

THE ALABAMA LAWYER

MAY 2021 | VOLUME 82, NUMBER 3



For more information on the Alabama State Bar's 144<sup>th</sup> Annual Meeting go to <https://www.alabar.org/news/annual-meeting>

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THE DOMESTIC RELATIONS ISSUE

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## P R E S I D E N T ' S P A G E



*Gray*

# Lawyers Inspire Us

The Alabama State Bar's motto—Lawyers Render Service—was first introduced by one of the greatest leaders in our profession, Fred Gray. Mr. Gray has devoted his life and legal career to ending all forms of racial discrimination and segregation. He successfully argued some of the most important constitutional law cases during the civil rights era and was a leader in the civil rights movement. Mr. Gray was appropriately described by Dr. Martin Luther King, Jr. as "the chief counsel for the protest movement,"<sup>1</sup> and he was the personal attorney for Ms. Rosa Parks, Dr. King, and Ms. Claudette Colvin. Mr. Gray was also the first African-American elected president of the Alabama State Bar.

Over the past few months, the Alabama State Bar has recognized Mr. Gray for his achievements. For example, I recently wrote a letter to President Joe Biden requesting that Mr. Gray be awarded the Presidential Medal of Freedom.<sup>2</sup> The Board of Bar Commissioners also passed resolutions detailing Mr. Gray's great accomplishments as well as the bar's highest respect and deepest gratitude for his life-long achievements. The bar will permanently honor Mr. Gray with the creation of the Fred David Gray Courtyard adjacent to the Alabama State Bar.

Fred Gray is a perfect example of a leader who committed his life to making this world a much better place. In short, Fred Gray is a true American hero, and I



am proud that the Alabama State Bar chose to recognize his lifetime of service. There are many others in our profession who deserve, but may not always receive, recognition for their daily impact on those around them. To showcase the inspiring leaders among us, the Alabama State Bar began the #MoreThanALawyer series during Christy Crow's tenure as president. You have probably seen the hashtag in some of our Scoop emails or on our social media pages.

Since its inception, we have had an amazing response to the program with numerous lawyers taking the opportunity to praise the accomplishments of their peers. Many of these stories are relatable to our readers and reflect charitable or other important work performed by lawyers and judges in their communities. The lawyers and judges featured in the #MoreThanALawyer series include: Nesha Wright, Yawanna McDonald, Kelly McTear, Daniel Fortune, Suntrease Williams-Maynard, Cassandra Adams, Marcus Maples, Chuck James, Timothy Wilson, Lisha Graham, Stephen Purdue, Will Parker, Laura Lloyd, Leon Hampton, Kameisha Logan, Gibson Vance, Leanne Richardson, Sam Bone, Mark Maloney, Tanisia Moore, Jason Isbell, LaBella McCallum, Chief Justice Tom Parker, Edgar Black, Susan Han, Bobby Poole, Kelly Butler, James Tarbox, Allison Skinner, Julian McPhillips, Chad Harrison, William Young, Don Davis, Peyton Faulk, Harry Hall, Judge Lang Floyd, Col. Charles Langlely, Jilisa Milton, Aaron Chastain, Jerome Thompson, Liz Huntley, Nikki Tinker, Ashley Cranford Marshall, Bernard Nomberg, Arthur Acosta, Laurel Crawford, Tremele Perry, Jacy Carpenter, Morris Lilienthal, Amber James, Bob Methvin, Cliff Mendheim, and Christy Crow.<sup>3</sup>

We are also excited to see that other state bars have adopted their own version of the #MoreThanALawyer series, including Arkansas and West Virginia.

Obviously, the above are just some of the leaders in our profession, and there are so many Alabama State Bar members who have had a substantial impact on their communities. Please continue to message us with nominations for those you feel deserve recognition. It may seem like a small gesture, but trust me, these stories provide a positive and uplifting message for our profession. Nominations can be submitted to Melissa Warnke at [melissa.warnke@alabar.org](mailto:melissa.warnke@alabar.org).

As I have echoed in almost every article, I truly am inspired by the members of our state bar, and I firmly believe that lawyers give back more to our communities and our state than any other profession.

I challenge all members of our bar to continue to lead our communities and state. My uncle said it best when he sent me a telegram (yes, you read that correctly) when I was in junior high; it read simply, "Lead, follow or get out of the way. I expect you to lead." As a profession, we have never "followed" or "gotten out of the way." Instead, lawyers have been catalysts for positive change for centuries. We are expected to lead and will continue to do so.

As my presidency draws to a close, I cannot help but be thankful for all of the lawyers I have been fortunate to meet

and work with over the past year. You have encouraged me throughout my tenure and will continue to inspire me for years following my presidency. I look forward to my next article where I will have the opportunity to personally thank so many of you who have helped me in my role over the last year. I am also excited to see many of you at our annual meeting this summer. If you have not already done so, I encourage you to register for the Alabama State Bar's 144<sup>th</sup> Annual Meeting, which will be held at the Grand Hotel Golf Resort & Spa in Point Clear, July 14-17. This is a great opportunity for us to engage with the leaders in our profession and learn from the many influential speakers that we have lined up. It is also a good excuse for a much-needed vacation for many of us. ▲

## Endnotes

1. See Elaina Plott, *For a Civil Rights Hero, 90, a New Battle Unfolds on His Childhood Street*, THE N.Y. TIMES (Dec. 25, 2020), <https://www.nytimes.com/2020/12/25/us/politics/fred-gray-rosa-parks-montgomery.html>.
2. See Letter from Robert G. Methvin, Jr. to President Joe Biden (Feb. 8, 2021), available at <https://www.alabar.org/assets/2021/02/Letter-to-President-Biden-re-Fred-Gray-1.pdf>.
3. While we could not detail the accomplishments of every #MoreThanALawyer nominee in this article, I hope that you will visit <https://www.alabar.org/more-than-a-lawyer-stories/> to read these inspiring stories about your colleagues.



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# Guest Speakers



Michael Floyd

## Spy the Lie

### Michael Floyd

Imagine how different your life would be if you could tell whether someone was lying or telling you the truth. Be it hiring a new employee, investing in a financial interest, or speaking with your child about drugs, having the ability to unmask a lie can have far-reaching and even life-altering consequences. Learn how a methodology originally developed to detect deception in counterterrorism and criminal investigations can be applied in daily life to recognize deceptive behaviors, both verbal and nonverbal.



Fred Gray, Sr.

## Reflections from Fred Gray

### Fred Gray, Sr.

Veteran civil rights attorney Fred Gray's legal career began in the midst of America's modern-day civil rights movement. With a quiet demeanor, strong determination, and secret commitment made in college, he vowed "to become a lawyer, return to Alabama, and destroy everything segregated I could find."

Over the course of his legal career, Gray has been at the forefront of changing the social fabric of America regarding desegregation; integration; constitutional law; racial discrimination in voting, housing, education, jury service, farm subsidies, medicine and ethics; and generally improving the national judicial system.



Sharon Muse

## From Zealous Representation to Threat Assessment: Identifying When a Client Becomes a Threat

### Sharon Muse

How prepared are you to avoid becoming the victim of violence? Walk through lawyer Sharon Muse's experience of being kidnapped by a former client and learn to recognize the red flags that might one day save your life. Discover the importance of situational awareness, mindset, and tactics to aid your defense. Analyze when—and when not—to trust your instincts and delve into the brain's reaction to a traumatic situation, which may cause you to hesitate when you need to take action.



Dickie Scruggs and Zack Scruggs

## From Prominence to Purpose: A Life of Second Chances

### Dickie Scruggs and Zach Scruggs

Former lawyers Dickie Scruggs and his son, Zach, are changing the lives of their fellow Mississippians. Dickie is best known as the architect of the litigation that resulted in the multi-billion-dollar Tobacco Settlement. Dickie and Zach, prominent attorneys and working side by side, spent time in federal prison for their role in a judicial corruption scandal. In prison they helped their fellow inmates prepare for the GED. In doing so they found purpose. Upon their release, they created 2<sup>nd</sup> Chance MS. Their non-profit provides vital support to lower-income adult students who are working to earn their high school diploma and an employable workforce certification. Since its inception in 2016, 2<sup>nd</sup> Chance MS has provided direct support to over 1,000 adults, helping 306 obtain their high school equivalency and 302 obtain an employable workforce credential. Their journey from prominence to purpose was a difficult road. But their story is a testament to receiving and giving second chances.



## EXECUTIVE DIRECTOR'S REPORT

**Ellen Brooks**  
*ellen.brooks@alabar.org*



# See You at the Grand!

It is a privilege to serve as your interim executive director. I come from a family of lawyers—my maternal grandfather, an uncle, my father, and my brother. I have been a member of the Alabama State Bar since 1976 and have spent 45 years in public service, so I feel right at home here.

The ASB staff is extraordinary. They keep multiple plates spinning with few drops. Our focus this time of year is on the 144<sup>th</sup> Annual Meeting in beautiful Point Clear at the Grand Hotel Golf Resort & Spa, July 14-17. The Grand is a blend of Southern charm and modern conveniences. There are activities for the whole family—a pool, putting greens, and lawn games, to name a few. The bar will offer tennis and golf as well. Additionally, those in a shopping mood will find a variety of local stores featuring everything from books to clothes to art and home décor.

Under the guidance of ASB President Bob Methvin, we are planning an exciting in-person program with plenty of CLE sessions and multiple social opportunities.

On Wednesday, enjoy the Opening Night Reception and Family Dinner followed by s'mores. Attend a reception and the Bench & Bar Luncheon Thursday, and then that night visit alumni receptions hosted by Birmingham School of Law, Cumberland School of Law, and Faulkner University Jones School of Law. Make sure to pack your dancing shoes for Friday's President's Closing Night Family Dinner celebrating President Methvin's dedicated service to the bar. Finally, on Saturday, we welcome Taze Shepard as our next president.

To be a part of all the action, registration is a must. It is easy—simply log on to your member dashboard at <https://www.alabar.org/dashboard> and then look for "Annual Meeting Registration" under "Dashboard Navigation" on the left side of the page. Once you register, you will receive the hotel registration link.

Meanwhile, enjoy this issue of *The Alabama Lawyer* featuring articles on domestic relations, an area of the law that affects more people than any other.

See you at the Grand! ▲

## Judge Terri Bozeman Lovell Named Alabama State Bar Executive Director; Lovell Makes History as First Female to Lead 142-Year-Old Organization

The Alabama State Bar (ASB) announces the selection of Judge Terri Bozeman Lovell as its new executive director. Lovell will begin in June and will be the first female executive director of the organization since its founding in 1879.

"We are thrilled to have Judge Lovell bring her vision, experience, and never-ending enthusiasm for the legal profession to the Alabama State Bar. This is an exciting hire for all Alabama lawyers," said ASB President Bob Methvin. "After an exhaustive national search that produced 80 candidates, Judge Lovell stood out, not only for her abilities, but because of her understanding of the needs of Alabama lawyers and the Alabama legal community."

Lovell, the presiding judge of the Second Judicial Circuit, was appointed in 2011 by then-Gov. Bob Riley and elected without opposition in 2012 and 2018. As circuit judge, she presides over civil and criminal jury cases, non-jury trials, and domestic relations cases. Prior to that, she served as Lowndes County District Judge from 1998 to 2011.



Lovell

Lovell is a graduate of Auburn University at Montgomery and Jones School of Law, where she earned her Juris Doctor in 1995 and was admitted to the Alabama State Bar in 1996. She also served as a law clerk to the judges and justices of the appellate courts of Alabama from 1996-1998.

"It is a great privilege and honor to lead the Alabama State Bar and help direct the future of the Alabama legal community," said Lovell. "I look forward to building relationships and identifying opportunities every day in which we can engage, equip and empower our members for their best work."

In addition to her service on the bench, she is the secretary-treasurer of the Alabama Circuit Judges Association, the co-chair of the ASB's Bench & Bar Task Force, and a member of the Alabama Sentencing Commission and the Circuit Judges Board of Directors. Lovell has served as president of both the District Judges Association and the Juvenile Judges Association. She is married to Jeff Lovell and they have two children, Luke and Abby. ▲



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## EDITOR'S CORNER

**W. Gregory Ward**  
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## The Domestic Relations Issue

I've always felt that few areas of the law require the finesse and careful touch of a skilled and informed lawyer more than domestic relations. Money judgments come and go, property passes between people quickly, but the foundations of our society—our marriages, especially when children are involved—deal with fundamental issues.

Beverlye Brady and Elaine Thomaston are two of our best domestic law practitioners. When I have questions, their telephones ring. So, when I was looking for someone to help put together an edition dedicated to domestic relations law, I called.

I gave them the same task I give everyone who works on an article for us—I asked them to find article that would: a) help an actual Alabama lawyer in their law practice, and b) make sure the articles are written so lawyers want to read it.

They jumped in with both feet. Here is what they came up with.

Stephanie Pollard wins the award for best title. And the substance of her article "Coloring Outside the (Child Support Guide) Lines" is as good as her title. I came away with some good pointers, and some interesting ways of looking at things (page 172).

Charles Dunn favored us with his unique perspective. Instead of focusing on one topic, he presented us with a salmagundi (yeah, I threw that word in) of topics, all under the rubric of *did you know?* I enjoyed his creative approach, and I think his overview will be well worth the time it takes to read his fine words (page 176).

Anna Sparks took the opposite approach. She sent in an article with a laser-like focus on parenting plans—what they are, how to come up with them, the obstacles that so easily beset them, and how they can be used to make things easier. Not only that, but she suggests a book from the Alabama Law Institute and some websites that might be just the ticket to keeping your clients on track with their lives, and out of the courtroom. Practical stuff, that (page 180).

Likewise, Caleb Faulkner helps us know how to register foreign divorce judgments. He shows the process, points us toward the important statutes, and warns us about the many pitfalls surrounding this hazard-laden subject (page 184).

We are ending on a high note. I'm sure you've all noticed that the audio versions of our articles are available on our website. I can't go anywhere without someone talking about how useful this new feature is. Thanks for all of the comments. While we were working on it, two young law students, Robert Humphrey and Ian Ross (with an assist from Judge Scott Donaldson) came across two pioneer female Alabama lawyers with fascinating back stories. They came up with a terrific article about it, "Through Their Eyes: Jane Dishuck and Louise Turner." I think you'll enjoy reading (or listening to) this one. And I expect great things from both of these young men—they have graduated from law school and are beginning their legal careers (page 192).

Enjoy the articles. Email me at [wgward@mindspring.com](mailto:wgward@mindspring.com) if you have questions or comments or want to write. Come join the fun. We are always looking for our next group of excellent writers.

And just wait till you see what we have for you in our next edition.

And don't forget to register for the upcoming Alabama State Bar annual

meeting. I plan on attending. If you have ideas, look me up and pitch them, or look me up just to say hello. ▲

## PROFESSOR HARRY COHEN:

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# Coloring Outside the (Child Support Guide) Lines

By Stephanie M. Pollard

## The one certainty we can all depend on in family law

is that Rule 32 of the *Alabama Rules of Judicial Administration* establishes guidelines for calculating child support for combined family income of zero to \$20,000 per month.<sup>1</sup> It establishes a rebuttable presumption that “the amount of the order that would result from application of these guidelines is the correct amount of child support to be ordered.”<sup>2</sup>

But what about the circumstances where our clients’ incomes or custodial schedules do not fit so neatly inside the guidelines?

While Rule 32 contemplates reasons for deviation,<sup>3</sup> we have to look to case law for guidance on how to color outside the guidelines.

### **When Combined Monthly Gross Income Exceeds the Uppermost Limits of the Guidelines**

Rule 32(C)(1) *Ala. R. Jud. Admin.* provides: “The court may use its discretion in determining



child support in circumstances where combined adjusted gross income ... exceeds the uppermost levels of the schedule.”<sup>4</sup>

The Alabama Court of Civil Appeals has held that when parties’ combined adjusted gross income exceeds the uppermost levels of the schedule, “the amount of child support awarded must rationally relate to the reasonable and necessary needs of the child, taking into account the lifestyle to which the child was accustomed and the standard of living the child enjoyed before the divorce and must reasonably relate to the obligor’s ability to pay for those needs.”<sup>5</sup>

The trial court is free to consider other factors in making its determination, but it *must* consider the two *Dyas* factors.<sup>6</sup> Notably, this does not have to include consideration of the obligee parent’s income.<sup>7</sup>

As counsel for the obligee parent (the one who is asking for money), it is imperative for you to have evidence and testimony to establish the reasonable and necessary needs of your client’s children and to be able to relate those expenses to the lifestyle and standard of living the children enjoyed before the divorce.

You also need to be able to establish that the obligor parent is financially able to pay the child support obligation.<sup>8</sup> For example, if you are representing one of the mothers of Mick Jagger’s children,<sup>9</sup> you could easily show that Mick (let’s pretend that he and I are on a first-name basis) tours worldwide and earns millions of dollars each year to support his children.

If your client’s child wasn’t fathered by a rock superstar, this can be done through discovery of income, production of bank account records (do not forget apps such as Venmo, PayPal, and CashApp), and evidence of large purchases and lifestyle items.

On the other hand, if you are representing the obligor parent (the one who has to pay), it is your duty to prove the obligee parent did not meet the two-prong *Dyas* test, and to make a compelling argument that the obligor parent’s income and ability to meet the children’s needs should be considered in the calculation, or you can prove other ways the obligor is satisfying the children’s needs outside of child support.

Just ensure that the expenses incurred by the obligor can be “clearly categorized as essential to basic child support”—the court of civil appeals has excluded payments for vehicle purchases, vehicle accessories, vehicle-registration fees, vehicle servicing, vehicle parts, automobile insurance, guns, a tree stand, skateboard parts, and monthly cellular-telephone payments from being credited to a parent’s child support arrearage, citing the same as “non-essential ‘extras.’”<sup>10</sup>

**Shared (50/50) Custody Situations**

Currently, the Schedule of Basic Child Support Obligations is premised on the assumption that the non-custodial parent will exercise “customary visitation rights, including summer visitation.”<sup>11</sup> But what



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are “customary visitation rights, including summer visitation?”

Each circuit seems to have its own idea of a “standard” or “customary” visitation schedule, but it seems that something close to an every-other-weekend schedule is somewhat standard. At least once every four years, the child support guidelines and schedule of basic child support obligations are to be reviewed to ensure their application results in appropriate child support determinations.<sup>12</sup> The Alabama Advisory Committee on Child Support Guidelines and Enforcement is currently engaged in virtual meetings to discuss possible changes to the current guidelines, including considerations for increased parenting time.<sup>13</sup>

The current guidelines do not suggest a calculation for shared (50/50) custody situations, but do include a calculation for split custody.<sup>14</sup> The only guidance given is in the comments to Rule 32, wherein the committee notes it can be “considered by the court as a reason for deviating from the guidelines in appropriate situations, particularly if physical custody is jointly shared by the parents.”<sup>15</sup>

How does this work in practice? In Lee County, Judges Mike Fellows and Steven Speakman use a formula that takes the difference between what each parent’s obligation would be to the other (example: mother would pay father \$400, father would pay mother \$650, difference is \$250), divides that number in half (\$250 divided by 2 = \$125), and orders the parent who would owe the higher amount to pay that difference (father would pay mother \$125).

