 who is "disabled." *See also* POMS SI 01150.121.A.2 and 3. While a so-called "Sole Benefit Trust" ("SBT") is usually drafted as a Special Needs Trust so that it does not count as an "available" or "countable" resource to a beneficiary who receives means-tested government benefits, the States are split on whether a SBT must contain a Medicaid payback provision (as required of first-party "(d)(4)(A)" and "(d)(4)(C)" Special Needs Trusts), or whether the trust agreement can instead mandate that all trust property must be paid out on an "actuarially sound" basis over the beneficiary's estimated life expectancy (which might be a viable option for beneficiaries who do not receive means-tested government benefits). The States are further split on the definition of "sole benefit" distributions, both in the context of SBTs and the other types of Special Needs Trusts discussed in this Section III, *supra*.

F. Special Needs Trusts are not "available" or "countable" for purposes of most "means-tested" government benefits

1. Special Needs Trusts (whether first-party or third-party) that are ***properly drafted*** **are not considered "available" or "countable"** for purposes of the beneficiary's eligibility for most

"means-tested" government benefits, including Medicaid and Supplemental Security Income (discussed in Section IV, *infra*).

a. A properly drafted Special Needs Trust (whether first-party or third-party) will specify that the Trustee is not obligated, and cannot be compelled by the beneficiary, a court, or anyone else, to use the assets of the trust to provide for the beneficiary's "support" or "maintenance." **In most jurisdictions, the use of the "support" or "maintenance" distribution standards typically results in the trust assets being deemed "available" or "countable" to the beneficiary for purposes of means-tested benefits.**

(1) Thus, the **classic "ascertainable standards"** for trust distributions found in most testamentary "Bypass/Credit Shelter Trusts" (*i.e.* "health, education, ***maintenance*** **and** ***support***") will generally render the assets of those trusts **"available" or "countable"** resources to a beneficiary seeking to maintain his eligibility for means-tested government benefits.

(2) While some practitioners utilize a **fully discretionary distribution** standard for Special Needs Trusts, unadorned by any descriptive standard whatsoever, many professional Trustees prefer an **illustrative listing of permissible types** of distributions that can be made from a Special Needs Trust without adversely impacting the beneficiary's means-tested benefits. The following are a few of **the most common types of permissible disbursements**.

(a) As noted *supra* at Section III.B.2.d, the administration of first-party Special Needs Trusts must be guided by the "sole benefit rule" imposed by the SSA. The **April 2018 revisions to the POMS attempt to soften the SSA's previously strict construction of the sole benefit rule.** The "kinder, gentler" construction of this rule (which, as noted above, generally does not apply to third-party Special Needs Trusts) is currently espoused in POMS SI 01120.201.F, requiring simply that the beneficiary derive "some benefit" from a trust disbursement. POMS SI 01120.201.F. Drafters and administrators of first-party Special Needs Trusts are well advised to review and understand these new provisions, and the examples illustrating the significant "thaw" in the SSA's previously intractable position on the sole benefit rule as applied to first-party Special Needs Trusts.

(b) Permissible disbursements include payments directly to the **providers of services** for the benefit of the beneficiary, including services not covered by Medicaid; household services, including cable TV, internet, telephone, security alarm, housekeepers; professional services, including those of attorneys, accountants, care managers, life care planners, benefits advocates, special education advocates, investment advisors; personal care services, such as dry cleaning, laundry, hairstylists, massage therapists, acupuncturists, personal attendants; companion/sitter services; counseling and therapies.

(c) Permissible disbursements include payments directly to the **providers of goods** for the benefit of the beneficiary (excluding food and shelter), including medical equipment and supplies, household appliances, furniture and furnishings; clothing and personal effects; camera and computer equipment; musical instruments; fitness and sporting equipment; hobby supplies; magazine and newspaper subscriptions; holiday decorations and cards; linens and towels; stationery and stamps; tickets to recreational or entertainment events.

(d) Also permissible are **"quality of life"** expenditures, such as appropriate vacations; educational opportunities and supplies; club memberships; a pet or service animal and its required supplies and veterinary care.

(e) Frequent requests for payment of **transportation** costs, including an appropriate private vehicle (and the fuel, maintenance and insurance therefor); taxi or private driver; public transportation passes; bicycle, moped or golf cart; helicopter or private airplane, are also permissible.

(f) Permissible disbursements also include **non-food** grocery and household items; personal care and hygiene items; over-the-counter medications.

(g) Finally, it is permissible for the trust to pay the beneficiary's **credit card bill** for items other than shelter or food (*e.g.* no payment for groceries, restaurant dinners, catered meals).

(h) The 2018 POMS revisions make it clear that the Trustee of a first-party or third-party Special Needs Trust may permissibly use trust assets to fund an ABLE account (discussed in detailed in Section VII, *infra*) for the beneficiary. *See* POMS SI 01120.201.I.1.c and h.

b. A properly drafted Special Needs Trust (whether first-party or third-party) will specify the Settlor's intention that **the trust should "supplement, not supplant" any public or private benefits** for which the beneficiary may be eligible as a consequence of his disability.

(1) Nevertheless, the Trustee should also be given the latitude to **"opt out" of such benefits** if they are not "reasonably available" to the beneficiary (*e.g.* the expense of obtaining the benefits exceeds the value thereof), or if the benefits are insufficient or otherwise inadequate to provide fully for the beneficiary's needs.

2. Special Needs Trusts that are ***properly administered*** **are not considered "available"** or "countable" for purposes of the beneficiary's eligibility for most "means-tested" government benefits, including Medicaid and Supplemental Security Income (discussed in Section IV, *infra*).

a. In general, the Trustee of a Special Needs Trust must make disbursements **directly to the provider** of goods and services for the benefit of the beneficiary with the disability, for purposes ***other than the beneficiary's food or shelter needs*** (*i.e.,* the two categories of disbursements that the government includes in a person's **"support" and "maintenance"**). *See* POMS SI 01120.201.I. for an overview of how to minimize the potential adverse impact of trust distributions on the beneficiary's means-tested benefits.

(1) Nevertheless, a Special Needs Trust **should not specifically prohibit** the Trustee from using the assets of the trust for the beneficiary's **food or shelter** needs, notwithstanding a possible reduction in the beneficiary's means-tested government benefits for such use, if to do so would serve the best interests of the beneficiary.

(a) The classic example of a situation where it would be in the beneficiary's best interests to use the assets of a Special Needs Trust to provide for his shelter is where his monthly cash benefit from Supplemental Security Income (maximum Federal Benefit Rate for 2019 is $771/month) is insufficient to cover his rent or mortgage payment. If the Trustee of the Special Needs Trust either (i) "makes up the difference" between the SSI payment and the actual rent or mortgage payment that is due, or (ii) pays the entire rent or mortgage payment that is due, this will in turn nominally reduce the beneficiary's SSI payment for that month. *See infra*, at Section IV.A.1.a.(2)(f). As long as the Trustee is cognizant of the impact on the beneficiary's means-tested

benefits of such disbursements, any potentially adverse impact on the beneficiary's overall living situation can generally be managed in the best interest of the beneficiary.

(2) Disbursements of cash or cash equivalents (including funds accessible via the beneficiary's personal unrestricted debit card, the beneficiary's credit card with cash advance features, or items that can be converted to cash, *e.g.* a gift card or gift certificate) should never be distributed directly to the beneficiary, as this will result in a dollar-for-dollar reduction in the beneficiary's means-tested benefits. POMS SI 01120.201.I.1.a and f.

(a) A distribution of cash (or cash equivalents) to the beneficiary's Guardian, Conservator, or legal representative, or other person "acting on his behalf," will be deemed made to the individual directly. *See* POMS SI 01120.201.D.3a. In contrast, **reimbursements paid to a third party** for funds expended on behalf of the beneficiary are not considered made to the beneficiary. *See* POMS SI 01120.201.I.g. Similarly, payments from a trust to pay a credit card belonging to a third party for purchases made by that person for the trust beneficiary are not deemed to be made directly to the beneficiary. *Id*.

(b) A practical tool to afford the beneficiary with limited access to appropriate purchasing power is an **"administrator-managed prepaid card"** such as the True Link debit card. *See* www.truelinkfinancial.com. The updated POMS that were issued in April 2018 specifically mention the True Link card in POMS SI 01120.201.I.1.e, and provide a step-by-step analysis on how to utilize this tool without jeopardizing the beneficiary's eligibility for means-tested government benefits. Required elements of the effective use of a True Link card include: (i) the Trustee is the owner of the prepaid card account, and the beneficiary is merely a cardholder; (ii) the card is not used to obtain cash; and (iii) the card is not used to pay for food or shelter items. The True Link card can be programmed by the administrator (*i.e.* the Trustee) to block its acceptance at specified types of vendors for specified categories of items. The administrator determines the amount of purchasing power pre-loaded onto the card, *i.e.* it is not attached directly to the trust assets.

3. As noted in Section III.B.2.d.(1), *supra*, transfers by a beneficiary under age 65 of his assets to a first-party Special Needs Trust that is *properly drafted and properly administered* are **not penalized as "uncompensated transfers"** for purposes of the beneficiary's eligibility for means-tested benefits. *See* 42 U.S.C. §§ 1396p(c)(2)(B) (iii) and (iv); 42 U.S.C. § 1382b(c)(1)(C)(ii)(IV); POMS SI 01150.121.A.3.

a. However, as noted in Section III.D.1.f, *supra*, numerous States do choose to penalize the funding of a (d)(4)(C) pooled Special Needs Trust account by a beneficiary who is **65 years of age or older** at the time of the funding transfer.

b. In general, **transfer penalties** for purposes of **Supplemental Security Income** apply to uncompensated transfers during a **36-month "look-back period,"** which starts from the date of the transfer or the date of the application for SSI, whichever is later. 42 U.S.C. § 1382b(c)(1)(A)(iv). To calculate the period of ineligibility, the amount transferred is divided by the transferor's monthly SSI benefit, rounding up or down to the nearest whole number. Uncompensated transfers to trusts that are not safe harbor "(d)(4)(A)" or "(d)(4)(C)" Special Needs Trusts (or a "Sole Benefit Trust," as described, *supra*, in Section III.E.) are generally treated as available resources if there are *any* circumstances under which the Trustee could make distributions for the benefit of the transferor or his spouse. POMS SI 01120.201.D.2.

c. In general, **transfer penalties** for **Medicaid** purposes include a maximum **"look-back period" of 60 months**. The penalty period is determined by dividing the value of the transferred assets by the statewide average private-pay rate for nursing home services. *See* 42 U.S.C. § 1396p(c)(1)(E) and POMS SI 01730.046.

IV. GOVERNMENT BENEFITS THAT ARE "MEANS-TESTED" AND THOSE THAT ARE BASED ON A WORKER'S EMPLOYMENT HISTORY

A. "Means-tested" government benefits for persons with disabilities

1. The two most relevant means-tested government benefits programs that most persons with disabilities wish to maintain are **Supplemental Security Income ("SSI")**, a monthly cash benefit intended to cover a person's food and shelter needs, and Medicaid. In 2019, the maximum Federal Benefit Rate ("FBR") for SSI is $771/month, although some States provide "State supplements" to this base amount. **Medicaid** is the means-tested program which provides basic health care and medical services. Financial eligibility for means-tested government benefits is determined by reference to the applicant's "available" or "countable" income and resources. **Properly drafted, established, funded and administered Special Needs Trusts do not count against the beneficiary in determining financial eligibility for these means-tested benefits.**

a. **SSI** is authorized by Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1383f, and Title 20, Part 416 of the Code of Federal Regulations. The **SSI eligibility requirements** include:

(1) The applicant is aged **65 or older, blind or "disabled"** (*i.e.* unable to engage in "substantial gainful activity," as described in Section III.B.2.b., *supra*). If the applicant is under the age of 18, disability is defined by reference to "marked and severe functional limitations," as described in Section III.B.2.b., *supra*.

(2) The applicant has **minimal earned and unearned income and resources** to pay for his food and shelter needs.

(a) Resources include the applicant's cash or other assets that he owns and can convert to cash and **use for his support and maintenance.** Resources are either "excluded" (*e.g.* a home, one automobile, normal household items and personal effects, certain burial funds and funerary services) or "countable." *See* POMS SI 01130.050 ("Guide to Resource Exclusions"). **Countable resources cannot exceed $2,000** for an individual, or $3,000 for a couple.

(b) Special Needs Trusts that are properly drafted, established, funded and administered are considered "unavailable" or "not countable" to the beneficiary for purposes of his financial eligibility for SSI.

(c) An applicant's **income may be either "earned" or "unearned,"** and if it is "countable" will reduce the amount of his monthly SSI cash payment. There are limited income exclusions which include the first $20 of income in a month (other than "In-Kind Support and Maintenance" ("ISM"), discussed *infra*); $65 of earned income in a month, plus half of the remaining earned income in a month, and for a person who is disabled but not blind, the first $780 per year. **"Earned income" only reduces the SSI payment by 50 cents for each dollar earned, while "unearned income" reduces the SSI payment dollar-for-dollar (with special rules for ISM,** discussed *infra*).

(d) **"Earned" income** includes wages; net earnings from self-employment; payments for participating in a sheltered workshop or other supported employment; royalties; and honorariums.

(e) **"Unearned" income** is all income that is not earned, and includes ISM; private pensions and annuities subject to the Employee Retirement Income Security Act ("ERISA") (29 U.S.C.A. § 1056(d)), as well as periodic payments, such as Social Security

Disability Income payments, worker's compensation, veterans benefits, unemployment benefits (most of which are **non-assignable to a Special Needs Trust**, *see, e.g.*, POMS SI 01120.200.G.1.c and POMS SI 01120.201.J.1.c); life insurance proceeds or other death benefits; gifts and inheritances; support and alimony; dividends and interest; and rents and royalties.

(A) There is one recent notable exception to the general rule that veterans benefits are non-assignable and thus constitute unearned income to the recipient: the **military "Survivor Benefits Plan" ("SBP")** retirement annuity option for the benefit of a "disabled dependent child." For purposes of this program, a "dependent child" is defined in 10 U.S.C. § 1447(11), and "disabled" is defined in 42 U.S.C. § 1382c(a)(3). The "Disabled Military Child Act" (Public Law 113-291, amending Title 10, U.S.C. §§ 1448, 1450 and 1455), signed by President Obama on December 19, 2014, authorizes a **military parent to elect (during the parent's lifetime) to *irrevocably assign* the SBP annuity for a disabled dependent child to a *first-party* Special Needs Trust**. *(See* discussion, *supra*, at Section III.B., for the requirements of a first-party Special Needs Trust.) The Department of Defense issued implementation guidance on December 31, 2015 in the form of a "Memorandum" to the Deputy Assistant Secretaries of the Army, Navy and Air Force, captioned "Enabling Payment of Survivor Benefit Plan Annuities to a Special Needs Trust." POMS SI 01120.201.J.1.e, part of the April 2018 POMS updates, expressly recognizes that the SBP annuity is assignable to a first-party Special Needs Trust. *See also* POMS SI 01120.200.G.1.d. Under current law, the beneficiary with a disability does not have the option of a *post mortem* assignment of the SBP annuity payments if his parent has not made this election during life.

(f) "In-Kind Support and Maintenance" ("ISM") consists of food or shelter provided directly to the applicant and paid for by a third person, including a Special Needs Trust. This category of unearned income does not result in a dollar-for-dollar reduction of the SSI benefit, but is generally limited to a maximum reduction equal to one-third of the maximum SSI Federal Benefit Rate (plus $20, in some cases), regardless of the actual value of the food and shelter provided. **"Shelter" includes only the following items: mortgage payments (including any property insurance required by the mortgage holder); real property taxes; rent; heating fuel; gas; electricity; water; sewer; and garbage removal.** *See* POMS SI 00835.465.D.1. The dollar value of these items is added and divided by the number of people living in the home to determine each person's *pro rata* share. If a person is not paying at least this amount towards his *pro rata* share (*e.g.* with his monthly SSI benefit), his SSI benefit will be reduced in one of two ways, depending on his living arrangement. *See* POMS SI 01120.200.E.1.b and POMS SI 01120.200.F.3.c.

(A) The **"Value of One-Third Rule" ("VTR")** applies if the SSI recipient lives in the household of another person throughout the month and receives both food and shelter from someone inside that household. The VTR reduces the SSI benefit by one-third of the FBR.

i. In 2019, the FBR is $771/month, so the VTR reduction is $257/month ($771÷3). (For the current FBR and VTR amounts, see POMS SI 00835.901.)

ii. If the VTR applies, the SSI payment is reduced by the full VTR amount, regardless of how "short" the recipient is towards paying his *pro rata* share of the household food and shelter expenses. For example, if his *pro rata* share is $790/month, and he can only pay $771/month towards his *pro rata* share, his **SSI payment will be reduced by the full VTR** of $257 rather than just the deficit of $19.

(B) In contrast, the **"Presumed Maximum Value Rule" ("PMV")** applies to all other living arrangements to which the VTR does not apply. The PMV rule

applies when a person outside the household, including the Trustee of a Special Needs Trust (whether first-party or third-party), pays for the food or shelter of an SSI recipient.

i. If the PMV Rule applies, the SSI recipient's SSI payment is reduced by the *lesser of* (A) one-third of the FBR *plus* the $20 general income exclusion (*i.e.* $277 in 2019, calculated as follows: $771÷3 plus $20), or (B) the *actual value* of the food and shelter received by the SSI recipient from the person outside the household.

ii. For example, if the Trustee of a Special Needs Trust pays $4,000/month towards the beneficiary's food and shelter expenses, his SSI payment is reduced by no more than $277/month. If, on the other hand, the Trustee pays only $100/month towards those expenses (*e.g.* because the beneficiary's other income and resources are sufficient to pay for the balance of his *pro rata* share of the household expenses), then his SSI payment is only reduced by $100, not by $277. (In contrast, if the VTR were applicable, as explained above, the SSI payment would be reduced by the full $257/month, not just by $100/month.)

(C) Warning: If the SSI recipient's monthly SSI payment is $257/$277 or less (*e.g.* because of other countable income, including government benefits), then a trust distribution for his food or housing expenses that results in a VTR or PMV reduction could "zero out" his SSI payment, resulting in the consequent loss of SSI-linked Medicaid.

(D) In contrast, distributions from an "ABLE account" for the food or shelter-related expenses of the "designated beneficiary" do not constitute ISM income to him if utilized for such purposes in the month of receipt. *See* POMS SI 01130.740.C.4. However, if a distribution for those purposes is not spent in the month of receipt, *i.e.* it is retained by the beneficiary into the month following the month of receipt, it will be counted as a "resource" subject to the normal SSI counting rules. *See* POMS SI 01130.740.D.2. For a full discussion of ABLE accounts, *see* Section VII, *infra.*

(g) In certain circumstances, the income or resources of other persons may be **"deemed" to be available** to the applicant for purposes of financial eligibility for SSI, including from a parent who is not eligible for SSI to an unmarried minor child who is applying for SSI, and from a spouse who is not eligible for SSI to a spouse who is applying for SSI. *See* POMS SI 01310.001 and SI 011320.001.

(3) Finally, the SSI applicant must be a **U.S. citizen, U.S. national or a "qualified alien,"** as defined in 8 U.S.C. § 1641(b).

(4) The SSA has the authority to designate a third party (an individual, an institution or an organization) as a **"Representative Payee" to receive and manage monthly SSI payments** for the benefit of a beneficiary who is incapacitated. These monthly payments to a Representative Payee do not become part of the beneficiary's Special Needs Trust or conservatorship estate; rather, the Representative Payee has independent authority to expend these payments for the beneficiary, and must separately report to the SSA how the benefits have been expended for the beneficiary during the annual reporting period. If the Representative Payee bank account to which the SSI benefits are direct-deposited each month has a balance that exceeds $2,000 for an individual (or $3,000 for a couple), the beneficiary will generally be considered "over-resourced," thus jeopardizing his ongoing eligibility for SSI. Although theoretically permissible, **SSI payments received by a beneficiary should not be added to a third-party Special Needs Trust, and it is not recommended that SSI payments be added to a first-party Special Needs Trust.**

b. Medicaid is governed by Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396w-5. **Medicaid eligibility requirements** and benefits can vary from State to

State, as it is a program that is jointly administered and funded by the Federal government and the States. Medicaid eligibility is often **inextricably linked to SSI eligibility**. In this regard, there are three main classifications of State Medicaid programs.

(1) "SSI criteria States," in which the eligibility criteria are the same for SSI and Medicaid, but which require a separate application process for each benefit. Seven States (and the Northern Mariana Islands) fall into this category (Alaska, Idaho, Kansas, Nebraska, Nevada, Oregon and Utah). *See* POMS SI 01715.010.A.2.

(2) "§ 209(b) States," in which at least one of the Medicaid eligibility criteria is more restrictive than the SSI eligibility criteria, and which require a separate application process for each benefit. Nine states fall into this category (Connecticut, Hawaii, Illinois, Minnesota, Missouri, New Hampshire, North Dakota, Oklahoma and Virginia). *See* POMS SI 01715.010.A.1. In determining a person's eligibility for Medicaid, the States in this category may not use a methodology that is more restrictive than that used by the SSI program on January 1, 1972. *See* 42 U.S.C. §§ 1396a(a)(10)(C)(i)(III) and 1396a(r)(2).

(3) "§ 1634 States," in which SSI recipients automatically qualify for, and are enrolled in, the State Medicaid program. The thirty-four States not mentioned in (1) and (2), above, as well as the District of Columbia, fall into this category. *See* POMS SI 01715.010.A.3.

c. There are three main types of Medicaid eligibility:

(1) "Categorically needy" persons qualify for Medicaid if they also qualify for certain other government benefits programs, typically SSI. All States are required to cover the categorically needy. *Ramey v. Reinertson*, 268 F.3d 955, 960 (10th Cir. 2001), citing *Herweg v. Ray*, 455 U.S. 265, 268 (1982).

(a) In working with families who have adult children with disabilities, practitioners will find that many of these persons obtain their Medicaid coverage by virtue of their **eligibility for at least $1 of SSI**. Thus, it is critical that Special Needs Trusts for such individuals be administered in such a way that disbursements do not totally eliminate the beneficiary's monthly SSI payment. This might happen, for example, if the Special Needs Trust pays for the beneficiary's shelter costs, which constitutes ISM, which can reduce the beneficiary's SSI payment by up to one-third of the maximum Federal Benefit Rate at the time of reference. If the beneficiary's monthly SSI benefit amount is less than this one-third amount before the reduction for ISM (*e.g.* because of other earned or unearned income), and is thus reduced to zero after the reduction, his SSI-linked Medicaid coverage is lost.

(2) "Optionally categorically needy" persons with limited resources can qualify for Medicaid if their monthly incomes are not more than 300% of the Federal Benefit Rate (*i.e.* $2,313 in 2019).

(3) "Medically needy" persons with limited resources can qualify for Medicaid even if their incomes are over 300% of the Federal Benefit Rate, if their monthly medical expenses exceed their income and they agree to "spend-down" their excess income on their medical expenses.

(a) In 2017, **"Spend Down" States** included California, Connecticut, Hawaii, Illinois, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

(b) Some States, known as **"Income Cap" States**, do not allow the "medically needy" to qualify for Medicaid by means of a "spend-down" of excess income. However, any excess income may be transferred to a Qualified Income Trust authorized by 42 U.S.C. § 1396p(d)(4)(B), discussed in Section III.B.3, *supra.* In 2017, the Income Cap States included Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Nevada, New Jersey, New Mexico, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas and Wyoming.[7]

(4) "Dual eligibles" are persons who qualify for both Medicaid and Medicare (discussed below). By virtue of their Medicare eligibility, these persons qualify for State Medicaid programs that will help them pay their Medicare premiums, co-payments or deductibles (*e.g.* the "Qualified Medicare Beneficiaries" program and the "Specified Low-Income Beneficiaries" program), and their prescription drug premiums or costs (*e.g.* the "Low-Income Subsidy" program run by the federal government). *See* additional discussion at Subsection B.1.e, *infra*.

d. Eligibility for SSI and Medicaid is also required for numerous community-based programs and services, *e.g.* group home residential arrangements and "life skills" programs. Access to these programs is limited to those persons whose financial affairs have been arranged so that they are eligible for SSI and Medicaid, and some will only accept SSI benefits as payment for program services, *i.e.* **private pay is not an option**. **A family's private wealth cannot guarantee access to these beneficial programs, contrary to the belief of many wealthy clients** who are accustomed to doing business on a "money talks" basis. Thus, even families of great wealth are engaging in Special Needs Trust planning for their beneficiaries with disabilities in order gain access to these programs.

B. Employment-based government benefits for persons with disabilities

1. Many persons with disabilities are eligible for employment-based government benefits **determined by reference to the employment history of a worker.** The applicant's income and resources generally do not adversely impact these benefits, *i.e.* ***these benefits are not means-tested***. Under Title II of the Social Security Act, the "Old Age, Survivors and Disability Insurance" program ("OASDI"), the SSA affords certain benefits for workers, and their families, when the worker retires, becomes disabled or dies. *See* 42 U.S.C. §§ 401-434; 20 C.F.R. §§ 404.1-404.2127.

a. Social Security Retirement benefits provide monthly cash payments to eligible workers who have attained at least 62 years of age, and who have worked, and paid FICA taxes on sufficient earnings, and have earned at least 40 "credits" (a maximum of four credits each year) (formerly referred to as "quarters of coverage"). *See* 42 U.S.C. § 414(a)(2). In **2019, the amount of earnings needed to earn one credit is $1,360** (or $5,440 to earn the maximum of four credits for the year). Credits are based on total wages (or self-employment income) during the entire year, no matter when during the year the actual work was performed. *See* U.S. Social Security Administration, Cost-of-Living Adjustment (COLA).[8]

b. Social Security Disability Insurance ("SSDI") benefits are monthly cash payments to a worker whose mental or physical disability renders him incapable of "Substantial Gainful Activity," as defined, *supra*, in Section III.B.2.b. The required number of "credits" (formerly referred to as "quarters of coverage") to secure this benefit varies depending on the age at which the worker became disabled. *See* https://www.ssa.gov/planners/credits.html. The

[7] http://payingforseniorcare.com/longtermcare/resources/medicaid.html.

[8] http://www.socialsecurity.gov/news/press/factsheets/colafacts2019.pdf.

SSA uses a "sequential evaluation process" to determine if the claimant's disability is sufficiently medically severe, and whether he can engage in *any* type of work available in the national economy taking into account his age, education, work experience and functional capacity.

c. The **SSDI** program also pays a monthly cash benefit to a person over the age of 18 (i) whose disability began prior to the age of 22, (ii) who is consistently unable to engage in "Substantial Gainful Activity," and (iii) who is unmarried, or is married to another similarly situated person. *See* 20 C.F.R. § 404.350(a)(5) and POMS DI 10115.001. This category of benefits is currently called **"Childhood Disability Benefits" ("CDB")**, but it was formerly known as **"Disabled Adult Child" ("DAC")** benefits. This benefit is payable to the adult child of his parent based on *the parent's* work and earnings record.

(1) In order to be eligible for the CDB benefit, the adult child's parent (i) must be receiving Social Security retirement or disability benefits, or (ii) must have died with sufficient earned "credits" (formerly known as "quarters of coverage"). **Payments under the CDB program count as "unearned income"** to the adult child for purposes of the SSI program, thus reducing the SSI benefit dollar-for-dollar (after a $20 income exclusion), and often eliminating the SSI benefit entirely, as well as eligibility for SSI-linked Medicaid.

(2) If the adult child is determined to be eligible for the CDB, it cannot be declined in favor of SSI eligibility. If a person who is receiving SSI payments (and is thus eligible for SSI-linked Medicaid), loses his eligibility for both SSI and SSI-linked Medicaid when he becomes eligible for CDB benefits, he will nevertheless be able to maintain his Medicaid eligibility under a different "class of assistance," aptly named "Disabled Adult Child Medicaid." That's the good news. The bad news: neither the SSA nor Medicaid will volunteer this information, and there are likely millions of people who have not re-established their Medicaid eligibility under the DAC class of Medicaid assistance.

d. There are various ways for a person to become eligible for **Medicare**, a federal insurance program with no income or resource limitations. *See* Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395kkk-1. Workers who have attained age 65, and are eligible for Social Security retirement benefits, are also eligible for Medicare. In addition, once a person has received **SSDI benefits (including CDB benefits) for 24 months**, he can become eligible for Medicare coverage, which includes the following elements.

(1) "Part A" providing hospital insurance.

(2) "Part B" providing medical insurance.

(3) "Part C" is an alternative option to traditional Part A and Part B coverage, and provides access to various managed care programs.

(4) "Part D" providing prescription drug coverage.

e. Once a person becomes eligible for Medicare, there are additional programs available to persons with low income, that may be administered through the State Medicaid program (known as **"Medicare Savings Programs"**). Such programs include (i) the "Qualified Medicare Beneficiary" ("QMB") program, which pays the premiums for Part A and Part B Medicare coverage, as well as Medicare co-insurance payments and deductibles; (ii) the "Specified Low Income Medicare Beneficiary" ("SLMB") program, which pays for the Part B premium; and (iii) the "Low Income Subsidy" (or "Extra Help") program, which helps pay for prescription drug coverage under Medicare Part D. As noted in Section A.1.c.(4), *supra*, these programs **are means-tested**, and

may require the payment of premiums determined with reference to the person's countable income. Each of these programs has separate income and resource limits. *See* www.medicare.gov.

V. SPECIAL NEEDS TRUST TAX CONSIDERATIONS

A. First-Party Special Needs Trusts

1. A first-party Special Needs Trust typically qualifies as a "grantor trust" for federal income tax purposes. Regardless of who serves as the Settlor, the sole beneficiary is almost always treated as the "grantor" for income tax purposes. Thus, the income and gains generated by the assets of a first-party Special Needs Trust that is a grantor trust are taxed to the beneficiary of the trust under IRC § 671, whether or not actually distributed to, or for the benefit of, the beneficiary.

a. IRC § 677 supports grantor trust status for a first-party Special Needs Trust with a "non-adverse party" serving as Trustee (*i.e.* because trust income is, or may be, payable to the beneficiary in the discretion of a non-adverse party, or held or accumulated for future distribution to the beneficiary). Ltr. Rul. 200620025 held that a first-party (d)(4)(A) Special Needs Trust was a grantor trust with respect to the beneficiary under IRC § 677(a)(1) and (2), since the income of the trust was to be used, or accumulated, for the benefit of the grantor-beneficiary in the discretion of a Trustee who was not an adverse party. IRC § 672(a) defines "adverse party" as any person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or non-exercise of the power he possesses. IRC § 672(b) defines "non-adverse party" as any person who is not an adverse party. Thus, a Trustee who has no beneficial interest in a first-party Special Needs Trust, *e.g.* as a remainder beneficiary, would be a non-adverse party. *See also* Rev. Rul. 83-25, 1983-1 C.B. 116.

b. Other mechanisms for assuring grantor trust status for a first-party Special Needs Trust include vesting the beneficiary with a non-testamentary special power of appointment over the trust corpus remaining at death after the Medicaid payback is satisfied. *See* IRC § 674.

(1) Even if the beneficiary is not capable of exercising the power of appointment due to his disabling condition, the mere possession of the power has been held sufficient. *See, e.g.*, Rev. Rul. 55-518, 1955-2 C.B. 384.

c. Granting the sole beneficiary of a first-party Special Needs Trust the administrative "power to reacquire the trust corpus by substituting other property of an equivalent value" under IRC § 675(4)(C) will also assure grantor trust status.

(1) In some regions, the SSA has held that a beneficiary's power to substitute property under IRC § 675(4)(C) is tantamount to an impermissible right to revoke the Special Needs Trust. As discussed in detail *supra*, at Sections III.B.2.C. and III.C.2, a power of revocation held by the beneficiary of a Special Needs Trust is grounds for disqualification.

d. If a first-party Special Needs Trust is a grantor trust for income tax purposes, it cannot qualify as a "Qualified Disability Trust' under IRC § 642(b)(2)(C)(ii), discussed *infra*, in Section V.B.2.

2. It is generally **beneficial for a first-party Special Needs Trust to be taxed as a grantor trust with respect to the beneficiary** for income tax purposes, inasmuch as many trust beneficiaries are in a lower income tax bracket than the compressed tax brackets that would otherwise apply to an irrevocable non-grantor trust. In 2019, a single individual taxpayer reaches the 37% bracket at $510,300 of taxable income, while an irrevocable non-grantor trust reaches the 37%

bracket at only $12,750 of income. *See* Rev. Proc. 2018-57, IR-2018-222 (11/15/18). These figures reflect the provisions of "AN ACT TO PROVIDE FOR RECONCILIATION PURSUANT TO TITLES II AND V OF THE CONCURRENT RESOLUTION ON THE BUDGET FOR FISCAL YEAR 2018" (Pub. L. 115-97, 131 Stat. 2504), formerly informally known as "The Tax Cuts and Jobs Act of 2017" (referred to hereafter as "the 2017 Tax Act").

a. If the beneficiary is a minor under the age of 19, the so-called **"Kiddie Tax" under IRC § 1(g) may also apply**. Threshold requirements for the application of the Kiddie Tax are (i) the child beneficiary has not yet attained 19 years of age prior to the end of the taxable year (or 24 years of age, if he is a student), (ii) the child beneficiary has at least one parent alive as of the last day of the taxable year, and (iii) the child beneficiary does not file a joint return for the taxable year. IRC § 1(g)(2)(A), (B) and (C). Under the 2017 Tax Act, the Kiddie Tax is no longer imposed at the highest marginal rate of the child's parents, but rather at the (generally) more confiscatory rates applicable to trusts and estates. *See* IRC § 1(j)(4)(B).

b. Since the typical beneficiary of a first-party Special Needs Trust will have no access to assets to enable him to satisfy his personal income tax liability with respect to the income and gains generated by the trust, it is advisable to include in the trust agreement a provision that allows the Trustee to utilize the assets of the trust to satisfy that income tax liability directly.

c. "Income" for income tax and trust accounting purposes can be a vastly different concept from "income" for purposes of means-tested benefits. *See* Section IV.A.1.a.(2)(c), (d), (e) and (f), *supra*, for a discussion of the latter. For example, if the Trustee of a Special Needs Trust uses trust principal to pay the beneficiary's rent, this constitutes "income" as "In-Kind Support and Maintenance" ("ISM") to the beneficiary for purposes of his means-tested government benefits, but it does not constitute income for income tax purposes. If the Trustee uses trust principal to pay for the beneficiary's education, the disbursement would not constitute income for purposes of either the income tax or means-tested benefit programs.

(1) This **definitional distinction** can cause tremendous issues for the beneficiary of a first-party Special Needs Trust, especially as the computer systems of the IRS and State revenue divisions communicate electronically with the computer systems of the Social Security Administration and the State Medicaid programs. Thus, after the beneficiary of a first-party Special Needs Trust (which is a grantor trust for income tax purposes) files his individual income tax returns properly reporting the income and gains attributable to the property with which his trust is funded, the State Department of Revenue computer is likely to send an "Alert" to the State Medicaid computer that the Medicaid-eligible beneficiary has reported $xxx of "income" for income tax purposes (which, of course, always exceeds the amount of "income" that a recipient of means-tested benefits can have and still retain eligibility). A benefits termination letter to the beneficiary from Medicaid, issued by an "auto-attendant," often ensues without any opportunity to speak with a live person about the critical distinctions between these definitions of "income." Occasionally, even a discussion with a live person is insufficient to convince the State Medicaid program that **the beneficiary remains eligible notwithstanding the proper income tax reporting of the income and gains** generated by the assets of the first-party Special Needs Trust. This is when one or more of the numerous "allied professionals" on the beneficiary's Special Needs Team must leap into action to prevent the erroneous termination of his means-tested benefits. *See, infra*, in Section VI.E.

d. If a first-party Special Needs Trust is a grantor trust with respect to the beneficiary, and the Trustee uses trust assets to pay for the beneficiary's medical expenses, the taxable income reportable by the beneficiary on his personal tax return may be offset by those **trust-funded medical expenses** if they exceed 10% of the beneficiary's 2019 Adjusted Gross Income. (N.B. If the beneficiary claims the standard deduction of $12,200/year in 2019 (under IRC § 63(c)(2)), the medical expense deduction will not help to reduce his tax liability unless it, combined

with all other remaining permissible deductions (*e.g.* charitable, state and local taxes, etc.), exceeds that standard deduction amount.) IRC § 213(d)(1)(A) (and the regulations thereunder) defines deductible "medical expenses" to include the costs of "diagnosis, cure, mitigation, treatment or prevention of disease," and the costs of treatments "affecting any structure or function of the body." This definition would include:

(1) Premiums for health and medical insurance, amounts paid for qualified long-term care services, and limited amounts paid for a qualified long-term care insurance contract.

(2) Prescribed medicine and drugs.

(3) The costs of transportation to obtain medical care, and the travel costs of a companion for a person who cannot travel alone.

(4) The cost of rendering a vehicle wheelchair accessible.

(5) Medically necessary caregiver services, even if not rendered by a licensed medical professional, as long as they are of a type generally performed by a nurse.

(6) Certain long-term care services for the "chronically ill," as defined in IRC § 7702B(c)(2). Payments to family members for long-term care services are not deductible unless the person is a "licensed professional with respect to such service."

(7) Meals and lodging for a caregiver rendering nursing or long-term care services.

(8) The cost of care in an assisted living facility, nursing home or other institution (including meals and lodging), if the principal reason for the placement is to obtain medical care.

(9) The entire cost of a skilled nursing home facility.

(10) The costs of living in a transitional group residence pursuant to the recommendation of a psychiatrist.

(11) The costs of a special education school that trains a child to overcome learning disabilities, including tuition, meals and lodging, if recommended by a doctor and if the principal reason for attending the school is to overcome the child's learning disabilities.

(12) Doctor recommended tutoring by a teacher who is specially trained and qualified to work with children who have learning disabilities caused by mental or physical impairments.

(13) Admission and travel to medical conferences that address the illness or condition of the patient.

(14) The cost to maintain medically necessary equipment.

(15) The cost of special equipment installed in a home, or improvements made for medical purposes (deductible only to the extent that the reasonable cost exceeds the increased value of the property, if any, that results from the improvement), including

entrance and exit ramps; widening doorways; installing railings or support bars; installing lifts; modifying stairways; grading the property to provide ready wheelchair access to the residence.

(16) For more examples of deductible medical expenses, consult IRS Publication 502, "Medical and Dental Expenses" (available at www.IRS.gov/pub/irs-pdf/p502.pdf).

In contrast, if the Trustee of a non-grantor Special Needs Trust (*i.e.* most *inter vivos* third-party Special Needs Trusts) makes such disbursements for the beneficiary's medical expenses, the trust may not deduct them as medical expenses. However, the trust may be entitled to a distribution deduction under IRC §§ 651 and 661 (and a corresponding amount will constitute income to the beneficiary reportable on his individual income tax return).

3. If a first-party Special Needs Trust is a grantor trust for income tax purposes, it is permissible to **use the grantor-beneficiary's Social Security Number**, rather than a separate trust Federal Employer Identification Number ("FEIN"), to report the trust's income and gains on the beneficiary's individual Form 1040. However, professional Trustees generally do **obtain a separate FEIN** for a first-party Special Needs Trust to help reinforce the notion that the trust and the beneficiary are not the same for purposes of the beneficiary's ongoing eligibility for means-tested government benefits. This optional approach is permitted by Treas. Reg. § 301.6109-1(a)(2)(i)(B). Even if the trust does have a separate FEIN, it would not be proper for the Trustee to file a full Form 1041 for the trust. Instead, the Trustee should file a simple "informational return" on Form 1041 notifying the IRS that the trust's income and gains will be reported on the grantor-beneficiary's personal individual return. The beneficiary should simply receive a copy of this filing; a Schedule K-1 should *not* be used for this purpose.

4. Since the Trustee of a first-party Special Needs Trust retains discretion to use the *entire* corpus and income contributed to the trust by the beneficiary, for the *sole benefit* of the beneficiary, there should be **no gift tax consequences to the beneficiary** upon funding.

a. The gift tax consequences of a transfer of the beneficiary's assets to a first-party Special Needs Trust were tangentially addressed in Ltr. Rul. 9437034. The beneficiary of a first-party Special Needs Trust funded with a personal injury settlement retained a testamentary special power of appointment over any property remaining in the trust after the Medicaid payback. This power was duly exercised in the beneficiary's Last Will and Testament prior to his death. The requested ruling concerned the includability of the trust corpus in the beneficiary's gross estate for federal estate tax purposes. In holding that the trust corpus remaining at the beneficiary's death was includable in his gross estate under IRC §§ 2038 and 2036(a), the Service also noted in passing that the beneficiary's retained right to alter the disposition of the trust corpus at his death through the exercise of the special testamentary power of appointment rendered the funding transfer an incomplete gift under Treas. Reg. § 25.2511-2(b). *Query* whether it would be possible to value any alleged gift of a remainder interest in a first-party Special Needs Trust, considering (i) the unpredictable impact of a disability on the beneficiary's life expectancy, (ii) the Trustee's complete discretion to disburse the entire trust corpus, and income, for the beneficiary's special needs, and (iii) the Medicaid payback obligation.

5. The estate tax consequences to the beneficiary of a first-party Special Needs Trust are generally well-settled. IRC § 2036(a)(1) will operate to cause **inclusion in the beneficiary's gross estate** of any property remaining in the trust at the time of his death. *See also* Ltr. Rul. 9437034, *supra.*

a. The value of the trust property that is properly includable in the beneficiary's gross estate could be significantly reduced by virtue of the **"payback" claim** against the

trust held by any Medicaid program(s) which provided medical assistance to the beneficiary during his lifetime. *See* IRC § 2053(a)(3). Furthermore, there may be a **"stepped-up basis"** available for any assets remaining in a first-party Special Needs Trust at the death of the beneficiary under IRC § 1014(b)(9), thus minimizing any capital gains tax payable upon the liquidation of the assets to satisfy the Medicaid payback.

(1) POMS SI 01120.203.E.1 permits the payment from the assets of a first-party Special Needs Trust remaining at the death of the beneficiary any state and federal estate or inheritance taxes attributable to the inclusion of the trust assets in his gross estate, prior to satisfying the Medicaid payback interest.

b. To the extent that a first-party Special Needs Trust has been funded by means of guaranteed annuity payments consequent to a personal injury claim (often referred to as a **"structured settlement"**), the present value thereof is also fully includable in the beneficiary's gross estate under **IRC § 2039**. Annuity contracts do not typically provide for the acceleration of future guaranteed payments to pay the annuitant's estate tax liability unless a "commutation right" has been purchased when the annuity is procured (for a hefty charge of 5% or more of the total premium paid for the annuity).

B. Third-Party Special Needs Trusts

1. An *inter vivos* third-party Special Needs Trust is most typically drafted as a **non-grantor "complex trust"** that is not required to distribute all of its income. Thus, such a trust would file its own income tax returns under **its own FEIN**, and be subject to the compressed tax brackets applicable to irrevocable non-grantor trusts. As noted, *supra*, in Section V.A.2., in 2019, complex trusts become subject to the 37% bracket at just $12,750 of income. IRC § 1(e). Nevertheless, if the trust's **Distributable Net Income ("DNI")** (as defined under IRC § 643(a)) is "carried out" to the beneficiary in a given tax year, it is taxable to, and reportable by, the beneficiary. The trust then issues the beneficiary a Schedule K-1 showing the taxable income properly reportable on his personal income tax return. If the beneficiary is a minor, the "Kiddie Tax" under IRC § 1(g) may also apply to "unearned" income from the trust reportable on his return. Furthermore, a third-party Special Needs Trust that is not a grantor trust may also be subject to the so-called "Medicare Tax" on its undistributed net investment income under IRC § 1411.

a. It is certainly possible, however, to draft an *inter vivos* third-party Special Needs Trust so that it is a "grantor trust" with respect to (typically) the person who establishes and funds the trust (*e.g.* the beneficiary's parent during that person's lifetime) by invoking one or more of the grantor trust rules set forth in IRC §§ 671-679, *e.g.* the "power of substitution" under IRC § 675(4). In this fashion, the parent would be responsible for paying the income taxes on the trust's income and gains, leaving the trust property undiminished by the amount of the income tax payments and reducing the parent's potential taxable estate by a similar amount.

2. "Qualified disability trust" ("QDT") status may be available to a third-party Special Needs Trust that is **not a grantor trust** for income tax purposes. *See* IRC § 642(b)(2)(C).

a. Even though the 2017 Tax Act eliminated the personal exemption for individuals previously afforded by IRC § 151(d)(5)(A), new IRC § 642(b)(2)(C)(iii)(I) provides that a QDT is still entitled to an exemption of $4,200 in 2019, as opposed to the $100 exemption under IRC § 642(b)(2)(A) allowed to an irrevocable non-grantor complex trust. This new exemption is indexed for inflation in future years. IRC § 642(b)(2)(C)(iii)(II). The requirements for a QDT are as follows.

(1) The trust must be **irrevocable**.

(2) The trust must be established for the **sole lifetime benefit** of a **person who is "disabled."** (Thus it is not possible for a QDT to provide for secondary permissible beneficiaries during the lifetime of the beneficiary, but it is permissible to designate remainder beneficiaries upon the death of the beneficiary with the disability.)

(3) The beneficiary with a disability is **under the age of 65** when the trust is established and funded.

(4) The beneficiary has been "**determined by the Commissioner** of Social Security to have been **disabled** (within the meaning of Section 1614(a)(3) of the Social Security Act, 42 U.S.C. 1382c(a)(3)) for some portion of the year."

(a) Thus, if the beneficiary is receiving Supplemental Security Income or Social Security Disability Income, the requisite disability determination will have been made. However, there are circumstances where the beneficiary with a disability is not receiving those benefits, and the QDT statute requires that the necessary disability determination be obtained through alternate means (*e.g.* as authorized by POMS SI 01150.121, or by similar provisions of a State's Medicaid program).

b. For a discussion of how the income of a QDT for the benefit of a minor is exempt from the "Kiddie Tax" under IRC § 1(g), *see* Stephen J. Silverberg, *A Clear Winner in the Tax Cuts and Jobs Act of 2017: Qualified Disability Trusts*, NAELA News Online, June 2018.

3. The gift tax consequences to donors of transfers to a third-party Special Needs Trust depend on whether any of the beneficiaries possess a **"right of withdrawal"** with respect to the contributed funds, commonly referred to as "Crummey powers." *See Crummey v. Commissioner*, 397 F.2d 82 (9th Cir. 1968). Because a gift to a trust does not generally qualify as a "present interest" for purposes of the annual gift tax exclusion under IRC § 2503(b)(1) (in 2019, $15,000 per donee), *Crummey* powers have been used for decades to convert a future interest gift to a trust into a present interest that qualifies the gift for the annual gift tax exclusion. However, **it is inadvisable to give a *Crummey* power to a beneficiary who receives means-tested government benefits,** such as SSI and Medicaid, inasmuch as the value of the property that is subject to the power could well be considered "income," or an "available" or "countable" resource, to the beneficiary, thus jeopardizing his continued eligibility for those benefits.

a. Nevertheless, it is certainly possible to **grant a right of withdrawal to a secondary permissible beneficiary** of a third-party Special Needs Trust, under the rationale of *Estate of Cristofani v. Commissioner*, 97 T.C. 74 (1991). Thus, a common approach is to grant a *Cristofani* right to a secondary beneficiary who does not have a disability, and who (i) may receive distributions during the lifetime of the primary beneficiary with a disability (typically for a limited purpose such as "emergency health care"), and (ii) is a remainder beneficiary upon the death of the primary beneficiary with a disability. If the holder of the *Cristofani* right fails to exercise it, the property subject to the right remains in trust for the primary benefit of the beneficiary with the disabling condition, thus preserving his ongoing eligibility for his means-tested government benefits.

b. Granting a *Crummey* power or *Cristofani* right of withdrawal to a beneficiary who receives means-tested government benefits is a frequent **planning *faux pas*** that can be remedied by means of a judicial modification of the trust. *See* discussion, *infra*, in Section VI.D.4.

4. The estate tax consequences to the beneficiary of a third-party Special Needs Trust will depend upon whether he is vested under the trust agreement with rights or powers that cause includability for estate tax purposes (*e.g.* a general power of appointment). A third-party Special Needs Trust that is not designed to implement generation-skipping transfer tax planning will

typically be drafted to **avoid estate tax includability** in the gross estate of the beneficiary. This is especially so since the beneficiary may be subject to Medicaid "estate recovery" at the time of his death under the provisions of one or more State Medicaid plans which have provided medical assistance benefits to him after the age of 55. Furthermore, most third-party Special Needs Trusts are drafted so that contributions thereto qualify as completed gifts by the donor, who typically retains no beneficial interests or powers that would cause estate tax inclusion.

VI. CHALLENGES (AND SOLUTIONS) IN SPECIAL NEEDS PLANNING

Estate planning attorneys, and the myriad allied professionals with whom they work, must address numerous challenges when advising families trying to secure the future of a beneficiary with a disability and consequent special needs. Although every family is unique, there are several predictable challenges (and viable solutions) presented by each special needs planning engagement.

A. "Person-first" terminology

1. For those estate planning attorneys and allied professionals who have little experience advising families with special needs issues, one of the biggest challenges is learning, appreciating and using "person-first" terminology when referencing the beneficiary with a disability and his consequent special needs. It does not matter how technically proficient an advisor may be if he or she **alienates the client by utilizing outdated and disparaging terminology** to refer to the person with the disabling condition. Just as the "N-word" offends most people of good will, so too does the "R-word" ("retard" or "retarded"), which has only recently gained a similarly offensive status. State and federal statutes are increasingly being amended to replace all forms of the "R-word" with more respectful terminology.

a. Many years ago, a new client with the patience of Job illustrated the concept of person-first terminology for the author, as follows: "I don't have a disabled daughter; I have a daughter with a disability. She isn't wheelchair-bound; she uses a wheelchair to get around. She is not an Autistic child; she's a child who has Autism. She's not mentally retarded; she has a cognitive disability. Her siblings without disabilities aren't normal; they are neuro-typical."

b. Using person-first terminology will seem cumbersome and unnatural at first. Clients, however *do take notice* of those who successfully integrate this concept into normal parlance. In time, the old terms that emphasized the disability first, instead of the person first, will become as offensive to the attorneys, and to the other allied professionals with whom they work, as they have been to these families. This may be the easiest challenge to overcome, and will completely transform the way a family relates to, and communicates with, their professional advisors. For a "cheat sheet" on the proper terminology to use when referring to individuals with disabilities, see "*Guidelines: How to Write and Report about People with Disabilities*," 8th Edition (2013), published by the University of Kansas Research and Training Center on Independent Living (available at www.rtcil.org/guidelines).

B. Determining an appropriate allocation of assets among beneficiaries with and without disabilities

1. Families often agonize over the issue of **how to divide their estates** between beneficiaries with disabilities and those who are "neuro-typical," *i.e.* without disabilities. The notion of a **"fair"** allocation collides with that of an **"appropriate"** allocation, considering that the beneficiaries with disabilities will likely never be fully self-supporting.

a. One extreme option, that can usually be discarded after a thoughtful discussion, is that of **leaving a family's entire estate**, including probate and non-probate assets, in

trust for the sole lifetime benefit of the child with a disability, allowing the neuro-typical siblings to inherit only upon that child's death. This option is usually neither fair nor appropriate.

(1) Delaying the inheritance of the neuro-typical siblings until the death of their sibling with a disability will **inevitably lead to resentment** in the very people who would serve as the primary social and support network for the child with a disability after the parents are deceased. Such resentment can range in intensity from mildly dysfunctional to pathologically aberrant. The last thing that the estate planning attorney should do is to facilitate a plan that is doomed to failure on a relational level.

b. Although disinheriting the beneficiary with special needs is generally inadvisable, as discussed, *supra*, in Section II, it might be an appropriate (and fair) option to consider if that beneficiary has a very large first-party Special Needs Trust funded with the proceeds of a settlement or verdict. However, many families believe that no amount of money will be sufficient to provide fully for the special needs of their children with disabilities. This is where a "Life Care Plan" can meet the challenge.

2. Developing a "Life Care Plan" for the beneficiary with special needs is an indispensable element of a realistic estate plan. Rather than just guessing as to the amount of money that will be needed to fully fund the special needs of a child with disabilities, a **Life Care Plan represents an objective, arm's length assessment of the estimated cost**. As the name implies, a Life Care Plan itemizes those medical and non-medical services, products, equipment, housing options, educational options and life-enhancing experiences from which the child with special needs will derive benefit during his estimated life expectancy, along with an economic analysis of the likely expenses and cost of same, indexed for inflation.

a. A Life Care Plan also provides an **indispensable road-map for the Trustee** of any Special Needs Trust. If there is no Life Care Plan in place at the inception of the trust, the Trustee is advised to procure one as the first order of business. If the beneficiary of a first-party Special Needs Trust has received a verdict or settlement as part of a personal injury lawsuit, the trial attorney will have obtained one or more Life Care Plans as part of that process. However, for families who have children with disabilities that are no one's fault, *e.g.* Autism or Down Syndrome, they typically have never heard of a Life Care Plan.

(1) A Life Care Plan is developed by an allied professional known as a "Life Care Planner," who frequently has a medical background as a nurse, physician, or rehabilitation therapist, or as a social worker. (This author prefers to collaborate with a Nurse Life Care Planner. *See* American Association of Nurse Life Care Planners at www.aanlcp.org.) There are several national associations that purport to "certify" Life Care Planners, but it is a generally unregulated emerging specialty without consistent standards. Nevertheless, a good Life Care Planner plays a critical role in answering the question **"How much is enough to leave in a Special Needs Trust** for my child with a disability?" which in turn informs the discussion about how to allocate a client's estate between beneficiaries with and without disabilities.

3. Consider **an equal allocation of probate assets coupled with an augmentation of non-probate assets** for the beneficiary with special needs. Clients are often concerned about memorializing (in their Wills or Revocable Living Trusts) an unequal allocation of assets among their children. They perceive that these documents are preserved in black and white for all eternity, and for all to see and read (and re-read) for decades. An easy solution to this concern is to **augment the equal probate share of the child with special needs** by means of non-probate assets that pass pursuant to a beneficiary designation, which typically is not preserved for posterity in the same fashion as a Will or Revocable Living Trust. Using life insurance (possibly owned by and payable to an Irrevocable Life Insurance Trust with embedded Special Needs Trust provisions) to fund an

appropriate augmentation of the beneficiary's share of probate assets is a viable solution for many clients.

C. Coordinating gifts, bequests and distributions for a beneficiary receiving means-tested benefits

1. As noted above, utilizing third-party Special Needs Trusts is the cornerstone of securing the financial future of a beneficiary who is receiving means-tested benefits to help fund the cost of his care and other needs. **A special needs estate plan will typically include a network of several third-party Special Needs Trusts** for the beneficiary with a disability, each of which is designed to receive funding form different sources, at different times, including the following.

a. A **testamentary** third-party Special Needs Trust under the Will or Revocable Living Trust of each parent may be the foundation of a Special Needs Plan.

b. Since a Testamentary Special Needs Trust cannot be designated to receive gifts or bequests from others if the testator is still alive, an ***inter vivos*** third-party Special Needs Trust **designed to receive bequests** from other family members or friends who wish to help secure the financial future of the beneficiary is an indispensable element of an effective Special Needs Plan. These generous third parties are advised of this option by means of a "Dear Family and Friends Letter."

(1) The **"Dear Family and Friends Letter"** will describe the Special Needs Planning that has been undertaken for the benefit of the beneficiary, and the ultimate goal of preserving his means-tested government benefits. The letter will then provide the **precise verbiage necessary to "incorporate by reference"** the provisions of the *inter vivos* third-party Special Needs Trust that is ready and waiting to receive "pour-over" testamentary bequests or other post-death transfers for the benefit of the beneficiary. The letter will also include a strong caveat that any potential benefactor should seek independent legal or tax advice from his professional advisors prior to implementing any proposed transfer to the trust.

c. Many families also wish to include an *inter vivos* third-party Special Needs Trust **designed to receive lifetime gifts that will qualify for the gift tax annual exclusion** by vesting *Cristofani* rights of withdrawal in secondary permissible beneficiaries (and remaindermen) but *not* in the primary beneficiary receiving means-tested benefits. *See* discussion, *supra*, in Section V.B.3.a. A "Dear Family and Friends Letter" should also be prepared for this type of gifting trust, with specific instructions about how the right of withdrawal process works.

(1) Drafting attorneys may need to engage in creative drafting designed to accommodate the increasingly complicated wishes of clients regarding the disposition of any assets remaining in the trust at the death of the beneficiary with a disability. To avoid a multiplicity of trusts to accommodate the wishes of different donors regarding their preferred remainder beneficiaries, it is possible to draft provisions that require **"tracking" the contributions from different donors** so that any remainder passes solely to persons designated by that donor. The success of such an approach may also require the drafting attorney to prepare instructions to the Trustee that generally require *pro rata* usage of the various internal "funds" (all with different remainder beneficiaries) established within the trust (although exceptions might be considered, *e.g.*, if necessary to minimize the transfer tax consequences to the trust beneficiaries).

d. Almost every family will need an *inter vivos* third-party Special Needs Trust designed as **an "accumulation trust" to serve as the "Designated Beneficiary"** of an IRA, 401(k) or other qualified plan account, which is in compliance with all of the requirements set forth in Treas. Reg. § 1.401(a)(9)-4. Designing the Trust as a "Qualified Disability Trust" (discussed

in Section V.B.2., *supra*) can afford significant income tax benefits to the beneficiary. *See* Stephen J. Silverberg, *A Clear Winner in the Tax Cuts and Jobs Act of 2017: Qualified Disability Trusts,* NAELA News Online, June 2018.

e. Many families also need a **Life Insurance Trust with embedded third-party Special Needs Trust provisions** designed to own, and be the designated beneficiary of, one or more single life or second-to-die policies insuring (typically) the parents of the beneficiary with special needs. Although the beneficiary with special needs should not hold a *Crummey* power, secondary permissible beneficiaries (and remaindermen) can hold *Cristofani* rights of withdrawal to facilitate the gift tax-efficient funding of the premiums for any policies owned by the Trust. N.B. In light of the historically high estate tax exemption afforded by the 2017 Tax Act (*i.e.* $11.4 million per person in 2019, indexed for inflation through January 1, 2026), fewer families are now electing an *irrevocable* Life Insurance Trust.

f. It is possible to **facilitate charitable planning** by designating a third-party Special Needs Trust as the income beneficiary of a Charitable Remainder Trust ("CRT") (either a Charitable Remainder Annuity Trust ("CRAT") or a Charitable Remainder Unitrust ("CRUT")) with a stated term not exceeding 20 years. The CRT would be funded ideally with appreciated property during the donor's lifetime, or at death with a qualified retirement account. **Under IRC § 7701(a)(1), a third-party Special Needs Trust would qualify as a permissible CRT income beneficiary.** At the end of the CRT term (not to exceed 20 years), the remainder could pass to a charitable organization which may have provided meaningful support to the family of the beneficiary, or which is devoted to the specific disabling condition with which the beneficiary is challenged.

(1) Designing the third-party Special Needs Trust as a "Qualified Disability Trust" (discussed in Section V.B.2., *supra*) can help ameliorate the income tax consequences of annual CRT distributions to the Special Needs Trust, as will distributions from the Special Needs Trust for the benefit of the beneficiary which will "carry out" to the beneficiary for income tax reporting purposes income that would otherwise be taxable to the Special Needs Trust at its compressed rates (as discussed in Section V.B.1., *supra*).

2. A Special Needs Estate Plan should also include one or more first-party Special Needs Trusts. Notwithstanding the best efforts of the estate planning attorney and allied professionals to utilize the above-described network of third-party Special Needs Trusts to coordinate financial benefits for the beneficiary with special needs, something *always* slips through the cracks that results in the beneficiary becoming legally entitled to receive property that jeopardizes his eligibility for means-tested benefits. Following are some of the more common scenarios.

a. The **well-intentioned generosity of a friend or family** member who (i) leaves an outright bequest to the beneficiary, (ii) makes an outright lifetime gift to the beneficiary, (iii) dies intestate with the beneficiary entitled to share in the estate as an heir-at-law, or (iv) designates the beneficiary as a direct payee of a non-probate asset, can wreak havoc on a beneficiary's eligibility for means-tested government benefits.

b. If the **beneficiary becomes legally entitled to receive benefits** as a contingent or default taker of a non-probate asset when the primary beneficiary predeceases the owner of the asset, this can jeopardize his means-tested benefits.

(1) If a beneficiary receiving means-tested government benefits is legally entitled to receive any of the property described in a. or b., above, **a "Qualified Disclaimer"** under IRC § 2518 by, or on behalf of, the beneficiary is ***not effective*** to avoid an interruption or termination of those benefits. *See* POMS SI 01150.110.E. Although the disclaimer

may be effective for transfer tax purposes, and valid under State law to convey title to the disclaimed asset to another person, the disclaimant's means-tested benefits will be adversely impacted.

c. If the beneficiary with special needs **wins the lottery** or another significant cash prize, the value of this windfall often pales in comparison to the value of the means-tested government benefits that can be lost as a consequence thereof.

d. If the beneficiary becomes legally entitled to receive court-ordered **child support or alimony** payments as a consequence of divorce, this may disqualify him from ongoing eligibility for means-tested benefits if not properly coordinated with his Special Needs Planning.

(1) Although the property described in c. and d. may be excluded as a resource once deposited to a first-party Special Needs Trust, such payments may constitute unearned income to the beneficiary (as discussed, *supra*, in Section IV.A.1.(2)(e)) unless such payments are **irrevocably assigned** to the first-party Special Needs Trust, including by court order. *See* POMS SI 01120.200.G.1.d and SI 01120.201.J.1.d.

e. The balance in a beneficiary's Representative Payee account (*i.e.* which receives direct deposits of his SSI, SSDI or CDB cash payments each month) may occasionally approach the $2,000 resource limit for means-tested benefits, resulting in his being "over-resourced" and thus jeopardizing ongoing eligibility for such benefits (*see* discussion, *supra*, at Section IV.A.1.a.(2)(a)). POMS GN 00602.075.C.1 would allow the **transfer of such "excess" funds in the Representative Payee account to a first-party Special Needs Trust** for the sole benefit of the beneficiary "established exclusively for the use and benefit of the beneficiary to meet the beneficiary's current and reasonably foreseeable needs."

f. In each of the above situations, having a **first-party Special Needs Trust available on "stand-by," on a pre-need basis**, provides a ready solution for handling the asset to which the beneficiary is legally entitled in a manner that will help preserve his eligibility for means-tested government benefits. As discussed, *supra*, in Section III.B.2.a., the permissible Settlors of a first-party Special Needs Trust now include the beneficiary (after December 13, 2016), if the beneficiary, though disabled, is a mentally competent adult, the beneficiary's parents, grandparents, legal Guardian or Conservator, or a court. A beneficiary's parent (or grandparent) may also establish a first-party Special Needs Trust as a "seed trust" (authorized by POMS SI 01120.203.B.7 and SI 01120.203.C.2.b) as part of their estate planning as an elegant pre-need solution to an inevitable problem.

(1) If the beneficiary is, in fact, an incapacitated adult (or a minor) when he becomes legally entitled to financial benefits such as those listed above, and which would otherwise be subject to a Conservatorship, it is likely that a **court procedure will be necessary to authorize the transfer** of those assets into a first-party Special Needs Trust established on a pre-need basis. Furthermore, any assets that remain in a **Conservatorship are "available" or "countable" resources** for purposes of the ward's eligibility for means-tested government benefits. *See* POMS SI 01140.215.B.1.

(2) In Ltr. Rul. 200620025 an adult child with a disability, and receiving means-tested government benefits, was designated as the direct beneficiary of a share of his deceased father's IRA. In order to preserve his means-tested government benefits, the son's legal Guardian petitioned a court of competent jurisdiction for authority to (i) **create a first-party Special Needs Trust, and (ii) fund it with the beneficiary's share of the inherited IRA**. The Service held that the first-party Special Needs Trust was a "grantor trust" for federal income tax purposes under IRC § 677(a). Thus, since a grantor trust is disregarded for income tax purposes, the Service held that

the funding of the trust with the beneficiary's share of the inherited IRA was not a transfer for purposes of IRC § 691(a)(2). This conclusion remained the same even after the beneficiary's share of the inherited IRA was transferred, by means of a trustee-to-trustee transfer, to a new IRA set up and maintained in the name of the deceased IRA owner to benefit the son through his first-party Special Needs Trust. Finally, the Service held that required minimum distributions from the new IRA to the first-party Special Needs Trust could be calculated using the son's life expectancy.

(3) If the beneficiary of a first-party Special Needs Trust which is established by his parents or grandparents on a pre-need basis as part of their estate plan happens to have testamentary capacity at that time, consider seeking input from the beneficiary as to who he would like to receive any assets remaining in the trust after any Medicaid "payback" is satisfied.

g. Rev. Rul. 2002-20, 2002-1 CB 794 (4/26/02), holds that a CRUT is qualified under IRC § 664 if the unitrust amount is paid to a separate first-party Special Needs Trust for the lifetime benefit of an individual who is "financially disabled" as defined in IRC § 6511(h)(2)(A), and that individual has a testamentary general power of appointment over the balance remaining in the Special Needs Trust after the Medicaid payback. Thus, the 20-year term limitation required for a CRT when a third-party Special Needs Trust is designated as the income beneficiary (discussed, *supra*, in Section VI.C.1.f) does not apply to such a first-party Special Needs Trust unitrust recipient. "Financially disabled" is defined as "unable to manage [the individual's] financial affairs by reason of a medically determinable physical or mental impairment of the individual which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." The Ruling holds that the use of the assets in such a first-party Special Needs Trust "is consistent with the manner in which [the beneficiary's] own assets would be used. [The beneficiary], therefore, is considered to have received the unitrust amounts directly" from the CRUT for purposes of IRC § 664 (d)(2)(A). "Accordingly, the term of the [CRUT] may be for the life of [the beneficiary of the first-party Special Needs Trust] and is not limited to a term of years. The same result would apply if the [CRUT] were a charitable remainder annuity trust."

(1) Caveat: Rev. Rul. 2002-20 does not mention the provisions of IRC § 6511(h)(2)(B), which states that "An individual shall not be treated as financially disabled during any period that such individual's spouse or any other person is authorized to act on behalf of such individual in financial matters." *Query* whether the mere existence of a court-appointed Conservator for the individual or an attorney-in-fact under the individual's Durable Power of Attorney for financial matters (which many beneficiaries of first-party Special Needs Trusts do indeed have) would render this charitable planning opportunity unavailable.

D. Existing trusts with "support" or "maintenance" standards for distributions to the beneficiary with a disability

Inasmuch as special needs estate planning is a relatively new sub-specialty, practitioners are frequently confronted with **older irrevocable trusts** that utilize the classic "ascertainable standards" of "health, education, *maintenance* and *support*" for all beneficiaries. As noted, *supra*, in Section III.F.1.a., if a trust beneficiary is receiving means-tested government benefits, such as SSI and Medicaid, the **"support" and "maintenance"** distribution standards typically result in the trust assets being deemed **"available" or "countable"** to the beneficiary, thus jeopardizing those benefits. The inclusion of the "maintenance" and "support" distribution standards (found in most "Bypass/Credit Shelter" Trusts and in many "Dynasty/Generation-Skipping" Trusts) threatens to disqualify the beneficiary with a disability from ongoing eligibility for means-tested government benefits. Options to deal with this challenge may include the following.

1. If the original trust grants the **power to amend** the trust provisions, the exercise of that power (by someone other than the beneficiary with special needs) is an unexpectedly easy solution.

2. The exercise of a **power of appointment** (by someone other than the beneficiary with special needs) in favor of a newly-created third-party Special Needs Trust can often solve the problem if the provisions allow for the appointment of trust assets to, "or for the benefit of," the beneficiary, including "in further and separate trust."

3. A **"decanting" encroachment** by the Trustee into a newly-created third-party Special Needs Trust is another frequently utilized solution. Although not all States currently have decanting statutes, well-respected practitioners who have thoroughly considered this topic have concluded that the "common law of every state likely confers decanting authority on trustees." *See* Jonathan G. Blattmachr, Jerold I. Horn & Diana S.C. Zeydel, *An Analysis of the Tax Effects of Decanting*, 47 Real Prop. Tr. & Est. L.J. 141, 170 (Spring 2012).

4. A **judicial modification** of the original trust which replaces the "support" and "maintenance" standards with Special Needs Trust provisions with respect to any distributions for the benefit of the beneficiary receiving means-tested government benefits is an expensive and labor-intensive option. State law typically provides specific procedures for the judicial modification of irrevocable trusts, which are designed to uphold the intent of the person who established the trust and to effectuate the purpose of the trust. It is typically necessary to craft and support the position that **had the creator of the trust known** that its original provisions for the beneficiary with the disability would disqualify him from ongoing eligibility for a significant source of funding his special needs (*i.e.* means-tested government benefits) the creator would have taken the steps needed to modify those provisions accordingly by replacing them with Special Needs Trust provisions. The trust modification petition **typically addresses the following issues.**

a. A statement of proper jurisdiction and venue.

b. A complete list of all interested parties, including the Trustee(s), the trust beneficiaries (both current and remainder), and any Guardian ad Litem who may need to be appointed to represent the interests of any unknown or unborn trust beneficiaries, or the beneficiary with the disability if he is not mentally competent.

c. A complete description of the original trust provisions in favor of the beneficiary with special needs (and the other trust beneficiaries).

d. A description of the facts and circumstances surrounding the creation of the trust, supported by appropriate affidavits of those persons with actual knowledge of same.

e. A discussion of the beneficiary's disabling condition, and whether the person who created the original trust was aware of the disabling condition and the consequent special needs of the beneficiary.

f. The exact type of government benefits for which the beneficiary is eligible, which would be reduced or eliminated if the original "support" and "maintenance" distribution standards are not replaced with Special Needs Trust provisions. Note: insist on seeing the actual "benefits award letter" which describes the beneficiary's government benefits, since many families do not know or appreciate the difference between means-tested and employment-related benefits.

g. Citations to the relevant state and federal law that supports the proposition that the "support" and "maintenance" standards in the original trust will disrupt or eliminate the beneficiary's means-tested government benefits.

h. A discussion of the intent of the creator of the original trust to benefit the beneficiary with special needs by creating the trust, and how that intent, or the accomplishment of the purpose of the original trust, would be defeated, or substantially impaired, if the original provisions remain unmodified, supported by affidavits of persons familiar with the creator's intent and/or an affidavit from an attorney, or other allied professional, who routinely works with similarly-situated clients.

i. A discussion of how the proposed trust modification will uphold the intent of the person who created the original trust, and the accomplishment of the purpose of the trust, by (i) allowing the beneficiary's eligibility for means-tested government benefit programs to continue, and (ii) allowing the modified trust to supplement, and not supplant, those government benefits.

j. An analysis of the beneficiary's life expectancy; the insufficiency of the assets of the original trust to fund fully all of his health care and disability-related special needs for the balance of his lifetime; and the need for government benefit programs to supplement the trust assets to fund fully those needs.

k. A discussion of **whether the State's Medicaid plan will require a "payback" provision** to be included in the modified trust, notwithstanding the status of the original trust as a third-party trust (which would normally not be required to include a Medicaid payback provision, as discussed, *supra*, in Section III.C.2). Some States take the position that a trust which would have been considered an "available" or "countable" asset as originally drafted must include a payback provision in the modified version only if the creator made no reference whatsoever to the beneficiary's disabilities. The States are reportedly very inconsistent with regard to requiring the inclusion of a Medicaid payback provision in a modified third-party Special Needs Trust.

(1) If a Medicaid payback provision is required in the modified trust, and if there are other current or remainder beneficiaries of the trust whose beneficial interests would be adversely impacted by the satisfaction of the payback from the property remaining in the trust upon the death of the beneficiary with special needs, then the family should consider other available sources of liquidity (*e.g.* **life insurance covering the beneficiary)** for satisfying the payback. Medicaid cares only that its payback right is satisfied, not the source of the funds with which it is satisfied. This is also especially problematic if the major asset of the modified trust is illiquid or otherwise "sacred" to the beneficiaries, such as the family homeplace or some other sentimental asset which they do not wish to liquidate upon the death of the beneficiary with special needs to satisfy the Medicaid payback.

5. The Trustee of an irrevocable trust that contains problematic distribution standards for a beneficiary who receives means-tested government benefits could also consider a **complete encroachment to the beneficiary** of the entire trust corpus, followed by an **immediate funding of a first-party Special Needs Trust** with that property. This approach would necessarily entail subjecting the property to a Medicaid payback; however, if the corpus is likely to be depleted entirely (or in large part) during the beneficiary's lifetime, the payback prospect is of little consequence. If the beneficiary is a minor or an incapacitated adult under relevant State law, it would be necessary to obtain court approval for the transfer of the encroached assets into the first-party Special Needs Trust. Furthermore, every effort should be made to time the encroachment to the beneficiary and the immediate funding of the first-party Special Needs Trust with the encroached

trust property in the same month so that his eligibility for means-tested benefits is adversely impacted for only a single month.

E. Lack of a "Special Needs Team" of allied professionals

Families trying to secure the future of beneficiaries with disabilities already realize that this requires a team effort. The estate planning attorney is ideally suited to help the client assemble this Special Needs Team as part of the estate planning process. The members of a typical Special Needs Team should include, at a minimum, the following professionals.

1. An **estate planning attorney** who is familiar with the myriad issues involved in advising families with special needs, or who is willing to obtain and work with co-counsel who is experienced in this area. There are two national organizations whose members are proficient in the special needs space: the Special Needs Alliance[9] and the Academy of Special Needs Planners.[10]

2. A **Life Care Planner**, discussed, *supra*, in Section VI.B.2.a.(1).

3. A **Care Manager**, who prepares a personal care plan for the beneficiary, coordinates the beneficiary's caregivers and oversees the implementation of the plan, and personally periodically verifies the quality of care being rendered to the beneficiary.

4. A **government benefits specialist** who can assist the family with applying for the various programs for which the beneficiary may be eligible as a consequence of his disability. Many benefits applications are derailed because of a family's unfamiliarity with the forms or the process, or because of the failure to adequately document the beneficiary's disabling condition from a medical or functional limitation standpoint. This professional can often also advise the Trustee of a Special Needs Trust as to whether any proposed trust disbursements will adversely impact the beneficiary's means-tested benefits.

5. If the beneficiary with special needs is of school age, a **special education advocate or attorney** can help the family obtain the "free and appropriate public education" ("FAPE") in the "least restrictive environment" ("LRE") to which he is legally entitled. Under the Federal "Individuals with Disabilities Education Act" ("IDEA"), the educational program for a child with a disability must be designed to prepare him or her for further education, employment and independent living, as outlined in an "Individualized Education Program" ("IEP") tailored to the child's specific and unique needs. *See* 20 U.S.C. § 1400 *et seq.* There is a small, but growing, cadre of attorneys who limit their practice to advising and representing parents in special education hearings under the IDEA, since many public school systems fail or refuse to provide the free and appropriate public education guaranteed by IDEA. An increasing number of students with Autism Spectrum Disorder (or other disorders with consequent disruptive or self-injurious behaviors) are the victims of physical abuse at the hands of their teachers, who have not been properly trained in the management of such behaviors. Civil remedies and criminal penalties are available for redress of such abuse.

6. **Accountants** who are well-versed in preparing income tax returns for Special Needs Trusts, the beneficiaries thereof, and the parents or legal guardians of the beneficiaries who are funding the costs of their medical care and other needs. Many accountants are unfamiliar with Special Needs Trust taxation rules, or with the myriad expenditures that qualify as medical expenses. *See supra* Section V.A.2.c.

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[9] http://www.specialneedsalliance.org/.

[10] http://www.specialneedsplanners.com/.

a. In addition to income tax returns for Special Needs Trusts, numerous States require **annual accountings to the State Medicaid plan** which detail the receipts and disbursements of a Special Needs Trust, both first-party and third-party. For example, the Georgia Medicaid plan has established a first-of-its-kind "Trust Review and Accounting Program" administered by Health Management Systems (a publicly-traded national corporation that provides healthcare cost containment services to both state and federal agencies). This program has already been replicated in Alabama, Iowa and North Carolina (with several others pending). Reviews of these annual trust accountings focus on **potential violations of the "sole benefit rule"** applicable to first-party Special Needs Trusts (*see* Section III.B.2.d.(1), *supra*) as well as disbursements from first-party and third-party Special Needs Trusts that constitute **"In-Kind Support and Maintenance"** that adversely impact the beneficiary's Supplemental Security Income monthly payment (*see* Section IV.A.1.a.(2)(f), *supra*). Most accountants and attorneys are not ideally suited for the preparation of these annual accountings, which can be prepared more cost-effectively by a paralegal or bookkeeper.

7. Investment advisors who are sensitive to the generally low risk tolerance of beneficiaries with disabilities, and understand how a beneficiary's specific disability impacts a portfolio allocation, *e.g.* a compromised life expectancy and the costs of funding his Life Care Plan. Many persons with disabilities have a normal life expectancy, and their assets must be invested so that inflation does not erode their purchasing power over the long term.

8. Life insurance professionals who understand the process of determining the expected cost of a Life Care Plan, and can recommend creative strategies for funding that cost taking into account all of the other resources available to the beneficiary, including his parents, siblings or other support network, as well as the various government benefit programs for which he may be eligible as a consequence of his disabilities. Increasingly, the beneficiaries of Special Needs Trusts find it desirable or advisable to obtain life insurance on their own lives, which may be possible (with a specialty underwriter) if their disabilities do not adversely impact their insurability.

9. An **appropriate Trustee**, and successors, for the network of Special Needs Trusts that will form the cornerstone of the beneficiary's financial security. Serving as the Trustee of a Special Needs Trust is not for the faint-of-heart. Even well-intentioned, motivated family members risk sabotaging a perfect Special Needs Plan if they improperly administer the Special Needs Trusts for which they are responsible. If those family members also happen to be the remainder beneficiaries of the Special Needs Trusts, then (human nature being what it is), it is quite possible that the beneficiary will not benefit as the client intended. Thus, an independent or professional Trustee is highly recommended for Special Needs Trusts.

a. Unfortunately, many professional or corporate Trustees have **very high minimums** for all trust accounts (and perhaps even higher minimums for Special Needs Trusts in recognition of the labor-intensive nature of their administration) which often preclude this option for many clients. Even more regrettable are the increasing numbers of corporate Trustees that categorically refuse to accept Special Needs Trusts of any size. Increasingly, attorneys, accountants, former trust officers and other allied professionals are offering **private fiduciary services** for Special Needs Trust administration with no, or a relatively low, minimum account threshold. These "allied professionals" are also often available to serve as **"distribution advisors"** to those Trustees (individual or corporate) who are not well-versed in the myriad rules and restrictions applicable to disbursements from Special Needs Trusts.

10. Last, but not least, the **legal Guardian** of a beneficiary with special needs will eventually serve as the **"quarterback" of the Special Needs Team,** after the beneficiary's natural parents are deceased. Many clients are paralyzed with fear by the prospect that (i) no one will agree to serve as Guardian for their children with disabilities because of the monumental task it represents, and (ii) anyone who does agree to serve will not do it as well as they have done. Assembling the

Special Needs Team as part of the estate planning process provides a solution to both of these concerns. (It is also advisable to secure the appointment of a Conservator at the same time to take responsibility for the actions described, *supra* at Section VI.C.2.f.)

a. If a person nominated under the client's Will to serve as Guardian of the client's child with a disability believes that he must personally undertake the responsibilities of all of the Team members listed above, the client's fear would be justified. However, if the nominated Guardian were able to view his role as the "quarterback" of those allied professionals, with a **division of labor agreed upon in advance**, then serving as Guardian would not seem nearly as daunting.

b. If the members of the Special Needs Team are identified and assembled while the parents of the beneficiary are still living, then the parents can take an active role in communicating their expectations so that, working together, the Team members may indeed do as well as the parents have done. Each Team member can be given appropriate opportunities to interact with the beneficiary, his parents, and each other, before the parents' demise. Instead of losing the history of care and love which the parents have left as part of their legacy, the **Team members are made a part of that history**.

c. Assembling the members of the Special Needs Team while the parents of the beneficiary are still living can also facilitate a more **accurate analysis of the cost** of procuring the services of the Team members in the future. If, as is often the case, the likely cost exceeds the clients' wildest nightmares, steps can be taken to bridge any funding gap that may exist.

d. For various reasons, the natural parents of adult children with disabilities often **fail or refuse to secure the appointment of a legal Guardian** for them. Psychologically, such parents simply cannot bear the thought of a process that necessarily emphasizes the areas in which their adult children remain vulnerable and unable to take care of their own health and personal safety. Such parents have spent their whole lives emphasizing their children's abilities (however modest), and refuse to focus realistically on their vulnerabilities, which is the primary focus of a guardianship hearing. Third parties (especially long-standing health care providers) often enable this "head-in-the-sand" approach as long as one of the natural parents of the adult child with a disability is still living, operating on a "wink-wink" basis (and often violating the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") in the process). Needless to say, this is an imprudent approach which can risk the health and well-being of the adult child with the disability if, for example, a catastrophic health care emergency were to arise and a doctor unfamiliar with the family insisted on Letters of Guardianship before taking any directions regarding the child's course of care.

VII. ABLE ACCOUNTS

A. Background Information

1. The "STEPHEN BECK, JR. **A**CHIEVING A **B**ETTER **L**IFE **E**XPERIENCE ACT OF 2014" (the "ABLE Act") (Public Law 113-295) was signed on December 19, 2014 by President Obama as part of the Tax Increase Prevention Act of 2014. This new legislation aims to "provide secure funding for disability-related expenses on behalf of designated beneficiaries with disabilities that will supplement, but not supplant, benefits" otherwise available to such persons through private sources, employment, public programs, or otherwise. ABLE Act § 101(1). The ABLE Act **adds new § 529A to the Internal Revenue Code** of 1986 (the "Code"), as well as numerous amendments to related provisions of the Code (*e.g.* IRC §§ 2501, 2503, 2511, 2642 and 2652 with respect to gift and generation-skipping taxes). Similar to § 529 Qualified State Tuition Program accounts, a qualified § 529A ABLE account is funded with after-tax dollars, all earnings on the account assets are tax-

deferred, and distributions for **"Qualified Disability Expenses" ("QDEs")** are not includable in the income of the designated beneficiary.

2. On March 23, 2015, the IRS issued Notice 2015-18 setting forth limited guidance for States eager to establish ABLE Programs without the benefit of even Proposed Regulations. A few days later, the Social Security Administration ("SSA") issued new POMS SI 01130.740 pertaining to ABLE accounts. On June 22, 2015, the Department of the Treasury published Proposed Regulations expanding on the provisions of the ABLE Act. On November 20, 2015, in response to hundreds of comments on the Proposed Regulations submitted by individuals and organizations, the Internal Revenue Service issued Notice 2015-81, "Interim Guidance Regarding Certain Provisions of Proposed Regulations Relating to Qualified ABLE Programs." On September 7, 2017, the Department of Health and Human Services, Centers for Medicare and Medicaid Services, issued further guidance, SMD#17-002, "Implications of the ABLE Act for State Medicaid Programs." Finally, in **March 2018, SSA issued a revised version of POMS SI 01130.740.**

B. General Requirements for a Qualified State ABLE Program

In order to qualify for tax-exempt status pursuant to IRC § 529A(a) and Proposed Regulation § 1.529A-1(a), a State ABLE program described in IRC § 529A, the Proposed Regulations, and POMS SI 01130.740, must comply with the following requirements.

1. The program is established and maintained by a State, or a State's agency or instrumentality (*e.g.* private company), pursuant to State statute, regulations or other action.

2. The program permits the establishment of an ABLE account only for a "designated beneficiary" who is a resident of that State, or a resident of a State contracting with that State for purposes of affording its residents access to an ABLE program.

3. The program permits the establishment of only one ABLE account, wherever located, for an "eligible individual" who is the designated beneficiary, by (i) the designated beneficiary himself, or, in the case of the beneficiary who is a minor or "is otherwise incapable of managing the account," (ii) his agent under a power of attorney, or, if none, (iii) his parent, or (iv) his legal Guardian (or, presumably, Conservator).

4. The program requires that the designated beneficiary be disabled or blind (as defined by the SSA) prior to his 26th birthday, and establish such disability or blindness in accordance with certain prescribed procedures, both upon the initial establishment of the ABLE account and periodically thereafter until its termination.

5. The program must limit the nature and amount of contributions by all persons to an ABLE account, including an annual limitation based on the annual gift tax exclusion under IRC § 2503(b), and a cumulative limitation keyed to the State's limit for 529 Plans under IRC § 529(b)(6).

6. The program must limit distributions from an ABLE account to the QDEs of the designated beneficiary during a tax year that he satisfies the disability requirements.

7. The program must require a separate accounting for an ABLE account to the designated beneficiary thereof, and additional periodic reports to the IRS and the SSA.

8. The program must limit the designated beneficiary to two opportunities each calendar year to provide investment direction regarding the assets in his ABLE account.

9. The program must prohibit the assignment of an interest in the ABLE account.

10. The program must provide that, upon the death of the designated beneficiary, the State's Medicaid plan may file a claim against the ABLE account for the total amount of medical assistance paid for the designated beneficiary under the State's Medicaid plan after the establishment of the account.

C. State Action to Establish an ABLE Program

1. The ABLE Act authorizes (but does not require) the States to establish ABLE programs. Any State which elects to establish an ABLE program must do so through legislation or regulations. *See, e.g.*, O.C.G.A. §§ 30-9-1 *et seq.*, for the "GEORGIA ACHIEVING A BETTER LIFE EXPERIENCE (ABLE) ACT."

a. On December 18, 2015, a provision of the Consolidated Appropriations Act of 2016 (Public Law 114-113, H.R. 2029, December 18, 2015), amended the original ABLE Act **to permit an individual to enroll in the ABLE program of any State**, whether it be the State of that individual's residence or another State with a valid ABLE program that accepts out-of-state residents. *See* http://www.ablenrc.org/about/what-are-able-accounts.

(1) The ABLE National Resource Center reports that all but nine States offer active ABLE programs. *See* http://www.ablenrc.org/state-review (last visited March 28, 2019) for **an update of the status of ABLE program legislation and implementation in all 50 states.**

(2) The Proposed Regulations permit a designated beneficiary to continue to maintain his ABLE account that was created in one State even after he is no longer a resident of that State. Prop. Reg. § 1.529A-2(o). Alternatively, the balance in an existing ABLE account may be rolled over to a new ABLE account in the designated beneficiary's new State of residence, but only once every 12 months. Prop. Reg. § 1.529A-1(b)(17).

D. Eligibility Requirements for a "Designated Beneficiary"

1. The "designated beneficiary" of an ABLE account, who is also **considered to be the owner** of the account, must be an "eligible individual." IRC § 529A(e)(1) and (3); Prop. Reg. § 1.529A-1(b)(1) and (4). POMS SI 01130.740.B.3.

2. An **"eligible individual"** must qualify as blind or disabled, as defined by the SSA, and **the onset of the blindness or disability must have occurred prior to the individual's 26th birthday**. A qualified ABLE program must require that the designated beneficiary be: (i) eligible for Supplemental Security Income (SSI) based on disability or blindness that began before age 26; (ii) entitled to Disability Insurance Benefits (DIB), Childhood Disability Benefits (CDB), or Disabled Widow's or Widower's Benefits (DWB) based on disability or blindness that began before age 26; (iii) a person who has certified, or whose attorney-in-fact acting under a Power of Attorney, parent, or guardian, has certified, that he: (A) has a medically determinable physical or mental impairment that results in "marked and severe functional limitations" (*i.e.* the standard for children claiming SSI benefits) that can be expected to result in death, or has lasted (or can be expected to last) for at least 12 months, or (B) is blind, and the disability or blindness occurred before age 26; or (iv) satisfies one of the conditions listed in the "Compassionate Allowances List" maintained by the SSA (*see* https://www.ssa.gov/compassionateallowances/conditions.htm). While an individual may file a disability certification meeting specific requirements in order to prove eligibility for an ABLE account, no inference regarding disability for purposes of eligibility for other government benefits may be drawn from such a certification. IRC § 529A(e)(1) and (2); Prop. Reg. §§ 1.529A-1(b)(9)(i) and (ii), and 1.529A-2(e)(1), (2), (3) and (5); POMS SI 01130.740.B.3.

a. An **eligibility determination applies for the entire taxable year.** Prop. Reg. § 1.529A-2(d)(1). Periodic recertification of the disability is required in accordance with Prop. Reg. § 1.529A-2(d)(2).

b. IRS Notice 2015-18 indicates that the final Regulations will eliminate one particularly problematic element of the disability certification requirements set forth in IRC § 529A(e)(2)(A)(ii) and Prop. Reg. § 1.529A-2(e)(1)(B)(iii), *i.e.* that a disability certification include a copy of the individual's diagnosis related to his impairment, signed by a physician. The final Regulations will reportedly require that the individual will retain the signed physician's diagnosis and make it available to the State's ABLE Program "upon request."

3. The Code and Proposed Regulations require program administrators to **collect and maintain records regarding the types of disabilities reported** by the designated beneficiaries of ABLE accounts. For this purpose, disabilities are divided into seven categories: developmental disorders; intellectual disabilities; psychiatric disorders; nervous system disorders; congenital anomalies; respiratory disorders; and other. IRC § 529A(d)(2) and Prop. Reg. § 1.529A-5(c)(2)(iv). This information is reported on IRS Form 5498-QA.

E. Contributions to and Disbursements from an ABLE Account

1. Any person (as defined by IRC § 7701(a)(1)), including the designated beneficiary, may contribute to an ABLE account, *i.e.* an individual, trust (including a Special Needs Trust), estate, partnership, association, company, or corporation. *See also* POMS SI 01130.740.B.2. However, the **annual cap on total contributions** to an ABLE account from all sources is limited by reference to the Federal annual gift tax exclusion amount under **IRC § 2503(b)** (which is $15,000 in 2019). IRC § 529A(b)(2)(B) and Prop. Reg. §§ 1.529A-2(g)(2) and 1.529A-1(b)(10); POMS SI 01130.740.B.2. A qualified ABLE program may accept contributions only **in the form of cash**, check, money order, credit card payment, electronic transfer, or other similar method of payment. IRC § 529A(b)(2)(A) and Prop. Reg. § 1.529A-2(g).

a. The Proposed Regulations provide that a qualified ABLE program must require the return of all contributions to an ABLE account in excess of the annual contributions limit, along with all net income attributable to those excess contributions, to the contributors on a last-in, first-out basis. Prop. Reg. §§ 1.529A-2(g)(2) and (4).

b. **Qualified contributions** also include certain rollover distributions from one ABLE account to a different ABLE account for the same designated beneficiary, or to an ABLE account for a designated beneficiary's family member. IRC § 529A(c)(1)(C); Prop. Reg. § 1.529-1(b)(17). For rollover purposes, a qualified member of the designated beneficiary's family is limited to a sibling only, including step-siblings and half-siblings, whether by blood or adoption. § 529A(e)(4); Prop. Reg. § 1.529A-1(b)(13). POMS SI 011130.740.B.5 and 10.

c. A **penalty-free rollover from a traditional 529 Plan** account (owned by the designated beneficiary or a family member) to an ABLE account is permissible. However, the rollover is subject to the annual contribution limit applicable to an ABLE account.

d. The designated beneficiary of an ABLE account who earns income from a job may **contribute an additional amount to his ABLE account from his compensation** up to the Federal Poverty Level (in 2019, $12,490), if he does not contribute to, or participate in, a defined contribution plan, a 403(b) annuity contract, or a deferred compensation plan.

e. While there is no federal income tax deduction for contributions to an ABLE account, some States do allow a modest income tax deduction (*e.g.* Ohio allows a maximum $2,000 deduction against the donor's Ohio income tax liability).

2. If distributions made from an ABLE account for the designated beneficiary's QDEs do not exceed the total QDEs of the designated beneficiary for his tax year, then **no amount so distributed shall be included** in the designated beneficiary's gross income. IRC § 529A(c)(1)(B)(i) and Prop. Reg. § 1.529A-3(a). However, the earnings attributable to distributions that are deemed not to be for QDEs will be includable as ordinary income in the designated beneficiary's taxable income. "The earnings portion of the distributions from the ABLE account as determined in the manner provided under IRC § 72, reduced by the product of such earnings portion and the ratio of the amount of the distributions for qualified disability expenses to total distributions, is includable in the gross income of the designated beneficiary to the extent not otherwise excluded from gross income." *See* IRS Guidance under § 529A: Qualified ABLE Programs (RIN 1545-BM68) June 22, 2015, at 20.

a. A well-respected Special Needs Planning tax attorney known to the author interprets the foregoing quoted verbiage as follows. "The income taxation of non-qualified ABLE distributions under IRC § 529A(c)(1)(A), by its reference to IRC § 72 (regarding annuity taxation), attempts to **tax only the *gain* related to the non-qualified distributions,** not the entirety of the distribution. IRC § 529A(c)(3) then requires the tax imposed by IRC § 529A(c)(1)(A) to be increased by 10%, and includable in the gross income of the designated beneficiary. It's framed in the nature of *a surcharge on the tax*, not a separate penalty."

3. The term **"qualified disability expenses"** means those incurred while the designated beneficiary is an eligible individual, which are **"related to"** the designated beneficiary's blindness or disability, and which are made **"for the benefit of"** the designated beneficiary to maintain or improve his health, independence, or quality of life. ABLE Act § 101(1); IRC § 529A(e)(5); Prop. Reg. §§ 1.529A-1(b)(16) and 1.529A-2(h)(1); POMS SI 01130.740.B.8. "Qualified disability expenses" should be broadly construed to include basic living expenses, and should not be limited to expenses for items for which there is a medical necessity or which provide no benefits to others in addition to benefiting the eligible individual. Prop. Reg. § 1.529A-2(h)(1).

a. IRC § 529A(e)(5), Prop. Reg. § 1.529A-2(h)(1), and POMS SI 01130.740.B.8 provide an initial list of **types of QDEs:** education, housing, transportation, employment training and support, assistive technology and related services; personal support services; health, prevention and wellness; financial management and administrative services; legal fees; expenses for ABLE account oversight and monitoring; funeral and burial expenses; and basic living expenses (*e.g.* food and special dietary items).

(1) Both the ABLE Act and Proposed Regulation § 1.529A-2(h)(1) initially required a qualified ABLE program to establish "safeguards" to distinguish between distributions used to pay QDEs and other non-qualified distributions, and to facilitate the identification of **amounts distributed for the designated beneficiary's "housing expenses"** including mortgage payments (as well as insurance required by the mortgage holder); real property taxes; rent; heating fuel; gas; electricity; water; sewer; and garbage removal. POMS SI 01130.740.B.9. These items are also included as elements of "In-Kind Support and Maintenance" attributed to an SSI recipient in the context of calculating the amount of his monthly cash benefit. *See* discussion *supra* at Section IV.A.1.a.(2)(f). The Proposed Regulations provided no guidance or suggested methodology to accomplish such required classification or tracking.

(a) In response to hundreds of negative comments regarding this aspect of the Proposed Regulations, the Treasury Department and the IRS agreed in Notice 2015-81 that **"the final regulations will not require a qualified ABLE program to identify or record**

whether distributions were made for housing expenses." Furthermore, that Notice also confirms that "the final regulations will not require, for any federal income tax purpose, a qualified ABLE program to establish safeguards to distinguish between distributions used for the payment of qualified disability expenses and other distributions."

(b) However, ABLE programs will be required to effectuate a **monthly "data exchange" with the SSA** regarding the first-of-the-month balance in an ABLE account, and disbursements from an ABLE account during the month, including funds loaded from an ABLE account onto the designated beneficiary's "prepaid debit card." POMS SI 01130.740.E.1 and 4, and 01130.740.G. The designated beneficiary must be prepared to **categorize distributions** from his ABLE account in order to properly determine his federal income tax obligations, and **for purposes of the "resource" analysis** required of SSI recipients. POMS SI 01130.740.C.5.b. and 01130.740.D.2. and 3.

F. ABLE Accounts and Means-Tested Government Benefits

1. Generally, the balance in a designated beneficiary's **ABLE account is disregarded** as a resource for purposes of determining his eligibility for means-tested Federal and State benefits. ABLE Act § 103(a). Thus, the ABLE Act allows individuals with disabilities to retain their eligibility for means-tested government benefits while controlling assets in excess of the general $2,000 resource limit for SSI and Medicaid, discussed *supra* at Section IV.A.1.a.(2)(a).

a. The new SSA POMS state that contributions to, distributions from, an ABLE account are not considered income to the designated beneficiary for purposes of his means-tested government benefits. *See* POMS SI 01130.740.C.1 and 4. Distributions from an ABLE account are deemed to be conversions of resources from one form to another. *See* POMS SI 01130.740.C.4. **Distributions from an ABLE account are not counted as income (including "In-Kind Support and Maintenance," discussed *supra* at Section IV.A.1.a.(2)(f)) to the designated beneficiary regardless of whether they are for non-housing QDEs, housing QDEs, or non-qualified expenses.** POMS SI 01130.740.C.4.

b. While the POMS acknowledge that distributions from an ABLE account are not income to the designated beneficiary (including income that constitutes "In-Kind Support and Maintenance") if spent in the same month received, there are numerous provisions of the POMS that address **an ABLE account, and distributions therefrom, as an available *resource*** to the designated beneficiary.

(1) A distribution from an ABLE account for a QDE *other than housing* is excluded from the designated beneficiary's countable resources if it is retained by him beyond the month received, as long as the designated beneficiary maintains, makes contributions to, or receives distributions from the ABLE account, the distribution remains unspent, and the distribution is identifiable. POMS SI 01130.740.C.5.a.

(2) In contrast, a distribution from an ABLE account for a *housing-related* QDE, or for an expense that is not a QDE, that is retained by the designated beneficiary in a month following the month of receipt is includable in the designated beneficiary's countable resources under the normal resource counting rules. POMS SI 01130.740.D.2 and 3.

c. Additionally, once the value of an **ABLE account exceeds $100,000,** the designated beneficiary's **eligibility to receive SSI payments is suspended**, but not terminated. ABLE Act § 103(b)(1). POMS SI 01130.740.C.3. Additional consequences of exceeding this threshold depend on the following.

(1) If the balance in an SSI recipient's ABLE account exceeds $100,000 by an amount that causes the recipient to exceed the SSI resource limit, whether alone or when combined with his other resources, the recipient enters into a **special SSI suspension period** where: (i) the SSA suspends the recipient's SSI payments without time limit (as long as the designated beneficiary remains otherwise eligible to receive SSI); (ii) the recipient maintains his underlying SSI-linked Medicaid eligibility; and (iii) the recipient's SSI eligibility does not terminate after twelve continuous months of suspension. The SSA will reinstate SSI payments for any month in which the designated beneficiary's ABLE balance no longer exceeds the resource limit and he is otherwise eligible. POMS SI 01130.740.D.1.a.

(a) If the balance in the ABLE account exceeds $100,000 by an amount that causes the recipient to exceed the SSI resource limit, but the recipient's other resources (*i.e.* other than the ABLE account) exceed the SSI resource limit, then (i) the SSA will suspend the recipient's SSI payments; (ii) the recipient loses his underlying SSI-linked Medicaid eligibility; and (iii) the recipient's SSI eligibility will terminate after twelve continuous months of suspension. The SSA will reinstate the recipient's SSI eligibility and Medicaid benefits for any month in which the recipient's ABLE account balance, combined with his other resources, do not cause the individual to exceed the resource limit. POMS SI 01130.740.D.1.b.

(2) If an individual is ineligible for SSI for any reason other than excess resources in an ABLE account, the special suspension status rules will not apply. The SSA will suspend the individual's SSI eligibility using normal procedures. POMS SI 01130.740.D.1.c.

d. The **total cumulative value of an ABLE account is capped** at the **State's limitation for § 529 Qualified State Tuition Program accounts** (a/k/a "529 Plans"), ranging from $235,000 to $468,000. The Proposed Regulations mandate the return to contributors of excess cumulative contributions (and the net income attributable to those contributions) which cause an ABLE account balance to exceed the State's maximum limitation for § 529 Plans. IRC § 529A(b)(6), and Prop. Reg. §§ 1.529A-1(b)(11) and 1.529A-2(g)(3) and (4). Although the Code and Proposed Regulations are not entirely clear, it is presumed that a designated beneficiary would also lose Medicaid eligibility if the value of his ABLE account exceeds the IRC § 529(b)(6) limit.

e. It is not entirely clear whether a transfer to an ABLE account by a designated beneficiary of his own assets when he is 65 or older would constitute a penalty transfer for purposes of means-tested government benefits eligibility, as discussed *supra* at Section III.B.2.d. and Section III.D.1.f. However, some well-respected practitioners insist that the designated beneficiary may continue to fund his ABLE account even after he attains 65 years of age, since the definition of "designated beneficiary" does not include any upper age limitation. POMS SI 10030.740.B.3. In contrast, no contributions to a first-party Special Needs Trust may be added after the beneficiary's sixty-fifth birthday, as discussed *supra* at Section III.B.2.d.

G. ABLE Accounts Are Subject to a Medicaid Payback Claim

1. IRC § 529A(f) states that upon the death of the designated beneficiary of an ABLE account, subject to any outstanding payments due for qualified disability expenses, all funds remaining in the ABLE account "**shall be distributed to [the State Medicaid program] upon filing of a claim** for payment by such State," up to an amount equal to the total medical assistance paid for the designated beneficiary from and after the date the ABLE account was established. Prop. Reg. § 1.529A-2(p) elaborates on this statutory provision as follows:

> "A qualified ABLE program must provide that a portion or all of the balance remaining in the ABLE account of a deceased designated beneficiary **must be distributed to a State that files a claim** against the designated beneficiary or the

> ABLE account itself with respect to benefits provided to the designated beneficiary under that State's Medicaid plan . . . The payment of such claim (if any) shall be . . . limited to the amount of the total medical assistance paid for the designated beneficiary after the establishment of the ABLE account . . .." *See also* POMS SI 01130.740.A. ("Upon the death of the designated beneficiary, funds remaining in the ABLE account, after payment of all outstanding qualified disability expenses, must be used to reimburse the State(s) for Medical Assistance (Medicaid) benefits that the designated beneficiary received, if the State(s) file(s) a claim for reimbursement."

a. Thus, **even third-party funds contributed to an ABLE account are potentially subject to a Medicaid payback claim, which is not required in the context of a third-party Special Needs Trust.** *See supra* at Section III.C.2.

(1) Thus, a State theoretically has discretion *not* to exact the Medicaid payback from an ABLE account. Several States (California, Florida, Maryland, Oregon and Pennsylvania) have reportedly passed the legislation necessary for a State Medicaid plan to forego a payback claim upon the death of the designated beneficiary of an ABLE account.

2. The State Medicaid program is considered a creditor of an ABLE account, not a beneficiary. IRC § 529A(f).

3. Any funds remaining in an ABLE account after the Medicaid payback will be distributed to the estate of the deceased designated beneficiary, or to another post-death beneficiary designated for the account. Prop. Reg. § 1.529A-3(d)(2)(i).

H. Additional Issues

1. If an individual cannot himself **establish or manage an ABLE account** (*e.g.* because he is a minor or "is otherwise incapable of managing" his ABLE account as a consequence of his disability (or otherwise), **the individual's agent under a power of attorney or, if none, his parent or "legal guardian," may establish an account for that individual and oversee its management as "a person with signature authority."** Prop. Reg. §§ 1.529A-1(b)(4) and 1.529A-2(c)(1); *see also* POMS SI 01130.740.B.6 for the definition of "person with signature authority." Any reference in the ABLE Act or Proposed Regulations to actions of the designated beneficiary, such as opening or managing the account, are deemed to include the actions of any individual other than the designated beneficiary who is granted signature authority over the ABLE account. Nevertheless, for SSI purposes, the SSA always considers the designated beneficiary to be the owner of the ABLE account, irrespective of who has signature authority over it. Prop. Reg. § 1.529A-1(b)(4) and POMS SI 01130.740.B.6.

a. Practitioners opine that **"incapable of managing"** his ABLE account does not necessarily require a judicial determination that the designated beneficiary is incapacitated, or that the incapacity be related to the disability, but could also include spendthrift tendencies, substance abuse and addictions, and similar financial mismanagement or imprudence. Proposed Regulation § 1.529A-1(b)(4) contemplates that a designated beneficiary may choose not to exercise signature authority over his ABLE account for any reason, or no reason.

(1) Despite the Proposed Regulations and the new POMS expressly allowing a parent or "legal guardian" of a designated beneficiary to establish and maintain an ABLE account on his behalf, State ABLE Programs reportedly vary widely regarding their willingness to allow this practice, some requiring a court-appointed conservator.

(2) Anticipating that a designated beneficiary with mental capacity who is initially capable of establishing his ABLE account but who may subsequently lose his capacity or simply choose not to manage the account, it is prudent to have him execute a **durable power of attorney granting a third-party signature authority** over his ABLE account in either such event. (The ABLE Program may have a form of limited power of attorney available for this purpose.) It is also advisable for his parents to include in their durable powers of attorney the express authority to establish, fund and manage an ABLE account for their child with a disability.

b. Any person with signature authority over an ABLE account who is not the designated beneficiary thereof may neither have nor acquire any beneficial interest in the account, and must only administer that account for the benefit of the designated beneficiary. Prop. Reg. § 1.529A-2(c)(3).

2. The designated beneficiary of an ABLE account may have no more than two opportunities in any calendar year to provide **investment direction**, whether directly or indirectly, with respect to the account assets. IRC § 529A(b)(4) and Prop. Reg. § 1.529A-2(l).

3. With regard to an **improvement, or other ameliorating change, in an individual's disability**, the Proposed Regulations permit continuation of an ABLE account (with some changes in the applicable rules) during any period when the designated beneficiary does not meet the requisite definition of disability or blindness, as long as the individual met the eligibility requirements at the time the account was originally established. Prop. Reg. § 1.529A-2(d)(3).

a. Beginning on the first day of the taxable year following the taxable year in which the designated beneficiary ceases to meet the requisite definitions of blind or disabled, there can be no additional contributions to, or distributions from, the ABLE account. Prop. Reg. § 1.529A-2(d)(3).

(1) If the designated beneficiary subsequently meets the requisite definitions of blindness or disability, additional contributions may again be accepted, and disbursements made, subject to the applicable annual and cumulative limits. Prop. Reg. § 1.529A-2(d)(3).

4. The designated beneficiary of each ABLE account must receive a separate **annual accounting**. IRC § 529A(b)(3) and Prop. Reg. § 1.529A-2(i).

a. IRC § 529A(d)(1) requires ABLE programs to provide **reports to the IRS and to designated beneficiaries** with respect to contributions, distributions, and returns of excess distributions, while IRC § 529A(d)(3) requires notice to the IRS of the establishment of an ABLE account. The IRS has issued forms for this purpose. IRS Form 5498-QA ("ABLE Account Contribution Information"), IRS Form 1099-QA ("Distributions from ABLE Accounts"), and the instructions therefor. Prop. Reg. §§ 1.529A-5(a)-(g), 1.529A-6(a)-(f).

b. IRC § 529A(d)(4) requires the State ABLE program to **electronically transmit to the SSA monthly statements** regarding all ABLE account balances and account distributions. *See also* POMS SI 011130.740.E.1., F., and G. Proposed Regulation § 1.529A-2(h)(1) initially provided that such reports must include details regarding distributions for the housing expenses of the designated beneficiary, or distributions used for non-qualified expenses. As discussed at Section VII.E.3.a.(1)(a), *supra*, the Final Regulations will eliminate these requirements.

5. The Proposed Regulations, when adopted as Final Regulations, will apply to taxable years beginning after December 31, 2014. Prop. Reg. § 1.529A-1(c).

6. Even in the absence of Final Regulations, most States have established State ABLE Programs. IRS Notice 2015-18 (I.R.B. 2015-12, March 23, 2015) provides that if State ABLE legislation, or ABLE implementation regulations and documents, passed or issued before Final Regulations are published do not fully comply with the Final Regulations, the States will be allowed sufficient transition periods to bring them into compliance.

I. Additional Tax Considerations for ABLE Accounts

1. If the total aggregate amount distributed from an ABLE account to, or for the benefit of, the designated beneficiary during his taxable year does not exceed his total QDEs for that year, no amount (income or principal) so distributed is includable in his gross income for that year. IRC § 529A(c)(1)(B)(i) and Prop. Reg. § 1.529A-3(a). In making this determination, all amounts distributed from an ABLE account to, or for the benefit of, the designated beneficiary during his tax year are treated as one distribution. IRC § 529A(c)(1)(D)(i) and Prop. Reg. § 1.529A-3(a). Thus, for income tax purposes, there is **no requirement to link a specific distribution from an ABLE account to a specific QDE of the designated beneficiary**. (Indeed, a similar distribution verification requirement was eliminated from IRC § 529 Qualified State Tuition Program accounts because of its unworkability from a staffing and programmatic standpoint.)

2. Additional amounts excluded from the gross income of the designated beneficiary include (i) a qualified rollover from one ABLE account to another ABLE account (as defined in Prop. Reg. § 1.529A-1(b)(17)); (ii) a program-to-program transfer (as defined in Prop. Reg. § 1.529A-1(b)(14); (iii) a change of designated beneficiary during the lifetime of the initial designated beneficiary if the successor designated beneficiary meets the relevant blindness or disability requirements, onset age, and is a sibling by blood or adoption (including a step-sibling or a half-sibling); and (iv) distributions after the death of the designated beneficiary in payment of outstanding obligations due for qualified disability expenses and any Medicaid payback claims. IRC § 529A(c)(1)(C) and Prop. Reg. § 1.529A-3(b)(1), (2), (3) and (4).

3. As noted in Section VII.E.2, *supra*, if any distribution from an ABLE account is includable in a person's gross income, it is deemed to be a *pro rata* distribution of principal and gains, with **the portion constituting gains subject to ordinary income taxation and a 10% penalty**. IRC § 529A(c)(3)(A) and Prop. Reg. § 1.529A-3(d). Exceptions to this 10% penalty tax include (i) post-death distributions to the designated beneficiary's estate, heirs or legatees, or creditors (but the earnings portion of the distribution is still subject to ordinary income tax); and (ii) returns of excess contributions over the Federal gift tax annual exclusion limit, returns of excess cumulative contributions over the State's § 529 Qualified State Tuition Program limit, or returns of contributions to "excess" ABLE accounts (*i.e.* if more than one ABLE account is erroneously established for a single designated beneficiary). Prop. Reg. § 1.529A-3(d)(1) and (2).

4. The designated beneficiary must pay an **additional excise tax of 6% on any excess annual contributions** (*i.e.* over the amount specified in IRC § 2503(b) for the taxable year of the designated beneficiary), unless the excess amount is returned to the contributor. IRC §§ 4973(a)(6) and (h), and Prop. Reg. § 1.529A-3(e).

5. Each contribution to an ABLE account by a person (other than the designated beneficiary) is treated as a **non-taxable completed present interest gift to the designated beneficiary** for gift tax purposes, and not as a future interest. IRC § 529A(c)(2)(A)(i) and Prop. Reg. § 1.529A-4(a)(1), Treas. Reg. § 25.2503-3(a), and POMS SI 01130.740.C.1.b. If a donor's gifts to the designated beneficiary (including the contribution to his ABLE account) do not exceed the annual gift tax exclusion amount set forth under IRC § 2503(b), the contribution is not subject to gift tax and has a zero inclusion ratio for purposes of the generation-skipping transfer tax. Prop. Reg. § 1.529A-4(a)(1) and (2).

6. **Distributions from** an ABLE account to, or for the benefit of, the designated beneficiary **are not treated as a taxable gift** to him. IRC § 529A(c)(2)(B); and Prop. Reg. § 1.529A-4(b).

7. A contribution to an ABLE account by the designated beneficiary that is comprised of his own property does not constitute a gift. Treas. Reg. § 25.2511-2(b) and (c). However, such property (and any earnings attributable thereto) would **constitute a gift by the designated beneficiary to any qualified successor designated beneficiary** who succeeds to his interest in the account, as contemplated by Prop. Reg. § 1.529A-3(b)(3). Prop. Reg. § 1.529A-4(a)(3). There are no gift tax or generation-skipping transfer tax consequences to a qualified successor designated beneficiary as a consequence of the change of beneficiary. IRC § 529A(c)(2)(C) and Prop. Reg. § 1.529A-4(c).

8. Upon the death of the designated beneficiary, his ABLE account is **fully includable in his gross estate** for estate tax purposes under IRC § 2031 and Prop. Reg. § 1.529A-4(d). However, the payment of any Medicaid payback claims exacted by a State may be deductible for estate tax purposes under IRC § 2053. Prop. Reg. § 1.529A-4(d).

J. Comparison of ABLE Accounts and Special Needs Trusts

1. The **benefits of an ABLE account over a first-party Special Needs Trust** are few, but include the following.

a. **No attorney, accountant or other paid allied professional** need be consulted or involved in opening an ABLE account.

b. There is **tax-deferred growth** on ABLE account balances, and tax-free distributions from the ABLE account if made for the QDEs of the designated beneficiary.

c. **Post-death QDE distributions** from an ABLE account (including funeral and burial expenses of the designated beneficiary) are permissible prior to any required Medicaid payback, whereas with a first-party Special Needs Trust, there must be an immediate cessation of payments except for the categories specifically allowed by POMS in SI 01120.203.E.

d. An ABLE account affords some **financial autonomy and fiscal education** to persons with disabilities who would otherwise be precluded by the SSI and Medicaid rules from controlling the investment and disbursement of sums in excess of $2,000.

e. It is arguable that an ABLE account could be established and funded with assets belonging to the designated beneficiary **even after he attains 65 years of age** (assuming that all of the other threshold requirements are met, including the onset of his qualified disability prior to age 26). This is not permissible with first-party Special Needs Trusts.

f. While every Special Needs Trust must be reviewed by SSA Regional Trust Review Teams and corresponding State Medicaid reviewers, a qualified ABLE program is viewed as a "safe-harbor," *i.e.* an individual designated beneficiary **need not seek formal approval** of his specific ABLE account.

g. Under the "disability certification" option for ABLE accounts, the Proposed Regulations allow for a designated beneficiary to **use the more lenient SSA child disability standard** of "marked and severe functional limitations" even for adult beneficiaries. Prop. Reg. § 1.529A-2(e)(1) and (2).

h. It is possible to **increase a designated beneficiary's monthly SSI** payment by using distributions from an ABLE account to pay for his food and housing expenses. Since such payments are **not deemed to be ISM**, there is no reduction of his SSI payment amount under the "Value of One-Third Reduction" or "Presumed Maximum Value" rules, as would be the case if a Special Needs Trust were to make distributions to pay for such expenses. *See* Section IV.A.1.(2)(f)(A) and (B), *supra*.

