THE FIRST METACARPAL IS NOT THE BEST POINTER

The thumb is the first digit of the hand; is shorter and thicker than the other fingers, and is nearer to the wrist than the other fingers. It is the first metacarpal bone.

Colloquially, the word "thumb" gets applied in many ways. To mention just a few, one scans when one "thumbs", one is under another's control when "under one's thumb", one is not liked when you "thumb your nose", and one approves or disapproves with the up or down of the thumb. And, oh yeah, there is the "rule of thumb"[1]. Several sites on the Internet come up when one types in this phrase,[2] and there is even a "rule of thumb.org" website.

Generally, the phrase "rule of thumb" is defined as a principle with broad application that is easily learned and easily applied; however, the "rule of thumb" is not a means of estimation not intended to be strictly accurate or reliable. (Emphasis added). [3]

Now, more and more often several "Rules of Thumb" are being "argued" by attorneys in the Family Law arena. Specifically:

- the 'term of alimony' (if any) should be no longer than 1/4, 1/3, or 1/2 of the term of the marriage;

- the 'amount of alimony' (if any) should be (i) no more than the level of child supporting for one (1) child applying the old child support guidelines, and/or (ii) child support and alimony should not be more than fifty percent (50%) of the payor's net pay; and

[1] Earliest citation of phrase was in Sue William Hopes' The Complex Fencing Master, 2nd Ed., 1692
[2] Wikipedia, Answers.com, Phrase-Finder, world wide words
[3] Wikipedia & Answers.com

- Equitable Division pursuant to Stokes v. Stokes[4] of the marital estate is always 50-50.

While these "Rules" are easy to quote and to apply, this author knows of no analysis that compares the application of these "Rules" with actual outcome. At best, these "Rules" provide some marginal degree of reference when discussing possible terms of resolution; however, application of these "Rules" without application of the law to specific facts calls to mind another "thumb" term - i.e., - the thumb screw – a form of vise used to pinch the thumb and inflict pain. In the divorce, this pain gets inflicted on your client by (i) paying too much or too little alimony for too long or too short a period of time, or (ii) always dividing the marital estate 50-50.

Specifically, the pain is inflicted on the non-working spouse and also (though to a lesser degree) to the lower income earning spouse, when this person leaves the marriage with little (if any) alimony for a short (if any) term, with a lower income producing ability/expectability, and with an "equal" division of the marital estate (both assets and debts) that is not "equitable". Or, another example, the pain is inflicted on the higher-income spouse when the combined "piling-on" of child support, alimony, and debt allocation leaves little on which to live. [5]

THE REQUIEM

John P. Wilson, III, Esq. of Levine & Smith, P.C., wrote an article entitled "Requiem for the Divorced Homemaker" (the Family Law Review, April, 2008); if you have not read this, it is an absolute must. In fact, if you are representing a client that is

[4] STOKES V. STOKES, 246 Ga. 765, 273 S.E.2d 169 (1980), as "flushed out" and defined in its progeny. (This author found 50 cases that have cited the Stokes opinion).

[5] The author's initial title for this article was "Has 'Double Jeopardy' Come to the Family Law Practice. The thinking was that a person's single act – being a party in a divorce – in fact exposed that person to "double jeapordy" – i.e., a resolution based on "rules" that facilitated resolution but that were devoid of any basis in Law and far too often also in fact.

seeking alimony or an "equitable division of marital property", I respectfully suggest that you insist that your client read it. While the term "homemaker" has definitely become more and more gender neutral, the "requiem" asserted by Mr. Wilson very negatively impacts both genders.

In his article, Mr. Wilson cited four (4) legal occurrences that have led to the reduction in amount and term of alimony awards and to a reduced chance of an "equitable division" of anything than 50-50; those were:

1) The U.S. Supreme Court's ruling in Orr v. Orr, 440 U.S. 268 (1979) which held that laws which do not apply to both genders are unconstitutional;
2) The tentative passage of the Equal Rights Amendment, which Mr. Wilson describes as not being "…a friend of the homemaker…";
3) The former Child Support Guidelines which were enacted in July of 1989 (The non-custodial parent paid a percentage of Gross Income depending on the number of children – i.e., 17 - 23% for 1, 24 – 27% for 2, 28 – 32% for 3, etc.). The income of the custodial parent (more often the Mother) was generally not considered (or, at least only indirectly to decide where in the percentage range the amount of support would fall); and,
4) The new Child Support Guidelines which permits the finder-of-fact to impute income to a spouse [19-6-15(f)(4)(D)]. These new Guidelines provide a "Presumptive Level of Support" generally lower than the support provided under the former Guidelines. This inevitably leads to the "self-fulfilling prophecy" recognized by Mr. Wilson – i.e., as he states it: "…[A]s the homemaker is awarded even less in child support, this in turn forces the parent

to abandon the role of homemaker to make ends meet…"