Each circuit seems to have its own idea of a “standard” or “customary” visitation schedule, but it seems that something close to an every-other-weekend schedule is somewhat standard.

Because there is so much discretion given to the court where there is no standard or customary visitation schedule, it is important to know your circuit’s standard or customary visitation schedule and your judge’s method of calculating support in shared custody situations so that you can prepare your case (and client) accordingly. One way of dealing with this is to use a calendar as demonstrative evidence to show the court how much parenting time each parent uses. You can bolster that with a child support proposal based, in part, on

the time each parent spends with the child. These demonstrative aides can help you make a good case for deviating from Rule 32 guidelines.

### **Modifications When Parents Or the Court Did Not Follow The Guidelines**

On those occasions where the court did not follow the guidelines, the client who wishes to modify child support must prove a material change in the circumstances that resulted in the earlier deviation from the guidelines.<sup>16</sup> The rebuttable presumption in Rule 32(A)(3)(c)<sup>17</sup> is applicable *only if* the moving party has “demonstrated a material change in circumstances that resulted in the [earlier] child support determination.”<sup>18</sup> If the court deviates from the child support guidelines, it is required to enter a written finding, “based upon evidence presented in court and stating the reasons therefor, that application of the guidelines would be manifestly unjust or inequitable.”<sup>19</sup>

Therefore, the first thing you must do as a practitioner is to determine what was the reason for deviation (it should be in both the settlement agreement/order *and* the CS-43 Notice of Compliance filed with the court), and what material changes in circumstances from those reasons listed have occurred to warrant a modification.

You should also be mindful of this when drafting settlement agreements, as child support is always modifiable based on a change in circumstances and a change in a parent’s ability to pay.<sup>20</sup> Consider the language used as the reason(s) for deviation—

phrasing that is commonly used, such as “the amount is fair and reasonable under the circumstances,” does not identify what the circumstances are. Be specific and intentional for your client. Some examples of concise phrasing might include:

- “Based on the 50/50 shared custody arrangement and current incomes of the parties which are relatively the same, the parties agree neither parent shall pay support to the other.”
- “Based on the parties’ agreement to equally divide all expenses for the children and current incomes of the parties, the parties acknowledge application of the child support guidelines is not appropriate.”
- “As mother will incur travel-related expenses to exercise visitation (including, but not limited to, airfare for herself and the children), application of the guidelines is not equitable at this time.”

Counsel your client to think prospectively. Help them to do just that by discussing potential issues that can arise affecting the child support obligation—or the lack of a child support obligation. ▲

**Endnotes**

1. Rule 32(A) *Ala. R. Jud. Admin.*
2. *Id.*
3. *Id.* at (A)(ii)(1) (reasons include, but are not limited to, shared physical custody or visitation rights providing for periods of physical custody or care of children by the obligor parent substantially in excess of those customarily approved or ordered by the court; extraordinary costs of transportation for purposes of visitation borne substantially by one parent; expenses of college education incurred prior to a child’s reaching the age of majority; assets of, or unearned income received by or on behalf of, a child or children; the assumption that the custodial parent will claim the federal and state income-tax exemptions for the children in his or her custody will

not be followed in the case; the actual child-care costs incurred on behalf of the children because of the employment or job search of either parent exceeds the costs allowed under subsection (B)(8) of this rule by 20 percent or more; a parent incurs childcare costs associated with the parent’s training or education necessary to obtain a job or to enhance that parent’s earning potential, not to exceed a reasonable time as determined by the court; and other facts or circumstances that the court finds contribute to the best interest of the child or children for whom child support is being determined.)

4. Rule 32(C)(1) *Ala. R. Jud. Admin.*
5. *Dyas v. Dyas*, 683 So. 2d 971, 973-74 (Ala. Civ. App. 1995) (emphasis added); see also *Ex parte Dyas*, 683 So. 2d 974, 977 (Ala. 1996).
6. *Young v. Young*, 2180190 (Ala. Civ. App. 2020).
7. *Id.*; Compare with Justice Bryan’s dissenting opinion in *Young v. Young*, 1190428 (Ala. 2020) (“... the Court of Civil Appeals’ opinion in this case is a plurality opinion and that, therefore, reliance on the rationale expressed therein should be exercised, if at all, with caution.”).
8. *Call v. Call*, 135 So. 3d 254, 261 (Ala. Civ. App. 2013).
9. According to *People* magazine, Jagger has eight children, with the youngest born in 2016. (“Eighth Child on the Way for Mick Jagger” *People* July 14, 2016).
10. *Evans v. Evans*, 500 So.2d 1095 (Ala. Civ. App. 1986); see also *Derie v. Derie*, 689 So. 2d 142, 145 (Ala. Civ. App. 1996), wherein the Alabama Court of Civil Appeals denied father’s argument that his annual contributions to an account established for the children’s education should be considered as a portion of his child support obligation when he agreed to do so by separate provision in the settlement agreement adopted by the divorce judgment; *Caswell v. Caswell*, 101 So. 3d 769 (Ala. Civ. App. 2012) (“To the extent that the parties are required to equally share in expenditures related to the extracurricular activities of the ‘minor children,’ that obligation is separate and distinct from father’s obligation to pay child support...”), citing *Deas v. Deas*, 747 So. 2d 332, 337 (Ala. Civ. App. 1999), and *Stringer v. Sheffield*, 451 So. 2d 320, 323 (Ala. Civ. App. 1984) (affirming the trial court’s refusal to award the father credit against his child-support arrearage for the purchase of sports equipment for the child).
11. Rule 32 Comment (3) to Amendments effective January 1, 2009.
12. Rule 32(G) *Ala. R. Jud. Admin.*
13. Committee meeting transcripts and other information is available at <https://www.alacourt.gov/ChildSupportReview.aspx>.
14. Rule 32(B)(10) *Ala. R. Jud. Admin.*
15. *Knight v. Knight*, 739 So.2d 507, 509 (Ala. Civ. App. 1999).
16. *Kwasigroh v. Kwasigroh*, 209 So. 3d 520, 526 (Ala. Civ. App. 2016) (citing *Milligan v. Milligan*, 149 So. 3d 623, 626 (Ala. Civ. App. 2014)).
17. Rule 32(A)(3)(c) provides a rebuttable presumption that child support should be modified when the difference between the existing child support order and the amount determined by application of the guidelines

varies more than 10 percent unless the variation is due to the fact that the existing child support order resulted from a rebuttal of the guidelines and there has been no change in circumstances that resulted in the rebuttal of the guidelines.

18. *Id.*
19. Rule 32(A)(ii) *Ala. R. Jud. Admin.*
20. *LoPorto v. LoPorto*, 717 So. 2d 418 (Ala. Civ. App. 1998).

**Stephanie M. Pollard**



Stephanie Pollard is a board-certified Family Trial Law Advocate and has 16 years of trial experience. She practices in Auburn and is an associate at McCollum & Wilson PC. Stephanie is a graduate of Auburn University and Cumberland School of Law.

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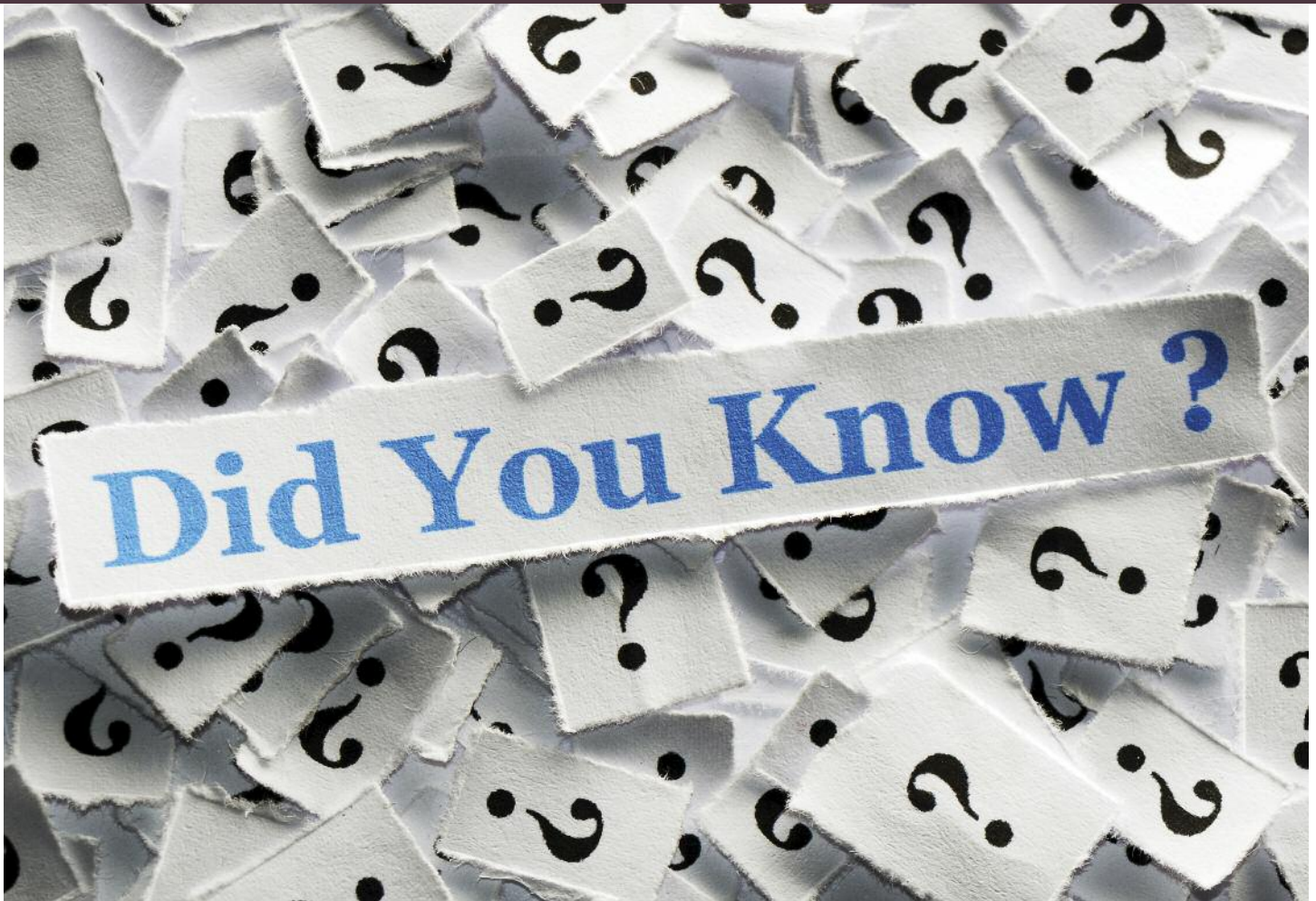
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THE ALABAMA LAWYER



*By Charles H. Dunn*

## When I was asked to consider writing an article for this issue,

the only parameters given to me in deciding on what topic to write were posed in two questions: will the article help an actual Alabama lawyer in their practice of family law, and is the article written so that you would want to read it?

Given that my attention span is that of a gnat, I have always been drawn to articles in scholarly publications that neatly and succinctly provide the topical “meat on the bone” and which then direct the reader to other authoritative sources where additional information can be gleaned should the

reader’s appetite for knowledge on the topic not be satiated. With that structure in mind, below are a few *Did You Know*s—nuggets of information that you might find useful in your application and practice of family law.

**DID YOU KNOW** under Rule 59.1, Ala. Rule Civ. P., an appeal may be dismissed as untimely when the parties only consent to extend the time for a *hearing* on the post-judgment motion? *Ex parte Bodenhamer*, 904 So. 2d 294 (Ala. 2004); *Slay v. Slay*, 292 So. 3d 651 (Ala. Civ. App. 2019) (holding that “consent to extend the time for a hearing on a post-judgment motion does not equate to consent to extend the pendency

of the post-judgment motion beyond the 90-day period prescribed by Rule 59.1”).

**Practice Pointer:** *For the unwary*, if the intent of all parties is to extend the time for the trial court to rule on a post-judgment motion filed pursuant to Rules 50, 52, 55, or 59 beyond the 90-day period that Rule 59.1 prescribes, make absolutely certain that the express consent of all parties appear of record. *And for the savvy*, filing a joint motion is not necessary as Rule 59.1 does not require that a trial court take any action to effectuate an express consent of all parties to extend the 90-day period to rule on a post-judgment motion. The only requirement to extend that period is that the express consent of all the parties appear of record which can be stated in a jointly filed submission with the trial court.

**DID YOU KNOW** while successive post-judgment motions are generally not allowed, a second motion that is timely filed within 30 days of the entry of the judgment which raises different arguments than the arguments asserted in the original post-judgment motion is valid and operates to extend the time for the filing of an appeal? *Barnes v. Barnes*, 298 So. 3d 1085 (Ala. Civ. App. 2019).

**Practice Pointer:** A second bite at the apple *may* be possible. Even if the trial court has already denied your client’s original post-judgment motion, another post-judgment motion may still be filed with the trial court so long as it contains *additional* and *different* arguments than the first, and so long as it can be filed within 30 days from entry of the judgment. And while a second bite at the apple is always nice, more importantly, a second post-judgment motion filed under these circumstances can preserve any arguments for appellate review that the first motion omitted by oversight or error.

**DID YOU KNOW** the Grandparent Visitation Act (“the GVA”), Ala. Code § 30-3-4.2 (1975), does not create a cause of action in which a grandparent may seek visitation from a third-party custodian of her grandchild? *Ex parte S.H.*, 2019 Ala. Civ. App. LEXIS 140.

**Practice Pointer:** *Ex parte S.H.* was a 3-2 opinion of the Alabama Court of Civil Appeals. As noted by Judge Moore in his dissenting opinion, subdivision

(b)(1) of the GVA authorizes an action for grandparent visitation when “the marital relationship between the parents of the child has been severed by death or divorce.” As worded, subdivision (b)(1) contemplates proceedings for grandparent visitation following the death of a parent. Under Alabama law, an action against a deceased person is a nullity, *see A.E. v. M.C.*, 100 So. 3d 587, 595 (Ala. Civ. App. 2012), so the respondent in such an action, as Judge Moore opined, could not be the deceased parent; rather, the respondent would have to be the living person or persons having legal custody of the child following the death of the parent or parents of the child.

**DID YOU KNOW** when an in-camera interview with a child is conducted by the trial court and no record is made of the interview, the Alabama Court of Civil Appeals will presume that the interview supports the findings of the trial court? *Clark v. Clark*, 292 So. 3d 1054 (Ala. Civ. App. 2019).

**Practice Pointer:** Proceed cautiously before waiving any due process rights of your client. Any such in-camera interview the trial court may have with a child will almost always result in severely limiting any likely success your client may have on appeal should the trial court’s custody judgment not be favorable. The better practice is to make sure that a record exists of any interview or examination of the child and that it be done in the presence of all counsel of record and only after the trial court determines that the child is competent to testify.

**DID YOU KNOW** if the trial court decides to deviate from the basic monthly child support obligation as established by strict application of the child support guidelines, the trial court must comply with Rule 32(A), Ala. R. Jud. Admin., by entering a written finding on the record indicating why application of the child support guidelines would be unjust or inappropriate? *Griggs v. Griggs*, 304 So. 3d 741 (Ala. Civ. App. 2020).

**Practice Pointer:** Even if the amount of child support the trial court orders as a result of its decision to deviate is not objectionable to your client, make sure the trial court’s reasons for deviation are always stated in its judgment. Remember, child support can always be modified. In circumstances when the existing child

support award resulted from a rebuttal of the guidelines, a party seeking to modify child support must plead and prove a material change in circumstances from those circumstances which resulted in the rebuttal of the guidelines. Rule 32 (A)(3)(c). If the trial court failed to enter a written finding on the record regarding why application of the child support guidelines was either unjust or inappropriate, then the client seeking a modification of child support may have a difficult time proving that a material change of circumstances has subsequently occurred.

**DID YOU KNOW** gross income in the calculation of child support includes Social Security benefits received by a child because of a parent's disability? *Phillips v. Phillips*, 307 So. 3d 597 (Ala. Civ. App. 2020).

**Practice Pointer:** While it is common practice to subtract the amount of Social Security benefits received by a child because of a parent's disability from the non-custodial, disabled parent's total support obligation calculated under the child support guidelines, few practitioners include the amount of Social Security benefits the child receives as a part of the disabled parent's gross monthly income. *See* Rule 32 (B)(9), Ala. R. Jud. Admin.

**DID YOU KNOW** while the juvenile court may hold its adjudicatory and dispositional hearings in a dependency case on different dates, if the child is no longer dependent on the date of disposition the juvenile court must dismiss the petition? *H.A.S. v. S.F.*, 298 So. 3d 1092 (Ala. Civ. App. 2019).

**Practice Pointer:** In the instance where a significant period of time has elapsed from the date of the adjudicatory hearing, make certain that sufficient evidence is produced at the dispositional hearing to clearly and convincingly support a finding that the child is still a dependent child, as that term is defined in Ala. Code § 12-15-102(8) (1975). Without any such evidence establishing a basis for that conclusion, the juvenile court cannot determine that a child is dependent and must dismiss the petition.

**DID YOU KNOW** living openly with a former spouse will not be considered cohabitation under § 30-2-55, and will not terminate an alimony obligation

to such former spouse? *Rivera v. Sanchez*, 297 So. 3d 1242 (Ala. Civ. App. 2019).

**Practice Pointer:** In such an instance, however, a recipient spouse waives the receipt of periodic alimony during the period of cohabitation with the payor spouse. *Id.*

**DID YOU KNOW** a trial court is not bound by an agreement of the parties and may adopt or reject such parts of an agreement as it deems proper from the situation of the parties as *shown by the evidence*? *Smith v. Smith*, 283 So. 3d 1242 (Ala. Civ. App. 2019).

**Practice Pointer:** Always review a trial court's final judgment which purports to incorporate the parties' agreement that had been read in open court where no or little ore tenus evidence had been presented. If the judgment deviates from the parties' agreement, the trial court's judgment will be reversed if there was no or insufficient evidence presented to the trial court to support its findings.

**DID YOU KNOW** there are three possible roles of a guardian ad litem (GAL) in a custody case: as counsel, as an investigator and/or fact witness, and as an opinion witness? *Rogers v. Rogers*, 307 So. 3d 578 (Ala. Civ. App. 2019).

**Practice Pointer:** The appointment of a GAL should be made when the trial court determines that the fulfillment of one or more roles of a GAL is needed for the case. A GAL serving in the role of counsel may participate in the litigation through activities associated with the role of an attorney and, while representing the child's best interests, owes a duty to the appointing court to be an advocate for the child's best interests. A GAL may also be appointed in a role that authorizes or requires the GAL to obtain facts to be presented to the trial court and, in that role, could likely obtain personal knowledge of the subject matter of the testimony. In some cases, GALs have been permitted to give opinions to the trial court in custody cases. Determining what role the GAL is expected to fulfill is critical in determining whether it may be appropriate to call the GAL as a witness or in determining any evidentiary issues as to the admissibility of any opinion testimony that the GAL may be asked to provide. No matter the role, the GAL must not usurp a

trial court's authority or be delegated any special authority of the trial court. For an excellent case which explains these different roles of the GAL, see *Rogers v. Rogers*, 307 So. 3d 578 (Ala. Civ. App. 2019).