(1) In 2019, the maximum federal SSI monthly benefit is $771. If a Special Needs Trust were to pay the beneficiary's housing or food expenses, a maximum reduction of $257 or $277 (depending on the beneficiary's living arrangement) would apply under the VTR or PMV rules applicable to ISM, yielding a monthly SSI benefit of only $514 or $494, as the case may be. If the same housing or food expenses were defrayed by distributions from the designated beneficiary's ABLE account, there would be no ISM reduction to his SSI payments, thus increasing his annual SSI payments by $3,084 or $3,324, as the case may be ($257 x 12 months = $3,084; $277 x 12 months = $3,324).

i. The **Medicaid payback claim** against the funds remaining in an ABLE account at the death of the designated beneficiary is **limited to medical assistance paid for his benefit *after the establishment of the account***. Funds remaining in a first-party Special Needs Trust at the death of the beneficiary are subject to a Medicaid payback claim for all medical assistance provided for the beneficiary during his lifetime (even prior to the establishment of the Special Needs Trust).

2. An **ABLE account is decidedly inferior to a third-party Special Needs Trust** for the following reasons.

a. All third-party funds contributed to an ABLE account are potentially subject to a Medicaid payback claim upon the death of the designated beneficiary, if the Medicaid program of the sponsoring State elects to file a claim (which, it may be anticipated, will be the case with most States that elect to offer an ABLE program). **Funds in a third-party Special Needs Trust are not subject to a Medicaid payback.** If families are not working with a Special Needs Planning attorney, they may never realize that **funding a third-party Special Needs Trust instead of an ABLE account would have avoided the Medicaid payback entirely,** allowing them to designate trust remainder beneficiaries of their choice.

b. While an ABLE account may generally be funded each year with a maximum of $15,000 (in 2019) from all sources combined, **a third-party Special Needs Trust has no such annual limit on contributions.** Even though the annual contribution limit set forth in IRC § 2503(b) is indexed for inflation, this annual limitation will make it difficult to accumulate a significant fund for the designated beneficiary in an expeditious manner. Thus, assuming that a designated beneficiary established an ABLE account in 2016 (*i.e.* the first year that any State offered an ABLE program), funded it each year with the maximum permissible amount ($14,000/year for the first two years, $15,000/year for the next five years, assuming no increase in the annual limit), and makes no withdrawals from the ABLE account, the $100,000 limit would not be exceeded until 2022 (not counting any tax-free earnings on the account balance over the years).

c. If the value of an ABLE account exceeds $100,000, the eligibility of the designated beneficiary for **SSI payments is suspended**. If the value of an ABLE account exceeds the State's § 529(b)(6) limit for its Qualified State Tuition Program, the eligibility of the designated beneficiary for Medicaid may be lost. **Neither such result ensues in the case of a Special Needs Trust for the beneficiary (whether first-party or third-party) that exceeds those maximum limits.**

d. While distributions from an ABLE account must be used solely for the QDEs of the designated beneficiary, **no such restrictions** exist in the context of a third-party Special Needs Trust.

e. While the designated beneficiary of an ABLE account must satisfy the definition of blind or disabled prescribed by the SSA, the **beneficiary of a third-party Special Needs Trust need not meet any particular definition of disability.** (As discussed, *supra*, at Section III.B.2.b., the beneficiary of a first-party Special Needs Trust must also satisfy the definition of disabled promulgated by the SSA.)

f. While the designated beneficiary of an ABLE account must prove that the onset of his disability occurred prior to this 26th birthday, **no such age limitation exists in the context of a third-party Special Needs Trust**. (As noted, *supra*, at Section III.B.2.e., a first-party Special Needs Trust must be established and funded prior to the beneficiary's 65th birthday, but the initial age of onset of his disability is irrelevant.)

g. While an ABLE account may only be established by the designated beneficiary, or by his parent, legal guardian or attorney-in-fact, **anyone can establish a third-party Special Needs Trust**.

h. While each designated beneficiary may have only one ABLE account, there is **no limit on the number of Special Needs Trusts (first-party or third-party) which may be established** for a beneficiary. This is particularly important if the funders of third-party Special Needs Trusts wish to designate different remainder beneficiaries after the death of the beneficiary with the disability.

i. While all property in an ABLE account is fully **includable in the gross estate** of the designated beneficiary under IRC § 2031 (as is also the case with a first-party Special Needs Trust), none of the property in a properly drafted non-generation skipping third-party Special Needs Trust need be includable in the beneficiary's gross estate.

j. While **all funds deposited to an ABLE account must be cash** or its equivalent, no such limitations are imposed on contributions to a Special Needs Trust (both first-party and third-party).

3. Notwithstanding the significant deficiencies of an ABLE account, it often makes sense **to augment traditional third-party Special Needs Trust planning with an ABLE account funded with first-party assets** in the following circumstances if the designated beneficiary does not wish to incur the expense of establishing a first-party Special Needs Trust.

a. If the designated beneficiary does not regularly spend all of his SSI payments or his other earned and unearned income, and repeatedly runs the risk of exceeding the $2,000 resource limit for SSI and Medicaid eligibility, such **excess first-party funds could be contributed, or irrevocably assigned, to his ABLE account.**

b. If the designated beneficiary is legally entitled to receive an inheritance, gift, prize, settlement, lottery winnings, or other funds of less $15,000, **or other periodic payments of less than $1,250/month**, and does not wish to "spend down" the funds quickly, *e.g.* by purchasing exempt assets with the otherwise disqualifying resources, such first-party funds could be contributed, or irrevocably assigned, to an ABLE account. N.B. Such funds may nevertheless be initially categorized as "income" to the designated beneficiary for purposes of his government benefits eligibility notwithstanding its deposit to the ABLE account. *See* POMS SI 01130.740.C.1.a.

Conclusion

Vast numbers of estate planning attorneys and allied professionals are finally taking steps to become educated about (and perhaps proficient in addressing) the myriad issues implicated by the special needs of their clients with disabling conditions. Each year hundreds of articles, treatises and conferences are made available to help practitioners keep abreast of developments in this ever-changing area of the law. *See, e.g.*, Katherine N. Barr, Richard E. Davis & Kristen M. Lewis, *Top 15 Tips for Estate Planners When Planning for Special Needs*, 24 Prob. & Prop. 38 (Mar./Apr. 2010),[11] and Kristen M. Lewis, *Planning Challenges for Beneficiaries With Special Needs*, Estate Planning, Vol. 46, No. 3 (March 2019). Advising clients who have beneficiaries with special needs is fraught with challenges, but the personal and professional rewards for successful planning are unparalleled.

[11] http://www.americanbar.org/content/dam/aba/publications/probate_property_magazine/v24/02/2010_aba_rpte_pp_v24_2_mar_apr_barr_davis_lewis.authcheckdam.pdf.

PLANNING FOR BENEFICIARIES WITH SPECIAL NEEDS

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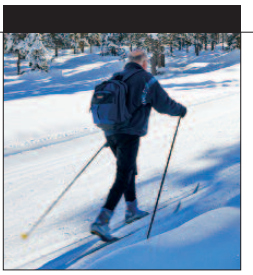
APPENDIX

- *Planning Challenges for Beneficiaries with Special Needs*, Estate Planning, March 2019, Vol. 46, No. 3.
- POMS SI 01120.200 - Information on Trusts, Including Trusts Established Prior to January 01, 2000, Trusts Established with the Assets of Third Parties, and Trusts Not Subject to Section 1613(e) of the Social Security Act
- POMS SI 01120.201 - Trusts Established with the Assets of an Individual on or after 01/01/00
- POMS SI 01120.202 - Development and Documentation of Trusts Established on or After 01/01/00
- POMS SI 01120.203 - Exceptions to Counting Trusts Established on or after January 1, 2000
- POMS SI 01130.740 - Achieving a Better Life Experience (ABLE) Accounts
- *Administering a Special Needs Trust: A Handbook For Trustees*, published by, and used with the express permission of, the Special Needs Alliance (all rights reserved) [also available at https://www.specialneedsalliance.org/wp-content/uploads/2019/02/SNA-2019-Handbook.pdf]
- *Cómo Administratar un Fideicomiso para Necesidades Especiales: Manual para Fideicomisanos,* published by, and used with the express permission of, the Special Needs Alliance (all rights reserved) [also available at https://www.specialneedsalliance.org/wp-content/uploads/2018/03/2018-Spanish-Online-3.pdf]
- *Preparing Annual Trust Accountings for Filing with the Georgia Department of Community Health: A General Guide for Trustees of Approved Special Needs Trusts*



Planning Challenges for Beneficiaries With Special Needs

To accommodate adequately the particular circumstances of beneficiaries with special needs, multiple trusts may be required.

KRISTEN M. LEWIS

Disabilities do not discriminate based on a family's socio-economic status. Families of great wealth have children or other beneficiaries with disabilities at the same rate as families of modest means. Estate planning attorneys, and the other allied professionals who serve these families, are no longer able to take the position that "We don't do special needs planning," or worse yet, recommend that the child or other beneficiary with a disability simply be disinherited (which is likely grounds for malpractice). A recent study by the Centers for Disease Control and Prevention concluded that the prevalence of Autism Spectrum Disorder (ASD) has risen to one in every 68 births in the U.S.[1] A more recent study concluded that the estimated prevalence of children in the U.S. with a "parent-reported" diagnosis of ASD is now one in 40.[2] The 2010 U.S. Census reported that almost 20% of the U.S. civilian non-institutionalized population claimed to have a disability.[3] With statistics like these, estate planners and allied professionals must become, and remain, educated about the tools and techniques available to help clients secure the future of beneficiaries with disabilities within the broader context of estate planning. A critical first step is recognizing, and knowing how to overcome, the most common challenges to effective special needs planning.

Challenge #1

Acknowledging the incorrect assumption that families of means can access on a private-pay basis the programs and services that they want for their beneficiaries with disabilities.

Increasingly, wealthy families who have never heard of Supplemental Security Income (SSI), which is the gateway to accessing myriad programs and services for persons with disabilities, and who never dreamed that anyone in their households would need to establish eligibility for Medicaid, are discovering two shocking realities:

1. Many of these beneficial programs and services are categorically unavailable on a private-pay basis.
2. Their beneficiaries with disabilities must indeed establish eligibility for SSI and Medicaid in order to participate in these programs and receive these services.

For example, many community-based congregate living arrangements require eligibility for either SSI or one of the many Medicaid "waiver" programs, as do high-quality "life skills" programs that train persons with disabilities how to live in the community, with appropriate supports, to avoid

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institutionalization. A family's private wealth simply cannot secure access to these beneficial programs, necessitating the same basic special needs planning pursued by families of modest means.

Challenge #2

Admitting a lack of proficiency in the increasingly complex area of special needs planning.

Estate planners who still recommend the disinheritance of a person with a disabling condition often do so because they are unfamiliar with special needs planning. Many traditional estate planning professionals are reluctant to develop new expertise in this estate planning niche. Rather than developing a proficiency in this specialized planning arena, or aligning themselves with co-counsel who can provide the necessary expertise, they recommend that the beneficiary with the disability be disinherited and provided for informally by other family members, often the adult siblings of the person with the disability. This approach is typically destined to fail.

Family members may claim that they are willing to manage on an informal basis the funds designated for the beneficiary with a disability. While such persons often maliciously and purposefully withhold the benefits of such informally designated funds from the intended beneficiary, even well-intentioned persons may ultimately fail to manage the targeted funds for the person with the disability. For example, if the donee of the designated funds commingles those assets with his or her own and thereafter (1) files for bankruptcy, (2) becomes party to a divorce proceeding and a subsequent equitable division of assets, (3) has a judgment lien recorded against him or her, or (4) fails to pay his or her tax liabilities and becomes subject to a tax lien, then the funds designated informally for the beneficiary with special needs could be dissipated entirely.

A similar result could ensue if the donee of the funds set aside informally for the beneficiary predeceases him or her and (1) dies intestate with heirs-at-law that include persons other than (or in addition to) the intended beneficiary, or (2) dies testate but fails to make proper arrangements in a will or revocable living trust for the ongoing management of the funds to be held for the benefit of the intended beneficiary.

Challenge #3

Understanding special needs trusts (and using them properly in an estate plan).

The cornerstone of securing the future of persons with disabilities within the broader context of estate planning is the special needs trust (SNT). The universe of SNTs can be divided into two main categories:

1. "First-party" SNTs (also sometimes referred to as "self-settled"), which are funded with assets belonging to the beneficiary, or to which the beneficiary is legally entitled.
2. "Third-party" SNTs, which are funded solely with assets derived from someone other than the beneficiary.

Custom-drafted first-party SNTs are federally authorized by 42 U.S.C. section 1396p(d)(4)(A), as part of the Omnibus Budget Reconciliation Act of 1993 (OBRA '93), as recently amended by the 21st Century Cures Act (P.L. No. 114-255), Title V, section 5007 ("Fairness in Medicaid Supplemental Needs Trusts"), sometimes referred to as "The Special Needs Trust Fairness Act." These federal laws set forth the statutory requirements for a first-party SNT. In addition, the Social Security Administration (SSA) maintains a guidance manual known as the "Program Operations Manual System" (POMS) regarding the validity and effectiveness of all SNTs (both first-party and third-party), the vast majority of which are set forth in POMS SI 01120.200, SI 01120.201, SI 01120.202, and SI 01120.203.[4] In addition, each state maintains similar guidance on SNTs in its Medicaid Manual. (For readers needing a refresher on the basic requirements for compliant first-party and third-party SNTs, the section on Challenge #8 provides such guidance.)

Compliant SNTs, whether first-party or third-party, do not "count against" the beneficiary for purposes of means-tested government benefits, including SSI and Medicaid. This is so because the beneficiary cannot compel the trustee to use the SNT assets for his or her "support" or "maintenance." In most jurisdictions, the mere inclusion of "support" or "maintenance" as a distribution standard for a beneficiary who receives means-tested benefits will result in the assets of the trust being deemed "available" or "countable" to the beneficiary, thus jeopardizing his or her continued eligibility for such benefits. (The section on Challenge #7 provides more guidance on this issue.) Thus, the classic "ascertainable standards" for trust distributions found in most credit shelter/bypass trusts (i.e., "health, education, maintenance, and support") generally disqualify the beneficiaries of those trusts for Medicaid and SSI.

1 See www.cdc.gov/mmwr/volumes/65/ss/ss6503a1.htm.

2 See Kogan, et al., "The Prevalence of Parent-Reported Autism Spectrum Disorder Among U.S. Children," Pediatrics, Vol. 142, No. 6 (December 2018), available at http://pediatrics.aappublications.org/content/142/6/e20174161.

3 See www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html.

4 The POMS are available at http://policy.ssa.gov, and were substantially updated in April 2018.

Challenge #4

Learning, appreciating, and using "person-first" terminology when referencing the beneficiary with a disability and his or her consequent special needs.

It does not matter how technically proficient an advisor may be if he or she alienates the client by using outdated and disparaging terminology to refer to the person with the disability. Just as the "N-word" offends most people of good will, so too does the "R-word" ("retard" or "retarded"), which has only recently gained a similarly offensive status. State and federal statutes are increasingly being amended to replace all forms of the "R-word" with more respectful terminology.

Compliant SNTs, whether first-party or third-party, do not "count against" the beneficiary for purposes of means-tested government benefits, including SSI and Medicaid.

Thus, rather than referring to a client's "autistic child," the preferred person-first terminology would be "child with autism." Rather than a "disabled child," a client has a "child with a disability." Instead of a beneficiary who is "wheelchair bound," that person "uses a wheelchair for mobility." The client's beneficiary is not "retarded," but rather has an "intellectual or cognitive disability." Using person-first terminology will seem cumbersome and unnatural at first. Clients, however, do take notice of those professional advisors who successfully integrate this concept into their normal parlance.

In time, the old terms that emphasized the disability first, instead of the person first, will become as offensive to the attorneys, and other allied professionals with whom they collaborate, as such pejorative terms have been to these families. Overcoming this challenge will transform the way a client relates to, and communicates with, the professional advisors.[5]

Challenge #5

Assembling a "team of allied professionals" to facilitate and implement the client's special needs estate plan.

Families trying to secure the future of beneficiaries with disabilities already realize that this requires a team effort. The estate planning attorney is ideally suited to help a client assemble the proper team of allied professionals as the special needs plan is being developed and then implemented.

The quarterback of the team is initially an estate planning attorney who is familiar with the myriad issues that must be addressed when advising families that are grappling with the consequences of a beneficiary's disabling condition. Another option is to collaborate with co-counsel who is experienced in this area. Any member of the Special Needs Alliance, an invitation-only professional organization whose attorney members devote a majority of their legal practices to special needs planning, would be ideally suited for this role.[6]

Life Care Planner. A "Life Care Planner" is an indispensable member of the client's team of allied professionals. Rather than just guessing the amount of funding needed to support the beneficiary with a disability for the rest of his or her life, a Life Care Planner develops an objective, arm's-length assessment of the likely cost. A Life Care Plan itemizes those medical and nonmedical services, products, equipment, housing options, educational options, and life-enhancing experiences from which the beneficiary with special needs will derive benefit during his or her estimated life expectancy, along with an economic analysis of the likely expense of each item or service, indexed for inflation. A Life Care Planner may have a background as a nurse, physician, rehabilitation specialist, or social worker. This author prefers to collaborate with Nurse Life Care Planners.[7]

A Life Care Planner plays a critical role in answering the client's question: "How much is enough to fund my beneficiary's SNT?" which in turn informs a discussion about how to allocate a client's estate assets between and among beneficiaries with and without disabilities. A Life Care Plan also provides a roadmap for the trustee of an SNT. If the SNT beneficiary or his or her family has not procured a Life Care Plan prior to the establishment and funding of an SNT, the trustee's first order of business is to procure this critical tool for administering the SNT effectively.

Government benefits specialist. Another essential member of the client's team is a government benefits specialist who can assist the client with applying for the various government benefit programs for which the person with a disability may be eligible. Many benefits applications are derailed due to the client's unfamiliarity with the forms or the process, including the failure to adequately document the bene-

5 For a "cheat sheet" on the proper terminology to use when referring to persons with disabilities, review "Guidelines: How to Write and Report about People with Disabilities," 8th Edition (2013), published by the University of Kansas Research and Training Center on Independent Living (available at www.rtcil.org/guidelines).

6 For a list of Special Needs Alliance members, go to www.specialneedsalliance.org/find-an-attorney/.

7 See American Association of Nurse Life Care Planners at www.aanlcp.org.

8 See 20 U.S.C. section 1400 *et seq.*

ficiary's disabling condition from a medical or functional limitation standpoint.

This professional serves as a lifelong resource for the beneficiary's team. For example, a government benefits specialist can advise the trustee of an SNT as to whether any proposed disbursements will adversely affect the beneficiary's means-tested government benefits. Many professional trustees have such an advisor on retainer if they do not have this expertise in-house.

Special education advocate. If the client's beneficiary with a disability is of school age, then a special education advocate or attorney should also be included on the team. This professional helps the client to obtain the "free and appropriate public education" (FAPE) in the "least restrictive environment" (LRE) to which a child with a disability is legally entitled.

Under the federal "Individuals with Disabilities Education Act" (IDEA), the educational program for a child with a disability must be designed to prepare the child for further education, employment, and independent living, as outlined in an "Individualized Education Program" (IEP) tailored to the child's specific and unique needs.[8] An increasing number of students with autism spectrum disorder (ASD)—or other disorders with consequent disruptive or self-injurious behaviors—are victims of physical abuse by educators who have not been properly trained to manage such behaviors, which implicates various civil and criminal laws that would need to be handled by litigation counsel.

Accountant. An accountant who is well-versed in preparing income tax returns for the trustees of SNTs, for the beneficiaries of SNTs, and for the parents or legal guardians of those SNT beneficiaries who are funding the costs of their medical care and other special needs, is another essential member of the client's team of allied professionals. Many accountants are unfamiliar with the income taxation rules that apply to first-party SNTs (which are generally taxed as "grantor trusts" with respect to the beneficiary) or third-party SNTs (which are generally taxed as "complex" trusts, or occasionally as "qualified disability trusts" under Section 642(b)(2)(C)).

In addition to income tax returns, many states require the preparation of annual SNT accountings for the state Medicaid agency which detail the receipts and disbursements of SNTs. Most accountants are not ideally suited for this task, which can be handled more cost-effectively by a paralegal or a bookkeeper.

Investment advisor. Another team member for all clients establishing and funding SNTs is an investment advisor who is sensitive to the generally lower risk tolerance of beneficiaries with disabilities, and who understands how a specific disabling condition affects an SNT portfolio allocation. The beneficiary may have a disability, but may also have a normal life expectancy necessitating SNT investments that will not be eroded by inflation. This investment challenge is exacerbated if a first-party SNT for the beneficiary has been funded in large part with structured settlement annuity contracts.

Life insurance specialist. A life insurance professional who can recommend creative strategies for funding the cost of a beneficiary's Life Care Plan is an indispensable member of the client's team of allied professionals. Nearly 100% of clients trying to secure the future of a beneficiary with a disability will need significant amounts of life insurance to do so. The beneficiary's disability is generally permanent, making term insurance alone an incomplete solution for the funding equation.

Furthermore, it is increasingly necessary to obtain life insurance on the beneficiary with the disability, e.g. to provide for his or her surviving lineal descendants, or to provide liquidity to fund a Medicaid payback obligation in a first-party SNT that holds illiquid assets. Oftentimes, a person's disability does not have an adverse impact on his or her insurability.

SNT trustee. Identifying an appropriate trustee to manage an SNT is becoming increasingly difficult as professional fiduciaries establish ever-higher minimums (e.g., $1 million or more), a reflection of how

labor-intensive SNT administration can be. Many corporate trustees categorically refuse to administer SNTs of any size. To fill this void, former trust officers, attorneys, and accountants are offering private fiduciary services for SNTs that require professional management.

Ideally, the SNT trustee will not be a family member, as even well-intentioned family members risk sabotaging a perfect special needs estate plan if they improperly administer the SNTs for which they are responsible. If those family members are also designated as the remainder beneficiaries of the SNTs, this inherent conflict of interest may result in less-than-generous use of the SNT assets for the beneficiary, thwarting the client's intention.

Legal guardian. Although the estate planning attorney may serve as the initial quarterback of the client's team of allied professionals as the special needs estate plan is being designed and implemented, the beneficiary's court-appointed legal guardian will eventually assume this role after the client's death. However, many clients will refuse to secure the appointment of a legal guardian and conservator for their beneficiaries during their lifetimes. Psychologically, these clients are unwilling to endure a process that necessarily emphasizes their beneficiary's vulnerabilities and weaknesses. They have spent their whole lives emphasizing their beneficiary's abilities (however modest) and steadfastly avoid a realistic focus on his or her vulnerabilities.

This "head-in-the-sand" approach is often facilitated by long-standing health care providers who are willing to continue to deal informally with the natural parents of the adult child with a disability (typically violating the Health Insurance Portability and Accountability Act of 1996 (HIPAA) in so doing). However, if the beneficiary is being treated by a provider who is unfamiliar with the beneficiary and his or her history, or if the beneficiary's parents are no longer managing his or her health care, providers will typically insist on a legal guardian if the beneficiary is not capable of executing an advance directive or health care proxy.

Challenge #6

Recognizing that a comprehensive special needs estate plan is not comprised of a single SNT, but rather consists of a "network" of SNTs that are each designed to be funded from different sources at different times.

Whenever the author receives a call from a prospective client, or from an attorney seeking co-counsel, requesting the preparation of "an" SNT for the client's beneficiary with a disability, it is immediately evident that the caller has barely scratched the surface of what constitutes a comprehensive special needs estate plan. The network of SNTs for the benefit of a beneficiary with a disability will typically include multiple third-party SNTs, discussed below.

Revocable living trust. The most obvious third-party SNTs in the network are those created under the will or revocable living trust (RLT) of each parent of a child with a disability. Even in jurisdictions where the probate process is not difficult or expensive, using a funded RLT as a "will substitute" often avoids the complications of the beneficiary's disability in the context of a probate proceeding. For example, depending on the nature and severity of the beneficiary's disability, and whether a legal guardian or conservator has already been appointed for him or her, the probate court may require a "guardian ad litem" to represent the beneficiary's interests in the probate proceeding, which can present significant delays in securing an order admitting a will to probate.

Receptacle SNT. Because a testamentary SNT, or an SNT to be established under an RLT once the settlor has died, is not actually created until the death of the testator or the settlor, these third-party SNTs cannot receive bequests prior to that time from others who may wish to benefit the beneficiary. Thus, another essential third-party SNT in the network is a "receptacle" SNT designed to coordinate and receive bequests and other *post mortem* distributions from others for the beneficiary with special needs.

These generous donors are advised of this convenient option by means of a "Dear Family and Friends" letter that describes in general terms the special needs planning that has been implemented by the client for the beneficiary, and provides the precise verbiage necessary to "incorporate by reference" the provisions of the receptacle SNT that is on "stand-by" ready to receive a pour-over bequest under a will or RLT, or other *post-mortem* transfers from a donor (e.g., pursuant to a beneficiary designation form for a life insurance policy). In this fashion, the well-intentioned generosity of a third party does not destroy the beneficiary's special needs plan, and the donor avoids the expense of implementing a full-fledged SNT under the donor's estate plan.

Gifting SNT. Some wealthy families include in their network of SNTs a

9 97 TC 74 (1991).

10 See Section 7701(a)(1).

11 See Rev. Proc. 2018-57, 2018-49 IRB 827; IR-2018-222, 11/15/18.

12 "An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018" (P.L. 115-97, 131 Stat. 2504).

third-party SNT that is designed to receive gifts that will qualify for the federal gift tax annual exclusion under Section 2503(b)(1). Inasmuch as a gift to a complex trust generally does not qualify as a "present interest" for purposes of the gift tax annual exclusion, a third-party gifting SNT must be designed so that secondary beneficiaries of the SNT are vested with "rights of withdrawal" under the rationale of *Estate of Cristofani*[9] to convert a future interest gift to the SNT into the requisite present interest. Thus, a common approach is to grant a *Cristofani* right to a secondary beneficiary of the SNT (typically a sibling of the beneficiary with the disability) who (1) may receive discretionary distributions during the life of the primary beneficiary (for a limited purpose such as "emergency health care"), and (2) is a remainder beneficiary of the SNT upon the death of the primary beneficiary.

Many traditional estate planning attorneys do not understand that vesting a *Crummey* right of withdrawal in the beneficiary with a disability who wishes to retain his or her eligibility for means-tested benefits (such as SSI and Medicaid) will cause the assets subject to the withdrawal right to be considered an "available" resource, thus disqualifying the beneficiary for those essential benefits. This planning *faux pas* may often be remedied by a judicial modification proceeding, or by the express declaration of the donor at the time of the gift to the SNT that the *Crummey* right otherwise granted by the SNT agreement to the beneficiary with a disability do not extend to the gift in question.

IRA designated beneficiary SNT. Virtually every client will include in the network of SNTs for their beneficiary with a disability a third-party SNT that is designed to qualify as a "designated beneficiary" of an IRA, 401(k), or other qualified plan, in compliance with the requirements of Reg. 1.401(a)(9)-4. Such an SNT must be drafted as an "accumulation trust" rather than a "conduit trust." Furthermore, for purposes of the required minimum distribution rules under Section 401(a)(9), this SNT must be drafted so that it constitutes a qualified "see-through" trust as contemplated by Regs. 1.401(a)(9)-4 and A-5(b).

The beneficiary may have a disability, but may also have a normal life expectancy necessitating SNT investments that will not be eroded by inflation.

Qualified disability trust. For clients with charitable intent, the network of SNTs can also include a third-party SNT designated as the income beneficiary of a charitable remainder trust (CRT) with a stated term not exceeding 20 years.[10] At the end of the CRT term, the remainder could pass to a charitable organization which provided meaningful support to the beneficiary's family, or which is devoted to the specific disabling condition with which the beneficiary is challenged. Designing this third-party SNT as a "qualified disability trust" (QDT) under Section 642(b)(2)(C) can ameliorate the income tax consequences of the annual CRT distribution.

If the SNT is not designed as a QDT, then distributions from the SNT for the benefit of the beneficiary will "carry out" the "distributable net income" (DNI) of the SNT that would otherwise be taxable to the SNT at the compressed tax rates applicable to an irrevocable non-grantor trust so that such income is then properly reported on the beneficiary's personal income tax returns. In 2019, an individual SNT beneficiary reaches the maximum 37% bracket at $510,300 income, while an irrevocable non-grantor trust reaches the 37% bracket at only $12,750 of income.[11]

Life insurance trust. Many clients trying to secure the future of a beneficiary with a disability will consider establishing a life insurance trust, with embedded third-party SNT provisions, that is designed to own, and be the beneficiary of, one or more significant policies insuring the life of (typically) the parents of the beneficiary with the disability. Although the beneficiary with the disability should not hold a *Crummey* right of withdrawal under a life insurance trust, as discussed above, secondary permissible beneficiaries can hold *Cristofani* rights to facilitate the gift tax-efficient funding of the premiums for any policies owned by the life insurance trust.

In light of the historically high estate tax exemption afforded by legislation commonly known as the Tax Cuts and Jobs Act of 2017,[12] fewer families are now electing an *irrevocable* life insurance trust.

"Stand-by" first-party SNT. In addition to the third-party SNTs described above, the client's network of SNTs for the beneficiary with the disability should also include at least one first-party SNT on "stand-by." Notwithstanding the best efforts of the estate planning attorney, and the other members of the client's team of allied professionals, something *always* slips through the network of third-party SNTs, resulting in the beneficiary with the disability becom-

ing legally entitled to receive property that jeopardizes his or her eligibility for means-tested benefits. Common scenarios leading to this unfavorable result include the following.

A well-intentioned third-party (1) leaves an outright bequest to the beneficiary, (2) makes an outright lifetime gift to the beneficiary, (3) dies intestate with the beneficiary sharing in the estate as an heir-at-law, or (4) designates the beneficiary as a direct payee of a non-probate asset, thus wreaking havoc on the beneficiary's eligibility for his or her means-tested government benefits. A qualified disclaimer of such interests under Section 2518 is *not effective* to preserve those benefits.[13] Similarly, if the beneficiary is legally entitled to receive court-ordered child support or alimony, direct receipt of such benefits would adversely affect his or her means-tested benefits.

The *irrevocable* assignment of the property interest to which the beneficiary is legally entitled in the above scenarios to a "stand-by" first-party SNT designed for this express purpose provides a ready solution that will preserve the beneficiary's eligibility for his or her means-tested benefits.[14] If the beneficiary is a minor or an incapacitated adult when becoming legally entitled to such assets, a court order likely will be necessary to authorize the beneficiary's conservator to make an irrevocable transfer of such assets to the first-party SNT. Any assets that remain in a conservatorship are "available" resources to the conservatee for purposes of means-tested benefits.[15]

If a beneficiary with a disability is designated as the direct beneficiary of an IRA, thus jeopardizing his or her means-tested government benefits, Ltr. Rul. 200620025 outlines a step-by-step procedure for obtaining a court order authorizing the beneficiary's conservator/guardian of the estate to fund a first-party SNT with the beneficiary's share of the inherited IRA by means of a trustee-to-trustee transfer (recognizing, of course, that such letter rulings generally cannot be relied upon or cited as precedent by taxpayers other than the one who paid dearly for the ruling in question).

Virtually every client will include in the network of SNTs for their beneficiary with a disability a third-party SNT that is designed to qualify as a "designated beneficiary" of an IRA, 401(k), or other qualified plan.

Challenge #7

Addressing existing trusts with "support" or "maintenance" distribution standards for the beneficiary with a disability that jeopardize his or her eligibility for means-tested government benefits.

Practitioners are frequently confronted with pre-existing irrevocable trusts that set forth the classic "ascertainable standards" for distributions to the trust beneficiaries (i.e., health, education, maintenance, and support). These are the distribution standards found in most bypass/credit shelter trusts and in many "dynasty" generation-skipping trusts, and threaten to disqualify a beneficiary from ongoing eligibility for means-tested government benefits. Options to address this challenge may include one or more of the following approaches.

If the trust grants the power to amend those provisions, the exercise of that power (by someone other than the beneficiary with a disability) is an unexpectedly easy solution. Similarly, the exercise of a power of appointment granted under the trust (by someone other than the beneficiary with special needs) in favor of a newly created third-party SNT can often solve the problem. A decanting encroachment by the trustee into a newly created third-party SNT is another frequently used solution.

The most laborious solution is a judicial modification of the trust which replaces the "support" and "maintenance" distribution standards for the beneficiary with a disability with third-party SNT provisions. State law varies widely regarding the logistics for a judicial modification, but it is generally necessary to prove that had the creator of the trust known that its original provisions for the beneficiary with special needs would disqualify him or her from ongoing eligibility for a significant source of funding for care (i.e., means-tested government benefits), the creator would have taken the steps needed to modify those provisions accordingly by replacing them with third-party SNT provisions.

Whichever of the above solutions is pursued, some states take the position that a trust which would have been considered an "available" or "countable" asset as originally drafted must include a Medicaid payback provision in the newly created or judicially modified trust (which, as the reader knows, is generally not required for third-party SNTs). If a Medicaid payback provision is required in the newly created or judicially modified trust, and if there are other current or remainder beneficiaries

13 See POMS SI 01150.110.E.
14 See POMS SI 01120.200.G.1.d and SI 01120.201.J.1.d.
15 See POMS SI 01140.215.B.1.
16 See POMS SI 01120.203.B.8.

of the trust whose beneficial interests would be adversely affected by the satisfaction of the Medicaid payback from the property remaining in the trust upon the death of the beneficiary with special needs, the client could consider other available sources of liquidity for satisfying the payback obligation (e.g., a life insurance policy covering the beneficiary, if his or her disability does not negatively affect insurability).

Medicaid cares only that its payback right is satisfied, not the source of the funds with which it is satisfied. This solution is particularly helpful if the major asset of the newly created or judicially modified trust is illiquid or otherwise sacred to the beneficiaries, such as the family home place or other sentimental asset which they do not wish to liquidate upon the death of the beneficiary with special needs to satisfy the Medicaid payback.

There is one last "nuclear" option for the trustee of an irrevocable trust that contains problematic distribution standards for a beneficiary who wishes to retain eligibility for means-tested government benefits: a complete encroachment of the entire trust principal and accumulated income outright to the beneficiary (or to his or her conservator) followed by an immediate funding of a first-party SNT with that property. This approach would necessarily entail subjecting the property to a Medicaid payback; however, if the trust principal is likely to be depleted entirely (or in large part) during the beneficiary's lifetime, the payback prospect is of little consequence. If the beneficiary is a minor or an incapacitated adult, it is generally necessary to obtain court approval for this approach.

Challenge #8

Appreciating the distinctions between first-party SNTs and third-party SNTs, knowing and complying with the federal and state requirements for each, and effectively deploying each type of SNT appropriately in a special needs estate plan.

First-party SNTs. The basic federal statutory requirements for a custom drafted first-party SNT are set forth in 42 U.S.C. section 1396p(d)(4)(A). (This statute does *not* apply to third-party SNTs.) The first federal statutory requirement prescribes the permissible settlors of a first-party SNT, including:

1. An adult beneficiary who retains sufficient mental capacity notwithstanding his or her disability (but only for first-party SNTs established on or after 12/13/2016).
2. A court-appointed guardian of the estate or conservator of the beneficiary, in the case of a minor or an incapacitated adult who meets the relevant threshold under state law.
3. A parent or grandparent of the beneficiary.
4. A court of competent jurisdiction.

In the case of a first-party SNT established through the actions of a court, the creation of the SNT must be *required* by a court order, not merely approved by the court.[16] Thus, the creation of the SNT cannot have been completed before the court order is issued.

Second, the SNT beneficiary must satisfy the SSA's definition of "disabled" at the time the first-party SNT is established, i.e., unable to engage in any "substantial gainful activity" (SGA) by rea-

son of any medically determinable physical or mental impairment, or combination of impairments, which can be expected to result in death, or which has lasted, or can be expected to last, for a continuous period of not less than 12 months.[17] If the beneficiary of the first-party SNT is under the age of 18, "disabled" is defined as a medically determinable physical or mental impairment, or combination of impairments, that causes "marked and severe functional limitations," and that can be expected to cause death, or that has lasted, or can be expected to last, for a continuous period of not less than 12 months.[18]

For 2019, the income threshold evidencing a person's ability to engage in SGA is $1,220/month (or $2,040/month for a person who is blind).[19] For purposes of an SGA determination, a person's gross earnings excludes unreimbursed out-of-pocket "impairment-related work expenses" (IRWEs) and the value of any work subsidies or support.

Third, a first-party SNT must be irrevocable. While the federal enabling statute does not expressly require irrevocability, both the SSA and state Medicaid programs do require irrevocability.[20]

Fourth, a first-party SNT must be for the "sole benefit" of the beneficiary. While the federal enabling statute uses only the phrase "for the benefit of" the beneficiary, the SSA and the state Medicaid programs have effectively required the stricter "sole benefit" standard to be used when evaluating first-party SNTs.[21] Defending alleged violations of the sole-benefit rule is a constant battle for the trustees of first-party SNTs.

Fifth, the federal enabling statute requires that the beneficiary of a first-party SNT be under the age of 65 when the SNT is established and funded with the beneficiary's assets.[22] If the SNT was established and funded prior to the beneficiary's 65th birthday, it continues to qualify even after he or she attains age 65.[23] While it is impermissible to add property to a first-party SNT after the beneficiary attains age 65, this does not include (1) interest, dividends, or other earnings on trust principal deposited to the SNT prior to the beneficiary's 65th birthday, or (2) annuity payments, support payments, or other periodic payments pursuant to an *irrevocable* assignment to the SNT prior to the beneficiary's 65th birthday.[24]

The final statutory requirement for a first-party SNT is the "Medicaid payback" obligation. Upon the death of the beneficiary (or other earlier termination event), medical assistance providers (i.e., Medicaid, but not SSA) must be reimbursed from any property remaining in the first-party SNT (*if* any remains) up to the total amount of medical assistance benefits paid on behalf, or for the benefit, of the beneficiary under one or more state Medicaid plans during his or her entire lifetime (i.e., not just from and after the establishment of the first-party SNT).[25]

The Medicaid payback amount is calculated based on the actual Medicaid rate for expenditures during the beneficiary's lifetime (which is significantly lower than private-pay rates for the same services) and does *not* include an "interest" component (thus amounting to an interest-free loan from the government). The trustee of a first-party SNT is well advised to review the details of the alleged Medicaid payback amount with persons who were intimately involved in the beneficiary's health care, as frequent (and significant) errors abound in Medicaid's record-keeping. If the beneficiary received Medicaid benefits from more than one state, the SNT must provide for payback to any and all state(s) that may have provided medical assistance under the state Medicaid plan(s), and cannot be limited to any particular state(s).[26] Furthermore, if the first-party SNT does not have sufficient funds upon the death of the beneficiary to reimburse in full each state that provided medical assistance, the trustee of the first-party SNT may reimburse the states on a *pro-rata* or proportional basis.[27]

In the context of a first-party SNT that is funded with proceeds derived from a personal injury claim (whether by settlement or verdict), it is also necessary to satisfy a super-priority *pre*-SNT Medicaid lien for medical assistance paid for the beneficiary prior to the establishment of the SNT for medical care necessitated by the wrongful acts that generated the recovery. Only after satisfaction of this pre-SNT lien can the first-party SNT be funded with any remaining proceeds allocable to the beneficiary. *Arkansas Dep't of Health &*

17 See 42 U.S.C. section 1382c(a)(3), 20 C.F.R. section 416.905, and POMS SI 01120.203.B.4.
18 See 20 C.F.R. section 416.906.
19 See www.socialsecurity.gov/news/press/factsheets/colafacts2019.pdf.
20 See POMS SI 01120.201.D.2 and SI 01120.200.D.2.
21 See POMS SI 01120.203.B.6, SI 01120.203.I.1, and SI 01120.201.F.
22 See also POMS SI 01120.203.B.2.
23 See POMS SI 01120.203.B.2.
24 See POMS SI 01120.203.B.3.
25 See POMS SI 01120.203.B.10.
26 *Id.*
27 *Id.*
28 547 U.S. 268 (2006).
29 See POMS SI 01120.201.A.2.
30 See POMS SI 01120.200.D.1.a, SI 01120.200.D.2, and SI 01120.201.D.1.
31 *Id.*
32 See POMS SI 01120.200.B.13, SI 01120.200.D.1.a, and SI 01120.200.D.1.b.2.
33 42 U.S.C. section 1396p(d)(4)(C), and related POMS provisions, set forth the following statutory requirements.
34 POMS SI 01120.203.D.1 and SI 01120.203.D.3.
35 POMS SI 01120.203.D.1.4 and 5.
36 POMS SI 01120.203.D.2.

Human Services v. Ahlborn[28] held that this pre-SNT lien may be satisfied only from that portion of the beneficiary's recovery that is specifically allocable to past medical expenses and costs. Despite a series of attempts by Congress to legislatively overrule the *Ahlborn* decision, the Bipartisan Budget Act of 2018 (H.R. 1892, 11th Congress, Section 53201, Subsections (b)(1) and (c)(3)), "permanently" and retroactively repealed the anti-*Ahlborn* legislation enacted as part of the Bipartisan Budget Act of 2013 (Joint Resolution, 113th Congress, H.J. Res. 59, P.L. No. 113-67).

Finally, numerous POMS provisions must also be satisfied before a first-party SNT will be considered fully compliant, including POMS SI 01120.203.B (for those established after 12/13/2016), SI 01120.203.C.4, SI 01120.203.B.8, SI 01120.203.B.10, SI 01120.201, SI 01120.200.D.1.a, SI 01120.203.A, SI 01120.203.B.1, SI 01120, 203.C.1, SI 01120.200.A.1, and SI 01120.200.B.13. POMS SI 01120.200.D.1.a. and b.2 effectively require the inclusion in the trust agreement governing a first-party SNT a spendthrift clause that is valid under state law, to preclude the beneficiary from selling his or her beneficial interest in the SNT for cash that can be used for his or her food or shelter needs (i.e., the beneficiary's "support" and "maintenance"). POMS SI 01120. 200.B.13 sets forth the SSA's understanding of a spendthrift clause. Best practice dictates the inclusion of a spendthrift clause that prohibits both voluntary and involuntary transfers of the beneficiary's interest in the first-party SNT.

Third-party SNTs. In contrast, third-party SNTs are not governed by a federal enabling statute, and are *not* subject to most of the federal statutory requirements mandated for first-party SNTs, as described above.[29] Thus, most importantly, *there is no Medicaid payback for a third-party SNT that is drafted properly from the outset.* Consequently, as a general matter, third-party funds should never be added to a first-party SNT, which could unnecessarily subject those funds to the Medicaid payback required of first-party SNTs, and first-party funds should never be added to a third-party SNT, which will lack the required Medicaid payback provisions.

Third-party SNTs are not governed by a federal enabling statute, and are not subject to most of the federal statutory requirements mandated for first-party SNTs.

Furthermore, (1) anyone can serve as the settlor of a third-party SNT; (2) the beneficiary need not meet any particular definition of "disabled;" (3) there is no age limitation on the beneficiary, or on the timing or funding of a third-party SNT; and (4) the beneficiary need not be the sole beneficiary of a third-party SNT. The POMS do require that a third-party SNT be irrevocable as to the beneficiary (i.e., the beneficiary cannot hold the right to revoke or terminate the SNT or to use the SNT assets for his or her "support" or "maintenance" under the terms of the SNT).[30] "If an individual does not have the legal authority to revoke or terminate the trust or to direct the use of the trust assets for his or her own support or maintenance, the trust principal is not the individual's resource for SSI purposes."[31] Drafters are well advised to include a valid spendthrift clause in a third-party SNT that precludes all voluntary and involuntary avenues for accessing the SNT assets for the beneficiary's support and maintenance.[32]

"Pooled" SNTs. In addition to the single-beneficiary first-party SNTs authorized by 42 U.S.C. section 1396p(d)(4)(A), described above, OBRA '93 also expressly authorized the concept of a "pooled" SNT, with a separate first-party sub-account established for the sole benefit of a beneficiary with a disability and funded with his or her assets.[33]

A first-party sub-account with a pooled SNT must be established and managed by a non-profit association (which need not be tax-exempt).[34] The pooled SNT must maintain a separate first-party sub-account for the "sole benefit" of each beneficiary, but may pool the assets of all of the separate sub-accounts for purposes of investment and management.[35] The beneficiaries must all satisfy the SSA's definition of "disabled," discussed above.[36] Each separate first-party sub-account with a pooled SNT must be established by (1) the beneficiary's court-appointed guardian of the estate or conservator; (2) the beneficiary's parent or grandparent; (3) a court of competent jurisdiction; or (4) the beneficiary him or herself, if he or she retains the requisite mental capacity notwithstanding his or her disability.[37] (As noted above, only since 12/13/2016 has it been permissible for a mentally competent beneficiary of a first-party "(d)(4)(A)" SNT to serve as the settlor.)

Finally, to the extent that a pooled SNT does not retain the amount remaining in a beneficiary's

first-party sub-account at the beneficiary's death (not all pooled SNTs provide for this), such remaining assets must be used to reimburse Medicaid (but not the SSA) up to the total medical assistance benefits paid on behalf of the beneficiary during his or her lifetime under one or more state Medicaid plans (i.e., not just after the first-party sub-account is established). If the first-party sub-account with a pooled SNT does not have sufficient funds upon the death of the beneficiary to reimburse fully each state that provided medical assistance, the trustee of the beneficiary's first-party sub-account may reimburse the states on a *pro-rata* or proportional basis.[38]

Although there is no express statutory limitation on the age of a beneficiary of a first-party sub-account with a pooled SNT (as there is with respect to a first-party SNT established under 42 U.S.C. section 1396p(d)(4)(A)), many states choose to impose a transfer penalty for the "uncompensated transfer" of the beneficiary's assets after age 65 if the beneficiary wishes to qualify for Medicaid-paid nursing home long-term care, and for certain long-term care services rendered in the community.[39] Finally, a first-party sub-account with a pooled SNT must also pass muster under POMS SI 01120.200.D.1 and SI 01120.203.D.1 to determine if it is a countable resource.

A separate third-party sub-account with a pooled SNT may also be established to hold assets derived solely from third-parties. While the beneficiary of a third-party sub-account with a pooled SNT must still meet the SSA's definition of "disabled" (which is not required for the beneficiary of a third-party SNT), (1) there is no restriction on who can establish the third-party sub-account; (2) the beneficiary's age does not limit the timing of the establishment or funding of a third-party sub-account; and (3) (most importantly) *there is no Medicaid payback required for a third-party sub-account with a pooled SNT.*

A sub-account with a pooled SNT is governed by a "Master Trust Agreement" that applies to all sub-accounts, each of which is established by completing a "Joinder Agreement," which generally does not require the involvement of an attorney (one of the most popular aspects of the pooled SNT option). If a first-party sub-account will be funded with the assets of a minor or an incapacitated adult, court approval (and the involvement of an attorney) is typically required. If there are funds remaining in a first-party sub-account (after satisfaction of any Medicaid payback) or in a third-party sub-account after the beneficiary's death, the Joinder Agreement can be customized to specify the remainder beneficiaries.

Although promoted as an effective savings mechanism for individuals with disabilities, annual contributions to an ABLE account from all sources combined are limited to the federal gift tax annual exclusion amount.

The pooled SNT is a very cost-effective option for a beneficiary who has too many assets to maintain his or her eligibility for means-tested government benefits, but not enough to warrant the expense of hiring an attorney to prepare a custom-drafted first-party or third-party SNT. Prior to 12/13/2016, a first-party sub-account with a pooled SNT was often the *only* option for a beneficiary who (1) had no living parents or grandparents, (2) had a disability but did not qualify under state law for a court-appointed guardian of the estate or conservator, (3) could not convince a court to serve as the settlor of a (d)(4)(A) SNT, and/or (4) was already age 65 or older. Practitioners should familiarize themselves with the pooled SNT options available in their communities.[40]

Challenge #9

Keeping up with new tools and techniques that will supplement, not replace, SNTs, such as the "ABLE" account.

Individuals whose disability or blindness commenced prior to their 26th birthday are eligible to have an ABLE savings account, modeled on the more traditional Section 529 Qualified State Tuition Program Account ("529 Plan"). The *S*tephen Beck, Jr. *A*chieving a *B*etter *L*ife *E*xperience Act of 2014" (ABLE Act)[41] was signed on 12/19/2014 by President Obama (as part of the Tax Increase Prevention Act of 2014). The ABLE Act adds new Section 529A, as well as numerous amendments to related IRC provisions (e.g., Sections 2501, 2503, 2511, 2642, and 2652). In March 2018, the SSA issued the revised current version of POMS SI 01130.740 governing ABLE accounts.[42]

Although promoted as an effective savings mechanism for individuals with disabilities, annual contributions to an ABLE account from all sources combined are limited to the federal gift tax annual exclusion amount under Section 2503(b), which in 2019 is $15,000. An individual who has earned income from a job may contribute an additional amount to his or her

ABLE account from compensation up to the federal poverty level (which is $12,060 in 2019). The total cumulative value of an ABLE account is capped at the state's limitation for Section 529 Plans (currently ranging from $235,000 to $445,000 across all 50 states). Contributions to an ABLE account are not considered as income to the individual, and distributions from an ABLE account for the individual's "qualified disability expenses" (QDEs) are similarly not includable in his or her income. The individual's QDEs are those incurred while the individual meets the SSA's blindness or disability thresholds and which are "related to" his or her blindness or disability and are for the benefit of the individual to maintain or improve his or her health, independence, or quality of life.

Section 529A(f) allows the states to file a Medicaid payback claim against an individual's ABLE account balance remaining at his or her death up to an amount equal to the total medical assistance paid for the individual from and after the date the ABLE account was established.[43] This Medicaid payback claim, if filed by a state, extends even to third-party funds contributed to the ABLE account.

Each contribution to an ABLE account by a third party is treated as a nontaxable completed present interest gift to the individual for gift tax purposes, and not as a future interest.[44] If a donor's gifts to the individual (including the contribution to his or her ABLE account) do not exceed the federal gift tax annual exclusion amount under Section 2503(b), the contribution is not subject to gift tax and has a zero inclusion ratio for purposes of the generation-skipping transfer tax.[45]

The benefits of an ABLE account over a first-party SNT are limited, but include the following:

1. No attorney, accountant or other paid allied professional need be involved in opening an ABLE account, which is accomplished entirely on-line.
2. There is tax-deferred growth on ABLE account balances, and tax-free distributions from the account if used for the QDEs of the individual.
3. An ABLE account affords some financial autonomy and a fiscal education opportunity for individuals who would otherwise be precluded by the SSI and Medicaid rules from controlling more than $2,000.
4. There is no upper age limitation on contributions of first-party funds to an ABLE account.
5. There is no formal approval from SSA or Medicaid required for an ABLE account.
6. Payments from an ABLE account for the individual's food or housing expenses do not reduce his or her SSI payment amount (as would be the case if an SNT—first-party or third-party—paid the same expenses).
7. The Medicaid payback claim is limited to medical assistance paid for the individual *after* the ABLE account is established.

An ABLE account is decidedly inferior to a third-party SNT for the following reasons:

1. All third-party funds contributed to an ABLE account are potentially subject to a Medicaid payback claim.
2. Annual contributions to an ABLE account are limited to the Section 2503(b) gift tax annual exclusion amount.
3. Once the value of an ABLE account exceeds $100,000, the individual's monthly SSI payments are suspended.
4. The individual must satisfy the government's definitions of blind or disabled.
5. The onset of the individual's blindness or disability must have occurred prior to age 26.
6. The only persons who can establish an ABLE account are the individual, or his or her parent, legal guardian, or attorney-in-fact.
7. An individual may have only one ABLE account.
8. All funds deposited to an ABLE account must be cash or its equivalent.

None of the foregoing restrictions or limitations apply to a third-party SNT. Clients who are not working with a knowledgeable team of allied professionals may erroneously believe that an ABLE account is all they need, and may not realize that it is not a substitute for the network of SNTs described in the section on Challenge #6.

Challenge #10

Persevering in a very challenging area. Do not give up!

Advising clients who have beneficiaries with disabilities is fraught with challenges, but the personal and professional rewards for overcoming those challenges with successful special needs planning are unparalleled. ■

37 POMS SI 01120.203.D.1 and SI 01120.203.D.6.
38 POMS SI 01120.203.D.8.
39 POMS SI 01120.203.D.1 and SI 01150.121.
40 The Academy of Special Needs Planners maintains a database of pooled SNTs in each state, as well as several "national" pooled SNTs. See https://specialneedsanswers.com/ pooled-trust.
41 P.L. 113-295.
42 For a current list of states that offer ABLE programs, visit www.ablenrc.org/state-review.
43 See also Prop. Reg. 1.529A-2(p), and POMS SI 01130.740.A.
44 See Section 529A(c)(2)(A)(i), Prop. Reg. 1.529A-4(a)(1), Reg. 25.2503-3(a), and POMS SI 01130.740.C.1.b.
45 Prop. Regs. 1.529A-4(a)(1) and (2).

Social Security

Program Operations Manual System (POMS)

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SI 01120.200 Information on Trusts, Including Trusts Established Prior to January 01, 2000, Trusts Established with the Assets of Third Parties, and Trusts Not Subject to Section 1613(e) of the Social Security Act

A. Introduction To Trusts

A trust is a legal arrangement involving property and ownership interests. Property held in trust may or may not be considered a resource for SSI purposes. The general rules concerning resources apply when evaluating the resource status of property held in trust.

1. Applicability of policy instructions

Generally, these instructions apply to trusts not subject to the trust provisions in Section 1613(e) of the Social Security Act, which we evaluate using instructions in SI 01120.201 through SI 01120.204. However, trusts that meet the requirements of SI 01120.203 must also meet the requirements of this section. Use these instructions to evaluate the following types of trusts:

a. Trusts established prior to January 01, 2000 that contain assets of the individual

This includes trusts established before January 01, 2000 that contain assets of the individual, any of which were transferred before January 01, 2000.

If the trust was established prior to January 01, 2000, but no assets of the individual were transferred to the trust prior to January 01, 2000, see SI 01120.201.

b. Trusts that contain assets of third parties

This includes trusts that are:

- established before January 01, 2000 that contain assets of third parties;
- established on or after January 01, 2000 that contain only assets of third parties, or the portion of a commingled trust attributable to assets of third parties; and

- Indian Gaming Regulatory Act (IGRA) trusts established by the Indian tribes that meet the criteria in SI 01120.195F.

NOTE: Trusts established on or after January 01, 2000 that contain assets of a Supplemental Security Income (SSI) applicant, recipient, or spouse (or the portion of a commingled trust attributable to assets of an SSI applicant, recipient, or spouse) must be evaluated under SI 01120.201 through SI 01120.204.

c. Other trusts not subject to Section 1613(e) of the Social Security Act

Trusts established on or after January 01, 2000 to which the instructions in SI 01120.201 through SI 01120.204 do not apply. When it is determined that a special needs trust or a pooled trust exception is met, the trust must still be evaluated under the rules of SI 01120.200.

NOTE: The instructions in those sections generally will refer you back to this section, where applicable.

2. Case processing alert

Trusts are often complex legal arrangements involving State law, Tribal law, and legal principles whose evaluation may require input from agency counsel. Therefore, these instructions may only be sufficient for you to recognize that an issue is present that needs referral to your regional office (RO) for possible referral to the Regional Chief Counsel (RCC). When in doubt, submit your question or issue via vHelp.

B. Glossary Of Terms

This glossary is intended for general reference and does not override or replace applicable State law with respect to matters such as establishment, operation, and termination.

1. Discretionary trust

A **discretionary trust** is a trust in which the trustee has full discretion as to the time, purpose, and amount of all distributions. The trustee may pay all or none of the trust as he or she considers appropriate to, or for the benefit of, the trust beneficiary. The trust beneficiary has no control over the trust.

2. Fiduciary duty

A **fiduciary duty** is the obligation of the trustee in dealing with the trust property and income. The trustee holds the property, with due care, solely for the benefit of the trust beneficiary. The trustee owes duties of good faith and loyalty to exercise reasonable care and skill, to preserve the trust property and make it productive, and to account for it. A trustee is a fiduciary but generally is not an agent of the trust beneficiary.

3. Grantor (settlor or trustor)

A **grantor (sometimes** also called a **settlor** or **trustor**) is the person who provides property to the trust principal (or corpus). The grantor must be the owner of, or have legal right to the property, or be otherwise qualified to transfer the property into the trust. A person may be a grantor even if an agent or another person, legally empowered to act on the first person's behalf (a legal guardian, representative payee for Title II or XVI benefits, person acting under a power of attorney, or conservator), establishes the trust with funds or property that belong to the first person. The person funding the trust is the grantor, even in situations where the trust agreement refers to a person legally empowered to act on the first person's behalf as the grantor. Where more than one person provides property to the trust, there may be multiple grantors. The terms grantor, trustor, and settlor are sometimes interchangeable.

4. Grantor trust (first-party or self-funded trust)

A **grantor trust** (also called a **first-party trust** or **self-funded trust**)is a trust in which the grantor of the trust is also the sole beneficiary of the trust. For information on who may be a grantor, see SI 01120.200B.3. in this section. State law on grantor trusts varies. Consult with your regional office, if necessary.

5. Indian Gaming Regulatory Act (IGRA) trust

An **IGRA trust** is a trust that an Indian tribe establishes under IGRA, regulations promulgated by the BIA, and the tribe's BIA-approved revenue allocation plan. The tribe establishes the trust to receive and invest per capita payments for its members, some of whom are minors or legally incompetent adults, pending distribution of the trust assets to those members after they attain the age of majority or cease to be legally incompetent.

6. Inter vivos trust (living trust)

An **inter vivos trust** (also called a **living trust**) is a trust established during the lifetime of the grantor.

7. Mandatory trust

A **mandatory trust** is a trust that requires the trustee to pay trust earnings or principal to or for the benefit of the trust beneficiary at certain times. The trust may require disbursement of a specified percentage or dollar amount of the trust earnings, or it may obligate the trustee to spend income and principal, as necessary, to provide a specified standard of care. The trustee has no discretion as to the amount of the payment or party receiving distribution.

8. Medicaid trust or Medicaid qualifying trust

For definitions of a **Medicaid trust** or **Medicaid qualifying trust**, see SI 01730.048. For additional guidance on these trusts, see SI 01120.200H. For SSI treatment of Medicaid trust exceptions, see SI 01120.203.

9. Pooled trust

A **pooled trust** is a trust that is established and managed by an organization and that contains and pools the assets of multiple individuals in separate accounts for investment and management purposes. This section contains information on reviewing third party pooled trusts. For information on pooled trusts in which the individual account is funded with the beneficiary's own assets, see SI 01120.203.

10. Residual beneficiary (contingent beneficiary or remainderman)

A **residual beneficiary** (also called a **contingent beneficiary** or **remainderman**) is not a current beneficiary of a trust, but he or she will receive the residual benefit of the trust contingent upon the occurrence of a specific event, such as the death of the primary beneficiary.

11. Revoke

The grantor of a trust may have the power or authority to **revoke** (reclaim or take back) the assets deposited in the trust. If the individual at issue (an applicant, recipient, or deemor) is the grantor of the trust, the trust is usually a resource to that individual if he or she can revoke the trust and reclaim the trust assets. For the definition of a deemor, see SI 01310.127.

However, if a third party is the grantor of the trust, and the individual at issue (an applicant, recipient, or deemor) is the beneficiary of the trust, the trust is not a resource to the beneficiary merely because the trust is revocable by the grantor. In a third party trust situation, the focus should be on whether the individual at issue (applicant, recipient, or deemor) can terminate the trust and obtain the assets for himself or herself.

12. Special or supplemental needs trust

A **special needs trust**, also known as a **supplemental needs trust**, may be set up to provide for a disabled individual's extra and supplemental needs other than food, shelter, and health care expenses that may be covered by public assistance benefits that the trust beneficiary may be eligible to receive under various programs. For more information on special needs trusts containing the assets of the individual, see SI 01120.203.

13. Spendthrift clause or spendthrift trust

A **spendthrift clause** or **spendthrift trust** generally prohibits both involuntary and voluntary transfers of the trust beneficiary's interest in the trust income or principal. This means that the trust beneficiary's creditors must wait until the trust pays out money to the trust beneficiary before they can attempt to claim it to satisfy debts.

It also means that, for example, if the trust beneficiary is entitled to $100 a month from the trust, the beneficiary cannot sell his or her right to receive the monthly payments to a third party for a lump sum. In other words, a valid spendthrift clause would make the value of the trust beneficiary's right to receive payments not countable as a resource.

However, not all States recognize spendthrift trusts, and States that do recognize spendthrift trusts often do not allow a grantor to establish a spendthrift trust for the grantor's own benefit. In those States that do not recognize spendthrift trusts (whether at all or because the trust is a grantor trust), we would count the value of the trust beneficiary's right to receive monthly payments as a resource because it may be sold for a lump sum.

We do not require trusts to include a spendthrift clause. If the trust provides for mandatory periodic payments to the beneficiary, then the trust may need a spendthrift clause for the trust not to count as a resource.

14. Terminate

In some instances, a trustee or beneficiary of a third party trust can **terminate** (or end) a trust and obtain the assets for himself or herself. For more information on Termination as it relates to self-settled trusts, see SI 01120.201B.6.

15. Testamentary trust

A **testamentary trust** is a trust that is established under the terms of a will and that is effective only upon the death of the individual who created the will (the testator). Sometimes third party inter vivos trusts (trusts created during the lifetime of the grantor) serve as wills. A trust into which property is transferred under the terms of a will, and during the life (inter vivos) of the testator, is not a testamentary trust for the purposes of this section because it is not effective only upon the testator's death, even if the will

transfers additional property into the trust upon the testator's death. When evaluating testamentary trusts, field offices should obtain and review a copy of the last will and testament.

16. Third-party trust

A **third-party trust** is a trust established with the assets of someone other than the trust beneficiary (or his or her spouse). For example, a grandparent can establish a third party trust using his or her assets, with a grandchild as the trust beneficiary. Be alert for situations where a trust is allegedly established with the assets of a third party but in reality is created with the trust beneficiary's property. In such cases, the trust is a grantor trust, not a third party trust.

17. Totten trust (bank account trust)

A **Totten trust** (also called a **bank account trust**) is a tentative trust in which a grantor makes himself or herself trustee of his or her own funds for the benefit of another. Typically, the grantor deposits funds in a savings account and indicates, either by the account titling or by filing a writing with the bank, that the grantor is trustee of the account for another person. The trustee can revoke a Totten trust at any time. Should the trustee die without revoking the trust, ownership of the principal passes to the trust beneficiary. Totten trusts are valid in most jurisdictions, but other jurisdictions have held them invalid because they are too tentative. In particular, they generally lack formal requirements and do not state a trust intent or purpose.

18. Trust

A **trust** is a property interest held by an individual or entity (such as a bank), called the trustee, who or which is subject to a fiduciary duty to use the property for the benefit of another (the beneficiary).

19. Trust beneficiary

A **trust beneficiary** is a person for whose benefit a trust exists. A trust beneficiary does not hold legal title to trust property but has an equitable ownership interest in it. As an equitable owner, the trust beneficiary has certain rights that a court can enforce, because the trust exists for his or her benefit. The beneficiary receives the benefits of the trust, while the trustee holds the title and duties. A beneficiary has certain rights relative to the trust, such as to enforce mandatory provisions of the trust, to demand an accounting, and to sue to remove the trustee. The trustee owes certain duties, such as loyalty and attention, to the beneficiary.

20. Trust earnings (income)

Trust earnings (also called **trust income**) are amounts earned by the trust principal. They may take such forms as interest, dividends, royalties, and rents. These amounts are unearned income to any person legally able to use them for personal support and maintenance. If the trust beneficiary has no right to receive or demand the earnings, trust income is not countable to him or her.

21. Trust principal (corpus)

The **trust principal** (also called the **corpus** of the trust) is the property placed in the trust, which the trustee holds subject to the rights of the beneficiary. It includes any earnings on the trust.

22. Trustee

A **trustee** is a person or entity that holds legal title to property in trust for the use or benefit of another. In most instances, the trustee has no legal right to revoke the trust or use the property for the trustee's own benefit. The trustee owes a fiduciary duty to the beneficiary.

C. Policy For Accounts That May Or May Not Be Trusts

1. Accounts that are not trusts

Although titled as trusts, some types of accounts and "trust-like" instruments are not trusts, and generally we should not evaluate them under these instructions for SSI purposes.

a. Conservatorship accounts

A conservatorship account generally is established by a court and administered by a court-appointed conservator for the benefit of an individual. A conservatorship account differs from a trust in that the "beneficiary" of the conservatorship account retains legal ownership of all of the account assets, although in some cases the assets may not be available for support and maintenance. For instructions pertaining to conservatorship accounts, see SI 01140.215.

b. Patient trust accounts

Many nursing homes, institutions, and government social services agencies maintain so-called "patient trust accounts" for individuals to provide them with toiletries, candy, and sundries. Although titled as trust accounts, they are not. For example, the individual might legally own the money in the account, while a social services agency holds the

money for the individual and disburses it as necessary for the individual's benefit. For more information on transactions involving agents, see:

- GN 00603.020 Collective Savings and Checking Accounts
- SI 00810.120 Income Determinations Involving Agents
- SI 01120.020 Transactions Involving Agents

c. Achieving a Better Life Experience (ABLE) accounts

An ABLE account is a type of tax-advantaged account that an eligible individual can use to save funds for his or her disability-related expenses. The eligible individual, who is also the designated beneficiary of the ABLE account, must be blind or disabled by a condition that began before the individual's 26th birthday. A State (or a State agency or an instrumentality of a State) can establish an ABLE program. An eligible individual can open an ABLE account through the ABLE program in any State, if the State permits it. ABLE accounts are not trusts, and you should not evaluate them under trust instructions. For more information on ABLE accounts, see SI 01130.740.

2. "In trust for" financial accounts

These accounts may or may not be trusts depending on the circumstances in the individual case. Representative payee accounts and Totten accounts are the most common examples.

a. Representative payee accounts

One of the most common types of "in trust for" accounts is the representative payee account. A representative payee account is not a trust. However, its title may misleadingly suggest that the representative payee is the legal owner of the account principal. If a representative payee deposits current or conserved benefits in an account, the titling of the account should reflect the beneficiary's ownership interest in the account. For instructions pertaining to transactions or determinations involving agents, see SI 01120.020 and SI 00810.120. For instructions pertaining to the titling of accounts established by representative payees, see GN 00603.010.

b. Totten trusts

A **Totten trust** is a revocable trust created by the depositing of money, usually in a savings account at a bank, in the depositor's name as trustee for another. (It may have the phrase "in trust for" in the title.) The typical Totten trust is a kind of "pay on death"

account. That is, the depositor names a beneficiary who inherits the funds in the account upon the depositor's death.

D. Policy For Trusts As Resources

1. Trusts that are resources

a. When trusts are resources

Trust principal is a resource for SSI purposes if a trust beneficiary (applicant, recipient, or deemor) has legal authority to revoke or terminate the trust and then use the funds to meet his or her food or shelter needs. The trust principal is also a resource for SSI purposes if the trust beneficiary can direct the use of the trust principal for his or her support and maintenance under the terms of the trust. For the definition of revoke, see SI 01120.200B.11. in this section.

Additionally, if the trust beneficiary can sell his or her beneficial interest in the trust, that interest is a resource. For example, if the trust provides for payment of $100 per month to the trust beneficiary for spending money, and the trust does not have a valid spendthrift clause, then the trust beneficiary may be able to sell the right to future payments for a lump-sum settlement. The present value of the future payments counts as a resource. For more information on spendthrift clauses, see SI 01120.200B.13. in this section.

b. Authority to revoke or terminate trust or use assets

1. **Grantor**

In some cases, the grantor has the authority to revoke a trust. Even if the grantor does not specifically retain the power to revoke a trust, a trust may be revocable in certain situations. For information on grantor trusts, see SI 01120.200B.4. and SI 01120.200D.3. in this section.

Additionally, State law may contain presumptions as to the revocability of trusts. If the trust principal reverts to the grantor upon revocation and he or she can use it for support and maintenance, then the principal **is** a resource to the grantor.

2. **Trust beneficiary**

   A trust beneficiary generally does not have the power to terminate a trust. However, in some instances, the trust beneficiary may have the authority to terminate the trust and gain access to the trust assets or direct the use of the trust principal. Specific trust provisions may allow the trust beneficiary to act on his or her own or to order actions by the trustee. The trust beneficiary's ability to direct the use the trust principal for support and maintenance, together with his or her equitable ownership in the trust principal, makes the trust principal a resource to the trust beneficiary.

   The trust beneficiary's right to mandatory periodic payments may be a resource equal to the present value of the anticipated payments, unless a valid spendthrift clause or other provision prohibits transfer or sale of the beneficiary's interest in such anticipated payments. For more information on spendthrift clauses, see SI 01120.200B.13. in this section.

   While a trustee may have discretion to use the trust principal for the benefit of the trust beneficiary, the trustee is a third party and not an agent of the trust beneficiary. The actions of the trustee generally are not considered to be the actions of the trust beneficiary, unless the trust specifically states otherwise.

3. **Trustee**

   Occasionally, a trustee may have the legal authority to terminate a trust. However, the trust generally is not a resource to the trustee unless he or she becomes the owner of the trust principal upon termination. The trustee is a third party. Although the trustee has access to the trust principal for the benefit of the trust beneficiary, this does not mean that the trust principal is the trustee's resource. If the trustee has the legal authority to withdraw the trust principal and use it for his or her own support and maintenance, the amount of the trust principal that he or she can withdraw and use is the trustee's resource for SSI purposes.

   NOTE: We are not responsible for developing or reporting claims or allegations of trustee misuse of trust funds. We will get involved only if the individual or entity allegedly misusing the funds is also the representative payee. For misuse of SSI funds, see GN 00604.001.

4. **Totten trust**

   The grantor of a Totten trust has the authority to revoke the financial account trust at any time. Therefore, the funds in the account are his or her resource

2. Trusts that are not resources

If an individual does not have the legal authority to revoke or terminate the trust or to direct the use of the trust assets for his or her own support and maintenance, the trust principal **is not** the individual's resource for SSI purposes.

The revocability of a trust and the ability to direct the use of the trust principal depend on the terms of the trust agreement and on State (or Tribal) law. If a trust is irrevocable by its terms and under State law, and the trust beneficiary cannot control or direct use of the trust assets for the trust beneficiary's support and maintenance, the trust **is not** a resource.

3. Revocability of grantor trusts

Some States follow the general principle of trust law that if a grantor is also the sole beneficiary of a trust, the trust is **revocable** regardless of language in the trust to the contrary.

However, many of these States recognize that the grantor cannot unilaterally revoke the trust if the trust document names a "residual beneficiary" who would receive the trust principal upon the grantor's death or the occurrence of some other specific event.

When a grantor names heirs, next of kin, or similar individuals to receive the assets remaining in the trust upon the grantor's death, assume that they are residual beneficiaries, absent regional instructions to the contrary. In such a case, the trust generally is irrevocable, subject to the NOTE.

When a trust is established for a beneficiary who is a minor, or if a court has ordered the establishment of a trust for an incompetent beneficiary, assume absent regional instructions and subject to the NOTE, that it is acceptable for "the estate of the beneficiary" to be named as the residual beneficiary without causing the trust to be considered revocable.

A trust may state that it is a "Grantor Trust" for tax purposes. Such a designation does not necessarily mean that it is a countable resource for SSI purposes. You must still develop the trust under these instructions to determine resource status for SSI eligibility purposes.

NOTE: The policies regarding grantor trusts may or may not apply in your particular State. Field offices should consult regional Program Operations Manual System (POMS) instructions or your regional office program staff if in doubt.

E. Policy For Disbursements From Trusts

1. Trust principal is not a resource

If the trust principal is not a resource, disbursements from the trust may be income to the SSI applicant or recipient, depending on the nature of the disbursements. Regular rules to determine when income is available apply. For general income rules, see SI 00810.005.

a. Disbursements that are income

Cash paid directly from the trust to the individual is unearned income.

Disbursements from the trust to third parties that result in the trust beneficiary's receiving non-cash items (other than food or shelter) are in-kind income if the items would not be partially or totally excluded non-liquid resources if retained into the month after the month of receipt.

For example, if a trust buys a car for the trust beneficiary and the trust beneficiary's spouse already has an excluded car for SSI purposes, the disbursement to purchase the second car is income in the month of receipt since it would not be an excluded resource in the following month.

For receipt of certain noncash items, see SI 00815.550. For a list of resource exclusions, see SI 01110.210.

b. Disbursements that result in receipt of in-kind support and maintenance

Food or shelter received by the trust beneficiary as a result of disbursements from the trust to a third party is income in the form of in-kind support and maintenance (ISM) and is valued under the presumed maximum value (PMV) rule. For instructions pertaining to the PMV rule, see SI 00835.300. For rules pertaining to a home, see SI 01120.200F. in this section.

c. Disbursements that are not income

Generally, disbursements from the trust to a third party are not income to the trust beneficiary, unless otherwise stated in SI 01120.200E.1.a. and SI 01120.200E.1.b. in this section. Disbursements that do not count as income may include those made for educational expenses, therapy, transportation, professional fees, medical services not

covered by Medicaid, phone bills, recreation, and entertainment. This list is illustrative and does not limit the types of distributions that a trust may permit. For bills paid by a third party, see SI 00815.400.

Disbursements made from the trust to a third party that result in the trust beneficiary's receiving non-cash items (other than food or shelter) are not income if those items would become a totally or partially excluded non-liquid resource if retained into the month after the month of receipt. For example, if a trust purchases a computer for the trust beneficiary, the computer is not income, since we would exclude the computer from resources as a household good in the following month. For resource treatment of household goods, personal effects, and other personal property, see SI 01130.430. For receipt of certain non-cash items, see SI 00815.550. For a list of resource exclusions, see SI 01110.210.

d. Reimbursements to a third party

Reimbursements made from the trust to a third party for funds expended on behalf of the trust beneficiary are not income.

Regular income and resource rules apply to items that a trust beneficiary receives from a third party. If a trust beneficiary receives a non-cash item (other than food or shelter), it is in-kind income if the item would not be a partially or totally excluded non-liquid resource if retained into the month after the month of receipt. If a trust beneficiary receives food or shelter, it is income in the form of ISM.

2. Trust principal is a resource

a. Disbursements to or for the benefit of the trust beneficiary

If the trust principal is a resource to the individual, disbursements from the trust principal received by the individual or that result in receipt of something by the individual are not income but conversion of a resource. However, trust earnings may be income. For instructions pertaining to the conversion of resources from one form to another, see SI 01110.100. For treatment of income when the trust principal is a resource, see SI 01120.200G.2. in this section. For treatment of dividends and interest as income, see SI 00830.500.

b. Disbursements not to or for the benefit of the trust beneficiary

If the trust is established with the assets of an individual or his or her spouse and the trust (or portion of the trust) is a resource to the individual:

- any disbursement from the trust (or from the portion of the trust that is a resource) that is not made to, or for the benefit of, the individual is considered a transfer of resources as of the date of the payment and is not considered income to the individual (see SI 01150.110); and

- any foreclosure of payment (an instance in which no disbursement can be made to the individual under any circumstances) is considered to be a transfer of resources as of the date of the foreclosure. Such foreclosure is not considered income to the individual.

F. Policy For Home Ownership And Purchase Of A Home By A Trust

1. Home as a resource

If the trust is a resource to the individual, the property at issue is subject to exclusion as a home under SI 01130.100. Even though the trust holds legal title to the property, the individual, as trust beneficiary, still has an (equitable) ownership interest in it. Therefore, the property's possibly being excluded as a home under SI 01130.100 likely will depend on whether the property serves as the individual's principal place of residence.

If the trust is not a resource to the individual, then the property also is not a resource to the individual, regardless of whether the property serves as the individual's principal place of residence (that is, regardless of possible exclusion as a home under SI 01130.100), because the property is part of the trust principal that is not a resource to the individual.

2. Rent-free shelter

An eligible individual does not receive ISM in the form of rent-free shelter while living in a home in which he or she has an ownership interest. Accordingly, an individual with an "equitable ownership interest in the trust principal" does not receive rent-free shelter (see SI 01120.200F.1. in this section).

3. Receipt of income from a home purchase

Because the purchase of a home by a trust for the trust beneficiary establishes an equitable ownership interest for the trust beneficiary, the purchase results in the receipt of ISM, in the form of shelter, in the month of purchase. This ISM is valued at no more than the presumed maximum value (PMV). For ISM to one person, see SI 00835.400.

Even if the trust beneficiary has an ownership interest in the home that he or she resides in, and is not receiving ISM in the form of rent-free shelter (because shelter is rent-free when

no household member has any ownership interest in, or rental liability for, the residence, see SI 00835.370B.1.). The purchase of the home or payment of the monthly mortgage by the trust is a disbursement from the trust to a third party that results in the receipt of ISM in the form of shelter (see SI 01120.200E.1.b. in this section).

a. Outright purchase of a home

If the trust, whose principal is not a resource, purchases the home outright and the trust beneficiary lives in the home in the month of purchase, the home is income in the form of ISM, and reduces the trust beneficiary's payment no more than the PMV **in the month of purchase only,** regardless of the value of the home (see SI 01120.200E.1.b. in this section).

b. Purchase by mortgage or similar agreement

If the trust, whose principal is not a resource, purchases the home with a mortgage and the trust beneficiary lives in the home in the month of purchase, the home would be ISM in the month of purchase. Each of the subsequent monthly mortgage payments results in the receipt of income in the form of ISM to the trust beneficiary living in the house, each valued at no more than the PMV (see SI 01120.200E.1.b. in this section).

c. Additional household expenses

If the trust pays for other shelter or household operating expenses, these payments are income in the form of ISM in the month of the trust beneficiary's use. For computations of ISM from outside the household, see SI 00835.350. For countable shelter expenses, see SI 00835.465D.

If the trust pays for repairs, maintenance, improvements, or renovations to the home, such as renovations to the bathroom to make it handicapped accessible, installation of a wheelchair ramp or assistive devices, or replacement of a roof, the trust beneficiary does not receive income. Disbursements from the trust for improvements increase the value of the resource and, unlike household operating expenses, do not provide ISM. For computations of ISM from outside the household, see SI 01120.200E.1.c. in this section.

G. Policy For Earnings And Additions To Trusts

1. Trust principal is not a resource

a. Trust earnings

Trust earnings are not income to the trustee or grantor **unless** designated as belonging to the trustee or grantor under the terms of the trust; for example, as fees payable to the trustee or interest payable to the grantor.

Trust earnings are not income to the SSI applicant or recipient who is a trust beneficiary **unless** the trust directs, or the trustee makes, payments from the trust to the trust beneficiary.

b. Additions to principal

Additions to trust principal made directly to the trust are not income to the grantor, trustee, or trust beneficiary. For exceptions to this rule, see SI 01120.200G.1.c. and SI 01120.200G.1.d. in this section.

c. Payments not assignable by law

Certain payments are non-assignable by law; therefore, are income to the individual entitled or eligible to receive the payments under regular SSI income rules, unless an exclusion applies. Although a trust may be structured such that it appears that non-assignable payments are made directly into the trust, non-assignable payments may not be made directly into a trust, to avoid income counting or for any other reason.

Important examples of non-assignable payments include:

- Temporary Assistance to Needy Families (TANF)/Aid to Families with Dependent Children (AFDC);
- Railroad Retirement Board-administered pensions;
- Veterans' pensions and assistance;
- Federal employee retirement payments (CSRS, FERS) administered by the Office of Personnel Management;
- Social Security Title II and SSI payments; and
- Private pensions under the Employee Retirement Income Security Act (ERISA) 29 U.S.C.A., Section 1056(d)).

NOTE: SSI payments do not count as unearned income. Therefore, SSI payments deposited into an SSI recipient's trust do not count as unearned income to the recipient. For more information on direct deposit to trusts, see SI 01120.201J.1.f. in this section.

d. Assignment of income

A legally assignable payment that is assigned to a trust or trustee is income for SSI purposes, to the individual entitled or eligible to receive the payment, **unless** the assignment is irrevocable. We consider assignment of payment by court orders to be irrevocable. For example, child support or alimony payments paid directly to a trust or trustee because of a court order are considered irrevocably assigned and thus not income. Also, U.S. Military Survivor Benefit Plan (SBP) payments assigned to a special needs trust are not income because the assignment of an SPB annuity is irrevocable. For more information on SPB annuities, see SI 01120.201J.1.e.

If the assignment is revocable, the payment is income to the individual legally entitled or eligible to receive it, unless an SSI income exclusion applies. For **non-assignable payments**, see SI 01120.200G.1.c. in this section.

2. Trust principal is a resource

a. Trust earnings

Trust earnings are income to the individual for whom the trust principal is a resource, unless the terms of the trust make the earnings the property of another. For when to count income, see SI 00810.030.

b. Additions to principal

Additions to principal may be income or conversion of a resource, depending on the source of the funds. If a third party deposits funds into the trust, the funds are income to the trust beneficiary. If the trust beneficiary transfers funds into the trust from an account that he or she owns, the funds are not income but a converted resource.

H. Policy For Medicaid Trusts And Medicaid Qualifying Trusts

1. Medicaid Trusts

a. General

Medicaid trusts are trusts that are established by an individual (by a means other than a will) on or after August 11, 1993 and that are made up, in whole or in part, of assets of

that individual. We consider a trust as established by an individual if it was established by:

- the individual;
- the individual's spouse; or
- a person (or a court or administrative body) with legal authority to act for the individual or spouse or who acts at the direction or request of the individual or spouse.

Medicaid trusts may contain terms such as "OBRA 1993 pay-back trust" or "trust established in accordance with 42 USC 1396" or may be mislabeled as an "MQT." Medicaid trusts must be evaluated under SI 01120.201 to determine whether they are a resource for SSI purposes.

For additional information and procedures for coding and referring these trusts to the State Medicaid agencies, see SI 01730.048.

b. State reimbursement provisions

Medicaid trusts generally have a payback provision stating that upon termination of the trust, or the death of the beneficiary, the trust will reimburse the State Medicaid agency for medical assistance paid on behalf of the individual. According to the law in most States, the State is not the residual or contingent beneficiary but is a creditor, and we consider the reimbursement to be payment of a debt, unless the trust instrument reflects a clear intent that the State is a beneficiary rather than a creditor. This law may or may not apply in your State, so consult your regional instructions or regional office.

2. Medicaid Qualifying Trusts (MQT)

An MQT is a trust or similar legal device established prior to October 1, 1993, other than by a will, under which the grantor (or spouse of the grantor) may be the beneficiary of all or part of the trust. The amount in the MQT considered available as a resource to the individual for Medicaid purposes, is the maximum amount that may be distributed under the terms of the trust to the individual by the trustee. This **Medicaid-only** provision has no effect on the income and resource determination for SSI purposes. MQTs must be evaluated under SI 01120.200 to determine whether they are a resource for SSI purposes.

NOTE: The last date to establish an MQT was September 30, 1993. Congress repealed section 1902(k) of the Social Security Act on

October 01, 1993.

I. Policy For Representative Payees And Trusts

If a representative payee funds a trust with an underpayment or conserved funds, see GN 00602.075 for additional rules that may apply. Additionally, representative payees may not deposit dedicated account funds in a trust.

J. Procedure For Development And Documentation Of Trusts

1. Written trust

a. Review the trust document

Obtain a copy of the trust document (the original trust document is not required) and related documents and review the document to determine whether the:

- individual (applicant, recipient, or deemor) is the grantor, trustee, or trust beneficiary;
- trust was established on or after January 01, 2000;
- trust was funded with assets of the individual or third parties or both;
- trust is revocable or can be terminated and, if so, whether the individual has authority to revoke or terminate the trust and to use the principal for his or her own support and maintenance;
- individual has access to the trust principal;
- trust provides for or permits payments for the benefit of the individual, to the individual or on the individual's behalf;
- trust principal generates income (earnings) and, if so, whether the individual has the right to any of that income;

- trust provides for mandatory periodic payments and, if so, whether the trust contains a spendthrift clause that is valid under State law and prohibits the voluntary and involuntary alienation of any interest of the trust beneficiary in the trust payments; and

- trust is receiving payments from another source.

b. Which instructions apply when determining the resource status and income treatment of a trust

Depending on the trust's date of establishment and whose funds the trust principal contains, follow these instructions to determine the resource status and income treatment of the trust:

If the trust was established…	**and contains…**	**follow instructions in:**
on or after January 01, 2000,	any assets of the individual,	SI 01120.199, SI 01120.201 through SI 01120.204, SI 01120.225 and SI 01120.227
	only assets of third parties,	SI 01120.200
before January 01, 2000,	assets of the individual transferred before January 01, 2000,	SI 01120.200

If the trust was established…	and contains…	follow instructions in:
	any assets of the individual transferred on or after January 01, 2000,	SI 01120.199, SI 01120.201 through SI 01120.204, SI 01120.225, and SI 01120.227
	only assets of third parties,	SI 01120.200

NOTE: If the trust beneficiary adds his or her own assets to an existing third-party trust, on or after January 01, 2000, redevelop the trust under the instructions in SI 01120.199, SI 01120.201 through SI 01120.204, SI 01120.225, and SI 01120.227. For more information on mixed trusts, see SI 01120.200A.1.b and SI 01120.201I.3.

c. Consult regional instructions

Consult any regional instructions that pertain to trusts to see if there are State or Tribal laws to consider on such issues as revocability or irrevocability and grantor trusts.

d. Referring a trust issue to the regional office

If there are any unresolved issues that prevent you from determining the resource status of a trust, or there are issues for which you believe you need a legal opinion, follow your regional instructions or consult with your regional office (RO) program staff via vHelp. The RO staff can resolve many issues via vHelp. If necessary, the RO staff will seek guidance from the central office (CO) or the RCC. Do **not** contact or refer materials to the RCC directly.

NOTE: When referring a trust to the RO, make sure to include all documentation, identify the applicant or recipient, identify the source of funds or assets, and explain relevant relationships of others named in the trust.

2. Oral trusts

a. State recognizes as binding

If the State in question recognizes oral trusts as binding (see regional instructions):

- record all relevant information;
- obtain from all parties signed statements describing the arrangement; and
- unless regional instructions specify otherwise, refer the case, through the Assistant Regional Commissioner, Management and Operations Support (ARC, MOS), to the RCC.

b. State does not recognize as binding

If the State does not recognize oral trusts as binding (see regional instructions), determine whether an agency relationship (a person acting as an agent of the individual) exists and develop under regular resource-counting rules or transfer of resources rules, as applicable. For transactions involving agents, see SI 01120.020.

3. Determining the nature and value of trust property (written or oral trust)

To determine whether the trust is a resource, apply the policies in SI 01120.200D in this section and in any applicable regional instructions.

NOTE: When you are unsure about any relevant issue, do not make a determination but discuss the case with the RO programs staff. They will refer the case to the RCC, if necessary.

When trust principal is a resource and its value is material to eligibility, determine the nature of the principal and establish its value by:

- contacting the holder of the funds, if cash; or
- developing as required under the applicable POMS section for the specific type(s) of property, if the trust principal is not cash.

4. Documentation for trust evidence

Record all information used in determining whether the trust is a resource or generates income on the Trust (RTRS) page in the SSI Claims System. For more information on what trust information to record, see MS INTRANETSSI 013.005. Record your rationales, summary

of supporting documentation, and conclusions on the Report of Contact (DROC) (and subsequently lock the DROC) or the Evidence (EVID) screen. When a certified electronic folder (EF) exists, fax the following into Section D (Non-Disability Development) of the Electronic Disability Collect System (EDCS):

- a copy of the trust document (original not required), along with trust attachments, amendments (if any), and exhibits;
- copies of any signed agreements between organizations making payments to the individual and the individual legally entitled to such payments, if the payments have been assigned to the trust or trustee;
- records of payments from the trust, as necessary; and
- any other pertinent documents, such as court orders, and the Form SSA-5002 (Report of Contact) that indicates the trust resource determination.

In the case of a paper folder, fax these materials into the Non-Disability Repository for Evidentiary Documents (NDRed), or record any development electronically in EVID.

For more information on trust documentation and development, see the trust review process in SI 01120.200L in this section.

NOTE: The SSI applicant or recipient as trust beneficiary generally has the right to request an accounting from the trustee to provide information about trust disbursements.

5. Medicaid trust and Medicaid qualifying trust determination

For information regarding Medicaid trusts and MQTs and the procedure to follow, consult SI 01730.048.

6. Systems input for trusts

Make the appropriate entries on the SSI Claims System Trust (RTRS) page. For more information on the SSI Claims System Trust page, see MS INTRANETSSI 013.005. You may also make a CG field entry (RE06 or RE07) per SM 01301.820. In non-SSI Claims System cases or where otherwise warranted, use Remarks (see MS MSSICS 023.003).

K. Posteligibility Changes In Trust Resource Status

If due to a change in policy, a policy clarification, or the reopening of a prior erroneous determination, a trust that was previously determined not to be a resource is determined to be a resource (or vice-versa), apply the following rules.

1. New trusts and trusts that have not previously been determined not to be a resource

A trust that either is newly created or has not previously been determined not to be a resource must meet the criteria set forth in SI 01120.200D.2. in this section for SSA to determine that it is not a resource. Do not determine that such a trust is not a resource unless the trust meets these criteria.

For a trust that was previously established but is newly discovered, reopen the prior resource determination back to the trust establishment date, subject to the rules of administrative finality (applying the shorter of the two periods). For more information on SSI administrative finality, see SI 04070.001.

A trust must have been previously determined not to be a resource in order for the 90-day amendment period to apply. If a 90-day amendment period is not applicable, then any future amendments to the trust will take effect the month following the month of amendment.

For overpayment waiver rules, see SI 02260.001.

2. Trusts that were previously determined not to be a resource under SI 01120.200

A trust that was previously determined not to be a resource under SI 01120.200 shall continue not to be a resource, provided that the trust is amended to conform with the policy requirements within 90 days. That 90-day period begins on the day SSA informs the individual or representative payee that the trust contains provisions that would require amendment in order to continue not to count as a resource under SI 01120.200.

a. New situations

Effective 04/27/18, if due to a change in policy, a policy clarification, or reopening of a prior erroneous determination, a trust that was previously determined not to be a resource under SI 01120.200 is now determined to be a resource, offer a 90-day amendment period.

b. During the 90-day period

Diary the case for follow-up in 90 days. If a trust was not previously counted as a resource, do not count the trust as a resource and do not impose an overpayment pending possible amendment within the 90-day period.

c. Good cause extension

We permit each trust that was not previously determined to be a resource only one 90-day amendment period. However, you may grant a request for an extension to the 90-day amendment period for good cause, if the individual requests it and provides evidence that the disqualifying issue cannot be resolved within the 90-day period: for example, if a court must amend the trust and there is a wait to get on the court docket. Document on the DROC screen the decision to grant the extension, the time allowed, and the reason. Diary the case for follow-up. Field office staff have discretion to provide a reasonable time period for a good cause extension depending on the situation.

d. End of the 90-day amendment period

If the trust is amended to be policy-compliant within the 90-day period (plus any extension), the trust continues not to be a resource for SSI purposes.

If the trust still fails to meet the policy requirements after expiration of the 90-day amendment period (plus any extension), count the trust as a resource beginning with the later of (1) the date when the policy change or clarification first applies to the trust or (2) the earliest date as of which the prior determination or decision is reopened and revised.

NOTE: All trust determinations made at the end of the 90-day amendment period are subject to the rules of administrative finality.

3. Reopening trust determinations

The field office may receive a request by any party to the determination, including SSA, questioning the correctness of the trust determination. The request to reopen a determination must be in writing and within the applicable time limit (see SI 04070.015. Reopening SSI Determinations).

L. Trust Review Process

Claims Specialists evaluate all trusts **that need a resource determination** (such as a new or amended trust) in all initial claims (IC) and posteligibility (PE) events. For PE events, do not reevaluate trusts that already have a resource determination, unless there is:

- an amendment to the trust,
- a change of or clarification in policy that affects the resource determination,
- a request for reopening, or
- a situation where you become aware of a prior erroneous determination. For resource status changes in PE events, see SI 01120.200K in this section.

To ensure accurate and consistent trust resource determinations:

- Claims Specialists submit their trust resource determinations and any related documentation to the Regional Trust Review Team (RTRT) for review using the Supplemental Security Income Trust Monitoring System (SSITMS) website.
- The RTRT review all trust determinations and provide a decision and any feedback to the Claims Specialists via the SSITMS website.

Claims Specialists and RTRT members can use this SSITMS link to access the website. For instructions on using the SSITMS website, visit the user guide located under the Help link on the SSITMS website.

NOTE: It is important to remember that trust determinations are subject to the rules of administrative finality. For more information on administrative finality, see SI 04070.040.

The following steps describe the trust review process for the Claims Specialists and RTRT members.

1. Claims Specialist actions

For all IC and PE cases where an applicant, recipient, or deemor alleges an interest in a trust that needs a resource determination, determine whether the trust is a countable resource. To make the trust resource determination, follow trust policy in SI 01120.200D in this section.

After making a trust resource determination:

a. Document the determination along with any references and rationale used in the decision-making process:

   - For SSI Claims System cases, use the Report of Contact (DROC) screen; and
   - For non-SSI Claims System cases, use a Form SSA-5002 (Report of Contact) and fax it into the electronic folder (EF) or Non-Disability Repository for Evidentiary Document (NDRED).

b. Fax the initial trust resource determination, trust document, and any pertinent information into the appropriate EF.

Then follow these trust review process steps:

a. Submitting trust determinations for RTRT review

Follow these procedures:

- Access the SSITMS website and select the "Add New" tab. Add the applicant's or recipient's name, representative payee's name (if any), social security number, and all other relevant trust information;
- Select the appropriate type of trust in SSITMS (third party trust, special needs trust, etc.);
- Add remarks describing your determination and rationale; and
- Submit the trust resource determination for RTRT review.

b. Reviewing the RTRT responses

SSITMS sends an email notification after the RTRT or regional trust lead (RTL) reviews the trust and makes a decision. To view the RTRT's response:

- Access SSITMS and select the case from the Summary page listing or use the link in the email to access the case, and

- Click on the "Details/Update" tab.

The Results field will show that the RTRT member either agreed or disagreed with the trust resource determination. When the Claims Specialist is ready to process the case, change the trust status to "FO Effectuated" using the Edit function.

NOTE: Select "FO Effectuated" only after completing all case development. Changing the Trust Status to "FO Effectuated" **locks** the case in SSITMS. Only the Remarks field will be accessible for additional comments.

c. Reevaluations of trust determinations

To request a reevaluation of a trust resource determination, access SSITMS and:

- change the Trust Status to "Referred to RTL" using the Edit function; and

- provide the rationale, a summary of supporting documentation, and appropriate references in SSITMS Remarks and select "Submit."

The RTL will select the case for review and determine if the central office (CO) or the Office of the General Counsel (OGC) needs to review the case. The RTL will respond to the request via the SSITMS website, and SSITMS will send an email notification when the RTL completes the reevaluation process.

d. Appeals of trust determinations

When the applicant or recipient appeals the trust resource determination, the RTL must review the Claims Specialist's reconsideration decision. To request a review of the trust reconsideration determination, access SSITMS and:

- select "Recon Pending" from the Recon Trust Status dropdown using the Edit function; and

- provide pertinent information about the reason for the appeal in Claims Specialist remarks and select "Submit."

NOTE: Do not enter the FO determination in the SSITMS Claims Specialist Remarks. SSITMS will send an email notification

when the RTL completes the FO reconsideration review. Do not load a recon into SSITMS until you have made a trust recon determination.

NOTE: Goldberg-Kelly payments may apply during trust reconsiderations only when the SSI recipient is already in pay.

e. RTRT return cases for further FO development

When the RTRT require additional information from the FO, they will return the case for further development. SSITMS will send to the FO mailbox an email notification about the further development requested. To view the RTRT's request, access SSITMS and:

- select the case from the Summary page listings or use the link in the email to access the case; and
- click on the "Details/Update" tab.

View the request for additional information in the Remarks field. After completing the development requested, update the Trust Status to "FO Development Completed" using the Edit button and submit.

2. Trust Reviewer (TR) actions

TRs review the Claims Specialist's trust resource determination along with any pertinent documentation in the SSI Claims System and the Claims File User Interface (CFUI). When TRs receive a trust resource determination for review in SSITMS, they select the case with "Pending" trust status from the SSITMS summary listing and:

- review the trust and associated information;
- provide feedback in the Remarks field in SSITMS;
- document the concurrence decision in a DROC screen or SSA-5002;
- indicate "agree" or "disagree" with the Claims Specialist's trust resource determination in Results;

- change the trust status to “Review Completed” after making a decision on the trust resource determination; and

- submit the response to the Claims Specialist.

Additionally, TRs refer:

- trusts back to the Claims Specialist when the case needs further development; and

- trusts established outside their region to the RTL. The RTL will refer the trust to the appropriate region.

3. Regional Trust Lead (RTL) actions

Regional Trust Leads (RTL) review trust resource determinations for all new or not previously evaluated pooled trusts, IGRA trusts, reevaluations, and appeals. When needed, RTLs request guidance from CO or the RCC and refer trusts to other regions for their input or decision. RTLs also refer trusts back to the FO when the case needs further development. Additionally, RTLs monitor the SSITMS website and add pooled trust precedents to the SSITMS SharePoint Repository for Precedents. For the pooled trust review process, see SI 01120.202C. For information on IGRA trusts, see SI 01120.195.

Follow these steps for the trust review process:

a. Reviewing trust resource determinations

Select the case from the SSITMS Summary listing page or by using the link in the email notification, and:

- click the “Details/Update” tab;

- review information provided by the Claims Specialist technician;

- determine if consultation with CO or the RCC is necessary;

- provide the review results in the Remarks field;

- update Trust Status to “Completed by RTL”; and

- indicate “agree” or “disagree” with the Claims Specialist’s determination in Results and click “Submit.”

b. Email notifications for reevaluation requests

RTLs will receive an email notification whenever a trust resource determination needs reevaluation. To view the reevaluation request, access the case from the SSITMS Summary page listing.

c. Reevaluate trust resource determinations

To reevaluate the trust resource determination, follow steps listed in SI 01120.200L.3.a. in this section. The specialist who submitted the case and the specialist’s FO mailbox will receive an automated email notification when the RTL makes a decision. The subject line will show “Response to Trust for Reevaluation.”

d. Appeal requests

SSITMS sends the RTL an email notification when he or she needs to review an FO determination on a trust reconsideration. To view appeal requests, access the case from the SSITMS Summary page listing or from the link in the email notification. To review the reconsideration determination, follow steps listed in SI 01120.200L.3.a. in this section. To address the appeal request, follow steps listed in SI 01120.200L.3.a. in this section. The specialist who submitted the case and the specialist’s FO mailbox will receive an automated email notification when the RTL makes a decision. The subject line will show “Response to SSI Trust Recon for Review.”

M. Procedure For Discussing SSI Trust Policy With The Public

1. What to discuss

When you discuss SSI trust policy with a member of the public, follow this guidance:

a. Do not advise an applicant, recipient, deemor, representative payee, legal guardian, or any other party on how to invest funds or hold property in trust. Remember that you are not permitted to provide legal or financial advice.

   Never recommend to an individual that he or she set up a trust or suggest that you think that a trust would be beneficial to him or her. Be aware that a trust may allow eligibility for SSI but not eligibility for Medicaid. Suggest that the individual check with the State Medicaid office.

b. Explain how trusts may affect SSI eligibility and payment amount in general terms or in terms specific to a particular trust arrangement. In the latter case, examine the trust document or a draft of the proposed trust provisions, as necessary. You can identify problematic provisions in the document and refer the individual to the POMS section related to the issue. Do not advocate specific changes to a trust.

c. Remember that an individual's ability to access and use the trust principal depends on the terms of the trust document and on State or Tribal law. The State or Tribal trust laws may be complex. Discuss the individual's documents with your regional office if you are unable to make a determination.

2. Use “SSI Spotlight” on trusts

Consider giving the individual a copy of the “SSI Spotlight” on trusts. You can get a copy of the Spotlight on trusts online.

N. Examples Of Trusts

The following examples are illustrative of situations that you may encounter. You should not rely solely on the analysis given in the examples in making determinations in a specific case, as State (or Tribal) laws vary and the language of individual trust documents may warrant different results from those given in the example. You can refer to regional instructions, if any, and consult your regional office, as necessary. You should also be aware of the possible implications the trust may have for Medicaid eligibility. For instructions on trusts and Medicaid, see SI 01730.048.

1. Trust principal is a resource

a. Example of a trust that is a countable resource

- **Situation**

The claimant is a child and the beneficiary of a trust established on her behalf by her mother, who is her legal guardian. The money used to establish the trust was inherited by the claimant directly from her grandmother, making the beneficiary the grantor. The mother is also the trustee. The trust document indicates that the trust may be revoked at any time by the grantor.

- **Analysis**

Since the grantor may revoke the trust at any time, the trust is a resource to the grantor. In this situation, the child is the grantor and the trust is her resource. This is the case because the actions of the mother, as legal guardian, are taken as an agent for the child. Be aware of situations in which the same person may serve multiple functions (such as parent, guardian, and trustee), and distinguish which specific function the person is performing in order to determine whether the person is acting as an agent for the claimant. Note that it is allowable for the same person to perform multiple functions independently of each other without acting as an agent of the claimant. For the definition of a grantor, see SI 01120.200B.3. in this section.

b. Example of a grantor trust that is a countable resource

- **Situation**

On April 21, 1998, the trust beneficiary, a 17-year-old SSI recipient, received a $125,000 judgment as the result of a car accident that left him disabled. His mother, as his legal guardian, placed the money in an irrevocable trust for the sole benefit of the recipient with his sister as trustee. The trustee has absolute discretion as to how the trust funds are to be spent, and the trust has a prohibition against the trustee's spending funds in a way or amount that would make the recipient ineligible for Federal or State assistance payments. There is no named residual beneficiary. Under the State law, if an individual is both the grantor of a trust and the sole beneficiary, the trust is revocable, regardless of language in the trust to the contrary.

- **Analysis**

Since the recipient's mother, as his legal guardian, established the trust with funds that belonged to the recipient, we treat the recipient as having established the trust himself. Therefore, he is the grantor of the trust. Since he is also the sole beneficiary of the trust, the trust is revocable under the State law and is the recipient's resource, regardless of the language in the trust document. The recipient is ineligible due to excess resources.

2. Trust principal is not a resource

a. Example of a trust that is not a countable resource

- **Situation**

The SSI recipient is the beneficiary of an irrevocable trust created and funded by her deceased parents. Her brother is the trustee. The terms of the trust give the brother full discretionary power to withdraw funds for his sister's educational expenses. The trustee uses these funds to pay the recipient's tuition and room and board at a boarding school. The trust pays $25 of monthly interest income into a separate account that designates the recipient as owner. She has the right to use these funds in any way she wishes. The trust also contains a valid spendthrift clause that prohibits the trust beneficiary from transferring her interest in the trust payments prior to receipt.

- **Analysis**

Since the recipient, as trust beneficiary, has no authority to terminate the trust established with her parents' assets or to access the principal directly, the trust principal is not her resource. While trust disbursements for the beneficiary's benefit may be income to her, the disbursements for tuition are not income since they do not provide food or shelter in any form. However, the trust disbursements for room and board are in-kind support and maintenance valued under the PMV rule. The $25 monthly deposits of trust earnings are income when deposited into the recipient's personal account and are resources to the extent retained into the following month. The trust beneficiary's right to the stream of $25 monthly payments is not a resource because she cannot sell or assign it prior to receiving the payments because of the valid spendthrift clause. For a definition of spendthrift clauses, see SI 01120.200B.13. in this section.

NOTE: If the SSI recipient is the beneficiary of an unfunded third-party trust; for example, the trust will be funded upon the death of a parent. It is not necessary to review and submit the unfunded trust to SSITMS for SSI eligibility purposes until it is funded.

b. Example of a trust that is not a countable resource

Situation

The claimant is a minor and the beneficiary of an irrevocable trust established in 1997 with the child's annuity payment by his father, who is his representative payee. The father is also the trustee. The claimant's brothers and sisters will become the trust beneficiaries in the event of the claimant's death. In the State where the claimant lives, the grantor can revoke the trust if he is also the sole beneficiary. The brothers and sisters are “residual beneficiaries” who become the beneficiaries upon the prior beneficiary's death.

Analysis

The trust principal is not a resource to the claimant. The trust document provides that the trust is irrevocable under the general rule in SI 01120.200D.2. in this section. Although the claimant is the grantor of the trust (because the actions of the father as payee are as an agent of the claimant), the trust is not revocable under the rule for grantor trusts because the claimant is not the sole beneficiary, see SI 01120.200D.3. in this section.

3. Trust requires legal review

a. Example of a trust that requires legal input

- **Situation**

The SSI claimant is the beneficiary of a revocable trust established with her father’s assets for her future care. Her father is her legal guardian. The claimant, as trust beneficiary, has no authority to terminate the trust. The claims specialist (CS) reviews the trust document to see if the claimant, through her legal guardian, has unrestricted access to the trust principal, whether the trust provides for payments on her behalf, and whether the trust principal generates income.

The trust document is very complex, and the fact that the claimant's father is grantor, trustee, and her legal guardian further complicates the situation. The CS cannot determine whether the trust principal is available to the trust beneficiary through the grantor or trustee.

- **Analysis**

Because it is not clear from the trust document whether the father, as legal guardian, "stands in the claimant's shoes" and controls the trust, the CS consults with the RO staff for possible referral through the ARC, MOS, to the RCC for an opinion.

b. Example of a trust that requires legal review

- **Situation**

The recipient is the beneficiary of an irrevocable trust. The trust document indicates that the recipient is the sole named beneficiary and also the grantor of the trust. The document also indicates that there are unnamed residual beneficiaries, the recipient's "heirs."

- **Analysis**

The adjudicator consults regional instructions on State law pertaining to grantor trusts. According to those instructions, a grantor trust may be a resource to the recipient, but the State law is unclear about the effect of the unnamed residual beneficiaries. The adjudicator consults with the RO staff for possible referral through the ARC, MOS, to the RCC.

O. References

- SI 00810.120 Income Determinations Involving Agents
- SI 00835.360 When to Charge In-Kind Support and Maintenance (ISM) from Third-Party Vendor Payments
- SI 01110.210 Excluded Resources
- SI 01120.020 Transactions Involving Agents
- SI 01120.195 Trusts Established under the Indian Gaming Regulatory Act (IGRA) for Minor Children and Legally Incompetent Adults (IGRA Trusts)
- SI 01120.201 Trusts Established with the Assets of an Individual on or After January 01, 2000

- SI 01140.200 Checking and Savings Accounts
- SI 01140.215 Conservatorship Accounts
- SI 01150.001 What is a Resource Transfer
- SI 01730.048 Medicaid Trusts
- MS INTRANETSSI 013.005 Trust

To Link to this section - Use this URL:
http://policy.ssa.gov/poms.nsf/lnx/0501120200

SI 01120.200 - Information on Trusts, Including Trusts Established Prior to January 01, 2000, Trusts Established with the Assets of Third Parties, and Trusts Not Subject to Section 1613(e) of the Social Security Act - 06/07/2018
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SI 01120.201 Trusts Established with the Assets of an Individual on or after 01/01/00

CITATIONS: Social Security Act as amended, Section 1613(e)

P.L. 106-169, Section 205

A. Background For Trusts Established With Assets Of An Individual On Or After 01/01/00

1. Foster Care Independence Act of 1999

On 12/14/99, the President signed into law the Foster Care Independence Act of 1999 (P.L. 106-169). Section 205 of this law provides, generally, that we consider trusts established with the assets of an individual (or spouse) as resources for Supplemental Security Income (SSI) eligibility purposes. The law addresses when to consider earnings on or additions to trusts as income. The law also provides **exceptions to the statutory rules in Section 1613(e) of the Social Security Act (Act)** for counting trusts as resources and income. The provisions in the law are effective for trusts established on or after 01/01/00. For information on exceptions to the statutory rules in Section 1613(e), see SI 01120.203.

For trusts established prior to 01/01/00, trusts established with the assets of third parties, and trusts that meet an exception to the statutory provisions of Section 1613(e) but meet the definition of a resource in SI 01110.100B.1., see SI 01120.200.

2. Third party trusts

These provisions do not apply to trusts established solely with the assets of a third party, either before or after 01/01/00. For development of third party trusts, see SI 01120.200. However, if at any point the individual adds his or her assets to such a trust, then that portion of the trust becomes subject to development under SI 01120.201. through SI 01120.204.

3. Case processing alert

Trusts are often complex legal arrangements involving State or Tribal laws and legal principles that a Claims Specialist may not be able to apply without advice from agency

counsel. Therefore, the following instructions may only be sufficient for you to recognize that an issue is present and that you may need to consult with your regional office (RO). The RO may refer the trust to the Regional Chief Counsel if necessary. When in doubt, submit your question to the RO staff using vHelp.

B. Glossary Of Terms

1. Asset

For purposes of this section, an **asset** is any income or resource of the individual or the individual's spouse, including:

- income excluded under section 1612(b) of the Act. For income exclusions in the Act, see SI 00830.099. and SI 00820.500.;
- resources excluded under section 1613 of the Act. For resource exclusions in the Act, see SI 01130.050.;
- any other payment or property to which the individual or the individual's spouse is entitled but does not receive or have access to because of action by:
    a. the individual or the individual’s spouse;
    b. a person or entity (including a court) with legal authority to act in place of, or on behalf of, the individual or the individual’s spouse; or
    c. a person or entity (including a court) acting at the direction of, or on the request of, the individual or the individual’s spouse.

2. Corpus or principal

The **corpus or principal** of the trust is all property and other interests held by the trust, including accumulated earnings and any other additions, such as new deposits, on or to the trust after its establishment.

NOTE: Earnings or additions are not included in the corpus in the month the trust credits or receives them because we consider them under income counting rules in that month. For more information, see SI 00810.000.

3. Foreclosure

For purposes of this section, **foreclosure** is an event that bars or prevents access to, or payment from, a trust to an individual now or in the future.

4. Legal instrument or device similar to a trust

A **legal instrument, device, or arrangement** may not be a trust under State or Tribal law but, even if it is not a trust, may nevertheless be similar to a trust in that it involves a grantor:

- who provides the assets to fund the legal instrument, device, or arrangement;
- who transfers property (or whose property is transferred by another) to an individual or entity with fiduciary obligations (considered a trustee for purposes of this section); and/or
- who makes the transfer with the intention that the individual or entity hold, manage, or administer the property for the benefit of the grantor or others.

Legal instruments or devices similar to a trust can include (but are not limited to) escrow accounts, investment accounts, conservatorship accounts, pension funds, annuities, certain Uniform Transfers to Minors Act (UTMA) accounts, and other similar devices managed by an individual or entity with fiduciary obligations.

For the definition of a grantor, see SI 01120.200B.3. For trusts established with the assets of an individual, see SI 01120.201B.8. in this section.

5. Spouse

For the purposes of this section, the individual's **spouse** is the individual we consider the spouse for normal SSI purposes. For determining marital status, see SI 00501.150.

6. Terminate

A trust may **terminate** (or end) for different reasons. For example, the grantor may retain the right to terminate a trust, or another individual may have authority to exercise a right to terminate the trust. It is important to determine who receives the trust corpus upon termination. The trust may terminate because its purpose is completed, it runs out of funds, or the beneficiary is no longer disabled or dies. Generally, provisions that permit the

trust to terminate prior to the beneficiary's death are called early termination provisions. For more information on early termination provisions, see SI 01120.199.

7. Testamentary trust (a trust established by a will)

A **testamentary trust** is a trust that is established under the terms of a will and that is effective only upon the death of the individual who created the will (the testator). Sometimes third party inter vivos trusts (trusts created during the lifetime of the grantor) serve as wills. A trust into which property is transferred under the terms of a will, and during the life (inter vivos) of the testator, is not a testamentary trust for the purposes of this section because it is not effective only upon the testator's death, even if the will transfers additional property into the trust upon the testator's death. When evaluating testamentary trusts, field offices should obtain and review a copy of the last will and testament.

8. Trust established with the assets of an individual

A **trust** is considered to have been **established with the assets of an individual** if any assets of the individual (or spouse), regardless of how little, were transferred into the trust other than by a will.

NOTE: The grantor named in the trust document who provided the assets funding the trust and the individual whose actions established the trust may not be the same. The trust may name the individual (for example, a parent or legal guardian) who physically took action to establish the trust rather than the individual who provided the trust assets. This distinction is important, especially in developing Medicaid trust exceptions in SI 01120.203. For a definition of a grantor, see SI 01120.200B.3. For examples of trusts established with the assets of an individual, see SI 01120.201C.2.b-c in this section.

9. Trust income

For purposes of this section, **trust income** includes any earnings on, and additions to, a trust established with the assets of an individual (or the individual's spouse):

- of which the individual is a beneficiary;
- to which the statutory trust provisions apply; and
- in the case of an irrevocable trust, if any circumstances exist under which payment from the earnings or additions could be made to or for the benefit of the individual.

10. Other definitions

For other definitions applicable to this section, see SI 01120.200B.

C. Policy For Certain Trusts Established On Or After 01/01/00

1. Effective date for trust provisions in SI 01120.201.

The trust provisions in SI 01120.201.:

- apply to certain trusts established on or after 01/01/00.
- do not apply to trusts established with the assets of an individual prior to 01/01/00, regardless of the individual's filing date. We evaluate trusts established prior to 01/01/00 under instructions in SI 01120.200.

A trust established with the assets of an individual prior to 01/01/00, but added to or augmented on or after 01/01/00, generally is still considered as established prior to 01/01/00. We consider the transfer of an individual's property to an existing trust as the establishment of a trust subject to the provisions of this section only if:

- the transfer occurs on or after 01/01/00; and
- the corpus of the trust does not include property that was transferred from the individual prior to 01/01/00.

However, additions to such a trust may be a transfer of resources. For instructions related to transfer of resources, see SI 01150.100. and SI 01150.110.

These provisions do not apply to trusts established solely with the assets of a third party, either before or after 01/01/00. For development of third party trusts, see SI 01120.200. However, if at any point in the future the individual’s own assets are added to a trust that previously contained only the assets of a third party, the portion of the trust funded with the individual’s assets is subject to the rules in SI 01120.201. through SI 01120.204.