It is clear that the 'Basic Child Support Obligation', which is the support level before child care and medical insurance costs are included in the calculation, is generally lower than that produced under the Old Guidelines. So, as Mr. Wilson further noted: With lower child support , the custodial parent must get <u>any</u> job; **but then** having a job dictates against alimony (even if that job is at a much lower level of income and benefits that could be had if alimony supported a transition back into and education for the return to the employment sector). The custodian parent receiving less support imposes a return to work (sometimes too early) and a reduction in the standard of living. [Note: An interesting phenomena of these new Guidelines is that imputing income to the non-working or under-employed spouse may in fact increase the level of support to be paid, the 'Presumptive Level of Support'. Remember, a "policy goal" of these new Child Support Guidelines is to obtain for the minor child/children a level of support which would continue as much as possible the same standard of living had the family stayed intact. While the imputing of income to a spouse will reduce the percentage of the total marital income of the higher-earning spouse, that lower percentage could still be a higher dollar amount of monthly support than the amount if no income were imputed. Also, if the imputing of income and the spouse's return to work raises the requirement of child care/after-school care, the monthly support number will very often be considerably higher. So, <u>watch out what you ask for or fight against</u>.]

<u>ALIMONY – THE 'A' WORD:</u>

Turning first to alimony, the general definition found in the Superior Court Jury Charges is "Alimony is an award from one party's estate – separate property or future

earnings – for the support of the other. The amount of the alimony (if any) and the term of that alimony (if less than until death of either party or remarriage of recipient) is generally based on one party's needs and the other party's ability to pay". [See also O.C.G.A. §19-6-1]

A. <u>AMOUNT:</u> As to the amount of alimony, O.C.G.A. §19-6-5 details eight (8) factors to be considered, those are:

1) Standard of living established during the marriage;

2) Duration of the marriage;

3) Age and physical and emotional condition of both parties;

4) Financial resources of each party;

5) If applicable, the time necessary for either party to acquire sufficient education or training to enable him/her to find appropriate employment;

6) Contribution of each party to the marriage, including but not limited to, services rendered in homemaking, child care, education, and career building of the other party;

7) Condition of the parties, including the separate estate, earning capacity and fixed liabilities; and,

8) Such other relevant factors as deemed equitable and proper.[6]

This Author has also often heard that the amount of alimony should be equal to a "child's portion" rule; the "rule" is that one child (under the old Child Support Guidelines) would receive 17% - 23% of the Payor's Gross Income as child support. The

[6] This Author reviewed the alimony provisions of most states East of the Mississippi. The factors listed above were rather universal; most also had the general factor of, "any other facts and circumstances the trier of fact wishes to consider". Three other factors found that were quite interesting were (1) Cost of Health Insurance, (2) Need to fund retirement benefits beyond Social Security, and (3) Economic misconduct of a party.

spouse-recipient is now this one child, and the amount of alimony should be calculated in the same fashion.

B. TERM: As to the term of alimony, Georgia Law generally provides that the alimony payment will continue until the remarriage of the recipient or the death of the payor or the recipient unless otherwise provided. While there is no legal guideline for the term, this Author asserts that many of the factors for consideration in determining the amount of the alimony also provide guidance in establishing a term that fits the facts of the case. Mr. Wilson observes that about 15 years ago, a "general rule of thumb" came into being – that rule being that the term of alimony would be one-third (1/3) to one-half (½) the term of the marriage; as a Mediator, I hear this very often. However, more and more – and as also observed by Mr. Wilson - I, as a Mediator, am hearing one-fourth (1/4) to one-fifth (1/5) of the term of the marriage or, i.e., 1 year of alimony for every 4 or 5 years of marriage. Such a "rule of thumb" has no foundation in the Law and may or not have any basis in the particular facts of each case.