**DID YOU KNOW** § 30-3-169.9(b), a part of the Alabama Parent-Child Relationship Protection Act, §§ 30-3-160 to -169.10, provides that, where the parties have been awarded joint custody, joint legal custody, or joint physical custody of a child, and at least one parent having joint custody, joint legal custody, or joint physical custody of a child continues to maintain a principal residence in this state, the child shall have a significant connection with this state and a court, in fashioning its judgments, orders, or decrees may retain continuing jurisdiction under §§ 30-3B-202 to 30-3B-204, even though the child's principal residence after the relocation is outside the state? *Adcock v. Fronk*, 289 So. 3d 1244 (Ala. Civ. App. 2019).

**Practice Pointer:** It is important to review and know the initial custody determination in a post-divorce custody case that has interstate implications under the Uniform Child Custody Jurisdiction and Enforcement Act, § 30-3B-101 to -405. In a custody case where an Alabama trial court which made the initial custody determination is being asked to relinquish its continuing and exclusive jurisdiction over the custody determination to another state, as long as one parent with joint custody, joint legal custody, or joint physical custody continues to reside in Alabama, the child continues to have a significant connection with Alabama. See § 30-3B-202(a)(1).

**DID YOU KNOW** while as a general rule, Social Security retirement benefits are not subject to garnishment, see 42 U.S.C. § 407(a), monies payable by the United States that an individual obligor is entitled to receive based on remuneration for employment may be pursued to enforce an alimony obligation? 42 U.S.C. § 659(a); *Johns v. Johns*, 291 So. 3d 505 (Ala. Civ. App. 2019).

**Practice Pointer:** Accrued installment payments for alimony are final judgments and can be collected like any other judgments, such as garnishment. Therefore, in consideration of the time and expense associated with enforcement proceedings, it might be more economical and efficient to file a garnishment, as opposed

to a petition for rule nisi, when attempting to collect past due alimony installments for a client.

**DID YOU KNOW** a trial court is not required to make a finding regarding the valuation of a marital asset? *Horne-Ballard v. Ballard*, 2020 Ala. Civ. App. LEXIS 50.

**Practice Pointer:** In the absence of a statute requiring that specific findings of fact be made, a trial court is not required to make any findings as a part of a property division, and an appellate court will presume that, in fashioning its property division and alimony award, the trial court made those findings necessary to support its judgment. As a matter of course, then, make certain that the record contains abundant and credible evidentiary support regarding the value of any disputed property as the appellate court will view the evidence regarding the value of the parties' property in the light most favorable to the trial court's judgment.

**DID YOU KNOW** under the Protection from Abuse Act a trial court cannot enter a mutual order regardless of the parties' oral or written agreement? § 30-5-5(d).

**Practice Pointer:** Section 30-5-5(d) of the Act " "[T]he court shall not enter mutual orders. The court shall issue separate orders that specifically and independently state the prohibited behavior and relief granted in order to protect the victim and the victim's immediate family and to clearly provide law enforcement with sufficient directives." Therefore, by statute, in a proceeding initiated by the filing of a petition for protection from abuse, the petitioner and respondent cannot agree to the entry of a mutual no-contact order as opposed to a protection from abuse order. ▲

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### Charles H. Dunn



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# Parenting Plans in Alabama Divorce Cases

*By Anna M. Sparks*

Most divorce lawyers have a genuine desire to help their clients

rebuild from the destruction that comes from a divorce. And one of the most important aspects of this is helping the client decide how to divide parenting time.

A comprehensive and detailed parenting plan will help parents avoid future battles because it will help prevent simple disagreements from escalating into full-scale conflicts.

A well-thought-out parenting plan should act like a road map to provide the parents with direction through inevitable conflicts. When creating a parenting plan for high conflict families, it is important to make sure that there isn't a history of domestic violence, substance abuse or dependence, and that there is no risk of flight with the children. Once the parties and the court have decided that both parents are fit to have custodial child visits, the work should begin to



create a plan that meets the needs of the child.<sup>1</sup>

Overall, approximately 20 to 25 percent of children of divorce have been found to suffer significant adjustment problems, in comparison to about 10 to 12 percent of the general child population. Separation and divorce substantially increase the risk of a child having adjustment problems, but it is also the case that most children of divorce do not experience serious problems in life functioning.<sup>2</sup>

Multiple sources of research, from both divorcing and intact marriages, indicate that wives and husbands give generally divergent reports about their past patterns of child caretaking, decision-making, and other household matters. In one study of couples in custody disputes that used broad, presumably easy-to-reach criteria of agreement about child caretaking activity, only nine percent of the parents were in agreement with one another.

Although in the past a number of legal scholars have referred to the strength of attachment—represented in the amount of time a child has spent with a parent—as crucial in potentially determining child custody, what is generally thought of as important today is attachment security.

Attachment security includes the quality of the parent-child relationship, not the extent of contact.<sup>3</sup> Therefore, if during the marriage one parent worked and the other parent stayed home with the child, there is no automatic assumption that the working parent is not fit to care for the child. The dynamics of the family will necessarily change during a divorce and it is

important to focus on the quality of relationship with the parent and child, not the quantity of time that the child spent with each parent during the marriage.

Traditionally, the parenting plan has been about child custody and the legal authority to make decisions on behalf of the children. This bare-bones plan does little to support a healthy co-parenting relationship during the initial period of separation and post-divorce. Research has shown us that the single most harmful aspect of a divorce for children is parents in conflict.<sup>4</sup>

If the main goal of the parenting plan schedule is the best interests of the children, it follows that the characteristics of each child and family should be a main focus. These characteristics include broad areas such as strengths, problems, and circumstances.<sup>5</sup> It may be helpful to have a client write a list of pros and cons of each parent's ability to care for the child. Often you will find that each parent has strengths that can be worked into the plan.

A number of helpful parenting schedule prototypes have been developed. Some offer multiple schedules based on the age of the child. These schedules can be especially helpful if parents experience difficulty in getting started with the process. Looking at prepared schedule options may help individuals recognize time-sharing patterns that could work for them. Reviewing such schedules can also help individuals identify calendar options that would not work well for them and thereby narrow the focus to other alternatives that are more likely to be successful.

The Alabama Law Institute (ALI) has developed the *Alabama Model Parenting Plan Form and General Time-Sharing Schedules Handbook*. The handbook contains an Alabama model parenting plan form and numerous general time-sharing schedules to aid parents, judges, and lawyers in child custody cases.<sup>6</sup>

### Developing a Parenting Plan—Where Do I Start?

The basic requirements of a parenting plan can be found in § 30-3-153. Under this section, all parenting plans must include: custody between the parents (i.e., joint custody, joint legal custody, joint physical custody, sole legal custody, or sole physical custody), the care and education of the child, the medical and dental care of the child, holidays, child support, any other aspects of the child's physical and emotional wellbeing, and a designation of the parent possessing primary authority for the child's involvement in academic, religious, civic, cultural, athletic, and other activities, and medical and dental care in the event the parents are unable to agree. When the parents cannot agree on what terms will be included in the plan, the trial court shall set out the terms of the plan after evidence is presented.

Divorce law was once described to me as a triangle. The families will have all the information about the needs of their children: their schedules, special family traditions, favorite places to eat, favorite vacations, family pets, favorite neighbors, schools, and, in general, all of the information that they experienced through

everyday life. This is the bottom of the triangle.

The professionals are the middle of the triangle. The lawyers, counselors, and other professionals will spend a year or so getting ready to litigate a divorce and learning all aspects of a case from one party's perspective and building on the information from the clients. Inevitably, the professionals learn a lot about the family, but still do not know the entire family as they operated during the times of unity.

The court is the top of the triangle. The court is going to listen to a day or so of testimony and look over evidence presented to it. Based on that very limited information, the court then has to make decisions about the personal details of

the parties' lives, including legal and physical custody, visitation schedules, and financial support.

Although having a court make these decisions is necessary at times, it is almost always better for the parties to make them through the entry of a settlement agreement. Parenting is about sacrifice, and in a divorce, both sides will need to sacrifice to ensure that the child is healthy and happy.

Some states, such as Utah, require that a parenting plan be filed along with the divorce petition.<sup>7</sup> The aim of this approach is to eliminate the perception that there is a winner when custody issues are litigated, reducing the incentive to compete. It is difficult to pronounce these a success.<sup>8</sup> Requiring a parenting plan from the onset may result in more animosity and more jockeying for an advantage in litigation.

The ALI handbook can be a big help in dealing with the seemingly endless options for dividing parental custody, including the ability of the parents to communicate, custodial arrangements and work schedules, age of the child, distance between parents, and the child's relationship with each parent.<sup>9</sup>

Most of the schedules are moving away from the every-other-weekend arrangement for the non-custodial parent and toward allowing each parent to have weekly quality time with the child. The Alabama Model Parenting Plan Form and General Time-Sharing Schedule provides a multitude of possibilities to assist the client in thinking about how to best divide custodial periods.

All divisions start with the age of the child and all children's need for

consistency and stability. A very young child needs bonding with both parents and the ability to establish a routine. The ALI has developed five age groups for the plans: 0-three years of age, four-five years of age, six-12 years of age, 13-19 years of age, and plans for families with multiple-age children.<sup>10</sup>

The younger the child, the greater the necessity to focus on basic physical needs. For infants and small children, it is important that each parent be competent in feeding, diapering, soothing, bathing, and following a routine, including the child's sleep cycle. Both parents of infants should keep a record of feeding, eliminating, sleeping, bathing, medications, and any new developments, and give it to the other parent upon the child's return. Parenting plans should build in record-keeping exchanges as required provisions.<sup>11</sup>

As an attorney assisting in the development of plans for the client, it is important that we recognize the age difference in children and the need for time with both parents to create bonding and child development. A win-or-lose mentality is extremely detrimental to the children involved in the divorce process.

The best parenting plans include provisions that allow for adjustments as the child grows. That is the best you can do to minimize the likelihood of future legal battles. A child's routine is quite different at six months than it will be at six years of age. A successful plan will factor in the child's different stages in life.

An infant requires frequent contact with both parents to bond. Therefore, the plan may require frequent back and forth between

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the parents so that the child bonds with both parents. As the child ages, the schedule can be adjusted so that there are more days spent with each parent and allows for more quality time with each parent.

What is most important is to let your clients know that a parenting plan is a backstop for the parties in the event of disagreements. Many parents and attorneys believe that once a parenting plan is put in place, the parties can not deviate from the plan, but this is not the case since the parents have the ability to deviate from the plan by agreement.

### Helpful Co-Parenting Resources

Co-parenting apps have become popular in the courts because they offer a way for parents to communicate without relying on text messaging or phone calls—which can be manipulated or abused in high-conflict situations. These apps can track when a parent opens a message (even if they do not respond to the message), post schedules for the child (and prevent them from having to have face-to-face communications), share medical expenses, and even pay expenses—all without having a conversation.

For attorneys, many of these apps include professional access to give attorneys the ability to monitor the parties' communication, if needed.

As an added bonus, if the parties require court intervention, the parties' communications can be printed, which is far better than pages of unorganized text messages, making it easier to manage and review.

Additionally, both parties are to understand that all communication

on the app is to only relate to issues concerning the child, therefore minimizing the emotional outbursts by either party. Some apps even offer a filter that prevents the use of profanity toward the opposing parent.

Most of the apps cost no more than \$100 per year. The technology allows for families to organize medical bills and extracurricular expenses, pay bills and child support, and maintain and swap schedules and shared time in the hopes that they will be able to prevent further court intervention. However, high conflict cases are inevitable and the ones that do return to court on modification or contempt petitions will have documentation that is more concise for the attorneys and judges involved.

Below are some of the most popular apps. The list is not all inclusive. I have used several different ones and generally tell families to find the one that works best for their needs.

**Our Family Wizard** (paid app)  
<https://www.ourfamilywizard.com/>

**Cozi App** (free and paid version)  
<https://my.cozi.com/>

**WeParent** (paid app)  
<https://weparent.app/>

**2Houses** (paid app)  
<https://www.2houses.com/en/>

**Custody Connection** (paid app)  
<http://www.custodyconnection.com/>

**CoParently** (paid app)  
<http://coparently.com/>

**Partnership** (paid app)  
<https://www.partnership.com/>

**AppClose** (free app)  
<https://appclose.com/>

### Endnotes

1. Hyman PHD, Daniel J., Parenting Plans, Meeting the Challenges with Facts and Analysis, (1<sup>st</sup> ed. America Bar Association 2018).
2. Michael E. Lamb, Critical Analysis of Research on Parenting Plans and Children's Well-Being, in PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY COURT, 2d ed. 170, 182 (Leslie Drozd et al. eds., 2016).
3. See *Id.*
4. Hyman PHD, Daniel J., Parenting Plans, Meeting the Challenges with Facts and Analysis, (1<sup>st</sup> ed. America Bar Association 2018).
5. See *Id.*
6. The Alabama Law Institute, Alabama Model Parenting Form and General Time-Sharing Schedules Handbook, <http://alabamaparentingplans.org/>.
7. FAMILY LAW: DON'T FORGET THE PARENTING PLAN, 31 Utah Bar J. 46, 47.
8. The Elimination of Child "Custody" Litigation: Using Business Branding Techniques to Transform Social Behavior, 36 Pace L. Rev. 375, 377.
9. The Alabama Law Institute, Alabama Model Parenting Form and General Time-Sharing Schedules Handbook, <http://alabamaparentingplans.org/>.
10. See *Id.*
11. Hyman PHD, Daniel J., Parenting Plans, Meeting the Challenges with Facts and Analysis, (1<sup>st</sup> ed. America Bar Association 2018).

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### Anna M. Sparks



Anna Sparks graduated from UAB in 2005 and Birmingham School of Law in 2010. For the past 10 years, her primary focus has been on family and domestic relations. In 2018, she moved her practice to Shelby County, where she is a partner at Shockley, Ransom & Sparks Law Group.



# REGISTRATION REQUIRED: A Roadmap to Registering Foreign Domestic Relations Judgments<sup>1</sup>

*By Caleb A. Faulkner*

## Occasionally, a party to a domestic relations case encounters

the need to register another state's support or custody judgment in Alabama. This issue arises when a party seeks to file an action in Alabama to either enforce and/or modify a judgment entered by a foreign state.

To make sure that Alabama obtains subject matter jurisdiction over this, the divorce practitioner should be familiar with the Uniform Interstate Family Support Act (known as

the UIFSA)<sup>2</sup> and the Uniform Child Custody and Enforcement Act (known as the UCCJEA).<sup>3</sup>

“In order for a court to enforce or modify a child-support order from another state, the UIFSA requires that the foreign order be registered in Alabama.”<sup>4</sup>

“Likewise, [t]he UCCJEA requires that a foreign custody judgment be registered in an Alabama trial court before that court may enforce or modify the terms of the custody or visitation award contained in with the foreign judgment.”<sup>5</sup>

If a support judgment<sup>6</sup> of another state<sup>7</sup> or a custody judgment of another state<sup>8</sup> is not registered in Alabama, Alabama courts subject matter jurisdiction of the matter.<sup>9</sup>

This article examines the statutes and case law surrounding registration procedures under the UIFSA and the UCCJEA. We do not attempt to provide an all-inclusive guide to the registration of foreign judgments, but rather to highlight significant areas and requirements of both Acts and to point practitioners in the right direction so that Alabama can gain subject matter jurisdiction.

## Statutory Components Of the UIFSA

Under the UIFSA, Alabama allows “[a] support order or income-withholding order” of another state to be enforced in Alabama if the order has first been registered in Alabama.<sup>10</sup>

### Registration for Enforcement under the UIFSA

A comprehensive list of the information required to register a support order for enforcement in Alabama can be found in Ala Code § 30-3D-602(a) (1975):

Except as otherwise provided in Section 30-3D-706,<sup>11</sup> a support order or income-withholding order of another state or a foreign support order may be registered in this state by sending the following records to the appropriate tribunal in this state:

- (1) a letter of transmittal to the tribunal requesting registration and enforcement;
- (2) two copies, including one certified copy, of the order to be registered, including any modification of the order;
- (3) a sworn statement by the person requesting registration or a certified statement by the custodian of the records showing the amount of any arrearage;
- (4) the name of the obligor and, if known;
  - (A) the obligor’s address and Social Security number;
  - (B) the name and address of the obligor’s employer and any other source of income of the obligor; and

(C) a description and the location of property of the obligor in this state not exempt from execution; and

- (5) except as otherwise provided in Section 30-3D-312,<sup>12</sup> the name and address of the obligee and, if applicable, the person to whom support payments are to be remitted.<sup>13</sup>

Once a request for registration is made, the court in which the request is made must file the order as a foreign order, “together with one copy of the documents and information, regardless of their form.”<sup>14</sup> In cases in which multiple orders are in place:

[T]he person requesting registration shall:

- (1) furnish to the tribunal a copy of every support order asserted to be in effect in addition to the documents specified in this section;
- (2) specify the order alleged to be the controlling order, if any; and
- (3) specify the amount of consolidated arrears, if any.<sup>15</sup>

If registration is sought in Alabama so that an enforcement pleading can be filed in an Alabama court, the pleading can be filed either at the same time as or after the request for registration is made.<sup>16</sup> Further, in cases where there is confusion as to which support order is the current and controlling order, a party may also ask the court to determine which order is controlling; in those cases, the request can be made either independently or as a part of a request for registration and enforcement or modification.<sup>17</sup> However, the requesting party must provide notice of this request to all parties who could be affected by such a determination.<sup>18</sup> Once the requirements for registration are met, the Alabama court has the same ability to enforce and otherwise address the support order as it does with support orders issued by Alabama courts.<sup>19</sup>

### Registration for Modification under the UIFSA

Section 30-3D-609 states that if the order is not already registered, in order to either modify or enforce a support order, the order must first be registered in the same way that an order must be registered for enforcement under the UIFSA.<sup>20</sup> A petition to modify, which must state the grounds for the modification, can be filed either at the same time as or after

the request for registration is made.<sup>21</sup> Jurisdictional requirements for modification are found in § 30-3D-611 and §30-3D-613. Once compliance with the requirements of either § 30-3D-611 or § 30-3D-613 are met, an Alabama court has the same authority to enforce another state's support order as it does to enforce an Alabama court's support order.<sup>22</sup>

### **Basis for Jurisdiction to Enforce and Modify a Support Order of Another State**

Section 30-3D-613 states:

If all of the parties who are individuals reside in this state and the child does not reside in the issuing state, a tribunal of this state has jurisdiction to enforce and to modify the issuing state's child-support order in a proceeding to register that order.