2. Application of the trust provisions in this section

a. Trusts to which the provisions in this section apply

Except as provided in SI 01120.203A., this section applies to trusts "established with the assets of an individual." A trust is considered to have been established with the assets of an individual if any assets of the individual (or spouse), regardless of how little, were transferred into the trust other than by a will. For the definition of an asset, see SI 01120.201B.1. in this section.

These provisions apply to trusts without regard to:

- the purpose for which the trust was established;
- whether the trustees have or exercise any discretion under the trust;
- any restrictions on when or whether distributions may be made from the trust; or
- any restrictions on the use of distributions from the trust.

Therefore, any trust established with the assets of an individual on or after 01/01/00 will be subject to these provisions and may count in determining SSI eligibility.

b. Exculpatory clauses

No clause or requirement in the trust, no matter how specifically it applies to SSI or another Federal or State program, can preclude a trust from being considered under the rules in this section. An **exculpatory clause** is one that attempts to exempt the trust from the applicability of these rules. For example, an exculpatory clause might state, "Section 1613(e) of the Social Security Act does not apply to this trust." Such a statement has no effect on whether these rules apply to the trust. The inclusion of an exculpatory clause in a trust does not itself make the trust a resource.

NOTE: While exculpatory clauses, use restrictions, trustee discretion, and restrictions on distribution amounts, etc. do not necessarily affect a trust's resource status, they do have an impact on how the various components of the trust are treated. For example, a provision in a discretionary irrevocable trust that limits the trustee to distributing no more than $10,000 to an individual has no effect on whether the trust itself is a resource but does affect the amount that would be countable as a resource.

c. Individual's assets form only a part of the trust

In the case of an irrevocable trust into which the assets of the individual (or the individual's spouse), along with the assets of (an) other individual(s), are transferred,

these provisions apply to the portion of the trust attributable to the assets of the individual (or spouse). Thus, in determining countable resources in the trust, you must prorate any amounts of resources, based on the proportion of the individual's assets in the trust.

EXAMPLE: Jimmy is an adult with cerebral palsy. His grandparents left $75,000 in trust for him in their wills (third party testamentary trust). Recently (after 01/01/00), Mr. Jimmy won an employment discrimination lawsuit and received a $1,500 judgment, which he deposited into the trust that his grandparents established. The $1,500 award is countable income in the month Mr. Jimmy receives the judgment because it is not irrevocably assigned to the trust. The $1,500 of Mr. Jimmy's funds are subject to these provisions and could be a resource if payment could be made to Mr. Jimmy or for his benefit (see SI 01120.201D.2. in this section). The $75,000 with which Mr. Jimmy's grandparents established the trust, by will, for Mr. Jimmy's benefit is not subject to these provisions but must be evaluated under the instructions for third party trusts in SI 01120.200.

3. Examples of trusts and the applicable provisions

a. Examples of trusts to which the trust provisions in SI 01120.201 apply

The following are examples of trusts to which the trust provisions in this section apply:

- An individual who was the plaintiff in a medical malpractice lawsuit becomes the beneficiary of a trust under a settlement agreement. The agreement states that the defendant's insurance company established the trust instead of paying the settlement funds directly to the plaintiff. The settlement funds meet the definition of assets under SI 01120.201B.1. in this section because they are payments that the individual is entitled to but did not receive because they were made by an entity acting on behalf of or at the direction of the individual. Therefore, the trust was **established with the assets of the individual**.

- The same result would occur if a court had ordered placement of the settlement in a trust, or if the individual was a child, regardless of whether State law requires placement of the settlement in a trust for the child.

- A disabled SSI recipient over age 18 receives a settlement, which is deposited directly into a trust. Because in this example, the settlement is the recipient's income. Since the settlement is the SSI recipient's income, the recipient is the grantor of the trust and the trust is a resource, unless it meets an exception in SI 01120.203

If the trust meets an exception and is not a resource, the settlement would still be considered income unless it is irrevocably assigned to the trust or trustee. So, for instance, if a court had ordered the settlement to be paid directly into an excepted trust, we would consider the settlement to be irrevocably assigned to the trust/trustee, and we would not count it as income. Refer to SI 01120.201J.1.d. in this section regarding irrevocable assignment.

b. Examples of trusts to which the trust provisions in SI 01120.201 do not apply

The following are examples of trusts where the trust provisions in SI 01120.201. do not apply:

- Emily Lombardozi, age 67, has a settlement agreement due to an automobile accident that left her paralyzed in 1994. Under the agreement, she receives a lump-sum payment in March of each year. Since 1995, the annual lump-sum payments have been deposited into an irrevocable trust. We do not consider the payments received in 03/00 and years thereafter to be for the establishment of a trust for purposes of these provisions. They are additions to a trust established prior to 01/01/00 and are evaluated under SI 01120.200.

- Same situation as the bullet above except that Ms. Lombardozi receives an inheritance of $3,000 that she deposits into the trust. We evaluate the trust under the rules in SI 01120.200. and the deposit of the inheritance as a transfer of resources under SI 01150.100.

- Robert Gates is a disabled child. His grandmother established an irrevocable trust with $2,000, of which he is the beneficiary, in 12/97. Robert won a lawsuit in 02/00 and placed the money from the judgment ($50,000) in the trust that his grandmother established. Since Robert transferred money into the third party trust after 01/01/00, the deposit of the judgment funds ($50,000) on or after 01/01/00 means that the individual's portion is evaluated under the provisions in this section. The funds deposited by his grandmother are not evaluated under these provisions since they are funds of a third party subject to evaluation under SI 01120.200.

D. Policy On The Treatment Of Trusts

1. Revocable trusts

a. General rule for revocable trusts

In the case of a revocable trust established with the assets of the individual, the entire corpus of the trust is a resource to the individual. However, certain exceptions may apply. For exceptions to counting trusts established on or after 01/01/00, see SI 01120.203. For instructions on revocability, see SI 01120.200D.1.b. and SI 01120.200D.3.

NOTE: The exceptions in SI 01120.203A. only apply to counting a trust under the statutory provisions of section 1613(e) of the Act. A trust that meets the definition of a resource is still countable, and you must develop it under SI 01120.200.

b. Relationship to transfer penalty

Any disbursements from a trust that is a resource that are not "to or for the benefit of" the individual are a transfer of resources. For information on payments for the benefit of or on behalf of the individual, see SI 01120.201F.1. in this section. For transfer of resource provisions, see SI 01150.100.

c. Example of a transfer of resources from a revocable trust

Willie Jones is a young adult with intellectual disabilities. Mr. Jones had a revocable trust established after 01/01/00. His guardian spent all but $5,000 of funds in the trust on Mr. Jones' behalf. His mother files for SSI for him, but he is not eligible because of the money in the trust. His mother takes a $4,500 disbursement from the trust and makes a down payment on a new car that she says she will use to transport Mr. Jones. However, she registers the car in her own name. Even though his mother will use the car to transport Mr. Jones, the purchase of the car is a transfer of resources since the

car does not belong to him. For policy on purchases for the benefit of the individual and titling of property, see SI 01120.201F.1. in this section.

2. Irrevocable trusts

a. General rule for irrevocable trusts

In determining whether an irrevocable trust established with the assets of an individual is a resource, we must consider how the trust can make payments. If the trustee can make any payments to or for the benefit of the individual or individual's spouse, the portion of the trust from which the trustee can make payments and that is attributable to the individual is a resource. However, certain exceptions may apply. For possible exceptions, see SI 01120.203. For information on payments for the benefit of or on behalf of the individual, see SI 01120.201F.1. in this section. For information on revocability, see SI 01120.200D.1.b.

b. Circumstances under which payment can or cannot be made

Take into consideration any restrictions on payments to determine whether the trustee can make payments to or for the benefit of the individual. Restrictions included in the trust may include use restrictions, exculpatory clauses, or limits on the trustee's discretion. However, if the trust can make a payment to or for the benefit of the individual under **any** circumstance, no matter how unlikely or distant in the future, the general rule in SI 01120.201D.2.a. in this section applies: the portion of the trust from which payment can be made to or for the benefit of the individual and that is attributable to the individual is a resource, provided that no exception from SI 01120.203. applies. For information on payments for the benefit of or on behalf of the individual, see SI 01120.201F.1. in this section.

c. Examples of irrevocable trusts and their resource treatment

The following are examples of irrevocable trusts and their resource treatment:

- An irrevocable trust provides that the trustee can make a one-time disbursement that totals $2,000 to, or for the benefit of, the individual out of a trust with $20,000 in assets. Only $2,000 is considered a resource under SI 01120.201D.2.a. in this section. The other $18,000 is considered to be an amount that cannot, under any circumstances, be paid to the individual and may be subject to the transfer of resources provisions in SI 01120.201E. in this section, SI 01150.100., and SI 01150.121.

- A trust contains $50,000 that the trustee can pay to the beneficiary only in the event that he or she needs a heart transplant or on his or her 100th birthday. The entire $50,000 could be paid to the individual under these specific circumstances and therefore is considered a resource.

- An individual establishes an irrevocable trust with $10,000 of his assets. His parents contribute another $10,000 to the trust. The trust permits distributions to, or for the benefit of, the individual only from the portion of the trust contributed by his parents. The trust is not a resource under the provisions in this section because the portion attributed to the beneficiary is not available. The portion of the trust contributed by the individual is subject to evaluation under the transfer of resources provisions in SI 01150.100 (see also SI 01120.201E. in this section). The portion of the trust contributed by his parents is subject to evaluation under SI 01120.200.

3. Types of payments from the trust

a. Payments to an individual

We consider payments to be made **to the individual** when any amount from the trust, including amounts from the corpus or income produced by the trust, are paid directly to the individual or someone acting on his or her behalf, such as a guardian or legal representative.

b. Payments on behalf of or for the benefit of an individual

For payments on behalf of or for the benefit of an individual, see SI 01120.201F.1. in this section. Also, for more instructions on disbursements from trusts, see SI 01120.201I. in this section.

4. Placing excluded resources in a trust

If an individual places an excluded resource in a trust and the trust is a countable resource, the resource exclusion may still apply to that resource. For example, if an individual transfers ownership of his or her excluded home to a trust and the trust is a countable resource, the home is still subject to exclusion under SI 01130.100. For a discussion of ownership of a home by a trust and the effect of payment of home expenses by the trust, see SI 01120.200F.

5. Trust instructions versus transfer instructions for assets in a trust

When an individual transfers assets into a trust, he or she generally transfers legal title of the asset to the trustee. In some cases, we could consider this a transfer of resources. To avoid both counting a trust as a resource and imposing a transfer of resources penalty for the same transaction, **the trust instructions take precedence over the transfer instructions**. The transfer instructions may apply to portions of the trust that we cannot count as a resource.

E. Policy For Relationship To Transfer Penalty (Irrevocable Trust)

1. Trust established with individual's resources

a. Foreclosure of payment

When all or a portion of the corpus of a trust, established with the individual's or spouse's resources, cannot be paid to or for the benefit of the individual, the portion that cannot be paid is considered a transfer of resources for less than fair market value.

Consider the date of the transfer to be:

- the date the trust was established; or, if later,
- the date payment to the individual was foreclosed (i.e., an action was taken that precludes current or future payments from the trust).

In determining the value of the transfer, do not subtract the value of any disbursements made after the date of the transfer, as determined according to the instructions in SI 01120.201E.1. in this section. Additions to the foreclosed portion of the trust after the date of the transfer may be new transfers that you must develop separately.

For instructions related to transfer of resources, see SI 01150.001.

b. Payment to or for the benefit of another

When all or a portion of the corpus of a trust, established with the individual's or spouse's resources, is a resource to the individual and payment is made from that portion of the trust to or for the benefit of another, such a payment is a transfer of resources.

c. Examples of trusts where the transfer penalty applies

The following are examples of trusts where the transfer penalty applies.

- Millie Russell is an adult SSI recipient. Upon the death of her mother, Ms. Russell receives the proceeds of a life insurance policy in the amount of $30,000. She uses the proceeds to establish an irrevocable trust solely to pay for the college expenses of her younger sister, in accordance with her mother's wishes. Receipt of the insurance proceeds is income to Ms. Russell. Establishment of the trust is a transfer of resources by Ms. Russell since the terms of the trust foreclose payment to her or for her benefit. Even though establishing the trust was her mother's wish, she was not legally obligated to do so. Her mother could have established a trust in her will or named the younger sister as beneficiary of the insurance policy.

- Same scenario as in the first example, except that Ms. Russell establishes an irrevocable trust for the benefit of her sister and herself. The trust is a resource to Ms. Russell and makes her ineligible. The trust makes a $5,000 tuition payment to State College on behalf of her sister. The $5,000 payment is a transfer of resources for Ms. Russell. Although counting the trust as a resource would make her ineligible, if the trust principal were spent down to the point where it would allow resource eligibility, we would still have to consider any tuition payments or other payments to or on behalf of her sister made within the 36-month transfer look-back period. For more information on the transfer penalty, see SI 01150.110.

2. Trust established with individual's non-resource assets

a. What is a non-resource asset?

A **non-resource asset** is an asset that meets the definition in SI 01120.201B.2. in this section but does not meet the definition of a resource in SI 01110.100B.1. and SI 01110.115. For example, a non-resource asset may be a lawsuit settlement that a court orders to be paid into a trust. The individual was entitled to it but did not receive it because of action by the court.

b. Transfer penalty

When we consider as a resource all or a portion of the corpus of a trust established by an individual or spouse with the individual's or spouse's non-resource assets under the trust provisions in SI 01120.201., the transfer of resources penalty may apply in the following circumstances.

- If an event occurs that forecloses payment from the portion of the trust that is a resource, then such foreclosure is a transfer of resources as of the date when payment is foreclosed. For the definition of foreclosure, see SI 01120.201B.8. in this section.

- If payment to or for the benefit of another individual is made from the portion of the trust that is a resource, then such payment is a transfer of resources.

In determining the value of the transfer, do not subtract the value of any disbursements made after the date of foreclosure. Additions made by the individual to the foreclosed portion of the trust after the foreclosure date may be new transfers that you must develop separately.

For instructions related to transfers of resources, see SI 01150.100.

NOTE: If a trust established with the individual's non-resource assets is not a resource to the individual, payment to or for the benefit of another person or foreclosure of payment to the individual is not subject to the transfer of resources penalty because the trust was not a resource. For example, an individual has non-resource assets of $10,000 that she places into an irrevocable trust for the benefit of her daughter. The trust is not a resource to the individual because the trust cannot make payments to her or for her benefit. It is also not a transfer of resources subject to the penalty provision because the trust is not a resource and the trust was established with non-resource assets. Likewise, payments from the trust to or for the benefit of the daughter are not transfers of resources.

F. Policy On Trusts And/Or Payments For The Benefit Of, On Behalf Of, Or For The Sole Benefit Of An Individual

1. General rule regarding trusts established for the sole benefit of an individual

Consider a trust established for the sole benefit of an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life.

Do not consider a trust that allows for the trust corpus or income to be paid to, or for the benefit of, a beneficiary other than the SSI applicant or recipient as a trust established for the sole benefit of the applicant or recipient, except as provided in SI 01120.201F.3. and SI 01120.201F.4. in this section.

2. Trust established for the benefit of or on behalf of the individual

Consider a trust established **for the benefit** of the individual, and consider payments to be **on behalf of,** or **to** or **for the benefit of** the individual, if the trustee makes payments of any sort from the corpus or income of the trust to another person or entity such that the individual derives some benefit from the payment.

For example, such payments could be for the purchase of food or shelter or household goods and personal items that count as income. The payments could also be for services for medical or personal attendant care that the individual may need, which do not count as income.

NOTE: We evaluate these payments under regular income-counting rules. However, they do not have to meet the definition of income for SSI purposes to be considered made **on behalf of,** or **to** or **for the benefit of**, the individual.

If the trustee uses funds from a trust that is a resource to purchase durable items, such as a car or a house, the deed or title must show **the individual (or the trust) as the owner of the item** in the percentage that the funds represent the value of the item. Failure to do so may constitute evidence of a transfer of resources.

3. Explanation of the sole benefit rule for third party payments

Consider the following disbursements or distributions to be for the sole benefit of the trust beneficiary:

a. Payments to a third party that result in the receipt of goods or services by the trust beneficiary

- The key to evaluating this provision is that, when the trust makes a payment to a third party for goods or services, the goods or services must be for the primary benefit of the trust beneficiary. You should not read this so strictly as to prevent any collateral benefit to anyone else. For example, if the trust buys a house for the beneficiary to live in, that does not mean that no one else can live there, or if the trust purchases a television, that no one else can watch it. On the other hand, it would violate the sole benefit rule if the trust purchased a car for the beneficiary's grandson to take her to her doctor's appointments twice a month, but he was also driving it to work every day.

- Purchased goods that require registration or titling, for example a car or real property, must be titled or registered in the name of the beneficiary or the trust(ee) unless State law does not permit it. For example, State law may not allow a car to be registered to the beneficiary, or may require a co-owner, if the beneficiary is a minor or an individual without a valid driver's license. Some State Medicaid agencies may permit a car to be titled in a third party's name if the trustee holds a lien on the car. A lien guarantees that the trust receives the value of the car if it is sold and prevents the purchase from being considered a transfer of resources.

  NOTE: Even if a person or entitiy other than the beneficiary or the trust(ee) is listed on the title of the purchased good, it must still be used for the sole benefit of the trust beneficiary.

- A third party service provider can be a family member, a non-family member, or a professional services company. The policy is the same for all.

- Payment for companion services can be a valid expense. For example, perhaps an Alzheimer's patient cannot be left alone and requires a sitter, or the beneficiary needs someone to drive her to the store and assist her with grocery shopping. Family members may normally do some of these things without compensation, but that does not prohibit the trust from paying for these services. Additionally, some incidental expenses for the companion can be payable. For example, if the trust pays a companion to take the beneficiary to a museum, the trust can pay for the admission of the companion to the museum, as this cost is part of providing the service. For payment of travel expenses for a companion, see SI 01120.201F.3.b. in this section.

- You should not request evidence of medical training or certification for family members who receive payment to provide care.

- Do not request income tax information or similar evidence from a service provider to establish a business relationship. If a family member service provider's income is relevant to the beneficiary's SSI eligibility or payment amount (for example, his or her income is part of the beneficiary's deeming computation as a deemor or ineligible child), request normal evidence of wages per SI 00820.130.

NOTE: You should not routinely question the reasonableness of a service provider's compensation. However, if there is a reason to question the reasonableness of the

compensation, you should consider the time and effort involved in providing the services as well as the prevailing rate of compensation for similar services in the geographic area.

b. Payment of third party travel expenses to accompany the trust beneficiary and provide services or assistance that is necessary due to the trust beneficiary's medical condition, disability, or age

Apply the following instructions in evaluating whether travel expenses are allowable and do not violate the sole-benefit rule:

- Travel expenses are transportation, lodging, and food.

- Providing services or assistance necessary due to the trust beneficiary's age means that the beneficiary is a minor and cannot travel unaccompanied.

- Absent evidence to the contrary, accept a statement from the trustee that the service or assistance provided is necessary to permit the trust beneficiary to travel. Do not request a physician statement concerning medical necessity. You should not request evidence of medical training or certification for the person accompanying the trust beneficiary.

- Use a reasonableness test in evaluating the number of people the trust is paying to accompany the beneficiary. For example, it is reasonable for a trust to pay for other individuals, such as parents or caretakers, to accompany a disabled minor child on vacation to provide supervision and assistance. Travel without this support would not be possible. However, it would violate the sole benefit rule if the trust paid for other individuals who are not providing services or assistance necessary for the beneficiary to travel.

NOTE: In this example, the fact that the parents or caretakers cannot afford to pay for their other children's trip, or cannot leave them at home, is not a consideration relevant to the sole-benefit requirement.

c. Payment of third party travel expenses to visit a trust beneficiary

The following travel expenses **to ensure the safety or medical well-being of the trust beneficiary** are allowable and do not violate the sole-benefit rule:

- Travel for a service provider to oversee the trust beneficiary's living arrangements when the beneficiary resides in an institution, nursing home, other long-term care facility (for example, group homes and assisted living facilities), or other supported living arrangements.

- Travel for a trustee, trust advisor named in the trust, or successor to exercise his or her fiduciary duties or to ensure the well-being of the beneficiary when the beneficiary does not reside in an institution.

NOTE: A third party can be a family member, non-family person, or another entity. If you have questions about whether a disbursement is permissible, please request assistance from your regional office.

4. Exceptions to the sole benefit rule for administrative expenses

The trust may also provide for reasonable compensation for (a) trustee(s) to manage the trust and reasonable costs associated with investment, legal, or other services rendered on behalf of the individual with regard to the trust. In evaluating what is reasonable compensation, consider the time and effort involved in providing the services and the prevailing rate of compensation for similar services considering the size and complexity of the trust.

5. Trusts that previously met the requirements to be excepted under section 1917(d)(4)(A) or (C) of the Act

If a trust that was previously determined to be exempt from resource counting under section 1917(d)(4)(A) or (C) contains (a) third party travel expense provision(s) that must be amended to conform with the third party travel expense provisions in SI 01120.201F.3.b. and SI 01120.201F.3.c. in this section, it must be amended within 90 days. The 90-day period begins on the day we inform the applicant, recipient, or representative payee (using the notice date) that the trust contains (a) third party travel expense provision(s) that must be amended to continue qualifying for the exception under section 1917(d)(4)(A) or (C).

Do not count a previously exempted trust as a resource, and do not impose an overpayment, during the 90-day period. If the trust still fails to meet the requirements of this section after expiration of the 90-day amendment period, begin counting the trust as a resource under normal resource counting rules. The trust principal becomes a countable resource beginning with the later of (1) the date when the policy change or clarification first affects the resource determination or (2) the earliest date as of which the prior determination or decision is reopened and revised.

All trust determinations made at the end of the 90-day amendment period are subject to the rules of administrative finality. For general administrative finality instructions, see SI 04070.00.

NOTE: Each previously excepted trust is permitted only one 90-day amendment period to conform with the third party travel expense provisions in SI 01120.201F.3.b. and SI 01120.201F.3.c. in this section.

G. Policy For A Legal Instrument Or Device Similar To A Trust

1. What is a legal instrument or device?

We generally will use trust instructions to evaluate a legal instrument, device, or arrangement, even if it is not a trust under State or Tribal law, if it is similar to a trust in that:

- it involves a grantor who transfers his or her own property (or whose property is transferred by another). For the definition of a grantor, see SI 01120.200B.3.;
- the property is transferred to an individual or entity with fiduciary obligations (considered a trustee for purposes of this section); and
- the grantor transfers the assets to be held, managed, or administered by the individual or entity for the benefit of the grantor or others.

NOTE: We will not consider these arrangements under trust instructions if they would count as resources under regular SSI resource-counting rules.

2. Examples of a legal instrument or device

A legal instrument or device similar to a trust can include (but is not limited to):

- escrow accounts;
- investment accounts;
- conservatorship accounts. For information on conservatorship accounts, see SI 01140.215.;

- pension funds. For information on retirement funds, see SI 01120.210.;
- annuities;
- certain Uniform Transfers to Minors Act (UTMA) accounts; and
- other similar devices managed by an individual or entity with fiduciary obligations.

H. Policy For Burial Trusts

It is important to determine whether a burial trust was established with the individual's funds or funds that have been irrevocably paid to the funeral director. Because the trust provisions in SI 01120.201. apply without regard to the purpose for which the trust was established, burial trusts that may be irrevocable under State law may be countable resources for SSI purposes if established with the individual's assets.

1. Burial trusts to which these provisions apply

The provisions of this section apply to a trust if:

- an individual does not enter into a pre-need funeral contract with a funeral provider but establishes a burial trust with his or her own assets;
- an individual enters into an irrevocable funeral contract with a funeral provider but establishes a revocable trust to fund the contract; or
- an individual enters into a revocable funeral contract with a funeral provider, even if the funeral provider places the money in a trust (except as provided in SI 01120.201H.2.b. in this section).

2. Burial trusts to which these provisions do not apply

a. Irrevocable burial contract

These provisions rules do not apply to a burial trust where:

- an individual irrevocably contracts with a provider of funeral goods and services for a funeral; and
- the individual funds the contract by prepaying for the goods and services; and either
- the funeral provider subsequently places the funds in a trust; or
- the individual establishes an irrevocable trust, naming the funeral provider as the beneficiary.

b. Revocable burial contract

These provisions do not apply to a burial trust where:

- an individual revocably contracts with a provider of funeral goods and services; and
- the individual subsequently funds the contract by irrevocably assigning ownership of a life insurance policy to the provider; and
- State law does not prohibit the individual from irrevocably assigning ownership of a life insurance policy to the funeral provider; and
- the funeral provider subsequently places the life insurance policy in an irrevocable trust.

These transactions constitute a purchase of goods and services by the individual and the establishment of a trust with the funeral provider's funds, not with the funds of the individual.

Evaluate these arrangements under regular resource rules. Specifically, see the burial contract instructions in SI 01130.420 through SI 01130.425. However, if the individual who purchased the funeral was named as the beneficiary of the burial trust that the funeral provider established, and thus retains an equitable interest, see the instructions applicable to third-party trusts in SI 01120.200.

3. Applicable exclusions

If application of the provisions in SI 01120.201H. in this section results in the counting of a burial trust as a resource, the burial space and burial funds exclusions may apply. We may exclude:

- (Burial spaces) without limit for an individual, spouse, and members of the individual's immediate family. For a definition of burial spaces and applicable policy, see SI 01130.400.

- (Burial funds) up to $1,500 each for an individual and spouse. For applicable instructions, see SI 01130.409. through SI 01130.425.

The trust undue hardship waiver may also apply (see SI 01120.203C.).

I. Policy For Disbursements From Trusts

1. Trust principal is not a resource

If the trust principal (or a portion of the trust principal) is not a resource, disbursements from the trust (or that portion) may be income to the individual, depending on the nature of the disbursements. Regular rules apply to determine when income is available.

a. Disbursements that are income

Cash paid directly from the trust to the individual is unearned income. We treat disbursements from the trust to the trust beneficiary's personal debit card the same as cash disbursements. We count the disbursement as unearned income for the month the disbursement is received or added to the debit card.

If disbursements from the trust to third parties result in the beneficiary's receiving non-cash items (other than food or shelter), the non-cash items are in-kind income if the items would not be a partially or totally excluded non-liquid resource if retained into the month after the month of receipt. For instructions on receipt of certain non-cash items, see SI 00815.550.

For example, if a trust buys a car for the beneficiary and the beneficiary's spouse already has a car that is excluded for SSI purposes, the second car is income in the month of receipt, since it would not be an excluded resource in the following month.

b. Disbursements that result in receipt of in-kind support and maintenance

Food or shelter received as a result of disbursements from a trust to a third party is income in the form of in-kind support and maintenance (ISM) and is valued under the

presumed maximum value (PMV) rule. For instructions pertaining to the PMV rule, see SI 00835.300. For rules pertaining to a home, see SI 01120.200F.

c. Disbursements that are not income

Disbursements from the trust that are not cash to the individual or are third party payments that do not result in the receipt of support and maintenance are not income. Such disbursements may include, but are not limited to, those made for educational expenses, some travel expenses, therapy, medical services not covered by Medicaid, phone bills, recreation, and entertainment (see SI 00815.400.).

Disbursements made from the trust to a third party that result in the beneficiary's receipt of a non-cash item (other than food or shelter) are not income if the non-cash item would become a totally or partially excluded non-liquid resource if retained into the month after the month of receipt. For instructions on receipt of certain non-cash items, see SI 00815.550.

For example, a trust purchases a computer for the beneficiary. Since we would exclude the computer from resources as a household good in the following month, the computer is not income. For instructions on household goods, personal effects, and other personal property, see SI 01130.430.

Funds transferred from the trust into an account established by the trust beneficiary under the Achieving a Better Life Experience (ABLE) Act are excluded from income to the trust beneficiary. For treatment of deposits into an ABLE account, see SI 01130.740.

d. Disbursements for credit card bills

If a trust pays a credit card bill for the trust beneficiary, whether the individual receives income depends on the list of itemized charges on the bill. If the trust pays for food or shelter items on the bill, we will generally charge the individual with ISM for those items up to the PMV. If the bill includes non-food, non-shelter items, the individual does not receive income as a result of the payment, unless the items received would not be totally or partially excluded non-liquid resources the following month.

EXAMPLE: If the credit card bill includes restaurant charges, payment of those charges results in ISM. If the bill also includes the purchase of clothing, payment for the clothing is not income.

e. Administrator-managed prepaid cards

Administrator-managed prepaid cards, such as True Link cards, are a type of restricted debit card that can be customized to block the cardholder's access to cash, specific

merchants, or entire categories of spending. Typically, the trustee is the account owner and administrator, and the trust beneficiary is the cardholder. To evaluate the income and resource implications of trust disbursements to administrator-managed prepaid cards, we must determine who owns the prepaid card account.

If the **trustee** is the owner of the prepaid card account:

- Whether the trust beneficiary receives income from trust disbursements depends on the type of purchase reflected in the card statement. Treat purchases in the following manner:
    - If the administrator-managed prepaid card is used to obtain cash, such as at an ATM, the withdrawal counts as unearned income.
    - If the administrator-managed prepaid card pays for food or shelter items, such as charges at a restaurant, the individual will generally be charged with ISM up to the PMV.
    - If the administrator-managed prepaid card pays for non-food, non-shelter items, such as for clothing at a department store, the individual usually does not receive income unless the item received would not be a totally or partially excluded non-liquid resource the following month.
- The administrator-managed prepaid card is not the trust beneficiary's resource.

If the **trust beneficiary** is the owner of the prepaid card account:

- Count all disbursements from the trust onto the card as unearned income; and
- Count any unspent balance on the card as a resource as of the beginning of the month after funds are loaded onto the card.

f. Disbursements for gift cards and gift certificates

Consider gift cards and gift certificates purchased by the trust for the individual's use to be cash equivalents. If the individual can use a gift card or certificate to buy food or shelter (such as a restaurant, grocery store, or VISA gift card), it is unearned income in the month of receipt. Any unspent balance on the gift card or certificate is a resource

beginning the month after the month of receipt. If the store does not sell food or shelter items (such as a flower shop or electronics store), but the card does not have a legally enforceable prohibition on the individual's selling the card for cash, then it is still unearned income. For general policy on gift cards and gift certificates, see SI 00830.522.

g. Reimbursements to a third party

Reimbursements made from the trust to a third party for funds expended on behalf of the trust beneficiary are not income. In addition, reimbursements from the trust to pay a credit card belonging to a third party for purchases made for the trust beneficiary are not income.

Existing income and resource rules apply to items that a trust beneficiary receives from a third party. If a trust beneficiary receives a non-cash item (other than food or shelter), it is in-kind income if the item would not be a partially or totally excluded non-liquid resource if retained into the month after the month of receipt. If a trust beneficiary receives food or shelter, it is income in the form of ISM.

h. Disbursements transferred into an ABLE account

Funds transferred from the trust into an account established by the trust beneficiary under the ABLE Act are excluded from income to the trust beneficiary. For treatment of deposits into an ABLE account, see SI 01130.740.

2. Trust principal is a resource

a. Disbursements to or for the benefit of the individual

If the trust principal (or a portion of the trust principal) is a resource to the individual, disbursements from the trust principal (or that portion of the principal) to or for the benefit of the individual are not income but conversion of a resource. However, we exclude from income any interest that the countable trust principal earns, per SI 00830.500.

For instructions pertaining to conversion of resources from one form to another, see SI 01110.100.

For instructions on treatment of earnings or additions when the trust principal is a resource, see SI 01120.201J.2. and SI 01120.201J.3. in this section.

b. Disbursements not to or for the benefit of the individual

In the case of a trust established with the assets of an individual (or his or her spouse), if from the trust, or portion of the trust, that is a resource:

- a disbursement is made other than to or for the benefit of the individual, consider such a disbursement a transfer of resources as of the date of the payment. For instructions on transfer of resources, see SI 01150.110.; or

- no disbursement could be made to the individual under any circumstances, consider the foreclosure of payment a transfer of resources as of the date of the foreclosure.

For a definition of "to or for the benefit of," see SI 01120.201F.1. in this section.

3. Mixed trust—part of the trust is a resource and part is not a resource

If part of the trust was established with assets of the individual (or spouse) and part was established with the assets of other individuals, consult the trust document to determine from which portion of the trust disbursements were made. If the trust document does not specify, a written statement from the trustee regarding the source of the disbursements will be determinative. If the trustee is unable to provide a statement, presume that disbursements were made first from the portion of the trust established with the funds of other individuals. When that portion is depleted, then presume that disbursements were made from the portion of the trust established with funds of the individual.

J. Policy For Earnings On And Additions To Trusts

For purposes of the SSI program, income includes any earnings on or additions to a trust:

- that is established with the assets of an individual;

- of which the individual is a beneficiary;

- that is a resource under these trust provisions; and

- in the case of an irrevocable trust, that can, under any circumstances, make payments from the earnings or additions to or for the benefit of the individual.

1. Trust principal is not a resource

a. Trust earnings

Trust earnings are not income to an SSI applicant or recipient who is a trust beneficiary **unless** the trust directs, or the trustee makes, payment to the beneficiary.

Trust earnings are not income to the trustee or grantor **unless** designated as belonging to the trustee or grantor under the terms of the trust, for instance, as fees payable to the trustee or interest payable to the grantor.

b. Additions to principal

Additions to the trust principal made directly to the trust are not income to the grantor, trustee, or beneficiary. Exceptions to this rule are noted in SI 01120.201J.1.c. and SI 01120.201J.1.d. in this section.

c. Payments not assignable by law

Certain payments are not assignable by law and, therefore, are income to the individual entitled or eligible to receive the payments under regular SSI income rules, unless an exclusion applies. Although a trust may be structured such that it appears that non-assignable payments are made directly into the trust, non-assignable payments may not be made directly into a trust to avoid income counting or for any other reason.

Important examples of non-assignable payments include:

- Temporary Assistance for Needy Families (TANF);
- Railroad Retirement Board-administered pensions;
- Veterans pensions and assistance;
- Federal employee retirement payments (CSRS, FERS) administered by the Office of Personnel Management;
- Social Security title II and SSI payments; and
- Private pensions under the Employee Retirement Income Security Act (ERISA) (29 U.S.C.A. section 1056(d)).

NOTE: SSI payments do not count as unearned income. Therefore, SSI payments deposited into an SSI recipient's trust do not count as unearned income to the

recipient. For more information on direct deposit to trusts, see SI 01120.201J.1.f. in this section.

d. Assignment of income

A legally assignable payment to a trust or trustee is income for SSI purposes, **unless** the assignment is irrevocable. If the assignment is revocable, the payment is income to the individual legally entitled or eligible to receive the payment. For example, child support or alimony payments paid directly to a trust or trustee because of a court order are considered irrevocably assigned and thus not income. Also, Survivor Benefit Plan (SBP) payments assigned to a special needs trust are not income because assignment of SPB annuities is irrevocable.

For examples of payments that are not assignable by law, see SI 01120.201J.1.c. in this section.

e. U.S. Military Survivor Benefit Plans

The Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 gives military members and retirees the option to irrevocably direct payment of a Survivor Benefit Plan (SBP) annuity for a dependent child to a special needs trust for the benefit of a disabled child. Since the SBP annuity is irrevocably assigned to the special needs trust, the monthly annuity payments are not income to the trust beneficiary. Accept an assignment made in accordance with the applicable policies of the Department of Defense. For more information on special needs trusts, see SI 01120.203., and for more information on assignment of income, see SI 01120.201J.1.d. in this section.

f. Direct deposit of non-assignable payments

Although an individual cannot assign a non-assignable payment to a trust, he or she may have a payment direct deposited into the trust. Such an arrangement means that the payment is still income to the person entitled or eligible to receive it. For SSI and Title II payments, per GN 02402.060D, SSA will not approve any direct deposit into a trust agreement account. Since direct deposit into a trust turns legal ownership and control of the funds over to the trustee and not the Title II/SSI beneficiary/recipient, such an arrangement violates the assignment of benefits provision(s) of sections 207 and 1631(d)(1) of the Act.

2. Trust principal is a resource--revocable trust

a. Trust earnings and additions to principal--revocable trust

Any earnings on and additions to a revocable trust are unearned income to the individual if:

- the trust was established with the assets of an individual;
- the individual is a beneficiary of the trust; and
- the trust is a resource under this section. For instructions on exclusion of interest income on earnings, see SI 00830.500.

EXCEPTION: If the source of any additions is the individual's resources, the additions are not income but conversion of a resource.

3. Trust principal is a resource--irrevocable trust

a. Trust earnings

Any earnings on an irrevocable trust are unearned income to the individual in the percentage that he or she provided the assets that constitute the corpus of the trust.

This is the case if:

- the trust was established with the assets of the individual;
- the individual is a beneficiary of the trust;
- the trust is a resource under this section; and
- circumstances exist under which the trust can make payment from the trust earnings to or for the benefit of the individual.

For example, if the individual's assets constitute 75% of the trust corpus and the trust earns $100 interest in April, $75 of interest is income to the individual if the trust can pay the interest to or for the benefit of the individual. For instructions on exclusion of interest income, see SI 00830.500.

b. Additions to principal--irrevocable trust

Any additions to an irrevocable trust are unearned income to the individual if:

- the trust was established with the assets of the individual;
- the individual is a beneficiary of the trust;
- the trust is a resource under this section; and
- circumstances exist under which the trust can make payment from the trust additions to or for the benefit of the individual.

EXCEPTION: If the source of the additions to the trust is the individual's other resource, then the additions are not income but conversion of a resource.

4. Individual's assets form only a part of the trust

In the case of an irrevocable trust where the assets of the individual (or the individual's spouse) were transferred along with the assets of (an)other individual(s), these provisions apply to the portion of the trust attributable to the assets of the individual (or spouse). Thus, in determining income to the trust, you must prorate any amounts of income, based on the proportion of the individual's assets in the trust.

EXAMPLE: Jimmy is an adult with cerebral palsy. His grandparents left $75,000 in trust for him in their wills. Recently (after 01/01/00), Mr. Smith won an employment discrimination lawsuit and received a $1,500 judgment, which went into the trust that his grandparents established. The $1,500 of Mr. Jimmy's funds are subject to the provisions of an irrevocable trust and could be a resource if payment could be made to or for Mr. Smith's benefit. For treatment of irrevocable trusts, see SI 01120.201D.2. in this section. The $75,000 deposited by his grandparents is not subject to these provisions and is not a resource. For third party trusts, see SI 01120.200.

In determining income to the trust, we must prorate the income in proportion to the percentage of funds placed in the trust by Mr. Jimmy. For income of a trust, see SI 01120.201J. in this section. Since this is an irrevocable trust, we will count 1.96% ($1,500/$76,500) of the trust earnings as income and not count 98.04% ($75,000/$76,500) of the earnings. Disbursements from or additions to the trust may require recalculation of the percentages.

K. Posteligibility Changes In Trust Resource Status

If due to a change in policy, a policy clarification, or the reopening of a prior erroneous determination, a trust that was previously determined not to be a resource is determined to be

a resource (or vice-versa), apply the following rules.

1. New trusts and trusts that have not been previously excepted under section 1917 (d)(4)(A) or (C) of the Act

A trust that either is newly formed or was not previously excepted from resource counting must meet all of the criteria set forth in SI 01120.199. through SI 01120.203., SI 01120.225., and SI 01120.227. to be excepted under section 1917(d)(4)(A) or 1917(d)(4)(C). Do not except such a trust from resource counting unless the trust meets all of these requirements.

For a trust that was previously established, but is newly discovered, reopen the prior resource determination back to the trust establishment date, subject to the rules of administrative finality. For more information on SSI administrative finality, see SI 04070.001.

NOTE: Do not impose an overpayment unless you determine that the trust is countable.

2. Trusts that previously met the requirements to be excepted under section 1917(d)(4)(A) or (C) of the Act

A trust that was previously determined to be exempt from resource counting under section 1917(d)(4)(A) or 1917(d)(4)(C) shall continue to be excepted from resource counting, provided the trust is amended to conform with the policy requirements within 90 days. That 90-day period begins on the day SSA informs the recipient or representative payee that the trust contains provisions that must be amended in order to continue qualifying for the exception under section 1917(d)(4)(A) or (C).

a. Existing situations prior to 04/27/18

Prior to 04/27/18, there were only four instances where you could offer a 90-day amendment period:

- Early Termination Provisions and Trusts (SI 01120.199.);
- Sole Benefit Requirement and Third Party Travel Expenses (SI 01120.201F.2. in this section);
- Pooled Trusts Management Provisions (SI 01120.225.); and
- Null and Void Clauses in Trusts Documents (SI 01120.227.).

Continue to apply these policies, where applicable.

b. Situations on or after 04/27/18

Effective 04/27/18, if due to a change in policy, a policy clarification, or the reopening of a prior erroneous trust determination, a trust that was previously determined to be exempt from resource counting under Section 1917(d)(4)(A) or (C) is determined to be a resource, offer a 90-day amendment period.

c. During the 90-day period

Diary the case for follow up in 90 days. Do not count a previously excepted trust as a resource, and do not impose an overpayment, pending possible amendment within the 90-day period.

d. Good cause extension

We permit each previously excepted trust only one 90-day amendment period. However, you may grant an extension request to the 90-day amendment period for good cause if the recipient requests it and provides evidence that the disqualifying issue cannot be resolved within the 90-day period: for example, if a court must amend the trust and there is a wait to get on the court docket. Document in the file the grant of an extension, the time allowed, and the reason. Diary (or tickle) the case for follow-up.

e. End of the 90-day amendment period

If the trust is amended to be policy-compliant within the 90-day period (plus any extension), the trust continues to be excepted from resource counting.

If the trust still fails to meet the policy requirements after the expiration of the 90-day amendment period (plus any extension), begin counting the trust as a resource under normal resource counting rules. The trust principal becomes a countable resource beginning with the later of (1) the date when the policy change or clarification first affects the resource determination or (2) the earliest date as of which the prior determination or decision is reopened and revised.

NOTE: All trust determinations made at the end of the 90-day amendment period are subject to the rules of administrative finality.

3. Reopening trust determinations

The field office (FO) may receive a request by any party to the determination, including SSA, questioning the correctness of the trust determination. The request to reopen a

determination must be in writing and within the applicable time limit. See SI 04070.015.

L. References

- SI 01120.195 Trusts Established under the Indian Gaming Regulatory Act (IGRA) for Minor Children and Legally Incompetent Adults (IGRA Trusts)
- SI 01120.200 Trusts – General, Including Trusts Established Prior to 1/1/00, Trusts Established with the Assets of Third Parties, and Trusts Not Subject to Section 1613(e) of the Social Security Act
- SI 01120.202 Development and Documentation of Trusts Established on or after 1/1/00
- SI 01120.203 Exceptions to Counting Trusts Established on or after 1/1/00
- SI 01120.204 Notices for Trusts Established on or after 1/1/00
- SI 01150.100 Processing Resource Transfers Occurring Before 12/14/99
- SI 01150.121 Exceptions — Transfers to a Trust

Social Security

Program Operations Manual System (POMS)

TN 54 (04-18)

SI 01120.202 Development and Documentation of Trusts Established on or After 01/01/00

A. Procedure For Trust Development

1. General development for written trusts

a. When to evaluate trust documents

Evaluate all trusts where an applicant, recipient, or spouse alleges an interest in a trust that needs a resource determination (such as a new or amended trust) in all initial claims (IC) and posteligibility (PE) events.

For PE events, do not reevaluate the trust resource determination (of a trust that has previously been reviewed) unless there is new and material evidence, such as an amendment to the trust or a clarification or change in policy that may affect the trust resource determination. However, evaluate all potential income implications, such as those of trust distributions and payments. For resource status changes in PE events, see SI 01120.201K.

b. Review the trust document

Obtain a copy of the trust document (the original trust document is not required) and related documents and review the document to determine whether the:

- individual is the grantor, trustee, or trust beneficiary;
- trust was established before, on, or after 01/01/00;
- assets were transferred into the trust before, on, or after 01/01/00;
- trust was funded with assets of the individual or third parties or both;

- trust is revocable or can be terminated and, if so, whether the individual has authority to revoke or terminate the trust and to use the principal for his or her own support and maintenance;

- individual has access to the trust principal;

- trust provides for or permits payments to the individual or on the individual's behalf for the benefit of the individual;

- trust principal generates income (earnings) and, if so, whether the individual has the right to any of that income;

- trust provides for mandatory periodic payments and, if so, whether the trust contains a spendthrift clause that is valid under State law and prohibits the voluntary and involuntary alienation of any interest of the trust beneficiary in the trust payments; and

- trust is receiving payments from another source.

c. Which instructions apply when determining the resource status and income treatment of a trust

Depending on the trust's date of establishment and whose funds the trust principal contains, follow these instructions to determine the resource status and income treatment of the trust:

If the trust was established...	**And contains...**	**Then follow instructions in:**
On or after 01/01/00	Any assets of the individual	SI 01120.199, SI 01120.201 through SI 01120.204, SI 01120.225 and SI 01120.227
	Only assets of third parties	SI 01120.200

If the trust was established...	And contains...	Then follow instructions in:
Before 01/01/00	Assets of the individual transferred before 01/01/00	SI 01120.200
	Any assets of the individual transferred on or after 01/01/00	SI 01120.199, SI 01120.201 through SI 01120.204, SI 01120.225, and SI 01120.227
	Only assets of third parties	SI 01120.200

NOTE: If the trust beneficiary adds his or her own assets to an existing third party trust on or after 01/01/00, redevelop the trust under the instructions in SI 01120.199, SI 01120.201 through SI 01120.204, SI 01120.225 and SI 01120.227. For more information on mixed trusts, see SI 01120.200A.1.b. and SI 01120.201I.3.

d. Consult regional instructions

Consult any regional instructions that pertain to trusts to see if there are any State or Tribal laws to consider on such issues as revocability or irrevocability and grantor trusts. You may also consult the Title XVI Regional Chief Counsel (RCC) Precedents. For RCC precedents on trusts, see PS 01825.000.

e. Referring a trust issue to the Regional Office (RO)

If there are unresolved issues that prevent you from determining the resource status of a trust, or there are issues that you believe need a legal opinion, follow your regional instructions or consult with your RO program staff via vHelp. If necessary, the RO staff will seek guidance from the central office (CO) or the Regional Chief Counsel (RCC). Do **not** contact or refer materials to the RCC directly.

NOTE: When referring a trust issue to the RO, make sure to include all documentation and an SSA-5002 (Report of Contact), if necessary, identifying the individual, source of the funds or assets, relevant relationships of others named in the trust, and a brief summary of the unresolved issue(s).

f. Reopening trust determinations

The field office may receive a request by any party to the determination, including SSA, questioning the correctness of the trust determination. The request to reopen a determination must be in writing and within the applicable time limit. For information on reopening SSI determinations, see SI 04070.015.

g. Manual notices

When applicable, issue a manual notice for trusts established with an individual's assets on or after 01/01/00 as required per SI 01120.204. For such notices, specify using free-form text each reason the trust is countable (that is, why it does not meet the relevant exception(s) or requirements). In the notice, you must cite:

- the applicable section of the trust (or any joinder agreement, if applicable) containing the problematic language or issue; and

- the Program Operations Manual System (POMS) citation that contains the policy requirements on that subject.

Additionally, provide the following language indicating where the POMS can be found on-line: "You can find the Program Operations Manual System (POMS) on the Social Security website." For examples of manual notice language, see SI 01120.204.

NOTE: You should not provide legal advice or attempt to explain how to remedy the problem. For guidance on discussing trust policy with the public, see SI 01120.200M.

2. General development for oral trusts

a. State recognizes as binding

If the State in question recognizes oral trusts as binding (see regional instructions):

- record all relevant information;

- obtain from all parties signed statements describing the arrangement; and

- unless regional instructions specify otherwise, refer the case to your RO staff. The RO will refer the case, through the Assistant Regional Commissioner, Management and Operations Support (ARC, MOS), to the Regional Chief Counsel.

NOTE: The special needs trust and pooled trust exceptions do not apply in the case of an oral trust since these exceptions require written evidence as part of the trust document. For more information on the special needs trust and pooled trust exceptions, see SI 01120.203.

b. State does not recognize as binding

If the State does not recognize oral trusts as binding (see regional instructions), determine whether an agency relationship (a person or entity acting as an agent of the individual) exists and develop under regular resource-counting rules or transfer of resources rules, as applicable. For transactions involving agents, see SI 01120.020.

3. Determining whether a trust is revocable or irrevocable

Determine whether a trust is revocable or irrevocable based on the terms of the trust and State or Tribal law considerations (grantor trust rules). For revocability of grantor trusts, see SI 01120.200D.1.b and SI 01120.200D.3.

4. Determining if a self-funded trust established on or after 01/01/00 is a resource

When determining whether a trust is a resource, apply the policies in regional instructions and SI 01120.201C and SI 01120.201D For instructions on determining the resource status of third party trusts and self-funded trusts established prior to 01/01/00, see SI 01120.200. If the individual used his or her assets to establish a trust on or after 01/01/00, and the trust is:

- revocable, count the trust corpus as a resource **unless one of the exceptions in SI 01120.203 applies.**

  NOTE: The exceptions in SI 01120.203A only apply to counting a trust under the statutory provisions of section 1613(e) of the Act. A trust that meets the exception to counting for SSI purposes under the statutory trust provisions of Section 1613(e) must still be evaluated under the instructions in SI 01120.200 to determine if it is a countable resource.

- irrevocable, count as a resource any portion of the trust attributable to the individual's assets and from which the trust can make payments to or for the benefit of the individual or the individual's spouse under any circumstance **unless one of the exceptions in SI 01120.203 applies**.

- irrevocable, and if the trust cannot make payments to or for the benefit of the individual or the individual's spouse under any circumstance, develop the establishment of the trust for a potential transfer of resources penalty using instructions in SI 01150.100.

  NOTE: If you determine that the trust is a resource, you must determine if an exception or waiver in SI 01120.203 applies.

5. Developing legal instruments and devices similar to a trust

a. Which legal instruments and devices to develop

Obtain any written documentation and review the legal instrument or device to determine if it meets the requirements in SI 01120.201G.

If it does, determine whether the arrangement created by the legal instrument or device is a countable resource under regular SSI resource counting rules. If the resource is:

- countable, develop the legal instrument or device under the other applicable resource rules.

- not countable, develop the legal instrument or device following the procedures for developing trusts.

NOTE: Review only a legal instrument or device established with the individual's assets on or after 01/01/00. Do **not** develop legal instruments and devices similar to a trust established with the individual's assets prior to 01/01/00 under instructions in SI 01120.200. However, transfers to such arrangements created by a legal instrument or device may be subject to the transfer of resources provisions. For instructions on transfer of resources, see SI 01150.100.

b. Referral to the RO

If you are unsure of whether the arrangement is one that you should develop as a legal instrument or device similar to a trust, refer the matter to the RO via the vHelp system. If necessary, the RO staff will seek guidance from the central office (CO) or the RCC.

B. Trust Review Process For Trusts Established On Or After 01/01/00

Claims Specialists evaluate all trusts **that need a resource determination** (such as a new or amended trust) in all IC and PE events. For PE events, do not reevaluate trusts that have a resource determination, unless there is:

- an amendment to the trust,
- a change of or clarification in policy that affects the resource determination,
- a request for reopening, or
- a situation where you become aware of a prior erroneous determination.

For resource status changes in PE events, see SI 01120.200K.

To ensure accurate and consistent trust resource determinations:

- Claims Specialists submit their trust resource determinations and any related documentation to the Regional Trust Review Team (RTRT) for review using the Supplemental Security Income Trust Monitoring System (SSITMS) website.
- The RTRT reviews all trust determinations and provide concurrence and any feedback to the Claims Specialists via the SSITMS website. After the Field Office (FO) receives the RTRT concurrence, Claims Specialists can adjudicate the case.

Claims Specialists and RTRT members can use this SSITMS link to access the website. SSITMS is a tool for SSA internal communication. Do not share information, including the precedents, with non-SSA personnel. For instructions on using the SSITMS website, visit the user guide located under the Help link on the SSITMS website.

NOTE: It is important to remember that trust determinations are subject to the rules of administrative finality. For more information on administrative finality, see SI 04070.040.

The following steps describe the trust review process for the Claims Specialists and RTRT members for reviewing trusts established with the assets of an individual on or after 01/01/00.

For the trust review process for trusts established prior to 01/01/00, third party trusts, or trusts not subject to Section 1613(e) of the Act, see SI 01120.200L. For instructions on the trust review process of Indian Gaming Regulatory Act (IGRA) trusts, see SI 01120.195.

1. Claims Specialists actions

For all IC and PE cases in which an individual alleges an interest in a trust established on or after 01/01/00 with his or her own (or spouse's) funds and which needs a resource determination, determine whether the trust is a countable resource. To make the trust resource determination, follow the appropriate trust policies in SI 01120.199, SI 01120.201, SI 01120.203, SI 01120.204, SI 01120.225, and SI 01120.227. Additionally, for pooled trusts follow instructions in SI 01120.202C. in this section.

After making a trust resource determination:

- Document the determination along with any references and rationale used in the decision-making process.
  - For SSI Claims System cases, use the Report of Contact (DROC) screen.
  - For non-SSI Claims System cases, use a Report of Contact form (SSA-5002) and fax it into the electronic folder (EF) or Non-Disability Repository for Evidentiary Document (NDRED).
- Fax the initial trust resource determination, trust document, and any pertinent information into the appropriate EF.

Follow the trust review process steps in SI 01120.202B.1.a. through SI 01120.202B.1.e. in this section.

a. Submitting trust determinations for RTRT review

To submit your trust determination for RTRT review:

- Access the SSITMS website and select the "Add New" tab. Add the applicant or recipient's name, representative payee's name (if any), social security number, and all other relevant trust information.
- Select the appropriate type of trust in SSITMS (for example, third party trust or special needs trust).
- Add remarks describing your determination and rationale.
- Submit the trust resource determination for RTRT review.

b. Reviewing the RTRT responses

SSITMS sends an email notification after the trust reviewer (TR) or regional trust lead (RTL) reviews the trust and provides a response. To view the RTRT's response:

- Access SSITMS and select the case from the Summary page listing or use the link in the email to access the case, and
- Click on the "Details/Update" tab.

The "Results" field will show that the RTRT member either agreed or disagreed with the trust resource determination. When the Claims Specialist is ready to process the case, change the trust status to "FO Effectuated" using the "Edit" function. The RTRT member may provide feedback in the remarks field.

NOTE: Select "FO Effectuated" only after completing all case development. Changing the Trust Status to "FO Effectuated" **locks** the case in SSITMS. Only the Remarks field will be accessible for additional comments.

c. Reevaluations of trust determinations

To request a reevaluation of a trust resource determination, access SSITMS and:

- Change the Trust Status to "Referred to RTL" using the "Edit" function.

- Provide the rationale, a summary of supporting documentation, and appropriate references in SSITMS remarks and select "Submit."

The RTL will select the case for review and determine if the central office (CO) or the Regional Chief Counsel (RCC) needs to review the case. The RTL will respond to the request via the SSITMS website, and SSITMS will send an email notification when the RTL completes the reevaluation process.

d. Appeals of trust determinations

When the applicant or recipient appeals the trust resource determination, the RTL must review the FO's reconsideration determination. To request a review of the trust reconsideration determination, access SSITMS and:

- select "Recon Pending" from the Recon Trust Status dropdown using the "Edit" function, and

- provide pertinent information about the reason for the appeal in FO remarks and select "Submit."

NOTE: Do not load a recon into SSITMS until you have made a trust recon determination. SSITMS will send an email notification when the RTL completes the FO reconsideration determination review.

NOTE: Goldberg-Kelly payments may apply during trust reconsiderations only when the SSI recipient is already in pay.

e. RTRT returns cases for further FO development

When the RTRT require additional information from the FO, they will return the case for further development. SSITMS will send an email notification about the further development requested to the FO mailbox. To view the RTRT's request, access SSITMS and:

- select the case from the Summary page listings or use the link in the email to access the case, and

- Click on the "Details/Update" tab.

View the request for additional information in the Remarks field. After completing the development requested, update the Trust Status to "FO Development Completed" using the "Edit" function and submit.

2. Trust Reviewer (TR) actions

Trust reviewers (TR) review the Claims Specialist's trust resource determination along with any pertinent documentation in the Supplemental Security Income Claims System (SSI Claims System), eView, and the Claims File User Interface (CFUI). When TRs receive a trust resource determination for review in SSITMS, TRs select the case with "Pending" trust status from the SSITMS Summary listing or from the link in the email notification, and:

- Review the trust and associated information.

- Provide feedback in the Remarks field in SSITMS.

- Document the decision in a Report of Contact (DROC) screen or SSA-5002.

- Indicate "agree" or "disagree" with the Claims Specialist's trust resource determination in Results.

- Change the trust status to "Review Completed" after making a decision on the trust resource determination.

- Submit the response to the FO.

Additionally, TRs refer:

- trusts back to the FO when the case needs further development.

- pooled trusts to the RTL for review and inclusion in the precedent file.

- trusts established outside their region, including pooled trusts with a precedent established in another region, to the RTL. The RTL will refer the trust to the appropriate region.

3. Regional Trust Lead (RTL) actions

Regional Trust Leads (RTL) review trust resource determinations for all pooled trusts, reevaluations, and appeals. When needed, RTLs request guidance from CO or the RCC, and refer trusts to other regions for their input or decision. RTLs also refer trusts back to the FO when the case needs further development. Additionally, RTLs monitor the SSITMS website and add pooled trust precedents to the SSITMS SharePoint Repository for Precedents. For instructions on establishing pooled trust precedents, see SI 01120.202C.3. in this section.

RTLs follow the trust review process steps in SI 01120.202B.3.a. to SI 01120.202B.3.d. in this section.

a. Reviewing pooled trust resource determinations

Select the case from the SSITMS Summary listing page or the link in the email notification and:

- Click the “Details/Update” tab.
- Review information provided by the Claims Specialist.
- Determine if consultation with CO or the RCC is necessary.
- Submit pooled trust documents to the RCC for a legal opinion when necessary.
- Provide the review results in the Remarks field.
- Update Trust Status to “Completed by RTL.”
- Indicate “agree” or “disagree” with the FO’s determination in Results and click “Submit.”

NOTE: Add a precedent to the SSITMS SharePoint Repository for Precedents for all pooled trusts that do not have a precedent

on file. Use the SSITMS "Help" link to access the precedent library on the SharePoint site.

For instructions on referring pooled trusts to the RCC and establishing and managing pooled trust precedent files, see SI 01120.202C.3. in this section.

b. Email notifications for reevaluation requests

RTLs will receive an email notification whenever a trust resource determination needs reevaluation. To view the reevaluation request, access the case from the SSITMS Summary page listing.

c. Reevaluate trust resource determinations

To reevaluate the trust resource determination, follow the steps listed in SI 01120.202B.3.a in this section. The Claims Specialist who submitted the case and the Claims Specialist's FO mailbox will receive an automated email notification when the RTL makes a decision. The subject line will show "Response to Trust for Reevaluation."

d. Appeal requests

SSITMS sends the RTL an email notification when he or she needs to review an FO determination on a trust reconsideration. An RTL who did not review the initial trust determination should review the FO reconsideration determination. To view appeal requests, access the case from the SSITMS Summary page listing or from the link in the email notification. To address the appeal request, follow the steps listed in SI 01120.202B.3.a. in this section.

The Claims Specialist who submitted the case and the Claims Specialist's FO mailbox will receive an automated email notification when the RTL makes a decision. The subject line will show "Response to SSI Trust Recon for Review."

C. Procedure For Reviewing Pooled Trusts And Establishing Precedent Files

To determine the resource status of a pooled trust, review the most recent version available of the master pooled trust for compliance with the requirements of section 1917(d)(4)(C) of the Act. Do not review prior versions of the master pooled trust agreement.

EXCEPTION: If the master trust has been amended, but the amendment does not cover the entire period of review, you may need to review the prior version(s) of the trust. See examples in SI 01120.202H.8.d. in this section.

For all IC and PE cases where an individual alleges establishment of a pooled trust subject to SI 01120.203:

- Review a copy of the master trust agreement, associated documents (such as any amendments) and his or her joinder agreement; and

- Determine whether a precedent for the pooled trust exists. Use the SSITMS "Help" link to access the SSI Trust Precedent SharePoint site that houses the precedent library.

- Review the precedent, if one exists. Trust precedents contain information to help you with evaluation of the pooled trust.

IMPORTANT: Do not share copies of trust precedents, RCC opinions, or other materials in the SSITMS SharePoint precedent file with the public, attorneys, or non-SSA personnel. The only precedents available to the public are in the PS part of the POMS instructions.

1. Procedure for reviewing pooled trusts that have not been amended and amended pooled trusts whose amendment applies to all prior versions

a. The pooled trust precedent is current and there has not been a policy change since the precedent was established

If the precedent in SSITMS SharePoint is for the most current version of the master pooled trust, and the applicant or recipient submits a trust agreement that is the same version or an older version of the master agreement amended by the current version, you do not need to review the master agreement submitted to make your determination. Use the resource determination in the precedent file. However, review the joinder agreement for SI 01120.203 compliance. Additionally, note that, before using the resource determination in the precedent file, you should check to make sure that there have been no policy changes since the precedent determination that would affect the trust resource determination.

After determining the resource status of the master pooled and joinder agreements:

- Document your determination and fax the master agreement and joinder agreement into the appropriate EF.

- Continue the trust review process in SI 01120.202B in this section. See the example of a current precedent for a pooled trust in SI 01120.202H.8.a. in this section.

b. The pooled trust precedent is current but there has been a policy change since the precedent was established

If the precedent in SSITMS SharePoint is for the most current version of the master pooled trust, but there has been a policy change since the precedent was established that may affect the resource determination for the master pooled trust, review the master agreement and joinder agreement for SI 01120.203 compliance, and take the following actions:

- Document your determination and fax the master agreement and joinder agreement into the appropriate EF.

- Continue the trust review process in SI 01120.202B. See the example of a current precedent for a pooled trust in SI 01120.202H.8.a. in this section.

c. The pooled trust precedent is not for the current version of the trust or there is no precedent

If the applicant or recipient submits a new or amended version of a pooled trust master agreement and/or the precedent in the SSITMS SharePoint is not for the most current version of the trust or no precedent exists, review the master pooled agreement and joinder agreement for SI 01120.203 compliance. Then take the following actions:

- Document your determination and fax the master agreement and joinder agreement to the appropriate EF.

- Continue the trust review process in SI 01120.202B in this section. See the example of an outdated precedent for a pooled trust in SI 01120.202H.8.b. in this section.

NOTE: RTLs submit the pooled trust documents to the Regional Chief Counsel (RCC) for a trust resource evaluation and update or establish a precedent in SSITMS SharePoint.

2. Procedure for reviewing amended pooled trusts whose amendment does not apply to all prior versions

If you encounter a situation where an applicant or recipient submits a pooled trust and the pooled trust manager established a new version of the master agreement that does not amend prior versions, take the following actions:

- If there is a precedent for the version of the agreement submitted, follow instructions in SI 01120.202C.1.a. in this section.

- If there is not a precedent for the version of the agreement submitted, follow instructions in SI 01120.202C.1.b. and SI 01120.202C.3. in this section. See example SI 01120.202H.8.c. in this section.

- Submit all versions of the pooled trust to the RTL by using SSITMS, including those with precedents.

3. Procedure for RTLs for establishing pooled trust precedents

a. Information in pooled trust precedents

Before adding or updating a pooled trust precedent in SSITMS SharePoint, RTLs must consult with the RCC. After the RCC evaluates the pooled trust documents, RTLs upload the trust precedent and related documents to the SharePoint site. Pooled trust precedents in SSITMS must contain the following information:

- A copy of the master trust agreement;

- A sample of a joinder agreement;

- A copy of the RCC evaluation of the pooled trust; and

- A precedent summary sheet containing the following information:

  a. Title of the pooled trust.

  b. Establishment date.

  c. Amendment dates.

  d. Resource determination (whether the master pooled trust agreement meets the requirements for exception) and date.

  e. Evaluation of whether the master pooled trust meets each of the requirements in SI 01120.203B.2. State in the summary the specific reason why the pooled trust does not meet any requirement.

  f. Conflicting trust provisions that render the trust countable: for example, a noncompliant early termination provision.

IMPORTANT: Do not share copies of trust precedents, RCC opinions, or other materials in the SSITMS SharePoint precedent file with the public, attorneys, or non-SSA personnel. The only precedents that are available to the public are in the PS Part of the POMS instructions.

b. Regional Chief Counsel (RCC) reviews all pooled trusts

RTLs must consult with the RCC before establishing and updating trust precedents in SSITMS SharePoint. The RCC reviews all pooled trusts and provides a written evaluation on whether they meet the requirements for exception in section 1917(d)(4)(C) of the Act.

c. RTLs manage the precedent files on the SSITMS SharePoint site

After consulting with the RCC, RTLs add precedents to SSITMS SharePoint for all pooled trusts that do not have a precedent on file and update the precedents when pooled trusts have been amended.

1. **Amended trusts that amend all prior versions**

For amended trusts that amend all prior versions, update the precedent summary sheet with the most recent information for the pooled trust and note that the amendments apply to all prior versions of the trust. For example:

- Add an amendment date and any reasons why the amended pooled trust is or is not in compliance.
- Add to SSITMS the most recent versions of the master pooled trust and joinder agreement.
- Do not delete prior versions of the pooled trust. Instead, identify them as "for historical purposes only."

2. **Amended trusts that do not amend all prior versions**

For amended trusts that do not amend all prior versions, keep a precedent for each version of the master agreement. For example, keep and update the prior version of a precedent summary sheet, a copy of the master trust agreement, and a copy of the RCC evaluation for each version of the pooled trust.

D. Summary For Trust Development

1. Trust development

The following is a summary of trust development presented in step-action format (for full development instructions, see SI 01120.202A in this section):

STEP	ACTION
1	Obtain and review a copy of the trust and all related documents. For instructions on the trust review process for Indian Gaming Regulatory Act (IGRA) trusts, see SI 01120.195.

STEP	ACTION
2	Does the trust contain **any** assets of the individual? • If **no**, follow instructions in SI 01120.200. **STOP.** **NOTE:** If the individual adds any of his or her assets to a third party trust on or after 01/01/00, redevelop the trust per SI 01120.201 through SI 01120.204. • If **yes**, go to **Step 3**.
3	Determine the date the individual transferred his or her assets to the trust. To know which instruction to follow, see SI 01120.201C.1. and SI 01120.202A.1.c. in this section. • If the individual transferred any of his or her assets prior to 01/01/00, follow instructions in SI 01120.200. **STOP.** • If the individual transferred his or her assets in the trust only on or after 01/01/00, go to **Step 4**.
4	Consult national and regional instructions to determine if the trust is revocable or irrevocable (for determining revocability of a trust, see SI 01120.202A.3. in this section and SI 01120.200D): • If you are unable to make a determination, consult with your RO programs staff. • If the trust is revocable, go to **Step 5**. • If the trust is irrevocable, go to **Step 6**. For policy on irrevocable trusts, see SI 01120.201D.2.

STEP	ACTION
5	The trust is a resource unless an exception applies. To see if an exception applies, go to SI 01120.203. For treatment of revocable trusts, see SI 01120.201D.1. Issue a manual notice per SI 01120.204 and include the following information: • The applicable section of the trust (or any joinder agreement, if applicable) containing the problematic language or issue; • The POMS citation that contains the policy requirements on that subject; and • The following language indicating where the POMS can be found on-line – "You can find the Program Operations Manual System (POMS) on the Social Security website at https://secure.ssa.gov/poms.nsf/Home?readform."
6	For the policy on irrevocable trusts see SI 01120.201D.2. Does the trust also contain assets of a third party? • If **yes**, determine the amounts in the trust attributable to the individual and the third party. Develop resource treatment of the portion attributable to the third party under SI 01120.200. Go to **Step 7** for the portion of the trust attributable to the individual. • If **no**, go to **Step 7**.

STEP	ACTION
7	Are there **any** circumstances that would allow payment from the trust to or for the benefit of the individual? • If **no**, the trust is not a resource. To see if a transfer penalty is applicable, refer to SI 01150.100. • If **yes**, the trust is a resource in the amount that the trust can pay out from the portion attributable to the individual unless an exception applies. To see if an exception applies, go to SI 01120.203. Issue a manual notice as instructed in **Step 5** in this table.

2. FO actions during the trust review process

The following is a summary of FO actions during the trust review process presented in step-action format (for full development instructions, see SI 01120.202A and SI 01120.202B.1. in this section):

Step	Action
1	Determine whether the trust is a countable resource. To help you evaluate the trust, follow the steps in SI 01120.202D.1. in this section. Additionally, for pooled trusts, follow instructions in SI 01120.202C in this section. Go to **step 2.** For instructions on the trust review process for Indian Gaming Regulatory Act (IGRA) trusts, see SI 01120.195.
2	Submit your trust resource determination to the RTRT for review using the SSITMS website. Follow instructions in SI 01120.202B.1.a. in this section. Go to **step 3.**
3	When SSITMS sends the automated notification that the RTRT completed review of the trust, access SSITMS to review the results. Go to **step 4**

Step	Action
4	Do you agree with the RTRT's review of the trust? • If yes, change the trust status in SSITMS to "FO effectuated" at the point when you are ready to adjudicate the IC or close the PE event. Do not change the status until all issues within the IC or PE event are resolved. **STOP.** • If not, request a reevaluation of the trust. For information on how to request a reevaluation, see SI 01120.202B.1.c. in this section. **NOTE:** You have to wait for the reevaluation's results to adjudicate your claim event.

3. RTRT actions during the trust review process

The following is a summary in step-action format indicating the RTRT's actions in the trust review process (for full development instructions, see SI 01120.202B.2. in this section):

STEP	ACTION
1	Access SSITMS to select the case with "pending" trust status or from the link in the email notification. Go to **step 2.** For instructions on the trust review process for Indian Gaming Regulatory Act (IGRA) trusts, see SI 01120.195.
2	Is the trust a pooled trust? • If yes, refer to RTL for review. STOP. • If not, go to **step 3.**

STEP	ACTION
3	Review the FO's trust resource determination. Use information documented in the SSI Claims System, eView, and CFUI to help with your review of the trust. Go to **step 4.**
4	Determine whether you agree or disagree with the FO's determination and provide feedback in the remarks section of SSITMS and document the decision on a DROC or SSA-5002. Go to **step 5.**
5	Select "Edit" to change the trust status to "Review Completed" and indicate in "Results" whether you agree or disagree with the Claims Specialist's trust resource determination. Go to **step 6.**
6	Submit your response. **STOP.**

4. RTL actions during the trust review process

The following is a summary in step-action format indicating the RTL's actions in the trust review process (for full development, see SI 01120.202B.3. and SI 01120.202C in this section):

STEP	ACTION
1	Access SSITMS to select the case from the SSITMS listing or from the link in the email notification. Go to **step 2.** For instructions on the trust review process for Indian Gaming Regulatory Act (IGRA) trusts, see SI 01120.195.

STEP	ACTION
2	Is this a reevaluation request? If yes, go to **step 3.** If no, go to **step 6.**
3	A RTL who did not review the initial determination reviews the FO and TR determinations and the remarks section to see the reason for the disagreement. Go to **step 4.**
4	Determine if CO or RCC consultation is necessary to resolve the disagreement. Contact CO or the RCC if necessary and go to **step 5** once you are ready to make a decision. If CO or RCC input is not necessary, go to **step 5.**
5	Make a determination on the reevaluation and submit your response via SSITMS. **STOP.**
6	Is the trust established outside your region? • If yes, refer the trust to the appropriate region for input. • If not, go to **step 7.**

STEP	ACTION
7	Review the FO's trust resource determination for the pooled trust. **NOTE:** If the trust determination is for a new pooled trust, add a new precedent to SharePoint. For pooled trusts, you must consult with the RCC before establishing and updating a precedent in SharePoint. Contact the RCC or CO if you need input while evaluating the trust. Go to **step 8.**
8	Determine whether you agree or disagree with the FO's determination and provide feedback in the remarks section of SSITMS and document the decision on a DROC or SSA-5002. Go to **step 9.**
9	Select "Edit" to change the status to "Completed by RTL" and indicate in "Results" whether you agree or disagree with the Claims Specialist's trust resource determination. Go to **step 10.**
10	Submit your response. **STOP.**

E. Procedure For Documenting Trusts

1. Documenting trusts in the SSI Claims System

Document the existence of a trust in the SSI Claims System by answering **Yes** on the Resource Selection (RMEN) page to the **Trusts** question. A **Yes** answer will bring the **Trust (RTRS) page** into the path.

- Complete the applicable trust questions on the Trust page.

- Enter the value of a trust that does not count as a resource in **excluded amount,** if an exception applies, and select the exclusion type, for example, meets special needs trust requirements or undue hardship, from the **exclusion reason** drop down menu.

- Record all information used in determining whether the trust is a resource and whether it generates income in the Trust page in the SSI Claims System. For more information on what information to record, see MS INTRANETSSI 013.005.

- Record your conclusion and rationale on the **DROC** screen or SSA-5002 and fax to NDRED.

2. Documenting trust on paper forms

Document the existence of a trust on the appropriate resources question on the form or in Remarks.

Record all information used in determining whether the trust is a resource and whether it generates income. Record your rationale and determination on an SSA-5002, and fax to NDRED. For non-SSI Claims Systems cases, document evidence on the **EVID** screen. For information on electronic evidence documentation and retention, see GN 00301.286.

3. Documentation requirements in all cases

Include in the file:

- A copy of the trust document;

- Copies of any signed documents between organizations making payments to the individual and the individual legally entitled to such payments, if the payments have been assigned, either revocably or irrevocably, to the trust or trustee;

- Source of assets funding the trust;

- Records of any payments or disbursements (such as ledgers and bank statements) from the trust, as necessary; and

- Any other pertinent documents, such as court documents.

F. Procedure For Coding Trusts

1. Coding Medicaid trusts on paper

Code a **Q** and the date of establishment of the trust in the Third party Liability (PT) field of the Supplemental Security Record (SSR) if the trust qualifies as a Medicaid Trust.

2. Coding the CG field

Code **RE06** or **RE07**, as applicable in the CG (case characteristics) field to indicate a revocable or irrevocable trust, respectively. For a list of CG code entries, see SM 01301.820.

G. Procedure For Medicaid Determination

1. When not to make Medicaid eligibility determination

If the individual resides in a section 1634 State (in which SSA makes Medicaid determinations on behalf of the State), do not attempt to make a Medicaid eligibility determination since the Medicaid determination regarding the trust may differ from the SSI eligibility determination. For a discussion of Section 1634 States, see SI 01715.010A.3.

2. Prepare manual notice

Posteligibility discovery of a trust in a section 1634 State will not result in a correct automated notice paragraph. Suppress any automated notice and prepare a manual notice using Medicaid Paragraph 1147 in NL 00804.110.

NOTE: If the individual is blind or visually impaired, see instructions on the special blind or visually impaired notice options in NL 01001.010.

3. Send trust information to State

a. 1634 States

Copy the trust information and send it to the same address used for assignment of rights (AOR) and third party liability (TPL) information. See regional instructions or contact your RO staff for the correct address.

b. 209(b) and SSI criteria States

In States where SSA does not have an agreement to make the Medicaid eligibility determination:

- copy the trust information and see, as applicable, regional instructions SI NY01150.110, SI DEN01150.110, and SI BOS01150.110; or

- contact your RO staff for the correct address to send the information. For a discussion of section 209(b) and SSI criteria States, see SI 01715.010A.1. and SI 01715.010A.2.

H. Examples Of Trust Evaluations

1. Example of when the trust principal is a resource

a. Situation

A 20-year-old SSI claimant is the beneficiary of an irrevocable trust. The court established the trust in 02/2014 with the proceeds of the settlement of a lawsuit. The claimant lives with her parents, who support her fully. Her parents filed a medical malpractice suit on her behalf against her doctor. The doctor's insurance company settled the lawsuit before it went to trial for $400,000. The court approved the settlement agreement, whereby the insurance company placed the money in an irrevocable trust for the claimant, naming her parents as trustees. The trust permits payments for the claimant's special needs other than support and maintenance. The trust does not provide for reimbursement of Medicaid expenditures to the State on behalf of the claimant.

b. Analysis

The trust was established with assets of the claimant. Although she never received them directly, the settlement proceeds meet the definition of assets in SI 01120.201B.2. Her parents, acting on her behalf, agreed to the settlement that established the trust. The court directed the proceeds to establish the trust after 01/01/00, so the instructions in SI 01120.201 apply. Although the trust is legally irrevocable under State law, it may be a resource because it permits disbursement of all the funds in the trust to or for the benefit of the claimant. The trust does not meet the exception for a special needs trust under SI 01120.203 because it does not require reimbursement of expenditures to the State(s) that provided medical assistance. Therefore, the trust is a resource in its full amount, $400,000. The claimant is ineligible due to excess resources.

2. Example of when the individual's assets form only part of the trust

See the example of when the individual's assets form only a part of the trust in SI 01120.201C.2.c.

3. Example of when part of the individual's assets in the trust is countable

a. Situation

Bill Murray is an SSI recipient. His wife, who is not eligible, won $150,000 in the State lottery, of which she received $85,000. She used the money to establish the Murray Family Irrevocable Trust. The trust stipulates that she must use $40,000 for their daughter's college education. She can use the remainder of the money for a number of purposes, including supplemental needs for Bill and income payments to herself, at the discretion of the trustee.

b. Analysis

Since Mrs. Murray established the trust with her assets and she can only pay $45,000 to or for the benefit of Mr. Murray, we will count $45,000 as a resource. We consider the remaining $40,000 in the trust a transfer of resources that we must evaluate under SI 01150.100.

4. Example of when a third party trust is not a resource

a. Situation

Woody King is a disabled young adult. In 08/2014, his parents established an irrevocable special needs trust on his behalf with $100,000 of their own funds. Prior to attaining age 18, he was ineligible because of the income and resources of his parents through deeming. Now that he has attained age 18, he is reapplying for SSI.

b. Analysis

Mr. King's resources do not include the trust established by his parents since he was not the grantor of the trust and it is irrevocable. The trust is not a countable resource for SSI purposes. However, payments from the trust, to or for the benefit of Mr. King, may be income.

NOTE: A third party trust can be revocable and not count as a resource as long as the trust beneficiary does not have the legal authority to revoke the trust or direct the use of the trust assets.

NOTE: If the SSI recipient is the beneficiary of an unfunded third party trust, — for example, the trust will be funded upon the

death of a parent — it is not necessary to review and submit the unfunded trust to SSITMS for SSI eligibility purposes until it is funded.

5. Example of when the trust is self-established but no payment can be made to or for the benefit of the individual

a. Situation

Arnie Becker is permanently disabled due to an injury he suffered in an automobile accident. Mr. Becker received a $3.5 million dollar insurance settlement that he put into two irrevocable trusts. The first trust is a discretionary trust providing $2.5 million for the education and welfare of his children. The second trust is a charitable trust containing $1 million. The trustee must distribute annually the earnings on the trust in the form of scholarships for students at a nearby college.

b. Analysis

Although Mr. Becker's trusts constitute a very large amount of money, none of the trust assets can be disbursed to him or to provide for his or his spouse's needs. SSA does not count the trusts as resources for SSI purposes. However, the establishment of the trusts is a transfer of resources under SI 01150.100. Mr. Becker will likely be ineligible for SSI for at least 36 months.

6. Example of a burial trust

a. Situation

Mattie Walker, an SSI recipient, wishes to plan her funeral through a prepaid agreement. In the State where she lives, recipients of public assistance, including SSI, must place the funds for their prepaid agreement into a funeral trust. Ms. Walker enters into a contract for a casket and vault valued at $5,000, and the funeral services she wants are valued at $1,500. She places the full amount in a revocable trust. As required by State law, the trust shows Ms. Walker as the grantor and the funeral home as the trust beneficiary.

b. Analysis

The revocable funeral trust is a resource under SSI burial trust policy in SI 01120.201H.2. This is the case because Ms. Walker is the grantor of the trust and the trust is revocable. The purpose of the trust is irrelevant for purposes of trust policy (see SI 01120.201C.2.d.).

However, since the trust is a resource, the SSI resource exclusions for burial spaces and funds apply. We exclude the vault and the casket as burial spaces. We exclude the $1,500 for funeral services under the $1,500 burial funds exclusion. Therefore, we exclude the total value of the trust. If the amount of funds for funeral services exceeds $1,500 (other than interest or appreciation), we would exclude up to $1,500, and the remaining amount would be countable.

For the burial space exclusion, see SI 01130.400, and for the burial fund exclusion, see SI 01130.409 through SI 01130.425.

NOTE: If a trust does not permit the use of the funds in the trust for burial, the burial exclusions are generally not applicable. Upon the individual's death, the individual would no longer be a beneficiary of the trust, unless the trust specifically provides otherwise. Therefore, individuals cannot designate $1,500 of an otherwise countable trust as a burial fund, unless the trust permits such a use. If you are unable to make this determination, consult with your RO programs staff using vHelp.

7. Example of a trust that includes an excluded resource

a. Situation

Armand Gonzales is a disabled adult SSI recipient. Mr. Gonzales received an award of $250,000 in a lawsuit in 06/2010 and the money went directly into a trust for his benefit. The trust does not meet any of the exceptions to the general SSI trust policy, so the trust would be a countable resource for SSI purposes. As a result, Mr. Gonzales has excess resources in 07/2010 (the month after the month in which the trust was established). The trustee uses all of the money in the trust to purchase a house for Mr. Gonzales (the trust holds the property title), and he moves into the home in 01/2011, when construction is completed. He contacts SSA and informs us of what has happened.

b. Analysis

Mr. Gonzales is ineligible due to excess income in 06/2010 and excess resources from 07/2010 to 01/11. When he moves into the house in 01/2011, we consider him to be living in his own home because he has an equitable ownership interest under a trust. The house qualifies for the home exclusion as of 02/2011, and if Mr. Gonzales meets all other SSI eligibility requirements, we will reinstate his benefits. For information on the home resource exclusion, see SI 01120.200F.1.

8. Examples of pooled trusts

a. Pooled trust precedent is current

Andy Smith filed for SSI benefits on 04/21/09. During his initial interview, he provided The Brothers of Townsville Master Pooled Trust and his joinder agreement for our evaluation. The master agreement states that the trust was established on 11/12/07 and there is no evidence that it has been amended.

The precedent summary sheet in SSITMS SharePoint shows that the trust was established on 11/12/07 and that it does not have any amendment dates. It also states that the master pooled trust meets the requirements of SI 01120.203 for exception.

Since SSITMS SharePoint has a current precedent on file for The Brothers of Townsville Master Pooled Trust, and there have not been any trust policy changes since 11/12/07 that would affect the resource determination in the precedent, we adopt the precedent determination for Mr. Smith's pooled trust, evaluate the joinder agreement for compliance, document the DROC, and submit our request for RTRT review via SSITMS.

b. Pooled trust precedent is not current

During Paul Baker's redetermination (RZ) on 06/02/10, he provided The Brothers of Townsville Master Pooled Trust and his joinder agreement for our evaluation.

The master agreement states the trust was established on 11/12/07 and amended on 10/24/09.

The precedent summary sheet in SSITMS SharePoint shows the trust was established on 11/12/07, but does not indicate any amendments.

The precedent in SSITMS SharePoint is not up-to-date. Therefore, we evaluate the master and joinder agreements for compliance, document our determination, and submit our determination via SSITMS for review.

Once the RCC evaluates the amended trust agreement, the RTL updates the precedent summary sheet in SSITMS SharePoint with the new determination information and a copy of the amended trust and updates all other trust-related documents.

c. No pooled trust precedent on file

Janet Moore reports during her RZ interview on 10/08/15 that she is a trust beneficiary of the Greater Los Angeles Master Pooled Trust. Her account was established in 07/2015. Ms. Moore submits her trust documents for our evaluation. We do not have a precedent in SSITMS SharePoint for the Greater Los Angeles Master Pooled Trust.

The Greater Los Angeles Master Pooled Trust was established on 05/15/08 and amended 06/04/12. The amendments do not apply to the prior version. We do not need to evaluate the 05/15/08 version of the master agreement to make a determination in Ms. Moore's case, because her trust was established under the 06/04/12 amended version of the trust. Therefore, we evaluate the 06/04/12 amended master trust agreement and joinder agreement for compliance and submit our determination via SSITMS for review.

Once the RCC evaluates the trust, the RTL creates a precedent for the Greater Los Angeles Master Pooled Trust that includes all the items listed in SI 01120.202C.3. in this section.

If another applicant who has a trust established under the original 2008 version of the trust submits a copy later (because the 2012 amendments do not apply to the 2008 version), establish a separate precedent for the 05/15/08 version of the trust.

d. Reviewing the most recent version of a master pooled trust

Scenario A: trust precedent is not current and 90-day trust amendment period does not apply

Gary Thompson has been a trust beneficiary of The Brothers of Townsville Master Pooled Trust since 02/01/08 and an SSI recipient since 2003. He reported the trust for the first time during an RZ interview in 08/20/15 and submitted his master and joinder trust documents. The Brothers of Townsville Master Pooled Trust has been amended three times, on 10/24/09, 03/18/12, and 02/15/13, and the amendments apply to prior versions. Our precedent file is not current because it shows that the master trust meets the requirement for exception based on the amended version of 03/18/12.

During Mr. Thompson's RZ, we evaluate the 02/15/13 amended version of the master pooled trust, because it is the most recent, and his joinder agreement. The RCC finds that the 02/15/13 version does not meet the requirements for exception. We document the trust determination and count the balance of the trust as a resource back to the start of the period of review based on administrative finality.

NOTE: Mr. Thompson does not qualify for a 90-day trust amendment period because his trust was not previously excepted from resource counting. A trust that either is newly formed or was not previously excepted from resource counting for that individual must meet all of the criteria in SI 01120.199 through SI 01120.203 and SI 01120.225 through SI 01120.227, to be excepted under section 1917(d)(4)(A) or 1917(d)(4)(C). Do not except such a trust from resource counting unless the trust meets all of these requirements.

Scenario B: trust precedent is not current and 90-day trust amendment period applies

Gary Thompson has been a trust beneficiary of The Brothers of Townsville Master Pooled Trust since 02/01/08 and an SSI recipient since 2003. We first excepted his pooled trust from resource counting in 03/2008. During an RZ interview on 08/20/15, Mr. Thompson submitted a copy of 02/15/13 amended master and joinder trust documents. The Brothers of Townsville Master Pooled Trust has been amended three times, on 10/24/09, 03/18/12, and 02/15/13, and the amendments apply to prior versions. Our precedent file is not current because it shows that the trust meets the requirements for exception as a resource based on the amended version of 10/24/09.

During Mr. Thompson's RZ, we evaluate the 02/15/13 version of the master pooled trust, because it is the most recent, and his joinder agreement. The RCC finds that the 02/15/13 version does not meet the requirements for exception because the early termination provision is noncompliant.

Since we had previously excepted The Brothers of Townsville Master Pooled Trust in Mr. Thompson's record (in 03/2008), we follow instructions in SI 01120.199 and offer him 90 days to amend the trust. On 11/11/15, the trust is amended and becomes compliant. Since the trust was amended during the amendment period, the trust remains excepted from resource counting during the amendment period and continuing.

Scenario C: trust amendments do not cover the entire period of review

Gary Thompson has been a trust beneficiary of The Brothers of Townsville Master Pooled Trust since 02/16/08 and an SSI recipient since 2003. We first excepted his pooled trust from resource counting in 03/2008. During an RZ interview on 08/20/15, Mr. Thompson submitted a copy of 12/15/13 amended master and joinder trust documents. The Brothers of Townsville Master Pooled Trust has been amended three times, on 10/24/09, 03/18/12, and 12/15/13. Our precedent file is not current because it shows that the trust meets the requirements for exception as a resource based on the amended version of 10/24/09.

Mr. Thompson's RZ period of review is 08/13 through 08/15. We evaluate the 12/15/13 version of the master pooled trust because it is the most recent and covers the period 12/13 to 08/15 and the 03/18/12 version of the trust because it is applicable to the other part of the period of review (08/13 – 12/13). (The 12/15/13 version of the trust amended the 03/18/12 version of the trust, but only after 12/15/13. The 12/15/13 amendment is not retroactive to 03/18/12.) We also evaluate his joinder agreements. The RCC finds that the 03/18/12 version of the trust is compliant, but the 12/15/13

version does not meet the requirements for exception because the early termination provision is noncompliant.

Since we had previously excepted The Brothers of Townsville Master Pooled Trust in Mr. Thompson's record (in 03/2008), we follow instructions in SI 01120.199, and offer him 90 days to amend the trust. On 11/11/15, the trust is amended and becomes compliant. Since the trust was amended during the amendment period, the trust remains excepted from resource counting during the amendment period and continuing.

I. References

- SI 01120.199 Early Termination Provisions and Trusts
- SI 01120.201 Trusts established with the assets of an individual on or after 1/1/00
- SI 01120.202 Development and Documentation of Trusts Established on or After 01/01/00
- SI 01120.203 Exceptions to Counting Trusts Established on or after 1/1/00
- SI 01120.204 Notices for Trusts Established on or after 1/1/00
- SI 01120.225 Pooled Trusts Management Provisions
- SI 01120.227 Null and Void Clauses in Trust Documents

Social Security

Program Operations Manual System (POMS)

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SI 01120.203 Exceptions to Counting Trusts Established on or after January 1, 2000

A. Introduction To Medicaid Trust Exceptions

We refer to the exceptions discussed in this section as **Medicaid trust exceptions** because section 1917(d)(4)(A) and (C) of the Social Security Act (Act) (42 U.S.C. § 1396p(d)(4)(A) and (C)) sets forth exceptions to the general rule of counting trusts as income and resources for the purposes of Medicaid eligibility and can be found in the Medicaid title of the Act. While these exceptions are also Supplemental Security Income (SSI) exceptions, we refer to them as Medicaid trust exceptions to distinguish them from other exceptions to counting trusts provided in the SSI program (such as undue hardship) and because the term has become a term of common usage.

The type of trust under review dictates the development and evaluation of the Medicaid trust exceptions.

There are two types of Medicaid trusts to consider:

1. Special Needs Trusts; and

2. Pooled Trusts.

CAUTION: A trust that meets the exception to counting for SSI purposes under the statutory trust provisions of Section 1613(e) must still be evaluated under the instructions in SI 01120.200 to determine if it is a countable resource. If the trust meets the definition of a resource (see SI 01110.100B.1.), it will be subject to regular resource-counting rules.

B. Policy For Special Needs Trusts Established Under Section 1917(D)(4)(A) Of The Act Before December 13, 2016

1. General rules for special needs trusts established prior to December 13, 2016

The resource counting provisions of section 1613(e) do not apply to a trust that:

- contains the assets of an individual who is **under age 65** and is **disabled**;

- is **established for the benefit of such individual through the actions of a parent, grandparent, legal guardian, or court**; and

- provides that the **State(s) will receive all amounts remaining** in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State(s) Medicaid plan(s).

NOTE: Although this exception is commonly referred to as the special needs trust exception, the exception applies to any trust that meets the above requirements, even if it is not titled a special needs trust.

CAUTION: A trust that meets the exception to counting for SSI purposes under the statutory trust provisions of section 1613(e) must still be evaluated under the instructions in SI 01120.200 to determine if it is a countable resource. If the trust meets the definition of a resource (see SI 01110.100B.1.), it will be subject to regular resource-counting rules.

2. Under age 65

To qualify for the special needs trust exception; the trust must be established for the benefit of a disabled individual under age 65. This exception does not apply to a trust established for the benefit of an individual age 65 or older. If the trust was established for the benefit of a disabled individual prior to the date the individual attained age 65, the exception continues to apply after the individual reaches age 65.

3. Additions to trust after age 65

Additions to or augmentations of a trust after age 65 (except as outlined below) are not subject to this exception. Such additions may be income in the month added to the trust, depending on the source of the funds (see SI 01120.201J.) and may count as resources in the following months under regular SSI trust rules.

Additions or augmentations do not include interest, dividends, or other earnings of the trust or any portion of the trust meeting the special needs trust exception. If the beneficiary's right to receive payments from an annuity, support payments, or Survivor Benefit Plan (SBP) payments (see SI 01120.201J.1.e.), is irrevocably assigned to the trust, and such assignment is made when the trust beneficiary was less than 65 years of age, treat the payments paid to a special needs trust the same as payments made before the

individual attained age 65. Do not disqualify the trust from the special needs trust exception.

4. Disabled

To qualify for the special needs trust exception, the individual whose assets were used to establish the trust must be disabled for SSI purposes under section 1614(a)(3) of the Act at the time the trust was established.

In cases where you need to develop for disability (for example, a special needs trust beneficiary files for SSI aged benefits), obtain a disability determination from the disability determination services (DDS) following procedure in SI 01150.121D.2. Develop disability as of the date on which the trust was established (unless you need to develop for an earlier period for another purpose).

If DDS determines that the trust beneficiary was:

- disabled as of the date the trust was established, the special needs trust meets the disability requirements for exception; or

- **not** disabled as of the date the trust was established, evaluate the trust under instructions in SI 01120.201. Since the trust provisions take precedence over the transfer provisions (see SI 01120.201D.5.), depending on the terms of the trust, the trust may count as a resource or the transfer penalty may apply (see SI 01150.121.).

5. Definition of established

Under section 1613(e) of the Act, a trust is considered to have been "established by" an individual if any of the individual's (or the individual's spouse's) assets are transferred into the trust other than by will. Alternatively, under the Medicaid trust exceptions in section 1917(d)(4)(A) and (C) of the Act, a trust can be "established by" an individual who does not provide the corpus of the trust, or transfer any of his or her assets into the trust, but who takes action to establish the trust. To avoid confusion, we use the phrase "established through the actions of" rather than "established by" when referring to the individual who physically takes action to establish a special needs or pooled trust.

6. Established for the benefit of the individual

Under the special needs trust exception, the trust must be established and used for the benefit of the disabled individual. SSA has interpreted this provision to require that the trust be for the sole benefit of the individual, as described in SI 01120.201F.2. Other than

trust provisions for payments described in SI 01120.201F.3. and SI 01120.201F.4., any provisions will result in disqualification from the special needs trust exception if they:

- provide benefits to other individuals or entities during the disabled individual's lifetime, or

- allow for termination of the trust prior to the individual's death and payment of the corpus to another individual or entity (other than the State(s) or another creditor for payment for goods or services provided to the individual).

Payments to third parties for goods and services provided to the trust beneficiary are allowed under the policy described in SI 01120.201F.3.a.; however, such payments should be evaluated under SI 01120.200E., SI 01120.200F., and SI 01120.201I. to determine whether the payments may be income to the individual.

NOTE: A third party can be a family member, non-family member, or an entity. Do not differentiate between third parties; anyone other than the trust beneficiary (or spouse, guardian, or representative payee) is a third party.

7. Who established the trust

The special needs trust exception does not apply to a trust established through the actions of the disabled individual himself or herself. (Remember that this instruction applies specifically to special needs trusts established under section 1917(d)(4)(A) before December 13, 2016.) To qualify for the special needs trust exception, the assets of the disabled individual must be put into a trust established through the actions of:

- the disabled individual’s parent(s);

- the disabled individual’s grandparent(s);

- the disabled individual’s legal guardian(s); or

- a court.

In the case of a legally competent, disabled adult, a parent or grandparent may establish a “seed” trust using a nominal amount of his or her own money or, if State law allows, an

empty or dry trust. After the seed trust is established, the legally competent, disabled adult may transfer his or her own assets into the trust, or a second individual with legal authority (for example, a power of attorney) may transfer the disabled individual's assets into the trust. To determine if the second individual had legal authority, see SI 01120.203B.9. in this section.

8. Court-established trusts

In the case of a trust established through the actions of a court, the creation of the trust must be required by a court order for the exception in section 1917(d)(4)(A) of the Act to apply. The special needs trust exception can be met when a court approves a petition and establishes a trust by court order, as long as the creation of the trust has not been completed before the order is issued by the court. Court approval of an already created special needs trust is not sufficient for the trust to qualify for the exception. The court must specifically either establish the trust or order the establishment of the trust. An individual is permitted to petition a court for the present establishment of a trust or may use an agent to do so. The court order establishes the trust, not the individual's petition. Petitioning a court to establish a trust is not establishment by an individual.

NOTE: An individual may petition the court with a draft document of a trust as long as it is **unsigned** and not legally binding.

a. Example of a court ordering the establishment of a trust

John is a legally competent adult who inherited $250,000 in January 2015, and is an SSI recipient. His sister, Justine, petitioned the court to create and order the funding of the John Special Needs Trust. Justine also provided the court with an unsigned draft of the trust document. A month later, the court approved the petition and issued an order requiring the creation and funding of the trust. This trust meets the requirement in SI 01120.203B.8. in this section. The fact that the trust beneficiary is a competent adult and could have established the trust himself, is not a factor in the resource determination.

b. Example of a court-established trust

Henry wins a lawsuit in the amount of $50,000. As part of the settlement, the judge orders the creation of a trust in order for Henry to receive the $50,000. As a direct result of this court order, a trust was created with Henry's settlement money. The trust document lists the $50,000 as the initial principal amount in Schedule A of the trust. This trust meets the requirement for exclusion in SI 01120.203B.8. in this section.

c. Example of a court-approved trust

Jane is ineligible for SSI benefits because she has a self-established special needs trust that does not meet the requirements for exception in SI 01120.203 in this section. Jane petitioned the court to establish an amended trust and to make the order retroactive, so that her original trust would become exempt from resource counting from the time of its creation. The court approved the petition and issued a **nunc pro tunc** order stating that the court established the trust as of the date on which Jane had previously established the trust herself. The court did not establish a new trust; it merely approved a modification of a previously existing trust. The amended trust does not meet the requirement for exclusion in SI 01120.203B.8. in this section.

d. Example of a court-approved trust

Dan is the beneficiary of a special needs trust. His sister petitioned the court to establish the Dan's Special Needs Trust and submitted to the court along with the petition Dan's special needs trust that had already been signed and funded. Although the court order states that it approves and establishes the trust, the court simply approved the existence of the already established special needs trust. This trust does not meet the requirement in SI 01120.203B.8. in this section. For an example of an unsigned and unfunded trust, see SI 01120.201B.8.a.

9. Legal authority and trusts

The person or entity establishing the trust with the assets of the legally competent disabled individual or transferring the assets of the individual to the trust must have legal authority to act with respect to the assets of the individual. Attempting to establish a trust with the assets of another individual without proper legal authority to act with respect to the assets of that individual will generally result in an invalid trust under state law.

NOTE: If you question the validity of a trust, please consult with your Regional Trust Lead (RTL) or get a Regional Chief Counsel (RCC) Opinion.

For example, John is establishing a seed trust for his adult child with his own assets, and John has legal authority over his own assets to establish the trust. John would need legal authority over his child's assets only if he actually takes action with the child's assets, for example, by transferring them into a previously established trust.

A power of attorney (POA) can establish legal authority to act with respect to the assets of an individual. However, a trust established under a POA for the trust beneficiary will result in a trust that we consider to be established through the actions of the disabled individual himself or herself because the POA merely establishes an agency relationship. A POA for

the trust beneficiary may be used as the legal authority to transfer assets of the beneficiary into the trust, including, for example, a previously established seed trust.

10. State Medicaid reimbursement requirement

To qualify for the special needs trust exception, the trust must contain specific language that provides that, upon the death of the individual, the State(s) will receive all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). The State(s) must be listed as the first payee(s) and have priority over payment of other debts and administrative expenses, except as listed in SI 01120.203E in this section.

The trust must provide payback for any State(s) that may have provided medical assistance under the State Medicaid plan(s) and not be limited to any particular State(s). Medicaid payback also cannot be limited to any particular period of time; for example, payback cannot be limited to the period after establishment of the trust. If the trust does not have sufficient funds upon the beneficiary's death to reimburse in full each State that provided medical assistance, the trust may reimburse the States on a pro-rata or proportional basis.

NOTE: Merely labeling the trust as a **Medicaid payback trust**, an **OBRA 1993 payback trust**, a trust **established in accordance with 42 U.S.C. § 1396p**, or a **Medicaid qualifying trust** (MQT) is not sufficient to meet the requirements for this exception. The trust must contain specific payback language whose effect is consistent with the requirements described above. An oral trust cannot meet this requirement.

C. Policy For Special Needs Trusts Established Under Section 1917(D)(4)(A) Of The Act On Or After December 13, 2016

1. General rules for special needs trusts established on or after December 13, 2016

On December 13, 2016, the President signed into law the 21st Century Cures Act (Public Law 114-255). Section 5007 of this Act allows individuals to establish their own special needs trusts and qualify for the exception to resource counting under Section 1917(d)(4)(A) of the Social Security Act.

The resource counting provisions of section 1613(e) do not apply to a trust that:

- contains the assets of an individual who is **under age 65** and is **disabled**;

- is **established for the benefit of such individual through the actions of the *individual*, a parent, a grandparent, a legal guardian, or a court**; and

- provides that the **State(s) will receive all amounts remaining** in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State Medicaid plan.

NOTE: Although this exception is commonly referred to as the **special needs** trust exception, the exception applies to any trust meeting the above requirements, even if it is not titled as a special needs trust.

CAUTION: A trust that meets the exception to counting for SSI purposes under the statutory trust provisions of section 1613(e) must still be evaluated under the instructions in SI 01120.200, to determine if it is a countable resource. If the trust meets the definition of a resource (see SI 01110.100B.1.), it will be subject to regular resource-counting rules.

2. Who established the trust

The special needs trust exception applies to a trust established through the actions of:

- the individual;

- a parent(s);

- a grandparent(s);

- a legal guardian(s); or

- a court.

a. Power of attorney

We consider a trust established under power of attorney (POA) for the disabled individual to be established through the actions of the disabled individual because the POA establishes an agency relationship. For additional information on a POA, see SI 01120.203C.3 in this section.

b. Use of a seed trust

If the legally competent, disabled adult does not establish the trust, a parent or grandparent may establish a "seed" trust using a nominal amount of his or her own money or, if State law allows, an empty or dry trust. After the seed trust is established, the legally competent, disabled adult may transfer his or her own assets into the trust, or another individual with legal authority (such as a power of attorney) may transfer the individual's assets into the trust. To determine if the individual had legal authority, see SI 01120.203C.9. in this section.

NOTE: Under 1613(e) of the Act, a trust is considered to have been "established by" an individual if any of the individual's (or the individual's spouse's) assets are transferred into the trust other by will. Alternatively, under the Medicaid trust exceptions in 1917(d)(4)(A) and (C) of the Act, a trust can be "established by" an individual who does not provide the corpus of the trust, or transfer any of his or her assets into the trust, but who takes action to establish the trust. To avoid confusion, we use the phrase "established through the actions of" rather than "established by" when referring to the individual who physically takes action to establish a special needs or pooled trust.

3. Legal authority and trusts

The person or entity establishing the trust with the assets of the legally competent, disabled individual or transferring the assets of the individual into the trust must have legal authority to act with respect to the assets of the individual. Attempting to establish a trust with the assets of another individual without proper legal authority to act with respect to the assets of the individual will generally result in an invalid trust under state law.

NOTE: If you question the validity of a trust, please consult with your Regional Trust Lead (RTL) or get a Regional Chief Counsel (RCC) Opinion.

For example, John, who is establishing with his own assets a seed trust for his adult child, has legal authority over his own assets to establish the trust. He needs legal authority over his child's assets only if he actually takes action with the child's assets, for instance by transferring them into a previously established trust.

A power of attorney (POA) can establish legal authority to act with respect to the assets of an individual. A trust established under a POA for the disabled individual will result in a trust that we consider to be established through the actions of the disabled individual himself or herself because the POA establishes an agency relationship. A third party can use the POA for the trust beneficiary as the legal authority to establish a trust or to transfer

assets of the beneficiary into the trust, as long as the POA provides the proper authority to do so.

4. Additional requirements for a trust established on or after December 13, 2016

Except as noted in SI 01120.203C.1. through SI 01120.203C.3. in this section, the requirements for an exempt special needs trust remain the same as those for a trust established prior to December 13, 2016. For additional requirements and guidance, see SI 01120.203B.2. through SI 01120.203B.6., SI 01120.203B.8., and SI 01120.203B.10. in this section.

D. Policy For Pooled Trusts Established Under Section 1917(D)(4)(C) Of The Act

1. General rules for pooled trusts

A pooled trust contains the assets of many different individuals, each held in separate trust accounts and established through the actions of individuals for separate beneficiaries. By analogy, the pooled trust is like a bank that holds the assets of individual account holders. A pooled trust is established and managed by a non-profit organization. The pooled trust instruments usually consist of an overarching "master trust" and a joinder agreement that contains provisions specific to the individual beneficiary.

Whenever you are evaluating the trust, it is important to distinguish between the master trust, which is established through the actions of the nonprofit association, and the individual trust accounts within the master trust, which are established through the actions of the individual or another person or entity for the individual, through a joinder agreement.

The resource-counting provisions of section 1613(e) of the Act do not apply to a trust containing the **assets of a disabled individual** that meets the following conditions:

- The pooled trust is established and managed by a **nonprofit association**;
- **Separate accounts** are maintained for each beneficiary, but assets are pooled for investing and management purposes;
- Accounts **are established solely for the benefit of the disabled individuals;**

- The account in the trust is **established through the actions of the individual, a parent, a grandparent, a legal guardian, or a court**; and

- The trust provides that, to the extent that any amounts remaining in the beneficiary's account, upon the death of the beneficiary, are not retained by the trust, **the trust will pay to the State(s)** from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under State Medicaid plan(s).

NOTE: There is no age restriction for this exception. However, a transfer of resources into a trust for an individual age 65 or over may result in a transfer penalty (see SI 01150.121).

CAUTION: A trust that meets the exception to counting for SSI purposes under the statutory trust provisions of 1613(e) must still be evaluated under the instructions in SI 01120.200, to determine if it is a countable resource.

2. Disabled

To qualify for the pooled trust exception, the individual whose assets were used to establish the trust account must be disabled for SSI purposes under section 1614(a)(3) of the Act at the time the trust was established. This also includes individuals age 65 and older.

In cases where you need to develop for disability (for example, a pooled trust beneficiary files for SSI aged benefits), obtain a disability determination from the Disability Determination Services (DDS) following procedure in SI 01150.121D.2. Develop disability as of the date on which the trust account was established (unless you need to develop for an earlier period for another purpose). If DDS determines that the trust beneficiary was:

- disabled as of the date the trust account was established, the trust account meets the disability requirement for exception; or

- **not** disabled as of the date the trust account was established, evaluate the trust under instructions in SI 01120.201. Since trust provisions take precedence over the transfer provisions (see SI 01120.201D.5.), depending on the terms of the trust, the trust might count as a resource or the transfer of penalty may apply (see SI 01150.121.).

3. Nonprofit association

The pooled trust must be established and maintained by the actions of a nonprofit association. For purposes of the pooled trust exception, a nonprofit association is an organization established and certified under a State nonprofit statute. For development of nonprofit associations, see SI 01120.203J. in this section. For more information on pooled trust management provisions, see SI 01120.225.

4. Separate account

A **separate account within the trust** must be maintained for each beneficiary of the pooled trust. However, for purposes of investment and management of funds, the trust may pool the funds in the individual accounts. The trust must be able to provide an individual accounting for each individual.

5. Established for the sole benefit of the individual

Under the pooled trust exception, the individual trust account must be established for the sole benefit of the disabled individual. (For a definition of sole benefit, see SI 01120.201F.1.) Other than the payments described in SI 01120.201F.3. and SI 01120.201F.4., this exception does not apply if the trust account:

- provides a benefit to any other individual or entity during the disabled individual's lifetime; or

- allows for termination of the trust account prior to the individual's death and payment of the corpus to another individual or entity. For more information on early termination provisions and trusts, see SI 01120.199.

NOTE: In general, we do not limit master trusts to allow only sub-accounts that are established by parties listed in section 1917(d)(4)(C)(iii) of the Act. As pooled trusts can have SSI and non-SSI beneficiaries, we would not count a trust solely because the master trust agreement permitted a non-SSI trust to be established by someone other than those listed in section 1917(d)(4)(C)(iii).

6. Who established the trust account

In order to qualify for the pooled trust exception, the trust **account** must have been established through the actions of:

- the disabled individual himself or herself;
- the disabled individual's parent(s);
- the disabled individual's grandparent(s);
- the disabled individual's legal guardian(s); or
- a court.

A legally competent, disabled adult who is establishing or adding to a trust account with his or her own assets has the legal authority to act on his or her own behalf. A third party establishing a trust account on behalf of a disabled individual with that individual's assets must have legal authority to act with regard to the assets of the individual. An attempt to establish a trust account by a third party with the assets of a disabled individual without the legal right or authority to act with respect to the assets of that individual will generally result in an invalid trust under state law. If there is a question regarding authority, consult your precedents or regional chief counsel.

A power of attorney (POA) is legal authority to act with respect to the assets of an individual. A pooled trust account may be established under POA given by the individual, a parent, or a grandparent.

NOTE: A representative payee must have legal authority to establish a trust or transfer funds into a trust for the disabled individual. If a representative payee attempts to establish a trust account with the assets of a disabled individual without the legal right or authority to act with respect to the assets of that individual, this will generally result in an invalid trust under state law.

7. Court-established trusts

In the case of a trust account established through the actions of a court, the creation of the trust account must be required by a court order for the exception in section 1917(d)(4)(C) of the Act to apply. That is, the pooled trust exception can be met when courts approve petitions and establish trust accounts by court order, so long as the execution of the trust account joinder agreement and funding of the trust have not been completed before the order is issued by the court. Court approval of an already executed pooled trust account joinder agreement is not sufficient for the trust account to qualify for the exception. The

court must specifically either establish the trust account or order the establishment of the trust account.

a. Example of a court ordering establishment of a trust account

John is a legally competent adult who inherited $250,000 and is an SSI recipient. His sister, Justine, petitioned the court to create and order the funding of an account in the Chesapeake Pooled Trust. Justine also provided the court with an unsigned draft of the trust document. A month later the court approved the petition and issued an order requiring the creation and funding of the trust account. This trust account meets the requirement in SI 01120.203D.6. in this section. The fact that the trust beneficiary is a competent adult and could have established the trust account himself, is not a factor in the resource determination.

b. Example of a court-established trust account

Mary, a legally incompetent SSI recipient, wins a lawsuit in the amount of $50,000. As part of the settlement, the judge orders the creation of a pooled trust account in order for Mary to receive the $50,000. As a direct result of this court order, a pooled trust account was created with Mary's settlement money. The pooled trust records and documentation of the initial deposit list the $50,000 as the initial principal amount. This trust account meets the requirement in SI 01120.203D.6. in this section.

c. Example of a court-approved trust account

Jane is ineligible for SSI benefits because she has a self-established pooled trust account that does not meet the requirements for exception in SI 01120.203D stating the pooled trust has to be established and managed by a nonprofit association. A for-profit association is managing Jane's pooled trust. The pooled trust changed management to a nonprofit association to satisfy the requirement. Jane petitioned the court to establish an amended trust account joinder agreement and to make the order retroactive, so that her original trust account would become exempt from resource counting from the time of its creation. The court approved the petition and issued a **nunc pro tunc** order stating that the court established the trust account as of the date on which Jane had previously established the trust account herself. The amended trust account joinder agreement does not meet the requirement in SI 01120.203D.6. in this section. The court did not establish a new trust account; it merely approved a modification of a previously existing trust account joinder agreement.

NOTE: Please forward all **nunc pro tunc** orders to your Regional Office for additional review and final determination.

8. State Medicaid reimbursement provision

To qualify for the pooled trust exception, the trust must contain specific language that provides that, to the extent that amounts remaining in the individual's account upon the death of the individual are not retained by the trust, the trust will pay to the State(s) from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). To the extent that the trust does not retain the funds in the account, the State(s) must be listed as the first payee(s) and have priority over payment of other debts and administrative expenses, except as listed in SI 01120.203E. in this section.

The trust must provide payback to any State(s) that have provided medical assistance under the State Medicaid plan(s) and not be limited to any particular State(s). Medicaid payback also cannot be limited to any particular period of time; for example, payback cannot be limited to the period after establishment of the trust.

If the trust does not have sufficient funds upon the beneficiary's death to reimburse in full each State that provided medical assistance, the trust may reimburse the States on a pro-rata or proportional basis.

NOTE: Merely labeling the trust as a **Medicaid payback trust, an OBRA 1993 payback trust**, a **trust established in accordance with 42 U.S.C. § 1396p**, or an **MQT** is not sufficient to meet the requirements for this exception. The trust must contain specific payback language whose effect is consistent with the requirements described above. An oral trust cannot meet this requirement.

E. Allowable And Prohibited Expenses For Special Needs And Pooled Trusts Established Under Section 1917(D)(4)(A) And (C) Of The Act

The following instructions, about trust expenses and payments, apply to Medicaid special needs trusts and to Medicaid pooled trusts.

1. Allowable administrative expenses

Upon the death of the trust beneficiary, the trust may pay the following types of administrative expenses from the trust prior to reimbursement of the State(s) for medical assistance:

- Taxes due from the trust to the State(s) or Federal government because of the death of the beneficiary;

- Reasonable fees for administration of the trust estate, such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust.

2. Prohibited expenses and payments

Upon the death of the trust beneficiary, the following are examples of some of the types of expenses and payments not permitted prior to reimbursement of the State(s) for medical assistance:

- Taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate;
- Inheritance taxes due for residual beneficiaries;
- Payment of debts owed to third parties;
- Funeral expenses; and
- Payments to residual beneficiaries.

NOTE: For the purpose of prohibiting payments prior to reimbursement of the State(s) for medical assistance, a pooled trust is not considered a residual or remainder beneficiary. Remember that a pooled trust has the right to retain funds upon the death of the beneficiary.

3. Applicability

This restriction on payments from the trust applies upon the death of the beneficiary. Payments of fees and administrative expenses during the life of the beneficiary are allowable as permitted by the trust document and are not affected by the State Medicaid reimbursement requirement.

F. Income Trusts Established Under Section 1917(D)(4)(B) Of The Act

Income trusts, sometimes called *Miller* trusts (named after a court case), established under section 1917(d)(4)(B) of the Act are **not** considered exceptions to trust rules for SSI purposes. However, some States may exclude these trusts from counting as a resource for Medicaid

purposes. This type of trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust).

G. Policy For Waiver For Undue Hardship

1. Definitions

a. Undue hardship

For purposes of the trust provisions of section 1613(e) of the Act, undue hardship exists in a month if:

- failure to receive SSI payments would deprive the individual of food or shelter; **and**
- the individual's available funds do not equal or exceed the Federal benefit rate (FBR) plus any federally administered State supplement.