In preparing this article, this Author reviewed an article entitled "The Divorce Spousal Calculator – An Alimony Formula Rescue" by Scott R. Stevenson, Esq. and Justin L. Kelsey, Esq. This article was revised in February of 2010. This article was written to introduce the "Divorce Spousal Support Calculator"; this calculator is described as "… a tool … to enable the family law practitioner to better advise their client … where a primary issue is alimony …". (See, www.alimonyformula.com). This Author found this article to be very informative.

This article reviewed twelve (12) alimony awards – amount and term – under the Laws of various states and under standards proffered by various professional

organizations and judicial scholars. The basic facts were:

- A marriage of 19 years;

- No children;

- Husband's annual gross income is $125,000.00;

- Wife's annual gross income is $25,000.00; and,

- There are not other assets to fund an "alimony buyout".

Does Husband pay alimony? If so, what is the amount and the term?

A summary of the awards are as follows:

	Alimony Award	Alimony Term[7]
High	$41,667.00	Permanent[8]
Low	$23,000.00	3 years[9]
Avg.	$30,398.00	13 years, 2 months[10]

And this author found some extremely important "words of wisdom" and acknowledgment in this article. That was: "… these formulas, guidelines and recommendations (detailed and applied in this article) **do not take into account the many other factors required for consideration in each individual case…"** (p. 24) [Emphasis added]. This comment certainly would apply to the referenced "Rules of Thumb" mentioned in this article and being asserted by attorneys.

It is also interesting to note that the formula prepared by the American Academy of Matrimonial Lawyers (AAML) was one of those reviewed. Applying the AAML formula to the facts, Jane was to receive alimony of $32,500.00 for a term of 14 – 15

[7] Four of the twelve alimony calculations presented did not suggest a term.
[8] This permanent award is subject to termination upon remarriage or death.
[9] Generally, the State of Texas allows no more than three (3) years of alimony (unless there is disabling mental or physical conditions).
[10] Texas not included

years. And this Author would note that the amount exceeds the "child's portion" "rule of Thumb" for alimony, i.e., $25,000.00, and the average term exceeds even the one-half of the marriage "rule of thumb" of 9 ½ years.

All of this leads to an inescaable conclusion: The facts of the case and the application of the factors detailed in the Law must control. Despite the disdain with which the concept of "alimony" is viewed, the payment of alimony may in fact make available more money for the two households. The Payor is often losing some or all of the itemized deductions and exemptions and at the same time becoming a single taxpayer with higher tax rates applying at lower levels of income.[11] The W-4 must be changed or a significant amount of income tax will not be withheld. And often, the Payee (recipient of the alimony) has the exemptions and would be filing as 'Head of Household' with a lower income. Shuffling income to the lower income (and lower tax rate) party while replacing the lost deductions and exemptions with the alimony deduction may result in more money being available. This scenario gets even more dramatic if substantial child care is to be paid.

However, having said this, the specific facts of each case can control only to the extent developed by a party in conjunction with counsel. One example. A party seeking alimony out of a desire to go to school to enable the obtaining of job - not return to school to get a third degree - needs to have the specifics – i.e., course of instruction desired; school alternatives; time required; probable cost. The simple desire to return to school or the sense of entitlement to alimony usually does not carry the day – and frankly

[11] This after-tax "cash flow determination" can only be estimated with any accuracy by proposing several "Pro Forma" tax returns.

should not carry the day.[12]

EQUITABLE DIVISION

Turning to the division of marital property, prior to 1982, Georgia was known as a 'title state'; if a piece of property were titled in just one spouse's name, attorneys used such "legal tools" as trust – actual, constructive/implied – gifts, and contract (promises between spouses) to have that property awarded to the non-titled spouse.

Then in 1982, a divided Supreme Court of Georgia (two dissenters) rendered the opinion in Stokes v. Stokes, 246 Ga. 765, 273 S.E.2d (1980). This case involved competing claims to a house – property that had been deeded to Husband by Wife's Father, a house had been built, and then Husband deeded the property to Wife. While the first line of the opinion is: "[T]he facts of this alimony and property division case are relatively unexceptional", the Court announced the concept of 'EQUITABLE DIVISION of MARITAL PROPERTY'.