A tribunal of this state exercising jurisdiction under this section shall apply the provisions of Articles 1<sup>23</sup> and 2,<sup>24</sup> this article,<sup>25</sup> and the procedural and substantive law of this state to the proceeding for enforcement or modification. Articles 3,<sup>26</sup> 4,<sup>27</sup> 5,<sup>28</sup> 7,<sup>29</sup> and 8<sup>30</sup> do not apply.<sup>31</sup>

On the other hand, § 30-3D-611(a) provides for jurisdiction in cases in which § 30-3D-613 is inapplicable:

If Section 30-3D-613 does not apply, upon petition a tribunal of this state may modify a child-support order issued in another state which is registered in this state if, after notice and hearing, the tribunal finds that:

- (1) the following requirements are met:
  - (A) neither the child, nor the obligee who is an individual, nor the obligor resides in the issuing state;
  - (B) a petitioner who is a nonresident of this state seeks modification; and
  - (C) the respondent is subject to the personal jurisdiction of the tribunal of this state; or
- (2) this state is the residence of the child, or a party who is an individual is subject to the personal jurisdiction of the tribunal of this state, and all of the parties who are individuals have filed consents in a record in the issuing tribunal for a tribunal of this state to modify the support order and assume continuing, exclusive jurisdiction.<sup>32</sup>

### **Modification under the UIFSA**

For all procedural and enforcement purposes, modification under either § 30-3D-613 or § 30-3D-611(a) is treated the same as a modification of an order issued by an Alabama court would be.<sup>33</sup> An Alabama court could not modify a support order that would be non-modifiable in the state that initially issued the order.<sup>34</sup> Further, “[i]f two or more tribunals have issued child-support orders for the same obligor and same child, the order that controls and must be so recognized under Section 30-3D-207<sup>35</sup> establishes the aspects of the support order which are nonmodifiable.” Once the person responsible for making support payments satisfies the obligation imposed by the original support order, an Alabama court cannot increase or extend the payor's duty.<sup>36</sup> When an Alabama court modifies another state's child support order, exclusive and continuing jurisdiction is bestowed upon Alabama courts.<sup>37</sup>

### **Choice of Law under the UIFSA**

When choice of law issues arise regarding the order, § 30-3D-604 provides guidance. The general rule is in subsection (a):

Except as otherwise provided in subsection (d), the law of the issuing state or foreign country governs:

- (1) the nature, extent, amount, and duration of current payments under a registered support order;
- (2) the computation and payment of arrearages and accrual of interest on the arrearages under the support order; and
- (3) the existence and satisfaction of other obligations under the support order.<sup>38</sup>

Subsection (d) states:

After a tribunal of this state or another state determines which is the controlling order and issues an order consolidating arrearages, if any, a tribunal of this state shall prospectively apply the law of the state or foreign country issuing the controlling order, including its law on interest on arrearages, on current and future support, and on consolidated arrearages.<sup>39</sup>

If arrearages are sought in regard to a registered support order, the longest statute of limitations—between

Alabama and the state in which the original order was issued—should be applied.<sup>40</sup> In a case involving arrears under a foreign support judgment that is properly registered in Alabama, once the law of the issuing state is used to determine “the computation and payment of arrearages and accrual of interest on the arrearages under the support order” under § 30-3D-604(a)(2), an Alabama court must use and apply Alabama law “to enforce current support and collect arrears and interest due.”<sup>41</sup>

In a modification action in Alabama, the duration of a support order is determined by the state that issued the original support order that is being modified.<sup>42</sup>

## Statutory Components Of the UCCJEA

In regard to the UCCJEA, Alabama allows “[a] child custody determination issued by a court of another

state” to be enforced in Alabama if the order has first been registered in Alabama.<sup>43</sup>

### Registration for Enforcement under the UCCJEA

A detailed description of the actions required to properly register a foreign custody determination can be found in § 30-3B-305(a):

A child custody determination issued by a court of another state may be registered in this state, with or without a simultaneous request for enforcement, by sending to the appropriate court in this state:

- (1) A letter or other document requesting registration;
- (2) Two copies, including one certified copy, of the determination sought to be registered, and a statement under penalty of perjury that to the best of the knowledge and belief of the person seeking registration the order has not been modified; and

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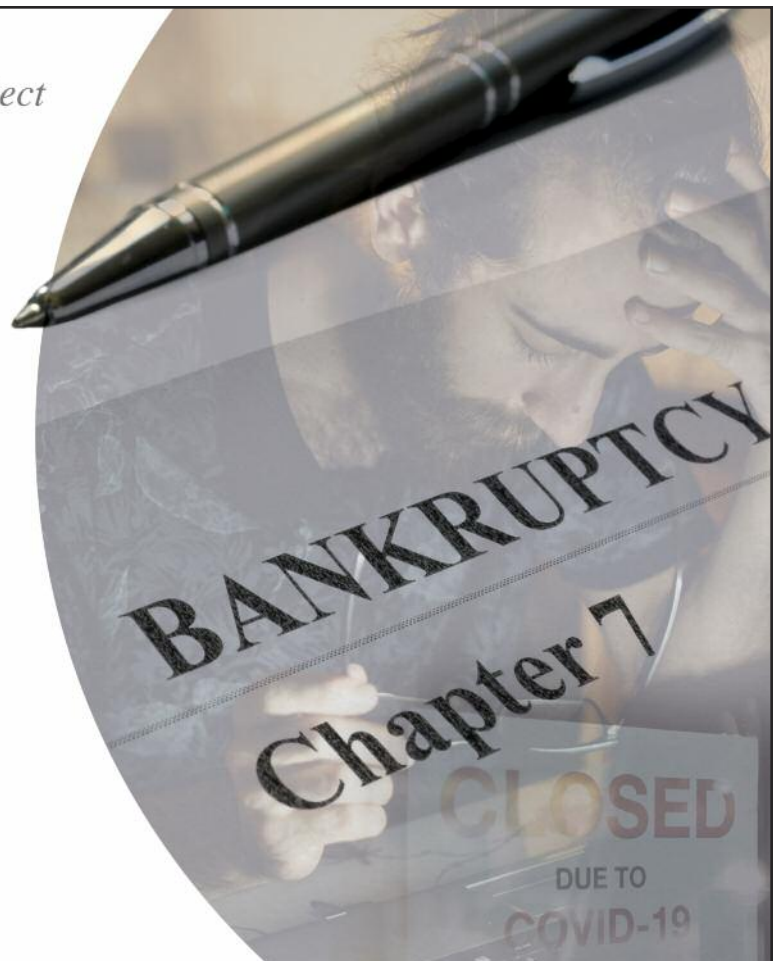
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- (3) Except as otherwise provided in Section 30-3B-209,<sup>44</sup> the name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation in the child custody determination sought to be registered.<sup>45</sup>

Once the court receives the above documents, the court must file the custody determination as a foreign judgment “with one copy of any accompanying documents and information, regardless of their form.”<sup>46</sup>

The court must then serve notice upon anyone who has custody or visitation under the order being registered, who then has a chance to contest the validity of the other party’s registration.<sup>47</sup> The notice must express that:

- (1) A registered determination is enforceable as of the date of the registration in the same manner as a determination issued by a court of this state;
- (2) A hearing to contest the validity of the registered determination must be requested within 30 days after service of notice; and
- (3) Failure to contest the registration will result in confirmation of the child custody determination and preclude further contest of that determination with respect to any matter that could have been asserted.<sup>48</sup>

A person who is served with such a notice and wishes to contest the validity of the registered order has 30 days from the date of service to request a hearing on the matter.<sup>49</sup>

At that hearing, the court shall confirm the registered order unless the person contesting registration establishes that:

- (1) The issuing court did not have jurisdiction under Article 2;
- (2) The child custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so under Article 2; or
- (3) The person contesting registration was entitled to notice, but notice was not given in accordance with the standards of Section 30-3B-108, in the proceedings before the court that issued the order for which registration is sought.<sup>50</sup>

If a hearing is not requested within 30 days, “the registration is confirmed as a matter of law” and all parties involved must be notified that the registration has been confirmed.<sup>51</sup> Once registration has been confirmed, the registration cannot be contested any further as long as such contest is based on information that could have been asserted before confirmation.<sup>52</sup> Once the registration requirements are complied with, Alabama courts have the same ability to enforce and otherwise address the custody determination as they do with custody determinations made by Alabama courts.<sup>53</sup>

### Jurisdiction for Modification under the UCCJEA

Further, § 30-3B-203 addresses an Alabama court’s jurisdiction to modify another state’s custody determination:

Except as otherwise provided in Section 30-3B-204,<sup>54</sup> a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under Section 30-3B-201(a)(1) or (2)<sup>55</sup> and:

- (1) The court of the other state determines it no longer has continuing, exclusive jurisdiction under Section 30-3B-202<sup>56</sup> or that a court of this state would be a more convenient forum under Section 30-3B-207;<sup>57</sup> or
- (2) A court of this state or a court of the other state determines that the child, the child’s parents, and any person acting as a parent do not presently reside in the other state.<sup>58</sup>

## Compliance with the UIFSA

Importantly, the Alabama Court of Civil Appeals has acknowledged “that substantial compliance with the registration requirements of the UIFSA is sufficient to afford an Alabama trial court subject-matter jurisdiction.”<sup>59</sup>

‘Substantial compliance’ may be defined as ‘actual compliance in respect to substance essential to every reasonable objective,’ of a decree



giving effect to equitable principles—equity—in the true meaning of that word. Substantial compliance means compliance which substantially, essentially, in the main, for the most part, satisfies the means of accomplishing the objectives sought to be effected by the decree and at the same time does complete equity.<sup>60</sup>

Whether a statute is substantially complied with is dependent upon the specific facts of the case.<sup>61</sup> The reason for the sufficiency of substantial compliance under the UIFSA seems to be an effort to avoid situations in which child support is not received by a custodial party who needs the support simply because every requirement was not perfectly and completely met.<sup>62</sup> Further, “[t]he ‘UIFSA was created to identify ways to improve the efficiency and effectiveness of interstate child support enforcement by addressing interstate cases in a uniform manner,’”<sup>63</sup> and “[r]equiring strict compliance with the registration statute does not further the purpose of the UIFSA.”<sup>64</sup>

## Compliance with the UCCJEA

As distinguishable from the UFISA, “substantial compliance” with the registration requirements of a foreign domestic order does not apply in regard to the UCCJEA.<sup>65</sup> Rather, Alabama law is clear that registration requirements of a foreign judgment under the UCCJEA must be strictly complied with before a custody order can be enforced<sup>66</sup> or modified by an Alabama court.<sup>67</sup> If a judgment containing custody and visitation proceedings is not registered before filing a petition seeking enforcement of those visitation provisions, the trial court never acquires subject matter jurisdiction to enforce and modify those visitation and custody provisions.<sup>68</sup> Any order of the trial court in a situation in which subject-matter jurisdiction is never acquired is void *ab initio*.<sup>69</sup>

## Conclusion

The registration processes of the UIFSA and the UCCJEA are similar in some ways and different in others.

It is imperative that practitioners understand the biggest procedural difference between the UIFSA and the UCCJEA: substantial compliance with registration requirements for support orders under the UIFSA is sufficient, but strict compliance with registration requirements for custody determinations is required under the UCCJEA.

The registration of foreign judgments is a unique and statutory-based process that, while not very common, most domestic practitioners will encounter at some point. Fortunately, the UIFSA and the UCCJEA, as well as case law from Alabama appellate courts, offer a clear roadmap on how to navigate all issues relating to the registration and subsequent enforcement and/or modification of foreign domestic judgments.▲

### Endnotes

1. This article analyzes and discusses the Uniform Interstate Family Support Act (UIFSA) and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Due to the sheer volume of these two acts, we will focus on registration and enforcement. The UIFSA can be found in Ala. Code §§ 30-3D-101 to –902, and the UCCJEA can be found in §§ 30-3B-101 to –405.
2. Ala. Code §§ 30-3D-101 to –902.
3. *Id.* at §§ 30-3B-101 to –405.
4. *Hummer v. Loftis*, 276 So. 3d 215, 219 (Ala. Civ. App. 2018) (citing Ala. Code § 30-3D-601 (1975)).
5. *Hummer v. Loftis*, 276 So. 3d 215, 221 (Ala. Civ. App. 2018) (citing Ala. Code § 30-3B-306 (1975) and *Krouse v. Youngblood*, 171 So. 3d 49 (Ala. Civ. App. 2015)).
6. The definition of “support order” under the UIFSA includes not only child support but also spousal support. Ala. Code § 30-3D-102(28).
7. *Hummer v. Loftis*, 276 So. 3d 215, 220 (Ala. Civ. App. 2018) (citing *Ex parte Reynolds*, 209 So. 3d 1122, 1126 Ala. Civ. App. 2016)).
8. *Hummer v. Loftis*, 276 So. 3d 215, 222 (Ala. Civ. App. 2018) (citing *Krouse v. Youngblood*, 171 So. 3d 49, 50 (Ala. Civ. App. 2015)).
9. *Id.* at 221-22.
10. Ala. Code § 30-3D-601 (2015); Ala. Code § 30-3D-603(b) (2015).
11. *Id.* at § 30-3D-706, which is not discussed in this article, is titled “Registration of Convention Support Order” and provides registration requirements for a Convention support order.
12. *Id.* at § 30-3D-312, which is not discussed in this article, is titled “Nondisclosure of Information in Exceptional Circumstances” and explains in what situations, and for what reasons, “specific identifying information” must be sealed as confidential.
13. *Id.* at § 30-3D-602(a) (2015).
14. *Id.* at § 30-3D-602(b) (2015).
15. *Id.* at § 30-3D-602(d) (2015).
16. *Id.* at § 30-3D-602(c) (2015).
17. *Id.* at § 30-3D-602(e) (2015).
18. *Id.* at § 30-3D-602(e) (2015).
19. *Id.* at § 30-3D-603 (2015).
20. *Id.* at § 30-3D-609 (2015).
21. *Id.* at § 30-3D-609 (2015).
22. *Id.* at § 30-3D-610 (2015).

23. Article 1, which is not discussed in this context in this article, is titled "General Provisions" and includes Ala. Code §§ 30-3D-101–30-3D-105.
24. Article 2, which is not discussed in this context in this article, is titled "Jurisdiction" and includes Ala. Code §§ 30-3D-201–30-3D-211.
25. "This article," Article 6, which is not discussed in this context in this article, is titled "Registration, Enforcement, and Modification of Support Order" and includes Ala. Code §§ 30-3D-601–30-3D-616.
26. Article 3, which is not discussed in this context in this article, is titled "Civil Provisions of General Application" and includes Ala. Code §§ 30-3D-301–30-3D-319.
27. Article 4, which is not discussed in this context in this article, is titled "Establishment of Support Order or Determination of Parentage" and includes Ala. Code §§ 30-3D-401–30-3D-402.
28. Article 5, which is not discussed in this context in this article, is titled "Enforcement of Support Order Without Registration" and includes Ala. Code §§ 30-3D-501–30-3D-507.
29. Article 7, which is not discussed in this context in this article, is titled "Support Proceeding Under Convention" and includes Ala. Code §§ 30-3D-701–30-3D-713.
30. Article 8, which is not discussed in this context in this article, is titled "Interstate Rendition" and includes Ala. Code §§ 30-3D-801–30-3D-802.
31. Ala. Code § 30-3D-613 (2015).
32. *Id.* at § 30-3D-611(a) (2015).
33. *Id.* at § 30-3D-611(b) (2015).
34. *Id.* at § 30-3D-611(c) (2015).
35. Ala. Code § 30-3D-207, which is not discussed in this article, is titled "Determination of Controlling Child Support Order" and provides guidance as to which child support order must be recognized and enforced in cases in which either one or multiple courts have issued child support orders.
36. Ala. Code § 30-3D-611(d) (2015).
37. *Id.* at § 30-3D-611(e) (2015).
38. *Id.* at § 30-3D-604(a) (2015).
39. *Id.* at § 30-3D-604(d) (2015).
40. *Id.* at § 30-3D-604(b) (2015).
41. *Id.* at § 30-3D-604(c) (2015).
42. *Id.* at § 30-3D-611(d) (2015).
43. *Id.* at § 30-3B-305 (1975); Ala. Code § 30-3B-306 (1975).
44. Ala. Code § 30-3B-209, which is not discussed in this article, is titled "Information to Be Submitted to Court" and details the required information to be provided by each party in its first filing in a child custody action.
45. Ala. Code § 30-3B-305(a) (1975).
46. *Id.* at § 30-3B-305(b)(1) (1975).
47. *Id.* at § 30-3B-305(b)(2) (1975).
48. *Id.* at § 30-3B-305(c) (1975).
49. *Id.* at § 30-3B-305(d) (1975).
50. *Id.* at § 30-3B-305(d) (1975).
51. *Id.* at § 30-3B-305(d) (1975).
52. *Id.* at § 30-3B-305(f) (1975).
53. *Id.* at § 30-3B-306 (1975).
54. Ala. Code § 30-3B-204, which is not discussed in this article, is titled "Temporary Emergency Jurisdiction" and provides for temporary emergency jurisdiction in regard to child custody.
55. Subsections § 30-3B-201(a)(1) and § 30-3B-210(a)(2), which are not further discussed in this article, state:  
 "Except as otherwise provided in Section 30-3B-204, a court of this state has jurisdiction to make an initial child custody determination only if:  
 (1) This state is the home state of the child on the date of the commencement of the pro-

ceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

- (2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under Section 30-3B-207 or 30-3B-208, and:
  - a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and
  - b. Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships."
56. Ala. Code § 30-3B-202, which is not discussed in this article, is titled "Continuing, Exclusive Jurisdiction" and states when an Alabama court does and does not have exclusive and continuous jurisdiction of a custody determination.
57. *Id.* at § 30-3B-207, which is not discussed in this article, is titled "Inconvenient Forum" and discusses how to proceed in situations in which an Alabama court may be an inconvenient forum.
58. *Id.* at § 30-3B-203 (1975).
59. *Hummer v. Loftis*, 276 So. 3d 215, 221 (Ala. Civ. App. 2018) (citing *Ex parte Reynolds*, 209 So. 3d 1122, 1128 (Ala. Civ. App. 2016)).
60. *J.M.S. v. State ex rel. Y.R.S.*, 216 So. 3d 1257, 1259-60 (Ala. Civ. App. 2016) (quoting *Pittman v. Pittman*, 419 So. 2d 1376, 1379 (Ala. 1982)) (internal citations omitted).
61. *J.M.S. v. State ex rel. Y.R.S.*, 216 So. 3d 1257, 1260 (Ala. Civ. App. 2016) (quoting *Pittman v. Pittman*, 419 So. 2d 1376, 1379 (Ala. 1982)) (internal citation omitted).
62. See *Ex parte Reynolds*, 209 So. 3d at 1127 ("[r]equiring strict compliance with § 30-3D-602(a) produces a harsh result, especially considering that the subject matter at issue in cases in which the UIFSA applies is child support."). Requiring strict compliance with the registration statute does not further the purpose of the UIFSA. See *In Re Marriage of Owen and Phillips*, 108 P.3d 824, 829 (Wash. Ct. App. 2005).
63. *Ex parte Reynolds*, 209 So. 3d at 1127 (quoting Ala. Admin. Code (Dep't of Human Res.), Rule 660-3-10-.01)).
64. *Id.* (citing *In Re Marriage of Owen and Phillips*, 108 P.3d at 829).
65. *Id.* at 221.
66. *Id.* at 222 (quoting *Krouse v. Youngblood*, 171 So. 3d 49, 50 (Ala. Civ. App. 2015)).
67. *Id.* at 222 (quoting Ala. Code § 30-3B-306(b)).
68. *Id.* at 222.
69. *Id.*

**Caleb A. Faulkner**



Caleb Faulkner is a graduate of Cumberland School of Law and an associate at Boyd, Fernambucq & Dunn PC in Birmingham where he practices family and divorce law.