NOTE: Inability to obtain medical care does not constitute undue hardship for SSI purposes, although it may under a State Medicaid plan. Also, the undue hardship waiver does not apply to a trust counted as a resource under SI 01120.200. It applies only to trusts counted under section 1613(e) of the Act (see SI 01120.201. through SI 01120.203).

b. Loss of shelter

For purposes of undue-hardship waiver in the context of section 1613(e) of the Act, an individual would be deprived of shelter if:

- he or she would be subject to eviction from his or her current residence, if SSI payments were not received; and
- there is no other affordable housing available, or there is no other housing available with necessary modifications for the disabled individual.

2. Application of the undue hardship waiver

a. Applicability

We will consider the possibility of undue hardship under this provision only when:

- counting an **irrevocable** trust as a resource results in the individual's ineligibility for SSI due to excess resources;

- the individual alleges (or information in the file indicates) that not receiving SSI would deprive him or her of food or shelter; and

- the trust specifically prohibits disbursements, or prohibits the trustee from exercising his or her discretion to disburse funds, from the trust for the individual's support and maintenance.

NOTE: If the trust is revocable by the individual, the requirements for undue hardship cannot be met because the individual can access the trust funds for his or her support and maintenance.

b. Suspension of resource counting

An irrevocable trust is not counted as a resource in any month for which counting the trust would cause undue hardship.

c. Resource counting resumes

Resource counting of a trust resumes for any month(s) for which it would not result in undue hardship.

3. Available funds

In determining the individual's available funds, we include:

a. Income

Income includes the following:

- All countable income received in the month(s) for which undue hardship is an issue;

- All income excluded under the Act received in the month(s) for which undue hardship is an issue. For a list of unearned and earned income exclusions, respectively, provided under the Act, see SI 00830.099. and SI 00820.500.; and

- The value of in-kind support and maintenance (ISM) being charged, i.e., the presumed maximum value (PMV), the value of the one-third reduction (VTR), or the actual lesser amount.

Do not include SSI payments received or items that are not income, per SI 00815.000.

NOTE: The receipt of ISM, in and of itself, does not preclude a finding of undue hardship.

b. Resources

Resources include the following:

- All countable liquid resources as of the first moment of the month(s) for which undue hardship is at issue (for a definition of liquid resources, see SI 01110.300.); and

- All liquid resources excluded under the Act as of the first moment of the month(s) for which undue hardship is at issue (for a list of resource exclusions under the Act, see SI 01130.050.).

SSI benefits retained into the month following the month of receipt are counted as a resource for purposes of determining available funds.

Do not include non-liquid resources or assets determined not to be a resource, per SI 01120.000.

4. Example

Frank filed for SSI in 3/2017 as an aged individual. In 2/2017, he received an insurance settlement from an accident that was placed in an irrevocable trust. After determining that he met the other requirements for undue hardship (including a prohibition on the trustee from disbursing any funds for Franks' support and maintenance), the claims specialist (CS) determined Franks' available funds. He receives $450 in title II benefits per month. His only liquid resource is a bank account that has $500 in it. The total of $950 in available funds ($450 in title II benefits and $500 in the bank account) means that undue hardship does not apply in 3/2017, because that amount exceeds the FBR of $735. (His State has no federally administered State supplement.)

Frank comes back into the office in 6/2017. He presents evidence that he has spent down the $500 in his bank account on living expenses in the past three months. As of 6/2017, he has no liquid resources, and his income total of $450 is below the FBR. Frank meets the undue hardship test for 6/2017 (which is his E02 month). The trust does not count as his resource in that month. If his situation does not change, he qualifies for an SSI payment in 7/2017.

H. Procedure For Follow-Up To A Finding Of Undue Hardship

1. When to use this procedure

Use this procedure when it is necessary to determine whether an individual who established a trust continues to be eligible for SSI based on undue hardship. Since undue hardship is a month-by-month determination, recontact the individual to redevelop undue hardship periodically.

2. Recontact period

The recontact period may vary depending on the individual's situation. If the individual alleges, and information in the file indicates, that the individual's income and resources are not expected to change significantly, and the individual is continuously eligible for SSI because of undue hardship, recontact the individual **no less than every six months**. If the individual's income and resources are expected to fluctuate, or the file indicates a history of such fluctuation, the recontact period should be shorter, even monthly in some cases.

3. Documentation

At each recontact:

- Obtain on a DROC the individual's statement, either signed or recorded, that failure to receive SSI would have deprived the individual of food or shelter for any month not covered by a prior allegation;

- Determine whether total income and liquid resources exceeded the FBR plus any State supplement for each prior month;

- If undue hardship continued for the prior period and is expected to continue in the future period, continue payment and tickle the case for the next recontact, per SI 01120.203H.4. in this section; and

- If undue hardship did not continue through each month, clear the **excluded amount** and **exclusion reason** entries on the **ROTH** screen for each month that undue hardship did not apply. Process the excess resources overpayment for those months. If undue hardship stops due to a continuing change in the individual's situation, such as income or resources, do not tickle the file to follow up. The individual must recontact SSA and make a new allegation of undue hardship.

4. Recontact controls

For SSI Claims System cases, use the DWO1 and establish a tickle to control the case for recontact when the individual is eligible for SSI based on undue hardship. (Use the Modernized Development Worksheet (MDW) for non-SSI Claims System cases.) If MDW is applicable, set up an MDW screen using instructions in MSOM MDW 001.001 and the following MDW inputs:

- In the **ISSUE** field: input TRUST;
- In the **CATEGORY** field: input T16MISC;
- In the **TICKLE** field: input the date by which the individual should be recontacted to redevelop undue hardship; and
- In the **MISC** field: input information (up to 140 characters) about the trust undue hardship issue including issues to be aware of and anything else the CS deems appropriate. If additional space is needed, use **REMARKS**.

I. Procedure For Developing Exceptions To Resource Counting

1. Special needs trusts under section 1917(d)(4)(A) of the Act before December 13, 2016

The following is a summary of special needs trust development presented in step-action format. Refer to the policy cross-references for complete requirements:

STEP	ACTION

STEP	ACTION
1	Does the trust contain the assets of an individual who was under age 65 when the trust was established? (See SI 01120.203B.2. in this section.) • If **yes**, go to **Step 2**. • If **no**, go to **Step 9**.
2	Does the trust contain the assets of a disabled individual? (See SI 01120.203B.4. in this section.) • If **yes**, go to **Step 3**. • If **no**, go to **Step 9**.
3	Is the disabled individual the sole beneficiary of the trust? (See SI 01120.203B.5. in this section.) • If **yes**, go to **Step 4.** • If **no**, go to **Step 9.**
4	Did a parent, grandparent, legal guardian, or court establish the trust? (See SI 01120.203B.6. in this section.) • If **yes**, go to **Step 5**. • If **no**, go to **Step 9.**

STEP	ACTION
5	Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death as required in SI 01120.203B.9. in this section? • If **yes**, go to **Step 6**. • If **no**, go to **Step 9**.
6	Verify if the trust contains any early termination provisions as described within SI 01120.199. If the trust does not contain any early termination provisions, go to Step 7. If the trust contains any early termination provisions, does it meet the early termination criteria in SI 01120.199F that would make early termination acceptable? • If **yes**, go to **Step 7**. • If **no**, go to **Step 9**.
7	The trust meets the special needs trust exception to the extent that the assets of the individual were put in trust prior to the individual's attaining age 65. Any assets placed in the trust after the individual attained age 65 are not subject to this exception, except as provided in SI 01120.203B.3. in this section. Go to **Step 8** for treatment of assets placed in trust prior to age 65. Go to **Step 9** for treatment of assets placed in trust after attaining age 65.
8	Evaluate the trust under SI 01120.200D.1.a. to determine if it is a countable resource.

STEP	ACTION
9	The trust (or portion thereof) does not meet the requirements for the special needs trust exception. Consider if the pooled trust exception in SI 01120.203D in this section applies. If neither exception applies, determine whether the undue hardship waiver applies under SI 01120.203K in this section.

2. Special needs trusts under Section 1917(d)(4)(A) of the Act on or after December 13, 2016

STEP	ACTION
1	Does the trust contain the assets of an individual who was under age 65 when the trust was established? (See SI 01120.203B.2. in this section.) • If **yes**, go to **Step 2**. • If **no**, go to **Step 9**.
2	Does the trust contain the assets of a disabled individual? (See SI 01120.203B.4. in this section.) • If **yes**, go to **Step 3**. • If **no**, go to **Step 9**.
3	Is the disabled individual the sole beneficiary of the trust? (See SI 01120.203B.5. in this section.) • If **yes**, go to **Step 4.** • If **no**, go to **Step 9.**

STEP	ACTION
4	Did the individual, a parent, a grandparent, a legal guardian, or a court establish the trust? (See SI 01120.203B.6. in this section.) • If **yes**, go to **Step 5**. • If **no**, go to **Step 9.**
5	Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death as required in SI 01120.203B.9. in this section? • If **yes**, go to **Step 6**. • If **no**, go to **Step 9**.
6	Verify if the trust contains any early termination provisions as described in SI 01120.199. If the trust does not contain any early termination provisions, go to **Step 7**. If the trust contains any early termination provisions, does it meet the early termination criteria in SI 01120.199F that would make early termination acceptable? • If **yes**, go to **Step 7**. • If **no**, go to **Step 9**.

STEP	ACTION
7	The trust meets the special needs trust exception to the extent that the assets of the individual were put in trust prior to the individual's attaining age 65. Any assets placed in the trust after the individual attained age 65 are not subject to this exception, except as provided in SI 01120.203B.3. in this section. Go to **Step 8** for treatment of assets placed in trust prior to age 65. Go to **Step 9** for treatment of assets placed in trust after attaining age 65.
8	Evaluate the trust under SI 01120.200D.1.a. to determine if it is a countable resource.
9	The trust (or portion thereof) does not meet the requirements for the special needs trust exception. Consider if the pooled trust exception in SI 01120.203D in this section applies. If neither exception applies, determine whether the undue hardship waiver applies under SI 01120.203K in this section.

3. Pooled trusts established under Section 1917(d)(4)(C) of the Act

The following is a summary of pooled trust development presented in step-action format. Refer to the policy cross-references for complete requirements.

STEP	ACTION
1	Does the trust account contain the assets of a disabled individual? (See SI 01120.203C.2. in this section.) • If **yes**, go to **Step 2**. • If **no**, go to **Step 8**.

STEP	ACTION
2	Is the pooled trust established and managed by a nonprofit association? (See SI 01120.203C.1., SI 01120.203C.3., and development instructions in SI 01120.203F in this section.) • If **yes**, go to **Step 3**. • If **no**, go to **Step 8**.
3	Does the trust pool the funds yet maintain an individual account for each beneficiary, and can it provide an individual accounting? (See SI 01120.203C.4. in this section.) • If **yes**, go to **Step 4**. • If **no**, go to **Step 8**.
4	Is the disabled individual the sole beneficiary of the trust account? (See SI 01120.203C.5. in this section.) • If **yes**, go to **Step 5**. • If **no**, go to **Step 8**.
5	Did the individual, (a) parent(s), (a) grandparent(s), (a) legal guardian(s), or a court establish the trust account? (See SI 01120.203C.1. and SI 01120.203C.6. in this section.) • If **yes**, go to **Step 6**. • If **no**, go to **Step 8**.

STEP	ACTION
6	Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death from funds not retained by the trust as required in SI 01120.203C.8. in this section? • If **yes**, go to **Step 7**. • If **no**, go to **Step 8**.
7	The trust meets the Medicaid pooled trust exception; however, the trust still should be evaluated under SI 01120.200D.1.a. to determine if it is a countable resource.
8	The trust does not meet the requirements for the Medicaid pooled trust exception. Determine if the undue hardship waiver applies under SI 01120.203I. in this section.

J. Procedure To Verify Nonprofit Associations When Evaluating Pooled Trusts

When a trust is alleged to be established through the actions of a nonprofit or a tax-exempt organization, consult the pooled trust precedent in SSITMS. If none exists, follow policy and procedure for verifying the tax-exempt status of organizations found at SI 01130.689E. "Gifts to children with life-threatening conditions."

K. Procedure For Development Of Undue Hardship Waiver

The following is a summary of development instructions for undue hardship presented in step-action format. Refer to cross-references for complete instructions:

STEP	ACTION

STEP	ACTION
1	Is the trust irrevocable? • If **yes**, go to **Step 2**. • If **no**, go to **Step 8**.
2	Would counting the trust result in excess resources? • If **yes**, go to **Step 3**. • If **no**, go to **Step 8**.
3	Does the individual allege, or information in the file indicate, that not receiving SSI would deprive the individual of food or shelter according to SI 01120.203G in this section? • If **yes**, go to **Step 4**. • If **no**, go to **Step 8**.

STEP	ACTION
4	Obtain the individual's signed statement (on the DPST screen in the SSI Claims System or, in non-SSI Claims System cases, on a SSA-795 faxed into NDRed) as to whether: • Failure to receive SSI payments would deprive the individual of food or shelter; • The individual's total available funds are less than the FBR plus any federally administered State supplement; • The individual agrees to report promptly any changes in income and resources; and • The individual understands that he or she may be overpaid if, for any month, available funds exceed the FBR plus any State supplement or if other situations change. • Go to **Step 5**.
5	Does the trust contain language that specifically prohibits the trustee from making disbursements for the individual's support and maintenance or that prohibits the trustee from exercising discretion to disburse funds for the individual's support and maintenance? • If **yes**, go to **Step 6**. • If **no**, go to **Step 8**.

STEP	ACTION
6	Add up all of the individual's income, both countable and excludable (see SI 01120.203G.3.a. in this section). Do not include any SSI payments received or items that are not income, per SI 00815.000. If the individual is receiving ISM, include as income the ISM being charged (the PMV, VTR, or actual amount, if less). Add up all of the individual's liquid resources, both countable and excludable (see SI 01120.203G.3.b. in this section). Does the total of the income and the liquid resources equal or exceed the FBR plus any federally administered State supplement? • If **yes**, go to **Step 8.** • If **no**, go to **Step7**.
7	Suspend counting of the trust as a resource for any month in which all requirements above are met (see SI 01120.203G.2. in this section). • In the SSI Claims System, document the findings of undue hardship and applicable months on the **DROC** screen. • On paper forms, document the information in the **REMARKS** section. For further documentation, see SI 01120.202C and SI 01120.202D; and for follow-up instructions, see SI 01120.203H in this section. **STOP**.
8	Undue hardship does not apply. However, in some instances where income and resources are currently too high, unless the trust is revocable, undue hardship may apply in future months.

Social Security

Program Operations Manual System (POMS)

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SI 01130.740 Achieving a Better Life Experience (ABLE) Accounts

Citations: Public Law 113–295 The Stephen Beck, Jr., Achieving a Better Life Experience Act (ABLE Act) – Enacted December 19, 2014

A. What Is An ABLE Account?

An Achieving a Better Life Experience (ABLE) account is a type of tax-advantaged savings account that an eligible individual can use to pay for qualified disability expenses. The eligible individual is the owner and designated beneficiary of the ABLE account. An eligible individual may establish an ABLE account provided that the individual is blind or disabled by a condition that began before the individual's 26th birthday.

An ABLE program can be established by a State (or State agency or instrumentality of a State). An eligible individual can open an ABLE account through the ABLE program in any State, if the State permits it.

Some States formed partnerships to improve access for eligible individuals to enroll in ABLE programs. You may see different types of arrangements between States administering ABLE programs.

- Some States have formed a consortium where the States have their own ABLE program, but join together to provide lower administrative costs and better investment options than they could on their own.

- Some States established their own ABLE program, but contracted with private companies to manage their ABLE program for them.

- Some States established their own ABLE program, but contracted with other States to manage their ABLE program for them.

- Some States do not operate their own ABLE program, but partnered with another State to offer the other State's ABLE program to their residents.

1. One ABLE account

A designated beneficiary is limited to one ABLE account, which a qualified ABLE program administers. Except in the case of a rollover or program-to-program transfer, if a designated beneficiary has an additional account, it generally will not be treated as an ABLE account, and will be subject to normal resource counting rules.

EXCEPTION: If an additional account is closed within 90 days from the account open date, the account will not be a countable resource for any period the additional account was open.

2. Medicaid reimbursement

Upon the death of the designated beneficiary, funds remaining in the ABLE account, after payment of all outstanding qualified disability expenses, must be used to reimburse the State(s) for Medical Assistance (Medicaid) benefits that the designated beneficiary received, if the State(s) files(s) a claim for reimbursement.

B. Definition Of ABLE Terms

1. ABLE program

An ABLE program is the program established and maintained by a State (or agency or instrumentality thereof) through which eligible individuals can open ABLE accounts.

2. Contributions

A contribution is the payment of funds into an ABLE account. Contributions must be in cash and may be made in the form of cash or a check, money order, credit card, electronic transfer, or a similar method. Any person can contribute to an ABLE account. (“Person,” as defined by the Internal Revenue Code, includes an individual, trust, estate, partnership, association, company, or corporation.) However, the total annual contributions that an ABLE account can receive from all sources is limited to the amount of the per-donee gift-tax exclusion in effect for a given calendar year. For 2018, that limit is $15,000.

3. Designated beneficiary

The designated beneficiary is the individual who owns the ABLE account and who was an eligible individual when the account was established or who succeeded the former designated beneficiary in that capacity.

To be an eligible individual, he or she must:

a. Be eligible for Supplemental Security Income (SSI) based on disability or blindness that began before age 26;

b. Be entitled to disability insurance benefits (DIB), childhood disability benefits (CDB), or disabled widow's or widower's benefits (DWB) based on disability or blindness that began before age 26; or

c. Certify (or an agent under a power of attorney or, if none, a parent or guardian must certify) that the individual:

- has a medically determinable impairment meeting statutorily specified criteria or is blind; and,

- the disability or blindness occurred before age 26.

NOTE: Do not draw an inference regarding disability under the Social Security Act from a disability certification.

4. Distributions

A distribution is any payment from an ABLE account. (A program-to-program transfer is not a distribution.) The designated beneficiary or person with signature authority determines when a distribution is made. Distributions (other than rollovers and returns of contributions) may be made only to or for the benefit of the designated beneficiary.

5. Member of the family

A member of the designated beneficiary's family means a sibling whether by blood or adoption, and includes a brother, sister, stepbrother, stepsister, half-brother, and half-sister.

6. Person with signature authority

A person with signature authority can establish and administer an ABLE account for a designated beneficiary who is a minor child or is otherwise incapable of managing the account. Signature authority is not the equivalent of ownership. The person with signature authority must be the designated beneficiary's agent acting under power of attorney, or if none, a parent or legal guardian of the designated beneficiary. For SSI purposes, always

consider the designated beneficiary to be the owner of the ABLE account, regardless of whether someone else has signature authority over it.

7. Program-to-program transfer

A program-to-program transfer means the direct transfer of:

- The entire balance of an ABLE account into an ABLE account of the same designated beneficiary in which the first ABLE account is closed upon the transfer of the funds; or
- Part or all of the balance to an ABLE account of an eligible individual who is a member of the family of the designated beneficiary.

8. Qualified disability expenses

Qualified disability expenses (QDEs) are expenses related to the blindness or disability of the designated beneficiary and for the benefit of the designated beneficiary. In general, a QDE includes, but is not limited to, an expense for:

- Education;
- Housing;
- Transportation;
- Employment training and support;
- Assistive technology and related services;
- Personal support services;
- Health;
- Prevention and wellness;
- Financial management and administrative services;

- Legal fees;
- Expenses for ABLE account oversight and monitoring;
- Funeral and burial; and,
- Basic living expenses.

9. Housing expenses

Housing expenses for purposes of an ABLE account are similar to household costs for in-kind support and maintenance purposes, with the exception of food. Housing expenses include expenses for:

- Mortgage (including property insurance required by the mortgage holder);
- Real property taxes;
- Rent;
- Heating fuel;
- Gas;
- Electricity;
- Water;
- Sewer; and
- Garbage removal.

10. Rollover

A rollover is the contribution to an ABLE account of a designated beneficiary (or a family member of the designated beneficiary), of all or a portion of an amount withdrawn from the designated beneficiary's ABLE account, provided that the contribution is made within 60 days of the date of the withdrawal. In the case of a rollover to the designated beneficiary's ABLE account, no rollover should have been made to an ABLE account of the designated beneficiary within the prior 12 months.

C. When To Exclude ABLE Account Contributions, Balances, Earnings, And Distributions

1. Exclude contributions as income

A payment made into an ABLE account constitutes a contribution. Consider the contribution made by the person to whom the funds belong or are due. Exclude contributions to an ABLE account from the income of the designated beneficiary. Excluded contributions include rollovers from a member of the family's ABLE account to an SSI applicant, recipient, or deemor's ABLE account.

NOTE: The fact that a person uses his or her income to contribute to an ABLE account does not mean that his or her income is not countable for SSI purposes as it normally would be. Income received by the designated beneficiary and then deposited into his or her ABLE account is income to the designated beneficiary. For example, an applicant, recipient, or deemor can have contributions automatically deducted from his or her paycheck and deposited into an ABLE account. In this case, include the income used to make the ABLE account contribution in the applicant, recipient or deemor's gross wages.

a. First party contributions

A contribution made by the designated beneficiary into his or her ABLE account is not income to the designated beneficiary. However, income received by the designated beneficiary and deposited into his or her ABLE account is income to the designated beneficiary. That is, the income is income in the first instance, but the contribution is not income.

An individual cannot use direct deposit to avoid income counting.

So, when a payment that belongs or is due to the designated beneficiary is direct-deposited into his or her ABLE account, the payment is considered to be received by the designated beneficiary, it is counted as income to the designated beneficiary as it otherwise would be, the designated beneficiary is considered the contributor for ABLE purposes, and the ABLE contribution is not considered income to the designated beneficiary.

Examples of payments that might be direct-deposited into an ABLE account, but still are counted as income as they otherwise would be, include:

- Wages;
- Benefit payments (Title II, Veterans Administration, pensions, etc.); and
- Mandatory Support payments (child support or alimony).

b. Third party contributions

Third party contributions are contributions made by persons other than the designated beneficiary. Further, third party contributions are made with funds that do not otherwise belong, or are not otherwise due, to the designated beneficiary; that is, they are made with the third party's funds. Accordingly, an ABLE contribution by a person other than the designated beneficiary is treated as a completed gift.

NOTE: A transfer of funds from a trust, of which the designated beneficiary is the beneficiary and which is not considered a resource to him or her, to the designated beneficiary's ABLE account generally will be considered a third party contribution for ABLE purposes because the contribution is made by a person or entity other than the designated beneficiary (namely, the trustee) and because the designated beneficiary does not legally own the trust. You may seek guidance from your regional trust lead if you have questions regarding the trust transfer to an ABLE account.

2. Exclude ABLE account earnings

The funds in an ABLE account can accrue interest, earn dividends, and otherwise appreciate in value. Earnings increase the account's balance. Exclude earnings an ABLE account receives from the income of the designated beneficiary.

3. Exclude up to and including $100,000 of balance

Exclude up to and including $100,000 of the balance of funds in an ABLE account from the resources of the designated beneficiary.

4. Do not count ABLE account distributions as income

A distribution from an ABLE account is not income but is a conversion of a resource from one form to another. See SI 01110.600B.4.

Do not count distributions from an ABLE account as income of the designated beneficiary, regardless of whether the distributions are for a QDE not related to housing, for a housing expense, or for a non-qualified expense.

5. Exclude retained distributions for a QDE not related to housing

a. Distribution for a QDE not related to housing

Exclude a distribution for a QDE not related to housing from the designated beneficiary's countable resources if he or she retains it beyond the month received.

This exclusion applies while:

- The designated beneficiary maintains, makes contributions to, or receives distributions from the ABLE account;
- The distribution is unspent;
- The distribution is identifiable. (**NOTE**: Identify excludable funds commingled with non-excludable funds. See SI 01130.700A); and
- The individual intends to use the distribution for a QDE not related to housing.

NOTE: Apply normal SSI resource counting rules and exclusions to assets or other items purchased with funds from an ABLE account.

b. Previously excluded distribution used for non-qualified expenses or housing expenses

If a designated beneficiary uses a distribution previously excluded per SI 01130.740C.5.a. in this section, for a non-qualified expense or a housing expense, or the individual's intent to use it for a qualified disability expense (not related to housing) changes, see SI 01130.740D.3. in this section.

c. Example of an excluded distribution

Eric takes a distribution of $500 from his ABLE account in June 2016 to pay for a health-related QDE. His health-related expense is not due until September, and Eric deposits the distribution into his checking account in June. The distribution is not income in June. Eric's distribution is both unspent and identifiable until Eric pays his health-related expense in September. Exclude the $500 from Eric's countable resources in July, August,

and September. For instructions to identify commingled, excluded, and non-excluded funds, see SI 01130.700.

d. Example of an excluded QDE purchase

Fred takes a distribution of $1,500 from his ABLE account in September 2016 to buy a health-related item that is a QDE. The item is an excluded resource in October and continuing, because it is the individual's personal property required for a medical condition. For instructions on household goods, personal effects, and other personal property, see SI 01130.430.

D. When To Count ABLE Account Balances And Distributions

1. Count ABLE account balance amounts over $100,000

Count the amount by which an ABLE account balance exceeds $100,000 as a resource of the designated beneficiary.

a. Rule for indefinite benefit suspension and continuing eligibility for Medicaid during periods of excess resources attributable to an ABLE account

A special rule applies when the balance of an SSI recipient's ABLE account exceeds $100,000 by an amount that causes the recipient to exceed the SSI resource limit--whether alone or with other resources. When this situation happens, we will place the recipient into a special SSI suspension during which:

- We suspend the recipient's SSI benefits without time limit (as long as he or she remains otherwise eligible);
- The recipient is SSI eligible for Medical Assistance (Medicaid) purposes; and
- The individual's eligibility does not terminate after 12 continuous months of suspension.

Reinstate the recipient's regular SSI eligibility for all months in which the individual's ABLE account balance no longer causes the recipient to exceed the resource limit and he or she is otherwise eligible.

NOTE: "SSI-eligible for Medicaid purposes" means that the individual is eligible for Medicaid in States where Medicaid eligibility is based on SSI eligibility (For SSA determinations of Medicaid Eligibility in 1634 States see SI 01730.000). No SSI recipients

will reach this suspension status for several years (that is, until it is possible for an ABLE account balance to exceed $100,000; that is not yet possible due to the limitation on contributions described in SI 01130.740B.2. in this section).

EXAMPLE: Excess resources — recipient is suspended but retains eligibility for Medicaid

Paul is the designated beneficiary of an ABLE account with a balance of $101,000 on the first of the month. Paul's only other countable resource is a checking account with a balance of $1,500. Paul's countable resources are $2,500 and therefore exceed the SSI resource limit. However, since Paul's ABLE account balance causes him to exceed the resource limit (i.e., his countable resources other than the ABLE account are less than $2,000), suspend Paul's SSI eligibility and stop his cash benefits, but he retains eligibility for Medicaid in his State.

b. Ineligibility due to excess resources other than an ABLE account

The special suspension rule does not apply when:

- The balance of an SSI recipient's ABLE account exceeds $100,000 by an amount that causes the recipient to exceed the SSI resource limit; but

- The resources other than the ABLE account alone make the individual ineligible for SSI due to excess resources.

When this situation happens, suspend the recipient's SSI benefits using the payment status code N04. While in N04, the recipient loses eligibility for Medical Assistance (Medicaid) and the individual's SSI eligibility terminates 12 months later if the suspension continues throughout this period. Reinstate the recipient's regular SSI eligibility and Medicaid benefits for all months in which the individual's resources, including the ABLE account, no longer cause the recipient to exceed the resource limit.

EXAMPLE: Combination of resources — recipient loses SSI eligibility

Christine is the designated beneficiary of an ABLE account with a first of the month balance of $101,000. Christine's only other countable resource is a checking account with a balance of $3,000. Christine's countable resources are $4,000 and therefore exceed the SSI resource limit.

However, because her ABLE account balance is not the cause of her excess resources (i.e., her countable resources other than the ABLE account are more than $2,000), the special rule does not apply, and Christine is not eligible for SSI because of excess

resources. Suspend Christine's SSI benefits using payment status N04. Her Medicaid benefits stop.

c. Ineligibility for other reasons

If an individual is ineligible for any reason other than excess resources in an ABLE account, the special suspension status does not apply. Suspend the individual's SSI eligibility using normal procedures.

EXAMPLE: Ineligibility for a reason other than excess resources in an ABLE account

In April, Sam's ABLE account balance is $102,500 as of the first of the month. However, Sam also has excess deemed income in April and is N01 despite the excess funds in his ABLE account. Before the end of April, Sam leaves the U.S. and does not return until July 1. Sam is N03 for May June, and July. If Sam still has excess resources in his ABLE account effective August 1 and is otherwise SSI eligible, place him in the special ABLE resource suspension status. He is eligible for Medicaid.

2. Count retained distributions for housing expenses or expenses that are not QDEs as a resource

A distribution from an ABLE account is not income, but is a conversion of a resource from one form to another. For more information see SI 01110.600B.4.

Count a distribution for a housing expense or for an expense that is not a QDE as a resource, if the designated beneficiary retains the distribution into the month following the month of receipt. If the designated beneficiary spends the distribution within the month of receipt, there is no effect on eligibility. However, apply normal SSI resource counting rules and exclusions to items purchased with funds from an ABLE account.

EXAMPLE: Retained distribution intended for housing expenses is a resource

Amy takes a distribution of $500 from her ABLE account in May to pay a housing expense for June. She deposits the $500 into her checking account in May, withdraws $500 in cash on June 3, and pays her landlord. This distribution is a housing expense and part of her checking account balance as of June 1, which makes it a countable resource for the month of June.

3. Count previously excluded distributions used for a non-qualified purpose or housing expense

Count the amount of funds used for a non-qualified expense or housing expense as a resource as of the first moment of the month in which the funds were spent if the

designated beneficiary uses the distribution (that was previously excluded per SI 01130.740C.5.a. in this section) for a non-qualified purpose or a housing expense.

If an individual's intent to use the funds for a QDE changes at any other time, but he or she has not spent the funds, count the retained funds as a resource as of the first of the following month.

a. Example of a previously excluded distribution used for a non-QDE

Sam takes a distribution of $25,000 from his ABLE account in May for an assistive technology and related service. He pays a $10,000 deposit. While waiting for the service to be completed, Sam takes a trip to a local casino in July where he loses $1,000 of his ABLE distribution gambling. The $1,000 he lost gambling is a countable resource in July. The other $14,000 Sam retains is an excluded resource while it meets the requirements of SI 01130.740C.5.a. in this section.

b. Example of a previously excluded distribution used for a housing expense

In June, Jennifer takes a $7,000 distribution from her ABLE account to pay an educational expense that is a QDE. Her educational expense is due in September. However, she has to make a $750 advance rent payment to her landlord for her college apartment in August. She uses some of the distribution she took in June to make the rent payment – a housing expense. The $750 is a countable resource in August. Exclude the remaining $6,250 of the retained distribution while it continues to meet the requirements of SI 01130.740C.5.a. in this section.

c. Example of a change of intent on the use of a distribution

In June, Jennifer takes a $7,000 distribution from her ABLE account to pay an educational expense that is a QDE. Her educational expense is due in September. In August, Jennifer gets a job offer and decides not to return to school. The $7,000 becomes a countable resource in September because she no longer intends to use it for an educational expense that is a QDE, unless Jennifer re-designates it for another QDE or returns the funds to her ABLE account prior to September.

E. How To Verify, Document, And Record ABLE Account Balances

You may become aware of an individual's ownership of an ABLE account if he or she tells you during an initial claim or redetermination or contacts the office to report it.

1. Obtain evidence of the ABLE account

When an applicant, recipient, or deemor alleges being the designated beneficiary of an ABLE account, obtain evidence and enter the following information:

- Select yes to the ABLE account question;
- Select the program State where the ABLE account was established or indicate unknown;
- Enter the unique account number assigned by the State or indicate Unknown;
- Enter the account opened date or indicate unknown;
- If the account is closed, input the account closed date or indicate unknown, or leave the field blank;
- Enter the name of the person with signature authority (if different from the designated beneficiary); and
- Enter the account balance information in the values field.

If the available evidence does not provide the necessary information, contact the appropriate ABLE program to obtain it.

Beginning October 1, 2017, States report the first-of-the-month account balances and the prior month's distribution information for all ABLE accounts in their program to us. Not all States began reporting in October 2017, but eventually all State ABLE programs will report. If you become aware of a new ABLE account via the monthly data exchange, see SI 01130.740E.4. in this section.

2. Document the evidence

Fax the evidence into the certified electronic folder (CEF) or Non-disability Repository for Evidentiary Documents (NDRED). If you contact the ABLE program directly, document the information you received on a Report of Contact (DROC) in the Supplemental Security Income (SSI) claims system or on an SSA-5002 (Report of Contact) in paper claims.

3. Record the account on the SSI claim system "Achieving a Better Life Experience (RABL)" page

Record the account information and balance on the SSI claim system Achieving a Better Life Experience (RABL) page. For instructions to complete RABL, see MS INTRANETSSI 013.038.

NOTE: The designated beneficiary of an ABLE account is always the owner of the account for SSI purposes. Review ABLE account balances during redeterminations and when potential ineligibility exists due to the ABLE account balance.

4. Determine status of mismatched account data

State ABLE programs notify us through a monthly data exchange when individuals establish new accounts. The pending Achieving a Better Life Experience (RAPN) page displays new account information. The following information will be included:

- Account Owner Name;
- Account Owner SSN;
- Account Owner Birth date;
- Program State;
- Account Number;
- Account Opened Date;
- Account Closed Date;
- Name of Signature Authority;
- Balance Month/Year; and
- Balance Amount.

If the data on the RAPN page does not match an existing ABLE account on the RABL page, determine whether the ABLE data received applies to the person for whom it was received. Select one of the options in the SSI claim system:

- update an existing ABLE page;
- add this ABLE account;
- reject this ABLE account; or
- decide later.

If you chose "decide later," address the pending RAPN page before closing an initial claim, redetermination, or appeal event.

NOTE: Once you document the ABLE account information in the SSI claim system, subsequent reports received from the State that have matching data automatically update the account balance information. However, distribution data will not be available until a future systems release.

F. How To Verify, Document, And Record ABLE Account Distributions

1. When to develop

Verify a distribution only when an applicant, recipient, or deemor alleges retaining, or other evidence indicates that he or she retained, all or part of the distribution into months following the month of receipt. The distribution is material only to determine whether the applicant, recipient, or deemor's countable resources exceed the resource limit, since distributions do not count as income.

2. Verify the distribution

Obtain evidence that shows distribution amount(s), distribution date(s), and the distribution recipient(s) (for example, the designated beneficiary paid the distribution directly to a vendor). Obtain and accept the applicant, recipient, or deemor's allegation that he or she used or intends to use the distribution for:

- a QDE not related to housing;
- a housing expense; or
- an expense that is not a QDE.

3. Exclude retained distributions for QDEs not related to housing

Exclude any retained distribution, or part of a distribution, for a QDE not related to housing, from the designated beneficiary's countable resources per SI 01130.740C.5. in this section.

Example of a retained QDE not related to housing

Elizabeth takes a distribution of $500 from her ABLE account in May to pay for a health-related QDE that she expects to pay in September. She deposits the distribution into her checking account in May and withdraws it in September to pay the health-related QDE. Exclude the $500 from Elizabeth's countable resources from June through September. Starting in June, document the deposit on the Financial Institution Account (RFIA) page. Input $500 as the "excluded amount." Select "Other" as the exclusion reason and input "ABLE QDE distribution" as the "other reason."

4. Count retained distributions for housing expenses and expenses that are not QDEs

Count as a resource any distribution or part of a distribution for a housing expense or an expense that is not a QDE if it is retained into the month following the month of receipt.

Example of a retained distribution for a housing expense

Amy takes a distribution of $500 from her ABLE account in May to pay a housing expense for June. She deposits the $500 into her checking account in May, withdraws $500 in cash on June 3, and pays her landlord. This distribution is a housing expense and is part of her checking account balance as of the first of the month in June, which makes it a countable resource for the month of June.

5. Count previously excluded distributions used for a non-qualified purpose or housing expense

Count the amount of funds used for a non-qualified expense or housing expense as a resource as of the first moment of the month in which the funds were spent if the designated beneficiary uses the distribution (that was previously excluded per SI 01130.740C.5.a. in this section) for a non-qualified purpose or a housing expense.

If an individual's intent to use the funds for a QDE changes at any other time, but he or she has not spent the funds, count the retained funds as a resource as of the first of the month following the month of change of intent. Document the individual's change of intent on a Report of Contact (DROC) in the SSI claim system or on an SSA-5002 (Report of Contact) in paper claims. For examples, see SI 01130.740D.3. in this section.

6. Record the amount excluded on the appropriate resource page

ABLE account distributions are the conversion of a resource from one form to another. Accordingly, they continue to be a resource if retained into the month following the month of receipt. Exclude from resources a distribution retained for a QDE not related to housing, per SI 01130.740C.5.a. in this section. Document ABLE account distributions on the appropriate SSI claim system resources page (e.g., cash, financial institution account).

NOTE: Distribution information obtained from the State by data exchange is in the SSI claim system, but you cannot access it until additional system enhancements are completed.

G. Handling And Recording ABLE Prepaid Debit Card Information

1. Handling ABLE prepaid debit cards

Some ABLE programs provide designated beneficiaries with a prepaid debit card, which may be used to control the issuance of distributions and provide designated beneficiaries with convenient access to their ABLE funds.

2. Handling ABLE debit cards in the SSI claim system

If a designated beneficiary has an ABLE prepaid debit card, record the ABLE prepaid debit card on the Other Resource (ROTH) page in SSI claim system. You need the program State and account number. Monies distributed onto an ABLE prepaid debit card are considered a qualified distribution unless we determine otherwise. Enter the intended use of the funds in the Description field. Enter the alleged Value of the ABLE prepaid debit card. Enter the entire alleged value as an excluded amount and as qualified distributions when funds are added onto the debit card. Use the new exclusion reason of “Qualified Disability Expenses” on the ROTH page to exclude monies on a prepaid ABLE debit card.

Administering a Special Needs Trust

A Handbook For Trustees (2019 Edition)

Special Needs Alliance®

Special needs require special attorneys.

Administering a Special Needs Trust
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Administering a Special Needs Trust: A Handbook for Trustees

Introduction and Definition of Terms

"Special Needs" trusts are complicated and can be hard to understand and administer. They are like other trusts in many respects—the general rules of trust accounting, law and taxation apply—but unlike more familiar trusts in other respects. The very notion of "more familiar" types of trusts will, for many, be amusing—most people have no particular experience dealing with formal trust arrangements, and special needs trusts are often established for the benefit of individuals who would not otherwise expect to have experience with trust concepts.

The essential purpose of a special needs trust is usually to improve the quality of an individual's life without disqualifying him or her from eligibility for public benefits. Therefore, one of the central duties of the trustee of a special needs trust is to understand what public benefits programs might be available to the beneficiary and how receipt of income, or provision of food or shelter, might affect eligibility. Because there are numerous programs, competing (and sometimes even conflicting) eligibility rules, and at least two different types of special needs trusts to contend with, the entire area is fraught with opportunities to make mistakes. Because the stakes are often so high—the public benefits programs may well be providing all the necessities of life to the beneficiary—a good understanding of the rules and programs is critically important.

The essential purpose of a special needs trust is usually to improve the quality of an individual's life without disqualifying him or her from eligibility to receive public benefits.

Before delving into a detailed discussion of special needs trust principles, it might be useful to define a few terms:

GRANTOR (sometimes "Settlor" or "Trustor")—the person who establishes the trust and generally the person whose assets fund the trust. There might be more than one grantor for a given trust. The tax agency may define the term differently than the public benefits agency. Special needs trusts can make this term more confusing than other types of trusts, since the true grantor for some purposes may not be the same as the person signing the trust instrument. If, for example, a parent creates a trust for the benefit of a child with a disability, and the parent's own money funds the trust, the parent is the grantor. In another case, where a parent has established a special needs trust to handle settlement proceeds from a personal injury lawsuit or improperly directed inheritance, the minor child (through a guardian) or an adult child will be the grantor, even though he or she did not decide to establish the trust or sign any trust documents.

TRUSTEE—the person who manages trust assets and administers the trust provisions. Once again, there may be two (or more) trustees acting at the same time. The grantor(s) may also be the trustee(s) in some cases. The trustee may be a professional trustee (such as a bank trust department or a lawyer), or may be a family member or trusted adviser—though it may be difficult to qualify a non-professional to serve as trustee.

BENEFICIARY—the person for whose benefit the trust is established. The beneficiary of a special needs trust will usually (but not always) be disabled. While a beneficiary may also act as trustee in some types of trusts, a special needs trust beneficiary will almost never be able to act as trustee.

DISABILITY—for most purposes involving special needs trusts, "disability" refers to the standard used to determine eligibility for Social Security Disability Insurance or Supplemental Security Income benefits: the inability to perform any substantial gainful employment.

INCAPACITY (sometimes Incompetence)—although "incapacity" and "incompetence" are not interchangeable, for our purposes they may both refer to the inability of a trustee to manage the trust, usually because of mental limitations. Incapacity is usually important when applied to the trustee (rather than the beneficiary), since the trust will ordinarily provide a mechanism for transition of power to a successor trustee if the original trustee becomes unable to manage the trust. Incapacity of a beneficiary may sometimes be important as well. Not every disability will result in a finding of incapacity; it is possible for a special needs trust beneficiary to be disabled, but not mentally incapacitated. Minors are considered to be incapacitated as a matter of law. The age of majority differs slightly from state to state, though it is 18 in all but a handful of states.

REVOCABLE TRUST—refers to any trust which is, by its own terms, revocable and/or amendable, meaning able to be undone, or changed. Many trusts in common use today are revocable, but special needs trusts are usually irrevocable, meaning permanent or irreversible.

IRREVOCABLE TRUST—means any trust which was established as irrevocable (that is, no one reserved the power to revoke the trust) or which has become irrevocable (for example, because of the death of the original grantor).

SOCIAL SECURITY DISABILITY INSURANCE—sometimes referred to as SSDI or SSD, this benefit program is available to individuals with a disability who either have sufficient work history prior to becoming disabled or are entitled to receive benefits by virtue of being a dependent or survivor of a disabled, retired, or deceased insured worker. There is no "means" test for SSDI eligibility, and so special needs trusts may not be necessary for some beneficiaries—they can qualify for entitlements like SSD and Medicare even though they receive income or have available resources. SSDI beneficiaries may also, however, qualify for SSI (see below) and/or Medicaid benefits, requiring protection of their assets and income to maintain eligibility. Of course, just because a beneficiary's benefits are not means-tested, it does not follow that the beneficiary will not benefit from the protection of a trust for other reasons.

SUPPLEMENTAL SECURITY INCOME—better known by the initials "SSI," this benefit program is available to low-income individuals who are disabled, blind or elderly and have limited income and few assets. SSI eligibility rules form the basis for most other government program rules, and so they become the central focus for much special needs trust planning and administration.

MEDICARE—one of the two principal health care programs operated and funded by government—in this case, the federal government. Medicare benefits are available to all those age 65 and over (provided only that they would be entitled to receive Social Security benefits if they chose to retire, whether or not they actually are retired) and those under 65 who have been receiving SSDI for at least two years. Medicare eligibility may forestall the need for or usefulness of a special needs trust. Medicare recipients without substantial assets or income may find that they have a difficult time paying for medications (which historically have not been covered by Medicare but began to be partially covered in 2004) or long-term care (which remains largely outside Medicare's list of benefits).

MEDICAID—the second major government-run health care program. Medicaid differs from Medicare in three important ways: it is run by state governments (though partially funded by federal payments), it is available to those who meet financial eligibility requirements rather than being based on the age of the recipient, and it covers all necessary medical care (though it is easy to argue that Medicaid's definition of "necessary" care is too narrow). Because it is a "means-tested" health care program, its continued availability is often the central focus of special needs trust administration. Because Medicare covers such a small portion of long-term care costs, Medicaid eligibility becomes centrally important for many persons with disabilities.

The Most Important Distinction

Two entirely different types of trusts are usually lumped together as "special needs" trusts. The two trust types will be treated differently for tax purposes, for benefit determinations, and for court involvement. For most of the discussion that follows, it will be necessary to first distinguish between the two types of trusts. The distinction is further complicated by the fact that the grantor (the person establishing the trust, and the easiest way to distinguish between the two trust types) is not always the person who actually signs the trust document.

"Self-Settled" Special Needs Trusts

Some trusts are established by the beneficiary (or by someone acting on his or her behalf) with the beneficiary's funds for the purpose of retaining or obtaining eligibility for public benefits—such a trust is usually referred to as a "self-settled" special needs trust. The beneficiary might, for example, have received an outright inheritance, or won a lottery. By far the most common source of funds for "self-settled" special needs trusts, however, is proceeds from a lawsuit—often (but not always) a lawsuit over the injury that resulted in the disability. Another common scenario requiring a person with a disability to establish a self-settled trust is when they receive a direct inheritance from a well-intentioned, but ill-advised relative.

A given trust may be treated as having been "established" by the beneficiary even if the beneficiary is completely unable to execute documents, and even if a court, family member, or lawyer representing the beneficiary actually signed the trust documents. The key test in determining whether a trust is self-settled is to determine whether the beneficiary had the right to outright possession of the proceeds prior to the act establishing the trust. If so, public benefits eligibility rules will treat the beneficiary as having set up the trust even though the actual implementation may have been undertaken by someone else acting on their behalf. Virtually all special needs trusts established with funds recovered in litigation or through a direct inheritance will be "self-settled" trusts.

Self-settled special needs trusts are different from third-party trusts in two important ways. First, self-settled trusts must include a provision directing the trustee, if the trust contains any funds upon the death of the beneficiary, to pay back anything the state Medicaid program has paid for the beneficiary. Second, in many states, the rules governing permissible distributions for self-settled special needs trusts are significantly more restrictive than those controlling third-party special needs trusts.

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Because Social Security law specifically describes self-settled special needs trusts, these instruments are sometimes referred to by the statutory section authorizing transfers to such trusts and directing that trust assets will not be treated as available and countable for SSI purposes. That statutory section is 42 U.S.C. §1396p(d)(4)(A), and so self-settled special needs trusts are sometimes called, simply, "d4A" trusts.

"Third-party" Special Needs Trusts

The second type of special needs trust is one established by someone other than the person with disabilities (usually, but not always, a parent) with assets that never belonged to the beneficiary. It is often used, when proper planning is done for a disabled person's family, to hold an inheritance or gift. Without planning, a well-meaning family member might simply leave an inheritance to an individual with a disability. Even though it may be possible to set up a trust after the fact, the funds will have been legally available to the beneficiary. That means that any trust will probably be a "self-settled" special needs trust, even though the funds came from a third party.

Parents, grandparents and others with the foresight to leave funds in a third party special needs trust will provide significantly better benefits to the beneficiary who has a disability. This type of trust will not need to include a "payback" provision for Medicaid benefits upon the beneficiary's death. During the beneficiary's life, the kinds of payments the trust can make will usually be more generous and flexible.

Some trusts are established by the beneficiary for the purpose of retaining or obtaining eligibility for public benefits with the beneficiary's funds. By far the most common source of funds for "self-settled" special needs trusts is proceeds from a lawsuit—often (but not always) a lawsuit over the injury that resulted in the disability.

The "Sole Benefit" Trust

Although there are two primary types of special needs trusts, there is actually a third type that might be appropriate under certain unusual circumstances. Because Medicaid rules permit applicants to make unlimited gifts to or "for the sole benefit of" disabled children or spouses, some individuals with assets may choose to establish a special needs trust for a child or grandchild with disabilities in hopes of securing eligibility for Medicaid for both themselves as grantor and for the disabled beneficiary. A number of states are very restrictive in their interpretation of the "sole benefit" requirement, so that such trusts are rarely seen. In many ways they look like a hybrid of the two other trust types; they may be taxed and treated as third-party trusts, but require a payback provision like a self-settled trust (at least in some states).

The Second Most Important Distinction

Once the type of trust is determined, the next important issue is discerning the type of government program providing benefits. Some programs (like SSDI and Medicare) do not impose financial eligibility requirements; a beneficiary receiving income and all his or her medical care from those two programs might not need a special needs trust at all, or might benefit from more flexibility given to the trustee. A recipient of SSI and/or Medicaid, however, may need more restrictive language in the trust document and closer attention on the part of the trustee.

SSDI/Medicare Recipients

Neither Social Security Disability Insurance benefits nor Medicare are "means-tested." Consequently, it may be unnecessary to create a special needs trust for someone who receives benefits only from those two programs. After 24 months of SSDI eligibility, the beneficiary will qualify for Medicare benefits as well, so it may be appropriate to provide special needs provisions to get the SSDI recipient through that two-year period, during which he or she may rely on Medicaid for medical care. Restrictive special needs trust language may actually work against an SSDI beneficiary if it prevents distribution of cash to the beneficiary in all circumstances; an SSDI recipient will almost always benefit from broad language giving more discretion to the trustee.

Some SSDI/Medicare recipients may also receive SSI and/or Medicaid benefits. It may be critically important for those individuals to have strict special needs language controlling use of any assets or income that would otherwise be available. As the Medicare prescription drug benefit evolves over the next few years, this concern may be somewhat lessened—but for the moment, it remains true that availability of the drug coverage provided by Medicaid is critically important to many Medicare recipients.

Even an SSDI/Medicare beneficiary who does not receive any SSI or Medicaid benefits may be a good candidate for special needs trust planning. Future developments in public benefits programs, including housing, are uncertain, but constant budget pressure may well make benefits now taken for granted completely or partially indexed to income and/or assets in the future. Medical conditions also change, of course, and some persons with disabilities living in the community who presently receive adequate support from Medicare may one day become dependent on Medicaid for services not available under Medicare-like long term care.

SSI/Medicaid Recipients

Most special needs trust beneficiaries are eligible for (or seeking eligibility for) Supplemental Security Income payments. In many states, receipt of SSI payments automatically qualifies one for Medicaid eligibility. Many other government programs explicitly rely on SSI eligibility rules as well, so that SSI eligibility rules become the central concern for those charged with administering special needs trusts.

Veterans' Benefits

"Veterans' benefits" is the term used to describe the benefits available to veterans, the surviving spouses, children or parents of a deceased veteran, dependents of disabled veterans, active duty military service members, and members of the Reserves or National Guard. These benefits are administered by the U.S. Department of Veterans Affairs ("VA").

The benefits available to veterans include monetary compensation (based on individual unemployability or at least ten-percent disability from a service-connected condition), pension (if permanently and totally disabled or over the age of 65 and have limited income and net worth), health care, vocational rehabilitation and employment, education and training, home loans and life insurance. Although the pension is available to low-income veterans, it is important to note that some income, such as child's SSI or wages earned by dependent children, is excluded when determining the veteran's annual income. Also keep in mind that a service-connected disability payment will not offset SSDI, but any VA disability payment will offset SSI.

> Parents, grandparents and others with the foresight to leave funds in a third-party special needs trust will provide significantly better benefits to a beneficiary with disabilities.

The benefits available to dependents and survivors of the veteran include Dependency and Indemnity Compensation ("DIC") and, in certain circumstances, home loans.

Transferring a VA recipient's assets into a special needs trust may not be fully effective. According to VA interpretation, the assets of such a trust will be counted as part of the claimant's net worth when calculating an improved pension. It is important to remember that the VA may place a "freeze" on new enrollees in order to manage the rapid influx of new veterans or older veterans who did not previously enroll for services. Therefore, it is important to evaluate current and future need for VA services in order to anticipate and plan for a situation where a person is otherwise eligible for VA benefits but, due to a freeze, cannot receive services. Under a new law, attorneys must become accredited with the VA to advise clients in this area.

Subsidized Housing

FEDERAL SUBSIDIZED HOUSING

The U.S. Department of Housing and Urban Development ("HUD") provides opportunities to low-income individuals and families to rent property at a cost that is lower than the open market. This is especially important to those people who are expected to pay for their shelter costs (rent or mortgage, plus utilities) with their insufficient SSI income. There are two issues to consider when evaluating the role of special needs trusts and subsidized housing: the initial eligibility for subsidized housing and the rent determination.

Eligibility for subsidized housing depends on the family's annual income. Annual income includes earned income, SSI, SSDI, pension, unemployment compensation, alimony, and child support, among other items. Annual income also includes unearned income, which is comprised, in part, of interest generated by assets. If the family has net family assets in excess of $5,000, the annual income includes the greater of the actual income derived from all net family assets or a percentage of the value of such assets based on the current passbook savings rate, as determined by HUD.

Assets that are not included as income upon receipt are lump sums, such as inheritances and insurance settlements for losses (although the income they generate will be countable), reimbursement for medical expenses, PASS set-asides, work training programs funded by HUD and the income of a live-in aide.

In general, to qualify for federal subsidized housing, an individual's countable income may not exceed eighty percent of the median income in the area to be considered "low income", and the individual's income may not exceed fifty percent of the median income to be considered "very low income". The result is a disparity in eligibility depending on where the person resides within the county, state, and region of the country.

There is no asset limit to be eligible for federal subsidized housing, although as described above, if countable assets are greater than $5,000, the interest income generated will be counted towards eligibility. If a person transfers an asset for less than its fair market value, then HUD will treat the asset as if it were still owned by the individual for two years after the transfer. HUD will assume that the asset generates

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income at the passbook rate and will include that income in calculating the individual's rent. Therefore, it is very likely that HUD will treat transfers to a special needs trust as a transfer for less than fair market value and, for the next two years, will include the interest generated by the special needs trust as income to the individual, either at the passbook rate or the actual earnings, whichever is greater.

Special Needs Trusts are excluded from family assets and the income generated by the trust assets is not included once the two-year penalty period has expired. It is important to note that, similar to other programs such as Medicaid and SSI, "regular" distributions from a special needs trust, even if made to a third-party provider, will be treated as countable income, even if used for non-food and shelter items.

In many states, receipt of SSI payments automatically qualifies one for Medicaid eligibility. Many other government programs explicitly rely on SSI eligibility rules as well, so that SSI eligibility rules become the central concern for those charged with administering special needs trusts.

The second issue relating to subsidized housing and a special needs trust is determining the monthly rent. Generally, an individual/family's rent will be thirty percent of their adjusted gross income. Similar to treatment under the threshold eligibility rules, the special needs trust and the income generated by trust assets are excluded, but "regular" distributions made directly to the beneficiary (as opposed to a third-party provider of goods or services) will be considered as income.

SECTION 8

Section 8 is a voucher program that is administered by HUD but managed by local public housing authorities ("PHA") or metropolitan housing authorities ("MHA"). The tenant pays their rent, typically thirty percent of their net adjusted income, to the landlord. The PHA pays the remaining balance due, which is called the voucher, to the landlord. The rent is based on the market value for the area and established by the PHA according to payment standards issued by HUD.

While a family member generally cannot serve as a Section 8 landlord, it is possible for a special needs trust to do so, even if the trustee is a family member. Although there are special rules applicable to a Section 8 landlord, it can be a beneficial relationship. The trust beneficiary would pay rent to the trustee (using the thirty percent of income rule) and the PHA would pay the remainder to the trustee.

It is important to investigate how your local housing authority's rules differ from the general rules listed above.

Temporary Assistance for Needy Families ("TANF")

TANF provides assistance and work opportunities to needy families. TANF is administered locally by the states, but is overseen by The Office of Family Assistance ("OFA"), which is located in the United States Department of Health and Human Services, Administration for Children and Families. TANF is a result of combining two other programs: Aid to Families with Dependent Children ("AFDC") and Job Opportunities and Basic Skills Training ("JOBS"). Because TANF is administered on a local level, the program and eligibility rules vary greatly from state to state. However, it is safe to assume that distributions directly made to the beneficiary of a special needs trust, or to the beneficiary's family if a minor, may be considered income and will impact eligibility for TANF.

Other Means-Tested Benefits Programs

State supplements to SSI and other government benefit programs, like vocational rehabilitation services, also play important roles in the lives of many individuals with disabilities. Because the welter of eligibility programs is confusing and the reach of most other programs is not as broad as those described in detail here, those other programs are not described in any depth. In analyzing the proper approach to establishment or administration of a special needs trust, however, care should be taken to consider all the available program resources and restrictions on use of trust funds mandated by those programs.

Eligibility Rules for Means- Tested Programs

As previously noted, the primary program with financial eligibility restrictions is SSI, the Supplemental Security Income program. Because the concepts are central to an understanding of other eligibility rules, and because many other programs explicitly utilize SSI standards, the SSI rules become the most important ones to grasp. They are described here in a general way, with a few notations where other programs (particularly long-term care Medicaid) differ from the SSI rules.

Income

SSI eligibility requires limited income and assets. SSI rules have a simple way of distinguishing between income and assets: Money received in a given month is income in that month, and any portion of that income remaining

on the first day of the next month becomes an asset. SSI rules also distinguish between what is "countable" or "excluded," "regular" or "irregular," and "unearned" or "earned" income. "Countable" income means that it is used to compute eligibility and benefit amount. "Excluded" means that it is not counted. "Regular" means that it is received on a periodic basis, at least two or more times per quarter or in consecutive months, and "irregular" or "infrequent" means that it is not periodic or predictable. "Unearned" means that it is passively received, such as SSDI benefits or bank account interest. "Earned" means that work is performed in exchange for the income. An SSI recipient is permitted to receive a small amount of any kind of income ($20 per month) without reducing benefits. That amount is sometimes referred to as the SSI "disregard" amount.

Each classification or grouping has a somewhat different rule, and it is an understatement to call these income rules "confusing." Any unearned income reduces the SSI benefit by the amount of the income, so investment income or gifted money simply reduces the benefit dollar for dollar, less the disregard. Earned income is treated more favorably, only reducing benefits by about half of the earnings. This is designed to encourage SSI recipients to return to the workforce. Keeping in mind that disability is defined as "unable to perform any substantial gainful activity," it is easy to see that any significant amount of earned income will eventually imperil SSI eligibility and, since trust administration does not usually involve earned income in any event, we will not attempt to deal with those issues here.

SSI also has a concept of "in-kind support and maintenance" (ISM) that is central to much understanding of special needs trust administration. Any payment from a third party (including a trust) for necessities of life—food or shelter (note that the federal government deleted "clothing" from the list of necessities in March 2005) to a third party provider of goods or services—will be treated as countable income, albeit subject to special rules for calculating its effect.

The effect of receiving ISM on SSI benefits is different from the receipt of cash distributions. Where as cash payments reduce the SSI payment dollar for dollar, ISM reduces the benefit by the lesser of the presumed maximum value of the items provided or an amount calculated by dividing the maximum SSI benefit by three and adding the $20 disregard amount.

For 2019 the maximum federal SSI benefit for a single person is $771. One-third of that amount is $257, and so the maximum reduction in benefits caused by ISM (no matter how high the value) is $277 per month. The meaning of that confusing collection of information is best illustrated using an example (CAUTION: some states provide SSI supplemental payments that affect this calculation).

Consider John, who is disabled as a result of his serious mental illness. He has no work history, and he does not qualify for SSDI. He is an adult, living on his own. He qualifies for the maximum federal SSI benefit of $771; he lives in a state which does not provide an SSI supplement.

If John's mother gives him $100 cash per month (for food and cigarettes), he is required to report that as countable unearned income each month. Although SSI may take two or three months to accomplish the adjustment, the program will eventually withhold $80 ($100 minus the $20 disregard) from his benefit for each month in which his mother makes a cash gift to him. The same result will obtain if John's mother is trustee of a special needs trust for John and the cash comes from that trust.

If, however, John's mother does not give him the $100 directly, but instead purchases $70 worth of food and $30 worth of cigarettes each month, only the food will affect his SSI payment—reducing it by $50 ($70 minus the $20 disregard). If she purchases $20 worth of food and $80 worth of cigarettes, there will be no effect at all—the food purchase is within the $20 monthly disregard amount. Similarly, if she purchases $20 worth of cigarettes and $30 worth of movie tickets, there will be no effect—provided that the movie tickets cannot be turned in for cash (because if the movie tickets can be converted to cash, John could—even if he does not—convert the movie tickets into payment for food or shelter).

In other words, the effect of John's mother's payments to him or for his benefit changes with the nature of her payments. Any cash she provides to him (over the $20 monthly amount ignored by SSI) reduces his SSI payment directly. Direct purchase of items other than food or shelter does not affect his SSI, so long as the purchased items cannot be converted to food or shelter. Finally, any payment she makes for food or shelter reduces his SSI check as well, but not as harshly as cash payments directly to John.

Now suppose that John's mother decides to give up on trying to work around the strictures of SSI rules, and she simply pays his rent at an adult care facility that provides his meals. Assume that the facility costs her $1500 per month, which she pays from her own pocket. Because of the ISM rules, John's SSI benefit will be reduced by only $277 per month, and so his SSI check will be $494. Critically important, however, John will still qualify for Medicaid benefits in most states because he receives some amount of SSI. If the adult care home payment comes from a special needs trust for John's benefit, the same result will occur, assuming that the room and board portion of the payment exceeds $277. Incidentally, the same result will also obtain if John's mother simply takes him in and allows him to live and eat with her without charging him rent.

Now assume that John does have a work history before becoming disabled, and that he qualifies to receive $571 per month from SSDI. Because he has been receiving SSDI for more than two years, he also qualifies for Medicare.

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Because his countable income is less than $771, he continues to receive $220 in SSI benefits ($20 of the SSD is disregarded), and qualifies for Medicaid as well (we will ignore the effect of the QMB and SLMB programs for qualified, special low-income Medicare beneficiaries, and the Medicare Part B premium which would ordinarily be withheld from his SSDI check). Now if John's mother pays his rent at the adult care home, or takes him into her own home, he will lose his SSI altogether—since he is receiving less than $277 per month from SSI, the effect of the ISM rules will be to knock him off the program. Unless he separately qualifies for Medicaid, he will also lose his coverage under that program. The income strictures are the same or similar for other programs, with one important exception. In some states, but not all, eligibility for community or long-term care Medicaid is also dependent on countable income. The income tests vary. In some, you can "spend down" excess income over the limit to become eligible. In others, if countable income exceeds the benefit "cap" (like SSI), you cannot become eligible at all.

Some states also attempt to limit expenditures from self-settled (and even third-party) special needs trusts, and can require amendments to the language of those trusts in order to allow eligibility. While a good argument can be made that the Medicaid program does not have that ability, as a practical matter, the trustee of the special needs trust will have to either litigate that issue or acquiesce in the Medicaid agency's demands.

Assets

The limitation on assets for SSI eligibility may be somewhat easier to master, or at least to describe. A single person must have no more than $2,000 in available resources in order to qualify for SSI. Some types of assets are not counted as available (called "non-countable"), including the beneficiary's home, one automobile, household furnishings, prepaid burial amounts plus up to $1500 set aside for funeral expenses (or life insurance in that amount), tools of the beneficiary's trade, and a handful of other, less important items. Each of these categories of assets is subject to special rules and exceptions, so it is easy to become tangled in the asset eligibility structure.

Deeming

The SSI program considers portions of the income and assets of non-disabled, ineligible parents of minor disabled children and of an ineligible spouse living with the SSI recipient as available, and countable for eligibility purposes. This is called "deeming". A certain portion of the ineligible person's income and assets is considered as necessary for his or her own living expenses, and therefore is excluded.

As soon as a child reaches age 18, parental deeming no longer occurs, even if the child continues to live in the household. If spouses voluntarily separate and live in different households, then deeming from the separate spouse or parent also ends. However, in both instances, if the separate person continues to provide support or maintenance to the SSI eligible individual, it will still count as income as described above unless a Court orders it to be deposited directly into the trust. There is also a limited exception to all parental deeming for a severely disabled minor child returning home from an institution or whose condition would otherwise qualify them for institutionalization, which is called a waiver.

"I Want to Buy a..." or "I Want to Pay for..."

What do these complicated rules mean for expenditures from a special needs trust? In-kind purchases, meaning purchase of goods or services for the benefit of the beneficiary, only potentially affect the SSI benefit amount, and not Medicaid benefits, although the Medicaid agency may restrict expenditures for approved things. There are a number of specific purchases that frequently recur:

Home, Upkeep and Utilities

Keep in mind that SSI's in-kind support and maintenance (ISM) rules deal specifically with payments for "food and shelter." The Social Security Administration includes only these items as food and shelter:

1. Food
2. Mortgage (including property insurance required by the mortgage holder)
3. Real property taxes (less any tax rebate/credit)
4. Rent
5. Heating fuel
6. Gas
7. Electricity
8. Water
9. Sewer
10. Garbage removal

The rules make special note of the fact that condominium assessments may in some cases be at least partial payments for water, sewer, garbage removal and the like.

In other words, a payment for rent will implicate the ISM rules, as will monthly mortgage payments. The outright purchase of a home, whether in the name of the beneficiary or the trust, will not cause loss of SSI (although it may reduce the beneficiary's SSI benefit for the single month in which the home is purchased). This brings up

another consideration. Purchase of a home in the trust's name will subject it to a Medicaid "payback" requirement on the death of the beneficiary, whereas purchase in the name of the beneficiary may allow other planning that will avoid the home becoming part of the payback. This complicated interplay of trust rules, ISM definition, estate-recovery rules, and home ownership makes this area of special needs trust administration particularly fraught with difficulty.

However, the Medicaid state agency's treatment of distributions from special needs trusts may differ from the Social Security interpretation—especially when the beneficiary of a self-settled trust is eligible for Medicaid benefits. For example, contrary to putting the house in the individual's name, a state may require that any purchase of a home by such a trust would result in title being held in the trust's name, thereby ensuring that the state will at least receive the proceeds from the sale of the residence upon the death of the beneficiary.

Clothing

Until March 7, 2005, purchase of clothing by a trust was considered as ISM for SSI, similar to shelter and food. Since then, a clothing purchase for the beneficiary will not affect the benefit amount or eligibility, whether the clothing in question is special garments related to the disability or just ordinary street clothes and shoes. Not all state Medicaid regulations reflect this change.

As soon as a child reaches age 18, parental deeming no longer occurs even if the child continues to live in the household.

Phone, Cable, and Internet Services

Other than those utilities listed above, there is no federal limitation on utility payments. In other words, the trust can pay for cable, telephone, high-speed internet connection, newspaper, and other "utilities" not on the list.

Vehicle, Insurance, Maintenance, Gas

Purchase of a vehicle and maintenance (including gas and insurance) is permitted under federal law. Note that there is a mechanical difficulty in providing gasoline without providing cash that could be converted to food or shelter. One technique which has worked well has been to arrange for the beneficiary to have a gas-company credit card. Because eligibility for such cards is easier to meet, and because the cards cannot be used to purchase groceries, administration of the credit account is easier to set up and monitor, and the card can then be billed directly to the trust.

Some state Medicaid agencies put limitations on the value, type, and title ownership of vehicles, such as only allowing a vehicle valued at up to $5,000, handicapped-equipped, or requiring a lien in favor of the payback trust on the title. The SSI program does not specifically require or monitor such limitations.

Pre-paid Burial/Funeral Arrangements

Nothing in federal law prohibits or restricts use of special needs trust funds for purchase of burial and funeral arrangements during the beneficiary's lifetime— except to the extent that the beneficiary has access to the funds used to pay for the arrangements, and thereby subject to the asset limitations affecting SSI recipients. State Medicaid agencies may limit the value of the burial contract. It is important to ask for an "irrevocable, pre-paid" funeral plan.

Tuition, Books, Tutoring

No limit under either federal or state law. This is an excellent use of special needs trust funds.

Travel and Entertainment

Once again, no limit except that there may be some concern about payment for hotels. When the beneficiary still maintains a residence at home, the hotel stay and restaurant may be considered "shelter" and "food" expenses. Some states may impose limitations on companion travel not found in federal law. These might include not allowing recipients to have the special needs trust pay for more than one traveling companion, the companion must be necessary to provide care, and the companion may not be a person obligated to support the beneficiary such as a minor beneficiary's parent. Note that foreign travel can have two other adverse effects: (1) airline tickets to foreign destinations, if refundable, will be treated as being convertible into food and shelter, and (2) if an SSI recipient is out of the country for more than a month, he or she may lose eligibility until return. For those reasons, foreign travel, unlike domestic travel, usually must be limited in time.

Household Furnishings and Furniture

The trust can be used to purchase appliances, furniture, fixtures and the like. Before March 2005, there was a theoretical concern in the SSI program that the value of household furnishings might exceed an arbitrary limit and affect the beneficiary's eligibility; that value limit has now been removed.

Television, Computers and Electronics

There is no specific limitation on purchase of household televisions or other electronic devices, although under SSI rules the individual is only allowed to own "ordinary household goods" that are not kept for collectible value and are used on a regular basis. The trust can also provide a computer for the beneficiary, plus software and upgrades.

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Durable Medical Equipment

There is no federal limitation on any medical related equipment, but individual states may limit purchase of some equipment as not being "necessary." Problem areas could be if the equipment could also be considered as recreational, such as a heated swimming pool needed for arthritic or other joint conditions.

Care Management

No federal limitation, but many states attempt to limit payments for care or management if made to a family member or other relative, especially if there is an obligation of support (e.g., parents of minor children).

Therapy, Medications, Alternative Treatments

Same principle as durable medical equipment, above, so long as the state does not regulate the treatment, there is no federal limitation.

Taxes

No federal limitation, but states may attempt to direct trust language on what taxes can be paid for, such as taxes incurred as a result of trust assets or at the death of the beneficiary. Since it is difficult to imagine an SSI or Medicaid beneficiary having significant non-trust income, it is hard to see how this limitation is so much troublesome as it is quarrelsome.

Legal, Guardianship and Trustee Fees

At least some states allow legal, guardianship, and trustee fees to be paid from the trust, although some federal law indicates that payment of guardian's fees or guardian's attorney fees may really benefit the guardian and not the beneficiary. Payments for trust administration expenses, including the trust's attorney's fees, are clearly permissible under both federal and state law, and are rarely limited beyond reasonableness standards.

Loans, Credit, Debit and Gift Cards

Receipt of a "loan" will not count as income for the SSI or Medicaid programs, which means that a trust can make a loan of cash directly to a beneficiary. There are rules that must be followed for loans to be valid and non-countable. There must be an enforceable agreement at the time that the loan is made that the loan will be paid back at some point, which usually means that it should be in writing. The agreement to pay back cannot be based on a future contingency such as, "I only have to pay it back if I win the lottery..." Finally, the loan must be considered as "feasible," meaning that there is a reasonable expectation that the beneficiary will have the means at some point to pay back the loan.

If a loan is forgiven, then it would count as income at that time. Also, if the beneficiary still has the loaned amount in the following month, it will then count as a resource. However, school loans are not countable as income or as a resource so long as the funds are spent for tuition, room and board, and other education-related expenses within nine months of receipt.

Since goods or services purchased with a credit card are actually a "loan" that must be paid back to the credit card company, they are also not considered as income to the beneficiary at time of purchase. As long as the beneficiary doesn't sell the goods for cash, there is also the added advantage that the trust can pay back the credit card company without the payment counting as income, except for purchases that are considered as food or shelter. Food and shelter related purchases use the same ISM countable income rules (and particularly the countable income limits) described above.

Use of a debit card by a beneficiary when purchases are made for payment through a trust-funded bank account is income to the beneficiary for the amount accessed. The total amount in the account available to be accessed could possibly be a countable resource. Is a gift card purchased by a trust and provided to a beneficiary considered to be a distribution of income, a line of credit to a vendor (similar to a credit card), or just access for in-kind purchase of goods or services on behalf of a beneficiary by the trust? SSI rules are not yet clear on this point, and it is probable that different Social Security and Medicaid offices will treat the use of debit and gift cards differently until precise guidelines are provided by the agencies. The safe approach is to use them in a very limited way; if they are to be used at all, keep receipts for all special needs items, and be prepared for adverse treatment.

It is generally beneficial for a self-settled special needs trust to be a grantor trust. This is true because the tax rates for non-grantor trusts are tightly compressed, and the highest marginal tax rate on income is reached very quickly for trusts.

Trust Administration and Accounting

Actual administration of a special needs trust is in most respects similar to administration of any other trust. A trustee has a general obligation to account to beneficiaries and other interested parties. Tax returns may need to be filed (though not always), and tax filing requirements will be based on the tax rules, not special needs trust rules. Some special needs trusts, but by no means all, will be subject to court supervision and control.

Trustee's Duties

As with general trust law requirements, the trustee of a special needs trust has an obligation not to self-deal, not to delegate the trustee's duties impermissibly, not to favor either income or remainder beneficiaries over one another, and to invest trust assets prudently. The obligations of a trustee are well-discussed in several centuries of legal precedent, and cannot be taken lightly. Legal counsel (and professional investment, tax and accounting assistance) will be required in administration of almost every special needs trust.

A few cardinal trust rules bear special mention:

NO SELF-DEALING

As with other trusts, the trustee of a special needs trust is prohibited from self-dealing. That means no investment of trust assets in the trustee's business or assets, no mingling of trust and personal assets, no borrowing from the trust, no purchase of goods or services (by the trust) from the trustee (other than, of course, trust administration services), and no sale of trust assets to the trustee. The same strictures also apply to the trustee's immediate family members, and the existence of an appraisal, or the favorable terms of a transaction, do not change these rules.

> A trustee has a general obligation to account to beneficiaries and other interested parties. Tax returns may need to be filed (though not always), and tax filing requirements will be based on the tax rules, not special needs trust rules.

IMPARTIALITY

Because the trust has both an "income" beneficiary (the person with disabilities) and a "remainder" beneficiary (the state, in the case of a Medicaid payback trust, or the individuals who will receive assets when the income beneficiary dies), the trustee has a necessarily divided loyalty. It is important to remain impartial as between the trust's beneficiaries. Thus, investment in assets exclusively designed to maximize income at the expense of growth, or vice versa, may violate the trustee's duty to the negatively affected class of beneficiaries. Note that a trust may, by its terms, make clear that the interests of one or the other class of beneficiaries should be paramount—though such language will probably earn the disapproval of the Medicaid agency in any self-settled trust which must be submitted to Medicaid for approval.

DELEGATION

Generally speaking, a trustee may delegate functions but may not avoid liability by doing so. In other words, while the trustee may hire investment advisers, tax preparers and the like, he or she will remain liable for any failures by such professionals.

Some states do limit the trustee's liability. For example, in states which have adopted the Uniform Prudent Investor Act, delegating investment authority pursuant to the Act will limit the trustee's liability so that he or she will only be required to carefully select and monitor the investment adviser.

INVESTMENT

Any trustee should be familiar with the principles of Modern Portfolio Theory, with its emphasis on risk tolerance and asset diversification. A trustee who holds himself, herself, or itself out as having special expertise in investments or asset management will be held to a higher standard, but any trustee will be required to understand and implement prudent investment practices. Some courts will institute an investment policy that requires a percentage of assets to be held in fixed income investments and the remainder in securities (e.g., a 60/40 split is common).

Bond

A trustee, especially one who administers a special needs trust supervised by a probate court, may need to be bonded. Bond is a type of insurance arrangement whereby the trustee pays a premium in order to guarantee that the trustee manages the trust and carries out his or her fiduciary duties correctly. The bond premium is an acceptable expense of the trust, and need not come out of the trustee's own pocket. If the trustee fails to exercise his or her fiduciary duty and the trust loses money as a result, the insurance company that issued the bond will compensate the trust and take action to collect from the trustee.

The bond premium depends on multiple factors, including the credit history of the trustee and the value of the trust. Most corporate trustees are exempt from posting bond. Individual trustees must "post bond"; that is, provide written documentation to the probate court that the individual is bonded. The bond is typically issued for a set period of time, for example one year, and at the expiration of the time period, the trustee must pay an additional premium or show the bond issuer that bond is no longer required by the probate court.

It is possible in most states, at least when the trust is supervised by a court, to ask the court for permission to deposit the assets in a restricted or "blocked" account with a financial institution rather than posting bond. While this circumvents the issue of being bonded, the financial institution should require a certified copy of the court's order authorizing the expenditure of funds prior to making a distribution from the special needs trust. This can result in frequent in-person trips to the bank by the trustee, although it avoids the sometimes costly bond premium.

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Titling Assets

The trust assets should not be titled in the beneficiary's name except in limited circumstances, such as when it is advantageous to title the home in the individual's name. Typically, the trust assets should be titled in the name of the trustee. For example, if James Jones is the trustee of the Lisa Martin Special Needs Trust, and that trust was signed on March 15, 2007, then the trust assets should be titled as follows: "James Jones, Trustee of the Lisa Martin Special Needs Trust u/a/d March 15, 2007" ("u/a/d" means "under agreement dated").

It is important that most assets not be held in James Jones's or Lisa Martin's name individually. If the assets are not titled properly, then the assets may be counted as a resource, or the interest earned counted as income, by the agencies that administer means-tested government benefits, which will frustrate the purpose of the special needs trust, as well as contribute to confusion during tax preparation. Additionally, as discussed in further detail below, it may also be important to request a separate Tax ID number for the trust as well as properly title the assets.

Accounting Requirements

A trustee is required to provide adequate accounting information to beneficiaries of the trust. That requirement generally means annual accountings. While there is no specific form required for accountings if the trust is not under court supervision, it is important to provide enough information that a reader could determine the nature and amount of any payment or investment. For some trusts, a simple "check register" accounting may be sufficient, showing interest income and the names of payees, with dates and amounts. Any trust with significant assets or diverse investments, however, should provide a thorough accounting.

Regular, complete accountings are critical. A beneficiary is generally foreclosed from later raising objections to investments or expenditures if he or she received adequate disclosure in the annual accounting at the time. In other words, thorough accounting can limit the trustee's later exposure to claims by beneficiaries, and therefore benefits the trustee.

In addition to the accounting requirements to the beneficiary, the trustee may be required to provide an annual or biennial accounting to the probate court. The trustee should use the county-specific forms available upon request from the court, and may also be required to provide the court with copies of bank statements and cancelled checks or receipts as evidence of trust distributions and deposits. This requires the trustee to be organized or be prepared to pay potentially substantial bank fees for duplicate account statements or cancelled checks.

> The trustee of a special needs trust is prohibited from self-dealing. That means no investment of trust assets in the trustee's business or assets, no mingling of trust and personal assets, no borrowing from the trust, no purchase of goods or services (by the trust) from the trustee (other than, of course, trust administration services), and no sale of trust assets to the trustee.

Reporting to Social Security

The simple term "income" has different meanings in trust accounting, tax preparation, and public benefits eligibility determinations. Trustees sometimes raise concerns that thorough trust accountings (to SSI, especially) may result in suspension of benefits, or that tax return information may be used to terminate SSI or other benefits. While such things undoubtedly do occur, Social Security workers are increasingly likely to be relatively sophisticated about such distinctions, and willing to work through any problems. In a general way, then, it is better to disclose more fully to Social Security rather than withhold any information. Annual accountings of any self-settled trust naming an SSI recipient as beneficiary should be provided to Social Security. Any third-party trust which makes significant distributions for the benefit of an SSI recipient should probably be provided to Social Security, just to prevent later problems that could have been headed off. If distributions disrupt eligibility, the problem is with the distribution, not with the accounting.

If the beneficiary receives only SSDI and not any concurrent SSI, there is no point in providing accounting information to Social Security, because SSDI benefits are not means-tested. If the trust is a third-party trust, the trustee may not have any obligation to provide accounting information, though the beneficiary may (if the beneficiary receives SSI and trust distributions invoke the ISM rules) be required to do so.

Although it no longer occurs as regularly, some Social Security eligibility workers may misunderstand the effect of special needs trust expenditures or terms and reduce or eliminate benefits improperly. When this does occur, it should be possible to remedy the error, but the beneficiary may suffer for months (or years) while the system works out the problem. Far better to head off problems in advance, rather than have to spend substantial resources and time resolving them after the fact. Be aware that fees for a trustee's time spent directly dealing with Social Security on the beneficiary's behalf may be subject to approval by SSA.

Reporting to Medicaid

If the beneficiary resides in a state where the receipt of SSI results in the beneficiary also being automatically enrolled in Medicaid, then no separate accounting requirement need be made to the Medicaid agency. However, if the individual is in a state where SSI and Medicaid are not interrelated, then it may be necessary to account to both agencies. The Medicaid consumer (or their guardian) is required to notify Medicaid of a change in resources or income within a set period of time, usually as short as ten days. This includes situations where the Medicaid consumer receives an inheritance or settlement and immediately transfers the funds to a special needs trust.

The trustee of a third-party special needs trust may not have the same duty to account, but may choose to provide accounting information to Medicaid rather than risk later disqualification of the beneficiary, even though Medicaid's power to consider trust expenditures may be subject to challenge.

Reporting to the Court

Many self-settled special needs trusts will be treated in essentially the same fashion as a conservatorship or guardianship of the estate. This is so because, typically, the court was initially asked to authorize establishment of the trust. Most courts expect any trust established by the court to remain under court supervision, including bonding, seeking authority to expend funds, and filing periodic accountings.

Even if the trust does not require court accounting, some consideration should be given to seeking court involvement. One great advantage of court supervision of the trust is that each year's accounting is then final as to all items described in that accounting (provided, of course, that the appropriate notice has been given to beneficiaries who might otherwise complain about the trust's administration and other court procedural requirements are followed).

The Court may also have a set fee schedule that governs the amount the trustee can be compensated for providing trust administration services.

Modification of Trust

As explained above, a special needs trust must be irrevocable in order for the trust to be considered an exempt resource. However, that does not preclude the trust itself from permitting the trustee to amend or modify the trust in limited ways, particularly as it relates to program eligibility for the beneficiary. This is particularly important since we cannot predict future changes to the laws governing means-tested benefits. The courts may also be willing to modify or terminate a trust whose purpose has been frustrated by law changes or other factors, such as the trust assets being valued at a nominal amount.

Wrapping up the Trust

If the special needs trust is a self-settled trust with a provision requiring repayment of Medicaid expenses, it will obviously be necessary to determine the "payback" amount upon the death of the beneficiary or termination of the trust. Because Medicaid's historical experience with these trusts is still slight, state agencies may have difficulty providing a reliable and final figure. The prudent trustee will request a written statement of the amount due, including evidence showing how it was calculated and a statement of authority to make the final determination. Once any payback issues have been addressed (and remember that most third-party special needs trusts will have no requirement of repayment to the state), then termination of the trust will follow the usual requirements of tax preparation and filing, final accounting and distribution according to the trust instrument. Remember, because Social Security requires that Medicaid reimbursement and certain tax liabilities must be squared away before the trustee may even pay for the beneficiary's funeral, purchase during the beneficiary's lifetime of an irrevocable pre-paid funeral is critical.

Income Taxation of Special Needs Trusts

Special needs trusts, like other types of trusts, can complicate income tax preparation. The first question to be addressed is whether—for income tax purposes- the trust is a "grantor" trust or not. Tax rules defining "grantor" trusts are neither simple nor intuitive, but fortunately there are some easy rules of thumb to apply, and they will work for most special needs trusts.

"Grantor" Trusts

A "grantor" trust is treated for tax purposes as a transparent entity. In other words, the grantor of a "grantor" trust is treated as having received the income directly, even though the accounts are titled to the trust and all income shows up in the name of the trust.

Generally speaking, a self-settled special needs trust will be a grantor trust if a family member is the trustee. If the trust names an independent trustee it may still be a grantor trust if one of several specific provisions exists in the trust. A qualified accountant or lawyer should be able to tell whether a given trust is a grantor trust at a glance. If it is, it remains a grantor trust for its entire life—or at least until the death of the grantor (when the trust may either terminate or convert into a non-grantor trust as to its new beneficiaries). Until the trust has been reviewed by an expert, assume that it is probably a grantor trust.

It is generally beneficial for a self-settled special needs trust to be a grantor trust. This is true because the tax rates for non-grantor trusts are tightly compressed, and the highest marginal tax rate on income is reached very quickly for trusts. The practical difference will be small

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if the trust actually makes distributions for the benefit of the beneficiary in excess of its annual taxable income, but the proper tax reporting approach should still be followed.

TAX ID NUMBERS

A grantor trust may, but need not, obtain an Employer Identification Number (an EIN). Some attorneys and accountants choose to secure an EIN in each case, while others resist doing so—either approach is defensible. Although banks, brokerage houses and other financial institutions may insist that the trust requires its own EIN, they are simply wrong. There is widespread confusion about the necessity for an EIN for irrevocable trusts, but a confident and well-informed trustee, attorney or accountant should be able to convince the financial institution that no separate EIN is required. Instead, the trustee can simply provide the financial institution with the grantor's Social Security number.

FILING TAX RETURNS

A grantor trust ordinarily will not file a separate tax return. If a grantor trust has been assigned an EIN, it may file an "informational" return. The return can include a paragraph indicating that the trust is a grantor trust, that all income is being reported on the beneficiary's individual return, and that no substantive information will be included in the fiduciary income tax return. Actually, completing the fiduciary income tax return is not an option for a grantor trust, although again there is much confusion on this point, even among some professionals.

Non-Grantor Trusts

Virtually all third-party, and some self-settled, special needs trusts will be non-grantor trusts. Because income will not be treated as having been earned by the beneficiary, a fiduciary income tax return (IRS form 1041) will be required.

TAX ID NUMBERS

A non-grantor trust will need to obtain its own EIN by filing a federal form SS-4. Nearly all third-party special needs trusts will be "complex" trusts—this designation simply means that the trust is not required to distribute all its income to the income beneficiary each year. Although the trust will be listed as "complex" on the SS-4, it may in fact alternate between "complex" and "simple" on each year's 1041.

FILING TAX RETURNS

The non-grantor trust must file a 1041 each year. All distributions for the benefit of the beneficiary are conclusively presumed to be of income first, so any trust expenditures in excess of deductions will result in a Form K-1 showing income imputed to the beneficiary. This should not cause particular concern, since Social Security (and even Medicaid) eligibility workers are increasingly likely to understand that "income" for tax purposes is different from "income" for public benefits eligibility purposes. Any tax liability incurred by the individual beneficiary as a result of this imputation can be paid by the trust, though the trustee may not have the authority to prepare and sign the individual's tax return.

Administrative and other deductible expenses on an individual tax return must reach 2% of the taxpayer's income before being deducted at all. The same is not true of a trust tax return, leading to a modest benefit to treatment as a non-grantor trust in some cases. This benefit may not offset the compressed income tax rates levied against non-grantor trusts, but each case will be different. The difficulty in determining the proper—and the best—income tax treatment is made worse when one adds the confusing option of treatment as a "Qualified Disability Trust."

Qualified Disability Trust

Beginning in 2002, Congress allowed some non-grantor special needs trusts to receive a modest income tax benefit. Trusts qualifying under Internal Revenue Code Section 642(b)(2)(C) receive a special benefit—they are granted a larger and special deduction on their federal income taxes. In tax year 2018, for example, a Qualified Disability Trust can deduct $4,150 before any tax payment is due. That figure is slated to increase each year. Once the trust deducts that amount from its income, any remaining income might then be passed through to the beneficiary's tax return; the beneficiary may well pay no tax, or a very low rate of tax.

Coupled with the greater flexibility available to non-grantor trusts in deducting administrative expenses, Qualified Disability Trust treatment may be advantageous in some cases. Typically, the Qualified Disability Trust election will be attractive when there is a fair amount of income on trust assets, and relatively few medical or other expenses incurred on behalf of the beneficiary. Careful review with a qualified income tax professional is usually necessary to determine whether to pursue Qualified Disability Trust treatment.

Seeking Professional Tax Advice

It should be apparent from this brief discussion of taxation of special needs trusts that professional tax preparation and advice are essential. Although most accountants are qualified to prepare fiduciary (trust) income tax returns, most do not have much experience in the field. A first question to ask a prospective accountant might be "How many 1041s do you typically prepare in a year?" Follow that with "Could you please explain the concept of Qualified Disability Trusts to me?" and you will quickly locate any truly proficient practitioner. You probably will not want to automatically reject an

accountant who cannot tell you about Qualified Disability Trusts immediately, unless you are prepared to deal with an accountant in another city—there are simply not very many accountants or tax preparers who have ever had occasion to claim that status on any fiduciary income tax return. As always, you can get some assistance in complicated special needs trust issues from the attorney who prepared the document, or the attorney who advises you as trustee. Members of the Special Needs Alliance® are usually among the very few who are familiar with these concepts, and your attorney may have worked with an accountant in your area who is familiar with the special tax treatment of these trusts.

For Further Reading

There are a handful of books and articles, and a growing number of websites, available to aid trustees of special needs trusts. Among our favorites:

Special Needs Trust Administration Manual: A Guide for Trustees, by Jackins, Blank, Macy and Shulman—this guide is among the best available. It was written by four Massachusetts lawyers, and is frankly focused on Massachusetts law and practice. Much of what the authors have to say, however, is applicable to special needs trusts in every state.

Special People, Special Planning: Creating a Safe Legal Haven for Families with Special Needs, by Hoyt and Pollock—provides some general advice and direction, but is more conversational than detailed. This volume also tends to focus on the "why" more than the "how", which is an important message but not as useful to someone who is already administering a special needs trust.

Special Needs Trusts: Protect Your Child's Financial Future, by Elias—this recent addition to the literature comes from Nolo Press, an organization that many lawyers find annoying at best. We disagree. This is a plain-language, straightforward explanation of special needs trusts from a lawyer who doesn't even practice in the area (his previous books for Nolo Press include explanations of bankruptcy, trademark and other areas of law).

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Cómo administrar un fideicomiso para necesidades especiales

Manual para fideicomisarios (Edición 2018)

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Cómo administrar un fideicomiso para necesidades especiales

ÍNDICE

Cómo administrar un fi deicomiso para necesidades especiales: Manual para fi deicomisarios

Introducción y definición de términos

Los fideicomisos para “necesidades especiales” son complicados y pueden ser difíciles de entender y administrar. Son como cualquier otro fideicomiso en muchos aspectos, se aplican las normas generales de contabilidad, ley e impuestos de los fideicomisos, pero diferentes a los fideicomisos más conocidos en otros aspectos. La sola noción de tipos de fideicomisos “más conocidos” a muchos les parecerá divertida, porque la mayoría de las personas no tiene ninguna experiencia especial en ocuparse de acuerdos de fideicomisos formales y los fideicomisos para necesidades especiales con frecuencia se crean en beneficio de personas que de lo contrario no esperarían tener relación con los conceptos de un fideicomiso.

El propósito esencial de un fideicomiso para necesidades especiales generalmente es mejorar la calidad de vida de una persona sin que pierda su idoneidad para recibir beneficios públicos. Por consiguiente, uno de los deberes centrales del fideicomisario de un fideicomiso para necesidades especiales es comprender cuáles programas de beneficios públicos podrían estar disponibles para el beneficiario y de qué forma recibir ingresos o proveer alimentación o una vivienda podrían afectar la idoneidad. Debido a que hay varios programas, normas de idoneidad opuestas (y en ocasiones contradictorias) y al menos dos tipos distintos de fideicomisos para necesidades especiales que considerar, en este asunto abundan las oportunidades de cometer errores. Con riesgos tan altos, los programas de beneficios públicos perfectamente podrían llegar a cubrir todas las necesidades de vida del beneficiario, es de suma importancia comprender bien las normas y los programas.

Antes de ahondar en un análisis detallado de los principios de un fideicomiso para necesidades especiales, podría ser útil definir algunos términos:

OTORGANTE (a veces “Fideicomitente” o “Fiduciante”): Persona que establece el fideicomiso y generalmente la persona que financia el fideicomiso con sus activos. Podría haber más de un otorgante para un determinado fideicomiso. La agencia tributaria puede definir el término de forma diferente a la agencia de beneficios públicos. Los fideicomisos para necesidades especiales pueden hacer que este término sea más confuso que otros tipos de fideicomiso, puesto que el verdadero otorgante para algunos fines puede no ser la misma persona que firma la escritura fiduciaria. Si, por ejemplo, uno de los padres crea un fideicomiso en beneficio de un hijo con una discapacidad y su propio dinero financia el fideicomiso, esa persona es el otorgante.

En otro caso, cuando uno de los padres ha establecido un fideicomiso para necesidades especiales para administrar el dinero obtenido en un arreglo judicial producto de una demanda por lesiones personales o una herencia impropiamente dirigida, el hijo menor de edad (a través de un tutor) o un hijo adulto será el otorgante, aunque no haya decidido establecer el fideicomiso ni haya firmado ningún documento del fideicomiso.

FIDEICOMISARIO: Persona que administra los activos del fideicomiso y las disposiciones del fideicomiso. Nuevamente, puede haber dos (o más) fideicomisarios que actúen al mismo tiempo. El o los otorgantes también pueden ser el o los fideicomisarios en algunos casos. El fideicomisario puede ser un fideicomisario profesional (como el departamento de fideicomisos de un banco o un abogado) o puede ser un familiar o un asesor de confianza, aunque puede ser difícil calificar a una persona no profesional para actuar como fideicomisario.

BENEFICIARIO: Persona en cuyo beneficio se establece el fideicomiso. El beneficiario de un fideicomiso para necesidades especiales generalmente (aunque no siempre) estará discapacitado. Si bien un beneficiario también puede actuar como fideicomisario en algunos tipos de fideicomisos, el beneficiario de un fideicomiso para necesidades especiales casi nunca podrá actuar como fideicomisario.

> El propósito esencial de un fideicomiso para necesidades especiales generalmente esmejorar la calidad de vida de una persona sin que pierda su elegibilidad para recibir beneficios públicos.

DISCAPACIDAD: Para la mayoría de los fines relacionados con los fideicomisos para necesidades especiales, “discapacidad” se refiere al estándar utilizado a fin de determinar la idoneidad para recibir beneficios de Seguro de Discapacidad del Seguro Social o la Seguridad de Ingreso Complementario: la incapacidad de realizar cualquier empleo remunerado considerable.

INCAPACIDAD (a veces Incompetencia): A pesar de que “incapacidad” e “incompetencia” no son intercambiables, para nuestros fines, ambos pueden referirse a la incapacidad de un fideicomisario de administrar el fideicomiso, generalmente debido a limitaciones mentales. La incapacidad por lo general es importante cuando se aplica al fideicomisario (antes que al beneficiario), debido a que el fideicomiso en circunstancias normales ofrece un mecanismo para transmitir el poder a un fideicomisario sustituto si el fideicomisario original pierde la capacidad de administrar el fideicomiso. La incapacidad de un beneficiario en ocasiones también puede ser importante. No todas las discapacidades van a significar una determinación de incapacidad, ya que es posible que el beneficiario de un fideicomiso para necesidades especiales sea discapacitado, pero no esté mentalmente incapacitado. Los menores de edad se consideran incapacitados como cuestión de derecho. La mayoría de edad difiere levemente entre cada

estado, aunque, excepto por un puñado de estados, es de 18 años.

FIDEICOMISO REVOCABLE: Se refiere a cualquier fideicomiso que, por sus propios términos, es revocable o modificable, lo que significa que se puede deshacer o cambiar. Muchos fideicomisos de uso común en la actualidad son revocables, pero los fideicomisos para necesidades especiales generalmente son irrevocables, es decir, permanentes e irreversibles.

FIDEICOMISO IRREVOCABLE: Se refiere a cualquier fideicomiso que se estableció como irrevocable (es decir, nadie se reservó la facultad de revocar el fideicomiso) o que ha pasado a ser irrevocable (por ejemplo, debido al fallecimiento del otorgante original).

SEGURO DE DISCAPACIDAD DEL SEGURO SOCIAL: En algunas ocasiones denominado SSDI o SSD, este programa de beneficios está disponible para personas con una discapacidad que tienen un historial laboral suficiente antes de quedar discapacitados o que tienen derecho a recibir beneficios por ser una carga familiar o superviviente de un trabajador discapacitado, jubilado o fallecido. No hay ninguna comprobación de "recursos" para la idoneidad de SSDI, por lo tanto, los fideicomisos para necesidades especiales pueden no ser necesarios para algunos beneficiarios, porque pueden calificar para programas de ayuda social del gobierno, como SSD y Medicare, aunque reciban ingresos o tengan recursos a su disposición. Sin embargo, los beneficiarios de SSDI también pueden calificar para SSI (consulte a continuación) o beneficios de Medicaid que requieren protección de sus activos e ingresos para mantener la idoneidad. Naturalmente, el simple hecho de que los beneficios de un beneficiario no sean comprobados como recursos, no implica que el beneficiario no podrá sacar provecho de la protección de un fideicomiso por otros motivos.

SEGURIDAD DE INGRESO SUPLEMENTARIO: Mejor conocido por las iniciales "SSI", es un programa de beneficios que está a disposición de las personas de bajos ingresos que son discapacitadas, ciegas o ancianas, y cuentan con ingresos limitados y pocos activos. Las normas de idoneidad del SSI son la base de la mayoría de los demás programas de gobierno y, por lo tanto, son el centro de gran parte de la planificación y administración de fideicomisos para necesidades especiales.

MEDICARE: Uno de los dos principales programas de atención de salud operados y financiados por el gobierno, en este caso el gobierno federal. Los beneficios de Medicare están a disposición de las personas de 65 años de edad y mayores (con la única condición de que tengan derecho a recibir beneficios del Seguro Social si optan por jubilarse, sea que realmente se jubilen o no) y las personas menores de 65 años de edad que han recibido SSDI durante al menos dos años. La idoneidad de Medicare puede anticipar la necesidad o utilidad de un fideicomiso para necesidades especiales. Los receptores de Medicare sin activos o ingresos sustanciales pueden enfrentar dificultades para pagar su medicamentos (los que históricamente no eran cubiertos por Medicare, sino hasta el año 2004, en que se comenzaron a cubrir parcialmente) o atención a largo plazo (que en gran medida sigue estando fuera de la lista de beneficios de Medicare).

MEDICAID: El segundo programa más importante de atención de salud administrado por el gobierno. Medicaid difiere de Medicare en tres importantes formas: es administrado por los gobiernos estatales (aunque financiado en parte con pagos federales), está a disposición de las personas que reúnen los requisitos de idoneidad financiera, antes que basarse en la edad del receptor y cubre toda la atención médica necesaria (aunque es fácil de argumentar que la definición de Medicaid de atención "necesaria" es demasiado restrictiva). Debido a que es un programa de atención de salud "con comprobación de recursos", la continuidad de su disponibilidad a menudo es el centro de la administración de fideicomisos para necesidades especiales. Puesto que Medicare cubre una parte tan pequeña de los costos de atención a largo plazo, la idoneidad de Medicaid adquiere una importancia central para muchas personas con discapacidades.

La diferencia más importante

Generalmente, dos tipos de fideicomisos completamente distintos se juntan como fideicomisos para "necesidades especiales". Los dos tipos de fideicomiso se van a tratar de forma diferente para fines de impuestos, determinaciones de beneficios y para la intervención de tribunales. Para gran parte del análisis que sigue, será necesario distinguir primero entre los dos tipos de fideicomisos. La distinción se complica más por el hecho de que el otorgante (la persona que establece el fideicomiso y la forma más fácil de distinguir entre los dos tipos de fideicomisos) no siempre es la persona que en realidad firma el documento del fideicomiso.

Fideicomiso para necesidades especiales "autoestablecido"

Algunos fideicomisos son establecidos por el beneficiario (o por alguien que actúa en su nombre) con los fondos del beneficiario, con el fin de mantener u obtener idoneidad para recibir beneficios públicos; tal fideicomiso generalmente se denomina fideicomiso para necesidades especiales "autoestablecido". Por ejemplo, el beneficiario podría haber recibido una herencia directa o haber ganado la lotería. Sin embargo, por mucho, la fuente más común de fondos para fideicomisos para necesidades especiales "autoestablecidos" es el dinero obtenido en una demanda, con frecuencia (aunque no siempre) una demanda por la lesión que ocasionó la discapacidad. Otro escenario común que requiere que una persona con una discapacidad cree un fideicomiso autoestablecido es cuando recibe una herencia directa de un pariente bien intencionado, pero mal aconsejado.

Un fideicomiso determinado puede considerarse como "establecido" por el beneficiario, aunque el beneficiario sea completamente incapaz de formalizar documentos y aunque un tribunal, un familiar o un abogado que representa al beneficiario en realidad hayan firmado los documentos del fideicomiso. La prueba clave para determinar si un fideicomiso es autoestablecido es determinar si el beneficiario tenía derecho a la posesión directa de las ganancias antes del acto de establecer el fideicomiso. De ser así, las normas de idoneidad para recibir beneficios públicos considerarán que el beneficiario estableció el fideicomiso aunque la implementación pueda en realidad haberla hecho alguien más que actuó en su nombre. Prácticamente todos los fideicomisos para necesidades especiales establecidos con fondos recuperados en un juicio o a través de una herencia directa serán fideicomisos "autoestablecido".

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Los fideicomisos para necesidades especiales autoestablecidos difieren de los fideicomisos de terceros en dos importantes formas. En primer lugar, los fideicomisos deben incluir una disposición que ordene al fideicomisario, si el fideicomiso contiene fondos en el momento del fallecimiento del beneficiario, devolver al programa Medicaid estatal todo lo que haya pagado para el beneficiario. Segundo, en muchos estados, las reglas que rigen las distribuciones permitidas para fideicomisos para necesidades especiales son considerablemente más restrictivas que las que controlan los fideicomisos para necesidades especiales de terceros.

Debido a que la ley del Seguro Social específicamente describe los fideicomisos para necesidades especiales autoestablecidos, con frecuencia se hace referencia a estos instrumentos en la sección reglamentaria que autoriza las transferencias a tales fideicomisos e instruye que los activos del fideicomiso no se tratarán como disponibles y contables para efectos del SSI. La sección reglamentaria es 42 U.S.C. §1396p(d)(4)(A), por lo que en ocasiones los fideicomisos para necesidades especiales se denominan sencillamente fideicomisos "d4A".

Fideicomiso para necesidades especiales de "terceros"

El segundo tipo de fideicomiso para necesidades especiales es uno establecido por alguien que no es la persona con discapacidades (normalmente, aunque no siempre, uno de los padres) con activos que nunca pertenecieron al beneficiario. Con frecuencia se usa, cuando se realiza una adecuada planificación para la familia de una persona discapacitada, para retener una herencia o donación. Sin planificación, un familiar bien intencionado podría simplemente dejar una herencia a una persona con discapacidad. A pesar de que es posible establecer un fideicomiso después del hecho, los fondos se habrán puesto legalmente a disposición del beneficiario. Eso significa que cualquier fideicomiso probablemente será un fideicomiso para necesidades especiales "autoestablecido", aunque los fondos vinieran de un tercero.

Los padres, abuelos y otros con la previsión de dejar fondos en un fideicomiso para necesidades especiales de terceros proporcionarán considerablemente mejores beneficios a un beneficiario con una discapacidad. Este tipo de fideicomiso no necesitará incluir una disposición de "devolución" para los beneficios de Medicaid después del fallecimiento del beneficiario. Durante la vida del beneficiario, los tipos de pagos que el fideicomiso puede hacer generalmente serán más generosos y flexibles.

El fideicomiso "en beneficio exclusivo"

Aunque hay dos tipos principales de fideicomisos para necesidades especiales, en realidad hay un tercer tipo que podría ser adecuado en determinadas circunstancias poco comunes. Debido a que las normas de Medicaid permiten a los solicitantes hacer donaciones ilimitadas o "en beneficio exclusivo" de hijos discapacitados o cónyuges, algunas personas con activos pueden elegir establecer un fideicomiso para necesidades especiales para un hijo o nieto con discapacidades con la esperanza de obtener la idoneidad para Medicaid para sí mismos como otorgantes y para el beneficiario discapacitado. Una serie de estados son muy restrictivos en su interpretación del requisito de "en beneficio exclusivo", de modo que muy pocas veces se ven estos fideicomisos. En muchas maneras se parecen a un híbrido de los otros dos tipos de fideicomisos; se pueden gravar y tratar como fideicomiso de terceros, pero exigen una disposición de devolución, como un fideicomiso autoestablecido (al menos en algunos estados).

Algunos fideicomisos son creados por el beneficiario con el fin de mantener u obtener elegibilidad para recibir beneficios públicos con los fondos del beneficiario. Por mucho, la fuente más común de fondos de fideicomisos para necesidades especiales "autoestablecidos" es el dinero producto de una demanda, con frecuencia (aunque no siempre) una demanda por la lesión que ocasionó la discapacidad.

La segunda diferencia más importante

Cuando se ha determinado el tipo de fideicomiso, el siguiente aspecto importante es discernir el tipo de programa gubernamental que ofrece beneficios. Algunos programas (como SSDI y Medicare) no imponen requisitos de idoneidad financiera; un beneficiario que recibe ingresos y toda su atención médica de estos dos programas podría no necesitar en absoluto un fideicomiso para necesidades especiales o podría beneficiarse de dar una mayor flexibilidad al fideicomisario. Sin embargo, un receptor de SSI o Medicaid, puede tener que usar un lenguaje más restrictivo en el documento del fideicomiso y el fideicomisario, prestar más atención.

Receptores de SSDI/Medicare

Ni los beneficios del Seguro de Discapacidad del Seguro Social ni Medicare requieren "comprobación de recursos". En consecuencia, puede no ser necesario crear un fideicomiso para necesidades especiales para alguien que recibe beneficios de estos dos programas. Después de 24 meses de idoneidad para SSDI, el beneficiario calificará para recibir también los beneficios de Medicare, por lo que puede ser adecuado incluir disposiciones para necesidades especiales a fin de mantener al receptor de SSDI durante ese período de dos años, durante el cual puede basarse en Medicaid para obtener atención médica. El lenguaje restrictivo de un fideicomiso para necesidades especiales de hecho puede actuar en contra de un beneficiario de SSDI si impide la distribución de efectivo al beneficiario en todas las circunstancias, un receptor de SSDI casi siempre se beneficiará de un lenguaje amplio que dé más discreción al fideicomisario.

Algunos receptores de SSDI/Medicare también pueden recibir SSI o beneficios de Medicaid. Puede ser de importancia crítica para esas personas usar un lenguaje estricto para necesidades especiales que rija el uso de cualquier activo o ingreso que pudiera estar disponible de otro modo. A medida que el beneficio de medicamentos de venta con receta médica de Medicare evolucione en los próximos años, esta preocupación puede disminuir en cierta medida, pero por el momento, sigue siendo válido que la disponibilidad de la cobertura de medicamentos proporcionada por Medicaid tiene una importancia crítica para muchos receptores de Medicare.

Incluso un beneficiario de SSDI/Medicare que no recibe ningún beneficio de SSI o Medicaid puede ser un buen candidato para planificar un fideicomiso para necesidades especiales. Los

futuros avances en los programas de beneficios públicos, que incluyen la vivienda, son inciertos, pero es bastante factible que la constante presión sobre los presupuestos provoque que los beneficios que ahora se dan por sentados se indexen completa o parcialmente a los ingresos o activos en el futuro. Las afecciones médicas también cambian, no cabe duda, por lo que algunas personas con discapacidades que viven en la comunidad y que actualmente reciben ayuda suficiente de Medicare algún día puedan pasar a depender de Medicaid para servicios no disponibles en Medicare, como la atención a largo plazo.

Receptores de SSDI/Medicaid

La mayoría de los beneficiarios de fideicomisos para necesidades especiales reúnen los requisitos (o buscan reunir los requisitos) para recibir pagos de Seguridad de Ingreso Suplementario. En muchos estados, recibir pagos de SSI automáticamente lo califica para optar a Medicaid. Muchos otros programas del gobierno también se basan explícitamente en las reglas de idoneidad del SSI, por lo que estas reglas se convierten en la preocupación central de las personas a cargo de administrar fideicomisos para necesidades especiales.

Beneficios para veteranos

"Beneficios para veteranos" es el término que se usa para describir los beneficios disponibles para los veteranos, los cónyuges supervivientes, hijos o padres de un veterano fallecido, cargas familiares de veteranos discapacitados, miembros de las fuerzas armadas en servicio activo y miembros de la Reserva o la Guardia Nacional. Estos beneficios los administra el Departamento de Asuntos de los Veteranos ("VA").

Los beneficios disponibles para los veteranos incluyen una remuneración monetaria (basada en la incapacidad para trabajar o como mínimo una discapacidad de un 10% producto de una afección derivada del servicio), pensión (si está discapacitado de forma permanente o totalmente, o tiene más de 65 años de edad y tiene un ingreso y patrimonio económico limitados), atención de salud, rehabilitación profesional y empleo, educación y capacitación, préstamos para la vivienda y seguros de vida. Aunque la pensión está disponible para veteranos con bajos ingresos, es importante señalar que algunos ingresos, como SSI de niños o salarios ganados por hijos dependientes, se excluyen para determinar el ingreso anual del veterano. Además, tenga presente que un pago por discapacidad relacionado con el servicios no compensará el SSDI, pero cualquier pago por discapacidad de VA compensará la SSI.

Los beneficios disponibles para cargas familiares y supervivientes del veterano incluyen la Compensación de Dependencia e Indemnización ("DIC", por sus siglas en inglés) y, en algunas circunstancias, préstamos para la vivienda.

Transferir los activos de un receptor del VA a un fideicomiso para necesidades especiales puede no ser completamente eficaz. De acuerdo con la interpretación

del VA, los activos de tal fideicomiso se contarán como parte del patrimonio económico del reclamante al calcular un aumento de la pensión. Es importante recordar que el VA puede "congelar" las nuevas inscripciones a fin de administrar la rápida afluencia de nuevos veteranos o antiguos veteranos que no se inscribieron antes para recibir los servicios. Por consiguiente, es importante evaluar la necesidad actual y futura de los servicios del VA a fin de prever y hacer planes para una situación en que una persona reúne los requisitos para recibir beneficios del VA pero que, debido a una congelación de las inscripciones, no puede recibirlos. En virtud de una nueva ley, los abogados deben acreditarse en el VA para asesorar a clientes en esta área.

Padres, abuelos y otros con la previsión de dejar fondos en un fideicomiso para necesidades especiales de terceros proporcionarán considerablemente mejores beneficios a un beneficiario con discapacidades.

Viviendas subvencionadas

VIVIENDAS SUBVENCIONADAS FEDERALES

El Departamento de Vivienda y Desarrollo Urbano de EE.UU. ("HUD", por sus siglas en inglés) ofrece oportunidades a personas y familias de bajos ingresos de alquilar propiedades a un costo menor que el del mercado abierto. Esto es especialmente importante para las personas que deben pagar por los costos de vivienda (alquiler o hipoteca, más los servicios públicos) con su ingreso de SSI insuficiente.

Hay dos aspectos que se deben considerar cuando se evalúa el papel de los fideicomisos para necesidades especiales y las viviendas subsidiadas: la idoneidad inicial para una vivienda subsidiada y la determinación del alquiler.

La idoneidad para una vivienda subsidiada depende del ingreso anual de la familia. El ingreso anual incluye el ingreso percibido, SSI, SSDI, pensión, seguro de desempleo, pensión alimenticia y pensión infantil además de otros elementos. El ingreso anual también incluye el ingreso no percibido, que se compone, en parte, de los intereses generados por los activos. Si la familia tiene activos familiares netos superiores a $5,000, el ingreso anual incluye el ingreso real derivado de todos los activos familiares netos o un porcentaje del valor de dichos activos basándose en la tasa actual de ahorros de la libreta de ahorros, el que sea mayor según lo determine el HUD.

Los activos que no se incluyen como ingreso al recibirlos son las sumas globales, como herencias y liquidaciones del seguro por pérdidas (aunque el ingreso que generan será contable), reembolso por gastos médicos, recursos reservados del plan para lograr la autosuficiencia (PASS, por sus siglas en inglés), programas de capacitación laboral financiados por el HUD y el ingreso de un asistente interno.

En general, para calificar para un vivienda subsidiada federal, el ingreso contable de una persona no puede exceder el 80% del ingreso medio en el área para que se le considere de "bajos ingresos" y el ingreso de la persona no puede exceder el 50% del ingreso medio para que se le considere de "muy bajos ingresos". El resultado es una

disparidad de la idoneidad según dónde reside la persona en el condado, estado y región del país.

No hay un límite de activos para reunir los requisitos para recibir una vivienda subsidiada federal, aunque como se describió anteriormente, si los activos contables son mayores que $5,000, los ingresos por interés generados se contarán para determinar la idoneidad. Si una persona

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transfiere un activo por menos de su valor equitativo de venta, el HUD tratará al activo como si todavía fuera propiedad de la persona durante dos años después de la transferencia. HUD supondrá que el activo genera un ingreso según la tasa de la libreta de ahorros e incluirá ese ingreso en el cálculo del alquiler de la persona. Por lo tanto, es muy probable que el HUD trate las transferencias a un fideicomiso para necesidades especiales como una transferencia por menos del valor equitativo de venta y, durante los próximos dos años, incluya el interés generado por el fideicomiso para necesidades especiales como ingreso a favor de la persona, ya sea según la tasa de la libreta de ahorros o las ganancias reales, lo que sea mayor.

Los fideicomisos para necesidades especiales se excluyen de los activos familiares y el ingreso generado por los activos del fideicomiso no se incluye tras haber vencido el período de penalización. Es importante señalar que, de forma similar a otros programas como Medicaid y SSI, las distribuciones "habituales" desde un fideicomiso para necesidades especiales, aunque se hagan a un tercero proveedor, se tratarán como ingreso contable, a pesar de que se usen para artículos de la vivienda y no alimenticios.

El segundo aspecto relacionado con las viviendas subsidiadas y un fideicomiso para necesidades especiales es determinar el alquiler mensual. Por lo general, el alquiler de una persona o familia será el 30% de su ingreso bruto ajustado. De modo semejante al tratamiento bajo el umbral de las normas de idoneidad, se excluyen el fideicomiso para necesidades especiales y el ingreso generado por los activos del fideicomiso, pero las distribuciones "habituales" realizadas directamente al beneficiario (a diferencia de a un tercero proveedor de bienes o servicios) se considerarán como ingreso.

SECCIÓN 8

La Sección 8 es un programa de cupones que controla el HUD, pero que es administrado por las autoridades de vivienda pública ("PHA") locales o las autoridades de vivienda metropolitana ("MHA"). El arrendatario paga su alquiler, generalmente el 30% de su ingreso neto ajustado, al arrendador. La PHA paga el saldo restante, que se denomina cupón, al arrendador. El alquiler se basa en el valor de mercado para el área y es establecido por la PHA de acuerdo con estándares de pago emitidos por el HUD.

Aunque un familiar generalmente no puede actuar como arrendador de la Sección 8, un fideicomiso para necesidades especiales puede hacerlo, a pesar de que el fideicomisario sea un familiar. Aunque hay normas especiales aplicables a un arrendador de la Sección 8, puede ser una relación provechosa. El beneficiario del fideicomiso pagaría un alquiler al fideicomisario (aplicando la norma del 30% del ingreso) y la PHA pagaría el resto al fideicomisario.