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Dishuck



Turner

# THROUGH THEIR EYES: Jane Dishuck and Louise Turner

*By Robert L. Humphrey, III and Ian R. Ross*

Jane Dishuck, née Kimbrough, grew up the daughter of an attorney in Clark County during the Great Depression. Despite the social norms of the time, Jane's father told her she could be whatever she wanted to be, but he hoped that the apple wouldn't fall too far from the tree and that she would become an attorney. That hope would be fulfilled.

In 1945, Jane enrolled at the University of Alabama School of Law. There, she met her soon-to-be husband, Frank Dishuck. Frank was in the class above Jane, a 2L at the time of her enrollment.

Prior to law school, Frank had been involved in a car accident that left him completely blind. As a result, he was unable to complete his assigned readings alone. To help, the school posted a job offer for a fellow student to be Frank's reader. Jane, being a classically strapped-for-cash student, jumped at the opportunity. She got the job, and every day, Jane and Frank would meet up and she would read aloud each assigned case for his classes. Of course, Jane was also responsible for reading her own first-year coursework. Despite this large workload, Jane

found a way and essentially completed two years of law school coursework in her first year.

The two eventually fell in love. But Frank came as a package deal: him and his seeing-eye dog, a German Shepherd named Falcon. After Jane's graduation in 1947, the couple eloped and were married. The newlyweds wasted no time getting to work. Roughly 19 years before women were allowed to serve on juries, Jane joined practice with Frank (and Falcon) and opened a firm in Tuscaloosa, becoming the first practicing female attorney there.

Tragically, Frank passed away a few years later after suffering a heart attack in the courtroom. On the same day that Frank died, a local lawyer attempted to buy her firm at a discounted rate. She was offended. And she declined.

Over the next 30 years, Jane would successfully maintain and grow the practice, all while raising three children by herself. She routinely tried cases to all-male juries. Later, she had the satisfaction of representing the aforementioned local lawyer's ex-wife in a divorce proceeding. The ex-wife received a favorable outcome, and the local lawyer learned a valuable lesson: Don't mess with Jane Dishuck.

Her children, one of whom became Jane's law partner, noted that their mother "would fight you to death, but be a perfect lady about it." This fighting spirit served Jane well, as she went on to become the first female president of the Tuscaloosa County Bar Association.

Leaving a legacy as a prominent lawyer and community leader, Jane passed away in 2009—joining Frank and Falcon.

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Just four years after Jane graduated from the University of Alabama School of Law, Louise Turner enrolled there. Unlike Jane, Louise was married before she enrolled. She had met her husband, Jimmy Turner, while obtaining her undergraduate degree in journalism at Alabama.

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Her husband had enlisted as a Marine while he was in the ninth grade, fought in World War II, and been blinded after he was hit by machine-gun fire at Iwo Jima. After a year-long recovery in Philadelphia and receiving a Purple Heart, Jimmy returned home to Alabama and began undergraduate classes at the University of Alabama under the G.I. Bill.

Jimmy, like Frank Dishuck, had a German Shepherd seeing-eye dog, Dusty. Dogs being reliable tests of character, Louise quickly became Dusty's favorite person in class. In short order, Jimmy and Louise fell in love and married.

During their courtship in undergraduate school, Louise began reading for Jimmy. When he decided to pursue becoming an attorney—also courtesy of the G.I. Bill—she carried her role as reader into the halls of the law school. Louise originally planned to become a teacher, but as she read Jimmy's first-year coursework and dove into case after case, she quickly became infatuated with the study of law.

In 1951, Louise enrolled in law school as one of five women in her class. Like the Dishucks, the Turners were separated in law school by one year. Again, like the Dishucks, Louise read Jimmy's cases to him while she kept up with her work one grade below him.

Louise Turner graduated from law school in 1953, and she and Jimmy immediately formed the Tuscaloosa firm of Turner & Turner.

This firm still serves the community today. While Louise and Jimmy are no longer at the helm of the ship, they left the firm in the capable hands of their children—several of whom became lawyers themselves.

However, the founders did not pass the wheel without making their mark on the Alabama legal landscape and, most importantly, helping a whole lot of people along the way. The Turner children recall the office always being stocked with an assortment of fruits and vegetables, pies and homemade cookies—compensation from grateful clients who could not pay and to whom Louise would not refuse service. She once remarked that she enjoyed the practice of law so much that as long as she could crawl into the office, she would continue to do so.

Louise continued to read for her husband throughout their practice. Whether it was a new landmark case or the Sunday paper, her role as her husband's reader never changed. When Louise passed away on March 3, 2010, she was buried next to Jimmy.

Following her death, the Alabama State Bar and the Tuscaloosa County Bar Association drafted a joint resolution honoring Louise for a "lifetime of dedicated service" and for her goal of "helping all those who needed her legal skills."

Both Jane and Louise were honored in 2008 by the Alabama State Bar Women's Section as recipients of the Maud McLure Kelly Award, presented at the annual meeting in Sandestin. Kelly was the first woman admitted to the practice of law in Alabama, after her performance on the entrance exam at the University of Alabama Law Department merited her admission as a senior.

All in all, Jane Dishuck and Louise Turner shared many interesting similarities. And both women embodied what it means to be an Alabama lawyer. Jane and Louise influenced many people to follow in their footsteps.

It's hard to not take a step back and marvel at their journey. ▲

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### Robert L. Humphrey, III



Robert Humphrey graduated from the University of Alabama School of Law in 2021 and will begin practicing soon with Balch & Bingham's corporate and financial services practice groups.

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### Ian R. Ross



Ian Ross recently graduated with the University of Alabama School of Law's 2021 class. In the fall, he will start clerking for Judge Huffaker in the Middle District of Alabama.



# 30 Faces of Pro Bono

P A R T 3 O F 6

This year marks the 30<sup>th</sup> anniversary of the Alabama State Bar’s Volunteer Lawyers Program. As a way to thank all of our volunteers, we have selected 30 representatives and will be sharing their stories over the coming year. Each volunteer represents hundreds of others who have made the program successful. That success is not confined to the program, but is shared with every volunteer and every client that received assistance.

**Henry A. Callaway, III,  
U.S. Bankruptcy Court,  
Southern District of  
Alabama,  
Mobile**

Google defines commitment as the state or quality of being dedicated to a cause, activity,



etc. Chief U.S. Bankruptcy Judge Henry Callaway is the definition of being committed to pro bono services and expanding access to justice. He has actively worked for many years to expand access to justice for low-income individuals, including serving on the board of the South Alabama Volunteer Lawyers Program (SAVLP) for over 25 years, including seven as president. He has also served as chair of the Alabama Access to

Justice Commission, president of the Mobile Bar Association, state bar commissioner for three terms, and member of the state bar Executive Council and Disciplinary Commission. He also received the American Bar Association Pro Bono Publico award.

When asked why pro bono work is so important, Judge Callaway explained, “So many aspects of the legal system involving low-income citizens—debt collection, eviction, child support, divorces, etc.—are complicated and virtually impossible for a lay person to navigate without a lawyer. Volunteer lawyers are a great way to address that problem.” While serving as chair of the SAVLP, he helped increase the number of participating lawyers to about 700 and expanded the program into surrounding counties. Being solution-oriented, Judge Callaway understands that a lawyer may not be available for everyone, so while serving on the Alabama Access to Justice Commission, he and the commission members developed 25 plain-language pro se forms for litigants.

Even now, he still finds time to expand access to justice and address legal problems. Judge Callaway was instrumental in creating the Alabama Bankruptcy Assistance Project (ABAP) to help low-income individuals file Chapter 7 bankruptcy, and he continues to serve on the ABAP Advisory Board.

## **Thomas J. Methvin, Beasley Allen Crow Methvin Portis & Miles PC, Montgomery**

“Pro bono service was my number one priority.” If you practiced

law in Alabama during Tom Methvin’s term as Alabama State Bar president, you know this to be a true statement.

Tom was very active and resourceful in expanding access to justice. “The thing I remember the most is how the issue of access to justice in Alabama was brought to light the year I was president. Our team constantly spoke about it, wrote articles on it, raised money for it, and got more lawyers involved in the VLP. I am hopeful that this made a lasting impression on the pro bono community and elevated the issue to a new level.”

Alabama was 51<sup>st</sup> in spending on civil legal aid, behind even Puerto Rico, and is still one of only three states that provides zero state funding for civil legal aid. This knowledge was the driving force behind Tom’s presidential agenda. Since Alabama spends the least amount on access to justice, it is even more important for lawyers to volunteer their time. “Lawyers have a monopoly on practicing law. A non-lawyer cannot go to court for someone else. Therefore, if lawyers don’t help the poor get access to justice, who will?”

Alabama has one of the highest lawyer enrollment rates in pro bono programs in the country, and leads the nation in the number of pro bono cases closed annually. “I am so thankful that so many lawyers were willing to get on the rolls of our volunteer lawyer programs.”

Tom continues to advocate for pro bono work and encourages pro bono participation. He describes pro bono work as David fighting Goliath and that clients need an



advocate to have a level playing field. “It is a great feeling to be a giant slayer when you get a victory for your client.”

## **Jeanne Dowdle (Rasco) Rizzardi, City Attorney’s Office, Huntsville**



Being innovative is often the key to success.

Jeanne Rizzardi has played a pivotal role in creating innovative ideas and solutions to expand access to justice. In 2012, the Alabama State Bar participated in the American Bar Association’s National Pro Bono Celebration. This was Alabama’s fourth consecutive year taking part in the celebration. Jeanne and her fellow committee members decided to shake up things, rolling out the “Justice Bus” to take lawyers to those in need of pro bono legal help.

The bus traveled to four different parts of the state, with the first stop in Decatur, where the volunteer lawyers traveled to meet with homeless military veterans at an “Operation Stand Down” event. Next, they headed to Summerdale to provide legal help with a variety of issues. The third group of volunteer lawyers and law students from Jones traveled to Lowndes County. The Justice Bus’s last stop was in Pleasant Grove, an area hit hard the previous year by massive tornadoes. It was a rewarding experience for all the attorneys involved. Jeanne explained, “I remember traveling on a bus with fellow lawyers directly to the people who



needed our help the most, was not only rewarding, it was just plain fun. It was a surreal experience to sit with fellow lawyers, from completely different areas of life and law, listening to funny lawyer stories, and even singing a few songs as we travelled down the roads of south Alabama. When we stepped off the bus with our matching t-shirts on, the people were relieved and knew that we were going to make their day just a little brighter.”

Just like the Justice Bus, Jeanne continues making stops to do pro bono work as a volunteer lawyer. Her fondest memories are of the clients she served and her volunteer work at local legal clinics providing pro bono services for Alabama’s most vulnerable citizens. She is a reminder that legal work can be fun and innovative. Jeanne is serving her ninth year on the Board of Bar Commissioners.

## Ahmad M. Shabani, Shabani Law Firm LLC, Hoover

Allen Shabani truly has a passion for pro bono work. He joined the Volunteer Lawyers Program just four months after passing the bar and has been an active volunteer attorney since then. He has represented several clients throughout the years in family law matters. When asked why he wanted to be a part of the VLP, he said, “This program has made a significant impact and a difference in the lives of many individuals who otherwise could not afford to



hire a lawyer.” He wanted to be part of something big, something impactful, but to also make a difference. Allen recommends that everyone join the VLP to ensure that indigent people will not suffer injustice as a result of their economical deficiencies. Being part of the program is something that he is very proud of, and the comments from his pro bono clients keep him encouraged.

In his practice, Allen works to expand access to justice for the Hispanic community. He has been very successful in advocating for the Hispanic population and helping prevent the deportation and separation of families. He does pro bono work with the VLP and also provides services at no cost in his private practice, explaining that a client’s inability to pay should not keep an attorney from providing service.

## W.N. Watson, Watson & Neeley LLC, Fort Payne

Servant leadership is a philosophy and set of practices that enriches lives, builds better organizations, and ultimately creates a more just and caring world. Rocky Watson is such a leader. A physical manifestation of this fact is the William D. “Bill” Scruggs, Jr. Service to the Bar Award he received. His lifelong commitment to pro bono work was evident from the beginning of his career. “I started doing pro bono work in 1974 when I was sworn in as an attorney. I came back to a small town in Alabama



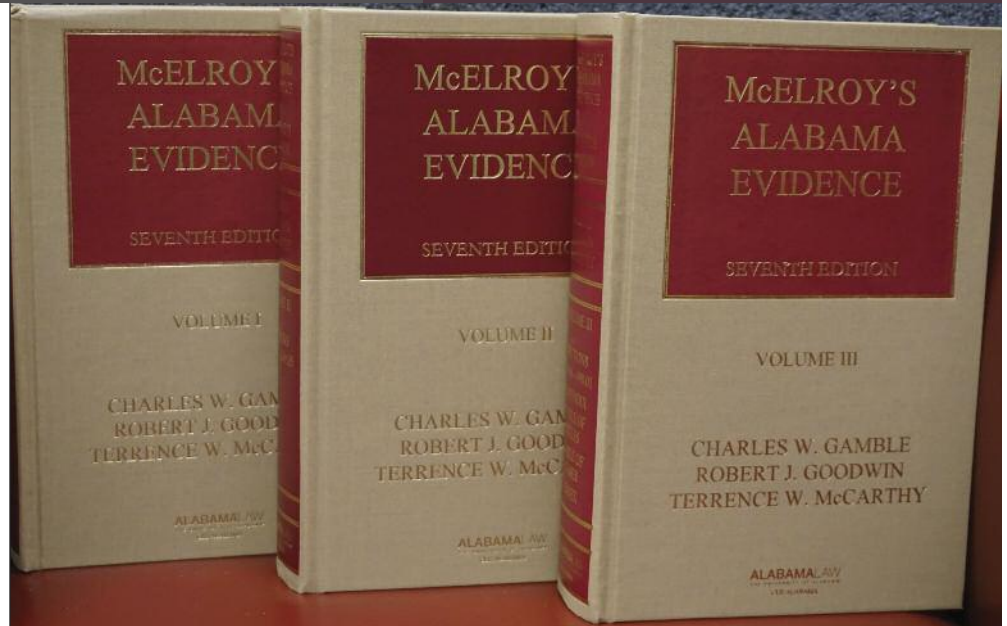
and was taught what the practice of law meant by members of the greatest generation, including my father. Most of the lawyers in Fort Payne at that time were veterans of World War II and the Korean War. That had given them a deep and profound understanding of service to their community and to their country. To them, that included giving legal services to those members of our community who otherwise would be unable to afford it.” Watson calls his interest in pro bono work a generational gift, one he has passed down to his daughter and law partner, who is also active in the Volunteer Lawyers Program.

One client he helped was a mother whose child had suffered multiple strokes as a teenager and was totally incapacitated, almost to a vegetative state. She had also lost her older son to drowning. Her only transportation was an old vehicle owned by her deceased son.

The client was in an accident, at no fault of her own, that totaled the vehicle. The insurance company balked at paying for the car because it was titled in her son’s name and the amount they wanted to pay her was far less than it would take for her to replace the vehicle.

Watson resolved the legal issue and got her compensation for the vehicle. He then got a car for her and allowed her to keep all of the proceeds from the case to help with other expenses. This legal assistance changed her life for the foreseeable future.

Rocky Watson sums up his belief in service by saying, “I hope that my generation is doing even a small portion of what the prior generation has done to pass on this idea of rendering service to upcoming attorneys.” ▲



*McElroy's Alabama Evidence*  
SEVENTH EDITION (2020)  
Volumes I, II and III

By Charles W. Gamble, Robert J. Goodwin,  
and Terrence W. McCarthy

***Reviewed by Judge R. Bernard Harwood, Jr.***

The long-awaited seventh edition of *McElroy's Alabama Evidence* is now available. And it doesn't disappoint.

As much as I try not to use clichés, there is one that so best fits here that it is unavoidable: This superb new resource is an absolute must have for anyone wishing to research Alabama evidence law.

Co-authored by Alabama evidence guru, University of Alabama School of Law Dean Emeritus, and Professor Emeritus Charles W. Gamble; Cumberland School of Law Professor Emeritus Robert J. Goodwin; and Cumberland Adjunct

Professor of Law and partner in Lightfoot, Franklin & White Terrence W. McCarthy, this new edition expands the two-volume sixth edition to three volumes.

An opening 97-page, well-organized table of contents introduces 2,709 pages of substantive text. At their terminus is a conveniently-placed appendix containing the January 30, 2020 amended version of Rules 503A (counselor-client privilege) and 902(13)(14) (certified records generated by an electronic process or system), along with the Committee Comments for those amendments.

There then follow these four alternative but complementary methods for researching particular evidentiary issues: (1) a table of the Alabama Rules of Evidence, listing the sections of text where each subsection of each rule is principally discussed; (2) a second table of the rules, again listing each subsection of each rule, but this time citing to every page of the text where any reference to the subsection appears; (3) a 235-page table of cases directing the reader to every page of the text on which a particular case is cited; and (4) a most user-friendly 88-page index.

A helpful innovation in this edition is a new format whereby italicized headings introduce the various paragraphs or groups of paragraphs contained in a section to tell the reader what particular subject matter is about to be discussed.

An example of how this new edition updates evidentiary subjects that have undergone significant change and expansion subsequent to the prior edition and its supplements are the new sections devoted to developments in the law of expert testimony. All aspects of Rule 702 and 703 are explored, including the effect of the 2013 amendment to 703, and the differing fields of operation of the *Daubert* test and the *Frye* general-acceptance test.

I recognize that this recitation of data is pretty dry stuff, but I share it to show the great lengths the authors have

gone to in order to provide not only an extraordinarily comprehensive treatise on the law of Alabama evidence, but also to ensure that it is fully and readily accessible.

The three authors, each of whom has previously written extensively on Alabama evidence law, have now combined forces to produce an encyclopedic treatment of the subject which is not only all-encompassing, but is also easily navigated by means of the several alternative research pathways they have provided.

Having opened with an apt cliché, I'll close with an equally apt one: The new edition of this standard treatise clearly stands as the bible on the subject. ▲

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### Judge R. Bernard Harwood, Jr.



Bernard Harwood is chair of the Alabama Supreme Court's Standing Advisory Committee for the Alabama Rules of Evidence and a partner with Rosen Harwood in Tuscaloosa. He previously served as a Tuscaloosa County Circuit Judge and an Alabama Supreme Court Justice.



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**NOTICE**

## DISCIPLINARY NOTICES

- ▲ Reinstatement
- ▲ Surrender of License
- ▲ Disbarments
- ▲ Suspensions

### Reinstatement

- Birmingham attorney **Don Eugene Siegelman** was reinstated to the active practice of law in Alabama by order of the Supreme Court of Alabama, effective December 14, 2020. Siegelman was previously disbarred from the active practice of law by order of the Alabama Supreme Court on June 12, 2012. [Rule 28, Pet. No. 2020-1007]

### Surrender of License

- On March 12, 2021, the Alabama Supreme Court issued an order accepting the voluntary surrender of **Michael Hilding McDuffie's** license to practice law in Alabama, with an effective date of February 8, 2021. [ASB Nos: 2018-1251 and 2020-1087]

### Disbarments

- Sulligent attorney **Daniel Heath Boman** was previously suspended from the practice of law in Alabama for two years, of which he was required to serve 90 days, and placed on probation for two years. On January 24, 2020, the Disciplinary Commission of the Alabama State Bar entered an order revoking Boman's probation and imposing the original two-year suspension. On September 28, 2020, the Supreme Court of Alabama entered an order requiring the two-year suspension to run consecutively with an earlier imposed and unrelated two-year suspension in ASB No. 2019-162. [ASB Nos. 2079-22 and 2017-1420]
- Birmingham attorney **Robert William Hensley, Jr.** was disbarred from the practice of law in Alabama, effective January 20, 2021. The Supreme Court of Alabama entered its order based on the Disciplinary Board's order accepting Hensley's conditional guilty plea wherein he admitted to violating Rules 1.3 [Diligence], 1.4 [Communication], 1.15 [Safekeeping Property], 5.5(a) [Unauthorized Practice of

(Continued from page 201)

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Law], 8.1(b) [Bar Admission and Disciplinary Matters], and 8.4(c), (d), and (g) [Misconduct], Alabama Rules of Professional Conduct. Hensley was previously summarily suspended on October 21, 2019 for failure to pay ordered restitution in a disciplinary matter. Thereafter, while suspended, Hensley agreed to represent a client in a traffic matter for a fee of \$1,500. Hensley failed to place the fees into his IOLTA account, but rather cashed the check and used the funds for personal expenses. Hensley also failed to inform the client he was suspended from the practice of law. [ASB Nos. 2019-715 and 2020-492]

- Athens attorney **Douglas Lee Patterson** was disbarred from the practice of law in Alabama, effective December 3, 2020. The Supreme Court of Alabama entered its order based upon the order of Panel III of the Disciplinary Board accepting Patterson's consent to disbarment on November 12, 2020. Patterson was recently convicted in the Limestone County Circuit Court in a three-count indictment charging him with use of official position or office for personal gain, financial exploitation of the elderly in the first degree, and theft of property in the third degree. [ASB No. 2020-731]

## Suspensions

- Montgomery attorney **Joseph Lee Fitzpatrick, Jr.** was suspended from the practice of law in Alabama for 91 days by order of the Supreme Court of Alabama, effective November 27, 2020. Fitzpatrick pled guilty to violating Rules 1.4 [Communication], 1.15(b) [Safekeeping Property], 1.16(d) [Declining or Terminating Representation], and 8.4(g) [Misconduct], Ala. R. Prof. C. [ASB No. 2019-487]
- Birmingham attorney **Allen Haygood Grier**, licensed in Alabama, was suspended from the practice of law by the Supreme Court of Alabama, effective December 14, 2020. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's order that Grier be suspended for failing to comply with the 2019 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-602] ▲

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## LEGISLATIVE WRAP - UP

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# The Conference Committee

We are at the time of year when the pace of the legislature is at its quickest. Sometimes it is hard to keep up with what is happening on each floor and what the current status is of bills that you are tracking. This is true when everything is happening in a smooth process and without disruption, but what about when the second house amends a piece of legislation? Does the sponsor of the bill have to accept that change, what control does she have, and what is the process? The answer is to send it to conference, a process discussed more thoroughly below.

Let's step back to the basics of the legislative process. As we all know, pursuant to the Alabama Constitution, a bill can only become law after being passed by both bodies of the legislature.

### SECTION 63

Every bill shall be read on three different days in each house, and no bill shall become a law, unless on its final passage it be read at length, and the vote be taken by yeas and nays, the names of the members voting for and against the same be entered upon the journals, and a majority of each house be recorded thereon as voting in its favor, except as otherwise provided in this Constitution.

Once passed by the second house, the bill is forwarded to the executive branch for action by the governor. The governor's options are the subject of the July 2020 edition of this column.

Now, let's talk about what happens when a bill gets amended in the second house and what options that presents. The house of origin, upon receipt of the amended bill, may:

**Concur in amendments**—The house of origin may concur in the amendments by the adoption of a motion to that effect. Upon such concurrence, the bill, having been passed by both houses in identical form, is ready for enrollment and transmittal to the governor. The enrolled bill is then signed by both presiding officers in the presence of the house or senate and transmitted to the governor. Joint Rule 2, 5 (2019).

**Refuse to concur in amendments**—The originating house may adopt a motion to non-concur, and the bill fails to pass.

**Refuse to concur in amendments and request a conference committee**—The house of origin may refuse to accept the amendments made by the second house. In this case, a motion is usually made to request a conference committee. The fact that the originating house has not concurred in the amendments and requests a conference committee is "messed" to the other house. The other house usually agrees to the request, and each house appoints three members to the conference committee.



And, finally, we have arrived at the conference committee, what it is, how they are governed, and how they work. As with aspects of the legislative process, the starting point is the Constitution:

## SECTION 64

No amendment to bills shall be adopted except by a majority of the house wherein the same is offered, nor unless the amendment with the names of those voting for and against the same shall be entered at length on the journal of the house in which the same is adopted, and no amendment to bills by one house shall be concurred in by the other, unless a vote be taken by yeas and nays, and the names of the members voting for and against the same be recorded at length on the journal, and no report of a committee of conference shall be adopted in either house, except upon a vote taken by yeas and nays, and entered on the journal, as herein provided for the adoption of amendments.

The conference committee is composed of three members from each house.<sup>1</sup> The Senate Committee on Assignments appoints two senators, and the presiding officer will appoint one member.<sup>2</sup> The speaker of the house appoints three representatives.<sup>3</sup> Generally speaking, the sponsor of the bill at issue will be one of the appointees from the house of origin. Usually, the appointees shall consist of two members of the majority party and one member of the minority party.<sup>4</sup>

Meetings of a conference committee must be posted at least one hour prior to the meeting except on the 12<sup>th</sup> day of a special session or the 30<sup>th</sup> day of a regular session.<sup>5</sup>

A conference committee or an appropriation bill may only address differences in monetary amounts between the senate passed and house passed version of the pending bill. No new appropriation item may be introduced. The amount of any entity's appropriation may not be increased

higher than an amount passed by one of the houses. This provision may be suspended as to particular items of appropriation by recorded majority vote of each house.<sup>6</sup>

For a conference committee to report, at **least two members of each house must agree**. The conference report is considered first by the house of origin. When approved by the house of origin, the report is then considered by

the second house. Neither house may amend a report.<sup>7</sup>

The conference committee may also report a minority report. In the event the house of origin rejects the majority report, the house may proceed to consider the minority report. If passed by the house of origin, the second house may proceed to consider the minority report.<sup>8</sup> The existence of the right to file a minority report exists only in the

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THE ALABAMA LAWYER

(Continued from page 205)

rules. The legislature has the right to determine its rules concerning acceptance or rejection of a minority conference committee report as the constitution neither specifically prohibits nor permits the filing of the report.<sup>9</sup>

When a committee agreement is reached and if both houses adopt the conference committee report by a ye and nay vote, the bill is finally passed. But, if either house refuses to adopt the report of the conference committee, a motion may be made for further conference. If a conference committee is unable to reach an agreement, it may be discharged, and a new conference committee may be appointed. Some highly controversial bills may be referred to several different conference committees. Should agreement never be reached in conference, the bill is lost.<sup>10</sup>

The house limits debate on the reports from conference committees to one hour.<sup>11</sup> The senate rules do not address the length of debate of a conference committee report, however a motion to accede to send a bill to conference is not debatable.<sup>12</sup> ▲

### Endnotes

1. Joint Rule 21(a) (2019).
2. Senate Rule 47(e) (2019). In the case of a conference committee on a joint resolution, the committee on assignments names all appointees. Senate Rule 47(g).
3. House Rule 63 (2021).
4. All senators appointed to a conference committee on a local bill shall represent the affected political subdivision if possible. Senate Rule 47(f).
5. Joint Rule 21(b) (2019).
6. Joint Rule 21(c) (2019).
7. Joint Rule 21(d) (2019).
8. Joint Rule 21(e) (2019).
9. *Opinion of the Justices No. 220*, 295 Ala. 26, 322 So. 2d 107 (Ala. 1975).
10. *Bd. of Revenue of Jefferson Cnty. v. Crow*, 141 Ala. 126, 37 So. 469 (Ala. 1904).
11. House Rule 27 (2021).
12. Senate Rule 21 (2019).

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## MEMORIALS

▲ James H. Evans

▲ Louis B. Feld

▲ Ben L. Zarzaur

# James H. Evans

Although 34 years have passed, in my mind's eye I am transported back to that day in March 1987, when I first met James H. "Jimmy" Evans. I was a 24-year-old newly minted lawyer looking for direction. He had already long established himself as the corruption fighting district attorney of Montgomery County. I sat across a huge antique desk from him, flanked by his administrative assistant, Bob Bryant, and Chief Deputy Ellen Brooks, as he sized me up. To this day, I'm not sure if it was the interview or my almost-daily follow-up calls over the next couple of weeks, but I finally received a call from Jimmy on a Friday afternoon advising me to report to work the following Monday.



Jimmy was a man of large stature. He seemed particularly imposing to me when, on occasion, he admonished me to "not make any exotic moves on his dance floor." Yet, it was the kind of scolding that a father would give a child. Never harsh or demeaning, but rather a reminder to do better. We were all family to him. As I'd go on to learn over the years, his heart was equally as large, with a desire to seek redress for those who had been wronged.

Life at the DA's office was chaotic and challenging. From shepherding cases through grand jury, district and circuit court, to rushing into the courtroom to strike a jury as I read through my green file folder, to finding a live tiger in the office who'd stopped by for a visit, to lively lunches with Jimmy at Tony's Pizza followed by chasing the Snap-On tool truck down Bell Street, it would be the best job I've ever had.

Like so many of us Jimmy mentored over the years, the lessons that I learned from him, both in and outside of the courtroom, are too voluminous to reduce to writing. The most important of those for me have been empathy for and championing the causes of those who have been victimized by crime, preparation, fearlessness in the courtroom, and, above all, to do justice. Jimmy was quite simply put the best courtroom trial attorney I've witnessed. His rapport with a jury was magical to watch.

*(Continued from page 207)*

I would go on to work with Jimmy for seven years, both at the DA's office and at the Attorney General's Office. Although our career paths diverged in 1995, I've tried to apply those lessons learned so many years ago every day since then. I remain grateful for the opportunities that he gave me and for the opportunity to tell him before it was too late to do so. Like me, many of you have a mentor or someone who has influenced the formative years of your career. Let him or her know how much of an impact they had on you if you still can. Time flies.

Rest in peace, Brother Jimmy. May it be your joyous portion to hear from Him, who sitteth as Judge Supreme, those welcome words: "Well done, good and faithful servant, enter thou into the joy of thy Lord!"

—Bruce M. Lieberman, Montgomery

## Louis B. Feld

L.B. Feld passed away on February 15, 2021 in Charleston, South Carolina. He was 73 years old. L.B. is survived by a loving family, including his wife, Lorraine (Lorie); daughter Gerri Mazer (Glenn); stepchildren Tammy Connor and Scott Kubiszyn; step-grandchildren Charlotte and Sam Connor; and brother Monty Feld (Margaret).



L.B. graduated from the University of Alabama and from the University of Alabama School of Law, where he graduated first in his class. He also obtained the master of laws (in taxation) degree from New York University, where he served on the board of the *Tax Law Review*.

After earning his degree from NYU, L.B. went to work in private practice in Birmingham, specializing in general taxation with a focus on estate planning. He played a huge role in elevating estate planners in Alabama from "scriveners" (will writers) to specialists who offered sophisticated tax-savings techniques, planning for the transition and protection of family assets, and business succession planning for closely held businesses. Such planning not only saved taxes, but, more importantly, helped clients anticipate and navigate difficult family and business issues.

L.B. was also a visionary. In 1993, he founded Feld & Hyde a "boutique" law firm, specializing in tax law and estate planning, well before the term "boutique law firm" was in use. The firm grew to become the largest private practice group of tax specialists in Alabama at the time.

In addition to practicing law, L.B. taught estate and gift taxation at the University of Alabama School of Law for over 25 years. He was also a frequent speaker on estate planning, estate and gift taxation, and business succession planning. In recognition of his efforts, L.B. was named an outstanding alumnus by the school of law and instructor of continuing legal education by the Alabama State Bar.

Although he founded Feld & Hyde and was the senior partner at Dominick Feld Hyde (which was formed in 2011 after the merger of Feld & Hyde and Dominick, Fletcher), L.B. never sought an elevated title or position. Instead, he was our social chair. He organized and led participation in March Madness, but the college football season was the highlight for all of us. L.B.'s "game boards" guaranteed that almost every participant would win one of his prized turkeys, smoked personally, of course, by him. He also played host and bon vivant at every firm social occasion.

Everyone at Dominick Feld Hyde hated to see L.B. retire and move to South Carolina in 2016, but we know how much he cherished his time with family there. We now mourn his passing, but are thankful we were able to have such an extraordinary individual as part of our lives.

—Gregory D. Hyde, Birmingham

## Ben L. Zarzaur

Ben Zarzaur, born September 24, 1946, passed away December 22, 2020.

He attended Spring Hill College, and then after a stint in the U.S. Army as a cook, pursued an accounting degree from the University of Alabama, graduating with a B.S. in commerce and business administration in 1969. Ben attended Cumberland School of Law (J.D. 1972), and then New York University's L.L.M. in taxation program, finishing first in his class. He practiced at Najjar, Denaburg until 1997, when he formed Zarzaur & Schwartz



PC, which later became a multi-state law firm specializing in creditors' rights and commercial litigation.

Ben was a consummate cook, a talent learned from his father, Joe Zarzaur, the proprietor of the Vestavia Hill's dinner club, Joe's Ranch House; passionate Alabama football fan; generous colleague and boss; innovative practice manager; an early adopter of leveraging technology in his law practice; and a friend and mentor to many.

He is survived by his wife, Sandra; his five children, Dr. Ben L. Zarzaur, Jr. (Stephanie), Wendy Zarzaur Johnston (James), Jason P. Zarzaur (Christy), Brent Yarborough (Whitney), and Brian Yarborough (Christy); and eight grandchildren. Three

of his children—Wendy, Jason, and Brent—followed him into the legal profession. ▲

—William M. Halcomb, Birmingham

### PROFESSOR HARRY COHEN:

Seeking stories for a tribute to Professor Harry Cohen, member of the University of Alabama Law School faculty for 37 years. [pgraves@bradley.com](mailto:pgraves@bradley.com)

**Boyce, Robert Clair, III**  
Birmingham  
Admitted: May 3, 1974  
Died: January 28, 2021

**Caldwell, Charles Eugene**  
Hoover  
Admitted: April 18, 1977  
Died: February 8, 2021

**Davis, Norman Henry, Jr.**  
Jacksons Gap  
Admitted: April 10, 1975  
Died: January 22, 2021

**Dick, Richard Evans**  
Huntsville  
Admitted: April 6, 1972  
Died: February 11, 2021

**Greene, Roy Mitchell**  
Phenix City  
Admitted: January 1, 1948  
Died: October 4, 2020

**Jones, Thomas Elliott**  
Auburn  
Admitted: April 27, 1979  
Died: January 21, 2021

**Klemm, Richard Rudolph**  
Hartford  
Admitted: September 7, 1994  
Died: March 6, 2020

**Laning, Davidson Lynn**  
Birmingham  
Admitted: September 28, 1979  
Died: December 11, 2020

**Layden, Hon. Lionel**  
Mobile  
Admitted: January 1, 1957  
Died: February 1, 2021

**Maples, Francis Gerald, Jr.**  
Ridgeland, MS  
Admitted: December 19, 1983  
Died: December 4, 2020

**Powers, William Pinkney, III**  
Columbiana  
Admitted: October 14, 1964  
Died: December 18, 2020

**Rutledge, William Eugene**  
Birmingham  
Admitted: January 1, 1963  
Died: December 21, 2020

**Sanchez, Philip Joseph, IV**  
Monroeville  
Admitted: April 23, 1993  
Died: January 9, 2021

**Scott, John Baytop, Jr.**  
Montgomery  
Admitted: June 1, 1954  
Died: October 15, 2020

**Smitherman, Gene Ramsey**  
Atlanta, GA  
Admitted: November 15, 1974  
Died: January 22, 2020

**Tate, Robert Greye, Jr.**  
Birmingham  
Admitted: January 1, 1957  
Died: January 9, 2021

**Terry, Jon Batton**  
Bessemer  
Admitted: September 22, 1977  
Died: January 24, 2021

**Vachon, Reginald Irene**  
Atlanta, GA  
Admitted: March 24, 1971  
Died: December 24, 2020



## OPINIONS OF THE GENERAL COUNSEL

*Roman A. Shaul*  
*roman.shaul@alabar.org*



# Alabama Lawyer Moving Firms

The last two decades have seen many lawyers and law firms on the move. More recently, the aging lawyer population and COVID-19 pandemic have continued to fuel the shifts and realignments of lawyers within the practice of law. The Office of General Counsel (“OGC”) routinely advises lawyers and law firms of their ethical obligations when leaving an existing firm. This article will summarize a few of the areas we ask lawyers and firms to consider when changing scenery.

### **The Lawyer’s Duty to Communicate**

Under Rule 1.4, Alabama Rules of Professional Conduct, lawyers have a duty to timely communicate relevant material information to clients so that they can make an informed decision about what should be done in their case. The OGC takes the position that it is a material development when a lawyer decides to leave or join another firm. Although the client does not have to be informed simultaneously with the departing firm,

the client should be told within a reasonable time of the announcement.

## The Client Controls the Choice of Lawyer

The OGC has reviewed a number of contracts, employment agreements, and settlement agreements over the years attempting to limit an individual lawyer's ability to take clients when leaving a firm. However, any restriction or agreement that seeks to limit, or has the effect of limiting, a client's choice of lawyers is ethically impermissible. Previous ethics opinions have made clear that neither a client nor her file "belong" to a firm or individual lawyer. See Formal Opinion 2010-02. It is possible that a lawyer or firm may have an interest in the client's file pursuant to a lien statute or equitable doctrine, i.e., quantum merit. In that event, the legal obligations of the parties are defined by the relevant caselaw and are beyond the OGC's ability to provide an opinion. As a best practice, the OGC recommends that prior to any formal separation, a joint communication be sent to clients as soon as reasonably possible. This communication should inform the client of the individual lawyer's departure date and their option to choose whether they want continued representation by the individual lawyer or firm. Any party wishing to place a lien on the file should convey this information to the client. Any attempt to place an invalid lien on a file may be seen as an ethical violation of the Alabama Rules of Professional Conduct.