Es importante investigar en qué se diferencian las normas de su autoridad de vivienda local de las normas antes indicadas.

Asistencia Temporal para Familias Necesitadas ("TANF")

TANF ofrece ayuda y oportunidades laborales a familias necesitadas. Los estados administran localmente la TANF, pero es supervisada por la Oficina de Asistencia a la Familia ("OFA", por sus siglas en inglés), que se ubica en la Administración de Asuntos de Niños y Familias del Departamento de Salud y Servicios Humanos de Estados Unidos. TANF es el resultado de la combinación de otros dos programas: Ayuda para Familias con Niños a su Cargo ("AFDC", por sus siglas en inglés) y Oportunidades Laborales y Capacitación en Habilidades Básicas ("JOBS", por sus siglas en inglés).

Debido a que TANF es administrada a nivel local, el programa y las normas de idoneidad varían mucho entre estados. No obstante, es seguro suponer que las distribuciones realizadas directamente al beneficiario de un fideicomiso para necesidades especiales, o a la familia de un beneficiario si este es menor de edad, pueden considerarse como ingresos y afectar la idoneidad para recibir TANF.

En muchos estados, recibir pagos de SSI automáticamente lo califica para optar a Medicaid. Muchos otros programas del gobierno también se basan explícitamente en las reglas de elegibilidad del SSI, por lo que estas reglas se convierten en la preocupación central de las personas a cargo de administrar fideicomisos para necesidades especiales.

Otros programas de beneficios con comprobación de recursos

Los complementos estatales a la SSI y otros programas de beneficios gubernamentales, como los servicios de rehabilitación profesional, también tienen papeles importantes en las vidas de muchas personas con discapacidades. Debido a que la mezcla de programas de idoneidad es confusa y el alcance de la mayoría de los demás programas no es tan amplio como los que se describen en detalle aquí, esos otros programas no se describen con profundidad. Sin embargo, al analizar el enfoque adecuado para establecer o administrar un fideicomiso para necesidades especiales, se debe tener cuidado para considerar todos los recursos y restricciones de los programas disponibles al uso de los fondos de fideicomisos ordenados por esos programas.

Reglas de idoneidad para programas con comprobación de recursos

Como se indicó anteriormente, el principal programa con restricciones de idoneidad financiera es el SSI, el programa de la Seguridad de Ingreso Suplementario. Puesto que los conceptos son centrales para comprender otras normas de idoneidad y debido a que muchos otros programas explícitamente usan los estándares del SSI, las normas del SSI pasan a ser las más importantes de comprender. Se describen aquí de forma general, con algunas anotaciones cuando otros programas (en particular Medicaid para atención de largo plazo) difieren de las normas del SSI.

Ingresos

La idoneidad de SSI requiere ingresos y activos limitados. Las normas del SSI tienen una forma sencilla de distinguir entre ingresos y activos: El dinero recibido en un mes determinado es ingreso en ese mes y cualquier parte de ese ingreso restante el primer día del mes siguiente se convierte en un activo. Las normas del SSI también distinguen entre lo que es ingreso "contable" o "excluido", "habitual" o "no habitual" y "no percibido" o "percibido". Ingreso "Contable" es aquél que se usa para calcular la idoneidad y el monto del beneficio. "Excluido" significa que no se cuenta. "Habitual" significa que se recibe de forma periódica, como mínimo dos o más veces por trimestre o en meses consecutivos y "no habitual" o "infrecuente" significa que no es periódico o predecible. "No percibido" significa que se recibe pasivamente, como beneficios del SSDI o el interés de una cuenta bancaria. "Percibido" se refiere a que se realiza un trabajo a cambio del ingreso. Un receptor del SSI puede recibir una pequeña cantidad de cualquier ingreso ($20 al mes) sin reducir los beneficios. Esa suma en ocasiones se denomina cantidad "no tomada en cuenta" del SSI.

Cada clasificación o grupo tiene una norma algo distinta, y decir que estas normas sobre ingresos son "confusas" se queda corto. Cualquier ingreso no percibido reduce el beneficio del SSI en la cantidad del ingreso, de modo que el ingreso por inversiones o el dinero regalado simplemente reduce el beneficio dólar por dólar, menos la cantidad no tomada en cuenta. El ingreso percibido se trata más favorablemente, ya que solamente reduce los beneficios en alrededor de la mitad de las ganancias. Esto está diseñado para estimular a los receptores de SSI a volver a la fuerza laboral. Teniendo en cuenta que discapacidad se define como "incapacidad de realizar cualquier actividad remunerada considerable", es fácil ver que cualquier monto significativo de ingreso percibido a la larga pondrá en peligro la idoneidad de SSI y debido a que la administración de fideicomisos generalmente no implica ingresos percibidos en cualquier caso, no intentaremos tratar esos temas aquí.

SSI también tiene un concepto de "mantenimiento y sustento en especies" (ISM, por sus siglas en inglés) que es fundamental para comprender en gran medida la administración de fideicomisos para necesidades especiales. Cualquier pago de un tercero (incluido un fideicomiso) para las necesidades de vida, alimentación y vivienda (observe que el gobierno federal eliminó "ropa" de la lista de necesidades en marzo de 2005) a un tercero proveedor de bienes o servicios, se tratará como un ingreso contable, aunque sujeto a normas especiales para calcular su efecto.

El efecto de recibir ISM en los beneficios del SSI es distinto a recibir distribuciones en efectivo. Mientras que los pagos en efectivo reducen el pago de SSI dólar por dólar, ISM reduce el beneficio por el valor máximo presunto de los artículos proporcionados o un monto calculado al dividir el beneficio máximo de SSI por tres y sumar la cantidad no tomada en cuenta de $20, lo que sea menor.

Para 2018, el beneficio federal máximo para una sola persona es de $750. Un tercio de ese monto es $250, por lo que la reducción máxima en beneficios provocada por el ISM (sin importar lo alto que sea el valor) es de $270 al mes. El significado de esa recopilación confusa de información se ilustra mejor a través de un ejemplo (PRECAUCIÓN: algunos estados hacen pagos complementarios del SSI que afectan a este cálculo).

Piense en John, que está discapacitado como consecuencia de su grave enfermedad mental. No tiene un historial laboral y no califica para recibir SSDI. Es adulto y vive por su cuenta. Califica para recibir el beneficio de SSI federal máximo de $750; vive en un estado que no ofrece un complemento de SSI.

Si la madre de John le da $100 en efectivo al mes (para comida y cigarrillos), debe declarar eso como ingreso contable no percibido cada mes. Aunque lograr el ajuste de SSI puede tomar entre dos y tres meses, el programa a la larga retendrá $80 ($100 menos los $20 no tomados en cuenta) de su beneficio para cada mes en el que la madre le hace un regalo en efectivo. John obtendrá el mismo resultado si la madre de John es fideicomisaria de un fideicomiso para necesidades especiales para John y el efectivo proviene desde ese fideicomiso.

Sin embargo, si la madre de John no le da $100 directamente, pero en cambio compra $70 en alimentos y $30 en cigarrillos cada mes, solo los alimentos afectarán su pago del SSI, con una disminución de $50 ($70 menos los $20 no tomados en cuenta). Si ella compra $20 en alimentos y $80 en cigarrillos, no habrá absolutamente ningún efecto, la compra de alimentos cabe dentro de la cantidad mensual no tomada en cuenta de $20. De modo similar, si ella compra $20 en cigarrillos y $80 en entradas para el cine, no habrá ningún efecto, siempre que las entradas para el cine no se puedan cambiar por efectivo (porque si así fuera, John podría, aunque no lo haga, convertir las entradas para el cine en pago para comida o vivienda).

En otras palabras, el efecto de los pagos de la madre de John en su beneficio cambia con la naturaleza de sus pagos. Todo dinero en efectivo que ella le entregue (sobre la cantidad de $20 mensual omitida por el SSI) disminuye directamente su pago de SSI. La compra directa de artículos que no sean alimentos o vivienda no afecta su SSI, siempre que los artículos comprados no se puedan convertir en alimentos o vivienda. Por último, cualquier pago que ella haga para comida también reduce su cheque del SSI, pero no tan severamente como los pagos en efectivo hechos de forma directa a John.

Ahora suponga que la madre de John decide dejar de intentar esquivar las constricciones de las normas del SSI y simplemente le paga el alquiler en un establecimiento de cuidado para adultos que le ofrece las comidas. Suponga que el establecimiento le cuesta $1500 al mes, que paga con su

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propio dinero. Debido a las normas de ISM, el beneficio de SSI de John se reducirá solamente en $270 al mes, por lo que su cheque del SSI será de $480. Sin embargo, de suma importancia, John calificará para recibir beneficios de Medicaid en la mayoría de los estados porque recibe alguna cantidad de SSI. Si el pago del hogar de cuidado para adultos proviene de un fideicomiso para necesidades especiales en beneficio de John, se producirá el mismo resultado, suponiendo que la parte de alojamiento y alimentación del pago supere los $270. A propósito, también se obtendrá el mismo resultado si la madre de John simplemente lo acoge y le permite vivir y comer con ella sin cobrarle alquiler.

Ahora suponga que John sí tiene un historial laboral antes de quedar discapacitado y que califica para recibir $520 al mes del SSDI. Debido a que ha estado recibiendo SSDI durante más de dos años, también califica para Medicare. Puesto que su ingreso contable es menor que $750, sigue recibiendo $250 en beneficios del SSI ($20 del SSD no se toman en cuenta) y también califica para recibir Medicaid (omitiremos el efecto de los programas QMB y SLMB para beneficiarios calificados especiales de bajos ingresos de Medicare y la prima de la Parte B de Medicare que comúnmente se retendría de su cheque del SSDI). Ahora si la madre de John paga su alquiler en el establecimiento de cuidado para adultos o lo recibe en su propia casa, él va a perder el SSI por completo, puesto que está recibiendo menos de $270 al mes del SSI, el efecto de las normas de ISM será dejarlo fuera del programa. A menos que califique de forma separada para Medicaid, también perderá su cobertura según ese programa.

Las constricciones de ingreso son las mismas o similares para otros programas, con una excepción importante. En algunos estados, pero no en todos, la idoneidad para Medicaid de atención comunitaria o atención a largo plazo también depende de los ingresos contables. Las comprobaciones de ingresos varían, en algunos, puede "gastar" el exceso de los ingresos sobre el límite para reunir los requisitos. En otros, si el ingreso contable excede el "tope" de beneficios (como SSI), no puede reunir los requisitos en modo alguno.

Algunos estados también intentan limitar los gastos de los fideicomisos para necesidades especiales autoestablecidos (e incluso de terceros) y pueden exigir modificaciones al lenguaje de esos fideicomisos a fin de permitir la idoneidad. Si bien un buen argumento puede ser que el programa Medicaid no tiene esa capacidad, como materia práctica, el fideicomisario del fideicomiso para necesidades especiales deberá lleva a juicio ese asunto o acceder a las exigencias de la agencia de Medicaid.

Activos

La limitación a los activos para idoneidad del SSI puede ser algo más fácil de dominar o por lo menos, de describir. Una persona soltera no debe tener más de $2,000 en recursos disponibles a fin de calificar para el SSI. Algunos tipos de activos no se cuentan como disponibles (denominados "no contables"), incluidos la vivienda del beneficiario, un automóvil, accesorios del hogar, sumas prepagadas para funeral más hasta $1500 apartados para gastos de entierro (o seguros de vida por ese monto), herramientas del oficio del beneficiario y algunos otros artículos de menor importancia. Cada una de estas categorías de activos está sujeta a las normas especiales y las excepciones, por lo que es fácil confundirse en la estructura de idoneidad de activos.

Consideración de ingresos

El programa del SSI considera partes del ingreso y los activos de padres no discapacitados que no reúnen los requisitos de hijos menores de edad discapacitados y de un cónyuge que no reúne los requisitos y vive con el receptor del SSI, según estén disponibles y contables para fines de idoneidad. Esto se denomina "consideración de ingresos". Una determinada parte de los ingresos y activos de la persona que no reúne requisitos se considera como necesaria para sus propios gastos de mantenimiento.

En cuanto un niño cumple 18 años, la consideración de los ingresos de los padres ya no se produce aunque el niño siga viviendo en el hogar familiar. Si los cónyuges se separan voluntariamente y viven en distintos hogares, también termina la consideración del cónyuge o el padre o la madre separado. Sin embargo, en ambos casos, si la persona separada sigue proporcionando mantenimiento y sustento a la persona que reúne los requisitos del SSI, de todas maneras contará como ingreso tal como se describió anteriormente, a menos que un tribunal ordene que se deposite directamente en el fideicomiso. Asimismo, hay una excepción limitada para todas las consideraciones de los ingresos de los padres de un hijo menor de edad gravemente discapacitado que vuelve a su hogar desde una institución o cuya condición de lo contrario lo calificaría para ser internado, lo que se denomina exención.

"Deseo comprar..." o "Deseo pagar..."

¿Qué significan estas complicadas normas para los gastos de un fideicomiso para necesidades especiales? Las compras en especies, es decir, la adquisición de bienes o servicios en beneficio del beneficiario, solo tiene la posibilidad de afectar el monto del beneficio de SSI y no los beneficios de Medicaid, aunque la agencia de Medicaid puede restringir los gastos para artículos aprobados. Existe una serie de compras específicas que se repite frecuentemente:

Vivienda, mantenimiento y servicios públicos

Tenga presente que las reglas de mantenimiento y sustento en especies (ISM) del SSI tratan específicamente con pagos para "alimentación y vivienda". La Administración del Seguro Social incluye solamente los siguientes artículos como alimentación y vivienda:

1. Comida
2. Hipoteca (incluidos los seguros de propiedad exigidos por el tenedor de la hipoteca)
3. Contribuciones territoriales (menos toda devolución de impuestos/crédito tributario)
4. Alquiler
5. Combustible para calefacción
6. Gas
7. Electricidad
8. Agua
9. Alcantarillado
10. Retiro de basura

Las normas ponen un énfasis especial en el hecho de que las tasaciones de condominios en algunos casos pueden ser como mínimo pagos parciales de agua, alcantarillado, retiro de basura y cosas parecidas.

En otras palabras, un pago del alquiler implicará las normas de ISM, al igual que los pagos mensuales de la hipoteca. La compra directa de una vivienda, en el nombre del beneficiario o el fideicomiso, no ocasionará la pérdida del SSI (aunque puede reducir el beneficio de SSI del beneficiario sólo en el mes de compra de la vivienda). Esto plantea otra consideración. La compra de una vivienda en nombre del fideicomiso la someterá a un requisito de "devolución" de Medicaid después del fallecimiento del beneficiario, mientras que la compra en nombre del beneficiario puede dar lugar a otra planificación que evitará que la vivienda pase a formar parte de la devolución. Esta complicada interacción de normas de fideicomisos, la definición de ISM, las normas de recuperación de propiedad y la propiedad de una vivienda implica que abunden especialmente las dificultades en esta área de la administración de los fideicomisos para necesidades especiales.

En cuanto un niño cumple 18 años, la consideración de los ingresos de los padres ya no se produce aunque el niño siga viviendo en el hogar familiar.

Sin embargo, el tratamiento de las distribuciones de fideicomisos para necesidades especiales de la agencia estatal de Medicaid puede diferir de la interpretación del Seguro Social, especialmente cuando el beneficiario de un fideicomiso autoestablecido reúne los requisitos para recibir los beneficios de Medicaid. Por ejemplo, en oposición a poner la vivienda a nombre de la persona, un estado puede exigir que cualquier compra de una vivienda hecha por tal fideicomiso signifique que el título se mantenga a nombre del fideicomiso con lo cual se asegura de que el estado recibirá como mínimo las ganancias de la venta de la residencia después del fallecimiento del beneficiario.

Ropa

Hasta el 7 de marzo de 2005, la compra de ropa con un fideicomiso se consideraba como ISM para el SSI, similar a alimentación y vivienda. Desde entonces, una compra de ropa para el beneficiario no afectará el monto del beneficio o idoneidad, ya sea que la ropa en cuestión sean prendas especiales relacionadas con la discapacidad o simplemente ropa y zapatos de calle comunes y corrientes. No todos los reglamentos estatales de Medicaid reflejan este cambio.

Teléfono, cable y servicios de Internet

Además de los servicios públicos enumerados anteriormente, no hay una limitación federal a los pagos de estos servicios. En otras palabras, el fideicomiso puede pagar el cable, el teléfono, conexión a Internet de alta velocidad, periódicos y otros "servicios públicos" que no aparecen en la lista.

Vehículo, seguro, mantenimiento, gasolina

La compra de un vehículo y el mantenimiento (incluida la gasolina y el seguro) está autorizada conforme a las leyes federales. Observe que hay una dificultad mecánica en proporcionar gasolina sin proporcionar efectivo que pueda convertirse en comida o vivienda. Una técnica que ha funcionado bien ha sido disponer que el beneficiario tenga una tarjeta de crédito de una empresa proveedora de gasolina. Debido a que los requisitos para obtener dichas tarjetas son fáciles de cumplir y como esas tarjetas no se pueden usar para comprar comestibles, es más fácil establecer y controlar la administración de la cuenta de crédito, además de que la tarjeta se puede facturar directamente al fideicomiso.

Algunas agencias estatales de Medicaid fijan limitaciones al valor, tipo y titularidad de los vehículos, como permitir solamente un vehículos valorado en hasta $5,000, equipado para discapacitados o exigir un derecho de prenda sobre la titularidad a favor del fideicomiso de devolución. El programa del SSI no exige ni supervisa específicamente tales limitaciones.

Arreglos funerarios/de entierro prepagados

Nada en la leyes federales prohíbe o restringe el uso de fondos de fideicomisos para necesidades especiales para la compra de arreglos funerarios y de entierro durante la vida del beneficiario, salvo en la medida que el beneficiario tenga acceso a los fondos usados para pagar los arreglos y, por ende, esté sujeto a las limitaciones que afectan a los receptores del SSI. Las agencias estatales de Medicaid pueden limitar el valor del contrato de entierro. Es importante solicitar un plan funerario "prepagado e irrevocable".

Colegiatura, libros, clases privadas

Sin límites conforme a las leyes federales o estatales. Es un excelente uso de los fideicomisos para necesidades especiales.

Viajes y entretenimiento

Nuevamente, no hay límite salvo que puede haber alguna atención al pago de hoteles. Cuando el beneficiario todavía mantiene una residencia en su hogar, la estadía en un hotel y el restaurante se puede considerar como gastos de "vivienda" y "alimentación". Algunos estados pueden imponer limitaciones a los viajes con acompañantes que no se incluyen en las leyes federales. Pueden incluir no autorizar a los receptores para que paguen por más de un acompañante con el fideicomiso para necesidades especiales, el acompañante debe necesariamente proporcionar cuidados y no puede ser una persona obligada a mantener al beneficiario, como uno de los padres de un beneficiario menor de edad. Tenga en cuenta que los viajes al extranjero tienen otros dos efectos adversos: (1) los boletos de líneas aéreas a destinos en el extranjero, si son reembolsables, se tratarán como convertibles a alimentos y vivienda, y (2) si un receptor de SSI se encuentra fuera del país durante más de un mes, puede perder su idoneidad hasta que regrese. Por tales motivos, los viajes al extranjero, a diferencia de los viajes nacionales, generalmente deben ser limitados en el tiempo.

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Accesorios y muebles de casa

El fideicomiso se puede usar para comprar electrodomésticos, muebles, instalaciones y cosas por el estilo. Antes de marzo de 2005, había una preocupación teórica en el programa del SSI de que el valor de los accesorios del hogar pudiera exceder un límite arbitrario y afectar la idoneidad del beneficiario; valor que en la actualidad ya no existe.

Televisión, computadoras y electrónica

No hay una limitación específica a la compra de televisores para el hogar u otros dispositivos electrónicos, aunque conforme a las normas del SSI, la persona sólo puede poseer "bienes domésticos comunes" que no se mantengan por su valor de colección y que se usen habitualmente. El fideicomiso también puede proporcionar una computadora al beneficiario, más software y actualizaciones.

Equipos Médicos Duraderos

No hay una limitación federal a los equipos médicos duraderos, pero cada estado puede limitar la compra de algunos equipos por no considerarlos "necesarios". Las áreas problemáticas pueden ser si el equipo también se puede considerar como recreativo, como una piscina temperada necesaria para la artritis u otras afecciones de las articulaciones.

Administración de la atención

No hay una limitación federal, pero muchos estados intentan limitar los pagos de la atención o la administración si es para un familiar u otro pariente, especialmente si hay una obligación de manutención (por ejemplo, padres de hijos menores de edad).

Terapia, medicamentos, tratamientos alternativos

El mismo principio que con los equipos médicos duraderos antes mencionado, siempre que el estado no regule el tratamiento, no hay una limitación federal.

Impuestos

Sin limitación federal, pero los estados pueden intentar dirigir el lenguaje del fideicomiso respecto a cuáles impuestos se pueden pagar, como los impuestos incurridos como consecuencia de los activos del fideicomiso o en el momento del fallecimiento del beneficiario. Puesto que es difícil imaginar que un beneficiario del SSI o de Medicaid tenga ingresos significativos no provenientes del fideicomiso, cuesta mucho ver cómo esta limitación podría ser problemática o conflictiva.

Generalmente es provechoso para un fideicomiso autoestablecido que sea un fideicomiso con responsabilidad del otorgante. Esto es válido porque las tasas impositivas para los fideicomisos sin responsabilidad del otorgante son muy comprimidos y en los fideicomisos se llega a la tasa impositiva marginal más alta sobre el ingreso de forma muy rápida.

Honorarios legales, de tutela y del fideicomisario

Por lo menos algunos estados permiten que los honorarios legales, de tutela y del fideicomisario se paguen con el fideicomiso, aunque algunas leyes federales señalan que el pago de los honorarios de un tutor o de los honorarios del abogado de un tutor puede beneficiar de hecho al tutor y no al beneficiario. Los pagos para los gastos de administración del fideicomiso, incluidos los honorarios de abogados, son claramente autorizados conforme a las leyes federales y estatales, y en pocas ocasiones se limitan fuera de los estándares de la moderación.

Préstamos, crédito, débito y tarjetas de regalo

El recibo de un "préstamo" no contará como ingreso para los programas del SSI o de Medicaid, lo que significa que un fideicomiso puede hacer un préstamo de dinero en efectivo directamente a un beneficiario. Hay normas que se deben cumplir para que los préstamos sean válidos y no contables. Debe haber un acuerdo exigible en el momento de hacer el préstamo que indique que el préstamo se devolverá en algún momento, lo cual generalmente significa que debe ser por escrito. El acuerdo de devolución no se puede basar en una contingencia futura, como "sólo tengo que devolverlo si gano la lotería..." Por último, el préstamo se debe considerar "viable", lo que significa que hay una expectativa razonable de que el beneficiario tendrá los medios en algún momento para devolver el préstamo.

Si se perdona un préstamo, se contará como ingreso en ese momento. Asimismo, si el beneficiario todavía tiene el monto prestado el mes siguiente, contará como recurso. Sin embargo, los préstamos estudiantiles son no contables como ingreso o como recurso siempre que los fondos se gasten en la colegiatura, la comida, el alojamiento y otros gastos relacionados con la educación en un plazo de nueve meses después de recibirlos.

Debido a que los bienes o servicios comprados con una tarjeta de crédito son en realidad un "préstamo" que debe devolverse a la empresa de la tarjeta de crédito, tampoco se consideran como ingreso para el beneficiario en el momento de la compra. Siempre que el beneficiario no venda los bienes a cambio de efectivo, también está la ventaja añadida de que el fideicomiso puede pagarle a la empresa de la tarjeta de crédito sin que el pago cuente como ingreso, excepto por las compras que se consideran como alimentación o vivienda. Las compras relacionadas con la alimentación y la vivienda usan las mismas normas de ingreso contable de ISM (y en especial los límites de los ingresos contables) que se describieron anteriormente.

El uso que haga un beneficiario de una tarjeta de débito cuando se realizan compras para pagarlas a través de una cuenta bancaria financiada por un fideicomiso es ingreso para el beneficiario por el monto accedido. El monto total en la cuenta disponible para su acceso podría ser

un recurso contable. ¿Es considerada una tarjeta de regalo comprada por un fideicomiso y entregada a un beneficiario por el fideicomiso una distribución de ingresos, una línea de crédito a un proveedor (similar a una tarjeta de crédito) o sólo acceso para compras en especies de bienes o servicios en nombre de un beneficiario? Las normas de SSI no están todavía claras en este tema y es probable que las distintas oficinas del Seguro Social y Medicaid traten el uso de tarjetas de débito y regalo de forma diferente hasta que las agencias proporcionen pautas precisas. El enfoque seguro es usarlas de forma muy limitada; si las va a usar, conserve los recibos de todos los artículos para necesidades especiales y esté preparado para un tratamiento adverso.

Administración y contabilidad del fideicomiso

La administración real de un fideicomiso para necesidades especiales es en muchos aspectos similar a la administración de cualquier otro fideicomiso. Un fideicomisario tiene la obligación general de responder ante los beneficiarios y otras partes interesadas. Puede que se deban presentar declaraciones de impuestos (aunque no siempre) y los requisitos de presentación de declaraciones de impuestos se van a basar en las normas fiscales, no en las normas de fideicomisos para necesidades especiales. Algunos fideicomisos para necesidades especiales, pero de ninguna manera todos ellos, estarán sujetos a supervisión y control de los tribunales.

Un fideicomisario tiene la obligación general de responder ante los beneficiarios y otras partes interesadas. Puede que se deban presentar declaraciones de impuestos (aunque no siempre) y los requisitos de presentación de declaraciones de impuestos se van a basar en las normas fiscales, no en las normas de fideicomisos para necesidades especiales.

Deberes del fideicomisario

Al igual que con los requisitos generales de la ley de fideicomisos, el fideicomisario de un fideicomiso para necesidades especiales tiene una obligación de no negociar por cuenta propia, no delegar los deberes del fideicomisario sin autorización ni favorecer a los beneficiarios de ingresos o restantes por sobre otros e invertir los activos del fideicomiso con prudencia. Las obligaciones de un fideicomisario se han analizado bien en varios siglos de precedentes legales y no se pueden tomar a la ligera. Se necesitará asesoría legal (y ayuda profesional en inversiones, impuestos y contabilidad) en la administración de casi todos los fideicomisos para necesidades especiales.

Merecen mención especial algunas normas cardinales de los fideicomisos:

NO NEGOCIAR POR CUENTA PROPIA

Al igual que otros fideicomisos, el fideicomisario de un fideicomiso para necesidades especiales tiene prohibido negociar por cuenta propia. Eso significa no realizar ninguna inversión de los activos del fideicomiso en los negocios o activos del fideicomisario, no mezclar los activos personales con los del fideicomiso, no tomar prestado del fideicomiso, no comprar bienes o servicios (con el fideicomiso) al fideicomisario (aparte de los servicios de administración del fideicomiso, naturalmente) y no vender los activos del fideicomiso al fideicomisario. Las mismas constricciones también se aplican a los familiares inmediatos del fideicomisario y la existencia de una evaluación, o los términos favorables de una transacción, no cambian estas reglas.

IMPARCIALIDAD

Debido a que el fideicomiso tiene a un beneficiario de "ingresos" (la persona con discapacidades) y un beneficiario "restante" (el estado, en el caso de un fideicomiso de devolución de Medicaid, o las personas que recibirán los activos cuando muera el beneficiario de los ingresos), el fideicomisario tiene necesariamente una lealtad dividida. Es importante mantener la imparcialidad con respecto a los beneficiarios del fideicomiso. En consecuencia, invertir en activos exclusivamente diseñados para maximizar el ingreso a costa del crecimiento, o viceversa, puede quebrantar el deber del fideicomisario hacia la clase de beneficiario afectada negativamente. Tenga presente que un fideicomiso, por sus términos, deja en claro que los intereses de una u otra clase de beneficiario debe ser primordial, aunque tal lenguaje probablemente se granjeará la desaprobación de la agencia de Medicaid en cualquier fideicomiso autoestablecido que debe ser presentado para la aprobación de Medicaid.

DELEGACIÓN

En términos generales, un fideicomisario puede delegar funciones, pero no puede evitar la responsabilidad por hacerlo. En otras palabras, aunque el fideicomisario puede contratar a asesores de inversión, profesionales de impuestos y otros por el estilo, seguirá siendo responsable por cualquier error de esos profesionales.

Algunos estados sí limitan la responsabilidad del fideicomisario. Por ejemplo, en estados que han adoptado la Ley Uniforme del Inversionista Prudente, delegar autoridad conforme a la Ley limitará la responsabilidad del fideicomisario de modo que él sólo deberá seleccionar y supervisar cuidadosamente al asesor de inversiones.

INVERSIÓN

Cualquier fideicomisario que conozca los principios de la teoría moderna de la cartera, con su énfasis en la tolerancia al riesgo y la diversificación de activos. Un fideicomisario que considere que tiene una experiencia especial en inversiones o administración de activos se medirá según un estándar más alto, pero cualquier fideicomisario deberá comprender e implementar prácticas de inversión prudente. Algunos tribunales instituirán una política de inversión que requiere que un porcentaje de activos se mantenga en inversiones de renta fija y el resto en valores (por ejemplo, es común dividirlas en 60/40).

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Fianza

Un fideicomisario, especialmente uno que administra un fideicomiso para necesidades especiales supervisado por un tribunal de sucesiones, debe tener una fianza. La fianza es un tipo de convenio de seguro por el cual el fideicomisario paga una prima a fin de garantizar que va a administrar el fideicomiso y llevar a cabo sus deberes fiduciarios correctamente. La prima de la fianza es un gasto aceptable del fideicomiso y no es necesario que salga del bolsillo del fideicomisario. Si el fideicomisario no ejerce su deber fiduciario y como consecuencia el fideicomiso pierde dinero, la compañía de seguros que emitió la fianza indemnizará al fideicomiso y tomará medidas para cobrarle al fideicomisario.

La prima de la fianza depende de varios factores, incluido el historial crediticio del fideicomisario y el valor del fideicomiso. La mayoría de los fideicomisarios corporativos están exentos de entregar una fianza. Los fideicomisarios individuales deben "entregar una fianza"; es decir, proporcionar documentación escrita al tribunal de sucesiones de que la persona tiene una fianza. La fianza generalmente se emite por un período de tiempo establecido, por ejemplo un año y al término del plazo, el fideicomisario debe pagar una prima adicional o demostrar al emisor de la fianza que el tribunal de sucesiones ya no la exige.

Es posible en la mayoría de los estados, al menos cuando el fideicomiso es supervisado por un tribunal, solicitar permiso al tribunal para depositar los activos en una cuenta restringida o "bloqueada" de una institución financiera en lugar de entregar una fianza. Si bien esto salva el problema de tener una fianza, la institución financiera debe exigir un copia certificada de la orden del tribunal que autoriza el gasto de los fondos antes de hacer una distribución del fideicomiso para necesidades especiales. Esto puede ocasionar frecuentes visitas del fideicomisario al banco, aunque evita la a veces costosa prima de la fianza.

Otorgamiento de títulos de propiedad de activos

Los títulos sobre los activos del fideicomiso no deben estar a nombre del beneficiario excepto en circunstancias limitadas, como cuando es ventajoso poner el título de la vivienda a nombre de la persona. Normalmente, los títulos sobre los activos del fideicomiso deben estar a nombre del fideicomisario. Por ejemplo, si James Jones es el fideicomisario del Fideicomiso para necesidades especiales de Lisa Martin y el fideicomiso se firmó el 15 de marzo de 2007, los títulos sobre los activos deben otorgarse de la siguiente manera: "James Jones, Fideicomisario del Fideicomiso para necesidades especiales de Lisa Martin c/c/f 15 de marzo de 2007" ("c/c/f" significa "conforme a un contrato de fecha").

El fideicomisario de un fideicomiso para necesidades especiales tiene prohibido negociar por cuenta propia. Eso significa no realizar ninguna inversión de los activos del fideicomiso en los negocios o activos del fideicomisario, no mezclar los activos personales con los del fideicomiso, no tomar prestado del fideicomiso, no comprar bienes o servicios (con el fideicomiso) al fideicomisario (aparte de los servicios de administración del fideicomiso, naturalmente) y no vender los activos del fideicomiso al fideicomisario.

Es importante que la mayoría de los activos no estén a nombre de James Jones o Lisa Martin individualmente. Si los títulos de los activos no se otorgan adecuadamente, entonces las agencias que administran beneficios con comprobación de recursos pueden contar los activos como un recurso, o contar el interés devengado como ingreso, lo que frustrará el propósito del fideicomiso para necesidades especiales, además de contribuir a la confusión durante la preparación de la declaración de impuestos. Asimismo, como se analiza con mayor detalle más adelante, también puede ser importante solicitar un número de identificación tributaria para el fideicomiso además de otorgar los títulos sobre los activos adecuadamente.

Requisitos de contabilidad

Un fideicomisario debe proporcionar información de contabilidad suficiente a los beneficiarios del fideicomiso. Este requisito generalmente significa informes de contabilidad anuales. Aunque no se exige un formulario específico para la contabilidad, si el fideicomiso no está bajo la supervisión de un tribunal, es importante proporcionar suficiente información para que el lector pueda determinar la naturaleza y el monto de cualquier pago o inversión. Para algunos fideicomisos, una simple contabilidad de "registro de control" puede ser suficiente, que muestre los ingresos por intereses y los nombres de los beneficiarios, con fechas y montos. Sin embargo, todo fideicomiso con activos considerables o diversas inversiones, debe proporcionar una contabilidad minuciosa.

La contabilidad habitual y completa es fundamental. Un beneficiario generalmente pierde el derecho de plantear posteriormente objeciones a las inversiones o los gastos si recibe suficiente información en la contabilidad anual en ese momento. En otras palabras, una contabilidad minuciosa puede limitar la exposición posterior del fideicomisario a reclamos de beneficiarios y, por ende, beneficia al fideicomisario.

Además de los requisitos de contabilidad para el beneficiario, se puede exigir al fideicomisario que proporcione un estado de cuenta anual o bianual al tribunal de sucesiones. El fideicomisario debe usar los formularios específicos del condado disponibles mediante solicitud al tribunal y es posible que también se le exija proporcionar al tribunal copias de los estados de cuenta bancarios y los cheques cancelados o recibos como prueba de las distribuciones y los depósitos del fideicomiso. Esto requiere que el fideicomisario sea organizado o que esté preparado para pagar comisiones bancarias posiblemente considerables por duplicados de los estados de cuenta o los cheques cancelados.

Informes al Seguro Social

El simple término "ingreso" tiene distintos significados en la contabilidad de fideicomisos, preparación de declaraciones de impuestos y determinación de la idoneidad para recibir

beneficios públicos. En ocasiones los fideicomisarios plantean la inquietud de que la contabilidad minuciosas del fideicomiso (al SSI, especialmente) pueden ocasionar la suspensión de los beneficios o que la información de devolución de impuestos se puede usar para poner fin al SSI u otros beneficios. Aunque es indudable que sí suceden tales situaciones, es cada vez más probable que los funcionarios del Seguro Social sean relativamente sofisticados sobre tales distinciones y estén dispuestos a resolver cualquier problema. De forma general, es mejor proporcionar información más completa al Seguro Social que retener una parte. Deben proporcionarse al Seguro Social los estados de cuenta anuales de cualquier fideicomiso autoestablecido que designe a un receptor del SSI como beneficiario. La contabilidad de cualquier fideicomiso de terceros que haga distribuciones significativas en beneficio de un receptor del SSI probablemente se debe proporcionar al Seguro Social, simplemente para prevenir problemas posteriores que se podían haber evitado. Si las distribuciones interrumpen la idoneidad, el problema es de la distribución, no de la contabilidad.

Si el beneficiario recibe solamente SSDI y ningún SSI de forma simultánea, no hay para qué proporcionar información de contabilidad al Seguro Social, porque los beneficios del SSDI no requieren comprobación de recursos. Si el fideicomiso es un fideicomiso de terceros, el fideicomisario puede no tener ninguna obligación de proporcionar información de contabilidad, aunque el beneficiario puede estar obligado a hacerlo (si el beneficiario recibe SSI y las distribuciones se acogen a las normas de ISM).

Aunque no sucede con tanta frecuencia, algunos funcionarios de idoneidad del Seguro Social pueden comprender mal el efecto de los gastos o términos de los fideicomisos para necesidades especiales y disminuir o eliminar los beneficios indebidamente. Cuando esto ocurre, debe ser posible solucionar el error, pero el beneficiario puede sufrir durante meses (o años) mientras el sistema resuelve el problema. Es mucho mejor evitar los problemas por adelantado, antes que tener que dedicar considerables recursos y tiempo para resolverlos después de los hechos. Tenga en cuenta que los honorarios por el tiempo que el fideicomisario dedique directamente a tratar con el Seguro Social a nombre del beneficiario pueden estar sujetos a la aprobación de la SSA.

Informes a Medicaid

Si el beneficiario vive en un estado en que recibir el SSI significa también la inscripción automática del beneficiario en Medicaid, no es necesario exigir una contabilidad separada para la agencia de Medicaid.

Sin embargo, si la persona está en un estado en que el SSI y Medicaid no están interrelacionados, puede que sea necesario rendir cuentas a ambas agencias. El cliente de Medicaid (o su tutor) debe notifica a Medicaid de un cambio en los recursos o ingresos dentro de un período establecido, generalmente con una brevedad de diez días. Esto incluye situaciones en que el cliente de Medicaid recibe una herencia o liquidación y transfiere de inmediato los fondos a un fideicomiso para necesidades especiales.

El fideicomisario de un fideicomiso de terceros para necesidades especiales puede no tener el mismo deber de rendir cuentas, sino que puede optar por proporcionar información de contabilidad a Medicaid antes que correr el riesgo de una descalificación posterior del beneficiario, aunque la facultad de Medicaid de considerar los gastos del fideicomiso puede estar sujeta a recusación.

Informes al tribunal

Muchos fideicomisos para necesidades especiales autoestablecidos se tratarán esencialmente del mismo modo que la administración o la tutela del patrimonio. Esto se debe a que, normalmente, en un inicio se solicitó al tribunal autorizar el establecimiento del fideicomiso. La mayoría de los tribunales esperan que cualquier fideicomiso establecido por el tribunal permanezca bajo su supervisión, incluidos los libros, solicitudes de autorización para gastar fondos y presentación de estados de cuenta periódicos.

Aunque el fideicomiso no exija una contabilidad para el tribunal, se debe estudiar en alguna medida si se solicita la intervención del tribunal. Una gran ventaja de la supervisión del tribunal del fideicomiso es que la contabilidad de cada año es definitiva en cuanto a todos los puntos descritos en esa cuenta (naturalmente, siempre que se haya dado el aviso correspondiente a los beneficiarios, que de lo contrario podrían quejarse del cumplimiento de los requisitos de administración del fideicomiso y otros requisitos de procedimiento judicial).

El tribunal también puede tener una lista establecida de honorarios que rige el monto con que se puede remunerar al fideicomisario por prestar los servicios de administración del fideicomiso.

Modificación del fideicomiso

Como se explicó anteriormente, un fideicomiso para necesidades especiales debe ser irrevocable a fin de que el fideicomiso se considere un recurso exento. Sin embargo, eso no impide que el fideicomiso en sí autorice al fideicomisario para que enmiende o modifique el fideicomiso en formas limitadas, especialmente en lo relativo a la idoneidad de programas para el beneficiario. Esto es especialmente importante porque no podemos predecir los cambios futuros en las leyes que rigen los beneficios con comprobación de recursos. Los tribunales también pueden estar dispuestos a modificar o terminar un fideicomiso cuyo propósito se frustró por los cambios en las leyes u otros factores, como que los activos del fideicomiso se valoren a un importe nominal.

Finalizar el fideicomiso

Si el fideicomiso para necesidades especiales es un fideicomiso autoestablecido con una disposición que exige la devolución de los gastos de Medicaid, obviamente será necesaria para determinar el monto de la “devolución” cuando muera el beneficiario o la terminación del fideicomiso. Debido a que todavía es escasa la experiencia histórica de Medicaid con estos fideicomisos, las agencias estatales pueden tener dificultades para ofrecer una cifra final y confiable. El fideicomisario prudente solicitará una declaración por escrito del monto adeudado, que incluye pruebas que demuestran cómo se calculó y una declaración de autoridad para tomar la determinación final. Cuando se hayan abordado los problemas de devolución (y recuerde que la mayoría de los fideicomisos de terceros para

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necesidades especiales no tendrán requisitos de devolución al estado), la terminación del fideicomiso cumplirá con los requisitos habituales de la preparación y presentación de declaración de impuestos, rendición de cuentas final y distribución de acuerdo con la escritura fiduciaria. Recuerde que debido a que el Seguro Social exige que el reembolso a Medicaid y algunas deudas de impuestos se concilien antes incluso de que el fideicomisario pague el funeral del beneficiario, es de importancia fundamental comprar durante la vida del beneficiario un funeral prepagado e irrevocable.

Impuestos sobre el ingreso de los fideicomisos para necesidades especiales

Los fideicomisos para necesidades especiales, como otros tipos de fideicomisos, pueden complicar la preparación de la declaración del impuesto sobre el ingreso. La primera pregunta que se debe abordar, para fines del impuesto sobre el ingreso, es si el fideicomiso es o no un fideicomiso "con responsabilidad del otorgante". Las normas que definen a los fideicomisos "con responsabilidad del otorgante" no son simples ni intuitivas, pero afortunadamente, se pueden aplicar algunas fáciles reglas generales que servirán para la mayoría de los fideicomisos para necesidades especiales.

Fideicomisos "con responsabilidad del otorgante"

Un fideicomiso "con responsabilidad del otorgante" se trata como una entidad transparente para fines tributarios. En otras palabras, se considera que el otorgante de un fideicomiso "con responsabilidad del otorgante" recibió el ingreso directamente, aunque los títulos sobre las cuentas estén a nombre del fideicomiso y que todos los ingresos se vean a nombre del fideicomiso.

Por lo general, un fideicomiso para necesidades especiales autoestablecido será un fideicomiso con responsabilidad del otorgante si el fideicomisario es un familiar. Si el fideicomiso designa a un fideicomisario independiente, igualmente puede ser un fideicomiso con responsabilidad del otorgante si el fideicomiso incluye una de varias disposiciones específicas. Un contador calificado o un abogado deben poder distinguir de un vistazo si un determinado fideicomiso es un fideicomiso con responsabilidad del otorgante. Si es así, seguirá siendo un fideicomiso con responsabilidad del otorgante durante toda su vigencia, o al menos hasta el fallecimiento del otorgante (cuando el fideicomiso puede terminar o convertirse en un fideicomiso sin responsabilidad del otorgante en cuanto a sus nuevos beneficiarios). Hasta que un experto haya estudiado el fideicomiso, suponga que probablemente es un fideicomiso con responsabilidad del otorgante.

Generalmente es provechoso para un fideicomiso autoestablecido que sea un fideicomiso con responsabilidad del otorgante. Esto es válido porque las tasas impositivas para los fideicomisos sin responsabilidad del otorgante son muy comprimidas y en los fideicomisos se llega a la tasa impositiva marginal más alta sobre el ingreso de forma muy rápida. La diferencia en la práctica será pequeña si el fideicomiso de hecho hace distribuciones en beneficio del beneficiario por sobre su ingreso gravable anual, pero aun así se debe seguir el enfoque correcto para declarar los impuestos.

NÚMEROS DE IDENTIFICACIÓN TRIBUTARIA

Un fideicomiso con responsabilidad del otorgante puede, pero no es obligatorio, obtener un número de identificación patronal (un EIN, por sus siglas en inglés). Algunos abogados y contadores optan por obtener un EIN en cada caso, mientras que otros se rehúsan a hacerlo, cualquiera de los dos enfoques es justificable. A pesar de que los bancos, las firmas de corretaje en bolsa y otras instituciones financieras pueden insistir en que el fideicomiso necesita su propio EIN, simplemente se equivocan. Hay una confusión extendida sobre la necesidad de un EIN para fideicomisos irrevocables, pero un fideicomisario, abogado o contador seguro y bien informado, debe ser capaz de convencer a la institución financiera de que no se necesita un EIN por separado. En cambio, el fideicomisario puede sencillamente proporcionar el número del Seguro Social del otorgante a la institución financiera.

PRESENTACIÓN DE DECLARACIONES DE IMPUESTOS

Un fideicomiso con responsabilidad del otorgante comúnmente no presentará una declaración de impuestos por separado. Si a un fideicomiso con responsabilidad del otorgante se le asigna un EIN, puede presentar una declaración "informativa". La declaración puede incluir un párrafo que indica que el fideicomiso es un fideicomiso con responsabilidad del otorgante, que todos los ingresos se declaran en la declaración del impuesto personal del beneficiario y que no se incluirá ninguna información sustancial en la declaración del impuesto sobre el ingreso personal del fideicomisario. En realidad, completar la declaración del impuesto sobre el ingreso del fideicomisario no es una opción para un fideicomiso con responsabilidad del otorgante, aunque existe mucha confusión sobre este punto, incluso entre algunos profesionales.

Fideicomisos sin responsabilidad del otorgante

Prácticamente todos los fideicomisos de terceros, y algunos autoestablecidos, para necesidades especiales serán fideicomisos sin responsabilidad del otorgante. Debido a que el ingreso no se tratará como percibido por el beneficiario, se exigirá una declaración del impuesto sobre el ingreso del fideicomisario (formulario 1041 del IRS).

NÚMEROS DE IDENTIFICACIÓN TRIBUTARIA

Un fideicomiso sin responsabilidad del otorgante deberá obtener su propio EIN mediante presentación de un formulario SS-4 federal. Casi todos los fideicomisos de terceros para necesidades especiales van a ser fideicomisos "complejos", esta designación sólo significa que no se exige al fideicomiso distribuir cada año todos sus ingresos al beneficiario de los ingresos. Aunque el fideicomiso se indique como "complejo" en el formulario SS-4, de hecho puede alternar entre "complejo" y "simple" en el formulario 1041 de cada año.

PRESENTACIÓN DE DECLARACIONES DE IMPUESTOS

El fideicomiso sin responsabilidad del otorgante debe presentar un formulario 1041 cada año. Se asume de manera concluyente que todas las distribuciones en beneficio del beneficiario son en primer lugar de ingresos,

por lo tanto, cualquier gasto del fideicomiso por sobre las deducciones originará un Formulario K-1 que muestra el ingreso imputado al beneficiario. Esto no debe ser causa de una preocupación especial, puesto que es cada vez más probable que los funcionarios de idoneidad del Seguro Social (e incluso de Medicaid) comprendan que "ingresos" para fi nes tributarios es distinto de "ingresos" para fi nes de reunir los requisitos para recibir benefi cios públicos. Cualquier deuda tributaria en la que incurra el benefi ciario individual como resultado de esta imputación puede ser pagada por el fi deicomiso, aunque el fi deicomisario puede no tener la facultad para preparar y fi rmar la declaración de impuestos de la persona. Los gastos administrativos y otros gastos deducibles en una declaración del impuesto personal deben llegar al 2% del ingreso del contribuyente antes de que se deduzca del todo. Lo anterior no se aplica a la declaración de impuestos del fi deicomiso, que lleva a un pequeño benefi cio en el tratamiento como fi deicomiso sin responsabilidad del otorgante. Este benefi cio puede no compensar las tasas comprimidas del impuesto sobre el ingreso gravadas sobre los fi deicomisos sin responsabilidad del otorgante, pero cada caso será diferente. La difi cultad de determinar el tratamiento tributario sobre el ingreso adecuado (y el mejor), empeora cuando se agrega la opción confusa de tratamiento como un "Fideicomiso para discapacidad calificada".

Fideicomiso para discapacidad calificada

A partir de año 2002, el Congreso autorizó que algunos fideicomisos para necesidades especiales sin responsabilidad del ortogante recibieran un pequeño beneficio tributario sobre el ingreso. Los fideicomisos que califican según la Sección 642(b)(2)(C) del Código del Servicio de Impuestos Internos recibirá un beneficio especial: se les permite reclamar una exención personal de sus impuestos federales sobre el ingreso. En el año fiscal 2018, por ejemplo, la exención personal será de $4,150, que significa quel el ingreso hasta esa suma no generará ninguna deuda tributaria en absoluto. De hecho, cuando el fideicomiso usa su exención y calcula el ingreso imponible restante, generalmente se transfiere al beneficiario, que puede reclamar otra exención personal de $4,050.

Junto con la mayor fl exibilidad disponible para los fi deicomisos sin responsabilidad del otorgante para deducir los gastos administrativos, el tratamiento de Fideicomiso para discapacidad califi cada puede ser ventajoso en algunos casos. Normalmente, la elección de Fideicomiso para discapacidad califi cada será interesante cuando hay una buena cantidad de ingresos en los activos del fi deicomiso y se incurre en relativamente pocos gastos médicos o de otro tipo en nombre del benefi ciario. Por lo general, es necesario un estudio cuidadoso con un profesional califi cado en impuestos sobre el ingreso para determinar si buscar o no el tratamiento de Fideicomiso para discapacidad califi cada.

Asesoría tributaria profesional

Debe ser evidente, a partir de este breve análisis de los impuestos de los fi deicomisos para necesidades especiales, que son esenciales la asesoría y la preparación de la declaración de impuestos con un profesional. Aunque muchos contadores están califi cados para preparar declaraciones fi duciarias (de fi deicomisos) del impuesto sobre el ingreso, muchos carecen de experiencia en este campo. Una primera pregunta que debe hacer a un posible contador podríaser: "¿Cuántos formularios 1041 prepara normalmente en un año?". Siga esa pregunta con: "¿Me podría explicar el concepto de Fideicomisos para discapacidad califi cada?" y rápidamente encontrará a un profesional deverdad competente. Probablemente no querrá rechazar automáticamente a un contador que no puede hablarle de los Fideicomisos para discapacidad califi cada de forma inmediata, a menos que esté dispuesto a tratar con un contador de otra ciudad, sencillamente no hay muchos contadores o profesionales de impuestos que hayan tenido la oportunidad de solicitar ese estado en cualquier declaración fi duciaria del impuesto sobre el ingreso. Como siempre, puede obtener alguna ayuda con los aspectos complejos de los fi deicomisos para necesidades especiales del abogado que preparó el documento o del abogado que lo asesora como fi deicomisario. Los miembros de Special Needs Alliance® generalmente se encuentran entre las poquísimas personas que conocen estos conceptos y su abogado puede haber trabajado con un contador de su área que conoce el tratamiento tributario especial de estos fi deicomisos.

Lectura complementaria

Hay un conjunto de libros y artículos, junto con un número creciente de sitios Web, disponibles para ayudar a los fi deicomisarios de los fi deicomisos para necesidades especiales. Entre nuestros favoritos:

Manual de administración de fi deicomisos para necesidades especiales: Guía para fideicomisarios, por Jackins, Blank, Macy y Shulman. Esta guíase encuentra entre las mejores disponibles. La escribieron cuatro abogados de Massachusetts y se centra francamente en la ley y práctica de Massachusetts. Sin embargo, gran parte de los que los autores dicen se puede aplicar a los fi deicomisos para necesidades especiales en todos los estados.

Special People, Special Planning: Creating a Safe Legal Haven for Families with Special Needs (Personas especiales, planifi cación especial: Creación de un refugio legal seguro para las familias con necesidades especiales), por Hoyt y Pollock. Ofrece algunos consejos generales e indicaciones, pero es más coloquial que detallado. Este ejemplar también tiende a centrarse en el "por qué" más que el "cómo", que es un mensaje importante, pero no tan útil para alguien que ya administra un fi deicomiso para necesidades especiales.

Special Needs Trusts: Protect Your Child's Financial Future (Fideicomisos para necesidades especiales: Proteja el futuro fi nanciero de su hijo), por Elias. Esta reciente adición a la bibliografía es publicada por Nolo Press, una organización que muchos abogados consideran molesta en el mejor de los casos. No estamos de acuerdo. Se trata de una explicación en lenguaje sencillo y directo de los fi deicomisos para necesidades especiales de un abogado que ni siquiera ejerce en el área (sus anteriores libros para Nolo Press incluyen explicaciones sobre bancarrota, marcas registradas y otras áreas del derecho).

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PREPARING ANNUAL TRUST ACCOUNTINGS FOR FILING WITH THE GEORGIA DEPARTMENT OF COMMUNITY HEALTH: A GENERAL GUIDE FOR TRUSTEES OF APPROVED SPECIAL NEEDS TRUSTS

Reporting period. The reporting period that must be covered in each annual accounting is the "fiscal year" of the trust. For Georgia Department of Community Health (DCH) accounting purposes, the fiscal year for each approved Special Needs Trust begins on the day on which the trust was signed (the "trust anniversary date"), and ends the day before that same date of the next year. For example, if the trust document was signed on March 26, then for DCH accounting purposes the fiscal year of the trust is from March 26 of one year to March 25 of the next year.

Filing. The accounting must be filed each year within 60 days following the anniversary date of the trust. For example, if the trust anniversary date is March 26, then the annual accounting must be filed by May 25. "Filed" means that the accounting must be physically received by the Trust Unit within 60 days following the trust anniversary date at the following address:

Georgia Department of Community Health
Attn: Trust Unit
900 Circle 75 Pkwy SE, Suite 650
Atlanta, GA 30339
Tel. 678.564.1168 / Fax 678.564.1169
Email: GATrustUnit@hms.com

Trust Inventory Update. The accounting must include an Inventory Update that shows the acquisition and any disposition of trust assets, and lists the assets of the trust as of the closing date of the accounting. The closing date for the accounting is the last day of the fiscal year of the trust.

- If the accounting is for the first fiscal year of the trust, the Inventory Update should start with the initial inventory that was submitted with the trust document.
- If the accounting is for a subsequent fiscal year, then the Inventory Update should start with the ending inventory shown on the previous accounting.

The Inventory Update should show any assets that were purchased, acquired or disposed of during the accounting period.

- If any assets were purchased or acquired during the accounting period, information must be given about the date of purchase and amount spent, or date, value and source from which the asset was received, and current ownership, including proof of title to purchased assets.
- If any assets were disposed of during the accounting period (for example, by a sale), a full explanation must be given, including date, amount received, and reason for the disposition. The amount received from the disposition of any trust assets must be accounted for in the accounting.

For trust assets held at the closing date of the accounting, the Inventory Update must provide complete information on each asset, including:

- Description
- Amount or value
- Location (for example, name of financial institution or address of property)
- How asset is titled (for example, name on the account or the deed)
- For financial accounts held by the trust, the trustee must include a copy of the monthly statement from the financial institution for the last month of the accounting period, showing:
  - Name on the account
  - Account number
  - Value of the account (The value of the account shown on the statement must match what is shown on the Inventory Update)

If an annuity or other structure is owned by the trust, paying into the trust, or purchased by the trust, detailed information must be given. This information must include a copy of the contract and any beneficiary designation.

Annual Accounting. Overall, the accounting must be a cash accounting that is accurate and must balance. Receipts do not need to be submitted with the accounting, but should be kept in a safe place so that they can be provided upon request. In general, the accounting will be subject to a Four-Part Test, which is described in more detail on the next page.

The structure of the accounting should consist of the following:

- Inventory Update (prepared as described above)
- Beginning balance (initial funding/balance forward from previous accounting)
- Receipts (cash and other items received by the trust)
- Expenditures (cash paid out)
- Balance on hand (at end of reporting period)
- Verification of balance on hand (statements)

All expenditures must be accounted for in the accounting and generally may be shown by category. That is, all expenditures must either be included in a category or shown individually. There are certain categories of expenditures, however, in which the expenditures must be listed individually, and for which additional documentation will need to be provided. These categories are described in the last page of this General Guide for Trustees.

FOUR-PART REVIEW TEST

The accounting will be subject to an overall four-part review test. Any expenditure that fails any of the four test criteria will require additional satisfactory justification. Accountings that fail the test will be handled on a case-by-case basis. The four test criteria include:

1. Beneficiary's benefit: All trust expenditures must be made for the primary benefit of the trust beneficiary and not for other parties or family members; there must be an ascertainable benefit to the member for each trust expenditure.

2. Appropriateness: Expenditures must be appropriate (a) for the beneficiary given the beneficiary's age, physical condition, lifestyle and needs, and (b) for the trust, given the size of the trust and the nature and availability of trust assets and income.

3. Consistency with trust guidelines and published policy: Expenditures must be consistent with guidelines stated in the trust document, and with published federal and state policy and these Guidelines, as appropriate within the review criteria set forth in these Guidelines.

4. FMV/reasonability: The amount of each trust expenditure must be consistent with the fair market value or cost of similar services/goods available in the marketplace at the time of purchase or acquisition, and must be an amount that can be determined to reasonably meet the special needs of the beneficiary.

EXPENDITURES REQUIRING ADDITIONAL DOCUMENTATION

There are certain categories of expenditures for which each expenditure must be shown, not just a total amount for the category, and for which specified additional information is required to be given in the accounting. These categories include:

1. Payments that provide any benefit to someone other than the beneficiary. Expenditures in this category must include a complete explanation of the reason for each expenditure.

2. Caregiving or other personal services. Expenditures in this category must include the following additional information:
   a. Name of each caregiver
   b. Relationship, if any, to the beneficiary
   c. Description of the services provided
   d. Hourly rate
   e. Total hours of services paid, on a weekly or monthly basis

3. Housing expenses. If the home in which the beneficiary resides is owned by the beneficiary or the trust, information must be given on whether other family members are residing in the home and whether they are contributing pro-rata their share of expenses.

4. Vehicle expenses. If a vehicle has been purchased using trust funds, information must be given on whether other family members are using the vehicle and whether they are contributing pro-rata their share of expenses.

5. Potentially egregious expenditures. Any expenditure that on its face possibly could be determined to be "egregious" will require a detailed explanation and justification. Potentially egregious expenditures will be reviewed and handled on a case-by-case basis. Examples that might fall within this category include but are not limited to any expenditure that:
   a. Does not show a clear benefit to the trust beneficiary
   b. Exceeds 15% of the value of the trust
   c. Is a clear violation of law, policy or the terms of the trust document
   d. Is clearly inappropriate for the beneficiary given the beneficiary's circumstances.

TRUST TERMINATION AND THE MEDICAID PAYBACK REQUIREMENT

Federal and state law, rules, and policy regarding Special Needs Trusts establish certain requirements that must be followed when the trust terminates for any reason. For this reason it is strongly recommended that, the Trustee seek and follow the advice of their CPA and legal counsel when terminating the trust. These requirements include:

1. Payback for Medicaid assistance received by the beneficiary must be made to Medicaid. Federal law at 42 U.S.C. Section 1396p(d)(4) specifies that the amount of the Payback Claim is equal to the total Medicaid assistance received by the SNT beneficiary during their lifetime.
   a. This Claim is applicable to all funds and other assets remaining in the Trust, as well as all assets purchased with Trust funds or held by the Trust
   b. "Assets" include all real and personal property, whether tangible or intangible, including cash and financial accounts, mobile homes, real estate, vehicles and investments including annuities.
   c. Certain expenses relating to winding up trust administration may be paid prior to making Payback, but expenses of funeral and burial may not be paid prior to making Payback.
   d. The amount of the Payback Claim may be obtained by contacting the Trust Unit at 678.564.1168.
   e. If the Trust does not have sufficient funds available to satisfy the Payback Claim in full, Trust assets must be liquidated until either the Trust is depleted by making payment on the Payback Claim, or the liquidation produces funds sufficient to pay the remaining balance of the Payback Claim.
   f. The controlling federal law does not provide for negotiation of the Payback Claim, and payment of the Payback Claim must be made as quickly as practicable following the death of the Member.

2. Final Accounting. As part of the process of resolving the Payback Claim the Trustee is required to file a Final Inventory Update and Accounting with the Trust Unit.
   a. This report must cover the time period from the ending date of the last accounting filed for this SNT to the time of filing the Final Inventory Update and Accounting.
   b. Once the Final Inventory Update and Accounting has been reviewed and approved and the Payback Claim has been resolved, a Release will be provided to the Trustee so that the final closing of the administration of the trust can be completed.

Cat On A Hot Tin Roof (1958)
Mental Health, Addiction And Accountability: The Crisis On Our Corners: Changing Courts To Handle Changing Communities

Presented By:

Moderator: Jeff Davis
State Bar of Georgia
Atlanta, GA

Hon. Cynthia C. Adams
Douglas Judicial Circuit

Hon. Verda M. Colvin
Macon Judicial Circuit

Hon. Ann B. Harris
Cobb Judicial Circuit

Hon. Asha F. Jackson
Stone Mountain Judicial Circuit

Hon. T. David Lyles
Paulding Judicial Circuit

Hon. Eric W. Norris
Athens Clark Judicial Circuit

Hon. Kathryn M. Schrader
Gwinnett Judicial Circuit

Hon. R. Ashley Wright
Augusta Judicial Circuit

The Crime Report | (https://thecrimereport.org/2018/01/30/a-road-map-for-reducing-incarceration-the-case-of-georgia/)

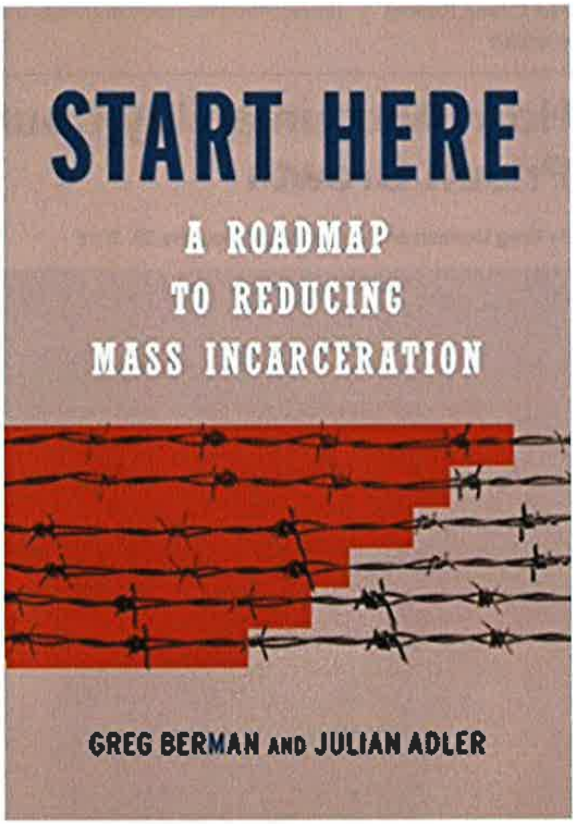
How 'Accountability Courts' Curbed Georgia's Prison Growth

By **Greg Berman and Julian Adler** | January 30, 2018

Photo by J. Chan via Flickr

On Monday, The Crime Report, *in partnership with* The Pantagraph, *described the criminal justice reforms (https://thecrimereport.org/2018/01/29/justice-success-story-how-illinois-cut-its-prison-population/) that have resulted in major reductions in prison populations in Illinois. We are pleased to publish an excerpt from a book looking at similar efforts in Georgia and elsewhere. The book, "Start Here: A Road Map to Reducing Mass Incarceration (https://www.amazon.com/Start-Here-Roadmap-Reducing-Incarceration/dp/1620972239)," will be published in March by The New Press. Its authors are Greg Berman, director of the Center for Court Innovation, a New York-based think tank that works to improve the performance of state courts and criminal justice agencies; and Julian Adler, the center's director of research-practice strategies. The excerpt has been condensed for space.*

When Republican Gov. Nathan Deal took office in January 2011, Georgia's prison population was still growing; the corrections budget had already reached $1 billion per year. "I was told that as Governor, I should be prepared to build two new adult prisons because our prison population would grow by another 5,000 during my first term," recalls Deal, a former prosecutor.



Georgia is not alone in its efforts to analyze the future trajectory of its criminal justice system. In recent years, dozens of states have sought to simultaneously reduce correctional spending and improve public safety. Much of this work has been driven by something known as the Justice Reinvestment Initiative (https://www.bja.gov/programs/justicereinvestment/index.html). The idea behind justice reinvestment is simple: to encourage administrative and legislative changes at the state level that will result in significant cost savings in terms of reduced spending on corrections. These savings can then be "reinvested" in community-based rehabilitative programs.

The idea behind justice reinvestment might be straightforward, but the implementation is not. It involves all three branches of government agreeing to work together. It requires intensive data analysis. And it demands a commitment to bipartisan political consensus. To help states interested in embarking down this path, nonprofit groups, including the Council of State Governments (https://csgjusticecenter.org/) and the Pew Charitable (http://www.pewtrusts.org/en/projects/public-safety-performance-project/about) Trusts (http://www.pewtrusts.org/en/projects/public-safety-performance-project/about), provide research support and strategic advice, much of it underwritten by the U.S. Department of Justice.

Tackling Drug Crime First

Greg Berman

"The fact that we were ultimately able to [institute change] in Georgia, a state that has legislative and executive branches run by Republicans, makes for a pretty interesting conversation about the soundness of smart-on- crime policy reform initiatives," notes Georgia Supreme Court Justice Michael P. Boggs. In 2012, Boggs was appointed by Gov. Deal to serve as co-chair of the Criminal Justice Reform Council, a group charged with finding problems to solve within the criminal justice system that might yield to bipartisan consensus. The first problem the council chose to tackle was drug crime.

Justice Boggs had witnessed the potential of alternatives to incarceration firsthand, having once presided over a felony-level drug court in Georgia. Even those without a personal connection were won over when they reviewed the research

literature, which credited adult drug courts with appreciable reductions in both recidivism and drug use. Several studies documented even larger effects for higher risk individuals and users of more serious drugs (for example, heroin and cocaine).

Julian Adler

The Criminal Justice Reform Council recommended expanded funding for drug courts and other specialized "accountability courts" in Georgia. "We've not only expanded the number of accountability courts but we've enlarged the scope," explains Boggs. "We are now increasing the number of veterans' courts, family dependency courts, DUI courts, mental health courts, and of course adult felony drug courts." Georgia's accountability courts now have the capacity to serve upwards of 3,500 participants each year...

The decision to start with drug crimes in Georgia was strategic. "By focusing on this segment of our prison population first, we proved that there was a better way," explains Governor Deal. He adds that the success of this initial reform effort paved the way for a more expansive and ambitious approach to rethinking incarceration in Georgia ... Deal says, "That allowed us to move into some of the more difficult areas of criminal justice reform: community-based diversion programs for juveniles; reforms within our prison system which focused on increasing educational and technical skills of inmates."

All of these moves were accomplished with bipartisan support.

All of these moves were accomplished with bipartisan support. According to Zoë Towns, formerly a staff member with the Pew Charitable Trusts, the ultimate impact was dramatic: "In a state like Georgia, the governor put the brakes on forty years of very fast, very steep growth in the prison population." The numbers suggest that Georgia has indeed succeeded in bending the curve, significantly altering the projected growth in the state prison population. As we write this, Georgia's prison system has about 8,000 fewer inmates than was projected for 2017. And the number of African Americans committed to Georgia prisons had dropped to roughly 10,000 from more than 13,000 in 2009.

That said, the number of Georgians behind bars is essentially the same today as it was in 2009. Years of effort and energy by really smart and committed people have altered Georgia's trajectory, but they have not dramatically reduced the number of people behind bars.

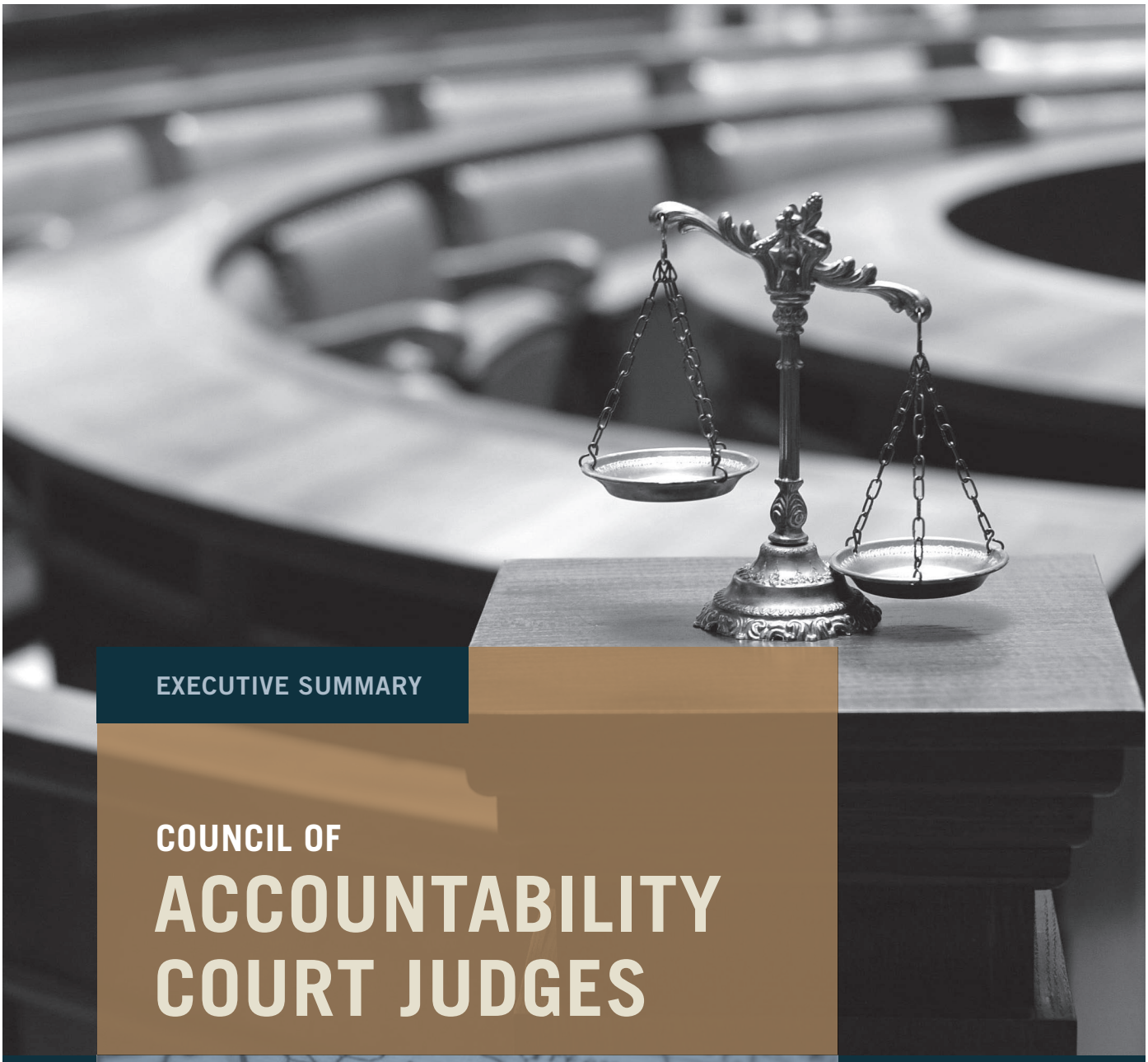
Change 'Won't Happen Overnight'

So what are we to take away from the Georgia experience? The most important lesson is that reducing incarceration in the United States is not going to happen overnight. Reformers in Georgia have devoted an enormous amount of time, money, and political capital to the cause of reform. They have found that the criminal justice system changes course slowly, if it changes course at all ...

Seizing the current window of opportunity means more than just identifying the right policy goals or providing money to scale up model programs. We need to be thoughtful about the details of implementation, and give practitioners the tools and training they need to do things differently. We need to actively engage frontline justice professionals in the reform process to ensure that they will take ownership of new ideas rather than working behind the scenes to subvert them ...

And we must also have the patience and resolve to pursue the goals of reform not just for an election cycle or two, but over the course of a decade or more. There are no quick fixes or easy solutions here. But there is a lot of room for improvement.

Greg Berman is director of the Center for Court Innovation, a New York-based think tank that works to improve the performance of state courts and criminal justice agencies. Julian Adler is the center's director of research-practice strategies. The authors welcome readers' comments.



EXECUTIVE SUMMARY

COUNCIL OF ACCOUNTABILITY COURT JUDGES

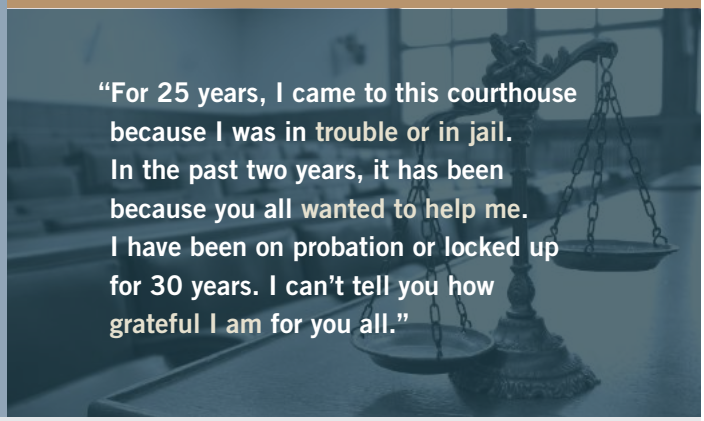
PROCESSES AND OUTCOMES

WHY ACCOUNTABILITY COURTS?

- **Accountability courts provide alternative sentencing for qualifying persons, typically those who have a mental illness and/or a substance use disorder.**
- **Accountability courts work to lower recidivism and prison costs by breaking the cycle of addiction and mental illness, which are the root causes of many offenses.**
- **The courts require regular check-ins with a judge, intensive treatment, counseling, drug testing, curfews, and court supervision to hold offenders accountable for their rehabilitation.**
- **The goal of accountability courts is to restore participants to productive, working, tax-paying citizens who provide for their families, thereby reducing costs to social services and the penal system.**
- **Court officials who work with accountability courts report that participants receive more scrutiny than those sentenced to prison.**

Accountability courts help lower recidivism and help people return to productive lives, supporting their families and paying taxes.

Accountability courts cost approximately $5,000 less per participant compared to incarceration.



ECONOMIC IMPACTS AND BENEFITS OF ACCOUNTABILITY COURT GRADUATES

In FY 2017
1,729
participants graduated from accountability courts in Georgia

Each graduate produced **$22,129** in economic benefits to the state, totaling
$38.2 million

Accountability courts save almost
$5,000 per participant
over traditional adjudication and incarceration[1]

RECIDIVISM

Applied Research Services, Inc. has conducted two recidivism studies of accountability court participants in Georgia.
Study #1 compared accountability court graduates to those terminated from such programs.
Study #2 compared accountability court participants (whether or not they graduated) to probationers in adjacent counties who did not enter an accountability court program.

	Study #1		Study #2	
Court Type	**Graduated**	**Terminated**	**Participants**	**Non-Participants**
Drug	27%	74%	44%	54%
Mental Health	32%	72%	35%	49%
Veterans Treatment	19%	54%	29%	46%
DUI	21%	63%	22%	39%
Family Treatment	12%	84%	N/A	N/A

- Participants who graduate from an accountability court program do far better than terminated participants after being discharged from a program.
- Recidivism rates of offenders that have some participation in an accountability court program are lower compared to similarly situated offenders who did not participate in a program.
- **Any amount of participation in an accountability court, regardless of completion, leads to lower recidivism.**

THE ROLE OF THE COUNCIL OF ACCOUNTABILITY COURT JUDGES

STANDARDS

The CACJ establishes operating standards for each type of accountability court. State standards align with the federal 10 Key Components of Drug Courts, published by the US Department of Justice, as well as best practices based on national research. These standards are the basis for certification, peer review, and funding.

PEER REVIEW

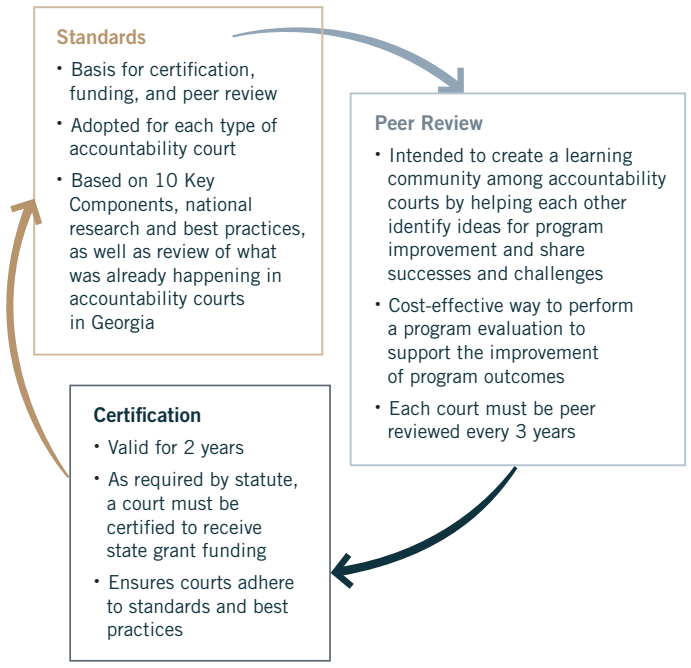
The CACJ provides for a peer review process to ensure courts adhere to best practices and state accountability court standards. Each certified court is required to be peer reviewed every three years. A peer review team typically consists of a judge, a court coordinator, a clinician/treatment provider, and a CACJ staff member, all of whom come from the same type of accountability court being visited. Peer review is a cost-effective way to perform a program evaluation to support the improvement of program outcomes. All involved can bring innovative practices back to their own court.

CERTIFICATION

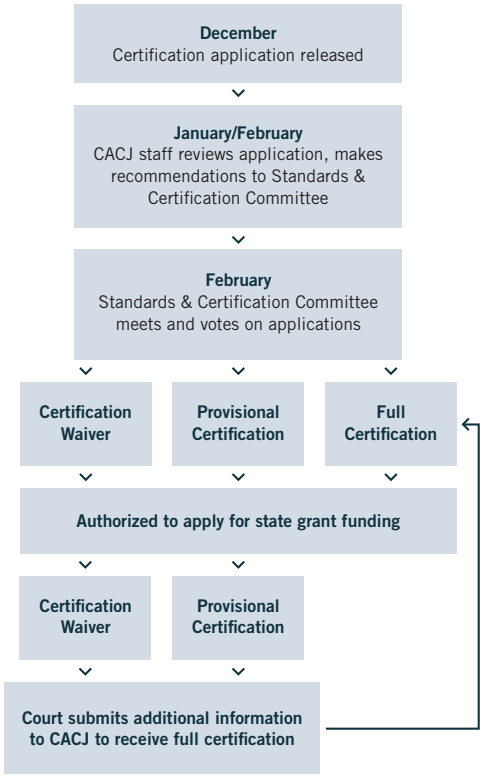
The CACJ Standards & Certification Committee certifies new and renewing courts every two years. An accountability court must be certified by the CACJ to be eligible to receive state grant funding. The certification process ensures that accountability courts adhere to best practices and CACJ standards. Courts can receive a certification waiver, provisional certification, or full certification, all of which qualify the court to apply for state grant funding. Those that receive a waiver or provisional certification must provide additional information within a specified period of time to receive full certification.

PERFORMANCE TRACKING

The CACJ collects 120 data elements every quarter from each accountability court to continually monitor and improve program outcomes, efficiency, and overall court effectiveness. Data elements include recidivism, the number of moderate- and high-risk participants, drug testing results, and the number of successful and unsuccessful program completions.



CERTIFICATION PROCESS



FUNDING

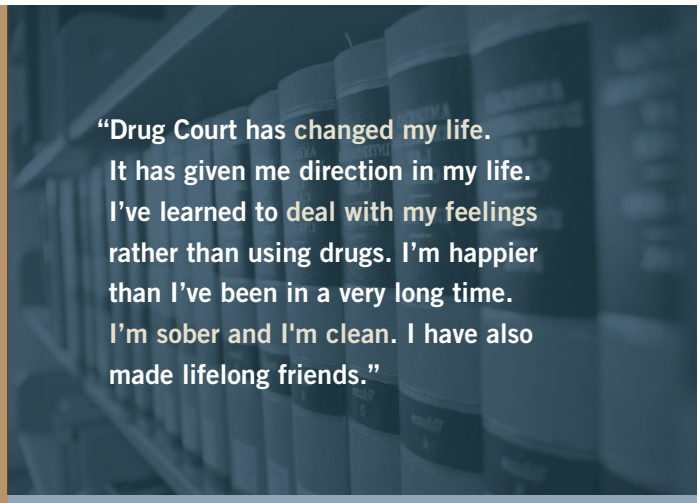
The CACJ manages state grants to local accountability courts. Three grant funding opportunities are offered throughout the year:

- **Fiscal Year Operating Grant**
  Annual funds to operate an accountability court
- **Supplemental Grant**
  Additional funds to meet workload needs
- **Emergency Grant**
  Additional funds for drug testing supplies and treatment due to an unanticipated increase in the number of program participants

Grant applications are put together by the court and submitted by the county in which the court operates. Grant funds are paid on a reimbursable basis. Both the operating and supplemental grants require a 10% county match.

While grant funding rests in the CJCC budget, all funding decisions are made by the CACJ Funding Committee. Since FY 2012, state funding for accountability courts has increased from $2.3 million to $32 million in FY 2019.

In addition to state grants, accountability courts receive funding from a variety of other sources including county funds, fees paid by participants, and any other funding they may bring in independently.



TRAINING

The CACJ ensures court personnel are trained. New court teams are given the opportunity to undergo implementation training from the National Drug Court Institute; the judge must attend judicial training from the CACJ; and the coordinator must attend coordinator-specific training. In addition, all members of a court should attend "tune-up" training every three years. There are additional trainings throughout the year for each member of the court team, including for clinicians on evidence-based practices.

ADMINISTERING ACCOUNTABILITY COURTS IS A TEAM EFFORT

BETWEEN THE STATE AND THE COUNTIES...

AND WITHIN EACH COUNTY

COUNCIL OF ACCOUNTABILITY COURT JUDGES

The Council of Accountability Court Judges (CACJ) was created by House Bill 328 in 2015 and is made up of all judges, senior judges, and judge emeriti who preside over accountability courts around the state. There are currently 157 member judges. In addition to an Executive Committee, the CACJ has five standing committees: Funding, Legislation, Nominations, Standards & Certification, and Training.

THE CACJ HAS SIX PRIMARY OBJECTIVES

To take Georgia's accountability courts to scale

The number of courts has grown from 29 in 2010 to 156 in 2018.

In 2013, just over 3,100 people participated in accountability courts. In 2018, there were 9,771 participants.

To reduce incarceration rates

Any amount of participation in an accountability court, regardless of completion, leads to lower recidivism.

To determine funding priorities

The CACJ distributes more than $30 million in state grants to help local accountability courts operate. A recent study showed that accountability courts cost $5,000 less per participant than traditional adjudication and incarceration.

To encourage adherence to standards

The CACJ ensures compliance with state standards through court certification every two years and peer review every three years.

To save lives and restore families

Court participants are working and being treated for the root causes leading to arrest.

To perform ongoing review and measurement

The CACJ collects 120 data elements quarterly from each court to monitor and improve program outcomes.

A 2010 Georgia Department of Audits and Accounts report analyzed a cohort of 2005 drug court participants. The report found that:

Only **7% were reconvicted** two years after graduation compared to 29% for a similar cohort sentenced to state prison.

The "average daily cost of drug court is **72% to 80% less** than the average daily cost of other traditional sentencing options."[2]

CACJ MISSION STATEMENT

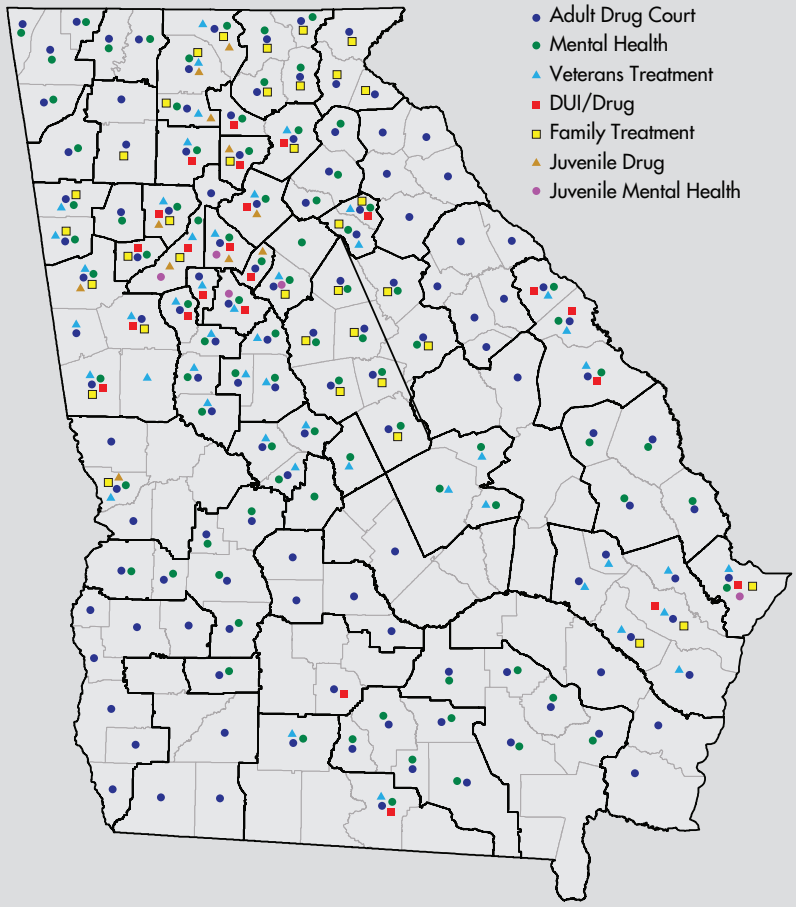
TO PROVIDE A UNIFIED FRAMEWORK THAT PROMOTES AND IMPROVES THE QUALITY, ACCESSIBILITY, AND ADMINISTRATION OF ACCOUNTABILITY COURTS.

References

1. Carl Vinson Institute of Government, University of Georgia. 2018, July. *The Estimated Economic Impacts and Benefits of Accountability Court Programs in Georgia.* Retrieved from gaaccountabilitycourts.org/economic-impact-study.
2. Performance and Audit Division, Georgia Department of Audits and Accounts. 2010, September. "Judicial Branch: Adult-Felony Drug Court."
3. Ibid.

As of July 1, 2018, Georgia had **156** certified and/or funded accountability courts (including juvenile accountability courts), with at least one in every judicial circuit in the state. In FY 2010, Georgia had only **29** adult drug courts in **75** counties.[3]

The number of participants in accountability courts throughout Georgia has grown steadily since FY 2013, when there were just over **3,100**, to **9,771** in FY 2017. An average of **1,700** participants graduated each year between FY 2015 and FY 2017.



TYPES OF ACCOUNTABILITY COURTS

Currently, Georgia has five types of adult accountability courts and two types of juvenile accountability courts:

Adult drug courts are designed for participants arrested for drug crimes or whose addiction to drugs and/or alcohol led them to criminal behavior.

Adult mental health courts serve participants with significant mental health diagnoses and/or co-occurring mental health and substance use disorders, and whose crime is related to their mental health issue.

Veterans treatment courts follow the drug court model but are designed to address unique issues veterans face as a result of their military service, often in a war zone.

Operating under the influence courts, commonly called DUI or DUI/drug courts, are intended to treat people convicted of operating a vehicle under the influence of drugs or alcohol multiple times.

Family treatment courts are intended to bring families back together by treating adults who have lost or will lose their children to foster care due to substance abuse issues.

Juvenile drug courts are designed to treat the unique needs of court-involved youth who use drugs or alcohol.

Juvenile mental health courts are designed to treat the unique needs of court-involved youth with serious unmet mental health needs.

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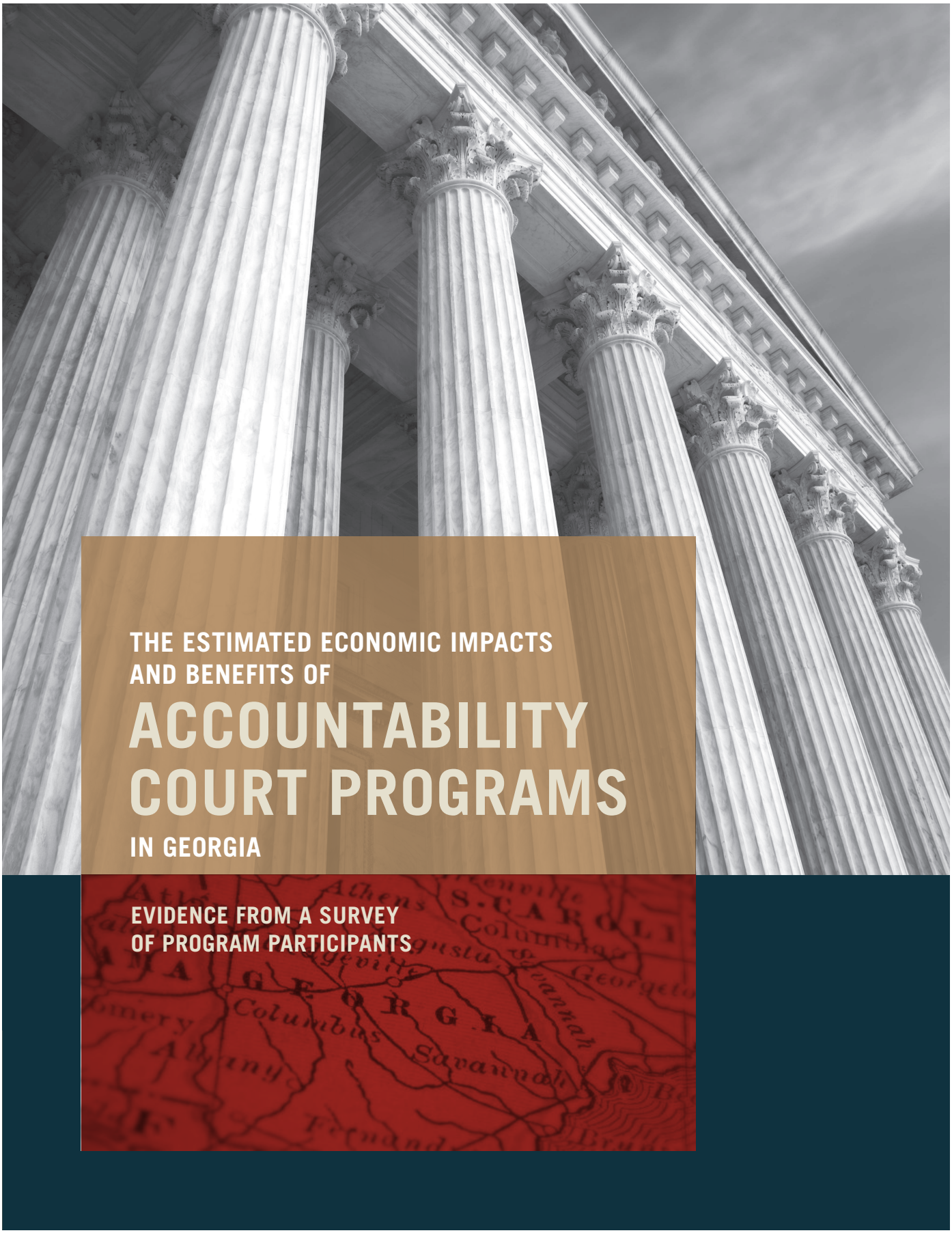


THE ESTIMATED ECONOMIC IMPACTS AND BENEFITS OF

ACCOUNTABILITY COURT PROGRAMS

IN GEORGIA

EVIDENCE FROM A SURVEY OF PROGRAM PARTICIPANTS

ECONOMIC IMPACTS AND BENEFITS OF 1,729 PROGRAM GRADUATES

In **FY 2017**

1,729

participants graduated from Georgia's **accountability court programs**

Each graduate **produces**

$22,129

in **economic benefits** to the **state**

$38.2 MILLION in estimated annual benefits

$3.3 MILLION in **program fees** collected from **participants who graduate**

$8.1 MILLION in **adjudication** and **incarceration** savings

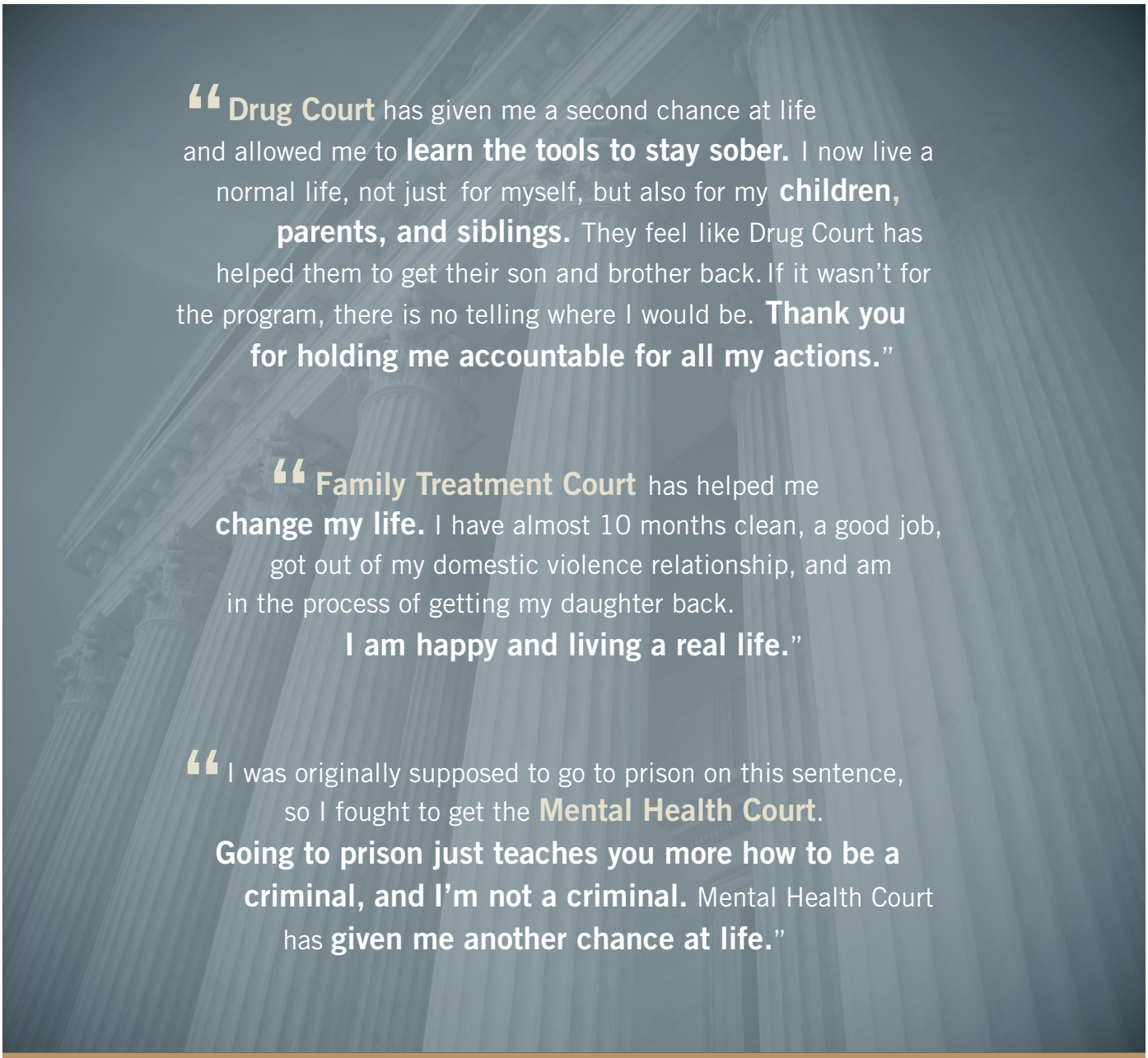
$8.1 MILLION in **health care** costs to the state avoided

$1.2 MILLION in **state income taxes** paid

$11.6 MILLION in **recidivism** costs avoided

$2.0 MILLION in **community service** work

$3.9 MILLION in **foster care system** costs avoided



"**Drug Court** has given me a second chance at life and allowed me to **learn the tools to stay sober.** I now live a normal life, not just for myself, but also for my **children, parents, and siblings.** They feel like Drug Court has helped them to get their son and brother back. If it wasn't for the program, there is no telling where I would be. **Thank you for holding me accountable for all my actions.**"

"**Family Treatment Court** has helped me **change my life.** I have almost 10 months clean, a good job, got out of my domestic violence relationship, and am in the process of getting my daughter back. **I am happy and living a real life.**"

"I was originally supposed to go to prison on this sentence, so I fought to get the **Mental Health Court**. **Going to prison just teaches you more how to be a criminal, and I'm not a criminal.** Mental Health Court has **given me another chance at life.**"

TEN KEY COMPONENTS OF A DRUG COURT

1 Drug courts integrate alcohol and other drug treatment services with justice system case processing.

2 Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.

3 Eligible participants are identified early and promptly placed in the drug court program.

4 Drug courts provide access to a continuum of alcohol, drug and other related treatment and rehabilitation services.

5 Abstinence is monitored by frequent alcohol and other drug testing.

6 A coordinated strategy governs drug court responses to participants' compliance.

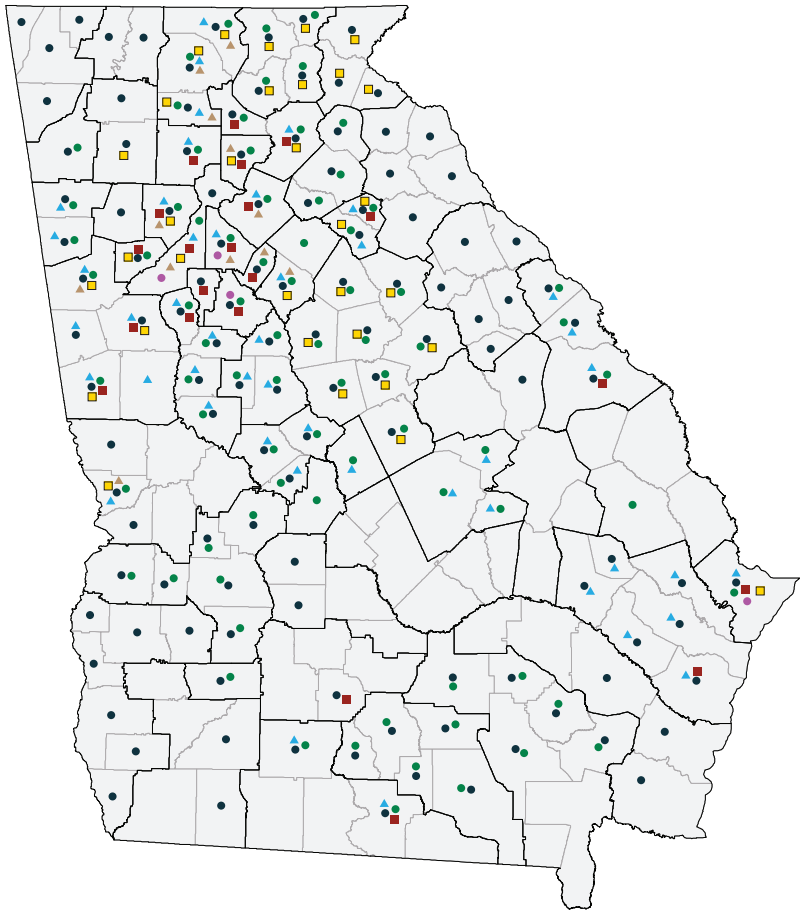
7 Ongoing judicial interaction with each drug court participant is essential.

8 Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.

9 Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations.

10 Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court effectiveness.

ACCOUNTABILITY COURT PROGRAM LOCATIONS



MAP LEGEND

- Felony/Drug
- Mental Health
- Veterans Treatment
- DUI/Drug
- Family Treatment
- Juvenile Drug
- Juvenile Mental Health

Drug Court provides an alternative to traditional justice system case processing. These programs keep individuals in treatment long enough for it to work, while supervising them closely. For a period of 18 to 24 months, participants are provided with intensive treatment, held accountable by the Drug Court judge for meeting their obligations to the court, society, themselves and their families through random drug tests, regular court appearances, and sanctions for failure to meet their obligations.

DUI Court is an accountability court program designed to change the behavior of repeat offenders arrested for DUI. The purpose of the program is to protect public safety by combining treatment of the underlying substance abuse problem with intensive supervision and testing to address the root cause of impaired driving.

Mental Health Court participants agree to take responsibility for the criminal charge by following a personalized treatment program that addresses their mental health condition and any substance abuse issues. Like drug court programs, participants are monitored closely by staff as they progress through the program.

Family Treatment Court is a program that uses individualized assessment, comprehensive behavioral and substance abuse treatment, and family support services to help break the cycle of addiction, stabilize families, and ensure the wellbeing of children.

Veterans Court programs are based on the drug court and mental health court models. They seek to keep veterans out of the criminal justice system by providing them with counseling, substance abuse treatment, and mental health treatment. These programs often incorporate veterans as mentors to assist in helping each participant with their individual needs.

SPENDING FOR ACCOUNTABILITY COURT PARTICIPANTS SAVES ALMOST $5,000

ACCOUNTABILITY COURT PROGRAM GRADUATE

$15,523

$9,682 state funds
- $8,123 state grant
- $1,559 prosecutors/public defenders

$5,841 local/federal funds

- Court costs
- Counseling
- Drug tests
- Supervision

TRADITIONAL ADJUDICATION AND INCARCERATION

$20,230

- Incarceration
- Probation

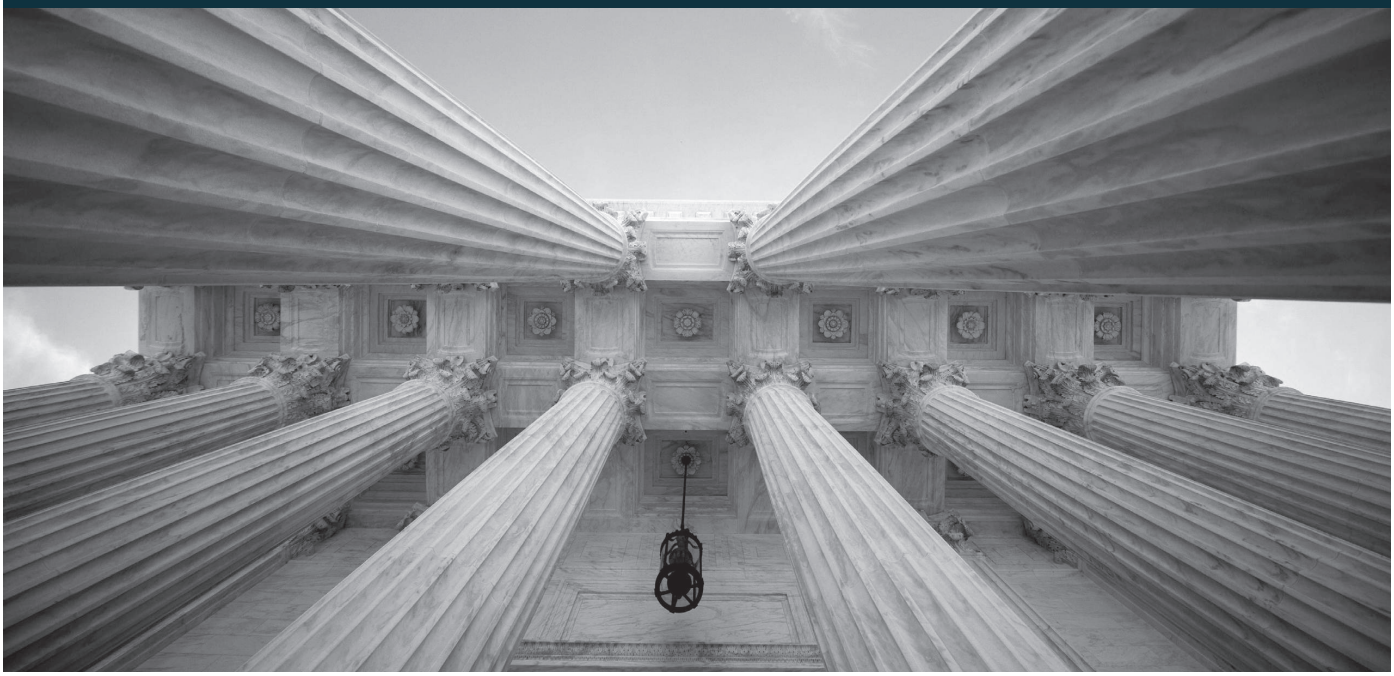
OTHER ECONOMIC BENEFITS OF ACCOUNTABILITY COURTS

ADDITIONAL BENEFITS PER GRADUATE

- **$1,932** in fees paid
- **$700** in Georgia income tax paid
- **$1,134** in community service

COSTS AVOIDED PER GRADUATE

- **$4,685** health care
- **$2,300** foster care system
- **$6,700** victim and societal costs from recidivism



CJCC has been the administrating agency of the funding directed towards accountability courts in Georgia since Governor Deal's Criminal Justice Reform efforts began in 2011. CJCC awards and administers funding, as directed by the Council of Accountability Court Judges, along with providing technical assistance in grants management to local courts throughout the state. The CJCC staff works in conjunction with the CACJ and local courts to provide resources and to ensure the success of Georgia's accountability courts.

In 2015, the General Assembly passed HB 328 and created the **Council of Accountability Court Judges (CACJ)**, leading to increased statewide collaboration among courts. The purpose of the council will be to effectively carry forth the constitutional by-laws and legislative responsibility to improve accountability courts and their quality through the expertise of judges. Another purpose and focus will be to establish standards and practices for all Accountability Court divisions based on the National Drug Court Institute and Substance Abuse and Mental Health Services Administration with a state goal of reducing recidivism of offenders with drug abuse problems. Further still, the CACJ strives to make accountability courts work for all Georgians by providing a unified framework that promotes and improves the quality, accessibility and administration of accountability courts. CACJ membership consists of judges who preside over Drug Court, Mental Health Court, Veterans Treatment Court, DUI Court, and Family Treatment Court divisions.

This report was developed and designed by the

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Since 1927, the Carl Vinson Institute of Government has been an integral part of the University of Georgia. A public service and outreach unit of the university, the Institute of Government is the largest and most comprehensive university-based organization serving governments in the United States through research services, customized assistance, training and development, and the application of technology.

Revised July 2018

Judicial Council of Georgia
Administrative Office of the Courts

Chief Justice P. Harris Hines
Chair

Cynthia H. Clanton
Director

Memorandum

TO: Elaine Johnson, Executive Program Director, Administrative Office of Courts

FROM: Matthew Bishop, Research Analyst, Administrative Office of the Courts

RE: PAC Court Evaluation

DATE: 6/1/2017

INTRODUCTION

The goal of Child Support Parental Accountability Courts (PACs) is to address the underlying issues facing non-custodial parents (NCPs) which cause them to be chronically delinquent in payment of child support obligations. Since the pilot programs began in 2009 and 2010 in Carroll County and Coweta County, respectively, Georgia's Child Support PAC programs have increased in number to a current total of 31 active programs. This evaluation follows up on a 2011 study conducted by Applied Research Services, Inc. on the PAC pilot programs. Five PAC programs have been selected for this evaluation, and the purpose of this evaluation is to determine whether participants in the five selected programs increased child support payments after becoming active in PAC and to determine the extent to which the PAC database collects information that is both useful and up-to-date.

The data set discussed here was extracted from five programs in the Child Support PAC database and matched with payment data from the Division of Child Support Services database collected by the Georgia Commission on Child Support on July 12, 2017. Any subsequent payment history updates to the database will not be reflected in this summary. Five PAC programs from these circuits have been selected for this evaluation based on years of operation and the ability to provide quality data: Stone Mountain Circuit, Enotah Circuit, Macon Circuit, Towaliga Circuit, and Augusta Circuit. These five programs offered sufficient continuous years of operation as well as sufficient numbers of participants to warrant inclusion in the evaluation.

Participants from these five programs with start dates between July 2012 and November 2015 have been included in the sample. These dates also ensure that at least one year of post-program payment data is available for each participant. During this time frame, data is available for 450 NCPs from three

categories: 81 graduates (NCPs who entered a program *and* successfully completed the program); 210 terminated participants (NCPs who entered a program but *did not meet* the requirements for graduation *and did not* complete the program), and 157 NCPs that were terminated in referral status (NCPs who were referred to the five programs but *did not* enter or become active in a program). NCPs who entered and became active in a program, namely graduates and terminated participants, will hereafter be referred to as "participants," while those who terminated in referral status will be called simply "referrals."

DATA COLLECTED

- **Payment summaries** - Payment amounts for both participants and referrals beginning 12 months before entering a program, payment amounts during program participation, and payment amounts during the 12 months after leaving a program are being analyzed.
- **Services** - records from the PAC database show services provided to each participant from the five selected programs. These services are intended to help address the root causes of chronic nonpayment and can include resume assistance, GED classes, referrals to employment programs, ID/License assistance, referrals to counseling, and access and visitation mediation among others.
- **Participant Characteristics** - The PAC database captures personal information for each participant, including age, education history, employment history, income, monthly support obligation amount, monthly arrears amount, and housing information.

LIMITATIONS

- This evaluation provides a snapshot on the performance of participants in five specific programs.
- Each participant enters the program following a program track designed to address each participant's specific underlying causes for non-compliance. These tracks include: Mental Health Track, Substance Abuse Track, and Literacy Track. Participants across different tracks may require a broad array of different services, and outcomes for participants may differ from one track to another. At this time, treatment track information is not included in reports generated by the PAC database and cannot be analyzed.
- The database does not currently capture changes in participant characteristics in specific areas of interest (education, employment, income, housing status, etc.) as they progress through the program. Future improvements in the database will document these changes and provide a "before and after" snapshot of each participant.
- Arrears amounts cannot be determined without collecting the adjudicated arrears on each case at the time of entry into a program. Showing modifications of support order amounts as well as reductions in arrears amounts would show whether participants are meeting their payment obligations.

- Regional economic conditions, such as concentrated poverty at the local level and the number of job opportunities available, potentially play an important role in the effectiveness of PAC programs. This analysis does not account for those factors.
- In many cases, data fields for participant characteristics such as education, employment, and income have been left blank. A more complete data set would allow for regression analysis, estimating the isolated effect of each variable of interest.

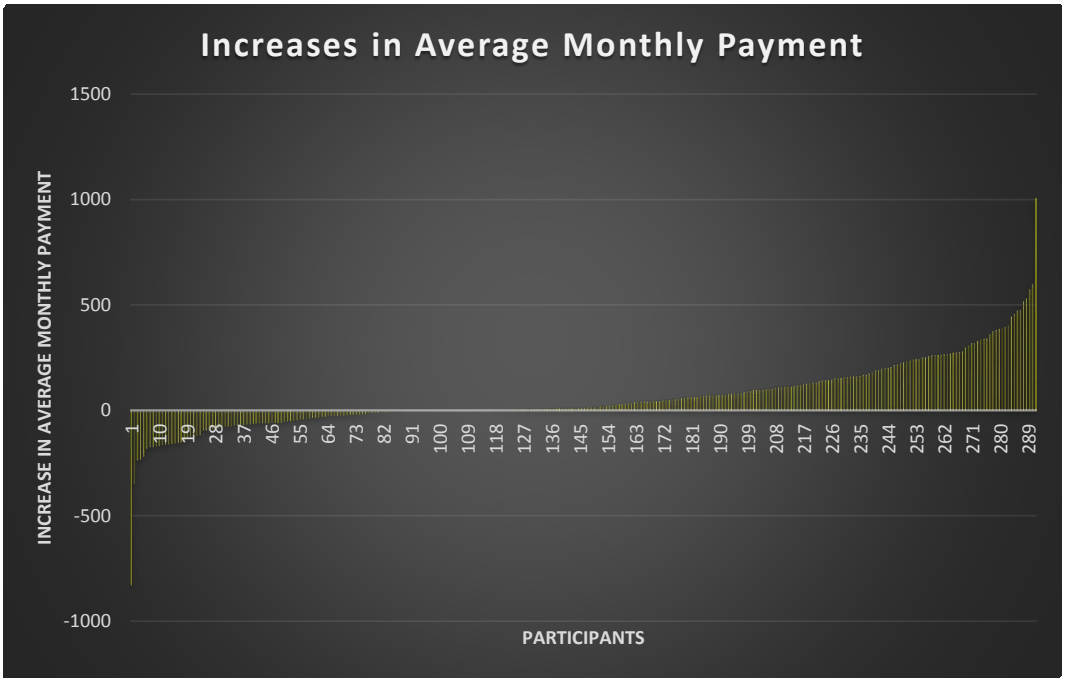
ANALYSIS

The following sections provide detailed analysis of payment data. Each section features a visual chart, followed by a summary of findings. The report concludes with recommendations for improved data collection.

PAYMENTS

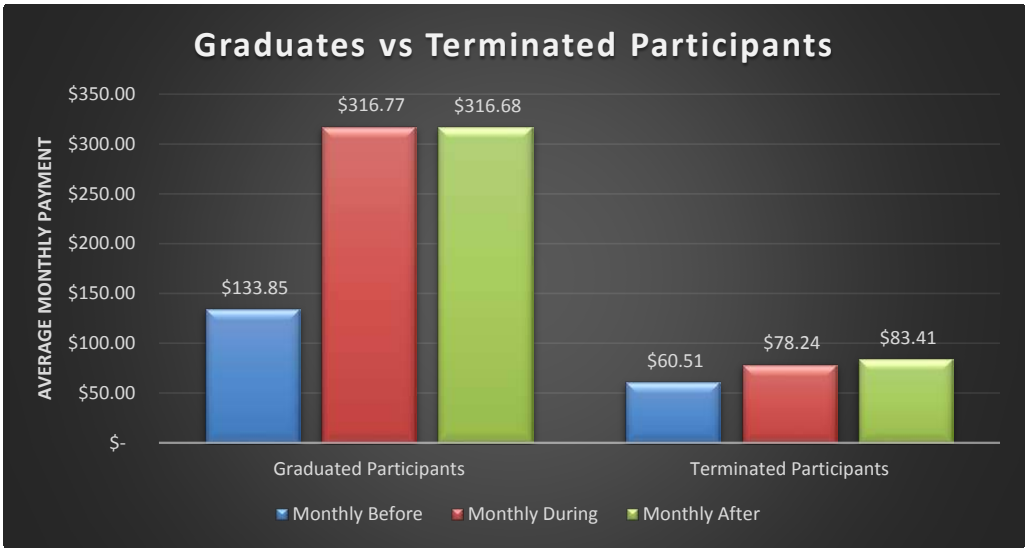
The chart above compares payments made by the 291 program participants (81 graduates and 210 terminated participants) from the five selected programs between time periods before, during, and after entering a PAC program. The average monthly payment for all program participants in the 12 months before entering the PAC Program was $80.93. While active in the program, participants averaged $144.63 in payments per month. Overall, this represents a 79% increase in average monthly payment. In the 12 month period after exiting the program, either by termination or graduation, participants averaged $148.34 per month in child support payment.