If a departing lawyer has the effect of causing a law firm to dissolve, the partners cannot agree to simply divide up clients without consulting those individuals first. Client choice or indecision does not prevent a law firm from assigning a lawyer to review a particular file, communicate with the client, or even take actions consistent with the client's interest if there are exigent circumstances or pending deadlines justifying such efforts. Absent some instruction from the client to the contrary, the former lawyer may ethically continue to have contact with the client. However, a lawyer's continued contact with a client after she has been asked to cease communication would be harassing and vexatious and, therefore, ethically impermissible.

## The Obligations of Law Firm Management

Under Rule 5.1(a) of the Alabama Rules of Professional Conduct, law firm management has an obligation to create measures that give reasonable assurance that "all lawyers in the firm conform to the Rules of Professional Conduct." The OGC takes the position that this includes a process that ensures an orderly and timely transition of all relevant files to the lawyer retaining the client. Both the firm and departing lawyer must at all times during the transition take steps to protect the interests of the client over their own individual self-interests. Rule 16(d), Alabama Rules of Professional Conduct. An ethically compliant process may need to include the ability of the retaining lawyer to maintain some access to reasonable staff resources, emails, voicemails, and electronic

court filing systems after departure. A firm's failure to ensure that the retaining lawyer receives relevant file material, or engages in a process of denying access to relevant material may be in violation of the Alabama Rules of Professional Conduct.

## Declining or Terminating Representation

Departing firms and lawyers are not always required to continue representation of a client. If a departing lawyer does not wish to continue representation of a particular client and the law firm does wish to retain them, then the client should be informed of this decision and asked if they want to remain with the law firm. Assuming the client wishes to stay with the firm, the individual lawyer will then have to seek permission to withdraw from the court if there is a pending lawsuit. If the court does not allow withdrawal, the attorney must continue the representation unless permitted to seek withdrawal under Rule 1.16, Alabama Rules of Professional Conduct. If the law firm does not wish to retain a client, the departing lawyer will have to continue representation unless she is authorized to seek withdrawal under Rule 1.16, Alabama Rules of Professional Conduct.

As always, if you have any questions, please contact us at [ethics@alabar.org](mailto:ethics@alabar.org). ▲

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## ABOUT MEMBERS, AMONG FIRMS

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### About Members

**Christopher Weaver** announces the opening of **Dads Law LLC** at 214 16<sup>th</sup> St. N, Bessemer 35020. Phone (205) 670-1102.

**Bressler, Amery & Ross PC** announces that **Beth Graham** rejoined the Birmingham office as an associate.

**Burr & Forman** announces that **Hanna Lahr, Laura Murphy, Sims Rhyne,** and **Al Teel** are partners in the Birmingham office, and **Christine Burns** and **Emily Killion** are partners in the Mobile office.

### Among Firms

**Abogados Centro Legal** of Birmingham announces that **Xenia Solano Rigby** joined as an associate, and the firm opened a Huntsville office.

**Capell & Howard PC** of Montgomery announces that **Sarah Johnston** is a shareholder.

**Agricola Law LLC** of Opelika announces that **Mallory K. Harper** joined as an associate.

**Haynes & Haynes PC** of Birmingham announces that **Ivey E. Best** joined as an associate.

**Baker Donelson** announces that **N. DeWayne Pope** joined the Birmingham office of counsel.

**Hill Hill Carter Franco Cole & Black PC** announces that **Michael M. Eley** joined the Montgomery office as a partner, and **Carami A. Garrett** joined the Birmingham office as an associate.

**Beasley Allen** of Montgomery announces that **James Eubank, Brittany Scott,** and **Soo Seok Yang** are principals.

**Holtsford Gilliland Higgins Hitson & Howard PC** announces that **Leigh M. Bostic** and **Mark D. Toppen** joined as associates, in the Gulf Coast and central Alabama offices, respectively.

**Bradley Arant Boult Cummings LLP** announces that **Martha Roby** joined as a senior advisor.



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**Hon. James E. Hill, Jr.**  
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**Hon. James D. Jordan**  
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(251) 867-7724

**Hon. Charles "Chuck" R. Malone**  
*chuck@malonenelson.com*  
(205) 349-3449

**Hon. Julie A. Palmer**  
*judgejuliepalmer@gmail.com*  
(205) 616-2275

**Hon. Eugene W. Reese**  
*genereese2000@yahoo.com*  
(334) 799-7631

**Hon. James H. Reid, Jr.**  
*bevjam@bellsouth.net*  
(251) 709-0227

**Hon. James H. Sandlin**  
*judge@jimmysandlin.com*  
(256) 319-2798

**Hon. Ron Storey**  
*ron@wiregrasselderlaw.com*  
(334) 793-7635

**Hon. Edward B. Vines**  
*evinesattorney@yahoo.com*  
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**Mann & Potter PC** of Birmingham announces that **Jerry T. Crowell** is an equity principal.

**Morris Haynes** of Birmingham announces that **Matthew Garmon** is a partner.

**Ogletree Deakins** announces that **David Warren** is the managing shareholder in the Birmingham office.

**Samford & Denson LLP** of Opelika announces that **Blake L. Oliver** joined as a partner, **D. Carter Weeks** and **Houston W. Kessler** joined as associates, and **C. Clay Torbert, III** joined as of counsel.

**Sheffield & Lentine PC** of Birmingham announces that **John C. Lentine** joined as an associate.

**Alexander Shunnarah** and **Tyler Vail** announce the formation of **Shunnarah Vail Trial Attorneys PC** at 120 18<sup>th</sup> St. S, Ste. 101, Birmingham 35233.

**Sirote & Permutt PC** announces that **Sarah Green** joined the Huntsville office as an associate.

**Thornton, Carpenter, O'Brien, Lawrence & Sims** of Talladega announces that **Mary Lauren Kulovitz** is a partner, and the firm name is now **Thornton, Carpenter, O'Brien, Lawrence, Sims & Kulovitz**.

**Watkins & Eager PLLC** announces that **Ashley C. Scarpetta** joined the Birmingham office as an associate. ▲



**Wilson F. Green**

**Wilson F. Green** is a partner with *Fleenor & Green LLP* and practices in Tuscaloosa and Birmingham. He is a *summa cum laude* graduate of the University of Alabama School of Law and a former law clerk to the Hon. Robert B. Propst, United States District Court for the Northern District of Alabama. From 2000-09, Green served as adjunct professor at his alma mater, where he taught courses in class actions and complex litigation. He represents consumers and businesses in consumer and commercial litigation.



**Marc A. Starrett**

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## RECENT CIVIL DECISIONS

# From the Alabama Supreme Court

### MVA; Motorized Wheelchairs

#### ***Pruitt v. Oliver*, No. 1190297 (Ala. Jan. 29, 2021)**

Operator of motorized wheelchair close to curb of public road who was hit by a motor vehicle was operating a “motor vehicle” under Ala. Code § 32-1-1.1(33) and was not deemed to be a “pedestrian” under § 32-1-1.1(42). Even though wheelchair operator may have violated rules of the road with respect to the equipment which was operational on the wheelchair, there remained issue of fact as to whether the lack of missing safety devices proximately caused the accident.

### Trial Procedure; Improper Argument to Jury

#### ***Allstate Ins. Co. v. Ogletree*, No. 1180896 (Ala. Feb. 5, 2021)**

Under the “substantial prejudice” standard for improper attorney argument and under the “probable prejudice” standard for mistrial motions based on improper argument, carrier demonstrated that improper argument by UM plaintiff’s counsel, to the effect that carrier could be completely compensated by tortfeasor’s estate, was improper and likely influenced the jury.

### Mandamus; Recusal

#### ***Ex parte Boone Newspapers, Inc.*, No. 1190995 (Ala. Feb. 12, 2021)**

Petitioner seeking recusal order in mandamus proceeding was not entitled to relief based on grounds not raised before the circuit court.

### Spoilation

#### ***Goins v. Advanced Disposal Services Gulf Coast, LLC*, No. 1190393 (Ala. Feb. 19, 2021)**

Among other holdings in a two-justice plurality panel opinion, trial court properly instructed jury on spoliation of evidence based on plaintiff’s loss of his cellphone data, where plaintiff initiated a factory reset of his phone five days after his lawyer had asked for a hearing on defendant’s motion to compel.

## Mediation; Sanctions

### **Allstate Property & Cas. Co. v. Harbin, No. 1190792 (Ala. Feb. 19, 2021)**

Two-justice plurality panel opinion; trial court abused its discretion in imposing sanctions against Allstate for amounts exceeding plaintiffs' attorneys' fees (amounts which were not contested) for purported violation of pretrial mediation order. Order simply required a representative with "full settlement authority"; the language did not require physical presence of Allstate representative, and there was no evidence that its attorney lacked full authority. Under *In re Novak*, 932 F.2d 1397 (11<sup>th</sup> Cir. 1991), "full authority" does not require that the party be willing to settle at all.

## State Agent Immunity

### **Moore v. Tyson, No. 1190547 (Ala. Feb. 19, 2021)**

Panel opinion (unanimous); trial court properly granted summary judgment to teacher and principal of school, based on *Cranman* immunity, in action by injured student arising from teacher's leaving classroom unattended while she went to the restroom, during which absence child fell after leaving her seat. Both defendants were exercising judgment in their duties, and plaintiffs did not demonstrate any policy violation (of "effective supervision") amounting to a checklist. Section 14 barred all official capacity claims.

## Evidence

### **Murphy Oil USA, Inc. v. English, No. 1190610 (Ala. Feb. 19, 2021)**

Trial court did not err by admitting evidence of plaintiff's medical expenses, which were challenged based on lack of expert testimony regarding reasonableness and necessity, where defendant stipulated to admission of doctor's testimony.

## Appellate Jurisdiction

### **Dyas v. Stringfellow, No. 1190258 (Ala. Feb. 26, 2021)**

Aggrieved party filed notice of appeal from order dismissing some but not all defendants. Subsequent to the notice of appeal, trial court entered an order dismissing the remaining defendant. Held: notice of appeal divested the trial court of jurisdiction, and the appeal was taken from a non-final judgment and was therefore improper.

## Will Contests

### **Taylor v. Hanks, No. 1190203 (Ala. Feb. 26, 2021)**

Genuine issues of material fact as to testamentary capacity rendered probate court's summary judgment improper in will contest. Misstatement in will that testator had no children suggested that testator was not aware of



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the natural objects of his bounty. Evidence that testator and child were estranged might be a possible explanation, but the misstatement accompanied by the testator's having two strokes immediately before executing the will might suggest otherwise.

### Mandate Rule

***Ex parte Encompass Health, Inc.*, No. 1190797 (Ala. March 12, 2021)**

Trial court's post-remand alteration of a dismissal of some defendants (originally with prejudice, later modified to be without prejudice) entered before dismissal of remaining defendants was a violation of the mandate rule, even though the dismissal order under review was not challenged in the first appeal; scope of the trial court's authority on remand is circumscribed by the decisions in the appeal.

### Standing

***Munsa v. Ivey*, No. 1200003 (Ala. March 19, 2021)**

Plaintiff citizens failed to allege particularized facts giving rise to an "injury in fact" resulting from their being required to comply with the governor's COVID mask mandate, and thus lacked standing to bring an action challenging its constitutionality.

## From the Court of Civil Appeals

### Workers' Compensation

***Turner v. Walter J. Baggett, Inc.*, No. 2190745 (Ala. Civ. App. Feb. 5, 2021)**

Trial court erred in limiting employee's compensation to permanent partial disability benefits for loss of use of his right arm under the "schedule." If the effect of the loss of a member extends to other parts of the body and interferes with efficiency, the schedule is not exclusive. Moreover, a permanent injury to a scheduled member which results in chronic pain in the scheduled member so severe as to render worker totally disabled is also not limited to scheduled benefits. Substantial evidence did not support the trial court's conclusion that the injury was contained to worker's arm, because undisputed objective medical evidence indicated that injury affects the worker's spinal cord nerves, causing a painful debilitating condition.

### Workers' Compensation; Location of Employment

***Sellers v. Venture Express, Inc.*, No. 2190165 (Ala. Civ. App. Feb. 12, 2021)**

Notwithstanding parties' agreement that Sellers's employment was to be principally localized in Tennessee, Ala. Code § 25-5-35(g) gave Sellers the right to seek compensation benefits under the Act for injuries sustained in Alabama, and that jurisdiction could not be divested by agreement of the parties.

### Motions to Dismiss vs. Summary Judgment

***Riddle v. Everett*, No. 2190817 (Ala. Civ. App. Feb. 12, 2021)**

Trial court erred in considering matters outside the pleadings and not converting a motion to dismiss to a motion for summary judgment.

### Workers' Compensation; Venue and Exclusivity

***Ex parte Standard Furniture Mfg. Co. LLC*, No. 2200251 (Ala. Civ. App. Feb. 26, 2021)**

Because venue is determined as of action's commencement and because a trial court entering an order has the inherent authority to enforce it, mandamus relief was unavailable to employer in subsequent (.01) action to challenge venue where the action in effect sought enforcement of the court's prior judgment awarding comp benefits. Exclusive remedy provisions of the Act do not apply to claim that employer has failed to abide by prior judgment in comp action in contempt setting.

### Rule 60

***1st Franklin Fin. Corp. v. Pettway*, No. 2190871 (Ala. Civ. App. Feb. 26, 2021)**

Order granting a Rule 60(b)(5) motion based on satisfaction of the judgment is appealable.

### Taxation; Interstate Commerce

***Black Eagle Minerals, LLC v. ADOR*, No. 2200050 (Ala. Civ. App. March 5, 2021)**

Tax scheme under 2009 version of Ala. Code § 40-18-24.2, under which composite income tax returns must be filed by pass-through entities on behalf of non-resident members, did not violate the Commerce Clause. Tax scheme overall did not increase the burden on out-of-state entities as compared with in-state entities, though the methodology for tax calculation and collection differed between out-of-state and in-state entities.

## Workers' Compensation; Return to Work

### *City of Guntersville v. Looney*, No. 2190773 (Ala. Civ. App. March 12, 2021)

Return to work statute, Ala. Code § 25-5-57(a)(3)i, does not apply in cases involving an initial disability determination where the employee is no longer working at the time of trial. Evidence was sufficient to support permanent total finding; employee testified that even though he returned to work and continued for several years post-injury as a laborer, he was forced to retire because of the chronic pain from the injury.

## Real Property; Bona Fide Purchasers for Value

### *Gates v. Ellis*, No. 2190775 (Ala. Civ. App. March 12, 2021)

Ala. Code § 35-4-90 protects only purchasers "for a valuable consideration." In this case, the consideration was a mere \$10 nominal consideration and thus would not support BFP status.

## Adverse Possession

### *Ross v. Clark Property Mgmt., LLC*, No. 2190916 (Ala. Civ. App. March 12, 2021)

Clark established adverse possession of vacant lot by the requisite clear and convincing evidence, in that Clark and its predecessors paid taxes and kept lot mowed and cleared debris after storms—collectively, acts consistent with open and notorious ownership.

# From the United States Supreme Court

## Railroad Disability Benefits

### *Salinas v. USRB*, No. 19-199 (U.S. Feb. 3, 2021)

USRB's refusal to reopen a prior benefits denial is subject to judicial review.

## FSIA

### *Federal Republic of Germany v. Philip*, No. 19-351 (U.S. Feb. 3, 2021)

Germany was entitled to immunity from a lawsuit by German citizens (heirs of German Jewish art dealers) regarding the WWII-era taking of medieval relics known as the Welfenschatz. FSIA's "expropriation exception" to immunity refers to

violations of the international law of expropriation, and thus incorporates what is called the "domestic takings" rule, under which a sovereign's taking of its own nationals' property is not unlawful under the international law of expropriation.

## FTCA

### *Brownback v. King*, No. 19-546 (U.S. Feb. 25, 2021)

Judgment in favor of federal defendants on FTCA claims barred *Bivens* claim as well, pursuant to the "judgment bar" provision of the FTCA, under which "[t]he judgment in an action under section 1346(b)" shall bar "any action by the claimant" involving the same subject matter against the federal employee whose act gave rise to the claim.

## FOIA

### *U.S. Fish & Wildlife v. Sierra Club*, No. 19-547 (U.S. March 4, 2021)

Deliberative process privilege protects from FOIA disclosure a series of in-house draft biological opinions that were both pre-decisional and deliberative, even if the drafts reflect the agencies' last views about a proposal.

## Immigration

### *Pereida v. Wilkinson*, No. 19-438 (U.S. March 4, 2021)

Removeable alien may seek cancellation of removal, a discretionary process in which the alien must prove certain elements, among them that the alien has not been convicted of certain classes of crimes. The alien bears the burden of demonstrating that point. In this case, alien did not carry burden for establishing entitlement to cancellation without affirmative proof that he had not been convicted of disqualifying offenses.

## Standing; Mootness

### *Uzuegbunam v. Preczewski*, No. 19-968 (U.S. March 8, 2021)

Two students, one who attempted religious speech purportedly in violation of public university policy and another who refrained from it because of the policy, sued to enjoin the university's policies and for nominal damages. Rather than defend the case, the university changed its policies and sought dismissal for lack of standing. The district court and the Eleventh Circuit agreed, concluding that the change in policy mooted the controversy. The Supreme Court reversed, holding that a request for nominal damages satisfies the redressability element necessary for Article III standing where a plaintiff's claim is based on a completed violation of a legal right. There was a question for remand as to whether the student who refrained from speech had suffered a completed injury in fact; the focus of this decision was on the third element of standing (redressability).

(Continued from page 217)

# From the Eleventh Circuit Court of Appeals

## Personal Jurisdiction; Procedure and Preservation

***Acrylicon USA LLC v. Silikal GMBH*, No. 17-15737 (11<sup>th</sup> Cir. Jan. 26, 2021)**

There are two ways to test the sufficiency of evidence concerning personal jurisdiction, both requiring a preponderance of evidence. First, a district court can impose the preponderance standard at the pre-trial stage by conducting an evidentiary hearing and making the requisite findings itself. Alternatively, the district court can wait to impose a preponderance-of-the-evidence standard until trial, through which it reviews the motion to dismiss under a prima facie standard (requiring that plaintiff present enough evidence to withstand a JML motion). If the district court applies the prima facie standard and denies a motion to dismiss, it is implicitly, if not explicitly, ordering that hearing and determination [of the motion to dismiss] be deferred until the trial. After trial, a defendant may still move the district court to revisit personal jurisdiction, at which time the court will impose a preponderance standard. In this case, defendant did not request a pre-trial hearing for application of the preponderance standard, so the district court applied the prima facie standard pre-trial. At trial, upon defendant's re-raising the personal jurisdiction issue, the district court found personal jurisdiction by a preponderance of evidence. On appeal, defendant assigned as error only the district court's initial denial of the Rule 12 motion. The Court held that defendant waived that issue; "when a district court denies a motion to dismiss for lack of personal jurisdiction, and then revisits personal jurisdiction post-trial in light of the record as it exists at that time, the defendant must appeal the post-trial disposition in order to preserve the issue of personal jurisdiction on appeal."

## Class Actions; Ascertainability

***Cherry v. Dometic Corp.*, No. 19-13242 (11<sup>th</sup> Cir. Feb. 2, 2021)**

There is a Circuit split on whether a class proponent must prove that membership in class is capable of being determined,

i.e. ascertainable, using "objective criteria," or whether the proponent must go further and demonstrate that identifying class members is "administratively feasible." In several prior unpublished (thus non-precedential) decisions, the Eleventh Circuit had endorsed the administrative feasibility test. In this case, the panel rejected the three prior unpublished decisions and held that administrative feasibility is not a prerequisite to class certification. Administrative feasibility may, however, be relevant to a determination of manageability under Rule 23(b)(3). This issue is highly unsettled.

## Red-Light Camera Enforcement (Florida Law)

***Pincus v. American Traffic Solutions, Inc.*, No. 19-10474 (11<sup>th</sup> Cir. Feb. 2, 2021)**

For those interested in red-light camera enforcement (a topic of some recent litigation in Alabama), the Court certified multiple questions of Florida law to the Florida Supreme Court regarding such systems.

## Shotgun Pleadings

***Barmapov v. Amuial*, No. 19-12256 (11<sup>th</sup> Cir. Feb. 3, 2021)**

District court did not abuse its discretion in dismissing impermissible shotgun pleading, when the court had dismissed a prior iteration of the complaint for the same reason but with leave to replead. There are four species of shotgun pleadings: (1) "a complaint containing multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint;" (2) one "replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action;" (3) one "that does not separate "each cause of action or claim for relief" into a different count;" and (4) one that "assert[s] multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against." This SAC was in the second category. Judge Tjoflat wrote a special concurrence offering guidance to lawyers and judges about how to proceed with shotgun pleadings (a topic on which he has repeatedly written).

## Standing; Statutory Violations

***Tsao v. Captiva MVP Restaurant Partners, LLC*, No. 18-14959 (11<sup>th</sup> Cir. Feb. 4, 2021)**

Plaintiff lacked standing to pursue claims based on compromising of his credit card number when defendant restaurant

chain's POS system was hacked. Plaintiff failed to plead and demonstrate a substantial risk of future identity theft or that identity theft was certainly impending, and consumer could not "manufacture" standing by incurring costs (changing credit cards) in anticipation of non-imminent harm.

## First Amendment

### ***Henderson v. McMurray*, No. 20-10879 (11<sup>th</sup> Cir. Feb. 9, 2021)**

Abortion protestors sued City of Huntsville and its police chief, alleging that their First Amendment rights to freedom of speech and the free exercise of religion through their application of the city's permit ordinance and the inclusion of a noise provision in their special-event permit. The district court sustained the ordinance and the noise provision, holding (among other grounds) (1) that the special-event permit provision restricting the protestors to prohibit any amplified sound which was "plainly audible," meaning "clearly heard inside an adjacent or nearby building..." was not void for vagueness, and (2) that the free-exercise claim was too unlike the hybrid claims previously recognized by the Supreme Court to benefit from the hybrid-rights doctrine. The Eleventh Circuit affirmed.

## Social Security

### ***Walker v. Commissioner*, No. 19-15039 (11<sup>th</sup> Cir. Feb. 11, 2021)**

Substantial evidence supported ALJ's determination that there was "good cause" to discount the opinions of two medical professionals, one a treating physician. Treating physician's opinion that Walker would be "permanently and totally disabled" conflicted with his own examinations of Walker, which showed no significant abnormalities. And it conflicted with other medical evidence, including Walker's functional-capacity evaluation.

## Immigration

### ***Camarena v. ICE*, No. 19-13446 (11<sup>th</sup> Cir. Feb. 18, 2021)**

8 U.S.C. § 1252(g) strips federal courts of jurisdiction over any challenge to the execution of any removal order.

## All Writs Act

### ***Rohe v. Wells Fargo Bank, NA*, No. 19-13947 (11<sup>th</sup> Cir. Feb. 18, 2021)**

All Writs Act does not create substantive federal jurisdiction, but rather is ancillary to pre-existing federal jurisdiction. There are two broad categories of permissible use of the Act: (1) when a district court acts in an appellate capacity, generally to direct action by another court whose proceedings are subject to appellate review by the Court issuing the order; and (2) the non-appellate use of the Act to directly protect the issuing court's own proceedings and judgment.

## FTCA; Statutory Construction

### ***Johnson v. White*, No. 19-14436 (11<sup>th</sup> Cir. Feb. 26, 2021)**

Allegations by federal inmate that corrections officers restrained him, removed his clothes, and sexually fondled him did not allege a "physical injury" under the FTCA, 28 U.S.C. § 1346(b)(2), and thus the district court properly dismissed the claim on Rule 12 motion. A 2013 amendment to § 1346(b)(2) expanded the "physical injury" requirement to any "sexual act," but that term is defined in 18 U.S.C. § 2246 as specific acts, but those acts do not include the fondling of an adult. Additionally, section 2246 defines "sexual contact"—not the term used in § 1346(b)(2)—as including the touching at issue.

## Derivative Jurisdiction

### ***Reynolds v. Behrman Capital IV LP*, No. 19-13537 (11<sup>th</sup> Cir. Feb. 23, 2021)**

When a state court lacks subject matter jurisdiction, a federal court sitting in removal also lacks subject matter jurisdiction. In this case, the district court extended that concept to personal jurisdiction, rejecting plaintiff bankruptcy trustee's reliance on Bankruptcy Rule 7004(d) (which looks to a defendant's national contacts and permits nationwide service of process) to establish personal jurisdiction. The Eleventh Circuit reversed, holding that the doctrine of derivative jurisdiction does not extend to personal jurisdiction, at least not in this case where Rule 7004 can be invoked.

## Fugitive Disentitlement Doctrine

### ***Ener v. Martin*, No. 19-12258 (11<sup>th</sup> Cir. Feb. 22, 2021)**

Fugitive disentitlement doctrine, a creature of equity, empowers courts to dismiss lawsuits or appeals of fugitives from the law. Vibe Ener (a Finnish model) left the U.S. against the orders of a Florida family court, then filed a lawsuit in federal district court to attack the proceedings of the family court while remaining outside its jurisdiction. Held: the fugitive disentitlement doctrine bars the action; Vibe Ener remains a fugitive, her lawsuit collaterally attacks the very proceedings from which she absconded, and dismissal prevents her from using the judicial process only when it benefits her.

## Property Rights

### ***PBT Real Estate LLC v. Town of Palm Beach*, No. 18-13920 (11<sup>th</sup> Cir. Feb. 22, 2021)**

Condo association challenged on due process and equal protection grounds a Florida law authorizing a municipality to relocate the electrical, telephone, and cable television utilities within a city by placing them underground and levying a special assessment on real property benefited by the relocation.

## Qualified Immunity

### ***Prosper v. Martin*, No. 19-12857 (11<sup>th</sup> Cir. March 5, 2021)**

(Continued from page 219)

District court properly granted summary judgment to defendant officer in § 1983 excessive force case resulting in victim's death. The only eyewitnesses to the incident were officer and decedent. Decedent's PR's version of the facts was based only on a blurry surveillance video which merely demonstrated that there was a struggle for several minutes. Because officer's version of the facts was the only version from an actual eyewitness, that version was undisputed.

### Antitrust; Sufficiency of Evidence

**American Contractors Supply, LLC v. HD Supply Constr. Co., No. 20-10813 (11<sup>th</sup> Cir. March 4, 2021)**

Sherman Act Section 1 does not prohibit independent actions by manufacturers and distributors, so at the summary judgment stage in a case like this, the plaintiff must present "evidence that tends to exclude the possibility that the manufacturer and nonterminated distributor were acting independently." Mere "equipoise" of the evidence does not suffice. In a "vertical restraint" case, "[t]he summary judgment standard . . . is more stringent than in other areas of antitrust law because a higher possibility of capturing and invalidating legitimate business conduct exists."

### Copyright; Implied License

**MidLevelU, Inc. v. ACI Info. Group, No. 20-10856 (11<sup>th</sup> Cir. March 3, 2021)**

In affirming a judgment for plaintiff in an infringement action, the Court held that the "implied license" defense was not confined to "work-for-hire" situations as described in *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1235 (11<sup>th</sup> Cir. 2010), but instead the proponent of the defense must demonstrate that owner granted permission to use the material by conduct or action.

### CAFA

**Smith v. Marcus & Millichap, Inc., No. 18-14797 (11<sup>th</sup> Cir. March 12, 2021)**

Plaintiffs did not establish application of the local controversy exception under CAFA (28 U.S.C § 1332(d)(3), (4)), applicable when (among other elements) more than two-thirds of class members are from the forum state. Plaintiffs attempted to prove class citizenship (for a class of nursing-home residents in Florida) with economic studies, statistics, and United States Census Bureau reports. They did not produce any evidence relating directly to the putative class, such as declarations of class members' intent to remain in Florida, property records, or tax records, to establish the 3,000 putative class

members' citizenship. That was insufficient to demonstrate citizenship, which would require not only residency but an intent to remain indefinitely (domicile).

### Bankruptcy; Standing

**In re Breland, No. 19-14321 (11<sup>th</sup> Cir. March 10, 2021)**

Chapter 11 debtor sued U.S., contending that Bankruptcy Court's appointment of trustee and ousting him of debtor-in-possession status (because he was allegedly transferring assets and defrauding creditors) violated his Thirteenth Amendment right to be free from "involuntary servitude"—because, he said, under the trustee's direction, all of his post-petition earnings would be put into the bankruptcy estate for the benefit of his creditors. The Bankruptcy Court dismissed Breland's Thirteenth Amendment claim as unripe, and the District Court held that Breland lacked Article III standing. The Eleventh Circuit reversed, holding that as tempting as it was to reach the merits of the claim, the loss of DIP status was an injury in fact, causally linked to the Bankruptcy Court's decision, and that the relief of restoration of DIP status would redress the injury, conferring standing.

### Qualified Immunity; Fourth Amendment

**Helm v. Rainbow City, Alabama, No. 19-11569 (11<sup>th</sup> Cir. March 10, 2021)**

District court properly denied summary judgment based on qualified immunity to tazing officer, chief of police, and assisting officers arising from incident in which plaintiff (had suffered a severe head injury when 15 years old which continues to cause grand mal seizures) suffered a seizure while attending a concert, where officers were advised of the nature of the seizure and its cause, and officer nevertheless tazed plaintiff three times while chief and other officers held down plaintiff. Officers were also not entitled to qualified immunity as a matter of law as to claims by victim's mother, who arrived on scene, advised of her reason for being there, but was tackled by an officer, then tazed and arrested for disorderly conduct.

### Tax; "Innocent Spouse"

**Sleeth v. CIR, No. 20-10221 (11<sup>th</sup> Cir. March 19, 2021)**

Tax Court did not abuse its discretion in determining that taxpayer was not entitled to "innocent spouse" protection for unpaid tax liabilities under joint returns, where factor (one of seven) concerning spouse's knowledge or reason to know of liability was strong.



## Derivative Actions (Georgia Law); *Burford* Abstention

***Deal v. Tugalo Gas Co.*, No. 19-14336 (11<sup>th</sup> Cir. March 19, 2021)**

Trial court erred in applying *Burford* abstention to count for judicial dissolution of Georgia corporation. *Burford* abstention applies where there is a pending administrative action, not present in this case. In a footnote and without analysis or explanation, the Court noted that its holding conflicted with that of two other circuits which have extended *Burford* to state-law judicial dissolution claims.

## FLSA; Individual Coverage

***St. Elie v. All County Environmental Services, Inc.*, No. 20-11619 (11<sup>th</sup> Cir. March 18, 2021)**

Employer is subject to “individual coverage” under the FLSA if employee is engaged in “commerce,” a term which FLSA defines as including interstate “communication.” In this case, testimony that employee handled several calls per week with out-of-state customers of employer was sufficient to bring employee within individual coverage, and district court erred by confining individual coverage solely to those instances where employee “direct[ly] participat[ed] in the actual movement of persons or things in interstate commerce.”

## RECENT CRIMINAL DECISIONS

# From the Eleventh Circuit Court of Appeals

## Habeas

***Armstrong v. USA*, No. 18-13041 (11<sup>th</sup> Cir. Feb. 5, 2021)**

Sentence reduction under 18 U.S.C. § 3582(c) does not constitute a new, intervening judgment for purposes of the bar on second or successive § 2255 motions under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).

## Exclusionary Rule; Good-Faith Exception

***USA v. Morales*, No. 19-11934 (11<sup>th</sup> Cir. Feb. 5, 2021)**

Affidavit supporting the search warrant reported that police found a small amount of marijuana and related items in trash outside defendant’s house on two separate occasions three days apart. Defendant challenged sufficiency of affidavit for establishing probable cause and contended that product of post-warrant search was therefore to be excluded.

The Eleventh Circuit held that regardless of the sufficiency of the affidavit, suppression of the fruits of the search would be inappropriate under the good faith exception to the exclusionary rule. See *United States v. Leon*, 468 U.S. 897, 922 (1984).

## Search; Impounded Cars

***USA v. Isaac*, No. 19-11239 (11<sup>th</sup> Cir. Feb. 5, 2021)**

Police do not need a warrant to search an impounded car if (1) they had authority to impound the car, and (2) followed department procedures governing inventory searches. In this case, the district court found that the department’s SOP was followed and authorized the impounding of the car; that finding was affirmed under the standard as being a mixed question of law and fact.

## Compassionate Release

***USA v. Harris*, No. 20-12023 (11<sup>th</sup> Cir. Mar. 2, 2021)**

District court did not abuse its discretion in denying inmate’s motion for compassionate release under 18 U.S.C. § 3582(c), in which she alleged that her medical conditions of lupus, scleroderma, hypertension, glaucoma, and past cases of bronchitis and sinus infections increased her risk of contracting COVID-19. Only hypertension appeared on CDC’s list of conditions that placed an adult at increased risk for severe illness caused by COVID-19.

## Wiretap Evidence

***USA v. Goldstein*, No. 18-13321 (11<sup>th</sup> Cir. Feb. 26, 2021)**

District court did not err in refusing to conduct an evidentiary hearing on the prosecution’s wiretap evidence under *Franks v. Delaware*, 438 U.S. 154 (1978). *Franks* requires an evidentiary hearing when the defendant makes a substantial preliminary showing that the contents of an affidavit supporting a wiretap are deliberately false or made with reckless disregard for the truth.

## Ineffective Assistance

***Clark v. ADOC*, No. 19-11443 (11<sup>th</sup> Cir. Feb. 25, 2021)**

Capital murder habeas petitioner failed to prove that his attorney provided ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984) in his failure to object when at least two jurors saw the petitioner physically restrained with a leg brace. His claim was procedurally defaulted by his failure to exhaust it in state court, and, regardless, he failed to show that he was prejudiced by that viewing in light of the overwhelming evidence of his guilt.

## Ineffective Assistance

***Lee v. GDCP Warden*, 987 F. 3d 1007 (11<sup>th</sup> Cir. 2021)**

Capital murder habeas petitioner was not entitled to relief from the state court’s rejection of his ineffective assistance

(Continued from page 221)

of counsel claim, because it was not unreasonable for it to conclude that there was no reasonable probability of a different sentencing result had mitigating evidence of defendant's family history of physical and emotional abuse been presented.

## Conspiracy

**USA v. Abovyan, No. 19-10676 (11<sup>th</sup> Cir. Feb. 22, 2021)**

Prosecution was not required to present direct evidence showing that defendant agreed to join a conspiracy to commit healthcare fraud; it could prove the conspiracy through circumstantial evidence or inferences from the defendant's conduct which furthered the conspiracy.

# From the Alabama Court of Criminal Appeals

## "Stand Your Ground"

**Todd v. State, CR-19-0239 (Ala. Crim. App. Feb. 5, 2021)**

Though circuit court erred in proceeding with jury selection before conducting a hearing on defendant's pretrial motion for "Stand Your Ground" immunity under Ala. Code § 13A-3-23, the error was both invited by the defendant and harmless. Defendant did not file the motion until five days before trial and did not object to the timing of the immunity hearing until after jury selection began. Further, the jury's verdict finding the defendant guilty of assault rendered any error in the immunity proceedings harmless.

## Expungement

**Ex parte Khouly, CR-20-0020 (Ala. Crim. App. Feb. 5, 2021)**

Offense of sexual abuse of a child less than 12 years of age under Ala. Code § 13A-6-69.1 is a violent offense; thus, records pertaining to a conviction under that statute are not eligible for expungement under Ala. Code § 15-27-2.

## Misdemeanor Probation

**Pack v. State, CR-19-0005 (Ala. Crim. App. Feb. 5, 2021)**

Ala. Code § 15-22-54(a)'s two-year limit on a term of probation for a misdemeanor conviction does not prohibit the

imposition of consecutive two-year probationary terms on separate convictions.

## Search and Seizure

**Powers v. State, CR-18-1196 (Ala. Crim. App. Feb. 5, 2021)**

Law enforcement officers executing a search warrant at a residence could lawfully search the purse of an occupant. She had a known relationship to the residence, and her purse could have concealed drugs that were the subject of the warrant.

## Probation Revocation

**Nelson v. State, CR-18-1039 (Ala. Crim. App. Feb. 5, 2021)**

Circuit court erred in revoking the defendant's probation based on his arrest on new charges. To revoke defendant's probation, the court was required to be reasonably satisfied that he had actually committed the new offenses.

## Probation Revocation

**Sledge v. State, CR-19-0529 (Ala. Crim. App. Feb. 5, 2021)**

Circuit court did not err in revoking the defendant's probation due to his unlawful possession of a pistol. Evidence showed that the defendant was driving a vehicle in which the gun was discovered, and his actions inside the vehicle indicated that he was aware of its presence.

## Constructive Possession

**West v. State, CR-19-0591 (Ala. Crim. App. Feb. 5, 2021)**

State's evidence was sufficient to show defendant had constructive possession of drugs and drug paraphernalia discovered in his truck. Without more, his presence in the truck would have been insufficient to prove constructive possession. However, the evidence showed that he owned and drove the truck, failed to immediately stop when a police officer signaled for him to pull over, had "bloodshot" eyes, and reached toward the area where the contraband was discovered.

## Murder; Sufficiency of Evidence

**Abrams v. State, CR-19-0434 (Ala. Crim. App. Feb. 5, 2021)**

State's evidence was sufficient to show that the defendant intentionally killed his wife. Forensic evidence refuted the defendant's claim that the victim was holding the gun when she was shot, and other evidence showed contentious text messages between the defendant and the victim that reflected marital discord and allegations of infidelity. ▲

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