PAYMENT INCREASES



The chart above compares changes in the average monthly child support payment for each participant in the 12 months before joining the program to the average monthly payment while active in the program. Each bar shows the dollar amount by which an individual participant's average monthly child support payment amount increased or decreased while active in a program. Results varied greatly from participant to participant. Of the 291 participants, 88 individuals averaged less in monthly payments after joining a PAC program compared with their average monthly payment in the 12 months before joining PAC; 28 participants recorded no payments at all either before or during the time they were active in PAC; and the remaining 175 participants increased their average monthly child support payment after joining PAC.

GRADUATES VS TERMINATED PARTICIPANTS

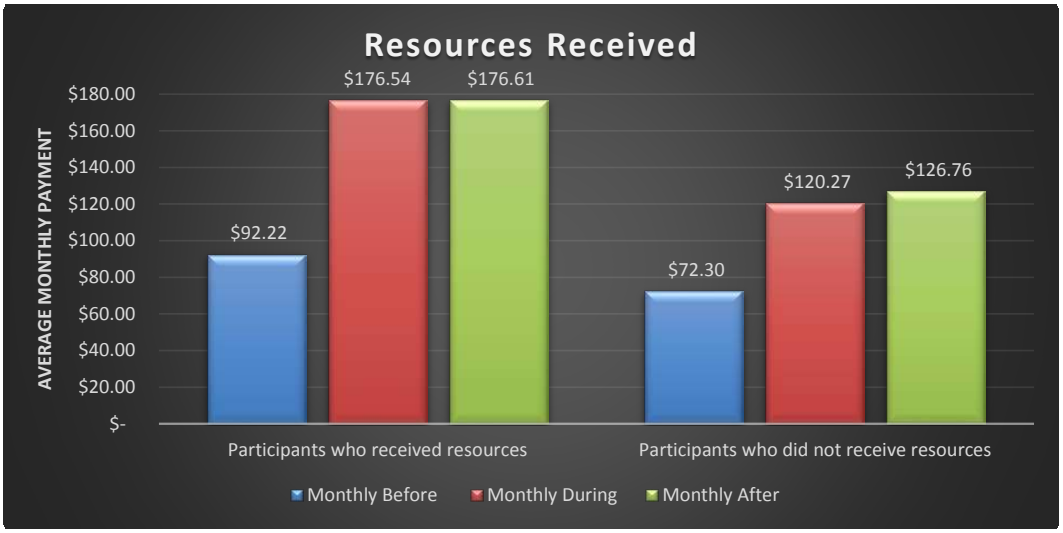


The chart above compares the average monthly payment rate for participants who graduated from a program to participants who were terminated from a program. On average, graduates entered PAC programs with a higher average monthly amount of child support payments. In the 12 months before entering the program, individuals who would become graduates entered the program averaging $133.85 per month in child support payments. Comparatively, individuals who would eventually be terminated from the program entered with average monthly child support payment of $60.51.

While active in the program, individuals who graduated increased their average monthly child support payment to $316.77, representing an increase of 136%. In the 12 months following their graduation date, graduates maintained a similar average monthly payment rate of $316.68.

Comparatively, individuals who would eventually be terminated from the program increased their average monthly payment amount by roughly 29% after joining the program. These individuals averaged $78.24 in monthly child support payments while active in the program. In the 12 months following their termination date, these individuals averaged $83.41 in child support payments.

RESOURCES RECEIVED

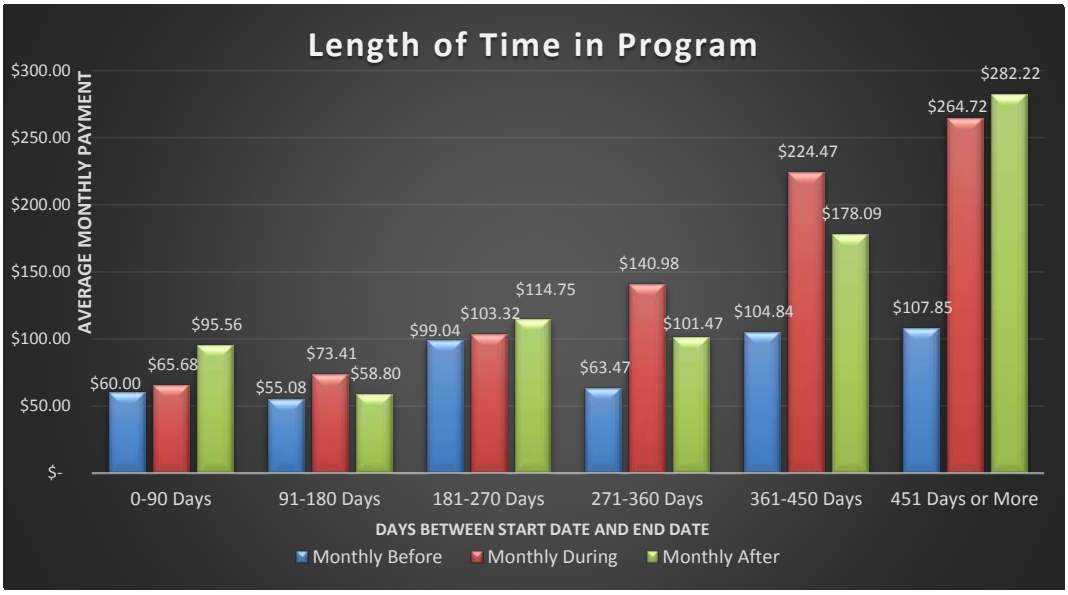


The chart above compares participants listed in the Resources report, for whom there is a record of utilizing at least one of the resources provided by PAC programs, to participants who are not listed in the Resources report. The types of resources typically provided include referrals to local clothes closet programs, resume assistance, job search assistance, assistance acquiring transportation, etc. Of the 291 participants involved, the resource report lists 126 individuals who received at least one resource from PAC programs. For the remaining 165 participants, there is no record of program resource utilization. As shown in the chart above, these two groups performed differently when comparing average monthly payment.

Participants who received at least one resource increased their rate of payment from $92.22 in the 12 months before entering the program to a monthly payment rate of $176.54 while active in the program, representing an average increase of 84%. In the 12 months after leaving the program, these individuals averaged a monthly child support payment rate of $176.61.

Comparatively, individuals for whom no record of utilizing resources exists, increased their monthly rate of payment from $72.30 to $120.77, representing an increase of 67%. On average, these participants were paying less in monthly child support before entering the program, and while they increased payment rates after becoming active in the program, the increase was smaller in magnitude when compared with participants who utilized at least one of the program's resources.

LENGTH OF TIME IN PROGRAM



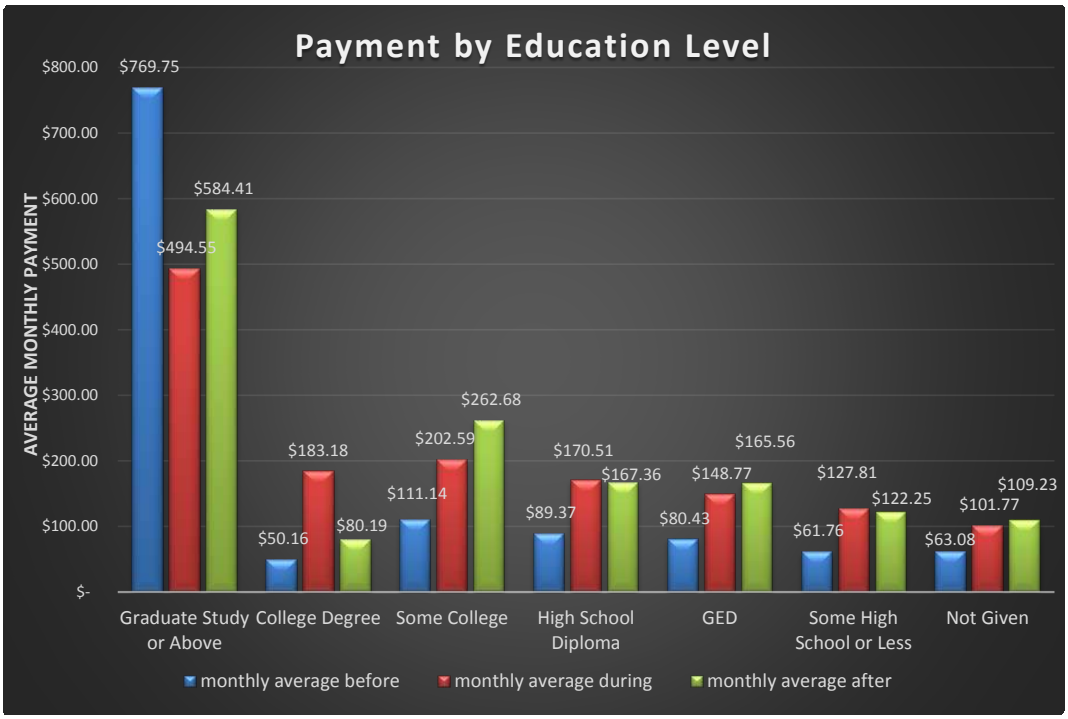
The chart above groups participants by the number of days between entering and leaving the program due to graduation or termination. The number of days spent active in the program is tied to different outcomes with regard to the average amount of child support paid per month. Among all participants, the average number of days spent in the program was roughly 294 days. All groups increased the average monthly amount of child support payment to some extent after starting the program, but this effect becomes larger as the number of days spent in the program increases.

Participants that entered and exited a program in 90 days or less increased average monthly child support payment from $60.00 per month to $65.68 after entering a program. Comparatively, participants who spent at least 450 days in a program increased average monthly child support payment from $106.20 to $280.15.

The numbers of participants in each category were as follows: 65 Participants with 0-90 Days; 47 participants with 91-180 days; 41 Participants with 181-270 days; 40 Participants with 271-360 days; 36 participants with 361-450 days; and 62 participants with 451+ active days in a program.

Graduates averaged 526 days (approximately 17.5 months) between start date and graduation date, while terminated participants averaged 205 days (approx. 6.8 months) between start date and termination date.

PAYMENT BY EDUCATION LEVEL

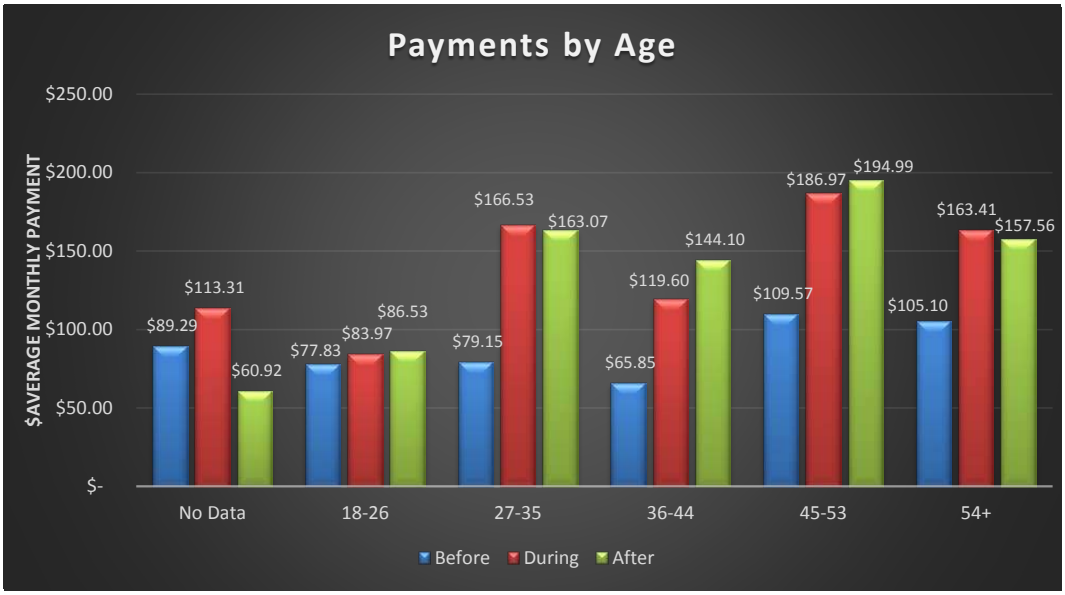


The graph above shows average monthly child support payments for each education level[1]. Participants with either graduate study experience or a graduate degree averaged higher monthly payments than all other groups before, during and after program participation. The graduate study group also failed to increase average monthly payment levels after joining the program. All other groups increased average monthly payment levels after joining the program.

The largest group was "some high school or less" with 101 participants, while 66 participants held a high school diploma, and 47 held GEDs. No education data was available for 54 participants. There were two categories with extremely small sample sizes, as there were only 5 participants with college degrees, 3 with graduate study or above, and 15 participants with some college coursework.

[1] Education level may change over the course of program participation. Currently, these changes are not being captured by the database.

AGE



Of the 291 participants in the sample, the average participant age at the program start date was approximately 37 years, and there were 19 participants with no date of birth available. There were 27 participants aged 18-26 at entry, 110 participants aged 27-35, 85 participants were 45-53, and seven participants were 54 years old or older.

The chart above shows how average monthly payments varied with participant age. Payment increases after joining the program were least pronounced in the youngest age bracket, where participants entered between the ages of 18 and 26. Conversely, participants aged 27-35 were paying at a similar level before entering the program, but were more successful in increasing average monthly payments after entering the program.

Participants in the oldest two age brackets, 45-53 and 54+, averaged higher monthly payments than younger groups in the 12 months before joining the program and increased average monthly payments by 71% and 55%, respectively.

PAYMENT BY EMPLOYMENT LEVEL

The graph above shows the average monthly child support payment for each employment level[2]. While participants at all employment levels increased average monthly payment to some degree after entering the program, participants who were employed full-time increased average monthly payments from $126.94 in the year before entering the program to $283.85 after entering, an increase of 124%. Part-time employed participants increased monthly payments from $96.61 to $215.35, representing a 123% increase.

Participants who were unemployed, or for whom no employment information was listed, were able to increase payment levels after entering the program, but were each paying lesser amounts upon entry and showed comparatively modest increases of 32% and 14%, respectively. Payment profiles for these groups resemble those of the terminated participants.

Almost half of all participants were listed as unemployed, with 145 participants designated as unemployed. Also, 66 participants were listed as full-time employed and 42 listed as working part-time. No employment data was available for 38 participants.

Wage data was largely incomplete, as there were only 43 participants for whom wage information was available, leaving 148 participants with no wage data furnished.

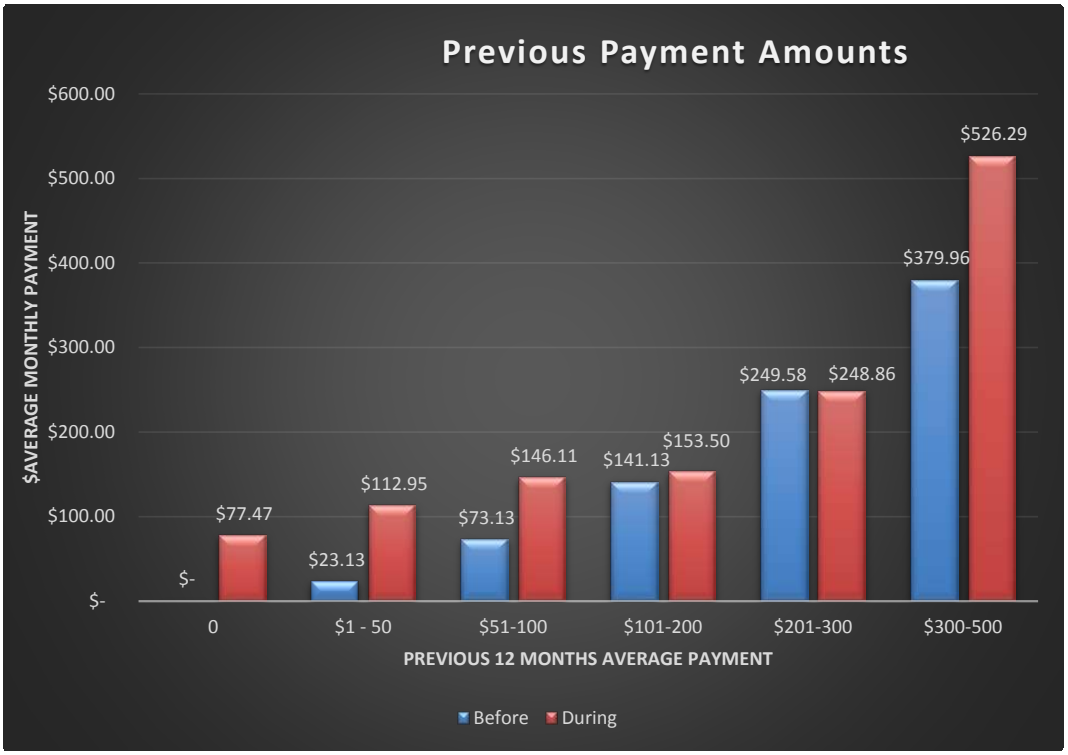
[2] Employment level may change over the course of program participation. Currently, these changes are not being captured by the database.

CRIMINAL HISTORY

The PAC database contains criminal history information that tells whether a participant has a prior conviction for a felony or misdemeanor. Of the 291 participants selected from the five selected programs, 21 indicated having no prior convictions, 88 participants had a prior conviction, and 182 had no data available for this category. Twelve participants indicated no prior misdemeanors, and 68 participants had criminal history including a misdemeanor offense. Misdemeanor data was not available for 211 of the participants. Also, 57 participants indicated prior felony convictions while 37 participants had no record of prior felony convictions. Felony data was not available for 197 of the participants.

Using the available data, participants with prior convictions performed fairly comparably to participants with no prior convictions. Due to a relatively small number of misdemeanor offenders, it is difficult to determine whether prior misdemeanor convictions affected participant outcomes. However, there does appear to be an important difference with regard to felony convictions. Participants with felony convictions entered the program averaging $71.42 in monthly payments, while those without felony convictions averaged $124.78. Upon entering the program, participants with felony convictions increased average monthly payments to $148.28, while those without felony convictions averaged $247.20 in monthly payments.

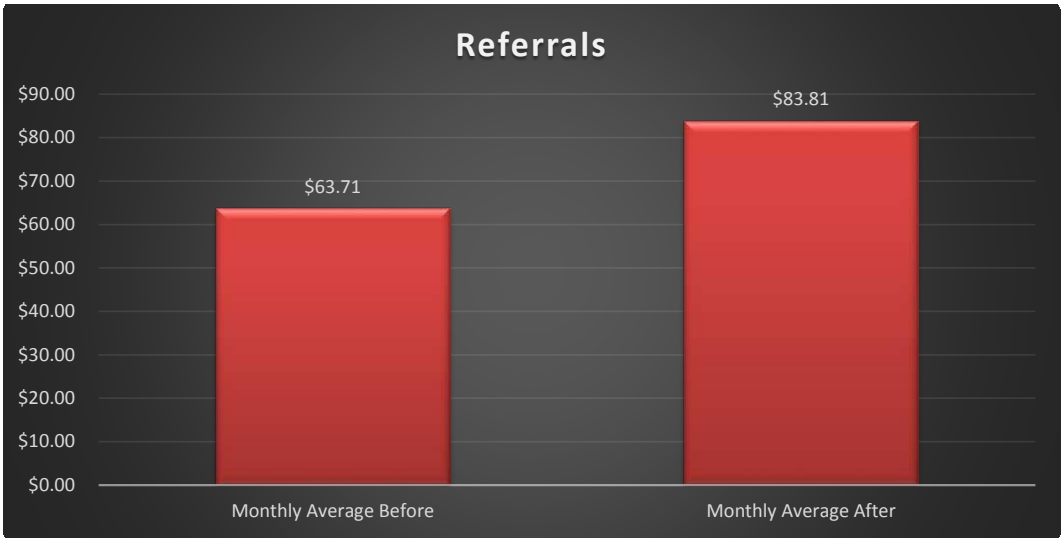
PREVIOUS PAYMENTS



The chart above groups participants by the average monthly payment in the 12 months before entering the program. The average monthly payment amount for all participants was $80.93 in the 12 months before entering the program. Eighty participants averaged $0.00 in the 12 months before entering PAC, and this group increased average payments to $77.47 while active in PAC. Eighty-six participants entered PAC averaging between $1 and $50 and this group increased average payments to $112.95. Fifty-one participants entered PAC averaging between $51 and $100, and this group increased average payments to $146.11 while active in PAC. Forty-three participants entered PAC averaging between $101 and $200, and this group slightly increased average monthly payment amounts from $141.13 to $153.50. Payment increases were less pronounced, on average, for the 18 participants who entered the program averaging between $201 and $300, as this group did not increase the amount of its average monthly child support payment. There were 8 participants who averaged between $300 and $500 in the 12 months before entering a PAC program, and these participants increased their average monthly payment amount to $526.29.[3]

[3] Not pictured in the chart, there were five participants averaging more than $500 in the 12 months before entering PAC. Average payments for this group decreased from $845.92 to $687.05. The chart doesn't include this group because their initial payments were approximately three standard deviations higher than the average, making this group outliers.

REFERRALS

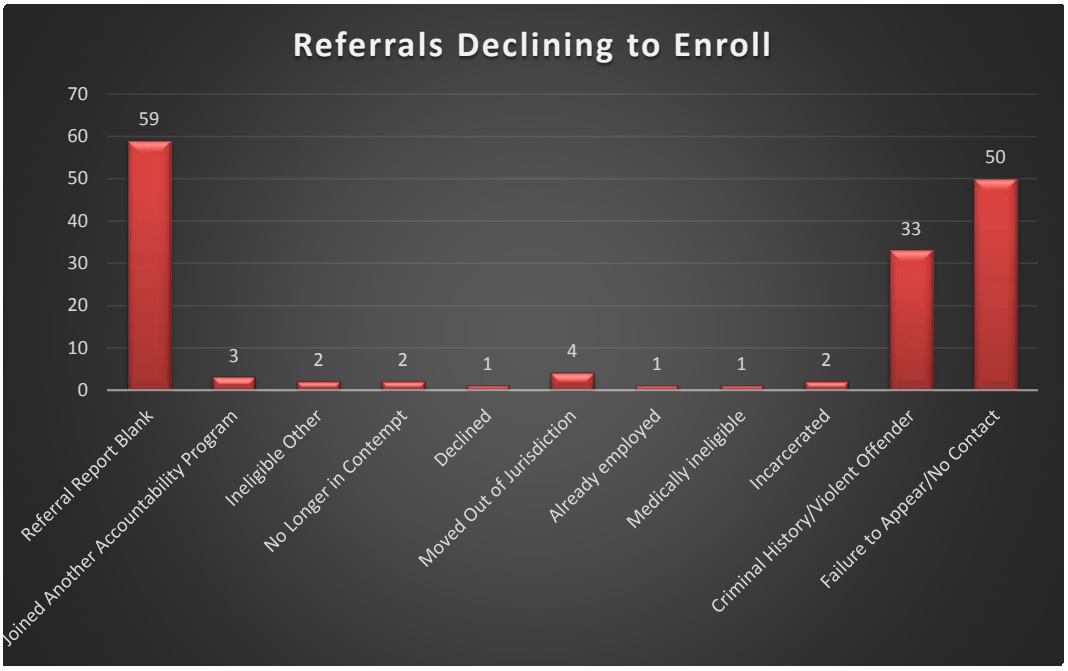


The data set also contains payment summaries for Non-Custodial Parents that were referred to the PAC programs (presumably because they were similarly delinquent in meeting child support payment obligations), but who did not participate in a PAC program. Payment data for these 157 referred individuals is included here for purposes of comparison[4]. In the 12 months before being referred to the program, referred NCPs averaged $63.71 in child support payments per month. In the 12 months after being referred to a PAC program, and declining to enroll, the average monthly child support payment for this group increased to $83.81, an average increase of 32%. In comparison, PAC participants increased payments by 79% after enrolling in a PAC program. While payments by participants who graduated rose 136% after joining PAC, participants that were eventually terminated increased their monthly payments by 29%, a level which closely mirrors individuals who were referred to the program.

Participants in referral status had less complete information available regarding their personal characteristics. Only 105 had a date of birth furnished, and these individuals averaged an age of 36 years old at the date of referral. Only 31 had employment information available while 27 referrals had education data furnished. Of these, three referred individuals were listed as employed and 28 were unemployed, while 20 had achieved at least a high school diploma or its equivalent. More complete information would allow better analysis on differences between referred individuals and those who choose to enter the program.

[4] Fundamental differences in characteristics between individuals who were referred and individuals who enrolled in the PAC program might make direct comparisons in payment data problematic.

REASONS REFERRALS DID NOT JOIN PAC



The graph above shows the reasons why each referred individual did not join the PAC Program. These entries are recorded in the PAC database. Of the 157 referrals for which payment data is available, 59 have no information explaining why the individual did not enroll. Ranking as the second most frequent reason given for not enrolling, 50 individuals did not enroll due to failure to appear for intake appointment or Coordinator's inability to make contact with the NCP. Additionally, there were 33 individuals disqualified from enrollment due to criminal history either, including felonies or violent offenses. The remaining 16 referrals listed assorted reasons such as joining other programs, moving away from the jurisdiction, being incarcerated, etc. Only two individuals cited an ability to pay the court-ordered amounts on their own as reason to decline enrollment.

SUMMARY OF FINDINGS

- Active participants in the five programs increased the average amount of monthly child support payments. On average, active participants from the five included PAC programs increased the amount of child support payments per month by 79%.
- Both graduates and terminated participants increased monthly average child support payments after joining PAC. Graduates increased payments at a higher rate than terminated participants.
- Of the 291 participants included in the analysis, 175 increased their average monthly payment after becoming active in a program, while 88 averaged less in monthly payments after entering a program. The remaining 28 participants continued to average $0 in monthly payments after joining the program.
- Participants that utilized program resources increased average monthly payments at a higher rate than individuals without a record of utilizing program resources.
- Payment increases were higher for individuals who stayed in the program longer. Participants who participated for 90 days or less showed the lowest increases in average monthly payment, while participants with 450+ days in a program showed higher, more sustained increases in payment.
- Payment increases in this sample were more pronounced among participants that had higher levels of formal education. Participants with high school diplomas and GEDs increased payments at a higher rate than participants who did not complete high school as well as those with no education information available.
- Participants with full-time or part-time employment were more successful than unemployed participants in increasing their average monthly child support payment.
- Felony offenders were less successful than participants with no felonies in increasing the monthly amount of child support payments.
- Referrals (NCPs who were referred to the five programs but *did not* enter or become active in a program) also showed slight increases in average monthly child support payments. In the 12 months after the referral date, these individuals increased average monthly payments by 32%. These results compare closely with terminated participants, who increased average monthly child support payments by 29% after becoming active in the program.
- The amount of child support paid by a participant in the 12 months before joining a PAC program appeared to be a strong predictor for the average monthly amount the participant would pay after joining PAC.
- Of the 159 referred NCPs that did not enter a program, 59 had no record in the database indicating a reason for declining to join. Also, 50 of these individuals failed to qualify due to criminal history or violent offender status, while 33 did not enter due to failure to appear for scheduled intake appointments.

RECOMMENDATIONS TO IMPROVE DATA COLLECTION

The data provided for this report has been useful in showing the PAC program's effectiveness at increasing payment amounts for participants. Future research could be improved both by collecting additional data and ensuring that all data elements are fully furnished for each participant. Additionally, these suggestions will broaden the scope of evaluation to determine the extent to which regional economic conditions impact the effectiveness of PAC programs. Here are some recommendations to improve the quality of future analysis.

- Improve data collection to show how participant characteristics such as education and employment level change over the course of the program. In the future, the following data points will be collected at multiple intervals between participant's program start date, graduation/termination date, and twelve months post-graduation, capturing changes as they occur:
    - Employment status
    - Income (hourly wage/salary amount)
    - Monthly child support payment obligation amount owed
    - Monthly arrears repayment amount owed by noncustodial parent
    - Government subsidies
- Improve data collection to include the following elements that are currently either not being captured by the PAC database or not being included in automated reports:
    - Number of children in each case
    - More detailed child support payment information on NCPs who paid $0 in the 12 months prior to program start date
    - A report for treatment track information for each participant.
    - Years of work experience
    - Length of unemployment
- Emphasize the importance of updating data fields with program coordinators. A complete data set would allow for a regression analysis to estimate the isolated impact of each.

GEORGIA DEPARTMENT OF HUMAN SERVICES
Division of Child Support Services

Community Outreach

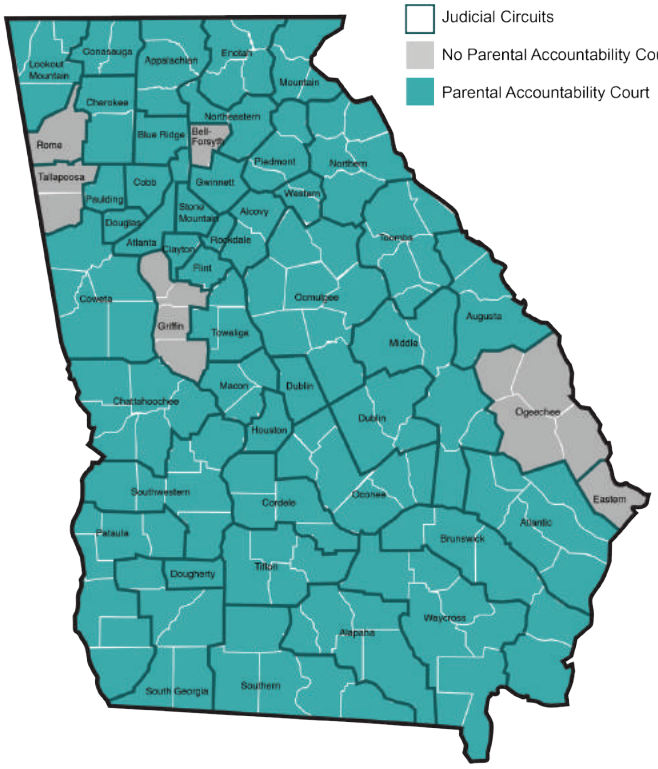
Helping parents support their children.

Parental Accountability Court Program

The Parental Accountability Court (PAC) program is a joint effort of the Division and Superior Court Judges to offer an alternative to incarceration and to help chronic nonpayers of child support make regular payments. The program uses community resources and judicial oversight to address barriers that keep parents from meeting their support obligations. Each program, including services provided to participants, is tailored to the needs of the local community. Superior Court Judges provide judicial oversight and collaborate with PAC coordinators to implement the program. PAC coordinators connect participants to existing community resources.

Judicial Circuits Served by Parental Accountability Courts

Parental Accountability Courts are in operations in 43 judicial circuits across the state. The Division's goal is to establish PACs in all 49 judicial circuits in SFY19.



SERVICES OFFERED TO PARTICIPANTS

- Volunteer work opportunities
- Literacy training
- Job assistance/placement
- Mental health services
- Clinical assessments
- Substance abuse treatment
- Coaching/mentoring
- Additional services specific to each local community

BY THE NUMBERS

Since SFY 2012, the Parental Accountability Court program has helped

6,212

noncustodial parents who were at risk of incarceration avoid jail time and provide much needed support to

9,461

of Georgia's children. Program participants paid an estimated

$6.6M

in support, which, in return, has saved the state millions in incarceration costs.

CONTACT INFORMATION

For information about the Parental Accountability Court Program and other outreach services, call **1-844-MYGADHS (1-844-694-2347)**.

Gerlda B. Hines, DHS Interim Commissioner | **Tanguler Gray**, Division Director | **John Hurst**, Division Deputy Director

GEORGIA DEPARTMENT OF HUMAN SERVICES
Division of Child Support Services

Community Outreach

Helping parents support their children.

Fatherhood Program

Through the Fatherhood program, the Division works with parents who are unemployed or underemployed and are, as a result, unable to pay their full child support obligations. The program connects parents with resources that lead to jobs paying above minimum wage, greater self sufficiency and more emotional, parental and financial involvement in the lives of their children. Georgia has the only statewide program in the U.S. **Services include:**

- GED classes
- Short-term training
- Volunteer opportunities
- Resume writing
- Federal bonding
- Referrals for access and visitation
- Referrals for legitimization
- Job placement, coaching and mentoring

"FATHERHOOD: A CELEBRATION" EVENTS

In an effort to raise awareness for the Fatherhood program's ability to help parents meet their child support obligations, the Division hosts outreach events around the state. These events celebrate the roles fathers play in the lives of their children. It is a fun atmosphere for parents to spend time with their children and to learn about the resources available to parents struggling to pay their child support. The Division hosted events in Albany, Columbus and Morrow in SFY18 and has additional celebrations planned in Lowndes and Gwinnett counties for SFY19.

FATHERHOOD CONVERSATIONS

In an effort to provide child support information to parents who feel uncomfortable attending in-person events in fear of arrest, DCSS began hosting Fatherhood Conversations.

Fatherhood Conversations provide child support information to the general public in a nonthreatening environment. Fatherhood Conversations are interactive and are made available for participation via LiveStream. Some forums allow the public to attend for live engagement. Additional conversations are planned for SFY19.

91%
of noncustodial parents owing child support in Georgia are fathers.

83,040
cases are considered to be hard-to-serve and potentially eligible for an outreach program.

During FFY18,

6,511
parents were enrolled in the Fatherhood program, supporting **9,173** children.

24
Fatherhood agents across Georgia

1,340
noncustodial parents enrolled in General Education Development (GED) classes through the Fatherhood program.

1,174
participants enrolled in short-term training programs

Fatherhood participants who have had their driver's licenses suspended or who are subject to license suspension for nonpayment of child support have the opportunity to regain driving privileges.

CONTACT INFORMATION
For information about the Georgia Fatherhood program and other community outreach services, call **1-844-MYGADHS (1-844-694-2347)**. Custodial and noncustodial parents may apply for services, enter and receive information about their cases, make a payment online or check payment information by using the Customer Online Services portal at **www.dcss.dhs.georgia.gov**. Users receive a password to protect confidentiality.

MENTAL ILLNESS RESOURCE GUIDE FOR FAMILY LAW PRACTICIONERS

*MAY IS MENTAL HEALTH MONTH

Author: Judge Asha Jackson,

Chief Judge DeKalb Superior Court/ Presiding Judge Felony Mental Health Court

What do you do if your client and/or their child(ren) have a mental health diagnosis or experience a crisis during the pendency of an action?

1st- Know that opposing counsel may make this an issue for the fact finder's consideration in divorce and custody actions. While having a mental health diagnosis, disability, or situational crisis should not in and of itself affect your case, it may certainly have a decisional impact particularly for cases that are not managed.

2nd- If you are aware of the issue, have a Crisis Intervention Plan that you can articulate for the court which includes a treatment plan, an emergency contact list (including contact information for treatment professionals), a support network, and sometimes education for the fact finder.

3rd- If you were not previously aware of the issue, DON'T PANIC. You may have to share information with your client and/ other family members about treatment which is the first priority. Inform the court that you may/will need a continuance because of a medical emergency but then provide updates when things are less chaotic.

4th- Be willing to speak to your client about a plan that will allow for your client to maintain a healthy lifestyle as well as to be engaged in resolving that clients affairs.

5th- Use the resources of the court (some counties have family courts supervised by juvenile court judges and for criminal cases there may be both misdemeanor and felony mental health courts) , the county where you reside (Most counties have a crisis stabilization unit for emergencies, a community service board for on-going treatment, and public medical facilities, and peer wellness support centers) , and any private resources that may be available to your client (i.e. EAP plans, private insurance, sliding scale providers).

NATIONAL RESOURCES

National Suicide Prevention Hotline 1-800-273-8255

National Association of Mental Illness (NAMI) Helpline 1-800-950-6264

Substance Abuse and Mental Health Services Administration (SAMSHA) Helpline 1-800-662-HELP (4357)

Service Members and Their Families https://www.mentalhealth.gov/get-help/veterans.

U.S. Department of Veteran's Affairs 1-800-273-8255 and Press 1 to talk to someone.

Send a text message to 838255 to connect with a VA responder.

Start a confidential online chat session at VeteransCrisisLine.net/Chat.

Find a VA facility near you.

Visit MilitaryCrisisLine.net if you are an active duty Service member, Guardsman, or Reservist.

Mental Health Information, Research and Resources through the National Institute of Mental Health 1-866-615-6464

GEORGIA RESOURCES

Georgia Crisis & Access Line: (800) 715-4225

Georgia offers a statewide toll-free call center for individuals to access services. The call also offers individuals a choice of providers and to schedule appointments for services. Individuals are able to specify the distance they are willing to travel and the call center identifies service providers within that proximity to the individual's zip code location.

Behavioral Health Crisis Center/Crisis Stabilization Unit (BHCC/CSU)

A BHCC provides community-based, 24/7 walk-in access to psychiatric assessment, intervention, and counseling for individuals experiencing a crisis, substantial and overwhelming stress, or a change in behavior that severely impairs functioning or causes increased personal distress. Services are designed to prevent ER visits or psychiatric inpatient hospitalization, and include temporary observation; mobilization of natural supports; and linkage to other appropriate levels of care or other services needed to effectively support the individual. A CSU provides short-term psychiatric treatment and stabilization in a community setting, but is not accessible on a 24/7 walk-in basis.

Children and Mental Health:

Georgia Apex Program:

The Georgia Apex Program focuses on three objectives:

1. To provide greater access to mental health services for students,

2. To provide for early detection of students' mental health needs, and

3. To create and sustain coordination between Georgia's community mental health providers and the local schools and school districts in which they reside.

The program is anchored to the DBHDD provider network (enrolled Tier I and Tier II providers).

Mental Health Resiliency Support Clubhouses:

Our Mental Health Resiliency Support Clubhouses seeks to support children and families coping with isolation, stigma, and other considerations associated with mental health disorders. The clubhouses provide educational supports, employment services, peer support, family engagement, social activities, and other initiatives geared to engage youth and assist them in managing symptoms.

Youth Peer Drop In Centers:

A youth peer drop in center provides a supportive, stigma-free environment where young adults, ages 16-26, can spend time learning skills needed to make the successful transition to adulthood. Services include structured activities that assist young adults in obtaining goals related to education, employment, housing, understanding mental and behavioral health, coping skills, and living skills.

System of Care Enhancement & Expansion (SOC-EE):

SOC-EE programming seeks to improve outcomes for children, young adults, and families, managing serious mental health challenges and substance use concerns, by focusing on social determinants such as education, employment, social connectedness, accessing behavioral health services, resiliency, and vocational/independence development.

High Fidelity Wraparound:

Statewide program provides community-based alternatives for youth (ages 5 to 17) and young adults (ages 18 to 21) with serious emotional and behavioral disturbances. The overall goal of the program is to provide High Fidelity Wraparound services and supports to safely divert youth who are at risk of admission to a Psychiatric Residential Treatment Facility (PRTF), and/or assist youth with remaining in the community and avoid readmission to a PRTF.

Crisis Stabilization:

There are four Child & Adolescent Crisis Stabilization Units (CSUs) in Georgia. Each serves youth from all over the state who are in need of short-term acute stabilization of behavioral health challenges.

Crisis Respite Apartments:

Serve individuals in the community who are in need of temporary housing with limited support. CRA bridge the gap for individuals transitioning from jail/prison or who are ready for discharge from a psychiatric inpatient setting but their residential placement is not ready. Individuals are supported and encouraged to maintain independence, i.e., appointment scheduling, daily living skills of cooking, cleaning, menu planning, social skills, and interpersonal skills. CRA services are time limited with a maximum stay of 60 days.

*****Mobile Crisis Response Services**

24/7 mobile response provides immediate on-site crisis management through assessment, de-escalation, consultation and referral with post-crisis follow-up to assure linkage with recommended services. These services may be accessed by calling the toll-free Georgia Crisis & Access Line at 1-800-715-4225.

For immediate access to routine or crisis services, please call the Georgia Crisis and Access Line (GCAL) at 1-800-715-4225. GCAL is available 24 hours a day, 7 days a week and 365 days a year to help you or someone you care for in a crisis. GCAL professionals will: 1. Provide telephonic crisis intervention services 2. Dispatch mobile crisis teams 3. Assist individuals in finding an open crisis or detox bed across the State 4. Link individuals with urgent appointment services.

OTHER RESOURCES:

Sample Crisis Plan- https://mentalhealthrecovery.com/crisis-planning/

For Family Members and Caregivers- https://www.nami.org/Find-Support/Family-Members-and-Caregivers

Peer wellness and Respite Care- https://www.gmhcn.org/peer-support-wellness-respite

Mental Health America- https://screening.mentalhealthamerica.net/diy

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A Man For All Seasons (1966)
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New Jersey Law Journal

VOL. 208 - NO 7 FEBRUARY 13, 2012 ESTABLISHED 1878

COMMENTARY

Chipping Away at Divorce Quagmire For Muslim and Jewish Women

BY ABED AWAD AND NOURA JEBARA

The ideal solution to protect New Jersey women whose husbands refuse to grant them a religious divorce is to adopt a New York-style law. There, litigants must allege in the verified complaint that before entry of final judgment of divorce, any barrier to the spouse's remarriage has been removed.

But a New Jersey state appeals court, ruling in *Lowy v. Lowy*, has given women the next-best thing: an enforceable mechanism for a religious divorce.

The issue of whether a court has the authority to order a litigant to grant a religious divorce has perplexed courts across the country, resulting in conflicting opinions.

In 1981, the Chancery Division, relying on implied contract theory and interpretation of Jewish law, directed the husband in *Minkin v. Minkin*, 34 A.2d 665, to grant his wife a religious divorce, called a get, because he agreed to be bound by Jewish law. *In Burns v. Burns*, 538 A.2d 438 (Ch. Div. 1987), the court directed the husband to initiate proceedings for the get in the Rabbinical Court. But *Afalo v. Afalo*, 685 A.2d 523 (Ch. Div. 1996), held that the court lacked authority to direct the husband to give his wife a get because it would violate the First Amendment.

The only reported appellate court decision in New Jersey is *Mayer-Kolker v. Kolker*, 359 N.J. Super. 98 (App. Div.), cert. denied, 177 N.J. 495 (2003). There, the court affirmed a trial judge's refusal to direct the husband to grant a divorce but remanded for the "development of a more complete record as to the parties' obligations under Mosaic law, including the ketubah [the Jewish marriage contract] and for a determination in light of such facts as to whether the court can compel defendant to cooperate with plaintiff in obtaining a get."

The Appellate Division has finally spoken on a trial court's authority to order a party to grant a religious divorce. In *Lowy*, A-472-10, issued last December, the parties' final judgment of divorce incorporated a Rabbinical Court decision in their dual final judgment of divorce.

The rabbinical decision provided: "If the arrangements for a Get will be made between Plaintiff and Defendant, Plaintiff shall pay for Get fees incurred." Studying the decision as a whole, the trial court creatively concluded that the husband was obligated to grant the wife a religious divorce.

The Appellate Division correctly noted that on its face, the rabbinical decision "did not require defendant to provide plaintiff with a Get." Finding that the trial judge lacked the authority to order a religious divorce, the trial court's order, therefore, constituted an unconstitutional entanglement in religious doctrine.

The *Lowy* court noted that the express language of the litigant's ketubah did not require the husband to grant his wife a religious divorce. Without the rabbinical decree or the agreement of the parties, as a source of authority, the *Lowy* court held that directing the husband to grant a get "constitute[d] impermissible judicial involvement in a matter of religious practice ... [and the] defendant ... was not bound by any contractual agreement to do so."

In sum, *Lowy* makes clear that an agreement to grant a religious divorce is enforceable by a trial court. New York is the only state that provides a civil remedy to compel a spouse to remove barriers to remarriage — in effect, granting a religious divorce — without the existence of an agreement between the parties. Many husbands refuse to grant religious divorces so they can extract better financial settlement terms or because they simply desire to punish the wife, as occurred in *Segal v. Segal*, 650 A.2d 996 (App. Div. 1994).

In most states, it is extremely difficult for a woman to obtain a religious divorce without her husband's consent. Ohio, for example, will not even enforce a settlement agreement providing for the granting of a religious divorce on unconstitutional entanglement grounds. *Steinberg v. Steinberg*, 1982 WL 2446 (Ohio App., 1982).

Without a religious divorce, a woman is religiously chained to her husband. Despite obtaining a civil divorce, a woman

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must obtain a religious divorce to remarry. If a Jewish woman remarries without one, she is considered an adulterer. As a result, children born out of this adulterous relationship may be considered illegitimate, with serious religious legal consequences ranging from inheritance ineligibility to marriage restrictions.

In the Muslim context, without a religious divorce, a woman cannot remarry. If she does, her marriage will be void and she will be committing adultery. With a Muslim woman's marriage still subsisting, her former husband will be considered the legally surviving husband entitled to inherit. The situation is even more complicated for Muslim women who marry abroad or continue to visit their native country. For example, several Muslim countries subject wives to travel restrictions.

Our country needs a legal remedy to protect women within our secular legal system. The U.S. Supreme Court anchors its separation of church and state jurisprudence in elaborate balancing tests. To best serve our clients, lawyers must balance the secular, legal remedies with our clients' religious requirements.

Religious requirements and secular remedies intersect in so many ways. While not the ideal solution because a husband could still refuse to agree to the religious divorce in the settlement or premarital agreement, *Lowy* does provide an effective secular remedy to a women's religious divorce quagmire short of a get law.■

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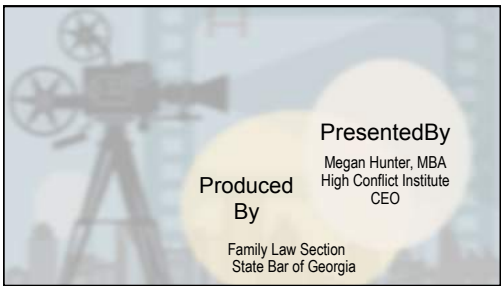
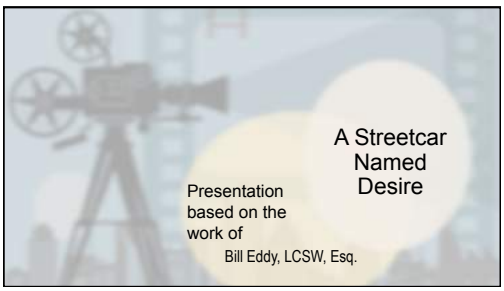
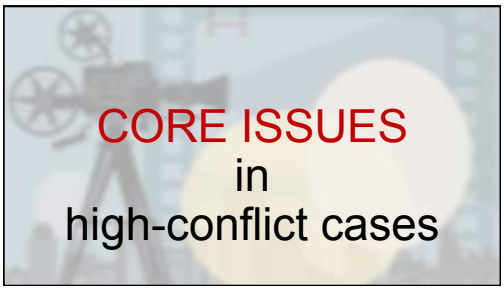
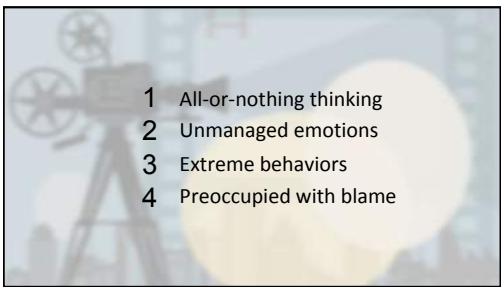








In high-conflict disputes, the issue's not the issue.

The personality is the issue.

MAY have a personality disorder (or traits)

A Personality Disorder is a significant biological disorder of the brain that involves anatomical, physiological and biochemical changes in brain function, and ultimately, abnormal behavior.

HOWEVER!!!

Not everyone with a personality disorder has a high-conflict personality.

Just a sub-set do.

CORE ISSUE 1

Lack of self-awareness

- why they are the way they are
- how they contribute to own problems
- how to change
- why they feel upset right now
- how they affect other people
- what skills they have that do work

-- Aaron Beck (1990)
Cognitive Therapy of Personality Disorders

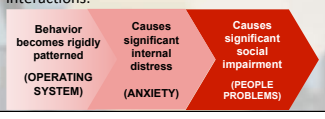
So, they don't get insight from your feedback.

Fighting, convincing, explaining, arguing.

CORE ISSUE 2

Lack of change

- When person loses "flexible adaptation" & takes a "non-reflective stance" in social interactions:



"This rigid behavior evokes responses in others which validate their inflexible beliefs."

-- Efrain Bleiberg (2001)
Treating Personality Disorders in Children and Adolescents

So, they need us to do the opposite of what we feel like doing and are used to doing.

CORE ISSUE 3

Externalizing responsibility (aka blame)

- They truly believe that forces outside themselves are responsible for all of their problems.
- They externalize by focusing blame on a specific person or group.

So, we must adapt our approach.

Avoid:

- trying to give them insights
- focusing on the past (instead, emphasize the future)
- negative feedback and angry confrontations
- telling them you think they have a personality disorder or high-conflict personality

What works for everyone else does NOT work for HCPs.

What works for HCPs works extremely well for the rest of your caseload.

Disclaimer

I am not training you to diagnose personality disorders.

It may be harmful to tell someone that you believe that they have a personality disorder or a high-conflict personality.

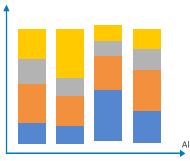
Just recognize potential patterns and adapt your approach.

Develop a private working theory

5 High-Conflict Personalities

Core Fear 1	Core Fear 2	Core Fear 3	Core Fear 4	Core Fear 5
FEAR OF FEELING INFERIOR	FEAR OF FEELING ABANDONED	FEAR OF FEELING IGNORED	FEAR OF FEELING DOMINATED	FEAR OF FEELING BETRAYED
Demanding Demeaning Self-absorbed Insulting	Overly friendly Shifts to anger Mood swings	Superficial & helpless Exaggerates Attention-seeking	Breaks rules & laws Deceptive Enjoys hurting people	Suspicious Expects conspiracies Counter-attacks first
NEEDS TO FEEL SUPERIOR	NEEDS TO FEEL ATTACHED & INCLUDED	NEEDS TO BE CENTER OF ATTENTION	NEEDS TO DOMINATE	NEEDS TO FEEL IN CONTROL
Always Dissing	Always Attaching	Always Dramatic	Always Conning	Always Suspicious

How Common?



National Institutes of Health study of over 35,000 people had following results for 5 "high conflict" personalities:

Narcissistic	=	6.2% (20-29 age group = 9.4%)
Borderline	=	5.9% (20-29 age group – 9.3%)
Paranoid	=	4.4% (20-29 age group – 6.8%)
Antisocial	=	3.6% (18-29 age group – 6.2%)
Histrionic	=	1.8% (18-29 age group – 3.8%)

All have substantial overlap with other personality disorders, substance abuse, depression, anxiety, bipolar disorder and suicide

----*Journal of Clinical Psychiatry, 7/2004, 4/2008 & 7/2008*

Percentages indicate rates of personality disorders; not rates of high-conflict personalities.

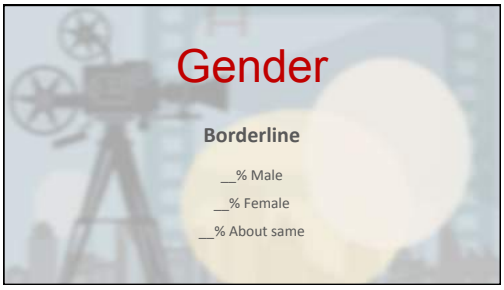
Gender

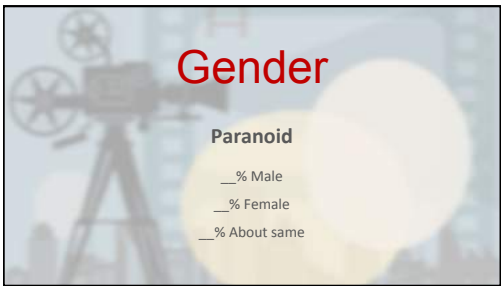
Narcissistic

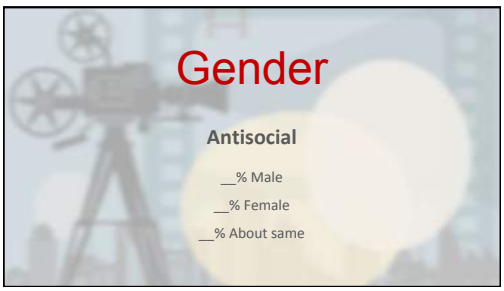
__% Male

__% Female

__% About same







Gender

Histrionic

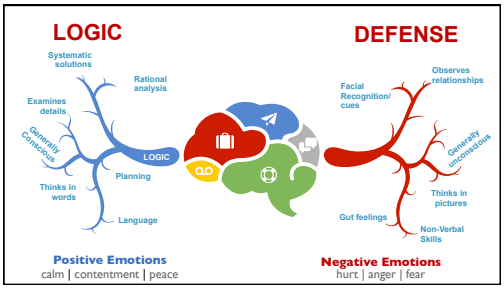
__% Male
__% Female
__% About same

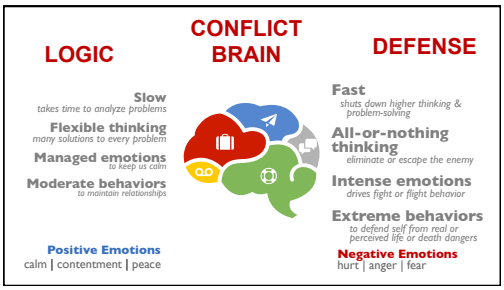
What Does This Tell Us?

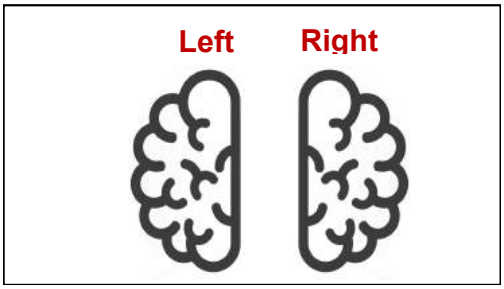
It's not about gender.
It's about a different operating system.

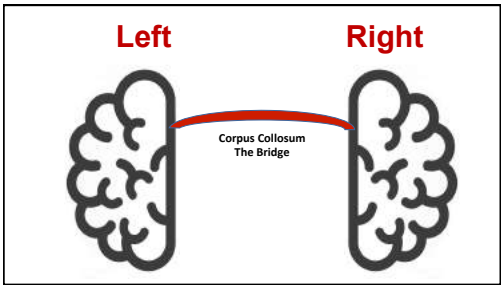
Avoid gender bias.

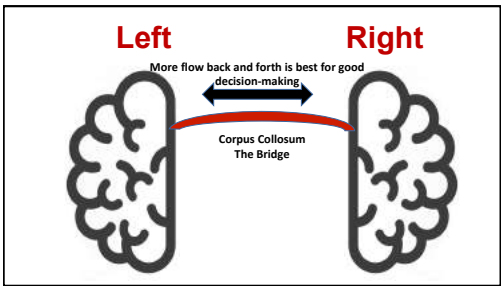
The Fear & Anxiety Operating System

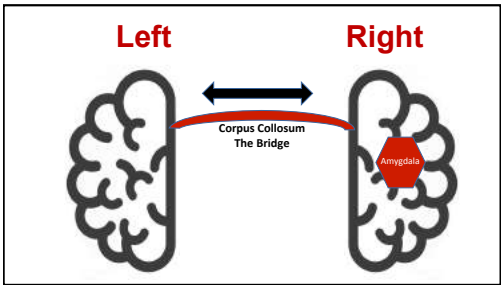


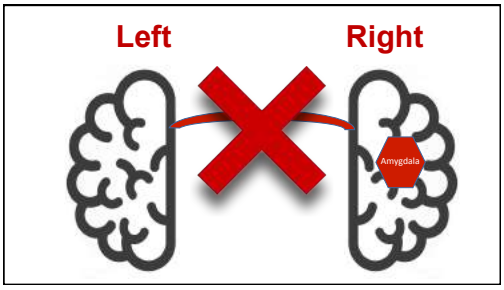


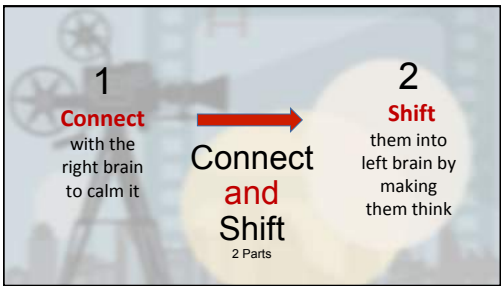


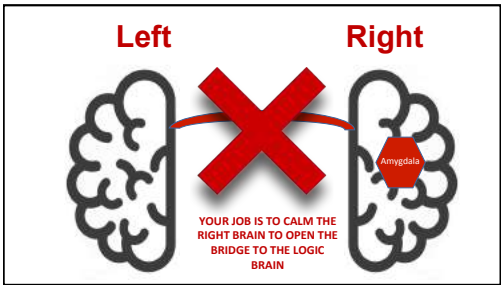


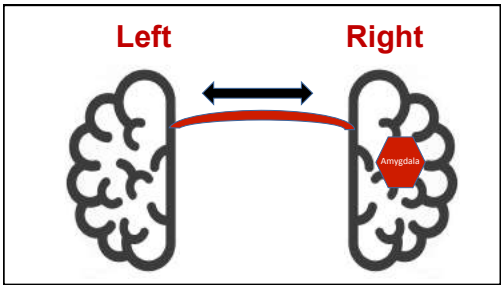












Connect

by talking to the Right Brain with EAR

Empathy – Attention - Respect

- Tone of voice and body language is amazingly important: Calm, confident, firm
- Avoid personal attacks: these escalate the defensiveness of HCPs and bad behavior
- Avoid threats: these escalate the HCP
- Avoid logical arguments in times of stress
- Avoid giving (focusing on) Negative Feedback: (focusing on past behavior, whole person, negative tone)

Talking to the Right Brain Calms Them (reduces anxiety) & Opens the Bridge to the Logic Brain

You'll be frustrated by the HCP's emotional reactivity and thinking distortions. It's easy to get "emotionally hooked," and to withhold any positive responses. It's easy to feel a powerful urge to attack or criticize.
Instead, consciously use your E.A.R.:
EMPATHY
ATTENTION
RESPECT

FEARS & EARS FOR HCPs

Their Fear

For any of these

- Being abandoned
- Being seen as inferior
- Being ignored
- Being dominated
- Being taken advantage of

Your EAR Response

Use any of these

- I want to help you
- I respect your efforts
- I'll pay attention
- I'll listen
- Its just rules we all have to follow
- I understand this can be frustrating
- I'll work with you on this
- I know this can be confusing

Shift

them into problem-solving by getting them to think

Don't focus on feelings . You won't resolve their emotional issues. Just acknowledge their frustrations.

Instead, focus the upset person on a choice:

- The goal is to get the upset person focused on problem-solving, away from his or her emotions.
- This puts responsibility on the person to help solve the problem; puts responsibility on the person for making the choice.
- It gives them some power, when they feel powerless.

Getting them to think Calms Them More & Gets Them Making Decisions Instead of You

Responding to Misinformation

1. Maintain a healthy skepticism

- Let them know that you will never know the full story.
- It is *possible* the extreme statements they are making are true. **"You might be right!"** And *possibly* not true.
- But next steps can still be taken and decisions can still be made about the future.

Responding to Misinformation

2. Teach them to use BIFF Responses

BRIEF: Keep it brief. Long explanations and arguments trigger more upsets for upset people.

INFORMATIVE: Focus on straight information, not arguments, opinions, emotions or defending yourself - you don't need to

FRIENDLY: Have a friendly greeting (such as "Thanks for responding to my request"); close with a friendly comment (such as "Have a good weekend").

FIRM: Have your response end the conversation. Or give two choices on an issue and ask for a reply by a certain date.

See: *How to Write a BIFF Response*

Setting Limits on High-Conflict Behavior

Some people can't seem to stop themselves.

Focus on external reasons for new behavior (rather than focusing on negative feedback about past behavior):

"Our policies require us to …"
"The law requires me to …"
"It might appear better to _____ if you…"
"I understand, but someone else might misunderstand your intentions…"
"Let's take the high road…"
"Choose your battles…"

Thanks for listening!

Website
www.highconflictinstitute.com

Online High-Conflict Co-Parenting Course
https://www.highconflictinstitute.com/parenting-without-conflict

New Ways for Families
www.newways4families.com

Articles from today's training
www.highconflictinstitute.com/seminar-resources

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the missing peace

State Bar of Georgia
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STATE BAR SERIES

Mister 880 (1950)
Funny Money In Family Law: Bitcoin And Crypto Currency

Presented By:

David G. Sarif
Naggier & Sarif LLC
Atlanta, GA

Funny Money in Family Law:

Bitcoin and Crypto Currency

By:

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What is cryptocurrency:

Cryptocurrency is an alternative form of payment. You're certainly familiar with cash, credit cards, and checks. But cryptocurrency, at its highest level, is basically virtual currency. These virtual currencies are stored in exchanges and digital wallets. The exchanges help facilitate the transfer of these virtual currencies and are also places where the currencies can be traded (think of day trading a stock, only people are day trading virtual currencies). Digital wallets also record and hold the value of the currency in real-time making it easy to carry out transactions accordingly. Cryptocurrency lives online and is traded on a blockchain, an encrypted ledger which details transactions.

There are many, many forms of cryptocurrency but Bitcoin is probably the most popular and well known due to publicity, the media, and its meteoric rise in value (and subsequent pullback). There are many pros and cons to virtual currency, but one of the attributes is the relative anonymity behind the use of cryptocurrency's use, which obviously can create issues in the context of a divorce case.

Why we should care:

Since cryptocurrencies are to a large extent both unregulated and encrypted, a party might think it is way to convert or hide assets from their spouse. And quite frankly, if someone knows what they are doing, it is very hard to trace. In a sense, cryptocurrencies are the modern day "offshore" account. Further, regulatory and legal infrastructure regarding cryptocurrencies are pretty far behind where they need to be.

Then there are the issues of how to divide cryptocurrency and how to value them. Personally, I think the easiest way to look at is like dividing highly volatile shares of stock. Of course, the unstable nature of the value of cryptocurrencies creates its own set of issues. Similar to dividing stocks, it would be prudent to consult a financial expert regarding any tax ramifications.

Red flags / clues to finding undisclosed cryptocurrency.

Bank/Credit Card Statements – Look for transactions to or from an exchange such as Coinbase (one of the most popular exchanges).

Tax Returns - According to IRS Bulletin 2014-21, cryptocurrency is considered property (and not currency). Accordingly, for tax purposes, cryptocurrency transactions are reported as capital gains or losses on an individual's Form 1040, Schedule D. Each time a party sells or spends cryptocurrency it should also be reported on an income tax return.

Discovery – Ask about it in discovery via interrogatories and Notice to Produce and/or Request for Production of Documents.

It's A Wonderful Life (1946)
Financial Bootcamp: Advanced

Presented By:

Ansley Callaway
Callaway & Company, LLC
Atlanta, GA

Laurie Dyke
IAG Forensics and Valuations
Marietta, GA

Elizabeth Garrett
Frazier & Deeter
Atlanta, GA

Deborah Gibbon
Gibbon Financial Consulting
Marietta, GA

Sherri Holder
The Holder Group
Marietta, GA

Paul Tigner
Fairshare Financial PC
Atlanta, GA

Brad Whitfield
Coastal Consulting Management Group
Savannah, GA

It's a Wonderful Life (1946)
Financial Bootcamp: Advanced

Annie: I've been savin' this money for a divorce, if ever I got a husband.

Laurie G. Dyke, CPA, CFF, CFE, IAG Forensics, Marietta, Georgia
Sherri S. Holder, CPA, ABV,CFF,CVA The Holder Group, Marietta, Georgia
Ansley L. Callaway, CPA/CFF, CVA, CDFA Callaway & Company, LLC, Atlanta, Georgia
Elizabeth J. Garrett, JD, CPA, CVA, Frazier & Deeter CPAs, Atlanta, Georgia
Deborah S. Gibbon, CPA, ABV, CFF, CVA, Gibbon Financial Consulting, Marietta, Georgia
Paul Tigner, CPA/ABV/CFF, CFE, FairShare Financial, P.C., Atlanta, Georgia
Brad Whitfield, CPA,CVA, CM&AA, Coastal Divorce Advisors, Savannah, Georgia

Laurie G. Dyke, CPA, CFF, CFE

Ms. Dyke is the Founder and Managing Partner of the Investigative Accounting Group d/b/a IAG Forensics & Valuation (IAG), a CPA firm that specializes in forensic accounting, fraud investigation, business valuation and litigation support. Ms. Dyke was an auditor and consultant with Ernst & Young for approximately nine years, started and managed a consulting practice for a regional CPA firm for approximately three years, has approximately ten years experience as a financial executive, and started her own business in 2002. She has been qualified approximately one hundred fifty times as an expert witness in accounting, forensic accounting, business valuation, and fraud investigation, testified in Georgia State and Superior Courts, Federal Court, and other state courts, assisted with criminal prosecution and defense, and has served as a court-appointed receiver.

Areas of expertise include business litigation, shareholder actions, contract disputes, family law, estates and trusts, government and non-profit, internal investigations and white collar crime – especially matters that involve complex analysis, re-construction and reconciliation of financial records.

Sherri S. Holder, CPA/ABV/CFF, CVA

Sherri L.S. Holder is a Certified Public Accountant, Accredited in Business Valuation and Certified in Financial Forensics (CPA/ABV/CFF) and a Certified Valuation Analyst (CVA). She has more than 20 years of experience in public accounting and is a member of the American Institute of Certified Public Accountants (AICPA), the Georgia Society of Certified Public Accountants (GSPCA) and the National Association of Certified Valuation Analysts (NACVA).

For more than 15 years, she has focused in the area of litigation, specializing in financial consulting and expert witness services in both bench and jury trials. She has been qualified as an expert over 40 times in numerous jurisdictions in Georgia. Ms. Holder provides her expertise to law firms and their clients in the areas of forensic and investigative accounting, as well as financial valuation. Her services include income analysis, business valuation, separate property tracing, mediation assistance and trial support.

Ms. Holder is a frequent speaker in family law financial matters, such as business valuations, tax issues and separate property analysis. She has been asked to present to the American Academy of Matrimonial Lawyers, Georgia's annual Family Law Institute, the Georgia Bar Association, Cobb County Bar Association, the Georgia Society of CPAs, and the Tennessee Society of CPAs among others.

Ms. Holder graduated cum laude from Georgia State University with a Bachelor of Business Administration (BBA) in Accounting. Ms. Holder is the Founder of The Holder Group, LLC. Ms. Holder is a native of Cobb County where she lives with her husband, Trey, and their two children. When away from the office Ms. Holder enjoys hunting and fishing with her family, outdoor adventures, volunteering her time with student ministries at her church, and traveling.

Ansley L. Callaway, CPA/CFF, CVA, CDFA

Ansley L. Callaway is the founding partner of Callaway & Company, LLC, a financial consulting practice located in Atlanta, GA that specializes in forensic accounting services, litigation support, valuation services and collaborative law. As Managing Director, Ms. Callaway provides consulting and financial analysis services primarily to law firms and their clients in the areas of forensic accounting, asset division and settlement, income analysis and financial valuation.

Prior to starting Callaway & Company, LLC, Ms. Callaway was an international financial executive where she provided direction and leadership for the financial operations of global corporations located in the regions of Asia Pacific, Latin and South America, Europe, Middle East and Africa, and the United States. She was responsible for coordinating global budgets and forecasting, establishing account policies and achieving financial objectives. Ms. Callaway started her professional career with Arthur Andersen, LLP in Atlanta, Georgia and Memphis, Tennessee, where she led financial audit engagements. After leaving Arthur Andersen, she took on corporate accounting at Knology, Inc. where she was responsible for financial statement preparation, SEC reporting and internal management reporting.

Ms. Callaway is a Certified Public Accountant, Certified in Financial Forensics, Certified Valuation Analyst, a Certified Divorce Financial Analyst, and Certified in Civil and Domestic Mediation. She has a Masters in Business Administration with a concentration in Finance and Economics. Ms. Callaway has over 20 years of financial and accounting experience including public accounting, corporate accounting and finance, and international finance.

Ms. Callaway is a frequent presenter on the topic of financial issues in family law matters and has been qualified as an expert numerous times.

Elizabeth J. Garrett, JD, CPA, CVA

As a Partner in the Divorce Litigation Support Practice at Frazier & Deeter, Beth Garrett primarily assists high net-worth individuals and corporate executives with divorce, tax and accounting issues. She helps with the division of financial and real estate assets through mediation and works with family practice attorneys through all financial aspects of divorce and child support matters.

Beth is frequently involved in cases to uncover hidden assets and income and assists with the preparation of reports to be used in settlement negotiations and at trial. She works with attorneys and clients to prepare business valuations, trace separate property, value complex retirement assets, and assist with budget preparation. She also prepares individual, partnership and fiduciary tax returns, specializing in divorce taxation.

Beth has testified in the metro Atlanta area and in other counties in Georgia in both bench and jury trials in divorce litigation matters. Beth has also spoken at continuing education seminars and authored several articles focusing on the tax laws surrounding divorce.

Beth is active in the community, serving as treasurer for the Dekalb Bar Association and frequently volunteering with several organizations, including the Volunteer Income Tax Assistance Program through the IRS.

Deborah S. Gibbon, CPA, ABV, CFF, CVA

Debbie is a Certified Public Accountant (CPA), Accredited in Business Valuation (ABV), Certified in Financial Forensics (CFF), a Certified Valuation Analyst (CVA), and a trained financial neutral for Collaborative Law with 35 years of experience. She previously worked as a Tax Manager with Arthur Andersen and as a Senior Manager in the Litigation Support/Valuation practice at Bennett Thrasher. She is the founding shareholder of Gibbon Financial Consulting, which is dedicated to expert witness testimony, business valuation services and forensic accounting exclusively for family law cases. She has been qualified as an expert witness in multiple jurisdictions and is a frequent speaker for the ICLE of Georgia, the American Academy of Matrimonial Lawyers, and the Georgia Society of CPAs. Over her career she has provided counsel on hundreds of divorce cases for middle to high income couples. She graduated cum laude from Illinois State University with a Bachelor of Science degree in Accounting.

Paul Tigner, CPA, ABV/CFF, CFE

Paul Tigner, is a Certified Public Accountant, Accredited in Business Valuation and Certified in Financial Forensics by the American Institute of CPA's as well as a Certified Fraud Examiner. Mr. Tigner is also a Registered Neutral in Georgia for General Civil and Domestic Relations Mediation and Arbitration. He is both a trainer and a practitioner of Collaborative Practice. He has over 30 years of financial analytical experience in legal matters. As founder and President of FairShare Financial, P.C., Atlanta, GA, he provides consulting and expert witness services as well as financial neutral services primarily to law firms and their clients in the areas of forensic accounting, financial valuation and economic damages.

Mr. Tigner holds memberships in various professional organizations including the American Institute of CPA's, the Association of Certified Fraud Examiners and the International Association of Collaborative Professionals. He is a past Board Member of the Collaborative Law Institute of Georgia, past president of the Association of Certified Fraud Examiners-Tampa Bay Chapter and a past member of the Georgia Society of CPA's Litigation and Dispute Resolution Committee, the Florida Institute of CPA's Litigation Services Committee and Relations with the FL Bar Committee. Mr. Tigner is a frequent instructor to CPA societies, bar associations, and educational organizations. He holds a Bachelor's of Business Administration-Accountancy from Georgia State University.

Brad Whitfield, CPA, CVA, CM&AA

Brad Whitfield, CPA, CVA, CM&AA has experience in taxation, business valuation, finance, consulting and accounting. He currently serves as contract CFO for several companies in Savannah that range in revenues from $5 million to $ 25 million. Brad is credentialed in business valuation and specializes in business valuation for litigation, tax, mergers, due diligence and consulting engagements. He has served as an Expert Witness in litigation engagements involving business valuation, lost profits, business damages, taxation and forensic accounting. He is a graduate of the University of Georgia with a degree in Finance and holds a Masters in Accounting from Georgia Southern University. Brad's prior background as a small business entrepreneur allows him to understand and communicate the value of a business.

Brad has valued over 300 different businesses for consulting, compliance and litigation support engagements. Additionally, Brad has published the following articles:

- "How a Financial Valuator Helps your Case" at the GA State Bar's Family Law
- "Succession Planning in a Family Business" published in August 2012 edition The Georgia Engineer

He has presented at various conferences concerning business valuation. Brad has performed several continuing education courses regarding business valuation for attorneys.

Ansley L. Callaway, CPA/CFF, CVA, CDFA

Question 1: If you modify alimony in 2019 does it lose the tax deduction?

Answer: The Tax Cut and Jobs Act ("TCJA") made changes to the tax treatment of alimony for divorces beginning in 2019. An individual paying alimony may no longer claim a deduction for alimony paid for divorces beginning in 2019. An individual paying alimony may no longer claim a deduction for alimony paid, and the individual receiving alimony no longer claims funds received as income.

The Tax Cut and Jobs Act does not apply to already existing divorces. If taxpayers have an existing divorce, and they modify that agreement, the new rules don't apply. An exception to this rule would occur when the modification expressly provides that the TCJA rules do apply. In limited circumstances this may be beneficial for taxpayers, in instances such as a change in the income level of the alimony payer or the alimony recipient. This can create an opportunity for the paying spouse to reduce his/her payments by the tax savings of the receiving spouse.

If the taxpayers want to apply the new tax law, each taxpayer must attach the modified agreement to each separately filed return, which will act as a nonalimony election under Section 71(b)(1)(B).

Question 3: Can a couple file a joint tax return if they are legally separated with a separate maintenance agreement?

For tax purposes a person is considered married if one of the following conditions are met:

- You are married and living together;
- You are living together in a common law marriage recognized in the state where you now live or in the state where the common law marriage began;
- You are married and living apart but not legally separated under a decree of divorce or separate maintenance; or
- You are separated under an interlocutory (not final) decree of divorce.

If the taxpayer lives apart from his/her spouse and meets certain tests, the taxpayer may qualify as head of household even if he/she isn't divorced or legally separated. These tests include, but are not limited to: filing a separate return, paying more than half the upkeep costs of the home, spouse did not live in the home during the last six months of the tax year, and the home was the main home of a dependent child.

If you are divorced under a final decree by the last day of the year, you are considered unmarried for the whole year and you can't choose married filing jointly or married filing separately as your filing status.

Are we still concerned about the Dependency Exemption?

Elizabeth J. Garrett, JD, CPA, CVA
Frazier & Deeter, LLC

Since December of 2017 we have heard news reports, read articles, and heard speeches about the changes that were enacted to the IRS Code through the Tax Cuts and Jobs Act and how it would affect the average taxpayer. For divorcing couples, the removal of the alimony deduction has been the most widely discussed topic; however, the change to the dependency exemption and who can correctly claim a child as a dependent is an equally important topic to consider.

For tax purposes, the custodial parent is considered to be the parent with whom the child resides the greater number of nights during the tax year. As we are seeing equal custody arrangements more and more frequently, it is important to know that the second test is the parent with the *higher* adjusted gross income. The custodial parent is eligible to file as Head of Household rather than Single for the tax year.

The child dependency exemption is suspended from 2018 to 2025. This means that stating which parent will claim the dependency exemption in a settlement agreement is not accurate or effective language. Instead, it should be determined which parent will claim the Child Tax Credit. The Child Tax Credit offers up to $2,000 per child under age 17 at the end of the tax year. The credit begins to phase out when a taxpayer has an adjusted gross income of $200,000 and completely disappears at $240,000. The IRS has provided guidance that the Child Tax Credit can be released to the noncustodial parent through Form 8332 just as the dependency exemption was previously.

Another credit tied to the parent who claims the child as a dependent is the Dependent Care Credit. This credit is available to the parent who claimed the child for the tax year, has earned income, and actually paid the expenses for work-related child care. The credit starts at 35% of the expenses up to $3,000 for one child and $6,000 for two or more children and is phased down to 20% of such expenses for taxpayers with income over $43,000.

During the divorce process, which parent will claim the children is an important topic to consider and it is wise to consult an accountant to advise the parties as to how each individual will be affected in order to have effective settlement negotiations.

Paul Tigner, CPA, ABV, CFF, CFE
FairShare Financial, P.C.

For child support income purposes, does one use Form W-2,

Box 1 – Wages, tips, other compensation,

Box 3 – Social Security wages or

Box 5 – Medicare wages and tips?

Box 1 – reports total taxable wages or salary. The number includes wages, salary, tips reported by the employee, bonuses, and other taxable compensation. Taxable fringe benefits such as group term life insurance will be included here, but Box 1 does not include any pre-tax deductions such as employee contributions to:

a) 401(k) plan or other retirement plan
b) medical, dental, vision insurance
c) Flex Spending Account
d) Health Savings Account

These items are, however, subject to Social Security Tax.

Box 3 reports the total amount of wages subject to Social Security Administration tax. The Social Security tax is assessed on wages up to $128,400 as of 2018. If Box 3 shows an amount over the wage base, check with your employer.

Box 5 reports the amount of wages subject to the Medicare tax. There is no maximum wage base for Medicare.

Summary:

Box 1 does not include certain income items received that are not subject to income tax in the current year.

Box 3 includes those additional income items but is subject to an annual cap.

Box 5 includes those additional income items and no cap.

Generally, Form W-2, Box 5 should be reported as Salary and Wages on a Child Support Worksheet, Schedule A, Line 1.

Note: If there is more than one employer providing a W-2 for the tax year, you will need to add up the Box 5 amounts and use the total.

Encore Production:

"IT'S A WONDERFUL LIFE"

Self-Employment Income

Certain adjustments need to be made to self-employment income for child support purposes. Self-employment income is typically reported on Form 1040, Schedule C and/or Schedule E (and you may need the underlying information to determine the adjustments, e.g. Form 1065, Form 1120S, Form 1120)

OCGA 19-6-15(f)(1)(B)

Self-employment income. Income from self-employment includes income from, but not limited to, business operations, work as an independent contractor or consultant, sales of goods or services, and rental properties, less ordinary and reasonable expenses necessary to produce such income. Income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership, limited liability company, or closely held corporation is defined as gross receipts minus ordinary and reasonable expenses required for self-employment or business operations. **Ordinary and reasonable expenses of self-employment or business operations necessary to produce income do not include:**

(i) Excessive promotional, travel, vehicle, or personal living expenses, depreciation on equipment, or costs of operation of home offices; or

(ii) Amounts allowable by the Internal Revenue Service for the accelerated component of

depreciation expenses, investment tax credits, or any other business expenses determined by the court or the jury to be inappropriate for determining gross income.

In general, income and expenses from self-employment or operation of a business should be carefully reviewed by the court or the jury to determine an appropriate level of gross income available to the parent to satisfy a child support obligation. **Generally, this amount will differ from a determination of business income for tax purposes.**

Brad Whitfield, CPA, CVA, CM&AA
Coastal Divorce Advisors

#4 Tax Consequences of Limited Liability Company Ownership in Divorce

"Mama always says life is like a box of chocolates. You never know what you're going to get". This could be said with divorce property division, especially involving real estate. In some cases, spouses may be awarded real estate or rental property titled in a single member LLC owned by the ex-spouse. In our example: Forrest owns assets in a single-member LLC (most often holding real estate) and Jenny (ex-spouse) has been awarded the LLC (or assets it holds) in the divorce. Does Forrest have to treat this as a sale or a gift, and how will it impact his tax liabilities?

Generally speaking, there are no tax implications as a result of the transfer of property pursuant to a divorce, even if the property is held in a Single-Member LLC. In the case of divorce, there are two IRS Codes that cover the tax treatment of asset and liability transfers pertaining to Single-Member LLCs. Sec. 1041(a) addresses the recognition of taxable gains and losses, while Sec. 2516 addresses transfer taxes, otherwise known as gift taxes. And both sections of the code have, relatively, the same parameters: Taxpayers are allowed tax-free transfers between ex-spouses, as long as, transfers are made pursuant to a divorce decree/agreement and are made in a timely manner as defined by the respective code sections.

As with any legal or tax matter, there are some specific items to be aware of, or as Forrest would say "Uh-Oh's". There must be follow-through on the transfer of property and ownership. *Spouse A* may receive investment property, *XYZ LLC*, through the divorce. If proper state registration was not completed nor deeds updated, then tax problems could occur. If *Spouse A* tries to sell the property, and it is determined *XYZ LLC* is still registered to the ex-spouse, or the ex-spouse is still listed on the deed with the county, then ex-spouse, technically, still owns it. The ex-spouse could be subject gift tax when the property is actually transferred to *Spouse A*. Further, if proper disclosure of assets is not made, later discovered, and the agreement is amended. If this happens outside of the timeline allowed by Sec. 1041(a) or Sec. 2516, the IRS can view this as a sale of property or a gift.

In summary, Single-Member LLC owners, as long as they are properly handled, should not have tax implications for transfers pursuant to a divorce. However, it is always best to consult a licensed and experienced Certified Public Accountant (CPA) during this time. Each situation is different and has its specific nuances that may cause it not to fall to the general rule outlined above.

#8 Tax Consequences of Partnership and S-Corporation Distributions

Forrest said, “Mama always had a way of explaining things so I could understand them”. Pass-through entity taxable income, owner distributions, inside/outside basis and how they are taxed, may be one of the most misunderstood tax concepts for business owners, individuals and outside advisors. The misunderstanding is likely due to the dreaded “it depends” answer given when asked about the taxability of cash or property distributions to individuals. Tax implications from pass-through entity distributions is a complex topic that depends on the type of entity, what is being distributed, and when it will be distributed. For the sake of this brief overview, the focus will be on current year distributions to owners in S-Corporations and Partnerships, specifically those distributions *not* done pursuant to the liquidation of the entity or the owner’s interest in an entity.

Both S-Corporations and Partnerships are pass-through entities, where taxable income or loss is taxed at the individual level. In most cases, taxable income or loss from a pass-through entity is reported on the owner’s personal tax return via a K-1 from the company, regardless of whether he/she takes cash distributions out of the business. Owners often take out cash from the company treated as distributions (draws). Distributions may be different from taxable income “passed through” to the owners via the K-1.

Cash distributions are reported on the individual’s K-1 from the pass-through entity in boxes 16 and 19 of the K-1. The key consideration for tax implications of distributions is the owner’s basis in the pass-through entity. Shareholder or partner basis schedules may or may not be available from the tax preparer and may not be accurate. If the owner has basis in the pass-through entity equal to or greater than the cash distribution, then the cash distributions are tax free. If a partner or shareholder takes distributions in excess of his/her tax basis, the amount of distribution above the tax basis is taxed at capital gain rates.

The same is loosely true for capital asset distributions, such as property or equipment. In regards to Partnerships, the partner’s basis in the entity will guide the value of the distribution, and rarely results in taxable events. If the partner’s basis is equal to or greater than the Partnership’s net holding value of the asset, the distribution is tax free. As similar to cash distributions, the partnership’s net holding value is also the value of the distribution. For example, the Partnership has a building they hold net of depreciation for $10,000 and the partner has a $12,000 tax basis, then the value of the asset distribution is $10,000 and no gains or losses are recognized for the partner or the Partnership. On the other hand, if the partner’s basis is less than the Partnership’s net holding value, the value of the distribution is the partner’s basis.

S-Corporations take a different approach to property distributions, which can lead to a taxable event. The standard rule does still apply: if the partner has basis for the value of the distribution, the partner has no taxable event. However, the S-Corporation itself could have a taxable event and that activity flows through to the shareholder. The details regarding the tax implications of the property distribution in S-Corporations are outside the scope of this overview.

The question then becomes, “What is basis and how do I get it?” Basis calculations can be complicated and can differ between S-Corporations and Partnerships. Generally, basis will increase from positive taxable income and cash contributions from the owner, and basis will decrease from taxable losses and distributions from the company. In some instances, liabilities or debt of a company can increase or decrease owner basis. Debt basis varies significantly between S-Corporations or Partnerships, as does the ordering rules of the basis calculation, which is beyond the scope of this discussion.

In summary, most distributions from pass-through entities involve cash to the owners. Taxable income and cash distributions are usually different amounts and are reported differently on the individual’s K-1. As long as the individual has basis in excess of the cash distributions, there are no tax consequences. It is important to understand and track inside/outside basis in pass-through entities to avoid tax implications from distributions.

State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

STATE BAR SERIES

Divorce American Style (1967)
Child Support: Deviations, Imputing Income And Other Emerging Issues

Presented By:

Lori Anderson
Atlanta Legal Aid
Atlanta, GA

Child Support Worksheet Basics

An overview of the Georgia guidelines and the new online worksheet

Atlanta Legal Aid Society
Lori Anderson
leanderson@atlantalegalaid.org
(404) 614-3955

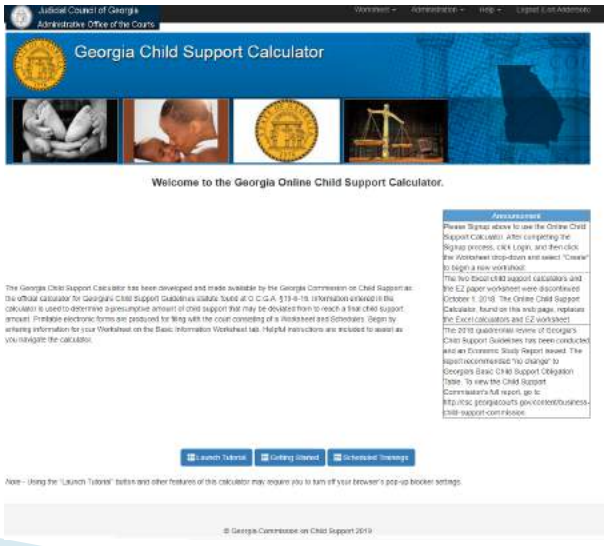
Duty to Support

- Both parents have a duty to support.
- Obligation predates order.
- Failure to support is a crime. (misdemeanor child abandonment)
- Duty to support is not affected by visitation or lack thereof.

Basic Child Support Calculation

- Each parent's income
- Number of children

Getting Started



http://csc.georgiacourts.gov/

Create a New Worksheet

Welcome to the Georgia Online Child Support Calculator.

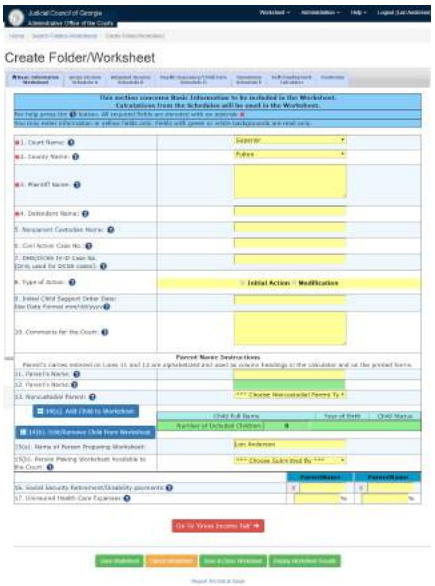
Basic Information

Information about your case:

- Court name and county
- Parties' names
- Parents' names (Careful! These can't be changed once entered.)
- Child(ren)'s names and <u>year</u> of birth

You can only work in **YELLOW** fields.
All other fields are **<u>read-only</u>**.

Clicking on blue buttons opens additional fields to enter information.



Names are serious business on the new worksheet.

Navigation

You can navigate between tabs either by clicking the tab titles at the top –

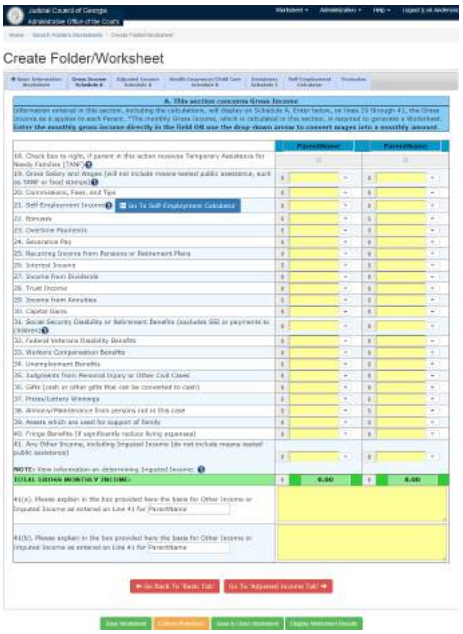
or by clicking the red button at the bottom to move to the next tab.

Schedule A

INCOME

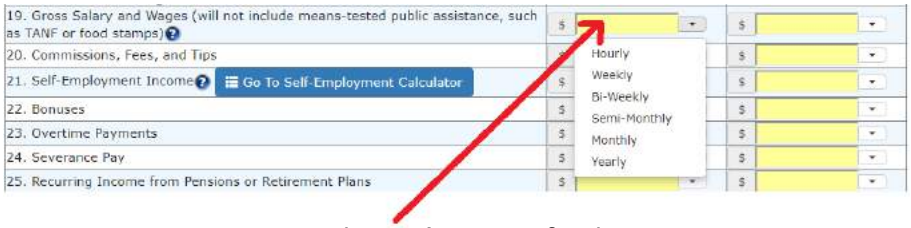
Commonly Includes:

- Regular earned income
- Overtime
- Bonuses
- Rental income
- Social Security Disability
- Social Security Retirement
- Imputed income
- See Schedule A for complete list



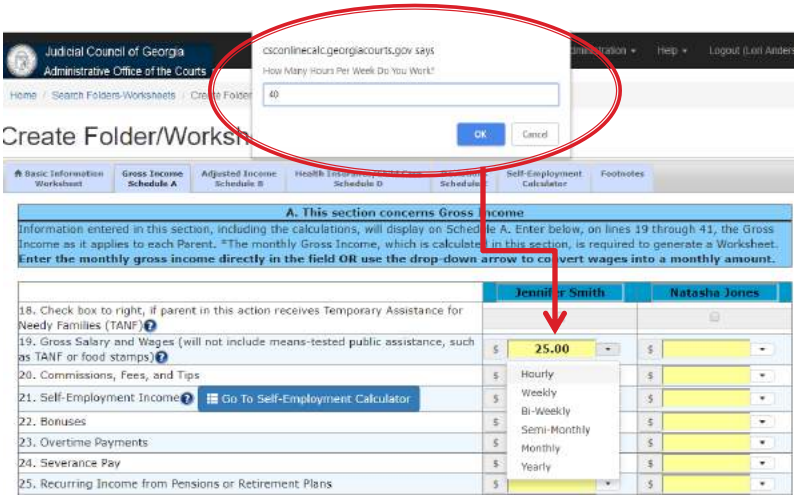
Calculating earned income

The new worksheet has a handy calculator for earned income in Schedule A.



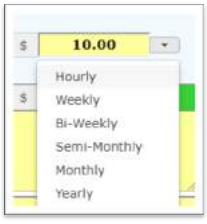
Enter each party's income for the time period you have. The worksheet will automatically convert it to monthly.

Calculating earned income



Calculating imputed income

Line 41: This feature functions exactly like the earned income calculator.



Result automatically converted to monthly:

Income – What it *isn't*...

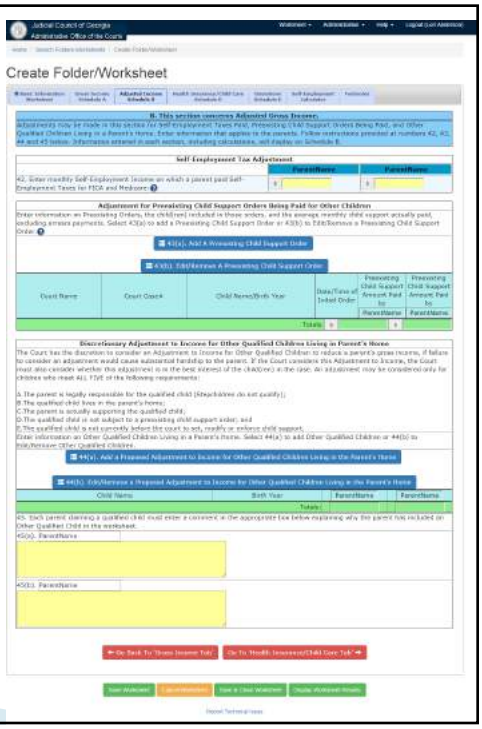
Child Support Calculations do ***not*** include:

- Stepparent's income
- Third-party custodian's income
- Means-tested income such as:
  - Food stamps
  - TANF (welfare)
  - SSI (Supplemental Security Income)

Schedule B

ADJUSTMENTS TO INCOME

- Self-Employment
  - Adjustment for self-employment taxes paid (more on that later…)
- Preexisting Orders
  - Must be an order
  - Must provide payment history for past 12 months
- Children in Household
  - Legal responsibility for child
  - Lives with parent
  - Actually supporting child
  - Not subject to child support order
  - Not currently before court for support matter



Schedule D

ADJUSTMENTS TO INCOME

MISSING

NAME: Schedule C
LAST SEEN: September of 2018
DESCRIPTION: not in use and intentionally blank
PHOTO BELOW

Schedule C is not in use and is intentionally left blank

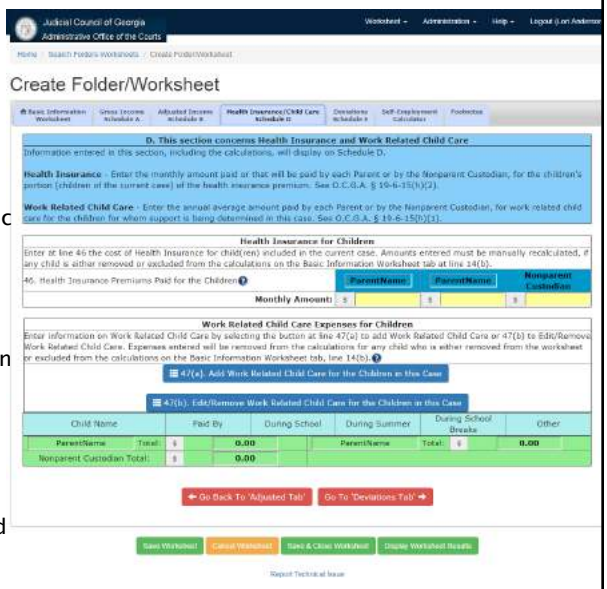
Schedule D

Health Insurance Premiums

- Only for children at issue
- Get specific amount from payroll
- Prorate total amount if specific amount is unknown

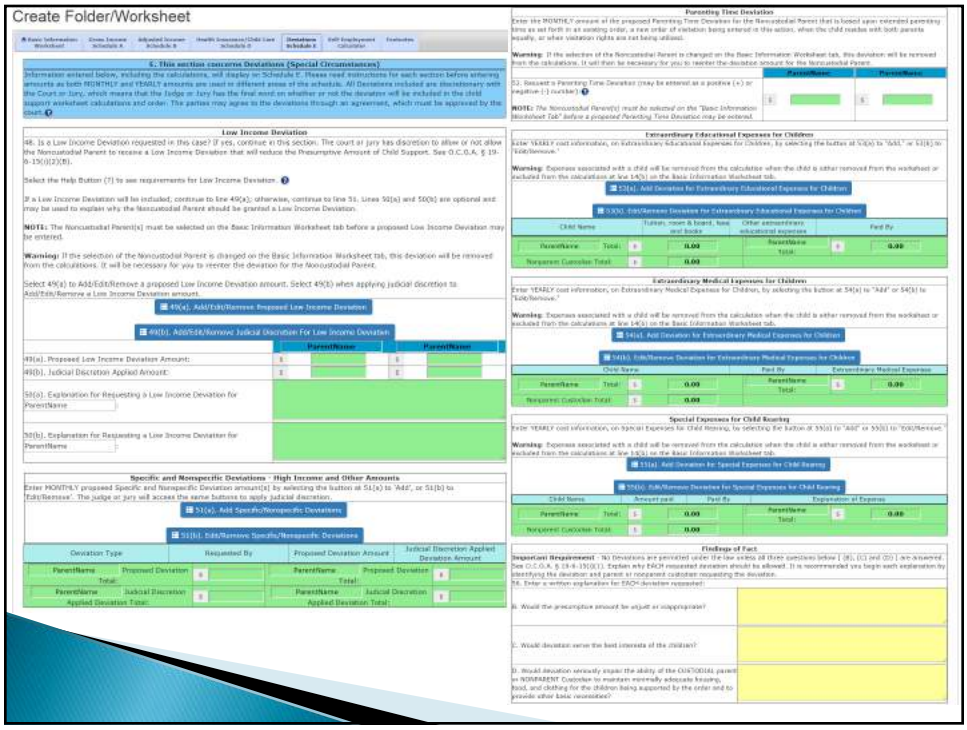
Child Care Expenses

- For parent's work or education
- Day care
- After school care
- Summer camp
- Nannies, family members paid



Schedule E

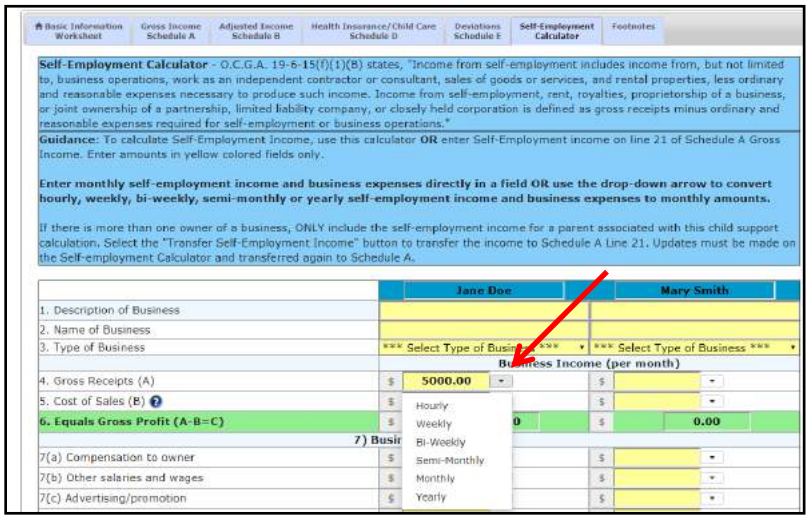
DEVIATIONS



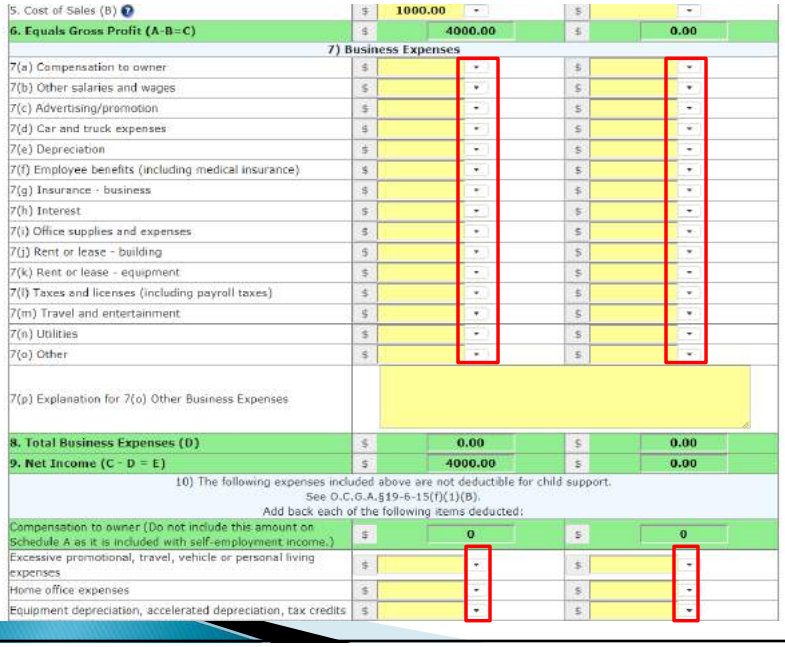
Schedule E Deviations

- Discretionary
- Best interests of the child test
- Includes: Extracurricular activities, private school tuition, life insurance premiums, extraordinary travel expenses, extraordinary medical expenses
- Special expenses for child rearing – must exceed 7% of basic support obligation (worksheet will calculate for you)
- Nonspecific deviation – *helpful for settlement*

Self-Employment Calculator



Self-Employment Calculator



Self-Employment Calculator

10) The following expenses included above are not deductible for child support. See O.C.G.A.§19-6-15(f)(1)(B). Add back each of the following items deducted:		
Compensation to owner (Do not include this amount on Schedule A as it is included with self-employment income.)	$ 0	$ 0
Excessive promotional, travel, vehicle or personal living expenses	$	$
Home office expenses	$	$
Equipment depreciation, accelerated depreciation, tax credits	$	$
Other	$	$
Explanation for Other Non-Deductible Expenses		
11. Total Non-Deductible Expenses (F)	$ 0.00	$ 0.00
12. Total Self-Employment Income (E + F)	$ 4000.00	$ 0.00
13. If needed, use the box below to enter notes that explain self employment income as entered above.		

Amounts from the Self-Employment Calculator will display on Schedule A, Line 21 as a positive number for a profit or as zero for a loss.

Transfer Self-Employment Income to Gross Income - Schedule A - Line 21

IMPORTANT: You must click the button to transfer income to Schedule A. If you make changes, you must click the button *again* to update the results in Schedule A.

Self-Employment Income Taxes

Basic Information Worksheet | **Gross Income Schedule A** | Adjusted Income Schedule B | Health Insurance/Child Care Schedule D | Deviations Schedule E | Self-Employment Calculator | Footnotes

A. This section concerns Gross Income

Information entered in this section, including the calculations, will display on Schedule A. Enter below, on lines 19 through 41, the Gross Income as it applies to each Parent. *The monthly Gross Income, which is calculated in this section, is required to generate a Worksheet. **Enter the monthly gross income directly in the field OR use the drop-down arrow to convert wages into a monthly amount.**

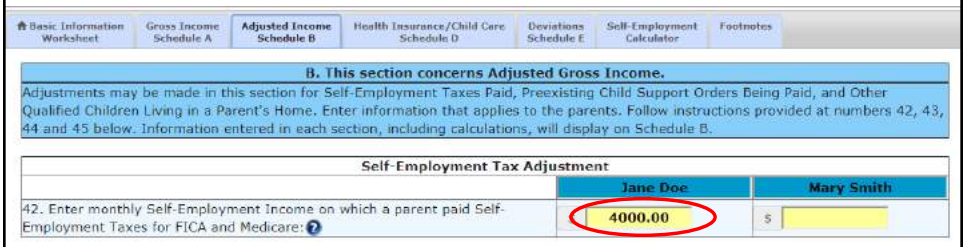
	Jane Doe	Mary Smith
18. Check box to right, if parent in this action receives Temporary Assistance for Needy Families (TANF)		
19. Gross Salary and Wages (will not include means-tested public assistance, such as TANF or food stamps)	$	$
20. Commissions, Fees, and Tips	$	$
21. Self-Employment Income — Go To Self-Employment Calculator	$ 4000.00	$ 0.00

Clicking the transfer button in the Self-Employment Calculator will transfer the party's gross income from self-employment onto Line 21 of Schedule A.

Next you will need to account for taxes (6.2% FICA and 1.45% Medicare).

Back to Schedule B!

Self-Employment Income Taxes



Basic Information Worksheet | Gross Income Schedule A | Adjusted Income Schedule B | Health Insurance/Child Care Schedule D | Deviations Schedule E | Self-Employment Calculator | Footnotes

B. This section concerns Adjusted Gross Income.

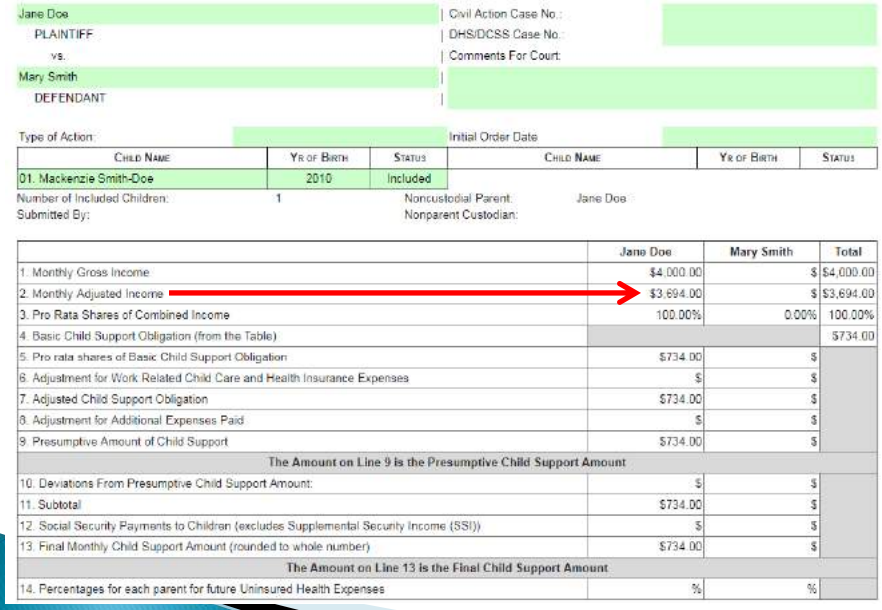
Adjustments may be made in this section for Self-Employment Taxes Paid, Preexisting Child Support Orders Being Paid, and Other Qualified Children Living in a Parent's Home. Enter information that applies to the parents. Follow instructions provided at numbers 42, 43, 44 and 45 below. Information entered in each section, including calculations, will display on Schedule B.

Self-Employment Tax Adjustment		
	Jane Doe	Mary Smith
42. Enter monthly Self-Employment Income on which a parent paid Self-Employment Taxes for FICA and Medicare:	4000.00	$

Manually enter the party's taxable income from self-employment on Line 42 of Schedule B. The calculator will deduct FICA and Medicare taxes.

The adjusted income will be displayed in the worksheet results.

Self-Employment Income Taxes



Jane Doe
PLAINTIFF
vs.
Mary Smith
DEFENDANT

Civil Action Case No.:
DHS/DCSS Case No.:
Comments For Court:

Type of Action:
Initial Order Date

Child Name	Yr of Birth	Status	Child Name	Yr of Birth	Status
01. Mackenzie Smith-Doe	2010	Included			

Number of Included Children: 1
Submitted By:
Noncustodial Parent: Jane Doe
Nonparent Custodian:

	Jane Doe	Mary Smith	Total
1. Monthly Gross Income	$4,000.00	$	$4,000.00
2. Monthly Adjusted Income	$3,694.00	$	$3,694.00
3. Pro Rata Shares of Combined Income	100.00%	0.00%	100.00%
4. Basic Child Support Obligation (from the Table)			$734.00
5. Pro rata shares of Basic Child Support Obligation	$734.00	$	
6. Adjustment for Work Related Child Care and Health Insurance Expenses	$	$	
7. Adjusted Child Support Obligation	$734.00	$	
8. Adjustment for Additional Expenses Paid	$	$	
9. Presumptive Amount of Child Support	$734.00	$	
The Amount on Line 9 is the Presumptive Child Support Amount			
10. Deviations From Presumptive Child Support Amount:	$	$	
11. Subtotal	$734.00	$	
12. Social Security Payments to Children (excludes Supplemental Security Income (SSI))	$	$	
13. Final Monthly Child Support Amount (rounded to whole number)	$734.00	$	
The Amount on Line 13 is the Final Child Support Amount			
14. Percentages for each parent for future Uninsured Health Expenses	%	%	

Finishing the Worksheet

- At any time, you can scroll to the bottom of the worksheet and click display worksheet results to see what the outcome is based on the data you have already entered.
- These buttons are at the bottom of every tab of the worksheet.

GEORGIA CHILD SUPPORT WORKSHEET
SUPERIOR COURT OF CLAYTON COUNTY
STATE OF GEORGIA

Natasha Jones	Civil Action Case No:	2019CV000000	
PLAINTIFF	DHS/DCSS Case No:		
vs.	Comments For Court:		
Jennifer Smith			
DEFENDANT			

Type of Action: Initial Order Date

Child Name	Yr of Birth	Status	Child Name	Yr of Birth	Status
01. Steven Smith-Jones	2010	Included			

Number of Included Children: 1
Submitted By:
Noncustodial Parent
Nonparent Custodian

	Jennifer Smith	Natasha Jones	Total
1. Monthly Gross Income	$4,166.67	$4,350.00	$8,516.67
2. Monthly Adjusted Income	$4,166.67	$4,350.00	$8,516.67
3. Pro Rata Shares of Combined Income	48.92%	51.08%	100.00%
4. Basic Child Support Obligation (from the Table)			$1,138.00
5. Pro rata shares of Basic Child Support Obligation	$556.71	$581.29	
6. Adjustment for Work Related Child Care and Health Insurance Expenses	$	$	
7. Adjusted Child Support Obligation	$556.71	$581.29	
8. Adjustment for Additional Expenses Paid	$	$	
9. Presumptive Amount of Child Support	$556.71	$581.29	
The Amount on Line 9 is the Presumptive Child Support Amount			
10. Deviations From Presumptive Child Support Amount:	$	$	
11. Subtotal	$556.71	$581.29	
12. Social Security Payments to Children (excludes Supplemental Security Income (SSI))	$	$	
13. Final Monthly Child Support Amount (rounded to whole number)	$557.00	$581.00	
The Amount on Line 13 is the Final Child Support Amount			
14. Percentages for each parent for future Uninsured Health Expenses	%	%	

Schedules		Attached	Not Applicable
A	Gross Income	☑	☐
B	Adjusted Income	☐	☑
C	Not in use	☐	☑
D	Additional Expenses	☐	☑
E	Deviations From Presumptive Amount	☐	☑

Print Worksheet Results | Open This Worksheet | Go To Search Screen

Practice Pointers

Practice Pointers…

- Get all supporting documents from client up front.
- Advise client that failure to provide reliable evidence of income in modification can result in imputation of *more* income. Jackson v. Sanders, 299 Ga. 332 (2016).

Practice Pointers…

- Do a test worksheet BEFORE filing
- Especially for modifications--don't assume reductions in income will always result in lower child support

Practice Pointers…

IMPORTANT: Failure to answer the three questions under Findings of Fact on Schedule E is reversible error. The questions *must* be answered when any deviation has been applied.

- OCGA § 19-6-15(c)(2)(E); Crook v. Crook, 293 Ga. 867 (2013)

Findings of Fact	
Important Requirement - No Deviations are permitted under the law unless all three questions below [(B), (C) and (D)] are answered. See O.C.G.A. § 19-6-15(i)(1). Explain why EACH requested deviation should be allowed. It is recommended you begin each explanation by identifying the deviation and parent or nonparent custodian requesting the deviation.	
S6. Enter a written explanation for EACH deviation requested:	
B. Would the presumptive amount be unjust or inappropriate?	
C. Would deviation serve the best interests of the children?	
D. Would deviation seriously impair the ability of the CUSTODIAL parent or NONPARENT Custodian to maintain minimally adequate housing, food, and clothing for the children being supported by the order and to provide other basic necessities?	

Practice Pointers…

- Prepare multiple worksheets for mediation or hearings/trials.
- Use the non-specific deviation to adjust amounts for settlement purposes.

Practice Pointers…

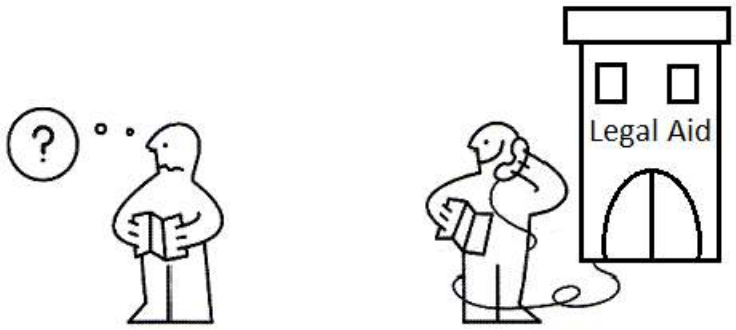
- Carry down pro rata percentages (or agreed-upon percentages) for child's uncovered medical expenses on Basic Information tab. This information also goes in the Child Support Addendum.

	Jennifer Smith	Natasha Jones
16. Social Security Retirement/Disability payments:	$	$
17. Uninsured Health Care Expenses:	%	%

Practice Pointers…

- Failure to attach a Child Support Worksheet to a final order is reversible error. Moore v. Moore, 346 Ga. App. 58 (2018).
- Get an Income Deduction Order at conclusion of the case.
- Complete a Federal Income Withholding Order.

Need help? Call us any time!



State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

STATE BAR SERIES

A Raisin In The Sun (1961) Marketing And Social Media

Presented By:

Sean Ditzel
Abernathy Ditzel Hendrick Bryce, LLC
Marietta, GA

Melanie Fenwick Thompson
Fenwick Thompson & Associates, LLC

SOCIAL MEDIA MARKETING (FOR DUMMIES)

Sean M. Ditzel, Abernathy Ditzel Hendrick Bryce
Melanie Fenwick Thompson, Fenwick Thompson Law

OOPS...

SOCIAL MEDIA MARKETING (FOR LAWYERS)

Sean M. Ditzel, Abernathy Ditzel Hendrick Bryce
Melanie Fenwick Thompson, Fenwick Thompson Law

TWEET-LENGTH OVERVEIW

- I. Ever-Evolving Platforms
- II. Stats and Figures
- III. Boosting Your Posts
- IV. Emerging Trend: Video Posts
- V. Do's and Don't of Social Media (mostly don'ts)

EVER-EVOLVING PLATFORMS

Facebook, and Insta, and Twitter.. OH MY!

EVER-EVOLVING PLATFORMS

- The Well-Known
  - Facebook
  - Messenger (owned by Facebook)
  - Instagram (owned by Facebook)
  - Twitter
  - LinkedIn
  - SnapChat
  - WhatsApp
  - YouTube
- The Emerging Players
  - Vero
    - No ad policy, but business profiles OK
  - Musical.ly
    - Snapchat killer? Longer/more sophisticated videos
  - STEEMIT
    - Built in cryptocurrency for "likes"

IN MEMORIUM

- Myspace
- Google Plus
- Friendster
- Vine
- Yearbook.com
- FriendFeed
- YouFace
- YikYak

I. STATS AND FIGURES

(And how they matter for you)

I. STATS AND FIGURES

42% of the earth population have at least one social media profile (3.2 billion people).

The average American user has 7.1 social media accounts

90.4% of Millenials (born after 1980) have a social media profile.

77.5% of Gen X users and 48.2% of Baby Boomers

II. STATS AND FIGURES

- Facebook Reigns Supreme
  - 68% of all US adults have a Facebook page
  - Users spend an average of 50 minutes per day on Facebook!!!
- Instagram Stories:
  - 150 Million active IG stories users in January 2017
  - 500 Million active IG Stories users as of January 2019
- Mobile Use
  - 80% of all social media access occurs on mobile platforms

II. ...AND HOW THEY MATTER FOR YOU

- Social networks earned 8.3 Billion from advertisers in 2018
- 88% of *all companies* are marketing online
- 50 million small business have a business page
- BUT only 2.5% pay to be active advertisers
  - Boosting your pages' post
  - Running a graphic ad/text ad within the platform
- AND less than 10% of business pages use video ads!!!

III. BOOSTING YOUR POSTS

- On Facebook, you can control your ad budget and target audience. Here are ways to filter your ads:
  - Age
  - Gender
  - Language Spoken
  - Location
  - Education
    - (Go Dawgs!)
  - Interests
  - Behaviors
  - Mutual Connections

WELCOME TO THE FUTURE

IV. SOCIAL VIDEO POSTS

- Views of *branded video content* increased 109% on YouTube and 375% on Facebook between 2017 and 2018.
- Remember graphics! – 85% of all Facebook video ads are watched with the sound off
- On Twitter, a video Tweet is 6x more likely to be retweeted than a photo Tweet.
- On Instagram, video posts receive 38% more engagement than photo posts (comments, likes and shares)

V. DO'S / DON'T'S OF SOCIAL MEDIA MARKETING

- Without further ado, Melanie Fenwick Thompson is going to tell you what you SHOULDN'T DO and Bar Rules to be mindful of
  - Rule 1.6 Confidentiality of Information
  - Rule 7.1 Communications Concerning a Lawyer's Services
  - Rule 7.2 Advertising (including the 2 year rule)
  - Rule 7.3 Direct Contact with Prospective Clients

ATTORNEY-CLIENT CONFIDENTIALITY

- RULE 1.6 CONFIDENTIALITY OF INFORMATION
  - A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client, unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these Rules or other law, or by order of the Court.
- The maximum penalty for a violation of this Rule is disbarment.
- ABA Formal Opinion 10-457 specifically states that attorneys must obtain the permission of their clients before posting about them online. It is especially important to consider this requirement when discussing verdicts and settlements. The same advice applies if you are responding to negative reviews online. Certain information about the client and case needs to remain confidential, or else there may be a very real breach of ethics.

SEPARATE FROM PERSONAL PAGES

Lawyers oath

- I, _____, swear that I will truly and honestly, justly and uprightly conduct myself as a member of this learned profession and in accordance with the Georgia Rules of Professional Conduct, as an attorney and counselor, and that I will support and defend the Constitution of the United States and the Constitution of the State of Georgia. So help me God.

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

a. A lawyer may advertise through all forms of public media and through written communication not involving personal contact so long as the communication is not false, fraudulent, deceptive or misleading. By way of illustration, but not limitation, a communication is false, fraudulent, deceptive or misleading if it:
   1. contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading;
   2. is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Georgia Rules of Professional Conduct or other law;
   3. compares the lawyer's services with other lawyers' services unless the comparison can be factually substantiated;
   4. fails to include the name of at least one lawyer responsible for its content; or…

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

   5. contains any information regarding contingent fees, and fails to conspicuously present the following disclaimer:

      "Contingent attorneys' fees refers only to those fees charged by attorneys for their legal services. Such fees are not permitted in all types of cases. Court costs and other additional expenses of legal action usually must be paid by the client."
   6. contains the language 'no fee unless you win or collect' or any similar phrase and fails to conspicuously present the following disclaimer:

      "No fee unless you win or collect" [or insert the similar language used in the communication] refers only to fees charged by the attorney. Court costs and other additional expenses of legal action usually must be paid by the client. Contingent fees are not permitted in all types of cases.

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

a. A public communication for which a lawyer has given value must be identified as such unless it is apparent from the context that it is such a communication.

b. A lawyer retains ultimate responsibility to insure that all communications concerning the lawyer or the lawyer's services comply with the Georgia Rules of Professional Conduct.

- **The maximum penalty for a violation of this Rule is disbarment.**

RULE 7.2 ADVERTISING

a. Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through:
   - public media, such as a telephone directory, legal directory, newspaper or other periodical;
   - outdoor advertising;
   - radio or television;
   - written, electronic or recorded communication.

b. A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

RULE 7.2 ADVERTISING

a. Prominent disclosures. Any advertisement for legal services directed to potential clients in Georgia, or intended to solicit employment for delivery of any legal services in Georgia, must include prominent disclosures, clearly legible and capable of being read by the average person, if written, and clearly intelligible by an average person, if spoken aloud, of the following:
   1. Disclosure of identity and physical location of attorney. Any advertisement shall include the name, physical location and telephone number of each lawyer or law firm who paid for the advertisement and who takes full personal responsibility for the advertisement. In disclosing the physical location, the responsible lawyer shall state the full address of the location of the principal bona fide office of each lawyer who is prominently identified pursuant to this paragraph. For the purposes of this Rule, a bona fide office is defined as a physical location maintained by the lawyer or law firm from which the lawyer or law firm furnishes legal services on a regular and continuing basis. In the absence of a bona fide physical office, the lawyer shall prominently disclose the full address listed with the State Bar of Georgia or other Bar to which the lawyer is admitted. A lawyer who uses a referral service shall ensure that the service discloses the location of the lawyer's bona fide office, or the registered bar address, when a referral is made.
   2. Disclosure of referral practice. If the lawyer or law firm will refer the majority of callers to other attorneys, that fact must be disclosed and the lawyer or law firm must comply with the provisions of Rule 7.3(c) regarding referral services.
   3. Disclosure of spokespersons and portrayals. Any advertisement that includes a non-attorney spokesperson, portrayal of a lawyer by a non-lawyer, portrayal of a client by a non-client, or any paid testimonial or endorsement, shall include prominent disclosure of the use of a non-attorney spokesperson, portrayal of a lawyer by a non-lawyer, or of a client by a non-client.
   4. Disclosures regarding fees. A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service.
   5. Appearance of legal notices or pleadings. Any advertisement that includes any representation that resembles a legal pleading, notice, contract or other legal document shall include prominent disclosure that the document is an advertisement rather than a legal document.

- The maximum penalty for a violation of this Rule is a public reprimand.

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

a. A lawyer shall not send, or knowingly permit to be sent, on behalf of the lawyer, the lawyer's firm, lawyer's partner, associate or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:
   1. it has been made known to the lawyer that a person does not desire to receive communications from the lawyer;
   2. the communication involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence;
   3. the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication; or
   4. the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer.

b. Written communications to a prospective client, other than a close friend, relative, former client or one whom the lawyer reasonably believes is a former client, for the purpose of obtaining professional employment shall be plainly marked "Advertisement" on the face of the envelope and on the top of each page of the written communication in type size no smaller than the largest type size used in the body of the letter.

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

C. A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client; except that the lawyer may pay for public communications permitted by Rule 7.1 and except as follows:

1. A lawyer may pay the usual and reasonable fees or dues charged by a lawyer referral service, if the service:
    1. does not engage in conduct that would violate the Rules if engaged in by a lawyer;
    2. provides an explanation to the prospective client regarding how the lawyers are selected by the service to participate in the service; and
    3. discloses to the prospective client how many lawyers are participating in the service and that those lawyers have paid the service a fee to participate in the service.
2. A lawyer may pay the usual and reasonable fees or dues charged by a bar-operated non-profit lawyer referral service, including a fee which is calculated as a percentage of the legal fees earned by the lawyer to whom the service has referred a matter, provided such bar-operated non-profit lawyer referral service meets the following criteria:
    1. the lawyer referral service shall be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service legal programs, and government, consumer or other agencies who can provide the assistance the clients need. Such organization shall file annually with the State Disciplinary Board a report showing its rules and regulations, its subscription charges, agreements with counsel, the number of lawyers participating and the names and addresses of the lawyers participating in the service;
    2. the sponsoring bar association for the lawyer referral service must be open to all lawyers licensed and eligible to practice in this state who maintain an office within the geographical area served, and who meet reasonable objectively determinable experience requirements established by the bar association;
    3. the combined fees charged by a lawyer and the lawyer referral service to a client referred by such service shall not exceed the total charges which the client would have paid had no service been involved; and
    4. a lawyer who is a member of the qualified lawyer referral service must maintain in force a policy of errors and omissions insurance in an amount no less than $100,000 per occurrence and $300,000 in the aggregate.
3. A lawyer may pay the usual and reasonable fees to a qualified legal services plan or insurer providing legal services insurance as authorized by law to promote the use of the lawyer's services, the lawyer's partner or associates services so long as the communications of the organization are not false, fraudulent, deceptive or misleading;
4. A lawyer may pay for a law practice in accordance with Rule 1.17.

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

d. A lawyer shall not solicit professional employment as a private practitioner for the lawyer, a partner or associate through direct personal contact or through live telephone contact, with a nonlawyer who has not sought advice regarding employment of a lawyer.

e. A lawyer shall not accept employment when the lawyer knows or reasonably should know that the person who seeks to employ the lawyer does so as a result of conduct by any person or organization that would violate these Rules if engage in by a lawyer.

- The maximum penalty for a violation of this Rule is disbarment

THANK YOU!!!!

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- Melanie Fenwick Thompson - mthompson@fenwickthompsonlaw.com

State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

STATE BAR SERIES

The Parent Trap (1961)
Arbitration, Collaboration And Mediation— Tools To Tame The Beast

Presented By:

Divida Gude
Fulton Superior Court

Georgia Lord
Radford & Keebaugh, LLC
Decatur, GA

Louis Tesser
Tesser Mediation, LLC
Sandy Springs, GA

LIGHTS, CAMERA, ACTION!
. . . REEL TO REAL FAMILY LAW . . .

"Ladies, you have to be strong and independent, and remember, don't get mad, get everything."

First Wives Club, 1996

LIGHTS, CAMERA, ACTION!
. . . REEL TO REAL FAMILY LAW . . .

Hallie: "I know what mystery my father sees in you."

Meredith Blake: "You do?"

Hallie: "You're young, beautiful, sexy, and hey, the guy is only human, but if you ask me, marriage is supposed to be based on something more than just sex, right?"

The Parent Trap, 1998

LIGHTS, CAMERA, ACTION!
. . . REEL TO REAL FAMILY LAW . . .

Toby: "Your parents' house is a lot nicer."

Bree Osbourne: "My parents' house comes with my **parents**."

Transamerica, 2005

LIGHTS, CAMERA, ACTION!
. . . REEL TO REAL FAMILY LAW . . .

"My father used to say a man can never outdo a woman when it comes to love or revenge."

The War of the Roses, 1989

LIGHTS, CAMERA, ACTION!
. . . REEL TO REAL FAMILY LAW . . .

The Impressive Clergyman: "Mawage. Mawage is wot bwings us togeder today. Mawage, that bwessed awangment, that dweam wifin a dweam… And wuv, tru wuv, will fowaw you foweva… So tweasure your wuv."

Prince Humperdinck: "Skip to the end."

The Impressive Clergyman: "Have you the wing?"

The Princess Bride, 1987

LIGHTS, CAMERA, ACTION!
. . . REEL TO REAL FAMILY LAW . . .

"Show Me the Money."

Jerry Macguire, 1997

LIGHTS, CAMERA, ACTION!
. . . REEL TO REAL FAMILY LAW . . .

"You lose! You get nothing! Good day, sir!"

Willy Wonka & the Chocolate Factory, 1971

LIGHTS, CAMERA, ACTION!
. . . REEL TO REAL FAMILY LAW . . .

"I made every mistake you can in a negotiation. I spoke first, I smiled… I negotiated with myself!"

30 Rock, 2006-2013

LIGHTS, CAMERA, ACTION!
. . . REEL TO REAL FAMILY LAW . . .

Bernadine: "Who do you think started this damn company, huh? And now, you think you can just take the money and run…"

Bernadine: "Hell, I'm not worried… you, on the other hand, should be."

Bernadine: "Your children aren't for sale." [walks away]

Bernadine: "Yeah?" [walks back toward John] "And if I hear you had 'em anywhere near that tramp BITCH, you're gonna regret it for the rest of your life!"

John Sr.: "Business hasn't been good for years, but don't you worry, you'll get what's comin' to you.

John Sr.: "I am prepared to offer you $300,000 cash, TODAY."

John Sr.: "Oh, by the way, I'm comin' to pick up my kids on Saturday."

Waiting to Exhale, 1995

LIGHTS, CAMERA, ACTION!
. . . REEL TO REAL FAMILY LAW . . .

"When I say that a particular number is my lowest price, that's my lowest price, and you can be assured that I arrived at whatever that number is very carefully."

Nightcrawler, 2014

LIGHTS, CAMERA, ACTION!
. . . REEL TO REAL FAMILY LAW . . .

Robin: "Gloria, I hope you find true love and get you some that's so electric, you ain't going to need no blow dryer."

Waiting to Exhale, 1995

LIGHTS, CAMERA, ACTION!
. . . REEL TO REAL FAMILY LAW . . .

"You are the worst thing that's ever happened to me."

Fight Club, 1999

LIGHTS, CAMERA, ACTION!
. . . REEL TO REAL FAMILY LAW . . .

[Ted Kramer hires a lawyer]
Ted Kramer: "I don't know the legal jargon for it, but I think it's 'desertion.' I don't meant to tell you your job, but I think I have an open-and-shut case."

John Shaunessy: "Well, at first Mr. Kramer, there's no such thing as an open-and-shut case where custody is involved. I'll bet your ex-wife has already found a lawyer who's advised her to move back to establish residency. The burden is on us to prove that your ex-wife is an unfit mother. That means I'll have to play rough. If I play rough, you can bet they will too. Can you take that?"

Ted Kramer: "Yes."

John Shaunessy: "And it's going to cost you $15,000."

Kramer vs. Kramer, 1979

LIGHTS, CAMERA, ACTION!
. . . REEL TO REAL FAMILY LAW . . .

"By the way, I faked every orgasm!"

The Naked Gun: From the Files of Police Squad!, 1988

LIGHTS, CAMERA, ACTION!
. . . REEL TO REAL FAMILY LAW . . .

Bernadine: "Girlfriend, here's to peace of mind and all the happiness your heart and hand can hold 'cause Lord knows you deserve it."

Waiting to Exhale, 1995

LIGHTS, CAMERA, ACTION!
. . . REEL TO REAL FAMILY LAW . . .

"After all, tomorrow is another day!"

Gone With the Wind, 1939

ARBITRATION AS A RESOLUTION TOOL IN DIVORCE

THE JUDGE VS THE (WIZ)ARD OF OZ
HE'S/SHE'S THE WIZARD AND SHE LIVES IN OZ

Honorable Divida Gude
Judicial Officer, Fulton County Family Division

May 23, 2019

Law Offices of Divida Gude, LLC
The Proscenium
1170 Peachtree Street Suite 1200
Atlanta, GA 30309
Email GudeLegal@gmail.com
Phone (404) 688-5548

ARBITRATION AS A RESOLUTION TOOL IN DIVORCE

Divida Gude

The Tornado is coming. Everything is knocked out of kilter!

Why arbitrate in Divorce? Why not go straight to trial after Discovery? Isn't Mediation the best way to resolve a divorce case? What do I have to gain/lose in abitration?

Speaking with several Georgia divorce lawyers as to why they have not used arbitration as a resolution tool in divorce, most say "in high conflict divorces parties want their day in court, their pound of flesh."[1] That usually means they want to be heard, the other side to be admonished/punished for his or her conduct, or they seek to be exonerated for their role in the divorce. Added to this, the parties will hold hostage that "thing" or issue which means the most to the other to achieve their "win." They want a public shaming! I believe mediation is the best way to work on the "emotional" part of the divorce, while arbitration works on the reality side.

Follow the Yellow Brick Road

Georgia law allows arbitration on all issues in a divorce including child custody. There is an exception which requires court approval for custody decisions. The court *shall* accept the arbitrator's decision on custody, "unless the judge makes specific written factual findings that under the circumstances of the parents and the child the arbiter's award would not be in the best interest of the child." *Duncan v. Mughelli*, 324 Ga. App. 465, 465, 751 S.E.2d 127, 128 (2013) (The Georgia Arbitration Code is contained in O.C.G.A .§ 9-9-1 through § 9-9-18.) Arbitration in custody cases (O.C.G.A. §19-9-1.1)

How do I get to the Emerald City?

What is Arbitration?

Arbitration is a process where a third party, not the judge, renders a decision in a dispute. Who is this third party? It can be anyone authorized to arbitrate, (excluding your Cousin Vinny), selected by the parties to render a final decision. Unlike mediation, the parties may select someone skilled in the particular field or areas which are issues in the divorce. In mediation, as long as the mediator is trained in mediation, no special expertise in subject matter is required. If there are contested issues in a divorce case which require knowledge of businesses or real estate, the parties could choose an arbitrator with that expertise, who is not necessarily a lawyer. Or, for a custody case, they may use an attorney

[1] Something which is owed that is ***ruthlessly*** required to be paid back.

experienced in high conflict custody cases, or a guardian ad litem as the arbitrator. Of course, knowledge of Georgia law is necessary if legal rulings are required. Many parties select retired judges who have tried hundreds of divorce cases, who are patient, good listeners and knowledgeable of the pertinent law. It makes a difference when they are not on the bench trying to conclude your case to get to the next one behind you. And, the fact that the arbitrator is being paid by the hour, calls for brevity of counsel.

But Dorothy has the Red Slippers!

Advantages of Arbitration

The best thing about having an arbitrator is that the attorneys and parties get to select the final decision maker rather than the judge assigned to the case. This allows them to establish their own criteria for the decision maker. As we know, a divorce case is subject to the court's scheduling, scheduling conflicts with attorneys, and a myriad of reasons which could delay a case for years, not months. After selecting an arbitrator and writing the contract with the particulars, the timeframe is in the hands of the attorneys. They can decide whether discovery will be formal or informal, how legal rulings will be resolved, and other issues which do not require a court date. Arbitration requires cooperation among attorneys and clients. The potential to control the process of getting divorced is in their hands.

The Lion: "I don't understand – If I only had a brain."

The Process

Arbitration differs from mediation in many ways. It can be done in conjunction with mediation, i.e., med-arb, or arb-med. That is when the arbitrator begins as mediator and if resolution is not reached, hears a short or long version of the facts from the parties to make a binding decision. In arb-med, the arbitration is first, where the arbitrator hears the case, renders a decision, or withholds a decision, and allows the parties to participate in resolving their issues with guidance as facilitator. The standard arbitration is a shortened presentation of your case, where the rules of evidence may or may not be relaxed, and after hearing from both sides, the arbitrator makes a decision. This process is a shortened version of what would happen at trial. However, some lawyers prefer a "trial like" presentation, even in arbitration.

Can we see the Wizard?

The Contract

In choosing to arbitrate, the parties get to create a road map of how the arbitration will proceed. The contract will be signed by the attorneys and the parties and submitted to

the court. The contract sets out the parameters of arbitration, including the selection of the arbitrator. The method of how the arbitrator is chosen, who pays the arbitrator, where the arbitration will be held. Will there be limitations on discovery? How will discovery disputes be decided? Do the parties seek binding rulings of evidentiary issues and pre-arbitration rulings and motions? How will the final decision be written, bullet points or full decision with findings of fact and conclusions of law? These are all part of the contract the lawyers and parties get to create.

The Scarecrow and Tin Man." If I only had a heart"

Obstacles to Arbitration in Divorce

For some, the main obstacle is cost. For others, the main advantage is cost savings. With more and more parties self representing in divorce cases, cost is a major issue. Not only is a lawyer not affordable for litigants in divorce cases, but paying an arbitrator's hourly rate is not feasible. Some states provide arbitrators for divorce cases at no cost to the parties as part of court annexed ADR programs. The court establishes a list of arbitrators or panels of arbitrators similar to what Fulton County Superior Court utilized in the 1980's in tort cases. An arbitrator or panel of arbitrators is assigned to the case and may render a binding or nonbinding decision.

Can we see the Wiz?

A lack of familiarity with the process could hinder the use of an arbitrator. Parties who have never been to court are skeptical of anything they don't understand. When have you seen mediation or arbitration on television? Not on Judge Judy, Judge Hatchett, or Judge Mathis. It is up to the lawyers to educate and encourage the parties that alternatives to trial are time saving, reasonable and have strong possibilities of a decision without trial. It helps if the lawyer has examples to illustrate the success of this process. Advising the client that finalizing a divorce could take years, not months is always a great motivator.

Another obstacle is the finality of the arbitrator's decision. Unless the arbitrator's decision is found to be defective under Georgia law, it will be final and entered as an order by the court. There is no appeal. With a clear decision of findings of fact and conclusions of law, it will be difficult to challenge an arbitrator's decision. Some believe a substantial difference exists because in a court decision, a party may appeal the proceedings in the trial, i.e., objections, admissibility and other evidentiary errors and rulings not available in arbitration.

"Where's Toto?"

But wait, isn't finality a good thing? Yes, for most it is. Then there are those I

mentioned previously who seek that "pound of flesh", no matter the cost. They will appeal, and appeal, and appeal, until they are either exhausted, out of money or lose in all efforts to overturn a decision. Post litigation in divorce can be as difficult as the divorce.

Binding or Nonbinding

If you have purchased an appliance, vehicle or have a lawsuit that ends up in bankruptcy court, you may be subject to binding arbitration. The good thing about divorce arbitration is that you can decide if the decision will be binding or non-binding. I know that there are those who believe nonbinding mediation is a waste of time, but not always.

Many years ago, I had firsthand experience on making a decision between binding and nonbinding arbitration. It was a case against a major corporation that filed bankruptcy. The bankruptcy court of New York ordered mediation or arbitration; which could be binding or nonbinding. Since I had to travel out of town to the company's headquarters for the arbitration hearing, I was torn between binding and nonbinding arbitration. I decided against mediation, because I wanted a decision. I didn't want to spend my client's money traveling to another city only to reach impasse. This case had lingered for years in bankruptcy court. I decided on nonbinding arbitration because Georgia's law on the main issue was different from the law of the state of our arbitration. It was the best decision I ever made. Even though the lawyers prepared pre and post briefs on the law and facts, the arbitrator refused to follow Georgia law and ruled for the Defendant. Fortunately, I got a "do-over" mediation in Georgia and the case settled to my client's satisfaction.

Everybody Rejoice! A Brand New Day.

The above scenario illustrates a situation where nonbinding arbitration could be your best option. Time and money are the drawbacks to nonbinding arbitration. To spend a day or more, presenting your case to an arbitrator, not to mention the time in preparation and financial burden of paying your lawyer and the arbitrator, the drawback to nonbinding arbitration is time and money. Do you really want to try your case over? Also, in certain agreements, the party who rejects the arbitrator's decision is responsible for fees and costs if there is a challenge.

However, nonbinding arbitration is also a reality check for what to expect in court, and might lead to a mediated agreement. Some people utilize nonbinding arbitration "not for a guarantee, but for a prediction of what would happen if the case went to trial."[2] "The hope is that once the disputants learn this prediction and have the opportunity to go through a

[2] Dispute Resolution, Beyond the Adversarial Model, Menkel-Meadow ,Love, et al. 2005

process that is similar to what they might obtain in court, they will voluntarily abide by the arbitrator's decision."[3]

Click your heels 3 times if you believe!

I guess you could consider a nonbinding arbitration much like a pretrial conference permitted by some judges. If the judge insinuates what he or she might do if the facts are proven as alleged, it gives incentive to the parties to resolve those issues where there is a strong possibility of an adverse ruling.

Let's ease on down the road.

Arbitration is another resolution process on the dispute resolution continuum or spectrum. Whether it is a fit for your case depends on the circumstances and your client's willingness and financial ability to participate and forego his or her day in court and, perhaps pound of flesh.

****

Arbitration in the Appellate Courts (Family Law)

Ciraldo v Ciraldo, 280 Ga. 602, 2006
Green v Hundley, 266 Ga. 592, 1996
Page v Page, 281 Ga. 155, 2006
Brazzel v Brazzel, 337 Ga. App. 758, 2016
Rollins v Rollins, 300 Ga. 485, 2017

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[3] Id., 475

Imitation Of Life (1959)
When Immigration Law And Family Law Matters Collide

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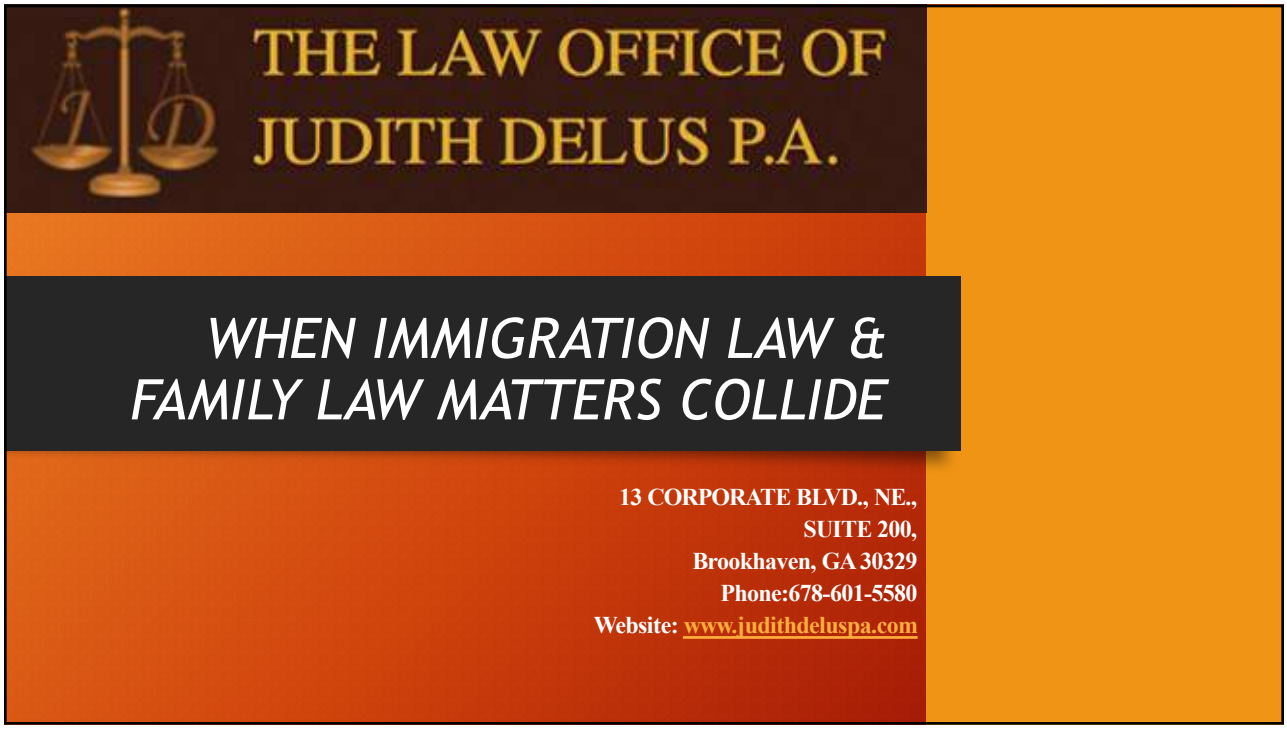
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A MARRIAGE OR A
DIVORCE BETWEEN
FAMILY LAW AND
IMMIGRATION LAW
TOPIC:
If the marriage is less than two years, how does a "no fault" divorce affect the alien and what about the adopted or non-adopted children sponsored by the U.S. citizen?
THE LAW OFFICE OF
JUDITH DELUS P.A.

TABLE OF CONTENTS

THE LAW OFFICE OF JUDITH DELUS P.A.

Will non usc spouse status be affected?

Divorce or separation may affect the legal status of conditional residents so be sure to ask your client their legal status.

If they used their spouse's status (as a U.S. citizen or lawful permanent resident) to immigrate within two years of marriage, they are a conditional resident. This includes entering the U.S. and adjusting their status while in the U.S.

If they are not certain of their status, you may wish to contact an experienced immigration attorney.

For example, if non usc spouse is married to an H1B visa holder, and the spouse has an approved adjustment of status application, but the priority date is not yet current, a divorce or separation may disqualify your client as a "dependent." In this case, your client may not be able to obtain a green card once the priority date becomes current.

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What effect does a divorce or separation cause?

- The answer depends on the non usc's spouse's status, the immigration benefit you received, and how and when you received the benefit.
- For example, if you got **conditional resident** status through marriage, that status is limited to two years. In order to become a permanent resident, you must file Form I-751 (Petition to Remove Conditions of Residence). You must file this form during the final 90 days before the date that the "green card" expires. (The date the "green card" expires is printed on the card.)
- Typically, both spouses file this form together, and include documents that prove that they are still married. However, if the marriage has already ended under state law, then you may file the I-751 by yourself by filing a waiver.
- A divorce may make it harder to become a permanent resident, but it is still possible. You must show that you married in "good faith." That means that you intended to live together as spouses when you married. To show this, you may submit documents showing that you shared a normal married life with your former spouse. This could include having a joint lease, a joint bank account, joint credit cards, or coverage under the same auto and health insurance policies.
- If you already have a green card and are a permanent resident at the time of the divorce, the divorce should not change your status. However, the divorce may force you to wait longer to apply for naturalization. In this case, you would need to wait five years, rather than three.

What Is a Request for Waiver of the Requirement to File a Joint Petition?

- If non usc spouse finalizes their divorce while still a conditional resident, but still want a green card, they must submit to USCIS not only Form I-751, but a request for waiver of the usual requirement that usc spouse and non usc spouse file the I-751 jointly, with both signatures. This allows the request that USCIS make the conditional residence into permanent residence without the support of usc spouse.
- Benificiary must accompany this request with the divorce decree or settlement, proof that the marriage was entered into in good faith, and a statement as to why they got divorced.
- Proof that the marriage was entered into in good faith (rather than fraudulently) is crucial to receiving USCIS approval of permanent residence. What's more, because USCIS has discretion about whether or not to approve the I-751 waiver (in other words, the agency is not legally obligated to grant it), you may have to show more than good faith upon entry to the marriage, but also demonstrate that it wasn't the non-citizen's fault that the marriage failed.

How Does Divorce Affect My Progress Toward U.S. Citizenship?

An immigrant who has been married to and living with a U.S. citizen has to wait only three years after getting a green card to become a naturalized citizen.

After the divorce, however, they will no longer qualify for this exception, and will have to wait the usual five years before becoming a U.S. citizen.

If it is determined that the marriage is not a sham and if non usc spouse can retain status and remain in the US after the divorce.

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If the marriage is terminated before the 5 years, who is responsible for the alien's support?

- *If USC spouse sponsors non USC spouse's immigration application and the marriage is ends, the sponsor needs to withdraw sponsorship promptly.*
- *Withdraw sponsorship promptly because through sponsorship you have assumed the responsibilities of supporting your spouse and his and her dependents.*
- *When a person signs an affidavit of support, he or she accepts legal responsibility for financially supporting the sponsored immigrant(s) until he or she becomes U.S. citizens.*
- *Divorce does not necessarily terminate your financial responsibilities toward your immigrant spouse before he or she becomes a U.S. citizen unless he or she leaves the United States.*
- *A spouse-sponsor should withdraw any Petition for Alien Relatives and the Affidavit of Support as soon as possible if divorce proceedings are imminent.*

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What happens to step-child(ren) after divorce?

- *A stepchild relationship is created whenever a parent of the child marries someone (other than the child's other parent) before the child's 18th birthday.*
- *The relationship is created automatically as a result of the marriage, assuming that the marriage is not a sham or does not violate the Defense of Marriage Act*
- *Normally, a step relationship terminates when a marriage ends, especially if it ends in divorce.*
- *However, under certain circumstances a step relationship may continue after the death of the natural parent or even after the legal separation or divorce of the stepparent and natural parent if there is an ongoing relationship between the stepparent and stepchild.*
- *If the marriage ends in annulment, however, the step relationship is deemed to have never existed because legally the marriage never existed.*

What happens to adopted child(ren) after divorce?

- *It is important that you determine if the petitioner and beneficiary are related through adoption or if their natural relationship was severed through an adoption.*
- *Aliens who gain permanent resident status in the U.S. through adoptive parents are not eligible to pass on immigration benefits to their natural parents.*
- *Also, the beneficiary's date of birth, the date of the adoption and time spent residing with and in the legal custody of the adoptive parents are critical in establishing the validity of the relationship.*

CASE LAW

See Matter of Simicevic, 10 I. & N. Dec. 363 (BIA 1963).

(see Matter of Pagnerre, 13 I. & N. Dec. 173 (BIA 1971),

Matter of Mowrer, 17 I. & N. Dec. 613 (BIA 1981),

Matter of Mourillon, 18 I. & N. Dec. 122 (BIA 1981)

8 CFR 204.2(d)(2)

8 CFR 204.2(d)(2)(vii)

Matter of Cuello, *20 I. & N. Dec. 94 (BIA 1989) and*

Matter of Marquez, *20 I. & N. Dec. 160 (BIA 1990)*

Matter of Teng, 15 I. & N. Dec 516 (BIA 1975)

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A MARRIAGE OR A DIVORCE
BETWEEN FAMILY LAW AND IMMIGRATION LAW

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INTRODUCTION

MARRIAGES FOR IMMIGRATION PURPOSES:

Common Law Marriages are valid if valid under State law[1]. Same sex marriages are valid[2], and Transgender marriages are also recognized[3]. Also, voidable marriages but not void marriages are recognized such as marriage between minors[4]. However, religious marriages may be valid if recognized by the sovereign in that country or state[5], such as a religious marriage in the country of Colombia[6], but not in Mexico[7]

Marriages cannot be contrary to public policy, such as polygamy, though valid under foreign law, it is against U.S. public policy and will not be recognized. However, DOS has noted that they will recognize the first marriage of a polygamist as valid[8]. Public policy issue is also dependent on state laws, for example, uncle-niece marriage is permitted under state law, it is recognized for immigration purposes[9]

For a marriage to be valid, a prior divorce must also be valid under the jurisdiction granting the divorce[10], however, if a couple was neither physically present, nor domiciled at any time in the divorcing country, USCIS will not recognize the divorce[11], and the divorce must be final, and not just simply a separation[12].

If the parties to a proxy marriage were not in each other's presence at the marriage ceremony, there must be proof of consummation[13].

If the marriage is found to be fraudulent, the alien is subject to deportation if married within two years prior to obtaining LPR status and marriage is judicially annulled or terminated within two years subsequent to LPR entry[14]

So, the marriage has occurred, the U.S. citizen has filed for his/her spouse to become a legal permanent resident (LPR), and one of the forms that have been submitted is an "affidavit of support", which has substantial benefits for the alien spouse during the marriage, and even if there is a divorce.

1.

AFFIDAVITS OF SUPPORT AND THE AFFECTS ON A DIVORCE

Immigration *Form I-864* is an affidavit of support which is an enforceable contract

against the affiant[15]. The sponsor and any joint sponsor are "jointly and severally liable for the support of the alien[16].

Execution of the Form I-864 creates a contract to begin after the sponsored immigrant acquires permanent residence[17]. The is enforceable by the sponsored person, the local state or federal government, or any agency providing a means-tested public benefit until the sponsored immigrant is: (1), naturalized; (2) ceases to be an LPR and departs the U.S.; (3) obtains a new grant of residency; (4) has earned or been credited with 40 qualifying quarters under Title II of the Social Security Act; or (5) dies[18].

Divorce does not end the obligation of support, nor a premarital agreement[19].

The sponsor must be a U.S. citizen or a legal permanent resident at least 18 years of age, domiciled in the U.S. and have an income 125% above the federal poverty line[20].

ADOPTIONS OF FOREIGN BORN CHILDREN

The Immigration and Naturalization Act (INA) has basically three pathways an adopted child may be considered a child for immigration purposes: (a non-orphan whose adopting parent has a full and final order of adoption and two years of legal custody and joint residence; (2) adopted children who qualify as orphans and are from countries that have not ratified the Hague Convention and they must have either a full order of adoption or guardianship; (3) adopted children who are citizens of or have habitually resided in a Hague Convention country prior to entering the U.S. and their adoption process complied with the Hague Convention[21].

The adoption of a foreign born child must be completed before the child reaches the age of sixteen, and an adoption *nunc pro tunc* after the age of 16 will not be given retroactive effect[22].

If the adopting parents are relatives of the biological parents, USCIS will inquire into the bona fides of adoption[23].

2.

VIOLENCE AGAINST WOMEN'S ACT AND A DIVORCE

If a marriage between a U.S. citizen and an LPR suffers from violence within the first two years of the marriage, a no-fault divorce may result in deportation.

The Violence Against Women's Act (VAWA) allows the spouse or child of a U.S. citizen or LPR, or the parent of a U.S. citizen, who is battered or subject to extreme cruelty to file a self-petition independently of the abuse spouse or parent[24]. The spouse or child must demonstrate that he or she resided with the abuser, was battered or subject to extreme cruelty during the marriage, that the marriage was entered into in good faith, that she is otherwise eligible for adjust to legal resident and is a person of good moral character[25]. The abused spouse must no longer be married the abuser and can demonstrate a connection between the legal termination of the marriage and the battering/extreme cruelty[26].

Spouses and children living abroad are also covered if their abuser are U.S. citizens, LPR's members of the U.S. military or are U.S. government employees or if some of the abuse took place in the U.S.[27]

CITATIONS

1. Matter of Ceballos, 16 I&N Dec. 765 (BIA 1979)
2. Obergefell v. Hodges, 135 S.Ct. 2584 (2015)
3. Matter of Zeleniak, 26 I&N Dec. 158 (BIA 2013)
4. Matter of G, 9 I&N Dec. 89 (BIA 1960)
5. Matter of Ceballos, 16 I&N Dec 765 (BIA 1979)
6. Matter of Alvarez-Quintana, 14 I&N Dec. 255 (BIA 1973)
7. Matter of Colettii, 11 i&n Dec. 551 (BIA 1965)
8. Department of State (DOS) Notice # 10021965
9. Matter of E, 4 I&N Dec. 239 (BIA 1951); Matter of Silva, 15 I&N Dec. 778 (BIA 1976);
10. Matter of Hann, 18 I&N Dec. 196 (BIA 1982)
11. Matter of Ma, 15 I&N Dec. 70 (BIA 1974)
12. Matter of Miraldo, 14 I&N Dec. 704 (BIA 1974)
13. 8 U.S.C. §1101(a)(35); Matter of B-, 5 I&N Dec. 698 (BIA 1954)
14. 8 U.S.C. §1227(a)(1)(G)(i); Malik v. U.S. Atty. Gen. 659 F.3d 253 (3rd Cir. 2011)
    Abdulahad v. Holder, 581 F.3d 290 (6th Cir. 2009)
15. 8 U.S.C. §1183a(a)
16. 71 FR 35732, 35743 (June 21, 2006)
17. 8 C.F.R. §213a.2(d)
18. 8 C.F.R. 213a.2(e)(2)(i)
19. Erler v. Erler, 824 F.3d 1173 (9th Cir. 2016)
20. 8 U.S.C. §1183a(f)
21. 8 U.S.C. §1101(b)(1)(E),(F),(G); 8 U.S.C. §1443; 22 C.F.R. 96.46; 22 C.F.R. 76.7(a)
22. Matter of Cariaga 15 I&N Dec. 716 (BIA 1976); Matter of Driago, 18 I&N Dec. 223 (BIA 1982)
23. Matter of Marquez, 20 I&N Dec. 160 (BIA 1990); 8 C.F.R. 204.2(d)(2)(vii)(B)
24. 8 U.S.C. §1154(a)(1)(A)(iii)-(vii) & (B)(ii)-(iii); 8 C.F.R. 204.2(c)(e);
25. 8 U.S.C. §1154(a)(1)(A)(iii)-(iv) & (B)(ii)-(iii)
26. 8 U.S.C. §1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc) and
    8 U.S.C. §1154(a)(1)(B)(ii)(aa)(CC)(bbb)
27. 8 U.S.C. §1154(a)(1)(A)(v) & (B)(iv)

Yours, Mine And Ours (1968)
Trending Topics In Military Law

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I. The 10/10 Rule

The Uniform Services Former Spouse Protection Act (USFSPA) was passed in 1982 as part of the National Defense Authorization Act of 1983.[1] The USFSPA allows the state courts to divide military retired pay incident to divorce or legal separation pursuant to state law.[2]

The USFSPA allows the former spouse to receive his or her portion of the military retired pay directly from the respective federal pay center. The Defense Finance and Accounting Service (DFAS) is the pay center and will make direct payments for the Army, Air Force, Navy, Marine Corps, and their respective reserve components. The Coast Guard pay center provides for direct payments for the Coast Guard, Uniform Public Health Service Commissioned Corps, and the National Oceanic and Atmospheric Administration (NOAA).[3]

DFAS or the Coast Guard pay center will only make direct payments to the former spouse if the "10/10 rule" is satisfied. There is much confusion and misperceptions regarding the "10/10 rule." Under the USFSPA, there must be 10 years of marriage overlapping 10 years of military service (i.e. good service creditable towards retirement—not "bad" years in the reserves where the service member fails to earn the minimum of 50 points) in order for the former spouse to receive direct payment.[4] Many attorneys, and even service members, believe that the 10/10 rule means that if they were not married to their spouse for 10 years overlapping 10 years of marriage, then the spouse has no interest at all in the service member's military pension.[5] However, that is not the case. The USFSPA allows the court to divide a pension in a marriage with less than 10 years of service overlap *if state law applies*, but the payments shall not be made directly to the former spouse by DFAS. Instead, the military spouse would have to pay the non-military spouse directly.

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[1] Public Law 97-52, passed September 8, 1982, http://uscode.house.gov/statutes/pl/97/252.pdf. The Department of Defense Authorization Act is now known as the National Defense Authorization Act (NDAA) which is passed each year providing any updates to budgeting, manning, and equipment acquisition for the Department of Defense.

[2] The USFSPA applies to non-disability retired pay.

[3] Department of Defense Financial Management Regulation (DODFMR) 7000.14-R, Vol. 7B, Ch. 29, Para. 290403, Sept. 2015.

[4] 10 USCS § 1408(d)(2); DODFMR 7000.14-R, Vol. 7B, Ch. 29, Para. 290604, Sept. 2015.

[5] *See* the Michigan case of *Richardson v. Pearson*, 2016 Mich. App. LEXIS 1191 (Mich. App. 2016) where the husband/service member tried to argue that wife had no interest in his pension because they had not been married for 10 years. The Michigan Court of Appeals disabused husband of that notion. However, some of this confusion may be perpetuated by states such as Alabama which has a statute which states that if the parties have not been married for at least 10 years during which the retirement was being accrued (effectively a 10/10 rule), then the retirement account is not subject to division during divorce. *See* Ala. Code 1975, § 30-2-51(b); *Baldauf v. Baldauf*, 185 So. 3d 1127 (Ala. Civ. App. 2015).

II. The Military's new Blended Retirement System (BRS).

For many years, critics have claimed that the current military retirement system is too expensive to maintain.[6] Today, the cost of the military retirement system exceeds 111 billion dollars annually.[7] Military retirement funding and other military spending is a significant and growing portion of the U.S. annual budget.[8]

Also, as a cliff vesting plan, the service member must serve a full 20 years to receive any retirement.[9] It is estimated that only 17% of all enlisted service members and 49% of all officers serve long enough to qualify for retirement.[10] Most leave voluntarily before 20 years. Others are not promoted and discharged. Still, others may be administratively separated for misconduct or they may be criminally prosecuted by the military and lose all retirement benefits. One of the major criticisms of the old plan was that over 80% of all who serve the country—including thousands who actually serve in combat—leave the military without *any* retirement benefit.[11] Consequently, critics saw the old retirement system as an impediment to attracting competitive recruits;[12] they also pointed out that the mediocre mid-career service members are motivated to

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[6] Tim Kane, *Military Retirement: Too Sweet a Deal*?, Charlie Mike. Retrieved from, http://warontherocks.com/2015/03/military-retirement-too-sweet-a-deal/; Lawrence J. Korb, Alex Rothman, and Max Hoffman, *Reforming Military Compensation Addressing Runaway Personnel Costs Is a National Imperative*, Center for American Progress, May 2012. Retrieved from https://cdn.americanprogress.org/wp-content/uploads/issues/2012/05/pdf/military_compensation.pdf.

[7] Kristy N. Kamarck, *Military Retirement: Background and Recent Developments*, Congressional Research Service, Dec. 10, 2015. Retrieved from https://www.fas.org/sgp/crs/misc/RL34751.pdf; Major Wener Vieux, *The Military Retirement System: A Proposal for Change, Military Law Review*, Volume 218, Winter 2013, U.S. Department of Army Pamphlet 27-100-218. Retrieved from https://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/218-winter-2013.pdf.

[8] Office of the Under Secretary of Defense (Comptroller)/ Chief Financial Officer, *Department of Defense Fiscal Year 2015 Budget Request*, March 2014. Retrieved from http://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2015/fy2015_Budget_Request_Overview_Book.pdf.

[9] Service members may qualify for retirement by serving not less than 20 years on active duty, which may be consecutive service or accumulated service; or they may serve not less than 20 years of qualifying reserve service, meaning that they must earn not less than 50 retirement "points" in a year.

[10] Department of Defense, *Valuation of the Military Retirement System; September 30, 2012*, 24. Retrieved from http://actuary.defense.gov/Portals/ 15/Documents/MRF_ValRpt2_2012.pdf.

[11] *Report of the Military Compensation and Retirement Modernization Commission*, January 2015. Retrieved from http://mldc.whs.mil/public/docs/ report/MCRMC-FinalReport-29JAN15-HI.pdf; Department of Defense, *Report of the Tenth Quadrennial Review of Military Compensation, Volume II Deferred and Noncash Compensation, July 2008*, 12–16. Retrieved from http://www.defense.gov/news/qrmcreport.pdf; Defense Business Board, *Report to the Secretary of Defense: Modernizing the Military Retirement System*, November 10, 2014. Retrieved from http://dbb.defense.gov/Portals/35/Documents/Reports/2011/FY11-

[12] As the Commission indicates in its Report, the Department of Defense has not kept pace with private sector employers where the Internal Revenue Service requires vesting of retirement plans under much shorter time frames. As a result, with an ever younger, "millennial" generation, "research has shown members of this generation change jobs frequently and tend to favor flexible retirement options, rather than the defined benefit pension plans preferred by previous generations." *Report of the Military Compensation and Retirement Modernization Commission*, January 2015. Retrieved from http://docs.house.gov/meetings/AS/AS00/20150204/102859/HHRG-114-AS00-20150204-

remain in service under the current plan.

As a result of these and other criticisms, many members of Congress considered the current retirement program too costly and antiquated.[13] Ultimately, in the 2013 NDAA, Congress established the "Military Compensation & Retirement Modernization Commission" to review the old system, consider some of these criticisms, and recommend changes.[14] On January 29, 2015, the Commission released its final report, recommending an overhaul to the current retirement plan, including establishing an enhanced defined contribution plan.[15] In the 2016 NDAA, Congress adopted many of the Commission's proposals.

The 2016 NDAA amended the old military retirement plan and launched the Blended Retirement System on January 1, 2018. Similar to the transition from the old Civil Service Retirement System (CSRS) to the Federal Employee Retirement System (FERS) in 1987, there was a phase in period. Under the plan, there are three distinct categories of service members:

> (1) those serving on (and before) December 31, 2017 with *more* than 12 years of service at that time (or 4,320 retirement points for a reserve component service member);
> (2) those serving on (and before) December 31, 2017 with *less* than 12 years of service at that time (or less than 4,320 retirement points for a reserve component service member); and
> (3) those who join on or after January 1, 2018.[16]

Those in the first category (> 12 years of service on December 31, 2017) will remain under the old retirement system, without exception. Those in the second category (< 12 years of service) may opt into the new system or remain under the old system.[17] Those in the third category may not choose; they will only be eligible for the new retirement system.[18]

This is a standard "grandfather" plan established for the sake of equity. Congress estimated that those with more than 12 years of service by January 1, 2018 are strongly vested in the current retirement system and should not be disturbed. Those with less than 12 years of service may do better under either system depending upon how much service they have, how

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SD001.pdf.

[13] Kristy N. Kamarck, *Military Retirement: Background and Recent Developments*, Congressional Research Service, December 10, 2015. Retrieved from https://www.fas.org/sgp/crs/misc/RL34751.pdf.

[14] National Defense Authorization Act for Fiscal Year 2013, GovTrack.us. Retrieved from www.govtrack.us/congress/bills/112/hr4310/text.

[15] Military Compensation and Retirement Modernization Commission, January 2015. Retrieved from, http://docs.house.gov/meetings/AS/AS00/20150204/102859/HHRG-114-AS00-20150204-SD001.pdf.

[16] *National Defense Authorization Act for Fiscal Year 2016.* Retrieved from https://www.gpo.gov/fdsys/pkg/BILLS-114s1356enr/pdf/BILLS-114s1356enr.pdf.

[17] The 2016 NDAA establishes the period from January 1, 2018 through December 31, 2018 as the election period.

[18] *National Defense Authorization Act for Fiscal Year 2016.* Retrieved from, https://www.gpo.gov/fdsys/pkg/BILLS-114s1356enr/pdf/BILLS-114s1356enr.pdf.

much (if any) "continuation pay" they receive (see below), and how much they desire to remain in the military.

This new blended retirement system includes:

(1) an enhanced Thrift Savings Plan (TSP),
(2) a reduced defined benefit plan,
(3) an interim "continuation" bonus, and
(4) an option to receive an immediate partial lump-sum payment against the defined benefit upon retirement.

First, a TSP account will be established for all new service members and those service members opting into the blended retirement system.[19] After the service member's first 60 days of service, the Government will automatically begin contributing 1% of the service member's base pay into this account every month. The Government will match, dollar-for-dollar, the service member's contributions up to 3% of base pay. Finally, if a service member contributes above 3%, the Government will contribute $0.50 towards every dollar the service member contributes above 3%, up to 5%. Therefore, if the service member makes a 5% contribution, the Government will match it (with a 5% maximum contribution). These contributions continue until the service member leaves service, retires, or reaches 26 years of service.[20] The TSP becomes the service member's property after two years of service. These contributions are invested under the direction of the TSP Board in a variety of U.S. Government securities and stock index funds.[21]

Second, the military's cliff vesting pension remains intact. However, the 2.5% multiplier that couples with the service member's total years of service to create the retirement multiplier, is reduced to 2% in exchange for the Government's TSP contribution. Since the 2.5% constant had the practical effect of yielding a retirement of 50% of the service member's base pay in retirement over a 20-year career, the lower constant yields 40% of the service member's base pay in retirement.[22]

Third, for those service members who achieved 12 years of service on or after January 1, 2018, the Blended Retirement System requires that the active duty service member be paid not

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[19] Under the old retirement system, the TSP is optional for members of the Department of Defense (since 2000), and the Government does not contribute or match contributions. The TSP is not a 401(k) but does bear many similarities. *See generally*, Mark Sullivan, *A Teaspoon of TSP*, The Family Law Review; Winter 2016.

[20] The 2016 NDAA states that the Government will cease making TSP contributions for service members after they have served for 26 years, though the service member may continue to serve.

[21] *National Defense Authorization Act for Fiscal Year 2016.* Retrieved from, https://www.gpo.gov/fdsys/pkg/BILLS-114s1356enr/pdf/BILLS-114s1356enr.pdf.

[22] For example, today a Lieutenant Colonel retiring after 20 years with a base pay of $8,000.00 (average of previous three years) would compute her retirement as follows: 0.025 x 20 x 8,000 = $4,000.00, whereas under the new retirement system, she would compute it as follows: 0.02 x 20 x 8,000 = $3,200.

less than 2.5 times their monthly base pay (and the Reserve/National Guard service member receive not less than 0.5 times the monthly base pay of an active duty service member of equivalent rank and years of service) sometime between their 8th and 12th year of service. This is called a continuation or mid-career bonus. At the discretion of the Secretary of the particular service, the active duty service member may also be paid as much as 13 times the monthly base pay (and the Reserve/ National Guard member may be paid as much as 6 times the monthly base pay of his active duty equivalent). The ultimate size and timing of such continuation bonuses are left up to the respective service secretaries in order to "shape" the force.[23]

Finally, the 2016 NDAA allows retirees (under the new system) who are entitled to begin receiving retirement to receive certain immediate "lump sum" payments against the defined benefit portion of their pension.[24] The plan allows for a retiree to receive either 25% or 50% of the annuity in a discounted present value lump-sum payment. The retiree receives the remainder of the annuity each month, and the annuity returns to the full annuity amount upon the retiree's 67th birthday.

The Defense Finance and Accounting Service (DFAS) administers the military retirement system through its implementing regulation, the DoD Financial Management Regulation. This regulation has not yet been updated to reflect the Blended Retirement System. Several aspects of the Blended Retirement System are still uncertain.[25] What is clear, is that the Blended Retirement System places many important choices into the hands of the service member.

III. The Frozen Benefit Rule

Prior to the passage of the National Defense Authorization Act (NDAA) for 2017, state courts had discretion on what method to use to divide a military pension.[26] However, the NDAA

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[23] "Shaping the force" is a term meaning that this continuation bonus may be greater for certain military ranks or occupational specialties (e.g. pilots) where the service may be short qualified personnel; its use is intended to motivate people to remain in service; Kristy N. Kamarck, *Military Retirement: Background and Recent Developments*, Congressional Research Service, December 10, 2015. Retrieved from https://www.fas.org/sgp/crs/misc/RL34751.pdf.

[24] This new lump-sum aspect harkens back to an earlier plan, called the Career Status Bonus Redux (CSB Redux). Under CSB Redux, service members who entered the service after July 31, 1986 could elect the "high three" retirement plan or the CSB Redux plan in their 15th year of service. If CSB Redux were elected, the service member received a $30,000 lump sum payment at that time in exchange for a lower retired pay multiplier and a lower annual cost of living adjustment. 10 U.S.C. § 1409; *see* Defense Finance and Accounting Service website http://www.dfas.mil/retiredmilitary/plan/estimate/csbredux.html.

[25] E.g., Will the service member's spouse be required to concur to elect the Blended Retirement System for members with less than 12 years of service? How will the Blended Retirement System account for disability payments such as Combat Related Special Compensation? How much continuation pay will the difference Service Secretaries allot for service members and will they do so based upon military occupational specialty?

[26] *See, e.g.*, *Johnson v. Johnson*, 2014 UT 21 (2014), where the Supreme Court of Utah held that "An appellate court's review of a district court's determination of which pay grade to apply to determine a former spouse's marital portion of an employee spouse's retirement benefit is subject to an abuse of discretion standard. 'A court has considerable discretion considering property [division] in a divorce proceeding, thus its actions enjoy a presumption

for 2017, which was signed into law on December 23, 2016, requires the use of a hypothetical division (described in more detail below) to divide a military pension of a service member who is still serving.[27] This applies to all divorces or legal separations after December 23, 2016.

As legislatures are wont to do, the law is not clear. The new law does not say "courts shall use the hypothetical method of division" rather the law limits the military retired pay subject to property division as "the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order."[28] This effectively caps the former spouse's portion at the current pay grade and years of service the service member has at the time of the divorce. Section 641 of the NDAA also provides that this requirement is effective with divorces, annulments, or legal separations after the date the NDAA became law which was December 23, 2016.[29] This is commonly referred to as the "frozen benefit rule."

For all divorces occurring after December 23, 2016 and where the service member is still serving, the MPDO must include the service member's "high 36" and years of creditable service (or points for a reserve component) at the time of the divorce. Further, the pay centers require that the court order dividing the military retired pay include the service members "high-36" and months (or points) of creditable service at the time of the divorce.

IV. Frozen Benefit Rule – How do we write it?

There are several ways to divide a military pension:

1. The flat dollar amount – this is still an acceptable method of division. The parties can agree, or the court can order, that the former spouse will receive a flat dollar amount each month from the service member's military retired pay. However, if the award is stated as a flat dollar amount, then the former spouse will not receive the cost of living adjustments. Depending upon the age of the parties and their life expectancy, this can have enormous consequences. A flat dollar amount can often do a great disservice to a former spouse, leaving hundreds of thousands of cost of living adjustment dollars in the retiree's pocket.

2. The flat percentage if the service member is retired – this is still an acceptable method of division. The parties can also agree, or the court can order, that the former

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of validity.'"

[27] House Resolution 4909 to the National Defense Authorization Act for 2017. https://armedservices.house.gov/legislation/markups/FChr-4909-national-defense-authorization-act-fiscal-year-2017-5. A similar bill has been introduced in the Senate, S.B. 2943, https://www.congress.gov/bill/114th-congress/senate-bill/2943.

[28] Section 641, National Defense Authorization Act of 2017. Available online at https://www.govtrack.us/congress/bills/114/s2943/text.

[29] Section 641, National Defense Authorization Act of 2017. Available online at https://www.govtrack.us/congress/bills/114/s2943/text.

spouse will receive a percentage of the service member's military retired pay. A flat percentage works when the service member is already retired and the parties or the court can ascertain how much of the military service was during the marriage. A flat percentage division might read:

> *"The former spouse is awarded 50% of the service member's disposable retired pay. For example, Colonel (COL) Smith retired from the U.S. Air Force with 26 years of creditable service. COL Smith was married to his wife, Mrs. Smith, for 24 of those years of military service. COL Smith served for 312 months (12 × 26), and of those he was married to Mrs. Smith for 288 months (12 × 24). Therefore, 92.3% of the military pension was accrued during the marriage (288 months / 312 months). If the parties agree that Mrs. Smith is going to get one-half of what was earned during the marriage, then she would receive 46.15% of COL Smith's military retired pay."*

3. The Time Rule (or Coverture Method) for a Service member Still Serving – no longer an acceptable method of division because of the new Frozen Benefit Rule. This method of division used to be the typical method of division of military pensions; and it is still valid for divorces prior to December 23, 2016. The time rule formula is an award expressed in terms of a martial fraction, where the numerator represents the period of the parties' marriage while the member was performing creditable military service, and the denominator is the total years of service. The former spouse's award is very often ½ of this.

4. Hypothetical Division – the new standard. A hypothetical award is an award figured as if the member had retired on the date of separation or divorce. This calculation does not give the former spouse the benefit of any of the member's pay increases due to promotions or increased service time after the divorce. The former spouse is then awarded a percentage (very often ½) of the marital portion of the hypothetical award. Steps:

a. Determine retired pay base. For members entering military service before September 8, 1980, the retired pay base is the member's final basic pay. For members entering service after September 8, 1980, the retired pay base is the average of the member's highest 36 months of basic pay.

b. Multiply the retired pay base by the retired pay multiplier. The retired pay multiplier is 2.5% multiplied by the years of creditable service (or 2.0% for those who have elected to participate in the new BRS). This yields the service member's hypothetical retired pay.

c. When the service member then actually retires the former spouse's award is converted from a percentage of the hypothetical retired pay to a percentage of the service member's actual disposable retired pay. This is done by taking the ratio of hypothetical retired pay to actual retired pay, adjusted for COLA, and multiplying by the percentage of hypothetical retired pay.

A hypothetical award, in COL Smith's situation, might read:

> "*Mrs. Smith shall receive fifty percent (50%) of COL Smith's military retired pay as if COL Smith had retired with a retired pay base of $10,877.70 with 26 years of service on (date of divorce).*"

The examples above illustrated clauses for dividing military pension where the service member has an active duty retirement. To divide a reserve component pension, the concepts are the same except that we look at reserve component retirements in terms of retirement points instead of months of service. For example, let's say that COL Smith has retired from the reserves. His retirement point statement tells us that he accrued a total of 5,600 retirement points during his 26 years of reserve service. Also from looking at his retirement points statement, we can see that he earned 4,000 of those retirement points during the marriage. Thus, 71.4% of the pension was earned during the marriage. (4,000 / 5,600 = 0.714).

If COL Smith is still serving, a hypothetical division of COL Smith's reserve retirement might read:

> "*Mrs. Smith is awarded 50% of the disposable military retired pay COL Smith would have received had the member become eligible to receive military retired pay with a retired pay base of $10,877.70 and with 4,000 Reserve retirement points on (date of divorce).*"

In some instances, particularly if the service member is still serving, you may not know whether the service member will retire with and active component retirement or a reserve component retirement. There are several service members that serve on active duty within the reserve component. If there is a possibility that a reserve service member might become eligible for an active duty retirement (accruing at least 20 years of active duty service), then it is wise to write the military pension division in both terms of retirement points and months of service.

For an active duty service member serving at the time of the divorce, the language for division under the frozen benefit rule might read:

> "The former spouse is awarded ___ percent of the disposable military retired pay the member would have received had the member retired on (date of divorce) with a retired pay base of (high-36) and with _____ months of creditable service."

For a reserve component service member serving at the time of the divorce, the language for division would read:

> "The former spouse is awarded ___ percent of the disposable military retired pay the member would have received had the member retired on (date of divorce) with a retired pay base of (high-36) and with _____ points of creditable service."

In order to calculate the service member's "high-36," the attorney is going to need to know the service member's rank, pay entry base date (PEBD - date of entry into military service), and date of rank. From there, the attorney can calculate the high-36.

As compared to the time rule formula, the hypothetical or the frozen benefit rule, reduces the former spouse's share of the military pension because the former spouse does not get the benefit of any future pay increases, promotions, and credit for additional years of service. When DFAS or the Coast Guard pay center calculate the former spouse's portion under the frozen benefit rule, the former spouse's portion is calculated based on the variables provided in the MPDO and then applies only the cost of living adjustments on military retired pay from the divorce until the receipt of military retired pay.

V. Indemnification and *Howell v. Howell*

Service members waive a portion of their military retired pay in order to receive VA disability compensation. For permanent disabilities incurred during and a result of military service, retirees may waive all or part of their military retired pay in two primary ways—through receipt of a military disability retired pay under Title 10 of the U.S. Code or through receipt of Veterans Disability benefits under Title 38 of the U.S. Code.

Because 10 USCS § 1408 (the USFSPA) only allows state courts jurisdiction to equitably divide military retired pay incident to divorce or separation, any waiver of military retired pay for equivalent amounts paid as disability compensation are beyond the state court's authority to divide incident to divorce or separation.[30] Naturally, a former spouse may be caught off guard as a result of such waiver.

Military disability retired pay is paid by the Department of Defense to service members who are disabled and have at least twenty years of creditable service for retirement *or* who are rated as at least 30% disabled. Military disability retired pay is calculated as the portion of the service member's retired base pay equivalent to the service member's disability rating (e.g. a 40% disability rating applied to a retired base pay of $2,000.00 would be $800.00). Now, if the service member would receive regular retired pay of a *greater* amount, the service member will receive the greater amount; however, the amount of disability retired pay will not be subject to income tax.

Veterans Administration (VA) disability benefits are paid by the Department of Veterans Affairs to service members who may be less severely disabled than those eligible for military disability retired pay or whose service related disabilities emerged after retirement. VA disability benefits are calculated under the same disability percentages as military disability

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[30] *Mansell v. Mansell*, 490 U.S. 581 (1989).

retired pay (a VA disability scale). A service member who receives a military pension shall waive a portion of that pension equivalent to the VA disability benefits received from the VA (e.g. a service member who receives $2,000.00 in military retired pay and who is eligible to receive $500.00 VA disability payment shall waive $500.00 of the $2,000.00 retired pay.) Any amounts received from the VA are not subject to income tax.

The service member has incentive to waive all or part of her military retired pay because the amounts waived for equivalent disability payments are tax free, thus increasing the recipient's net income. Of course, such a waiver also can reduce the former spouse's portion of the retired pay.

Many former spouses have had their portion of the military retired pay reduced without any notice or warning when the retired service member has received VA disability pay and waived a portion of their retired pay, post-divorce. This is sometimes referred to as a "post-divorce re-characterization of military retired pay." This has resulted in former spouses taking the retired service member back to court post-divorce in typically contempt action. Prior to May 2017, states were divided in their responses to this situation. Some states held that the trial court cannot order the service member to make direct payments to the former spouse in the event that the service member waives a portion of his or her retired pay for VA disability post divorce.[31] These states have held that the U.S. Supreme Court decision in *Mansell v. Mansell* prohibits the division of VA disability benefits and therefore any indemnification clause is prohibited by *Mansell*. Other states have held that the retired service member must indemnify the former spouse for the reduction in the former spouse's portion of retired pay based on the service member's waiver.[32] These states have ordered indemnification of the former spouse's portion of the military retired pay, holding that the service member's unilateral waiver takes property away from the former spouse without due process.

The United States Supreme Court resolved these differences of opinions between the states on VA indemnification clause in the case of Howell v. Howell which came out in May 2017.[33] In *Howell v. Howell*, the parties were divorced in Arizona in 1991. The trial court ordered that Ms. Howell would receive 50% of her husband's military retired pay. Mr. Howell retired from the Air Force in 1992, shortly after the divorce. Thirteen years after the divorce, Mr. Howell received a 20% VA disability rating for his shoulder. He then began receiving approximately $250.00 in VA disability compensation, and in order to do so, waived $250.00 of his military retired pay. This had the effect of reducing Ms. Howell's portion of the military retired pay without any notice. Ms. Howell petitioned the trial court in Arizona to enforce the

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[31] *Youngbluth v. Youngbluth*, 6 A.3d 677 (Vt. 2010); *Mallard v. Burkart*, 95 So. 3d 1264 (Miss. 2012); *Ex parte Billeck*, 777 So. 2d 105 (Ala. 2000); *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992); *Kramer v. Kramer*, 567 N.W.2d 100 (Neb. 1997).

[32] *Black v. Black*, 842 A.2d 1280 (Me. 2004); *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001); *Krapf v. Krapf*, 786 N.E.2d 318 (Mass. 2003); *Resare v. Resare*, 908 A.2d 1006 (R.I. 2006); *In re Marriage of Howell*, 361 P.3d 936 (Ariz. 2015); *Merrill v. Merrill*, 238 Ariz. 467, 362 P.3d 1034 (2015); *Ast v. Ast*, 162 So. 3d 720 (La. App. 3 Cir., 2015).

[33] *Howell v. Howell*, 581 U.S. __ (2017)

original order and order Mr. Howell to pay her the difference directly. The trial court approved and ordered Mr. Howell to pay her directly, and the Arizona Supreme Court upheld. The issue was then brought before the U.S. Supreme Court. The U.S. Supreme Court held that, in line with the Court's decision in *Mansell v. Mansell*, the Court could not order the service member to indemnify the former spouse for funds that the former spouse loses when the service member waives military retired pay for VA disability compensation.

Former spouse proponents have viewed this as a major setback for former spouses, especially coming on the heels of the frozen benefit rule. Based on this new ruling from the U.S. Supreme Court, courts cannot order a service member to indemnify a former spouse in the event that he or she waives military retired pay for VA disability compensation. And, when read in conjunction with *Mansell v. Mansell*, the Parties also cannot agree to an indemnification clause. Former spouse advocates view this as a taking of the former spouse's property with no notice or due process for the former spouse.

VI. The Survivor Benefit Plan

It is a fundamental of military divorce that military retired pay ceases to be paid upon a retiree's death. It can be argued that military retired pay is delayed compensation for services performed years ago – years while a couple pooled their resources – and is therefore marital property which the spouse (or former spouse) should enjoy even after the retiree's death. Unfortunately, Congress has decided the matter differently. Still, all is not lost for those left behind when a retiree dies. The Survivor Benefit Plan (SBP) is a qualified annuity program where the Department of Defense will pay certain amounts as a monthly annuity to certain persons related to the deceased retiree.[34]

SBP is available upon election (and payment of premiums) by the service member to the following classes of service members: (1) active duty retirees; (2) active duty service members with more than twenty (20) years of service creditable towards retirement; (3) reserve component (reserves and National Guard) retirees actually receiving retirement (generally those who have attained sixty [60] years of age, except for NDAA 2008); and reserve component members who have attained twenty (20) or more years of military service creditable towards retirement even though they have not yet attained sixty (60) years of age.[35]

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[34] An annuity is a periodic payment for the lifetime of the beneficiary. A qualified annuity may begin, end or modify upon certain conditions. *In re Marriage of Ziegler*, 207 Cal. App.3d 788 (Cal.App.1st Dist. 1989).
[35] 10 U.S.C. 1448(a)(1).

The SBP is a unitary benefit which the retiree must elect for either (1) a spouse, (2) a spouse and minor children, (3) a former spouse, (4) a former spouse and minor children, or (5) persons with an insurable interest in the retiree.[36]

The service member may select any amount of his retirement between a minimum of $300 or a maximum of his entire retired pay as the SBP base amount. However, if the service member is married at the time he becomes eligible to participate in the SBP, the service member will be automatically enrolled in the SBP at the maximum benefit amount with the spouse as the beneficiary. This election can only be changed to a lower amount with the written concurrence of the spouse.[37]

DFAS will pay the beneficiary (or beneficiaries) a total of 55% of the selected SBP base amount. For example, if the service member will receive $4,500.00 per month upon retirement, the beneficiary will receive 55% or $2,475.00. Whatever SBP amount the service member elects, the beneficiary receives this amount with annual cost of living adjustments commensurate with the annual Consumer Price Index.

SBP is not free. SBP premiums are *generally* 6.5% of the selected base amount.[38] These premiums are deducted from the service member's retired pay and are excluded from the service member's taxable income. There is no other way to pay the SBP premium.

When do you enroll? Service members retiring from active duty are automatically enrolled in the SBP at the *spouse and minor children* election at the maximum amount. This election pays the surviving spouse the SBP at the full base amount, and in the event the surviving spouse dies before the parties' minor children attain eighteen (18) years of age or twenty-two (22) years of age if full-time students, the SBP is paid in equal amounts to the children until such time as they emancipate (and the entire benefit shifts in equal installments to remaining minor children).

The military allows active duty service members to elect SBP coverage different from above upon retirement. However, any election other than the spouse and minor children at the

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[36] See 10 U.S.C. § 1450(a); Minor children who qualify as beneficiaries under the SBP are generally, unmarried, under age 18, or at least 18 but under 22 and pursuing a full-time course of study in a recognized educational institution, or incapable of self-support because of physical or mental incapacity, which existed before the 18th birthday or was incurred after age 18 but before age 22 while pursuing a full-time course of study; and are children of the service member, including an adopted children, stepchildren, foster children or recognized natural children. A stepchild, foster child or recognized natural child is eligible, so long as the child lived with the service member in a regular "parent-child" relationship. Grandchildren of the service member also qualify, subject to all the provisions above, if credible evidence shows that they live with the service member and are supported in a typical "parent-child" relationship.

[37] See 10 U.S.C. § 1448(a)(3)(A)

[38] Premiums increase minimally [0.00055 x number of minor children] when the service member elects spouse/former spouse and children SBP coverage.

maximum amount must be made with the spouse's written consent.[39] Reserve and National Guard members may elect SBP coverage upon attaining twenty (20) years of service creditable towards retirement or anytime in the twelve (12) month period prior to the retiree's sixtieth birthday (which is the date retired Reservists begin receiving military retired pay).[40]

The USFSPA allows the state courts the authority to award the SBP to a former spouse over the objection of the service member.[41] Whether a court can award the SBP is then a question of state law and in the discretion of the court. In some states, the legislature has made it clear that the court may order SBP over the objection of the service member.[42] In other states, the appellate courts have made it clear that the court may award the SBP over the service member's objection.[43]

If a service member elects SBP coverage for a spouse and the parties divorce, there must be a deliberate change from "spouse" to "former spouse", or the (former) spouse will lose SBP coverage. The SBP does not provide for an automatic change in status from spouse to former spouse incident to divorce. Thus, a SBP election in favor of a spouse who becomes a former spouse will provide no benefit to the former spouse. It is necessary that the service member request a change from spouse to former spouse coverage. The service member must make this request to the Defense Finance and Accounting Service (DFAS) within one year of the divorce decree or the filing date of the settlement agreement, or, alternatively, the former spouse may notify DFAS of the change (i.e. a "deemed election").

If the parties divorce and the former spouse should receive the SBP but neither a change nor a deemed election are filed with DFAS, does the former spouse have any recourse? If this occurs, the only recourse via the military is a letter appeal to the Board of Corrections Review for the particular military branch. If the failure to change the status of the former spouse lies with the military member and not by any fault, omission or failure to file a "deemed election" by the former spouse, there is some judicial authority for reopening the decree to provide other equitable remedies to the former spouse (e.g. life insurance).

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[39] 10 U.S.C. § 1448(a)(3)(A).

[40] 10 U.S.C. § 1448(a)(3)(B).

[41] See 10 U.S.C. § 1450(f)(4).

[42] *In re Marriage of Ziegler*, 207 Cal. App.3d 788 (Cal.App.1st Dist. 1989) (holding that California court was empowered pursuant to statute to award the Survivor Benefit Plan to a former spouse in a divorce); *Skeens v. Skeens*, 2000 Va. App. 687 (Va.Ct.App. Oct.3, 2000) (holding that Virginia trial court may order a party to designate a spouse or a former spouse as irrevocable beneficiary . . . of all or a portion of any survivor benefit or annuity plan of whatsoever nature pursuant to Virginia Code § 20-107.3(G)(2). Also, "the court, in its discretion, shall determine as between the parties, who shall bear the costs of maintaining such plan." *Id.*).

[43] *Franks v. Franks*, 86 So. 3d 1252 (Fla. Dist. Ct. App. 1st Dist. 2012) (holding that Florida courts have the discretion to order a spouse to maintain an annuity for a former spouse under the Survivor Benefit Plan); *Matthews v. Matthews*, 336 Md. 241, 250 (Md. 1994) (holing that 10 U.S.C. § 1450(f)(4) vests Maryland state courts with the power to require a participating member to designate a former spouse as a beneficiary under the SBP).

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REPRESENTING "HIGH PROFILE" CLIENTS IN FAMILY LAW CASES

BY:

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PREFACE

This article, one which attempts to identify certain pitfalls and rules of thumb particular to cases involving the "high profile client," stands in large part on the shoulders of articles previously written and published by the following attorneys at an American Bar Association Family Law Section meeting on the subject: Fred Glassman, Ellen W. Kessler, and Rick Robertson. It is with their permission that we include their valuable input and ideas herein.

ADVOCACY MEETS CELEBRITY: PRACTICE TIPS FOR THE REPRESENTATION OF THE HIGH PROFILE CLIENT

Who is the "high profile" client? Generally speaking, it is a celebrity, a well-known figure in the media or business world, or any individual who evokes greater-than-ordinary public attention or notoriety. A high profile client may also be an individual with extraordinarily high income who, while not in the public eye, often has other people managing certain everyday aspects of his or her life. Although not all high profile clients are in the movies, we rely on movie titles below to distinguish different categories of concern in the representation of this type of client.

A LIFE LESS ORDINARY

As anyone who has represented a high profile client will tell you, these types of clients bring with them particular areas of concern, but, at the end of the day, their concerns about their cases are remarkably similar to those of any other client whose life has suddenly been rendered less ordinary by the onset of a domestic case. Most high profile clients, like most other clients, want closure in the form of a speedier resolution than the courts can typically provide. Most high profile clients, like most other clients, feel their privacy being chipped away by public record pleadings and the burdensome process of discovery. Finally, most high profile clients, like most other clients, want an attorney who can be a doggedly protective force as well as available to them during the majority of hours on any particular day.

Apart from the special areas of concern that must be kept in mind when dealing with a high profile client – areas that will be discussed in greater detail below – perhaps the baseline difference, then, between a high profile client and another client is simply the level of expectation that must be managed. All clients come into a case with certain expectations, and it is part of an attorney's job to contour those expectations in accordance with legal and practical realities. Unlike a typical client, however, high profile clients may have a level of expectation that is unusually elevated due to the "instant gratification" factor that their careers and lifestyles have come to contain. High profile clients, perhaps more than other clients, require meetings during unusual hours, quicker turnaround on phone calls, and more detailed reassurances about the progress of their case. Establishing a reasonable level of expectation from the beginning is therefore essential to keeping and cultivating a high profile client's (as well as any other client's) satisfaction.

SIX DEGREES OF SEPARATION

One of the greatest challenges in representing a high profile client in a domestic case lies in the degrees of separation that often come between 1) the client and an attorney's communications with him or her; and 2) the client and the everyday management of his or her finances. Both kinds of divides have the potential to jeopardize the outcome of a case.

Counsel to high profile clients do not always have the benefit of direct communication with their clients, but must instead give messages or instructions through a third-party intermediary such as an agent. To avoid confusion and to best protect both attorney and client, written letters and / or e-mails ideally should be sent both to the third-party intermediary and directly to the client. Written communications are particularly crucial where deadlines are concerned. Although memorializing advice in writing tends to create something of a defensive posture, it avoids the "telephone" game of miscommunication that frequently results from indirect contact with a client and creates a point of reference for future client and attorney use.

Maintaining a good relationship with any third-party intermediary is key to effective representation for obvious communication reasons, but it may also help when it is time for a bill to be paid. Because of what are surely a multitude of rationales, high profile clients do not always address the issue of unpaid attorney's fees in a timely fashion. This phenomenon may stem from the fact that these clients frequently see the role of attorneys as an unpleasant side effect of the development of his or her art or commercial success. It may also be that a particular client views him - or herself as "good for it" in the end, and does not understand the immediate impact on an attorney's bottom line and office resources. Whatever the case may be, the unpaid bill clearly impacts the attorney and his or her ability to continue forward in the case, and an amicable relationship with a third-party intermediary can work to clear the obstacle of an unpaid bill much more quickly. Additionally, it is wise to be very clear about how the fee is to be paid. Even when very wealthy people say, "Don't worry about the cost," they may be upset with a bill if they did not anticipate the amount. Be sure to mention dollar amounts as early as possible to avoid "sticker shock" later on.

Apart from the problems inherent in indirect communication with a high profile client, challenges also arise from the client's unfamiliarity with the management of his or her everyday expenses. In a case handled by our firm, for example, it was the client's accountant, not the client himself, who alone had the requisite knowledge to verify the domestic relations financial affidavit submitted to the court. Unlike the typical family law client who can, at a glance, determine whether his or her spouse or ex- is artificially inflating the expenses of the parties' child based upon his or her own common sense and experience, high profile clients are often utterly at a loss as to what expenses they incur on a month-to-month basis – whether for their child or for something else. Moreover, the accountants or financial advisors employed by high profile clients are hired to pay bills and to manage money, not to make judgments or distinctions as to what expenses are being incurred. Proving finance-related elements of a case therefore requires much more effort and creativity than may be normal from the attorneys and financial consultants involved.

BROADCAST NEWS

The one aspect of a high profile case that unquestionably distinguishes it from other cases is the media interest component. While all clients are concerned about very private aspects of their lives being made part of the public record, very few need be concerned that anyone will actually go to the trouble of finding or further investigating such a public record. The contrary, of course, is true for a high profile client who is subject to media scrutiny. In a high profile case, public opinion can play a large role in the impact of a case on a client's life and career, if not in the disposition of the case itself. Confidentiality orders and contact with any public relations firm hired on the client's behalf are invaluable tools when publicity has the potential to figure largely in a case.

While the availability of confidentiality orders is somewhat constrained by constitutional issues such as the public's right of access to information, these kinds of orders will generally be entered by a court when both sides are able to agree to the information that warrants protection. If you do not have a proposed confidentiality order already on file with your office, try contacting colleagues to see if they have a form that they are willing to share with you. Because of their protective benefits, such orders should almost always be sought to shield a client's privacy in a high profile case.

As for the role of any public relations firm hired on the client's behalf, it is always useful to confer with the client and the PR firm itself as to how the client's public image can be benefitted as the case goes on. Often a "no comment" statement from an attorney creates a negative inference on behalf of the client, but any comments other than "no comment" should be carefully crafted in light of the client's wishes and the PR firm's expert advice. Since press images and sound bites from a high profile case are likely to have a longer shelf-life than the case itself, we must carefully consider not only how the publicity will affect the case, but also how it will affect the client's career and future opportunities.

THE INSIDER

Because high profile clients do not always have the same level of intimacy with the management of their finances or other details of their daily lives that other clients might have, experts are particularly useful in the development of a high profile case. Financial experts such as forensic accountants, for example, are invaluable in sorting out the myriad of transactions that occur on a monthly or yearly basis in the bank and credit card accounts of parties with extraordinarily high incomes. Custody experts such as psychologists may also be useful; this is particularly true where a high profile client's "image" as a public persona may be confused by the trier of fact with what is the client's much more private, but much more accurate, at-home persona. As always, the bottom-line is how to put on the most compelling case possible on behalf of the client. To the extent that such presentation can be improved with the use of experts, those experts should be retained and their testimony presented. In this sense, representation of a high profile client is not altogether different from any client who walks through an attorney's door.

In conclusion, high profile clients bring atypical challenges with them in the form of adequate attorney-client communication, never-ending public scrutiny, and effective fact development. Should these hurdles be met, and we hope that they might be better met with the suggestions set forth above, high profile clients are, in essence, no different from the other clients who form the basis of our practice. They, like every client, deserve our respect, attention, and best efforts.

Ultimately, adapting to the special concerns which arise in "high profile" cases is simply another challenge for family law practitioners who regularly strive to handle all types of personalities, emotions, and practical problems. Although these special clients may require additional degrees of perseverance and creativity from those who represent them, those extra efforts almost certainly will be rewarded in the form of a well presented case, a more satisfied client, and, last but not least, a hard earned and well deserved fee.

State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

STATE BAR SERIES

All That Heaven Allows (1955)
Star Crossed...It's Over Easy – Successfully Handling Difficult And Easy Divorces

Presented By:

Laura Wasser
Wasser, Cooperman and Mandles, P.C.
Los Angeles, CA


the evolution of dissolution
by Laura Wasser, Esq.
it's over easy®
the online divorce service

"All That Heaven Allows" (1955)

Star Crossed…it's over easy—Successfully Handling Difficult and Easy Divorces

Laura A. Wasser, Esq.
Wasser Cooperman and Mandles PC, Los Angeles
C.E.O. at It's Over Easy, the online divorce service

State Bar of Georgia Family Law Institute Presentation
May 25, 2019

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I. INTRODUCTION

After practicing Family Law for over 20 years, it is evident to me that now is the time to bring the philosophy used by me in my private practice and our firm generally to a greater population of individuals. Representing high profile/high net worth clients over time, in addition to the *pro bono* work I've done with nonprofit organizations catering to victims of domestic violence and folks embroiled in Family Law matters over the years, I understand that an access to justice platform needs to be generated for people in between.

During the course of my career, which often deals with child custody issues I have had two children. Although I was not married to the fathers of either of my two sons, we all function as co-parents. Being pregnant, giving birth, and raising children while practicing in a field which deals with the most devastating issues pertaining to child custody has been illuminating.

II. THE EVOLUTION OF DISSOLUTION

I'm Laura Wasser, attorney, author and founder of It's Over Easy, the online divorce service.
I'm the parent of two awesome kids. Their dads and I share custody and, so far, we all feel that we are doing pretty well.

I have been practicing Family Law for over 20 years. Family Law is pretty much a euphemism for Divorce Law.

Navigating child custody, support and division of assets is something I know a little bit about.

Over the years countless friends and clients have said to me, "If I only knew then what I know now…" long after their divorce was final, and how the wisdom of their experiences could have saved them heartache, aggravation and money.

Why does it take having gone through the divorce experience to know that things could have been handled better? Why has there been so little progress in effective resolution techniques? How can we change the way we approach and perceive divorce?

I truly believe that in this day and age, divorcing couples (or unmarried parents in custody disputes) are generally capable of working out many of their issues on their own. Many

are trying. Whether it be by virtue of mediation, collaborative practice, counselling or some combination of legal guidance through an admittedly archaic and complicated system, and direct communication as opposed to through expensive attorneys. An evolution is taking place; the evolution of dissolution.

In 2013, I wrote a book called, “It Doesn’t Have to Be That Way - How to Divorce Without Destroying Your Family or Bankrupting Yourself.”. The book gives some helpful hints on modern dissolution taking into account the hurdles faced by couples who want to separate their households and finances in a civil and cost-effective way.

When I first started working as a divorce lawyer I came to work at my dad’s firm. He knew what he was doing; not only had he and my mom had the most respectful divorce ever, they resolved their financial issues, worked effectively as co-parents to my brother and me and, to this day they are friends. Our firm has always promoted settlement-oriented resolution no matter the circumstances. We believe that agreements made between couples are much better than allowing a judge, who doesn’t know either spouse or their children, make decisions about big ticket life issues.

Most of our clients are wealthy and or famous. The number of zeros on their bank account balances may be different from what’s in other people’s, but the fear, anger and sadness are the same. In some ways, divorce is a great equalizer. Unless you have been through it before, you know little or nothing about the laws or the process and it can be frustrating and terrifying.

One of the reasons I wrote the book was to provide people who maybe couldn’t afford expensive attorneys some of the insight and information we provide our clients.

The next step naturally was an online divorce site. It’s Over Easy allows like-minded couples to separate and divorce from their own living rooms. Our team has developed an intuitive and simple process for uncontested divorces available to everyone. The platform is simple, and you go at your own pace. Throughout the testing phase the people who visited and used the site overwhelmingly told us that the forms, process and platform were easy to use.

We have child custody and co-parenting tools to assist with communication and creation of shared schedules. Our balance sheet programs will explain property allocation and we have created technology to assist with determination of the appropriate amounts of child and spousal support. If you hit a roadblock on any of the issues, we offer live chat with lawyer/mediators, financial advisors and mental health professionals who can help self-represented litigants

understand the law in their state so that together with their soon-to-be-ex-spouse, they can move towards resolution of the conflict.

The site also has tons of content for folks going through or thinking of going through the divorce process. From education comes reason. Our blog has articles written by professionals and actual people who have gone through the experience. We have tools and suggestions of ways to “think outside of the box” and avoid costly litigation.

Put simply, Its Over Easy gives people going through what is absolutely NOT an easy life experience the ability to be the masters of their own destiny and move through to the next stage of their lives more simply and inexpensively.

While it may seem obvious, those in the epicenter of a separation or divorce may not immediately recognize the importance of communication. Anyone about to embark on the path to separation would do well to remember to be reasonable and be compassionate – like a do unto others mantra. Each partner is scared, and even though one or the other may not be feeling the love now, presumably once upon a time they loved one another. The wisdom of my experience tells me there has to be the better way. I encourage people to take deep breaths, be adults, and try to work it out on their own. This is a legal transaction. Treat it as one. The entire process can last months, and many divorcing spouses may likely have some leftover funds to spend on therapy and attain the emotional healing they deserve. There is something quite empowering about being the masters of your own destiny. Remember, the money one doesn’t spend on attorneys is money they will have for their children’s futures. Dissolving a marriage as outlined above is the cleanest, the simplest, the easiest way to mediate divorce as quickly as possible.

At It’s Over Easy we take the idea of community seriously, which is why we created, The Index. The Index is a directory that provides resources and support unique to what our users might need when going through a divorce. Everything from fiscal planners, real estate agents and mental health practitioners to a great blow-dry, dating app, massage or meditation class. We believe that the process of recovery, renewal and reinvention requires support in many forms. OOtify, the mental health marketplace that connects people to mental health professionals, is one of our providers and we make good partners because we value the idea of effective mental health.

We have amassed an online destination rich with service providers for all new chapter lifestyle needs. The Index is a resource not just fitting for divorce, but for all relationship-life

stages. We call this the Evolution of Dissolution - a more cost effective, equitable and compassionate way to get divorced and move on to the next chapter.

III. HOW WE CHANGE THINGS

So many clients and friends have asked me over the years to put together a how to guide or course for divorce. The most common information requested both online and in office meetings and calls in my private practice is always, something along the lines of "What should I expect?" If only there were a course people could take to prep and carry them through the process. Creating an online divorce platform gave me yet another avenue to educate people on how to best approach divorce. The site takes users through Child Custody, Division of Assets and Support issues with helpful suggestions for information gathering and exchange, negotiation of terms and preparation of documents for court submission.

A new approach to divorce is necessary and appropriate for today's culture. Twenty-first Century families do not have the patience or negative energy to waste on long, drawn out expensive (financially and emotionally) divorces. We also would prefer to be the masters of our own destinies in terms of controlling the process. This point of view persists across boundaries of geography, class, race religion ethnic origin and sexual orientation.

Time - We are a culture on the move. We do not have landlines and we do not get paper mail. We cyber sign our documents. We invented on line dating. We text custody schedules and change our relationship status via social media. We research on the internet as opposed to in encyclopedias and we read our novels and newspapers on a device. Online shopping affords us the opportunity to see, click buy and wear within hours of purchase. Instant gratification. Today's couples do not have time to travel to a brick and mortar office, find parking and sit in meetings where someone who is likely past his or her prime lectures on all they know about their specialized field.

Money – We grew up in a service driven, results oriented economy so we tend to be both sophisticated about the things we pay for and impatient when the service isn't as promised. Whatever our income or our tastes, when we spend money, we want to see results. The current state of just about every family court department (assuming the county has a dedicated family law courtroom) is overcrowded and underperforming. Judicial officers do not have enough hours

in the day to read, hear and rule on complicated domestic matters. Self-help centers are often less than desirable if they do exist and *pro bono* agencies serve only the most desperate and destitute.

Control – This is a key factor for today's culture. We truly do insist on being the masters of our own destiny. The Wizard of Oz behind the velvet curtain is no longer acceptable to us. We raise our little girls to know that they are as good and strong and smart as their male counterparts and that no means no. Women are breadwinners and men are stay-at-home dads, and this is accepted by those who are accustomed to piloting the processes of their lives. We are not shy about establishing conditions and setting standards for ending our relationships, the disposition of property and the custody schedules of our children.

Health – We are also a culture who is most equated with caring for our physical and emotional well-being. Whether it is a fitness regime, diet or meditative breathing exercise we strive for the wellness which can be attained if one is willing to be present and adhere to realizing certain goals. "Conscious Uncoupling" as explained by Gwyneth Paltrow, "Gentle Separation" as explained by Jennifer Aniston's ex Justin Theroux, or "Peaceful Co-parenting" as touted by Kate Hudson all reflect that a healthier approach to separating is overwhelmingly desired.

So how do we accomplish this timely, affordable, controlled, healthy approach to divorce?

IV. L.A.W. BACKGROUND

My initials are L-A-W (Laura Allison Wasser). My parents tell me I was conceived the night they found out that my father passed the California Bar Exam. I am the child of divorce. My parents separated when I was 16 and my brother was 13. It was a classic example of practice what you preach in that my father Dennis Wasser is a renowned Family Law attorney in Los Angeles (Billie Jean King, Steven Spielberg, Clint Eastwood, Tom Cruise) and he and my mother had one of the most respectful, amicable divorces possible in the mid-1980's.

I was briefly married between my second and third years of law school. It was a beautiful (and costly) wedding at the Bel Air Hotel with 10 bridesmaids, 10 groomsmen, gorgeous flowers, photos etc. Shortly after graduating and taking the bar exam in 1994 we separated. We had nothing but a Jeep Cherokee, a pit bull named Raul and some credit card debt. I got it all and processed the divorce as my first assignment clerking for my father's firm while waiting for my

bar results. It was complicated even as a law school graduate who grew up with divorce law as a backdrop. The forms are antiquated and redundant, the law is not clearly laid out anywhere and there was a dearth of resources for adequate self-help.

Setting out on my career path I aimed to make things simpler for clients and focus on education, control and resolution via settlement in my practice. Because I was younger than many of my colleagues (the Southern California Family Law bar in the 1990's was populated by white Jewish men in their 50's and 60's.) I began to be the go-to referral for divorces, prenuptial agreements and paternity actions for young athletes, pop stars, actors and directors. Entertainment attorneys, business managers and agents would send their clients to me to sort through the issues and get the clients back on the field, in front of the camera or on tour. I was young, dressed and spoke like they did and had a visible tattoo. I was relatable and worked quickly to "fix "things. Britney Spears, Christina Aguilera, Gavin Rossdale, Ashton Kutcher, Shaquille O'Neal, Ryan Reynolds, Kelis, Travis Barker, Dwyane Wade, Hilary Duff, Johnny Knoxville were a few of my career establishing clients. Even pre-launch of TMZ in 2005, and other 24/7 online news sites, the practice of Family Law was changing in that high-profile and high-net-worth divorce was beginning to be handled differently. People did not want to drag or be dragged through the mud in the process of their dissolution. The saying any publicity is good publicity does not apply to parents with confused children.

My book "It Doesn't Have to be That Way – How to Divorce Without Destroying Your Family or Bankrupting Yourself" was the precursor to Gwyneth Paltrow and Chris Martin's Conscious Uncoupling in that the wisdom of my father's experience and my simplified, "young-ed down" philosophy were set out in a book for all to explore.

In 2018 we launched It's Over Easy the online divorce service. In addition to assistance with completion, service and filing of all necessary forms, It's Over Easy provides educational content on our Insights Blog and links to my weekly podcast *Divorce Sucks! with Laura Wasser,* and The Index which is a full directory of professionals and lifestyle specialists that users can access for support during and after divorce.

We really aim to change the way families approach divorce and are poised to do so now more than any other time in history.

V. MO' MONEY, MO' PROBLEMS – WHAT NOT TO DO

I will discuss my professional and personal observations and experiences and share anecdotes regarding what I have seen done well and how at times things can go horribly, horribly wrong.

Computer Literacy – The husband who copied an entire hard drive from his wife's computer and sent naked photos of her and her children's tennis coach, her plastic surgery invoices and a few choice catty emails about close friends of hers to the entire parent-teacher association of the private school her children attended.

Cat Custody - A few years ago I had a case where the couple fought bitterly over their three cats. In most states, pets are treated by Family Law courts as chattel not children. That is, there are no shared custody orders for animals; they will be awarded to one party of the other unless the parties agree otherwise. This couple opted to write up a shared use schedule and it worked for a while until the wife got a new live in boyfriend and the husband took issue with the way his darling cats were being treated when at his ex's house. Figuring he would teach the new couple a lesson, he ground up some Ex-lax and sprinkled it on the cats' food just before the transition. Cat vomit and diarrhea galore. We had a three-day evidentiary hearing complete with veterinarian testimony and many explicit photos of a once-white condominium in the Wilshire Corridor to determine causation and the appropriate damages sanction.

Tuxedo Graffiti - I had a client who was nominated for an Oscar this past year. He was separated and when his tux was delivered it came to his old address where wife was still residing. Wife graciously took it in and advised the delivery person that she would see that her husband got the ensemble well before he had to walk the red carpet. But not before she removed the tuxedo shirt and wrote CHEATER across the back of it in black sharpie!

Additional anecdotes regarding house destruction, sex tapes, drug and alcohol use/abuse, vaccination versus anti vax, bullying hamsters, female breadwinners and albatrosses, a burnt engagement ring and post separation purchase of the final collection of a fashion designer before his untimely death. None of these are appropriate ways to handle things with your ex or about to be ex. Sharing the anecdotes and exemplifying what not to do is not only entertaining but provides some perspective with regard to the process.

VI. HOW DO I KNOW?

Many clients have a difficult time deciding when to move on. When I speak to groups of people contemplating divorce, I ask them to examine the questions that freak us out in our moments of panic. I try to offer a framework for thinking about the practical implications of the word ("divorce") that they haven't said aloud yet: the law, the possibilities, the potential consequences, the approach that can see parents and children through the process as smoothly as possible and with dignity. We must counsel clients on how to think about the unthinkable. Suggest they structure their thinking this way, and everyone involved will be better off.

Sure, if they walked in on their husband in their bathtub with the nanny while the three-year-old naps in the next room, that's a pretty clear signal that the marriage is doomed. It's rarely either as sudden or as clear-cut as that. Most relationships hover on a precipice for years before one party or the other finally decides it is time to jump and coming to the decision isn't easy. You assume expectations when you enter a relationship like this, you take on responsibilities when you share a life with someone, and you know that the actions you take can have a ripple effect. So, it is unusual that a sudden epiphany or a single turning-point shows with dramatic clarity that one is not fulfilled and happy. (Even the wife walking in on the cheating husband, when asked, may admit that she can't remember the last time she and her husband had sex, or a night out together, or a good conversation.)

Instead, they go along not even saying the word ("divorce") aloud; barely whispering it to themselves. They admit that something is very wrong in this relationship, but the realization is frightening. And then, when one finally does say the word aloud even to him or herself, panic sets in. The questions hurtle through the brain: Do I move out, or does he? Who owns the bank account? What does the law say I should do? How will I make enough money to support the children and me on my own? What will be the impact on the kids? What kind of future will I have?

When an individual reaches that point where the fears for the future become less oppressive than the unhappiness of the present, that's when they know: This relationship is over. But how does one weigh the fears against the unhappiness? The way around that – and the most important thing to do right now – is to educate clients about the legal and practical facts vis-à-vis separation: why, when, how to do it. The reason is simple: The more they know, the more

control they will have over the process and the better a captain of the dissolution you will be. And as with just about everything having to do with divorce today, there are a range of choices confronting the couple – a range of decisions to make.

VII. PROSPECTIVE CLIENTS

This is also when people will begin to seek counsel if they have decided to "lawyer up". Perhaps as a start to shopping around for the right representation, or at least as a way to start gathering information on their choices. It may be that they intend to meet a couple of attorneys to get a feel for the process at the same time as asking for expert advice on the rules in a particular jurisdiction. On numerous occasions, I have met with a client for an initial consultation – explaining what to expect as the process goes forward and outlining how the person should get his/her ducks in a row – without being retained for another few months. Many lawyers will offer a free one-hour consultation if they think it may lead to being retained, while others will charge their hourly rate, which may indeed be worth it.

Start by explaining that different jurisdictions have different definitions for separation, and that the date of separation may trigger different consequences. In some states, for example, separation may be defined as one partner moving out of the residence; in another, it may mean that one spouse officially leaves the marriage bed. And the date on which this happens may affect one or the other spouse's liability. So, the first step is to find out the prevailing definition in your jurisdiction, and the second is you explaining that to clients in a way that they can understand.

Separating isn't just about moving parts. Once the separation decision has been made, both parties need to make a plan as to who will do what and which of them will go where. Or perhaps, as in the new "nesting" option, maybe both of them will go, moving to smaller separate digs so that whichever parent's week it is for custody, the kids get to stay at home; they are never uprooted.

VIII. IF THERE WERE A WHAT TO EXPECT WHEN YOU'RE DIVORCING BOOK

Divorce has three components if you have children; Child Custody, Division of Assets and Support. To explain to prospective clients what to expect, I will usually give them a bit of a guide on these three as follows:

A. **Custody** – Figure out what really works best for their kids and the parents. In that order. I encourage them to really put the children first and to treat their co-parent like their greatest ally. He/she is the other person in the universe who loves their kids as much as they do. In most cases children benefit from time with both parents. Make sure that you encourage the facilitation of the relationship with the other parent so that their kids can have this benefit. What does child custody look like in a separation/divorce scenario these days?

Obviously, this question must be answered on a case by case basis. Parents should take a look at their kids, their ages, their specific issues and interests. They should look at their spouse/co-parent, each of their living situations, career obligations and realistic time commitments. Many clients come to me even in this day and age with the assumption that shared custody will be like it was when they were growing up; kids with dad every other weekend and one night, mid-week for pizza or burgers and then drop off before bed. That is so not how it works any more.

First of all, the roles of Mom and Dad have evolved much differently since we were kids being shuttled off to Dad's for the weekend to watch cartoons and eat way more sugar than mom would have allowed at home. Our generation has seen the advent of Stay-at-home dads whether they are the home-maker spouse or simply based on career choices. Many more dads and moms have occupations which allow for work from home. This gives more time for hands on parenting for both parents. Look around the elementary school; these days there are as many dads as there are moms fulfilling the roles of room parents, field trip chaperones and attending the daytime plays, presentations and musical performances. Also, the sharing of responsibilities is different than it was when our dads were coming home from a long day of work to Mom's home cooked meal and clean house (if that even ever happened). Many or most families have two working parents which means that the kid stuff has to be more evenly distributed.

This often means that when a family is transitioning into a split, things are easier (or can be) as both parents know how to do things to care for their kids. Plenty of couples come to my office with custody already resolved. This is a huge accomplishment and speaks volumes as far

as how this divorce will go down. The more traditional couples where one works (or works more) and the other has always been the primary child care provider can get tricky. We will examine all sorts of custody arrangements and how to get there and modify the schedule as time passes and the children age.

Anecdote - Co-parenting our teenagers. Social media, vaping and Ubers are more than our parents ever had to deal with. We are living in an age where our teens are afforded a whole new panoply of temptations about which most of us know little to nothing about. The basics of "teenagedom" have remained the same; brooding, hormonal, intensely private, knowledge of absolutely everything (particularly how lame their parents and younger siblings are) and a frightening sense of invincibility when it comes to experimentation and curiosity. Inevitably the specifics have changed with the times. Social media rules, kids have a vastly expanded means of transportation and there is a new a bubble gum, watermelon, cotton candy deliciousness called vaping which is highly addictive, easy to obtain and completely baffling to nearly all of us over 40 (why would you want to inhale something that smells and tastes like a public bathroom deodorizer or bad 1990's incense?!)

Anyway, I would not dream of advising anyone on how to remedy the situation. I have only just begun to slog through the world of my teen's white lies, closed doors and vague afterschool plans or sleepovers. Here's what I do know though – I am not going through it alone. My ex and I are a united front in this and many co-parenting matters and I truly thank my lucky stars each day. We likely do better communicating and co-parenting in our current relationship than we ever would have had we stayed together. With parents in two separate homes, two separate agendas and two separate lives, it is far easier for a teenager to employ the smoke (excuse the pun) and mirrors of teen-subterfuge. In my practice I have seen several parents who have not successfully navigated the teen discipline thing. Communication is key. Counsel co-parents to stay informed and share information with their co-parent. Today there is a host of technology which can assist with co-parenting and for lack of a better word, tracking our kids. Coparenter, Curbi, Life360 are all apps that invite parents to work together and stay in tune with their kids and each other.

B. **Asset Division** – Once a person has decided to move forward with the dissolution process it is important to break the financial part of this process into bite sized pieces. I break down their financial picture into four sections:

What you have.

What you owe.

What you earn and;

What you spend

What if they don't know the answers to one or all four of these? That's where we embark upon The Discovery Process.

Discovery is a legal term for the process by which both parties educate themselves as to each other's individual circumstances – financial and otherwise. Declarations are made as to assets, debts, income, and expenses; documents must be produced; written questions – called interrogatories – must be answered; and depositions may be taken. This is where both partners, through their lawyers, gather all the information that will be central not just to resolving all issues in a divorce settlement or a divorce decree in court, but also for post-settlement "maintenance," which is another word for enforcement – for ensuring that both parties comply with the settlement that has been agreed to.

On the *Divorce Sucks!* podcast I host each week we do a bit at the end where we ask the guest candid questions about relationship status, favorite, break up song, the romantic comedy that they could watch on repeat, etc. We call them *The Divorce Sucks! Interrogatories* and swear in the guest before we begin our examination. This of course is all a riff on one of the discovery methods available to parties in any lawsuit. Discovery – or the exchange of information – is particularly essential in fact state mandated in dissolution actions.

I remember a client thought she had scored a major coup as she showed me her iPhone roll of blurry photos of her husband's bank records, credit card receipts, and investment statements. I felt bad when I had to tell her that her efforts at espionage had probably been pointless. Today, in almost every jurisdiction, disclosure is essential to cutting a deal, so acting like James Bond, is a waste of time. (Well, not entirely. If the documents produced had differed from those photographed, that might have been interesting.)

C. **Support** – Having the information about what each spouse earns and what the family spends are the key factors for support. Although spousal and child support vary by state/jurisdiction the underlying idea is that spouses continue to live in or as close to the lifestyle they lived during the marriage.

IX. THE DEAL

Structure a deal which makes financial and emotional sense. Neither spouse will get everything they want but we can help them to prioritize the things that are important and measure those against ones which aren't. One of the most important things to communicate is to be reasonable. I explain that this is a business transaction and encourage people to treat it like one.

Also people need to be realistic in terms of what they have learned about their situation, what will work best for their family in its new form. With regard to custody, what will make the most sense for the kids? As for money, what makes sense? Wanting to keep the family residence and being able to afford it are two different things. Although nobody can see the future, we can help clients plan for it by being realistic and conservative in terms of the resolution of issues. Structuring custody, assets and support in such a way that your client can comfortably move on is the best service a problem solving attorney can provide.

X. THE NEXT CHAPTER

Soon-to-be-former-spouses need to think about their next chapter. How to be the best in the next phase of their life. Where to live/how to pack or reorganize/sell or donate personal possessions. How to budget- start new. Dating and dealing with their ex dating, co-parenting and blended families.

Anecdote - Vacation with the new girlfriend – As I type this I am on a hotel room balcony overlooking South Beach Miami. My 13-year-old and 9-year-old are beneath me at the beach playing in the surf with….my ex's 34-year-old girlfriend. Really. She is lovely. They love her and she is genuinely interested in them. We planned spring break and because of work schedules my ex and I were both only free to travel during the same dates. Neither of us wanted to miss time away with the kids and he wanted to get some time away with a woman he had been

dating for a few months. Joint vacation – problem solved. Totally practicing what I preach. More on this as the story develops….

XI. CONCLUSION

At a time in our history when family dynamics are finally taking into consideration blended families, next chapters and villages raising children, we as Family Law practitioners will be an integral part of going through the process for not just the parties to a divorce, but anyone who it touches; friends, siblings, parents, new partners, work colleagues. We are their guide It is a guide and a What to Expect When You are Divorcing which can hopefully assist the client during a frightening, emotionally challenging time.

XII. AUDIENCE QUSTIONS

The Snake Pit (1948)
Caselaw And Legislative Update

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IV. PART FOUR: Courtney E. Dixon

PART ONE: J. Ashley Sawyer

Cook v. Campbell-Cook, 2019 Ga. App. LEXIS 151 (3/8/19)
Contempt, 9-15-14 Attorney's Fees

Wife filed a motion for contempt against husband alleging he violated several terms of their divorce decree. In his Answer, husband denied all of wife's substantive allegations. After the trial, the court found the husband in contempt, the wife moved for attorney's fees pursuant to O.C.G.A. § 9-15-14(b) asserting that the husband's defenses to her contempt lacked substantial justification and were frivolous. The court granted the motion for attorney's fees. The Husband appealed the fee award and contended the trial court erred by 1) failing to make specific findings of fact as to the conduct upon which the award of attorney's fees was based; 2) failing to sufficiently assess whether the attorney's fees were reasonable and necessary and were incurred due to husband's sanctionable conduct; 3) finding that all of his defenses to the contempt action lacked substantial justification; and 4) awarding fees which were incurred before husband asserted any defenses in the action.

The Court of Appeals held that the trial court made sufficient findings of fact to support the award of fees and further did not abused its discretion by finding that all of Husband's defenses to the contempt lacked substantial justification. The trial court's order stated that the court looked to each of the defenses asserted by the husband to determine whether, in fact, they lacked substantial justification and explained its basis for concluding that each of them did so. Additionally, at the final hearing on the motion for fees, the court discussed each defense separately and explained how each one met the required standard. In support of his contention that his defenses to the contempt motion did not lack substantial justification, husband cited the fact that the court allowed him additional time to pay certain expenses and take certain action to purge himself of contempt. The Court of Appeals did not find these allowances by the trial court proved that husband had asserted a justifiable defense to wife's contempt claims.

The Court of Appeals agreed that the trial court did not sufficiently consider the reasonableness and necessity of the all of the fees awarded to wife. While there was evidence of reasonableness and necessity introduced (wife's counsel's affidavit, billing statements, her testimony regarding same, and husband's counsel's lengthy cross-examination of the wife's counsel regarding her fees) this evidence only supported the award of *some* of the attorney's fees incurred. The appellate record did not include sufficient proof of the costs and the reasonableness of *all* of the fees awarded. For example, the court awarded attorney fees that the wife incurred from September 29, 2017 through October 26, 2017, but that bill was not a part of the record. And the hearing testimony related thereto was not sufficiently detailed to permit meaningful appellate review of an award of those particular fees. The award was therefore vacated and remanded for the trial court to determine the amount of reasonable and necessary attorney fees and to indicate the basis for its award.

Lastly, the Court of Appeals found that because the trial court awarded attorney fees based on the conclusion that husband's defenses lacked substantial justification, and he first asserted defenses in the contempt action in the answer he filed on July 20, 2017, the trial court erred by awarding attorney fees incurred by wife prior to July 20, 2017.

Price v. Grehofsky, 2019 Ga. App. LEXIS 145 (3/7/19)
Stepparent Adoption, Equal Protection

Stepmother appealed the trial court's denial of her petition to adopt her stepdaughter and to terminate the parental rights of the child's biological mother. On appeal, the stepmother argued that the trial court erred in its application of the statute applicable to stepparent adoptions (O.C.G.A. § 19-8-10(b)) in that there was no justifiable cause for mother's failure to communicate with and provide support for the child and the adoption was in the child's best interest.

The child's biological mother was a stay-at-home mom for several years without any independent income. The trial court found that even if the biological mother had the money for support payments, she did not know where father resided with the child and would not have known where to send the payments (despite her attempts to contact the father and determine his location). With regard to mother's failure to communicate with the child, the trial court found the mother attempted to contact father multiple times, but father stonewalled her efforts to communicate by not accepting her calls, letters, cards and gifts for the child. Given this, and the trial court's broad discretion in this area, the Court of Appeals held the trial court was authorized to find the mother had justifiable cause for her failure to support and communicate with the child.

The Court of Appeals further found that the trial court acted within its discretion in finding that the termination was in the best interest of the child, another area in which the trial court has broad discretion, and which may not be disturbed unless plain abuse is found. The mother testified she had no intention of removing the child from father and stepmother's care, that she had been clean and sober for years, that she recently obtained a job and was a good mother to the two children in her care. This evidence, coupled with the mother's efforts to communicate with the child, was enough to find the adoption was not in the child's best interest.

Stepmother argued that the trial court's decision violated the Equal Protection Clause. Stepmother also argued that the trial court was overly deferential to mother's liberty interest in the child despite the fact that the child's best interests are of equal constitutional weight. Appellate courts will not rule on a constitutional question unless it clearly appears in the record that the trial court distinctly ruled on the point. As the record in the case contained no such ruling, the Court of Appeals declined to rule on this issue.

Hill v. Burnett, 2019 Ga. App. LEXIS 138 (3/7/19)
Attorney's Fees, 9-15-14, Same-Sex Parents

Hill and Burnett, a same sex couple, were together from 2013 to 2016. They did not marry subsequent to the *Obergefell* decision. In 2014, two twin girls were born to Burnett. Hill never adopted the children although the couple considered doing so. Hill had a close, loving relationship with the children. They called her "Momma." After the couple broke-up in 2016, Hill filed petitions seeking to legitimate the girls and establish parenting time and custodial rights. The trial court dismissed the petitions for lack of standing and Burnett moved for attorney's fees under O.C.G.A. § 9-15-14(a). The court awarded the fees in full (approximately $25,000.00). In her appeal, Hill argued that the trial court erred in awarding attorney's fees to Burnett. She also contended the trial court erred in requiring her, rather than her attorney, to pay the award and in setting a deadline for payment.

Hill maintained that the arguments of her petition were made in a good faith attempt to establish a new theory of law in Georgia for which the court cannot award attorney's fees pursuant to O.C.G.A. § 9-15-14(c). Hill sought to establish standing and to gain custody and parenting time under various legal theories. Although these theories were from other jurisdictions (primarily Wisconsin), Georgia courts can consider law and decisions from other jurisdictions as persuasive authority. The appellate court concluded that a "reasonable lawyer" may have read the cited authority from other jurisdictions and concluded they offered some support for Hill's claims. The law does not require Hill to prevail, only that she present a justiciable issue that might reasonably be believed the Court would accept. Given this, the appellate court found the trial court erred to the extent it awarded fees as to Hill's claims for custody and parenting time.

However, Hill pointed to no authority that would qualify as recognized persuasive authority in connection with her claim for legitimation. Georgia's legitimation statute pertains to biological fathers only and defines that term. Further, since the two never married, there was no argument for legitimacy under O.C.G.A. § 19-7-20(c) (rendering a child born out of wedlock legitimized when the parents later marry). As Hill cited no law from any jurisdiction to support her claim for legitimation, the appellate court affirmed the trial court's award of fees to the extent they were incurred in defending against the legitimation claim. However, the case was remanded to determine the portion of the fees which should be allocated to such defense.

Lastly, O.C.G.A. § 9-15-14(a) makes clear that fees can be asserted against a party (as opposed to the lawyer) so long as that assessment is just, which the appellate court found to be the case in the context of Hill's legitimation claim. Hill cited no authority barring a trial judge from ordering a money judgment be paid by a date certain, and the court found no error is that regard.

Hewlett v. Hewlett, 2019 Ga. App. LEXIS 143 (3/7/19)
Adoption, Termination of Parental Rights, Grandparent Custody

The biological mother appealed an order terminating her parental rights and granting an adoption petition filed by her child's maternal grandparents. The mother argued on appeal that the trial court erred because its order was not supported by clear and convincing evidence of her parental unfitness pursuant to former O.C.G.A. § 15-11-310, which was in effect at the time.

The child was born with evidence of barbiturates in his system causing DFCS to intervene. To avoid foster care, the grandparents became the temporary guardians of the child. In the four years following the child's birth, the mother suffered from a mental condition without medication and struggled with illegal drug use resulting in periodic homelessness and incarceration before entering and successfully completing a mental-health court program. In the years prior to the adoption petition, the mother had remained drug-free, obtained and maintained stable housing, and stabilized her mental health. Further, with the help of the grandparents, she established and maintained a bond with the child through regular visitation.

The appellate court found there was no evidence presented that harm would result from the child remaining with the grandparents in the current guardianship arrangement nor was there any evidence that continuing a parental relationship, in some form, with the mother would harm the child. As such, the Court of Appeals reversed the judgment of the trial court.

Schaffeld v. Schaffeld, 2019 Ga. App. LEXIS 141 (3/7/19)
Contempt, Meretricious Relationship, Alimony

As a part of the parties' divorce settlement agreement, husband was ordered to pay wife alimony with the payments to cease if the wife remarried or entered into a meretricious relationship. Four years after the divorce, husband decided the ex-wife had entered into such a relationship and stopped paying his monthly alimony obligation. Wife filed contempt, which was denied, as well as her motion for new trial. Wife appealed and argued that the trial court erred in finding her right to alimony had terminated due to her involvement in a meretricious relationship.

The record showed that the Wife was is in an exclusive relationship with a physician who practiced medicine some 45 miles away from her residence. They had overnight visits and spent as much time together as they could. However, there was no "set schedule" and the Wife did not "know from weekend to weekend if she'd be able to see him or not." They had taken trips together and spent holidays together. He never lived continuously with the wife. He did not keep clothes or a toothbrush at her house. He did not receive mail at her house or pay her bills. He was not registered to vote at her house. The court found that although the wife and her romantic partner did not spend every night together, they "lived together when his medical clinic was closed Saturday through Monday."

The finding of contempt turned on the meaning of the term "meretricious relationship," which is a stable, marriage-like relationship in which the parties cohabit knowing that a lawful marriage between them does not exist. Georgia courts have consistently held that a meretricious relationship is one that involves continuous, open cohabitation and in which the parties are either sexually intimate or share living expenses. Contrary to the trial court's determination, "continuously" means "in a continuous manner without interruption," which was not present in the instant case. The appellate court therefore reversed and remanded the case.

Grailer v. Jones, 2019 Ga. App. LEXIS 135 (3/6/19)
Modification of Custody, Child Support, Attorney's Fees, Affidavit of Election, Contempt

This case has a protracted procedural history, which is summarized below:

- Pursuant to the parties' divorce settlement agreement, both parents were awarded joint physical and joint legal custody of their child.
- The father subsequently filed a modification petition, and the superior court entered an order, again granting the parties joint physical and legal custody.
- The following year, the mother filed a custody modification, which the superior court dismissed, finding that there was no material change in circumstances.
- Three years later, the father filed a petition to modify custody, attaching an affidavit in which the child elected to live with father. The following month, the mother filed an affidavit in which the child elected to live with the mother. The case was transferred to juvenile court, which entered an order granting the parties joint legal custody, but granting primary physical custody to the father. The juvenile court denied the mother's subsequent motion for new trial, and the mother appealed.
- Nearly a year and half later, the mother filed a petition for modification of custody. The father moved to dismiss the petition, arguing that the trial court lacked jurisdiction because the previous modification order was still on appeal, and the trial court granted the dismissal.

- Some months later, the Court of Appeals affirmed the denial of the mother's motion for new trial, vacated the award of attorney fees to the father because the juvenile court did not specify the basis therefor, and remanded the case on the attorney fee issue.
- Immediately thereafter, Mother filed in superior court her third petition for modification, attaching an affidavit in which the child elected to live with her. The superior court transferred the case to juvenile court again.
- The father filed a counterclaim for modification of custody requesting to reduce visitation with Mother and sought an award of attorney fees under O.C.G.A. §§ 19-9-3 (g) and 9-15-14. After a temporary hearing, the juvenile court transferred temporary primary physical custody of the child to the mother and gave father parenting time.
- The father later filed a motion for contempt alleging that mother withheld the child from the father as ordered. Soon thereafter, the juvenile court entered an emergency order finding the mother in willful contempt. The father then filed additional contempt motions alleging that the mother had interfered with his custody and/or visitation.
- The juvenile court conducted a hearing on the parties' outstanding motions. After the mother rested her case, the father made an oral motion to dismiss her modification petition on the basis that she had withheld custody from him in violation of custody orders, citing O.C.G.A. § 19-9-24 as a basis for the dismissal. The juvenile court granted the motion.
- Two months later, the father again filed a contempt motion alleging that the mother had interfered with his visitation. Four days later, the mother filed a petition for a TPO; the superior court dismissed the petition because the mother elected not to go forward with it.
- That same month, the juvenile court entered a final order in which it dismissed mother's motions (modification and contempt) because it found she withheld the child from father over 35 times, granted father's modification claim, gave him primary physical, required mother to pay child support, and awarded father attorneys fees per O.C.G.A. § 19-9-3 and § 9-15-14.
- The next month, mother filed a second TPO. The superior court granted it and the child was removed from father's custody.
- Father then filed a contempt in juvenile court, alleging mother interfered with his custody by obtaining the TPO. Following a hearing, the juvenile court entered an order on the father's contempt motions, finding the mother in willful contempt for interfering with the father's custody. The court did not find her in contempt for obtaining the TPO. However, the court determined that the mother's petition for a TPO was based on the same allegations made during the previous trial between the parties, and it vacated the TPO. The court ordered the mother to pay attorney fees to the father pursuant to O.C.G.A. § 19-6-2 and ordered the mother's immediate incarceration for 15 days or until she paid the attorney fees.
- The next day, the juvenile court entered an amended order on the father's contempt motion, reinstating the TPO so that the magistrate judge sitting by designation for the superior court could preside over the TPO matter.
- Approximately a month later, the juvenile court withdrew the incarceration order.

Analysis (affirmed in part, reversed in part, vacated in part, and remanded):

1. Mother contended that the juvenile court erred by dismissing her modification petition. The mother contended that O.C.G.A. § 19-9-24 involves subject matter jurisdiction, which is an affirmative defense that must be asserted in either a responsive pleading or by separate motion. The Court of Appeals found this argument to be without merit. Mother did not cite any legal authority to support her contention that a parent must assert in writing his right

to dismissal under O.C.G.A. § 19-9-24 before the custody hearing and the Code section imposes no such requirement.

2. Mother argued that the juvenile court erred by failing to honor the child's affidavit of election to live with her and granting physical custody to the father. While the affidavit in this case was presumptive, the appellate court held that the court can forgo honoring the affidavit if the court determines the election not to be in the child's best interest, which the court did and provided a basis for such in its order.
3. Mother contends that the juvenile court abused its discretion by finding her in contempt for interfering with the father's visitation. The record supports the trial court's finding that the mother withheld and interfered with visitation. The appellate court found the mother's argument that she was not in contempt because the child refused to visit with his father unpersuasive.
4. Mother argued that the juvenile court erred by modifying her child support obligation because the father never sought a modification, he failed to demonstrate a substantial change in the parents' income or financial status, and the juvenile court failed to specify in the order the basis for modification. As neither the order nor the addendum listed the basis for the modification, reflected a finding that the juvenile court found a substantial change in either the parents' income or financial status or the needs of the child, or stated whether the modification was in the child's best interest, the appellate court vacated that portion of the juvenile court's order addressing child support.
5. Mother argued the juvenile court erred by awarding the father attorney fees under O.C.G.A. § 9-15-14(b) because (a) he did not file a separate motion for the fees, instead seeking them in a counterclaim; (b) no detailed billing records were presented and no evidentiary hearing was held; and (c) the court failed to specify the conduct justifying the award or to apportion the award. Pretermitting whether the father's failure to file a separate motion for fees or the juvenile court's failure to hold an evidentiary hearing precluded the award, the appellate court found that the trial court's failure to include the necessary factual findings or the statutory basis for the award required that it be vacated.
6. Mother argued that the juvenile court erred by entering the order incarcerating her for contempt and making the payment of attorney fees a condition for purging the contempt because the order was ambiguous and failed to allow her a reasonable time to pay the fees. The juvenile court had withdrawn the incarceration order at the time of the appeal and thus the enumeration was held moot.
7. Mother contended that the juvenile court erred by awarding the father attorney fees pursuant to O.C.G.A. § 19-6-2. The appellate court held that O.C.G.A. § 19-6-2 does not apply to a petition for modification of child custody or to contempt proceedings unless the allegations are for failure to comply with the original alimony or divorce decree. Since the trial court found the mother in contempt for violating a custody order entered subsequent to the original decree, the appellate court held that father was not entitled to attorney fees based on O.C.G.A. § 19-6-2.

Johnson v. Johnson, 2019 Ga. App. LEXIS 123 (3/5/19)
Contempt, Visitation, Child Care Expenses

Mother filed a contempt petition against her ex-husband (the child's Father) alleging, among other things, that he was in contempt of the provision of their divorce decree governing visitation and support of the parties' adult son. Following an evidentiary hearing, which was not transcribed, the

trial court entered an order finding Father in contempt, ordered him to abide by the provisions of the decree that required him to pay 70 percent of the childcare costs while mother was working, and awarded mother funds for previously incurred childcare costs. Father appealed, challenging the findings of contempt and the evidentiary basis for the trial court's award of the childcare costs.

As to visitation, the parties' settlement agreement provided: "Husband shall be entitled to parenting time with [R. J.] on alternating weekends from 6:00 P. M. on Friday through 6:00 P. M. on Sunday. … The Husband shall be entitled to parenting time with [R. J.] on each Wednesday (or other mutually convenient weekday) afternoon for dinner." Under the plain language of the agreement, Father was "entitled" to visitation with his son, but nothing in the language of the decree made such visitation compulsory. Because Father could not be compelled to visit with his son, he did not violate the terms of the decree by failing to exercise his visitation privileges, and the trial court abused its discretion in finding Father in contempt of this provision of the decree.

While the trial court ordered Father to pay 70 percent of any costs Mother incurred from hiring childcare while she worked during the times Father had been granted visitation, that award was clearly authorized by the provision of the decree and was not imposed as a sanction for Father's failure to visit with his son or to force compliance with that provision. Accordingly, the appellate court reversed the trial court's order finding father in contempt for failing to exercise his visitation rights, but because father did not face any sanctions, and any caretaker costs he could be held partly responsible for during his forfeited visitation time were authorized as part of the decree, the remainder of that provision was affirmed.

Father further argued that the evidence did not support the trial court's award against him for failure to pay childcare costs because Mother failed to present sufficient evidence that the costs were actual or necessary to her employment. The appellate court was unable to review this contention because the proceedings were not transcribed, the exhibits introduced at the hearing could not be located, and Father did not attempt to utilize any authorized means to re-create the evidence.

Ford v. Ford, 2019 Ga. App. LEXIS 111 (3/4/2019)
Attorney's Fees, Waiver of Alimony

Husband and Wife entered into a settlement agreement in their divorce case, which contained a standard provision waiving alimony as well as "any other claims of any nature whatsoever each may have against the other for any payment in the nature of alimony…" The settlement agreement also contained a provision entitled "Attorney Fees," which stated the judge would determine the issue of attorney fees and the parties would submit letter briefs in that regard. The trial court entered a final decree of divorce incorporating the parties' settlement agreement. Subsequently, the wife submitted a letter brief asking the trial court to award her attorney fees under both O.C.G.A. § 19-6-2 and O.C.G.A. § 9-15-14(b). The husband filed a letter brief in response, in which he argued that the wife was not entitled to attorney fees under either section. He did not mention the settlement agreement's waiver-of-alimony provision in his brief. The trial court awarded the wife attorney fees under O.C.G.A. § 19-6-2 but denied her request for attorney fees under O.C.G.A. § 9-15-14. The husband moved for reconsideration of the award of attorney fees under O.C.G.A. § 19-6-2 on the ground that the award constituted alimony in violation of the terms of the parties' settlement agreement. The trial court had not ruled on the motion for reconsideration when the husband petitioned for a discretionary appeal from the attorney fee award.

The wife argued that the husband did not adequately preserve for appellate review the issue of whether the settlement agreement precluded the attorney fees award. The husband made this argument in his motion for reconsideration, but the trial court did not rule on that motion. While issues which have not been ruled on by the trial court may not be raised on appeal, the Court of Appeals held this rule did not prevent the husband from challenging the sufficiency of the evidence supporting the attorney fees award by the trial court, and the husband could argue the effect of the settlement agreement in making that challenge.

Where there is ambiguity regarding a contractual term of a settlement agreement, as was the case here, the court is required to apply the rules of contract construction. In doing so, the court must avoid any construction that would render any provision of the contract language meaningless. Wife argued for a construction that would exempt from the "Alimony" provision of the settlement agreement alimony in the form of attorney fees under O.C.G.A. § 19-6-2. Such construction would render meaningless the portion of the provision stating that the parties waive their right to "any … claims of any nature whatsoever … for any payment in the nature of alimony" because an award of attorney's fees under O.C.G.A. § 19-6-2 is a form of alimony. The broadly worded waiver left no room for the exception the wife proposed. The husband argued for a construction that would exempt from the "Attorney Fees" provision of the settlement agreement fees awarded under O.C.G.A. § 19-6-2. This construction would not render meaningless any portions of the "Attorney Fees" provision and gives meaning to both the "Alimony" and "Attorney Fees" provisions. The settlement agreement provided the parties with a method for pursuing claims for attorney fees, but this method did not extend to attorney fees waived by the parties (namely, attorney fees awarded under O.C.G.A. § 19-6-2 that are in the nature of alimony). The Court of Appeals therefore reversed the award of attorney's fees to Wife.

Plummer v. Plummer, 305 Ga. 23 (2019)
Custody Modification, UCCJEA, Jurisdiction

During the parties' divorce case, Mother (who had primary custody of the parties' child) moved to Florida. Two years after the divorce concluded, Father filed a modification of custody action while he was still living in Georgia. After serving Mother, but prior to a Temporary Order being issued in the case, Father moved to Virginia pursuant to an assignment with the U.S. Navy. Subsequently, Mother filed a motion to dismiss for lack of jurisdiction. After a hearing regarding same, the trial court determined 1) that it had lost subject matter jurisdiction pursuant to O.C.G.A. § 19-9-2, and 2) that because Mother lived in Florida and Father lived in Virginia, the court lost exclusive continuing jurisdiction over the child custody determination. Father appealed and the Court of Appeals affirmed. The Supreme Court granted certiorari to determine whether the trial court properly found it was without jurisdiction to rule on the custody modification.

In accordance with O.C.G.A. § 19-9-2, the court has jurisdiction to modify a child custody determination unless and until there is a judicial finding that neither the child nor the child's parents reside in the state. Father argued that this section should be interpreted in harmony with other states' interpretations, which concluded that the jurisdictional question is determined as of the time a child custody modification action is filed. Mother asserted that the court should apply the plain meaning of the statute, and that Georgia lost its exclusive, continuing jurisdiction when she, father, and the child no longer lived in Georgia.

Generally, in domestic relations cases, the Georgia Supreme Court has held that jurisdiction, whether subject matter or personal, is dependent upon the state of things at the time that an action is filed and nothing in O.C.G.A. § 19-9-2 is inconsistent with that general rule. Therefore, the Court of Appeals held the trial court had jurisdiction over the child custody modification action because Father resided in Georgia when the modification action was filed and that jurisdiction was not lost when Father later transferred to Virginia. The judgment of the trial court was reversed.

PART TWO: Rebeca Salmon

REID v. REID, 348 Ga. App. 550 (2019)
Attorney's Fees

Husband filed application for discretionary review of fee award to Wife for attorney's fees in divorce action. Husband contented the trial court erred in awarding the fees because 1) the trial court failed to identify any sanctionable conduct for an award of fees under O.C.G.A. § 9-15-14 and 2) there was no evidence that would have enabled the trial court to determine the amount of fees. Husband also argues that the parties' financial circumstances did not warrant an award of fees under O.C.G.A. § 19-6-2.

The Court of Appeals affirmed that Wife was entitled to award of attorney's fees under O.C.G.A. § 19-6-2 and O.C.G.A. § 9-5-14 authorizing fees in divorce action, per court's discretion. The Court found that the trial court has sufficiently identified sanctionable conduct due to Husband's positions throughout the action that lacked substantial justification. The Court also held that the trial court was permitted to consider settlement offers when evaluating whether Husband delayed the proceedings. The Court vacated the dollar amount awarded because the trial court failed to demonstrate how it arrived at that exact amount, and did not demonstrate how the fees were related to the sanctionable conduct. The Court remanded the case for further proceedings, limiting the fee award to those fees incurred because of the sanctionable conduct.

HERBERT v. JORDAN, 348 Ga. App. 538 (2019)
Temporary Protective Order

In this consolidated case, Damyera Herbert filed appeals of 12-month TPOs granted to Melissa Jordan and Charles Gooden. Herbert contented the trial court erred in both cases by 1) moving forward with a hearing after the case was dismissed as a matter of law, 2) refusing to allow Herbert to argue her counterclaim at the same hearing, 3) granting TPOs that prohibited contact with Jordan's and Gooden's unidentified children, and 4) granting TPOs that prohibited contact with Jordan's and Gooden's immediate family members.

The Court of Appeals reversed the granting of the TPOs under O.C.G.A. § 16-5-94, and held that the original TPO petitions had been dismissed as a matter of law, due to the trial court's failure to hold a hearing within 30 days, as required by O.C.G.A. § 19-13-3. The Court found that the parties had not agreed to any continuance of a hearing past the 30 days requirement, and therefore that the original TPO petitions had been dismissed as a matter of law under O.C.G.A. § 19-13-3(c) when

a final hearing was not held within the 30-day requirement. Therefore, the trial court did not have the authority to issue the 12-month TPOs at the hearing held 35 days after the filing of the original TPO petitions.

DEP'T OF HUMAN SERVS V. WYTTENBACH, 348 Ga. App. 810 (2019)
Adoption, Jurisdiction, Juvenile Court

In this adoption matter, the Department of Human Services appealed the superior court's order, which terminated the parental rights of the mother, legal father, and biological father of two minor children, and granted temporary physical custody of the minor children to the foster parents. The order also enjoined the Department from interfering with the physical placement of the children with the foster parents, and enjoined the Department from allowing the biological father or any of his relatives to have contact or visitation with the children. The Department contended that the superior court 1) did not have jurisdiction over the matter because the juvenile court had jurisdiction over the termination of parental rights matter prior to the superior court and 2) erred in splitting legal and physical custody between the foster parents and the Department.

The foster parents moved to dismiss the appeal because 1) the Department was not a party to the adoption action, 2) the order was not appealable under O.C.G.A. § 5-6-34(a)(1) because the action was still pending and 3) the Department failed to transmit the juvenile court record from the dependency, termination of parental rights, and legitimation actions concerning the minor children.

The Court of Appeals held that the Department did have standing to appeal the injunctive portion of the order, as the subject of that injunction, and that the order was appealable under O.C.G.A. § 5-6-34(a)(11). The Court also held that the Department's appeal could not be dismissed merely for failing to transfer the record. The Court rejected the Department's priority jurisdiction argument, and held that due to a change in the wording of the statute, the superior court's jurisdiction to terminate parental rights in an adoption or legitimation action was not affected by the juvenile court's jurisdiction, pursuant to O.C.G.A. § 15-11-10(3)(D). However, the Court held that the superior court could not enjoin the Department from interfering with the physical placement of the minor children while at the same time maintaining that legal custody over the minor children was granted to the Department. Therefore, the Court vacated the order and remanded the case to superior court for a new order to be entered consistent with the opinion.

IN THE INTEREST OF A.H., 348 Ga. App. 817 (2019)
Juvenile Court, Dependency, Termination of Parental Rights

DFCS appealed the order granting foster parents' motion for placement following termination of parental rights and prohibiting DFCS from removing child from the home. DFCS contended that the juvenile court erred by infringing on DFCS's right as the legal custodian to determine placement of minor child.

The Court of Appeals vacated and remanded due to failure of juvenile court to apply the proper statute. The Court found that the juvenile court should have applied O.C.G.A. § 15-11-321 when

determining placement and legal custody. The Court held that the juvenile court did not cite the statute nor fully consider the five factors detailed in the statute. Therefore, the order was vacated and remanded to enter an order consistent with the statute.

ELMORE v. CLAY, 348 Ga. App. 625 (2019)
Grandparent Visitation

In this adoption action filed by the stepmother of a minor child, stepmother appealed the granting of visitation rights to the child's paternal grandmother and maternal grandfather, who are married to each other. The stepmother contended that the trial court erred in granting grandparent visitation rights against the wishes of the stepmother/adoptive mother and the father.

The Court of Appeals found that the record did not properly show that the trial court exercised its discretion in granting visitation rights, but merely indicated the trial court believed it was required to grant the visitation rights. The Court found that the trial court concluded that the factors in O.C.G.A. § 19-7-3(c)(1) had been met, as the minor child had resided with her father and the grandparents off and on for more than six months, and the grandmother had provided childcare and financial support for the minor child, acting as a mother-figure. However, the Court expressed concern that the trial court had stated that they were "bound by these existing factors." Due to this language, the Court was not able to determine if the trial court exercised discretion in the decision to grant grandparent visitation, or erroneously believed that the existing factors automatically led to clear and convincing evidence that the child would be harmed if the grandparents were not granted visitation. For this reason, the Court remanded the matter for the trial court to properly exercise its discretion under O.C.G.A. § 19-7-3(c)(1).

IN THE INTEREST OF E.S., 348 Ga. App. 546 (2019)
Dependency, Juvenile Court, Jurisdiction

In this dependency matter regarding 10 children, the Mother appealed the denial of her motion to dismiss the petition and the final disposition order entered in the case. Her appeal only applies to the 7 youngest children. Mother contended 1) that venue was improper regarding the 7 youngest children, 2) that there was insufficient service of process, and 3) that the juvenile court failed to hold a preliminary protective hearing within 72 hours of the children being taken into custody. The Court of Appeals affirmed the prior order because 1) the evidence supported the trial court's finding that venue was proper, 2) Mother waived the defense of insufficient service of process, and 3) the trial court has the discretion to continue to preliminary protective hearing.

The Court found that evidence had been presented at the motion to dismiss hearing to support the conclusion that venue was proper, namely that the last address the mother used to get food stamps was in that county, and that 2 of the 7 youngest children had lived in that county at some point. The Court held that even though the mother contented in her amended motion to dismiss that she was not properly served at least 72 hours before the adjudication hearing, she failed to raise this issue in her original motion to dismiss, and therefore waived that defense pursuant to O.C.G.A. § 9-11-12(b). The Court found that the preliminary protective hearing was commenced the day

following the removal of the children, but was continued three times, without the mother's objection the first time and with the mother's explicit consent the two subsequent times. Therefore, the Court held that the trial court did not abuse its discretion and did not act contrary to the children's interests in continuing the preliminary protective hearing, as there were no objections and the mother insisted that her motion to dismiss be considered prior to the preliminary protective hearing.

WOODALL v. JOHNSON, 348 Ga. App. 820 (2019)
Step-parent Adoption, Termination of Parental Rights

In this adoption matter filed by the minor child's stepfather, the father appealed the termination of his parental rights and the granting of the adoption by the stepfather. The father contended that the trial court 1) abused its discretion by denying his motion to supplement the record, 2) failed to detail sufficient facts to support the termination of parental rights under former O.C.G.A. §§ 19-8-19 and 19-8-18, and 3) failed to apply the clear and convincing evidence standard; and that 4) there was insufficient evidence to support termination of his parental rights under former O.C.G.A. § 19-8-10.

The Court of Appeals reversed the termination and adoption because 1) the evidence did not support a finding that the father had abandoned the minor child, 2) the failure of the petition to include the statutory language precluded the trial court from finding abandonment, and 3) the stepfather did not show that the father did not have justifiable cause for failing to communicate with the minor child. The Court held that to support an adoption based on abandonment by the father, there must be clear and convincing evidence of an "actual desertion, accompanied by an intention to sever entirely, as far as possible to do so, the parental obligations growing out of the [parent/child relationship], and forego all parental duties and claims." The Court held that there was evidence that the father had not abandoned the child, i.e., paying child support (albeit late or pursuant to a contempt order), providing proof of a clean drug screen a year before the final hearing, sent gifts to the minor child through the paternal grandmother, requesting to begin visitation, and almost daily attempting to contact the minor child during the year preceding the final hearing.

Furthermore, the court reversed the order due to the failure of the petition to reference or include the language notifying the father to show the court why his parental rights should not be terminated, which precluded the father from being properly notified of the grounds on which the final order was based. Finally, based on the evidence that the mother prevented the father from seeing the minor child and did not encourage the minor child to communicate with the father, there was no evidence that the father did not have justifiable cause for failing to communicate with the minor child.

REID v. LINDSEY, 348 Ga. App. 425 (2019)
Grandparent Visitation, Extracurricular Activities, GAL Fees

Father appealed an order granting paternal grandmother visitation one weekend each month, two weeks during the summer, a portion of school breaks, and various holidays, with certain conditions concerning extracurricular activities. Father contended that 1) the trial court did not have clear and convincing evidence to support the findings of fact, and that the court erred in 2) granting priority to the grandmother's visits over the minor child's extracurricular activities, and 3) ordering that the father had to pay a portion of the GAL fees.

The Court of Appeals held the trial court 1) did not fail to detail specific findings of fact, 2) was authorized to find that the child would be harmed if paternal grandmother was not granted visitation by sufficient clear and convincing evidence presented, 3) was authorized to conclude that the visitation was in the child's best interest by sufficient clear and convincing evidence presented, and 4) was authorized to find that the child's best interests would be served by giving priority to grandparent visitation over non-school-related extracurricular activities, and held that 5) the father was not required to pay half of GAL fees.

The Court found that the trial court had made numerous factual findings, regarding the prior relationship of the minor child and his grandmother, in temporary order, and that such findings had been incorporated into the final order. Such findings were that the grandmother had been the minor child's primary physical custodian for ten years, that the minor child lived with the grandmother almost exclusively during those ten years, and that the grandmother was responsible for homeschooling the minor child, transporting the minor child to his extracurricular activities, taking him on vacations and other outings, and providing for his medical, dental, educational, financial, social and mental needs.

The trial court also found that the minor child had a very close relationship with the grandmother, and that the removal of such relationship would be harmful to the minor child, particularly after the death of his own mother when he was 5 years old, the time spent away from his father and siblings due to the medical needs of his twin brother, and the loss of his relationship with his step-mom and step-siblings following the divorce. The Court of Appeals held that the trial court was authorized to make such a finding based on the evidence presented, as detailed above. The Court further held that such a finding of harm was supported by the fact that the grandmother had provided childcare and financial support to the minor child for at least one year, and that there was a pre-existing relationship between the grandmother and the minor child, pursuant to O.C.G.A. § 19-7-23. Therefore, it was the father's burden to rebut the presumption of harm to the child.

For the same reasons that removal of such visitation would be harmful to the child, the trial court also found that allowing the visitation with the grandmother would be in the minor child's best interest. The Court held that the trial court had sufficient clear and convincing evidence to make such a finding as well.

The Court, applying a de novo standard of review, held that the trial court did not misconstrue the plain language of the statute regarding grandparent visitation and interference with extracurricular

activities. The Court agreed that "extracurricular" applied only to school-related activities, and that non-school related activities did not have to take precedence over grandparent visitation. The Court stated that, otherwise, a parent could schedule a child for a multitude of extracurricular activities to circumvent the grandparent visitation rights. Therefore, the trial court did not err in granting priority to the grandmother's visits over the minor child's non-school related activities.

The Court of Appeals did agree with the father on one matter, that of the trial court ordering the father to pay 50% of the GAL fees. The Court reversed the trial court's order regarding fees, as prohibited pursuant to O.C.G.A. § 19-7-3(e)(1), which states that a GAL appointed in a grandparent visitation matter will be at the sole expense of the grandparent.

JENKINS v. JENKINS, 348 GA. App. 290 (2018)
Temporary Protective Order

Father appealed the granting of 12-month extension to a TPO requested by daughter. Father contended that the evidence did not show that he stalked his daughter, posed any danger to her, or that she was in reasonable fear for her safety.

The Court of Appeals held that the daughter presented sufficient evidence to establish that her father stalked her, finding no error and affirming the order. The father texting his daughter even just once after receipt of the ex parte order was a sufficient violation of the protective order, as it was preceded by a pattern of harassment and intimidation. The daughter also presented evidence of the father's prior harassing and intimidating text messages, as well as his aggressive behavior and domestic violence, including grabbing her son by the neck, which caused her to fear for her and her family's safety. The daughter having responded to his contact after the ex parte order did not negate the father's violation of the ex parte order by making the first contact via text. Therefore, the 12-month TPO was properly granted.

JACKSON v. BROWN, 348 Ga. App 294 (2018)
Modification of Custody/Visitation, Attorney's Fees

Father appealed an order that required the father to pay the mother a sum for attorney's fees and other costs incurred in the modification matter involving custody, child support, and parenting time. The father contended that the trial court lacked legal authority to make such an award of fees and costs because there was no argument during the hearing regarding attorney's fees, but the only evidence was a letter brief sent by the mother's attorney to the judge after the hearing.

The Court of Appeals vacated and remanded the order for the trial court to make express finding to specify the basis for the award of attorney's fees and costs. The Court held that the record did not provide a basis for the trial court's decision, neither a trial transcript nor the letter brief. The Court also held that the order did not contain a statutory basis for the award.

BEAVERS v. PROVOST, 304 GA 841 (2018)
Dependency, DFCS

Parents appealed a dismissal of their petition for habeas corpus to regain custody of their children. Parents were seeking to regain custody of their children following removal by DFCS and the entry of an Order of Adjudication and Disposition, which found that the parents had failed to adequately address past issues of family violence and participate in assessment, training, and therapeutic services. Parents contended that 1) the children were taken without a proper and valid court order and 2) that the court had improperly issued the Dependency Removal Order entered after the children were removed.

The Supreme Court affirmed the trial court's order, and held that the parents were not entitled to habeas relief on their claim. The habeas court dismissed and denied the petition, finding that the dependency issues were under the juvenile court jurisdiction and that the parents were not entitled to the relief requested. The Supreme Court held that any defects in the DRO were remedied by the A&D Order, and therefore the issues the parents alleged were moot. The parents did not have a cognizable claim, and dismissal was affirmed.

BAZAN v. BAZAN, 347 Ga. App. 204 (2018)
Modification of Custody/Visitation, Pro Se Party, Due Process

Father appealed modification order granting Mother legal and physical custody of the minor children and directing father to have supervised visitation. Father contended that trial court denied him due process by denying him the opportunity to produce evidence and present his defense, and did not provide accommodation for his *pro se* status.

The Court of Appeals affirmed the modification order and held that 1) the father was not denied the opportunity to present evidence even though the trial court adjourned the hearing twice without giving the father's attorney the opportunity to present evidence, and 2) the trial court did not abuse its discretion by denying the father's request to re-open evidence after he had rested by mistake. The father was represented by counsel at the first two hearings, but was *pro se* at the final hearing. The Court found that the first two hearings were adjourned in the middle of the mother presenting her case in chief; therefore the father was not entitled to present evidence at those hearings. The Court found that the record showed that at the final hearing, once the mother had rested her case, the father testified under oath, then concluded with, "that's all I have, Your Honor." When the trial court asked the father if he had any witnesses, the father stated "no." After the mother's attorney argued on attorney's fees, the father stated that he wanted to call the mother to the stand, but the trial court informed him that evidence was closed, and refused to hear any more evidence. The court's decision was subsequently announced from the bench.

The Court of Appeals held that the trial court had the discretion to re-open evidence or not, and that they did not abuse such discretion in refusing to grant the new trial or re-open the evidence. The Court also held that while the trial court did not accommodate the father's *pro se* status, the trial court could not have done so; per Georgia law, a different standard at hearings cannot be

applied to *pro se* parties as opposed to parties represented by counsel. Therefore, the modification order was affirmed.

CHALK v. POLETTO, 346 Ga. App. 491 (2018)
Legitimation, Opportunity Interest, Attorney's and GAL Fees

Father appealed trial court's order in legitimation matter that 1) granted the mother's motion for directed verdict, 2) denied the father's petition for legitimation, 3) denied the father's motion for a new trial, and 4) granted mother's petition for attorney's fees and costs. The father contented the trial court erred in denying his petition because he did not abandon his opportunity interest in establishing a relationship with his biological children, but that his testimony clearly showed parental involvement over a five-year period. The father also contended that the award of attorney's fees under O.C.G.A. § 19-9-3(g) was improper because that statute only applies in custody cases, and custody was not addressed in this matter as the petition was denied. In addition, the father contented that including half of the GAL fees in the fee award was incorrect as the trial court had not included that amount in the pronouncement from the bench during the hearing.

The Court of Appeals affirmed the trial court's order and held that 1) denying the father's petition was not an abuse of discretion and 2) the trial court did have the authority to award fees and costs to the mother pursuant to the child custody statute.

The Court held that the evidence on the record showing the father's extensive overseas travel, including attending the Olympic Games in Brazil, despite reporting little annual income, coupled with no documentation supporting the father's claims that he ever provided financial support for his children was enough to support the trial court's finding that he had abandoned his interest in his children, especially when considered against the backdrop of his attempted fraud in the present matter and his prior felony conviction arising out of false statements made to received benefits. In short, the Court held that the evidence on the record below supported the trial court's discretion to not believe a word of what the father said, and therefore deny his petition.

The Court affirmed the award of attorney's fees because there was no authority to support the father's contention that the statute did not apply to the legitimation matter, and further because the father's petition had included a prayer for joint legal custody, making custody an issue in this matter. The Court affirmed the inclusion of the GAL fees in the award because the father cited no authority to support his claims, and the Court found them to be without merit.

PART THREE: Samantha Fassett

Buchanan v. Buchanan, 348 Ga. App. 15 (2018)
Motion to Enforce

Parties separated after twenty-three years of marriage. Parties met to discuss property division. At the meeting, Wife took handwritten notes regarding some of the property owned by the parties, which Husband signed and dated. Wife filed a Motion to Enforce, after Husband refused to sign a typed version of the handwritten notes. After a hearing on the issue, the superior court entered an Order stating that the parties reached an agreement on all property issues.

Husband appeals superior court's order enforcing settlement agreement, arguing that the signed notes did not constitute a binding settlement agreement. The Court of Appeals agreed with the Husband that the court erred in ruling the noted constituted a full agreement, and contested issues remain between the parties regarding property excluded from the notes. The Court of Appeals reversed the order, and remanded the case for further proceedings.

In the Interest of T.S., 348 Ga. App. 263 (2018)
Dependency, DFCS

DFCS filed a complaint after reports that Mother's boyfriend shot both children with a BB gun in Mother's presence. There were also reports of drug use, domestic violence, and Mother's failure to provide for the children. After reports of safety plan violations, DFCS filed a dependency action. Mother admitted to repeated violations of DFCS's safety plans, housing instability, and a history of abuse. The Juvenile Court entered in an Order awarding custody of the children to the Department.

Mother appeals the Order, claiming that the DFCS failed to establish by clear and convincing evidence that her children were dependent. The Court of Appeals affirmed the Order, pointing to numerous facts on the record showing a clear case for dependency of the children.

Bridger v. Franze, 348 Ga. App. 227 (2018)
Self-executing Change of Custody

Mother and Father never married. Father filed to legitimate in Georgia after Mother moved multiple times with the child. Though Father had a storied history with previous visitations, the trial court awarded joint legal custody, and joint physical custody if Father ever moved to the area. The Court additionally entered a child support order, which did not take into account health insurance or childcare costs.

Mother appealed the Courts award of, among other things child support and the award of joint physical custody if Father moves to the area. The Court of Appeals determined that the relocation custody provision was a self-executing modification of custody, citing Scott v. Scott, 276 Ga. 372 (2003), and stating that the self-executing change of custody must be reversed. The Court additionally stated that the court erred in failing to include health insurance and daycare costs in its child support calculation, pursuant to O.C.G.A. § 19-6-15(h)(2) and (b)(7).

Borgers v. Borgers, 347 Ga. App. 640 (2018)
Contempt, Modification of Custody

2013 divorce decree awarded primary physical custody and final decision-making power to Mother. Said decree also expressed concern as to whether homeschool was in the children's best interest, but did not prohibit it. Father filed a "Petition for Contempt and Modification of Custody" and later a second Motion for Contempt. Neither action requested a change in custody, or requested that the Court stop the Mother from homeschooling. The trial court held two hearings, both of which were not transcribed, and issued a "Final Order Regarding Contempt Order and Modification," holding the Mother in contempt, and providing for her incarceration pending compliance. The Court later held a status conference, also not transcribed, and entered a "Compliance Order," finding that everyone was in compliance with the Court's previous order, and providing that the Mother was required to enroll one of the children in school rather than homeschool.

Mother appealed, stating that the trial court erred in modifying custody in a contempt action where no motion to modify was made, and in ordering her to enroll her children in school rather than homeschooling. The Court of Appeals agreed with the Mother, and reversed the trial court's decision, stating that the education issue is a custody issue. The Court cited case law indicating that a change in decision-making authority is indeed a change in custody, required a significant change in circumstances, and that the trial court exceeded its authority in modifying custody in this matter as a new action for modification was not filed. Concurring opinion based on the constitutional right to parent and make parenting decisions.

Phillips v. Phillips, 347 Ga. App. 524 (2018)
Equitable Division, Child Support

During the parties' divorce, Husband was medically discharged from the military, receiving 100% disability pay in lieu of retirement benefits. He also began receiving GI education benefits. The Divorce Decree ordered a rental property to be sold, included rental income from said property and GI benefits included in Husband's income for child support purposes, and awarded Wife a portion of Husband's disability pay.

Husband appealed the Decree challenging the child support award and the award of disability pay to Wife. The Court stated that the GI education benefits were correctly included in Husband's income for child support purposes, but that including rental income for a house ordered to be sold was improper. The Court further acknowledged that the division of Husband's disability pay was a violation of 10 U.S.C.S. § 1408 and that disability is exempt from division. The case was remanded for further proceedings.

Roberts v. Roberts, 347 Ga. App. 360 (2018)
Contempt, Attorney's Fees

Father refused to comply with Order awarding Paternal Grandfather grandparent visitation. Court awarded Paternal Grandfather "compensatory visitation" and $850 in attorney's fees in an order for Contempt. Grandfather subsequently discovered that Father moved away with the child. After

a second Motion for Contempt, the Court incarcerated the Father, allowing him to purge himself of contempt by 40 days of make-up visitation and an additional $1,000 in attorney's fees.

Father appealed this second contempt order. The Court of Appeals held that the trial court acted within its discretion in finding Father in contempt even though there was no provision specifically preventing him from moving, ordering incarceration, and providing make up visitation in order to purge contempt. The trial court erred, according to the Court of Appeals, however, in making the new award of fees a second condition of purging himself of his contempt. See Horn v. Shepherd, 292 Ga. 14 (2012).

Perkins v. Perkins, 347 Ga. App. 345 (2018)
Child Support for Child Born Out of Wedlock

Final Judgment and Decree of Divorce awarded Mother $67,672.58 for reimbursement from Father for reasonable child rearing expenses for the parties' child pursuant to O.C.G.A. § 19-7-24, which states in pertinent part, it is the joint and several duty of each parent of a child born out of wedlock to provide for the maintenance, protection and education of a child until the child reaches the age of 18 or becomes emancipated." A child born out of wedlock is either 1) a child whose parents are not married when the child is born and do not subsequently marry; 2) a child who is the issue of an adulteress relationship of the wife during the wedlock; or 3) a child who is not legitimated.

Father appealed stating that child was born during the marriage and therefore, the code section did not apply. Said statute specifically states the duties of parents with children "born out of wedlock" which is not applicable to the facts of the present case. The Court of Appeals vacated the judgment against Father, and remanded the case.

Ford v. Ford, 347 Ga. App. 233 (2018)
Procedure, Direct Appeal

Father appealed trial court's Judgment granting divorce, challenging a series of Orders ultimately granting the Mother sole custody of the parties' minor children. Because the Father did not pursue discretionary review, the Court of Appeals did not have jurisdiction to determine the merits of his case, and had to dismiss the action. The Court noted that it is empowered on its own motion to address the issue of jurisdiction, when neither party addressed the issue. The trial Court differentiates custody cases from orders involving custody in divorce cases, citing Hoover v. Hoover, 295 Ga. 132 (2014.)

Patten v. Ardis, 304 Ga. 140 (2018)
Grandparent Visitation

Father passed away while Mother was pregnant. Paternal Grandmother visited the minor child several times after her birth, but he Mother determined that the visits were not a good idea and stopped them. Grandmother filed a Petition for Grandparent Visitation pursuant to O.C.G.A. § 19-7-3(d) and O.C.G.A. § 19-7-3(c)(1). Mother moved to dismiss, stating 19-7-3(d) was ruled

unconstitutional by Brooks v. Parkerson, 265 Ga. 189 (1995). The trial court entered an order awarding Grandmother visitation, stating it is consistent with the child's best interests.

Mother appealed. The Georgia Supreme Court stated part (d) of the statute violates "the right of parents to the care, custody and control of their children, as that fundamental right is guaranteed by the Constitution." The Court reversed the trial court's award of visitation and remanded the case to hear the Grandmother's petition under part (c)(1) of the statute. The Court held that part (d) is unconstitutional because "it authorizes an award of visitation to a grandparent over the objection of a fit parent without any showing whatsoever (much less a showing by clear and convincing evidence) that the visitation is required to keep the child from actual or threatened harm."

Pate v. Sadlock, 345 Ga. App. 591 (2018)
Custody, Visitation, Grandparent Visitation

Divorce Order allowed for visitation for Father and for the Paternal Grandparents. Mother later petitioned for modification of Grandparents' visitation, after Father was arrested. Grandparents counterclaimed for contempt of the existing order, and sought additional visitation. Mother also petitioned to modify Father's visitation rights, and Father counterclaimed. After the cases were combined, the trial court entered an order allowing for reunification visitation between the Father and children and increasing the Grandparents' visitation.

Mother appeals this order. The Court of Appeals determined that the reunification plan set out by the trial court did not constitute a self-executing modification of custody because it did not hand over its power to determine the children's' best interest to a third party. The Court also ruled that O.C.G.A. § 19-7-3 provides grandparents with standing to bring a modification after rights have been established.

PART FOUR: Courtney E. Dixon

Brumbelow v. Mathenia, 347 Ga. App. 861 (2018)
Legitimation, Opportunity Interest

Biological father appealed the trial court's denial of his petition for legitimation and motion for new trial. The trial court found that the biological father abandoned his opportunity interest in developing a parent-child relationship with the child. The trial court also found that it was in the child's best interest for the legitimation to be denied. The biological Father and Mother engaged in a relationship while the Mother was separated from her husband. The biological father had some doubt as to whether he was the child's father. Mother made it difficult for the Father to stay in contact with her during her pregnancy. Mother voluntarily relinquished her parental rights the day after the child was born and the child went to live with prospective adoptive parents. The Father learned of the child's birth a month later and filed a petition for legitimation.

The Court of Appeals found that the Father did not abandon his opportunity interest. The Father participated in at least one prenatal appointment and attempted to make some contact with the biological Mother. Furthermore, the Father's action to file a legitimation petition a month after the child was born demonstrated his desire to quickly take responsibility for the child and assume a parental role. Because the matter involved an unwed father who had not abandoned his opportunity interest in a parent-child relationship, the standard to use is the father's fitness as a parent and not the best interest of the child. Furthermore, if the father is found to be fit his petition must prevail. The Court reversed the trial court's ruling that Father abandoned his opportunity interest in a parent-child relationship and remanded the case to for determination on his fitness as a parent.

In the Interest of J.C., 2019 Ga. App. LEXIS 237 (4/30/19)
Custody, Juvenile Court, Dependency, Guardianship

Mother of two children appealed the juvenile court's order which granted guardianship *sua sponte* to the children's paternal grandparents. Guardianship was granted after the Mother's arrest for drug possession and an untreated injury suffered by one of the children. The Department of Family and Children Services filed a dependency petition. The juvenile Court found there to be probable cause that the children were dependent and entered a preliminary protective order. The order granted the Department of Family and Children Services temporary custody. Later, the juvenile court entered an order finding the children dependent and accepted a reunification plan. The children were placed in the home of their paternal grandparents. After a year of hearings, a status hearing was held where the court heard evidence that the mother had failed to complete the entire reunification plan. The court then transferred guardianship to the paternal grandparents. However, neither the grandparents or the Department of Family and Children Services had filed a guardianship petition prior to the status hearing. The mother did not consent to the guardianship and was not provided notice that a guardianship hearing would be held. The mother appealed.

The Court of Appeals reversed the juvenile Court's order transferring guardianship to the paternal grandparents. The Court held that the trial court must comply with all applicable statutes for establishing guardianship. O.C.G.A. § 15-11-243 requires that notice of a petition for a dependent child must be given to the parent. Because no petition was filed, the mother had no notice of the guardianship. O.C.G.A. § 15-11-241 requires that a petition for permanent guardianship contain specific information including, the contact information for relatives of the child if the parent of the child did not provide consent. No such petition was filed in this case. O.C.G.A. § 29-2-18 requires the court to hold a hearing on guardianship after proper notice is given, using the best interest of the child standard. O.C.G.A. § 15-11-240(a)(1) requires the court to make certain findings including that reasonable efforts to reunify the dependent child with their parents would be detrimental to the child. An appropriate hearing was not held and the court did not make the required findings. Because there was no petition for guardianship, no notice given the mother and no required findings the juvenile court's order was reversed.

Naar v. Naar, 2019 Ga. App. LEXIS 233 (4/29/19)
Alimony Modification, Attorney's Fees

Husband and Wife divorced in 1988. The final order incorporated an alimony agreement that granted the Wife $1,500 a month in alimony for four years and $2,500 a month in alimony until she remarried, or the parties died. The alimony agreement included a term that waived the parties' rights to file a modification of alimony pursuant to Varn v. Varn, 242 Ga. 309 (1978). Husband made payments until November of 2017. Wife filed a contempt. Husband then filed a petition to modify based on his limited income of $2,953 a month. Husband admitted that the alimony agreement included a modification waiver, however, he argued that the alimony should be modifiable as a matter of public policy and equity. Husband cited a concurring opinion by Georgia Supreme Court justice Norman S. Fletcher. Justice Fletcher cautioned courts to allow some flexibility when considering the long-term circumstances of parties who wish to include a modification of alimony waiver. Wife moved to dismiss the Husband's petition and sought attorney's fees under O.C.G.A. § 9-15-14(b), claiming the petition was frivolous. Later Wife amended her petition and sought attorney fees under O.C.G.A. § 19-6-19(d) as the prevailing party. The trial court dismissed the petition for modification and granted attorney's fees to the Wife.

The Court of Appeals affirmed the dismissal of the Husband's modification petition. Husband argued that the Court of Appeals should certify a question to the Supreme Court of Georgia: whether exceptional circumstances or public policy concerns regarding the care of the elderly should provide exception to the modification of alimony waivers. The Court found that it could not certify a question that would control the outcome of the case.

The Court of Appeals reversed the award for attorney's fees. The Court found that the Husband claims were not frivolous. Husband acknowledged that he signed a modification waiver and argued instead for the change of public policy and equity. The Court acknowledged that a law cannot be changed where precedent exists if no new claims are brought. Also, the Husband's argument had limited support from the concurring opinion of Justice Fletcher in Nelson v. Mixon, 265 Ga. 441(1995).

Dingle v. Carter, 2019 Ga. App. LEXIS 228 (4/25/19)
Contempt, Bankruptcy, Attorney's Fees

Mother and Father filed cross motions for contempts based on a 2014 final modification order governing custody, child support and attorney's fees. The order granted physical custody of the party's child to the Mother. It also required the Mother to give the Father 14 days' notice if she were to be deployed and granted Father temporary guardianship of the child. In 2015, the Mother filed a motion for contempt alleging that the Father failed to pay child support and obtain insurance as required by the modification order. The trial court found the Father in contempt. However, the order was later vacated due to a service of process issue. In 2016, the Father filed a motion for Contempt alleging that the Mother failed to notify him of her deployment. Thereafter, both parties amended their motions to include various violations, including the Mother's claim that Father be held in contempt for failure to pay attorney's fees. The trial court found the Mother in Contempt for failure to notify the Father about her deployment. The trial court also found that it lacked the authority to determine if the attorney fee award against the Father was dischargeable under his bankruptcy.

The Court of Appeals held that the trial court did not abuse its discretion by holding the Mother in contempt. The Mother admitted that she did not notify Father of her deployment at the contempt hearing. Father filed bankruptcy in 2015 and listed the Mother's attorney as a creditor. After filing bankruptcy, the trial court ordered the Father to pay the $30,000 in attorney fees to Mother. Father was discharged in bankruptcy in 2016. The Court of Appeals held that state court has concurrent jurisdiction to determine what is non-dischargeable because it is alimony, maintenance, or support under 11 U.S.C. § 523(a)(5). The bankruptcy court made no determination of the dischargeability of the attorney fee award, therefore, the issue was remanded to the trial court.

The Mother argued that the trial court erred in abating the Father's child support obligation during her deployment. Pursuant to O.C.G.A. §19-6-15 the trial court is authorized to deviate from the presumptive amount of child support if the deviation is supported by findings of fact and found to be in the best interest of the child. Furthermore, the trial court must find that the child support deviation is reasonably necessary for the support of the child. The court must also determine if the application of the presumptive amount would be unjust or inappropriate and if the best interest of the child would be served by the deviation. The trial court did not make a written finding of how the deviation is in the best interest of the child. Therefore, the Father's abatement was reversed and remanded.

Lastly, the Court of Appeals reversed the trial court's award of attorney fees to the Father pursuant to O.C.G.A. § 19-15-14 and O.C.G.A. § 19-6-2. The trial court did not hold an evidentiary hearing, which is required to make a determination for attorney's fees under O.C.G.A. § 19-15-14. O.C.G.A. § 19-6-2 allows for the award of attorney's fees in alimony and divorce cases, therefore it does not apply to this matter.

Morgan v. Morgan, 2019 Ga. App. LEXIS 222 (4.12.19)
Custody, Grandparent Custody

The grandparents of a 13-year-old child appealed an order awarding custody to the child's mother. The grandparents have been the primary custodians of the child for most of his life. The grandparents and parents of the child entered into a consent order in 2008. The consent order awarded custody of the child to the grandparents. However, the order also stated that the parents could petition the court for a change of custody when they were physically and mentally able to take care of the child. After the child's father died, the mother and grandparents entered into another consent order in 2014. The 2014 order awarded the parties joint legal custody and significant visitation to the Mother. While the orders were in place the Mother became employed, obtained stable housing, cared for the child's sibling and made frequent visits with the child. The Mother even made contact with mental health professionals to continue to treat the child's trauma caused by his uncertain custodial future. The trial court applied the standard of O.C.G.A. § 19-7-1(b.1), which requires a rebuttable presumption that it is in the best interest of the child for custody to be awarded to their parents.

The Grandparents argued that the trial court should have applied the standard set out in Durden v. Barron, 249 Ga. 686(1982). Under the Durden standard, third party custodians are entitled to prima facie right to custody against the parent. When the Durden standard is applied, the parent can regain custody by showing their parental fitness by clear and convincing evidence and that the change in custody is in the best interest of the child. The Durden standard is applied when

there is a permanent award of custody to a third party, after an evidentiary hearing is conducted with specific findings by clear and convincing evidence of parental unfitness.

The Court of Appeals found that no permanent award of custody was given to the grandparents. Each temporary order contemplated the return of the child to his parents. Therefore, the trial court properly applied the standards set out in O.C.G.A. § 19-7-1(b.1). The burden was on the Grandparents to show by clear and convincing evidence, that the child would suffer physical harm or significant long-term emotional harm if custody was awarded to the mother. The Grandparents also argued that a change in custody should be barred because they had physical custody of the child for most of his life. The Court of Appeals held that the determination of laws is a function of the General Assembly.

Lastly, the Grandparent's argued that the evidence did not support the change in custody to the Mother. The Court of Appeals reviewed the evidence in the light most favorable to the trial court's decision and found that the trial court was authorized to conclude that the Grandparents did not demonstrate by clear and convincing evidence that it was in the child's best interest for custody to remain with them.

Long v. Truex, 2019 Ga. App. LEXIS 221 (4.10.19) (Two Cases)
Modification of Custody, Attorney's Fees

The parties have one child of the marriage and were divorced in 2014. The parents were awarded joint legal custody and the Father primary physical custody in the Final Judgment and Decree. After the divorce, an order for modification of custody and for contempt were entered by the trial court. The Court of Appeals proceeded on two cases concerning the parties.

Case No. A19A0038: Shortly after the issuance of the Final order in the divorce, Mother filed a petition to modify custody. Mother cited that there was a material change in condition and circumstance that warranted a change of custody. Father then filed a modification petition asking for sole legal custody and supervised visitation for the Mother. The trial court held an evidentiary hearing and awarded sole legal and physical custody to the Father and supervised visitation to the Mother. After the trial court's order was entered, Mother filed a timely motion for new trial. Later, she filed a notice to dismiss the motion. The trial court did not enter an order addressing Mother's motion to dismiss. However, the trial court did enter an order denying the Mother a new trial.

Thirty days later, the Mother appealed the 2016 order modifying custody and an April 2018 order denying her motion for new trial. The Court of Appeals held that it had jurisdiction to hear the matter because the appeal was timely filed. Although, the Mother filed a notice to dismiss her motion, a trial court is required to grant, deny or otherwise dispose of a party's motion for a new trial. O.C.G.A. § 5-6-38. Because there was no record of the trial court issuing an order to dispose of the Mother's motion, the Court of Appeals had jurisdiction to review the modification of custody order.

The Mother argued that the trial court lacked a sufficiency of evidence to support the custody modification. A trial court's custody decision will be upheld on appeal unless it is shown that a court clearly abused its discretion. Carr-MacArthur v. Carr, 296 Ga. 30(2014). The Court of Appeals found that there was evidence to support the trial court's ruling and that it did not abuse its discretion. The trial court record included testimony of the Mother's inability to effectively co-

parent from a parenting coordinator. It also included findings that the trial court's observation of the Mother's mental health during the court proceeding.

Case No. A19A0749: Mother appealed an award of attorney's fees to the Father. The trial court entered an order finding Mother in contempt in December of 2015. Mother filed a motion for reconsideration and the trial court denied the motion. Mother then filed a motion for new trial in August of 2016. The trial court denied the motion for new trial in April of 2018. Mother also filed a notice of appeal of the December 2015 contempt order, which was dismissed for lack of jurisdiction. While the motion for new trial was pending the Father filed a motion for attorney's fees under O.C.G.A. § 19-15-14(a), because of the motion for new trial. In July of 2018, the trial court granted the Father attorney fees because the Mother's motion was filed 240 days after the trial court's contempt ruling.

The Court of Appeals granted discretionary review of the order awarding attorney's fees. The Court vacated the award because it did not specify who was obligated to the pay award. The trial court entered an amended order that specified the Mother was to pay the attorney fees on August 7, 2018. However, the Court of Appeals found that the order was without effect because it was entered after the Mother applied for discretionary review. Lastly, Father motioned that Mother should be sanctioned on the grounds that her discretionary appeal was frivolous. The Court denied the motion, citing that it had granted the application for discretionary appeal and vacated the order.

2019 Legislative Update

House Bill 79: Passed by the house and senate. Signed by Governor Kemp on May 2, 2019. H.B. 79 Amends O.C.G.A. § 19-9-3 to prohibit the discrimination of legally blind persons in custody proceedings.

House Bill 331: A bill to amend Article 1, Chapter 13, Title 19. The bill would amend the definition of family in family violence petitions to include acts between persons whom a past or present pregnancy has developed or whom are in a past or present dating relationship. The bill remains in the house as of February 2019.

House Bill 381: Amends and corrects grammar contained in O.C.G.A. § 19-6-15 and other minor revisions to the child support guidelines to bring them in line with federal law. H.B. 381 corrects and defines guidelines for determining the amount of child support and deviations. The bill removes alimony as a deduction in income and provides for it to be considered a deviation in certain circumstances. The bill was sent to the governor for signature on April 11, 2019.

House Bill 543: Would amend Article 1 Chapter 7, Article 19 to include O.C.G.A.§19-7-3.1. The new code section provides the procedures for a court to adjudicate an individual to be an equitable caregiver of a child. Equitable caregivers must establish that they have a parental like relationship to the child. The equitable caregivers must also prove that the child would suffer physical or long-term emotional harm and that a continued relationship is in the best interest of the child. A court may grant standing to an individual to be considered an equitable caregiver based on the consent of the child's parent. Bill sent to the governor on April 11, 2019.

SB 190: Strikes language that requires a complaint for modification of custody to be filed as a separate action in the county of residence of the legal custodian of the child. Under this legislation, a complaint to modify legal or physical custody must be filed in the county where the defendant resides under Article VI, Section II, Paragraph VI of the Georgia Constitution. The change has the effect of allowing a party to bring a counterclaim for modification of legal custody or physical custody in response to a complaint to modify custody. The bill also clarifies that a party cannot file a complaint to change custody in response to a motion for contempt.

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How To Deal With High Conflict Opposing Counsel And The Future Of Family Law

Presented By:

Bill Eddy
High Conflict Institute
San Diego, CA

Dealing with High Conflict Counsel and The Future of Family Court

Bill Eddy, LCSW, Esq.
Attorney, Mediator, Therapist, Author

HIGH CONFLICT INSTITUTE
the missing piece

Handling Opposing Counsel

Personality Styles: Aggressive, adversarial *style* can be turned off and on as the situation merits (fight, negotiate, settle)

Maladaptive Personality Traits: A *pattern* of dysfunctional behavior that is not enough for a personality disorder

Personality Disorders: A *rigid pattern* of dysfunctional behavior, which lawyer can't stop even when its self-defeating

What to Expect from HCP Counsel

- "Love-you, Hate-You": Mood swings, sudden and intense anger, manipulations
- "I'm Very Superior": Frequent insults, demands for special treatment, bragging
- "Con Artist": Efforts to charm you, then publicly humiliate you; lying, aggressive
- "Always Dramatic": Repeated crises, based on misinformation, lots of blaming
- All: Splitting you and your staff; Projecting their problem behavior onto you

1. Be Assertive

- Be as assertive as Opposing is aggressive
- We tend to either fight or flee HCP counsel
- Instead of fighting: remain steady with factual information, appropriate motions, and avoid engaging in defending yourself
- Instead of fleeing (avoiding): pace yourself and anticipate aggressive HCP behavior; resist the urge to avoid the case

See article: Dealing with High Conflict Counsel

2. Listening to Opposing Counsel

- HCP Counsel are often upset and experiencing self-generated crises
- Avoid getting emotionally hooked into their crisis (which we unconsciously are wired to do)
- Avoid long-winded, venting phone calls – you can cut them short because there's no resolution anyhow for HCPs – but do it with E.A.R.

E.A.R. Statement

Example: "I can ***understand*** your frustration – this is an important case for your client. Don't worry, I will pay full ***attention*** to your concerns about this issue and any proposals you want to make. I have a lot of ***respect*** for your commitment to solving this problem, and I look forward to solving it too.

Communicate with E.A.R.

The key difference between cases that settle and those that go to trial is whether attorneys will talk to each other.

- Try to find some empathy for Opposing Counsel
- Develop a friendly relationship, regardless of how you are treated
- Don't take personal attacks personally
- Don't be intimidated – its not about you
- Find something you can respect about them

Cautions About E.A.R.

- Avoid believing or agreeing with content.
- Avoid volunteering to "fix it" for them (in an effort to calm down their emotions).
- Be honest about empathy and respect (find something you truly believe).
- Keep an arms-length relationship.
- You don't have to listen forever.
- You don't have to use words or these words.

3. Choose Your Battles

- Don't get emotionally hooked.
- Don't fight every action or request of HCP counsel.
- Remind yourself of what's important.
- Let HCP win some procedural points.
- Let HCP counsel save face at times.

You don't have to prove anything to HCP Counsel – you can't! It's not about you.

4. Respond with B.I.F.F.

- Respond quickly to events and misinformation with accurate information
- Ignore personal attacks in private (letters, phone comments, etc.)
- Don't ignore personal attacks in public – respond quickly with accurate information (BIFF) which is communicated to all who received the personal attack information

Use B.I.F.F Responses

Brief: Keep it brief. Long explanations and arguments trigger upsets for HCPs.

Informative: Focus on straight information, not arguments, opinions, emotions or defending yourself (you don't need to)

Friendly: Say you have empathy for their concerns; you will pay attention to their concerns; you will respect their efforts (E.A.R.)

Firm: Gently repeat information and close the door to further argument

See article: *How to Write a BIFF Response*

5. Ask for or Make a Proposal

You can turn any complaint into a proposal.

Focus on the future.

When they are blaming or complaining, just ask you: "**So then, what do you propose?"**

6. Set Limits

Set personal limits on inappropriate behavior, whenever possible, because HCPs can't stop themselves.

Don't allow bad habits to get established early in the case: limit phone calls to mostly business; don't do too many favors; don't allow bending the rules too much (it won't be reciprocated)

Set Limits (Cont'd)

Focus on rules and the perceptions of those external to them and external to your relationship with them, as reasons to act differently.

"The law requires…"
"A judge would likely see this as violating…"
"It might appear better if you…"
"Let's be seen as taking the high road…"
"The court prefers that we …"

7. Avoid Professional Splitting

High-Conflict Disputes are generally those with:

1. A high level of hostility
2. For prolonged period of time
3. Extreme opposite positions
4. Facts seriously in dispute
5. Emotions dominate discussions and decision-making
6. Usually one or more high-conflict personality clients who is "splitting"
7. Often one or more professionals who get emotionally "hooked" into the splitting process

Professional Splitting Dynamics

- It's personal
- It's hostile
- It's about attacking personal competence, ethics, intelligence, etc.
- Positions are polar opposites, all-or-nothing
- It often involves projection onto the other, and therefore "getting it backwards"

Example (Children's Atty to Therapist)

"Since my last visit with my clients, it is reported to me that they are having increased anxiety and negative responses to parenting time with their father. It is not clear to me what the source for those behaviors is, but I view this 'decompensation' as alarming and, at the same time, in need of modification.... You stated in our conversation that you told the girls that you will try to persuade the parties not to 'force them to spend more time with their Father.' Whether that encouraged them to become more negative with their Father, I'm not sure.... On the other hand, prior to your involvement, they were subjected to the stress of their parents and it appears to be continuing."

Response (Therapist to Lawyer)

"It is clear from your letter to me that you do not accurately recall much of what I said to you in our earlier conversation. I do not know whether you simply misunderstood or chose to misrepresent my comments, nor do I see the necessity for your employing a hostile and non-collegial tone in your writing. It is also of concern to me that you appear to be practicing beyond the scope of your license in rendering psychological diagnoses and prescribing treatment plans.... These children are not decompensating. It is neither accurate nor appropriate for you to be using this term."

7 Solutions to Professional Splitting

1. Recognize it as projection of an HCP's problem
2. Don't automatically believe what you hear; check out allegations directly with others
3. Anticipate and avoid getting emotionally "hooked"
4. Avoid extreme solutions
5. Remain open-minded at all times
6. Acknowledge positive qualities
7. Treat all parties and professionals with Empathy, Attention and Respect (E.A.R.)

8. Understand Incivility

- Incivility is not about you – it's about the person who cannot manage their own emotions and behavior.
- Significant amount of incivility is by HCPs. Most lawyers remain civil.
- Incivility will not stop because there are rules against it – it will only stop when consequences are imposed.
- Bystanders can play a role: by saying "that's enough", by frowning; by not laughing; many HCPs think its funny.

See article: Misunderstanding Incivility

9. Know Your Case Better than Opposing Counsel

- The more you know your case, the less easily you will be caught off-guard.
- Be ready to quickly provide more accurate information when opposing makes statements that are false or misleading.
- Anticipate false and misleading statements – and be ready to respond.
- Tell your client to let you know as soon as events occur that may be troublesome.

10. Support and Consultation

- When you are dealing with HCP Opposing counsel, it is easy to feel outraged, isolated, incompetent, doubt your approach, and fear public embarrassment. Expect this.
- Get support from staff and colleagues
- Get consultation: Experienced attorneys may have dealt with similar problems or even the same Opposing Counsel and can give useful suggestions. You're not alone!

The Future of Family Law
More Structure, More Skills and Less

- More structure: High-conflict parents don't have much structure and stability inside, so they need it from outside.
- More skills: Problem isn't lack of decisions, it's lack of decision-making and other problem-solving skills.
- Need to provide a structure to learn skills in, such as New Ways for Families or other methods.
- Less stress: By providing maximum structure and emphasis on learning and using skills, high-conflict parents can be more engaged in solutions rather than defensiveness, and more likely to follow through on their agreements.

HIGH CONFLICT INSTITUTE

Thank you!

For more information, contact:

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Calming Upset People with an EAR Statement℠

Everyone gets upset some of the time. High conflict people get upset a lot of the time. A simple technique called an "EAR Statement" can help you calm others down. This is especially helpful if you are in a close relationship or a position of authority. High conflict people tend to emotionally attack those closest to them and those in authority, especially when they are frustrated and can't manage their own emotions. The intensity of their uncontrolled emotions can really catch you off-guard. But if you practice making EAR Statements you can connect with upset people and usually help them calm down.

EAR STATEMENT℠

EAR stands for Empathy, Attention and Respect. It is the opposite of what you feel like giving someone when he or she is upset and verbally attacking YOU! Yet you will be amazed at how effective this is when you do it right.

An EAR Statement connects with the person's experience, with their feelings. For example, let's say that someone verbally attacks you for not returning a phone call as quickly as he or she would have liked. "You don't respect me! You don't care how long I have to wait to deal with this problem! You're not doing your job!"

Rather than defending yourself, give the person an EAR Statement, such as: "Wow, I can hear how upset you are. Tell me what's going on. I share your concerns about this problem and respect your efforts to solve it." This statement included:

EMPATHY: "I can hear how upset you are."
ATTENTION: "Tell me what's going on."
RESPECT: "I respect your efforts."

The Importance of Empathy

Empathy is different from sympathy. Having empathy for someone means that you can feel the pain and frustration that they are feeling, and probably have felt similar feelings in your own life. These are normal human emotions and they are normally triggered in people close by because emotions are contagious. When you show empathy for another person, you are treating them as a peer who you are concerned about and can relate to as an equal in distress.

Sympathy is when you see someone else in a bad situation that you are not in. You may feel sorry for them and have sympathy or pity for them, but it is often a one-up and one-down position. There is more of a separation between those who give sympathy and those who receive it.

But, you don't even have to use the word "empathy" to make a statement that shows empathy.

Here are some examples:

"I can see how important this is to you."
"I understand this can be frustrating."
"I know this process can be confusing."
"I'm sorry to see that you're in this situation."
"I'd like to help you if I can."
"Let's see if we can solve this together."

The Importance of Attention

Getting attention is one of the most important concerns of high conflict people. They often feel ignored or disrespected and get into conflicts as a way of getting attention from those around them. Many have a lifetime history of alienating the people around them, so they look to others – professionals, friends and new acquaintances – to give them attention. Yet they rarely feel satisfied and keep trying to get more attention. If you show that you are willing to pay full attention for a little while, they often calm down.

There are many ways to let a person know that you will pay attention. For example, you can say:

"I will listen as carefully as I can."
"I will pay attention to your concerns."
"Tell me what's going on."
"Tell me more!"

You can also show attention non-verbally, such as:

Have good "eye contact" (keeping your eyes focused on the person)
Nod your head up and down to show that you are attentive to their concerns
Lean in to pay closer attention
Put your hand near them, such as on the table beside them
(Be careful about touching an upset HCP – it may be misinterpreted as a threat, a come-on, or a put-down)

The Importance of Respect

Anyone in distress, and especially HCPs, need respect from others. Even the most difficult and upset person usually has some quality that you can respect. By recognizing that quality, you can calm a person who is desperate to be respected.

Many high conflict people are used to being disrespected and being independent and "not needing others." This characteristic often leads them into conflict with those around them, who don't wish to see them as superior and are tempted to try to put them down. This just makes the HCP even more upset.

Here are several statements showing respect:

"I can see that you are a hard worker."
"I respect your commitment to solving this problem."

"I respect your efforts on this."
"I respect your success at accomplishing _____."
"You have important skills that we need here."

Why EAR is so Important

Upset people, especially high conflict people, may not be getting empathy, attention and respect anywhere else. They have usually alienated most of the people around them. It is the last thing that anyone wants to give them. They are used to being rejected, abandoned, insulted, ignored, and disrespected by those around them. They are starving for empathy, attention and respect. They are looking for it anywhere they can get it. So just give it to them. It's free and you don't sacrifice anything. You can still set limits, give bad news, and keep a social or professional distance. It just means that you can connect with them around solving a particular problem and treat them like an equal human being, whether you agree or strongly disagree with their part in the problem.

Many HCPs also have a hard time managing their own emotions. Since brain researchers have learned that we "mirror" each other's emotional expressions, it makes sense to respond to upset people with a calm and matter of fact manner – so that they will mirror us, rather than us mirroring their upset mood (which is what most people do much of the time – and it just makes things worse).

Managing Your Amygdala

Of course, this is the opposite of what we feel like doing. You may think to yourself: "No way I'm going to listen to this after the way I've been verbally attacked!" But that's just your amygdala talking, in an effort to protect you from danger. Our brains are very sensitive to threats, especially our amygdalas (you have one in the middle of your right brain and one in the middle of your left). Most people, while growing up, learn to manage the impulsive, protective responses of their amygdalas and over-ride them with a rational analysis of the situation, using their prefrontal context behind the forehead.

In fact, that is a lot of what adolescence is about: learning what is a crisis needing an instant, protective response (amygdala) and learning what situations are not a crisis and instead need a calm and rational response (prefrontal cortex). High conflict people often were abused or entitled growing up, and didn't have the secure, balanced connection necessary to learn these skills of emotional self-management. Therefore, you can help them by helping yourself not over-react to them. Just use your own prefrontal cortex to manage your own amygdala – which will help the upset person manage theirs.

It's Not About You!

To help you stay calm in the face of the other person's upset, remind yourself "it's not about you!" Don't take it personally. It's about the person's own upset and lack of sufficient skills to manage his or her own emotions. Try making E.A.R. statements and you will find they often end the attack and calm the person down. This is especially true for high conflict people (HCPs) who regularly have a hard time calming themselves down. All of the E.A.R. statements above are calming statements. They let the other person know that you want to connect with him or her, rather than threaten him or her. It's their issue and you don't have to defend or explain yourself. It's not about you!

What to Avoid About EAR

Don't Lie:
Upset people are often hyper-sensitive to lying. If you really can't feel empathy for the person, find something that you can respect that he or she has done. If you really can't respect the person, then simply pay attention. You can always just say: "Tell me more." This calms the person, because it tells him or her that you will listen without needing to be persuaded to do so. If your body language shows you are open to listening, most upset people feel better and will calm down enough to tell you what's going on.

You don't have to listen forever:
EAR doesn't mean just listening. It's a statement in response to the person's upset mood, which you can use at any time. It can help you wrap up a conversation, if you need to do something else. High conflict people are known for talking endlessly. Keep in mind that high conflict people often don't get a sense of relief from telling their story or talking about their pain – they have told it many times and it is stuck. Often, they are stuck trying to get others to give them empathy, attention and respect, so that if you just give them an EAR statement, they may not feel the need to keep talking or talk so long. You can interrupt an upset person much of the time, by saying how you can empathize with and respect the person.

EAR doesn't mean you agree or disagree:
Giving your empathy, attention and respect helps you connect with an upset person as a human being. It doesn't mean that you agree or disagree with their point of view. Too often, people get stuck on arguing about an "issue." But with high conflict people "the issue's not the issue" – it's their inability to manage their own emotions and, sometimes, their behavior. If you are challenged about whether you agree or not, simply explain that you care or want to be helpful.

Maintain an "arms-length" relationship:

Giving your empathy, attention and respect to an upset person doesn't mean that you have to have a close relationship. You can still maintain a professional relationship, co-worker relationship, neighbor relationship, etc. In fact, it is wise not to become too close to a high conflict person, so that you don't raise their expectations of you becoming responsible for their welfare or planning to spend more time together than you intend.

Conclusion

Everyone gets upset some of the time. You don't have to be a high conflict person to be upset. At moments of trauma, anger and sadness, we really need the human connection of knowing that someone has empathy for us, is paying attention and still has respect for us. You can give anyone an EAR Statement to help them calm down. Nothing in this article is intended to mean that only HCPs get upset.

Making EAR Statements – or non-verbally showing your Empathy, Attention and Respect – may help you calm or avoid many potentially high-conflict situations. It can save you time, money and emotional energy for years to come. But it takes lots of practice.

Bill Eddy is a lawyer, therapist, mediator, and the Training Director of the High Conflict Institute, a training and consulting company focused on dealing with difficult people in high-conflict disputes. For more, www.HighConflictInstitute.com.

How To Write A BIFF Response®

Hostile email, texts and other electronic communications have become much more common over the past decade. Most of this is just "venting," and has little real significance. However, when people are involved in a formal conflict (a divorce, a workplace grievance, a homeowners' association complaint, etc.) there may be more frequent hostile email. There may be more people involved and it may be exposed to others or in court. Therefore, how you respond to hostile communications may impact your relationships or the outcome of a case.

Do you need to respond?
Much of hostile e-communication does not need a response. Letters from (ex-) spouses, angry neighbors, irritating co-workers, or attorneys do not usually have legal significance. The letter itself has no power, unless you give it power. Often, it is emotional venting aimed at relieving the writer's anxiety. If you respond with similar emotions and hostility, you will simply escalate things without satisfaction, and just get a new piece of hostile mail back. In most cases, you are better off not responding. However, some letters and emails develop power when copies are filed in a court or complaint process – or simply get sent to other people. In these cases, it may be important to respond to inaccurate statements with accurate statements of fact. If you need to respond, I recommend a **BIFF Response: Brief, Informative, Friendly and Firm**

BRIEF
Keep your response brief. This will reduce the chances of a prolonged and angry back and forth. The more you write, the more material the other person has to criticize. Keeping it brief signals that you don't wish to get into a dialogue. Just make your response and end your letter. Don't take their statements personally and don't respond with a personal attack. Avoid focusing on comments about the person's character, such as saying he or she is rude, insensitive or stupid. It just escalates the conflict and keeps it going. You don't have to defend yourself to someone you disagree with. If your friends still like you, you don't have to prove anything to those who don't.

INFORMATIVE
The main reason to respond to hostile mail is to correct inaccurate statements which might be seen by others. "Just the facts" is a good idea. Focus on the accurate statements you want to make, not on the inaccurate statements the other person made. For example: "Just to clear things up, I was out of town on February 12th, so I would not have been the person who was making loud noises that day." Avoid negative comments. Avoid sarcasm. Avoid threats. Avoid personal remarks about the other's intelligence, ethics or moral behavior. If the other person has a "high conflict personality," you will have no success in reducing the conflict with personal attacks. While most people can ignore personal attacks or might think harder about what you are saying, high conflict people feel they have no choice but to respond in anger – and keep the conflict going. Personal attacks rarely lead to insight or positive change.

FRIENDLY
While you may be tempted to write in anger, you are more likely to achieve your goals by writing in a friendly manner. Consciously thinking about a friendly response will increase your chances of getting a friendly – or neutral – response in return. If your goal is to end the conflict, then being friendly has the greatest likelihood of success. Don't give the other person a reason to get defensive and keep responding.

This does not mean that you have to be overly friendly. Just make it sound a little relaxed and non-antagonistic. If appropriate, say you recognize their concerns. Brief comments that show your empathy and respect will generally calm the other person down, even if only for a short time.

FIRM
In a non-threatening way, clearly tell the other person your information or position on an issue. (For example: "That's all I'm going to say on this issue.") Be careful not to make comments that invite more discussion, unless you are negotiating an issue or want to keep a dialogue going back and forth. Avoid comments that leave an opening, such as: "I hope you will agree with me that …" This invites the other person to tell you "I *don't agree*."

Sound confident and don't ask for more information if you want to end the back-and-forth. A confident-sounding person is less likely to be challenged with further emails. If you get further emails, you can ignore them, if you have already sufficiently addressed the inaccurate information. If you need to respond again, keep it even briefer and do not emotionally engage. In fact, it often helps to just repeat the key information using the same words.

Example

Joe's email: "*Jane, I can't believe you are so stupid as to think that I'm going to let you take the children to your boss' birthday party during my parenting time. Have you no memory of the last six conflicts we've had about my parenting time? Or are you having an affair with him? I always knew you would do anything to get ahead! In fact, I remember coming to your office party witnessing you making a total fool of yourself – including flirting with everyone from the CEO down to the mailroom kid! Are you high on something? Haven't you gotten your finances together enough to support yourself yet, without flinging yourself at every Tom, Dick and Harry?* ..." [And on and on and on.]

Jane: *"Thank you for responding to my request to take the children to my office party. Just to clarify, the party will be from 3-5 on Friday at the office and there will be approximately 30 people there – including several other parents bringing school-age children. There will be no alcohol, as it is a family-oriented firm and there will be family-oriented activities. I think it will be a good experience for them to see me at my workplace. Since you do not agree, then of course I will respect that and withdraw my request, as I recognize it is your parenting time."* [And that's the end of her email.]

Comment: Jane kept it brief, and did not engage in defending herself. Since this was just between them, she didn't need to respond. If he sent this email to friends, co-workers or family members (which high conflict people often do), then she would need to respond to the larger group with more information, such as the following:

Jane: *"Dear friends and family: As you know, Joe and I had a difficult divorce. He has sent you a private email showing correspondence between us about a parenting schedule matter. I hope you will see this as a private matter and understand that you do not need to respond or get involved in any way. Almost everything he has said is in anger and not at all accurate. If you have any questions for me personally, please feel free to contact me and I will clarify anything I can. I appreciate your friendship and support."* [And that's it]

Comment: Again, Jane has kept it brief, informative, friendly and firm. With other people involved, it is important to keep a door open for communication and show a willingness to correct any misconceptions, if necessary. There is no need to address all of Joe's allegations in this group email, as it will just escalate the dispute and other people will feel they have to get involved.

Conclusion
Whether you are at work, at home or elsewhere, a BIFF Response can save you time and emotional anguish. The more people who handle hostile mail in such a manner, the less hostile mail there will be.

Bill Eddy is a lawyer, therapist, mediator, and the Training Director of the High Conflict Institute, a training and consulting company focused on dealing with difficult people in high-conflict disputes. For more, www.HighConflictInstitute.com.

Dealing with High-Conflict Counsel: An Interview with Bill Eddy

by Deborah Bayus, President North County Bar Association, San Diego County, California

Perhaps one of the most difficult aspects of practicing law is an early assessment of the parties to the disputes. Although family law practitioners often expect emotions to run high in representation, none of us are immune from the presence of a highly-charged client. However, an emotional client is one species while one with a "high-conflict personality"—an HCP—is quite another. Couple this irrational personality with an HCP attorney who feeds the fuel and carries the torch for the HCP client, and you may find the challenge beyond your expertise. To my knowledge, there is at least one source of guidance: attorney/mediator/social worker Bill Eddy.

Last year, Eddy, author of the books High Conflict People in Legal Disputes; Splitting; Managing High Conflict People in Court; and the newly-released Its All Your Fault!, provided NCBA members [with a seminar] with an inside view to the litigation personalities who focus on finding and eliminating their adversaries. In a recent discussion with Bill, I learned that he has been getting more questions from attorneys and judges who attend his seminars about dealing with high-conflict counsel. With the new civility standards in California since last July, the topic is ripe for discussion.

Q. Bill, in a nutshell, what is the definition of a high-conflict personality?

Basically, when a person has a high-conflict personality, he or she is stuck in conflict. It's part of who they are. The issue's not the issue. They will just find another issue to fight about the same way. It's how they routinely think, feel, and act. Because it's part of their personality, they can't see it. They can't see that their behavior is out of line or "over-the-top." It feels necessary and normal to them even though everyone around them can see that the person— who I call an HCP—is acting very inappropriately. It's hard to believe, but they really lack self-awareness of how inappropriate they are. And you can't "make" them see it like you can't make a blind person see. HCPs just get defensive when you give them negative feedback, and often escalate the conflict even more.

Q. How can we determine if opposing counsel's lack of civility is fostered by their own high-conflict personality, as opposed to zealous representation? In other words, in practice, what kind of behavior, or series of behaviors, should we view as "red flags?"

The biggest sign is whether they can turn their aggressive behavior on and off to appropriately fit the circumstances. If they are always aggressive—even when it hurts their client or themselves—that is a sign they can't stop themselves. It's this lack of self-awareness that's key; e.g., if you can't even talk to them reasonably on the phone; if they always make it personal with personal attacks or public rebukes of you or your client; if they have emotional outbursts they can't control; when they can't even make a settlement proposal or respond to one; if they "project" their own

behavior onto you and blame you for acting in ways that they are really acting; or if they tell the judge that
you're being uncooperative or not communicating. These are all signs of a highconflict personality and predictive of future uncivil behavior.

Q. How do we effectively deal with opposing counsel when we are faced with this situation?

I believe there are at least four key points:

1. Don't take it personally. This high-conflict behavior isn't about you. It's about the highconflict person, the HCP. If you get emotionally hooked, you are likely to feed the conflict and look like an HCP yourself. Don't respond to every inappropriate challenge of high-conflict opposing counsel. You don't have to defend yourself. You will become exhausted.

2. Don't counter-attack in the same aggressive manner because, if you do, they will use it against you. HCPs are far more clever at blaming people than most reasonable people are. And, for a while, you will look bad to your client, to the court, and perhaps to other professionals (especially if they don't know you). The key, I believe, is in staying reasonable and unaffected even when the HCP is pushing your buttons. Display calm confidence in the face of the HCP's histrionics.

3. Instead, be very assertive in the case. Keep the pressure on for settlement. Keep preparing for court, if necessary. Keep writing settlement letters and preparing court documents. Let opposing counsel know that you are not going to back down based on dramatics. Know more about your case than anyone else. Stay focused on the facts and who needs to hear them. Do your homework and keep the information pressure on. Then, you retain your credibility in front of your client, in front of the court, and in front of the opposing party. Be the one who stays focused on information rather than emotion.

4. Don't pressure your client to settle just to get the case over with. Keep informing your client of the realities of the situation and let the client decide what to do. Don't feel that you have to prove anything to your client or to opposing counsel. It's not about you. Let your client know that you are dealing with opposing counsel with a reputation for being "difficult." But don't go into greater detail or you risk being considered uncivil yourself. Many cases with high-conflict opposing counsel never settle, so be prepared from the start to go to court.

Q. Are there disciplinary measures in place for HCP counsel?

Unfortunately, the new civility standards don't have any teeth. They are voluntary. This shows a deep misunderstanding of the problem of HCPs. About 15% of the general population appears to have high-conflict personalities, and this means that they can't stop themselves. This means that it often takes consequences to have any impact on their high-conflict behavior.

Just suppose, for the sake of discussion, that 15% of lawyers are HCPs. This means that 85% are able to act fairly reasonably and able to manage their own behavior in a civil manner and don't need civility standards to know what's appropriate and what's not. It's the 15% who need it spelled out for them who need these standards, but they aren't going to follow them or change their own behavior unless they have to.

I believe there needs to be an enforcement mechanism before you will see a positive change in civility in our profession. Especially since HCPs are increasing in our society at large, I believe you will see more, not less, in our profession unless there's some enforcement.

On the other hand, there was a very recent appellate court case in which the attorneys had consequences. They were personally sanctioned for pursuing a frivolous appeal in which the court stated:

"An attorney in a civil case is not a hired gun required to carry out every direction given by the client…. As a professional, counsel has a professional responsibility not to pursue an appeal that is frivolous or taken for the purpose of delay, just because the client instructs him or her to do so. … Under such circumstances, the high ethical and professional standards of a member of the bar and an officer of the court require the attorney to inform the client that the attorney's professional responsibility precludes him or her from pursuing such an appeal, and to withdraw from the representation of the client. In re Marriage of Gong and Kwong (2008) 163 Cal. App. 4th 510, 521."

Perhaps, with cases like this, HCP opposing counsel will be a little more careful about reinforcing their HCP clients in engaging in high-conflict behavior designed to harass reasonable parties and their counsel.

Q. If you were to introduce programs for MCLE Ethics, what topics do you believe would be the most beneficial to counsel?

I can think of several things. First would be to understand the brain research on how emotions are contagious. Just in the last few years, a lot has been discovered which helps explain why we get emotionally hooked by clients and by high-conflict professionals. Understanding these dynamics can help us avoid getting emotionally hooked, which happens a lot in these high-conflict cases.

Second would be teaching alternate methods of responding to high-conflict parties (and many these days don't even have an attorney) and high-conflict counsel so that these cases don't just spin out of control with everyone overreacting to everyone else. Communicating effectively to calm down the conflict rather than escalating it. Calming high-conflict clients on both sides should be part of what we do, and it's now part of the civility standards, at least in family law.

Third would be addressing the issue of "professional splitting" in which opposing professionals start to hate each other and make the dispute personal. This is predictable when one or more parties with a high-conflict personality are in a case, and avoidable. Checking out rumors. Speaking directly. Not seeing the case or the parties as "all good" versus "all bad."
Lastly, looking at developing real consequences for uncivil behavior and how we as a profession can set limits on our peers instead of tolerating incivility. Also, looking at how the courts can sanction the extremes without alienating the profession as a whole. Without consequences, this problem will continue to increase. We're already seeing that. That's why we're talking about this today.

Bill Eddy is a lawyer, therapist, mediator, and the co-founder and Training Director of the High Conflict Institute, a training and consulting company focused on dealing with difficult people in high-conflict disputes. For more, www.HighConflictInstitute.com.

MISUNDERSTANDING INCIVILITY AND HOW TO STOP IT

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Recently there has been growing discussion of incivility in all areas of modern life. Public figures, professionals and the public are growing more concerned about this behavior. While this problem appears in every occupation, I am writing this article about the legal profession as a lawyer.

Nowadays, parties in disputes are abandoning lawyers and attempting to represent themselves more than ever before. Students are applying to law schools in fewer numbers than in decades. Worldwide, the view is growing that lawyers are a source of hostility, rather than a profession that manages it. While my points in this article may apply to any occupation today, because the problem is people, the practice of law appears to attract and tolerate more of such people.

As a practicing attorney for 15 years in Family Courts, I routinely experienced incidents of incivility – especially when I was starting out. As a family mediator - before, during and after my court practice - I have experienced a few such incidents, but much less so. More recently, as a speaker at bar conferences and judicial trainings on managing "high-conflict" behavior, I am increasingly asked about methods for dealing with rude, obnoxious and shameful behavior by "high-conflict" counsel.

I am told by judges and lawyers alike that new attorneys are more engaged in this type of behavior. If this is really true, it's hard to tell whether it is the result of new lawyers learning from the worst role models, or from seeing uncivil behavior rewarded instead of stopped, or simply entering the profession as ruder people. Perhaps all of the above.

What I do know is that this problem is not being very effectively addressed and I believe it is because most people misunderstand its dynamics. This article addresses what may be happening and provides a few suggestions for dealing with it.

Persuasion Doesn't Work

On January 28, 2013, a Wall Street Journal article reported that some leading New York lawyers joined together to address the problem of incivility in a new way. They re-wrote popular songs and performed them at a bar meeting about "lawyers behaving badly." Apparently, it was great fun and succeeded at bringing attention to the problem, but I doubt it had any impact. For years, judges and leading attorneys have given speeches in an effort to inspire their colleagues to "behave." I have attended sincere lectures on civility by justices of the highest courts in several states and provinces, and I have great respect for them. But this hasn't stemmed the increase in this behavior.

For example, in 2007, the State Bar of California adopted the "California Attorney Guidelines of Civility and Professionalism." The introduction to the guidelines state in part:

> "As officers of the court with responsibilities to the administration of justice, attorneys have an obligation to be professional with clients, other parties and counsel, the courts and the public. This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution."

This is a great set of guidelines for civil behavior and I was encouraged by this effort. But they have failed to reduce the problem, which has only increased since then. In setting forth these guidelines, the President of the Bar stated:

> "… As we all know, uncivil or unprofessional conduct not only disserves the individuals involved, it demeans the profession as a whole and our system of justice. A growth in uncivil conduct in the legal profession caused me to initiate the effort for Board adoption of civility and professionalism guidelines.
>
> I hope you will join me in encouraging California attorneys to engage in best practices of civility by making the *Guidelines* their personal standards and goals…."
>
> Sheldon H. Sloan, Letter to Bar Leaders, July 17, 2009.

It turns out that "encouraging" attorneys hasn't worked. 80-90% of lawyers already act civilly with each other and the court. They don't need detailed guidelines about how to behave, because they already routinely act in a civil manner. The 10-20% who act uncivilly haven't changed. Lack of encouragement isn't the issue for them. They need real consequences if they are going to stop their behavior, and retraining or expulsion from the profession.

Unfortunately, the *Guidelines* avoided enforcement consequences, such as sanctions, specifically saying: "Sanctions can be expected to lead to a less collegial relationship among counsel, and tend to undermine the civility effort." (*Guidelines* FAQs, July 2009). The hope was that improving the profession would be sufficient reward in and of itself, by improving enjoyment of one's professional work and raising the overall view of lawyers in society. That hopeful approach has failed. So what other approaches are there?

Public Shaming Doesn't Work

In February, 2013, on the San Diego Family Law Listserve, one lawyer named another lawyer (I'll just say "Lawyer A") and described Lawyer A's uncivil behavior in detail which he ("Lawyer B") thought was outrageous. The uncivil behavior had to do with Lawyer A having a couple of dogs dropped off at Lawyer B's office, without warning or agreement, that were the subject of a divorce dispute and prior unproductive conversations between the lawyers. Apparently, the dogs created quite a management and cleanup problem.

This triggered two Listserve discussions: 1) Was Lawyer A's behavior outrageous? Most of those who responded agreed it was and some suggested legal actions that could be taken by Lawyer B against Lawyer A.

2) Was it inappropriate for Lawyer B to publicly give Lawyer A's name – was this perhaps uncivil too? This drew heated responses on both sides. The theory of those who supported the public "outing" was that public shaming will lead to better behavior. The other viewpoint was that public shaming is not part of the solution, but part of the problem of incivility. It showed highly negative personal attacks designed to harm another professional's reputation. In a sense: fighting fire with fire. It doesn't make things better and appears to make things worse.

Yet public shaming is an increasingly common approach in our society – even among public figures and even endorsed by some business leaders. For example, Robert Sutton, a management professor at Stanford University, published a popular book in 2007, titled *The No A**hole Rule: Building a Civilized Workplace and Surviving One That Isn't.* In it he argues for the near-elimination of a**holes from the workplace, including employees and managers who qualify. (I'm restraining myself here – he spells the a** word out and admits that he "shamelessly" used the word to get attention – which he successfully did.) I agree with many of his concerns and many of his ideas (although I prefer the term "high-conflict people" or HCPs for short – without publicly labeling any individual). But I disagree with his support of public shaming.

For example, he describes a restaurant scene in which someone is bothering a waitress:

> One day, I waited behind an especially rude customer who was sitting at the counter. He made crude comments, tried to grab the waitress, complained about how his veal parmigiana tasted, and insulted customers who told him to pipe down.
>
> This creep kept spewing his venom until a fellow customer approached him and asked (in a loud voice), "You are an amazing person. I've been looking everywhere for a person like you. I love how you act. Can you give me your name?" He looked flustered for a moment, but then seemed flattered, offered thanks for the compliment, and provided his name.
>
> Without missing a beat, his questioner wrote it down and said, "Thanks. I appreciate it. You see, I am writing a book on a**holes… and you are absolutely perfect for chapter 13." The entire place roared, and the a**hole looked humiliated, shut his trap, and soon slithered out—and the waitress beamed with delight. (p. 179-180)

A Bar of Soap

The problem with this approach is that it promotes calling people names in public, which is itself seen as uncivil behavior by many people. When I was a teenager, my mother washed my mouth out with soap for using words like that – even in our house!

When restaurant customers or beleaguered lawyers resort to self-help by publicly humiliating someone by name who has been offensive, it looks a lot like there are two a**holes and the problem often escalates. Sutton admits this about himself in an example in his Epilogue, after he first published the book. He was at a concert where he told two noisy, drunken women behind him

to quiet down and they called him an a**hole. So he said they were the "real a**holes" to which they screamed back "you are the f***ing a**hole, not us." To his credit, he admits that he may have contributed to the problem in that case. (p. 202)

Identification as a Victim

What many people don't realize is that much or most incivility is justified in the uncivil person's mind by the actions of others. "I had to say what I did after what they said or did to me!" is what I often hear or see in uncivil situations. From my experience with HCPs, efforts to angrily confront them with their own behavior just trigger more defensive behavior, not less. They lack self-awareness of their impact on others and are absorbed in their own arrogance or distress. It appears that their uncivil behavior is part of their personality, rather than an aberration. Negative feedback – especially reciprocal insults – doesn't change their normal approach to life at all. In fact, it reinforces it.

In a book on the development of personality disorders, beginning in childhood or adolescence, the researcher Efrain Bleiberg with the Menninger Institute describes a common pattern he has identified, which I have summarized as follows:

> When people develop personality disorders, they don't reflect on their own behavior in social interactions, with the following result:
>
> 1. Their behavior becomes rigidly patterned (doing the same thing over and over again).
> 2. This causes significant social impairment (they don't have friends and social respect).
> 3. Which causes significant internal distress (because people need friends and respect).
> 4. This rigid behavior "evokes" responses in others which "validate" or justify their inflexible beliefs and behavior in their eyes. ("See, I showed them," they often say, proud of their bad behavior.)
>
> Bleiberg, *Treating Personality Disorders in Children and Adolescents*, 2001.

In other words, a person with a personality disorder tends to trigger negative responses in others, but then they don't gain any insight from these negative responses, regardless of how well-intentioned the responders might have been. If you think of giving personality-disordered people or "high-conflict" people insight into their own behavior, just tell yourself: "Forgetaboudit!"

Consequences, not insight, are what is needed with such people. But could uncivil attorneys have personality disorders?

Attorneys with Personality Disorders?

When people have a personality disorder, they have a narrower range of behavior, as described by the mental health handbook, the DSM-IV and the new DSM-5. If incivility is part of that personality-based behavior, then it is an embedded pattern habit that is generally harder to

change than stopping drinking or drug use is for an alcoholic or addict. It's an automatic behavior which the person accepts as "necessary and normal," since those with personality disorders lack self-awareness and behavior change.

According to various studies in the United States, approximately 10-20% of the general population has a personality disorder. They are present across all economic levels, racial/ethnic groups, age groups and geographic regions of the country (although slightly higher in urban areas than rural). (Grant, et al. *Journal of Clinical Psychiatry,* July 2004, April 2008 and July 2008 issues.) To have a personality disorder, one must have significant social impairment and/or internal distress. No one has studied, to my knowledge, whether lawyers as a group have less than the general population, about the same or more. But many people inside and outside the profession believe there is a higher incidence in the legal field – that it attracts high-conflict people, many of whom have personality disorders.

From my experience and observations, this personality-based behavior follows three general patterns in the legal field, whether full personality disorders or just some traits of these disorders:

Narcissists: These attorneys see themselves as superior and allowed to treat others as lesser beings. The common expression is that they see themselves "as a legend in their own mind." They enjoy being uncivil to opposing parties, opposing counsel and their own clients. Yet they see themselves as outstanding advocates – zealous advocates – for their clients, and justify every insult they deliver as part of that advocacy role. They think that the rules don't really apply to them and they laugh it off when those "beneath them" (in their eyes) are upset by their behavior. Yet they effectively impress those above them enough, such as judges and leaders in the legal community, that they rarely get confronted with real consequences for their behavior.

Borderlines: Such lawyers can't control their emotions – they are all over the place. They may slam down the phone or blurt out that someone is an a**hole in a negotiation session. They write fiery emails and send them, blasting the other party for being a jerk (totally oblivious to the inappropriateness of what they themselves have written). They always feel on the defensive and go from crisis to crisis (mostly self-created), dealing angrily with their own clients, staff, and opposing counsel in much the same manner. Yet they are totally surprised when others point out to them that they are acting inappropriately. Some of them even get in trouble for treating the court disrespectfully, because they have difficulty controlling their emotions and their mouths with anyone – even in court.

Antisocials: These lawyers enjoy other people's pain. They freely criticize and manipulate their clients, the opposing parties and opposing counsel. They ask opposing counsel for favors, but rarely return them. The legal profession

gives them cover for the behavior they came in with, because they are usually clever enough to cultivate the appearance of being chummy with those in authority positions. This personality in particular is developed by adolescence and very hard to change. Sole practice and family law are areas where they can thrive and engage in misbehavior with little likelihood of consequences. They have a much harder time in large firms where people catch on to them and won't tolerate their daily behavior. But some slip through anyway. They cleverly manipulate the court (such as lying about case precedents or their own actions in a case) and rarely get caught.

All of these personalities are extremely hard to change and many people have more than one. However, people with just traits of a personality disorder, but not the full disorder, may be more able to change with sufficient consequences and training. All of them identify themselves as victims defending themselves from others, which helps them justify any behavior they engage in. A lecture from the bench or guidelines "encouraging" better behavior will have no impact on them whatsoever. Incivility is part of who they are. It is a defense mechanism fundamental to their personalities. You might as well tell them not to breathe. Instead, there are better approaches.

Of course, it's very important to recognize that personality disorders can be in the eye of the beholder and that even mental health professionals disagree on who fits this diagnosis. Many people with personality disorders don't see it in themselves, but see it in others who are acting reasonably. In fact, that's what drives a lot of litigation when a person with a personality disorder is involved. Which person is it? The focus needs to be on behavior rather than labeling. But uncivil behavior does need to be changed.

Consequences

Based on years of working in mental health settings, family law practice and studying the research on personality problems, it has become clear to me that changing personality-based behavior requires consequences, much in the same way that treatment for alcoholism and addiction doesn't really begin until there are sufficient and immediate motivating consequences, such as losing a driver's license, a job or a marriage.

I would make the following three suggestions:

1. **Requiring Civility as a Mandatory CLE Topic Itself:** For years, there has been a required effort in the legal profession to educate lawyers about alcoholism and addiction, including mandatory continuing legal education (CLE) every two years on the subject and referral services for those in need of a recovery program. I would suggest requiring Civility as a mandatory CLE topic for all lawyers itself, not just part of Ethics, including descriptions of specific behaviors that are considered uncivil and exposing examples, without naming names, except where there are public cases, such as some recent appellate cases in which lawyers received sanctions.

Lawyers could submit confidential case examples of recent uncivil behavior prior to a CLE seminar, for larger discussion. For example: "Is it uncivil to write a letter that states that opposing counsel is "a disgrace to the profession?" Or to throw papers that fall on the ground at opposing counsel just before court is in session? Or to tell a new lawyer "You're not a real attorney" during settlement negotiations? Or to refuse to shake opposing counsel's hand when he or she arrives with a client for a deposition? Or to serve papers on the opposing party at work by armed two marshals when that party's counsel said he would accept service?

Some local bar leaders have begun to take this approach of giving public examples (without names) for discussion, although it's not at a mandatory CLE. Such a CLE should become mandatory until the problem of incivility is significantly reduced, at which time it could become voluntary.

2. **Providing real consequences:** Financial sanctions from the court, suspensions of licenses and disbarment are real sanctions. We are starting to see more court decisions at the appellate level endorsing sanctions against attorneys who have been particularly egregious in their behavior. This is a good thing. Disciplinary action by the Bar needs to become more assertive in the civility area. The *Civility Guidelines* are a great idea, but they need enforcement measures. State Bar presidents and committees should build on these efforts.

3. **If the first two suggestions don't produce enough behavior change:** Perhaps there should be an effort to requiring civility training for certain attorneys, just as certain lawyers are required to take professional responsibility courses as a disciplinary consequence. After all, recovery from alcohol and drugs takes repeated learning and practice of healthier behaviors, not just a lecture. But first, let's see if the first two suggestions make a difference.

And perhaps it wouldn't hurt if some judges put a bar of soap next to the gavel in their courtroom, as a subtle reminder to lawyers and the parties that we need to act civilly with each other and the public, and that there may be consequences if we don't!

The practice of law has contributed greatly to the peace and stability we enjoy in democratic countries. It is the envy of nations becoming free around the world. But the legal system is based on rules and consequences for the violation of those rules. With the apparent increase in people with personality-based problems in our society, we should recognize the need to use our rules – and consequences – on ourselves as well. As they say, we can do better!

Bill Eddy is a lawyer, therapist, mediator, and the co-founder and Training Director of the High Conflict Institute, a training and consulting company focused on dealing with difficult people in high-conflict disputes. For more, www.HighConflictInstitute.com.

State Bar of Georgia
INSTITUTE OF CONTINUING LEGAL EDUCATION

STATE BAR SERIES

Who's Afraid Of Virginia Woolf (1966) (Continued) Evolving Into A Tech Savvy Law Firm

Presented By:

T.C. Whittaker II
PwC New Ventures
Atlanta, GA

Building A Tech Savvy Law Firm

pwc.com/us/NewVentures

Agenda

1. Challenges for Small & Medium Law Firms
2. Cloud Market Growth & Why it matters
3. Excelling in the Digital Era
4. PwC Law Firm Solution
5. Demo

1

The Challenges for Small & Medium Law Firms

49%

Failed to meet annual targets for billable hours in 2017

Top Pain Points

Too Much Time on Administrative Tasks

Sources:
Altman Weil's most recent Law Firms in Transition survey
Survey by Thomson Reuters

Not Enough Time Practicing Law

2.5
Daily Hours Spent on Billable Work

5.6
Daily Hours Spent on Non Billable Tasks

Sources:
Clio's 2018 Legal Trends Report

Law Experts Not Business Experts

Overcoming the odds of Small business Failure

>50%
Of Small Businesses fail in the first 5 years.

82%
Fail due to cash flow issues

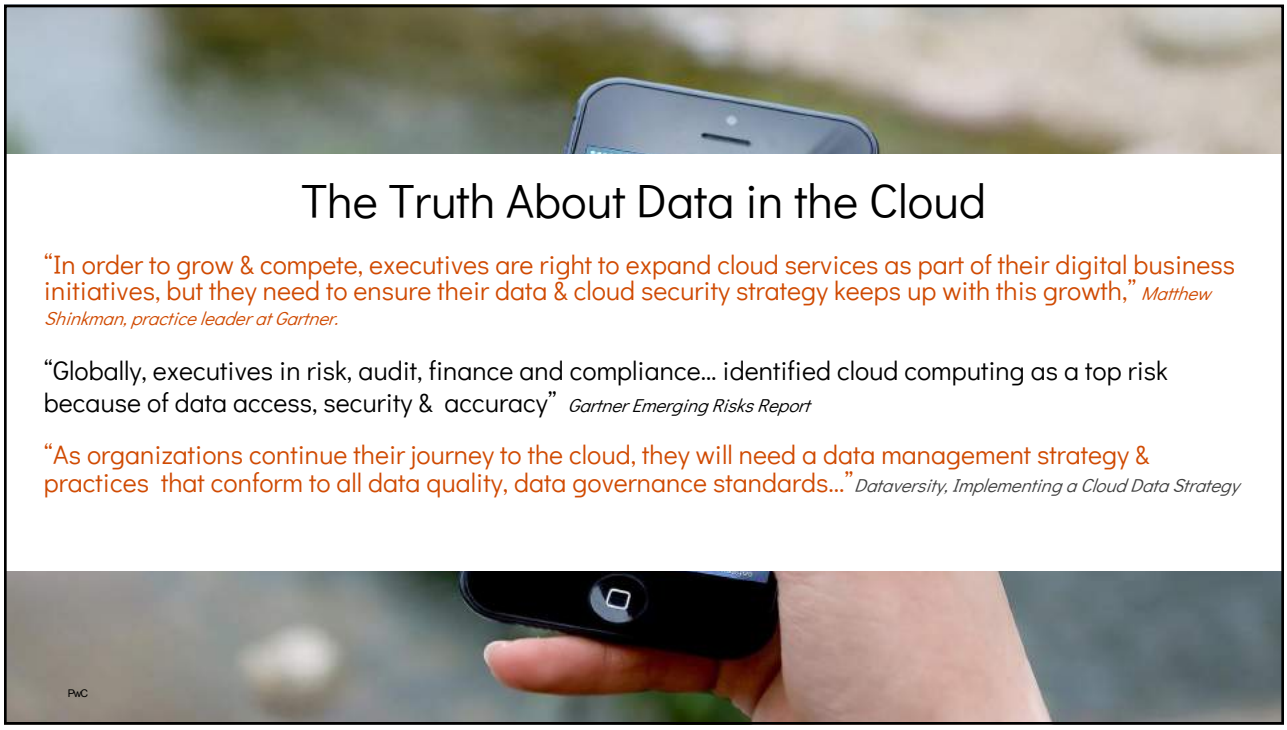
2

Growth of the Cloud & Why it Matters

Cloud Market Trends

Cloud Enabled Apps continue to grow exponentially

- Adoption is high amongst SMBs with over 73% of orgs looking to move all apps to SaaS by 2020*. *IDC Cloud Trends*
- Full or partial public or private cloud adoption in businesses across all industries is at 96%.
- Businesses who have adopted the cloud are reporting on average:
  19% increase in process efficiency
  16% reduction in operations costs
  15% reduction in IT spending



The Truth About Data in the Cloud

"In order to grow & compete, executives are right to expand cloud services as part of their digital business initiatives, but they need to ensure their data & cloud security strategy keeps up with this growth," *Matthew Shinkman, practice leader at Gartner.*

"Globally, executives in risk, audit, finance and compliance… identified cloud computing as a top risk because of data access, security & accuracy" *Gartner Emerging Risks Report*

"As organizations continue their journey to the cloud, they will need a data management strategy & practices that conform to all data quality, data governance standards…" *Dataversity, Implementing a Cloud Data Strategy*

PwC

3

Excelling in the Digital Era

Excelling in the Digital Era

Embrace the cloud
Adopt an opportunity mindset.

1

Leverage technology tools
Make the leap to automated systems.

2

Unlock Data Insights
Improve with business intelligence.

3

PwC | How you can evolve into a tech-savvy law firm

The Cloud will Shift The Way You Do Business

56%
Of Law Firms Utilize The Cloud

4%
Increase in Cloud Utilization 2017 - 2018

10%
Plan to Replace existing tools with Cloud Tools

Sources:
2018 Legal Technology Survey Report
RightScale 2018 "State of the Cloud" Survey

1. Embracing The Cloud

19%

Avg. Increase in Process Efficiency

16%

Avg. Reduction in Operational Costs

15%

Avg. Reduction in IT Spending

Source:
RightScale 2018 "State of the Cloud" Survey

2. Software in the Cloud

Transforming into a Data Driven, Automated, Well-Oiled machine.

- Paying Bills
- Expenses
- Operations
- Payroll and HR
- Accounting

Paying Bills

Bill.com

About the solution

- Billing management
- Automated reminders
- Flexible for both electronic and old-fashioned payments
- Integrates with cloud based accounting software

Benefits

- Quick
- Affordable
- Simple

Expenses

Expensify

About the solution

- No more manual data entry
- Mobile app on your phone
- Automated expense recording
- Real-time reporting

Benefits

- Intuitive
- Easy
- $5/month

Operations

Clio

About the solution

- Practice management
- Billing and time-tracking
- Client management
- Legal calendaring
- Task management
- Trust accounting
- Document management

Benefits

- Streamline operations
- Capture valuable data
- Efficiency

Payroll & HR

GUSTO

About the solution

- Payroll
- Benefits
- HR
- Compliance
- Taxes

Benefits

- Fast
- Easy
- Accurate

Accounting

QuickBooks.

About the solution

- Track transactions
- Report on results
- Connect bank accounts & credit cards
- Record both income and expenses
- Robust app store

Benefits

- Easy
- Accessible
- Collaborative

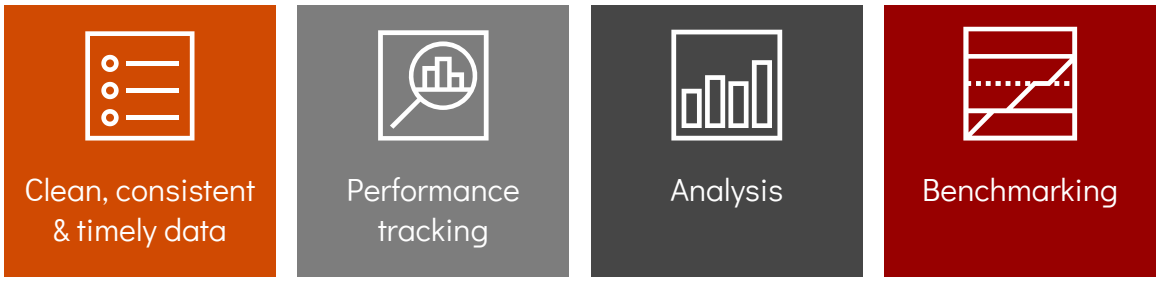
Failing to Transform

What are the true costs of failing to adapt new tech & tools?

- Paying Bills
- Expenses
- Operations
- Payroll and HR
- Accounting

Evolving into a Tech Savvy Law Firm

Unlock Your Data to extract 4 Key Values

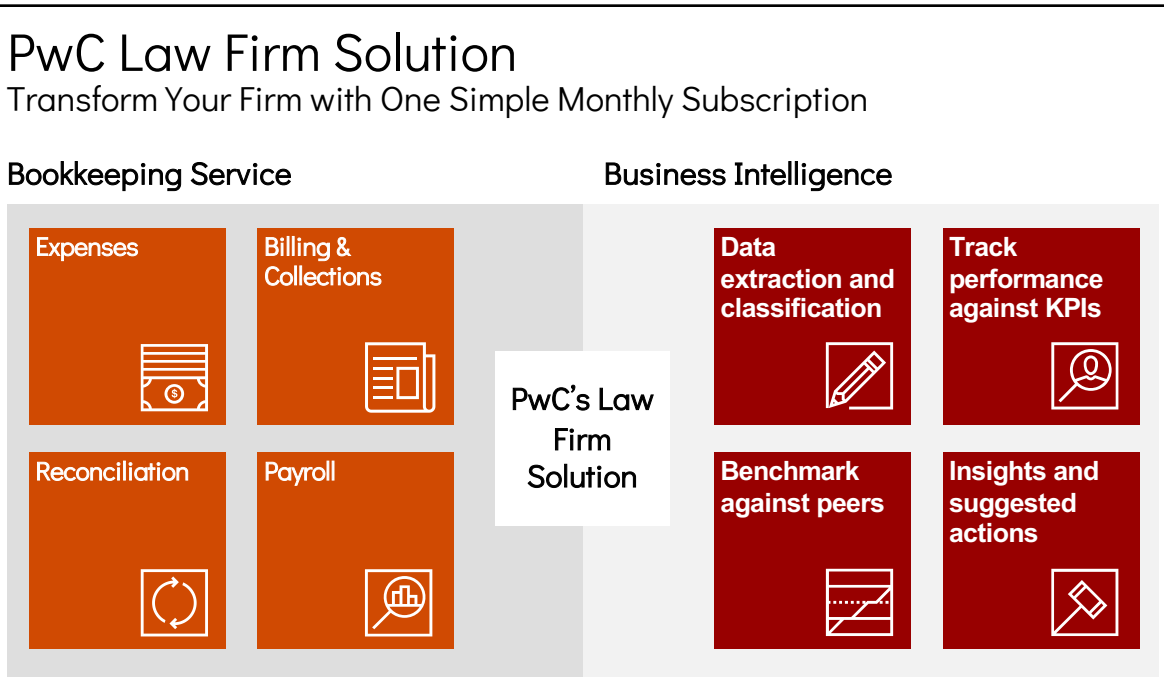


4

PwC Law Firm Solution

PwC Law Firm Solution

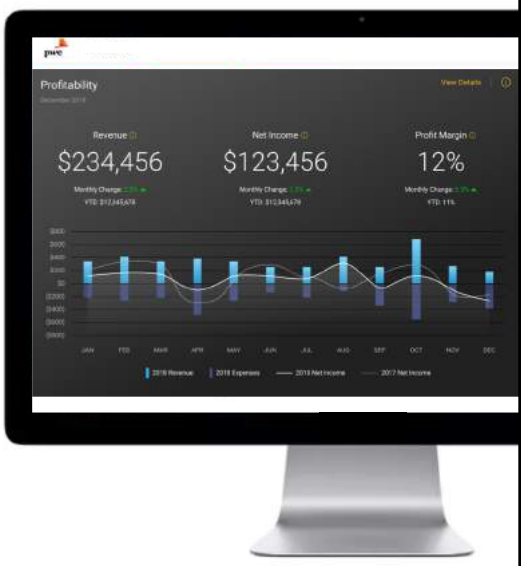
Transform Your Firm with One Simple Monthly Subscription



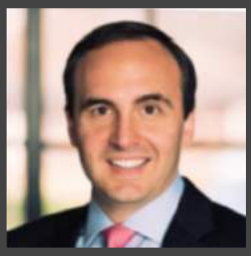
PwC Law Firm Solution

Providing Small & Medium Law firms with the Big Law Firm Advantage

- Cloud Enable Your Systems
- Get new access to Business Intelligence
- Transform into an automated, data driven, well oiled machine



PwC Expertise



T.C. Whittaker
Law Firm Solutions Leader, PwC
thomas.c.whittaker@pwc.com

1. Held various executive and entrepreneurial roles before joining PwC
2. Passionate about technology solutions that can disrupt industries
3. Heard and seen many stories about law firms that have evolved using technology

Thank you

At PwC, our purpose is to build trust in society and solve important problems. PwC is a network of firms in 158 countries with over 250,000 people who are committed to delivering quality in assurance, advisory and tax services. Find out more and tell us what matters to you by visiting us at www.pwc.com/US.

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STATE BAR SERIES

A Star Is Born (1954)
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Design Thinking For Lawyers:
Transform Your Law Practice With UX Design

Presented By:

Zach Pousman
Helpfully

Appendix

ICLE BOARD

Name	Position	Term Expires
Carol V. Clark	Member	2019
Harold T. Daniel, Jr.	Member	2019
Laverne Lewis Gaskins	Member	2021
Allegra J. Lawrence	Member	2019
C. James McCallar, Jr.	Member	2021
Jennifer Campbell Mock	Member	2020
Brian DeVoe Rogers	Member	2019
Kenneth L. Shigley	Member	2020
A. James Elliott	Emory University	2019
Buddy M. Mears	John Marshall	2019
Daisy Hurst Floyd	Mercer University	2019
Cassady Vaughn Brewer	Georgia State University	2019
Carol Ellis Morgan	University of Georgia	2019
Hon. John J. Ellington	Liaison	2019
Jeffrey Reese Davis	Staff Liaison	2019

GEORGIA MANDATORY CLE FACT SHEET

Every "active" attorney in Georgia must attend 12 "approved" CLE hours of instruction annually, with one of the CLE hours being in the area of legal ethics and one of the CLE hours being in the area of professionalism. Furthermore, any attorney who appears as sole or lead counsel in the Superior or State Courts of Georgia in any contested civil case or in the trial of a criminal case in 1990 or in any subsequent calendar year, must complete for such year a minimum of three hours of continuing legal education activity in the area of trial practice. These trial practice hours are included in, and not in addition to, the 12 hour requirement. ICLE is an "accredited" provider of "approved" CLE instruction.

Excess creditable CLE hours (i.e., over 12) earned in one CY may be carried over into the next succeeding CY. Excess ethics and professionalism credits may be carried over for two years. Excess trial practice hours may be carried over for one year.

A portion of your ICLE name tag is your **ATTENDANCE CONFIRMATION** which indicates the program name, date, amount paid, CLE hours (including ethics, professionalism and trial practice, if any) and should be retained for your personal CLE and tax records. **DO NOT SEND THIS CARD TO THE COMMISSION!**

ICLE will electronically transmit computerized CLE attendance records directly into the Official State Bar Membership computer records for recording on the attendee's Bar record. **Attendees at ICLE programs need do nothing more as their attendance will be recorded in their Bar record.**

Should you need CLE credit in a state other than Georgia, please inquire as to the procedure at the registration desk. ICLE does not guarantee credit in any state other than Georgia.

If you have any questions concerning attendance credit at ICLE seminars, please call:
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