The Court very specifically defined the parameters of its deliberations and holding. The Court stated: "…[W]e deal here solely with the authority of the trier hearing an alimony case to award to one spouse real property titled in the name of the other spouse where the basis of such award is neither alimony, partitioning, trust nor fraud, but is "equitable division of property". [Stokes @ p. 171].

The Court then reviewed a variety of cases showing that this State had for some time begun a "transition" from the title concept of property and had been making

[12] Using a criminal law term (in keeping with the original title explained in FN1, I respectfully suggest that each attorney "**Mirandize**" your clients; by that, I mean give your client a copy of O.C.G.A. §19-6-5 and/or the Pattern jury Charges on Equitable Division. I believe that an attorney is only as good as the input from his/her client, and it must be the client that at least takes the "first shot" at establishing his/her case as to what is "equitable" and as to establishing the right or lack of right to any amount and term of alimony. This active involvement of the client invokes perhaps the greatest protection available against 'Double Jeopardy' and could – at least as to his/her case – prevent the playing of the Requiem.

awards/divisions of property on the basis of the equities. Finding that a "…court has the ancillary jurisdiction to determine the equitable interest of either spouse in the real or personal property owned, either in whole or in part, by the other spouse…", (quoting form McConaughey and Hinchey, "Divorce, Alimony and Child Support" §12-2, p. 179) the Court then affirmed the jury's award of an interest in the house titled solely in Wife's name.

However, at least to this Author, as important as the majority decision recognizing the concept of 'Equitable Division' was the concurring opinion of Mr. Justice Harold Hill; in his concurrence, Mr. Justice Hill delineated a three (3) step approach (p. 174) to 'Equitable Division' and identified several factors that should be considered by the fact finder in deciding what division of the marital estate would be "equitable"; those factors (not that different from those detailed above as to alimony) are:

1) The duration of the marriage, and any prior marriage of either party;

2) The age, health, and employability of each party;

3) The contribution or service of each spouse to the family unit;

4) The amount and sources of income, (separate) estate, debts, liabilities as well as debts and liabilities against this separate property;

5) The financial and income needs of each of the parties;

6) The marital estate and sources of income as well as related debts and liabilities; and,

7) The opportunity of each for future acquisition of assets and income by employment or otherwise.

Note: These factors identified by Justice Hill are now a part of the Suggested

Pattern Jury Charges published by the Council of Superior Court Judges of Georgia (although stated in a different sequence and not verbatim).

This Author has found no article, case, or other source that proffers a "rule of thumb" as to Equitable Division like that referenced as to alimony. However, as a mediator I **very**, **very** often am told that (i) Georgia Law is "50-50", or (ii) Georgia Law requires "50-50". Yet, nowhere in the Stokes opinion, nowhere in the more than fifty (50) cases citing Stokes, nowhere in the Court's Pattern Jury Charges, and nowhere in any other applicable Law is a 50-50 division dictated or even a presumption suggested/recommended. Again – as with the amount of and the term of alimony – **it is fact dependent, with the determination of "equitability" being a moving target.**

EQUITABLE DIVISION "v." ALIMONY

I purposely presented these two concepts – Equitable Division "**v**." Alimony – in the adversarial **"v"**; can these "live together" and can they be considered and awarded based on the same facts? The elementary answer is "yes"; but how is the best done?

Mr. Justice Hill answered this twice in his concurring opinion; first, in detailing the factors to be considered in making an "equitable division", he asks (Stokes @ p. 174)"…whether the appointment (of the marital estate) is in lieu of or in addition to permanent alimony (referring readers to his Paragraph 3 immediately below which specifically addressed an award of alimony (Stokes @ p. 174).

Then in that Paragraph 3 – after determining each party's separate estate and after determining and equitably dividing the marital estate – the fact finder is to "…[P]rovide permanent alimony, if it sees fit to do so…".

The Suggested Pattern Jury Charges (22.200 "Introduction to Alimony") provides

that the fact finder "…may decide equitable division before deciding alimony, or …may decide alimony before deciding equitable division…".

Regardless of the sequencing of consideration, the award of "alimony" and the determination of an "equitable division" are independent determinations that should also be viewed as "co-dependent". The same Pattern Jury Charge states that the fact finder has four (4) options:

"… You (fact finder) may: (1) grant alimony and no equitable division; (2) may grant equitable division and not alimony, (3) grant both, or (4) grant neither, according to the facts …and the law…". Each divorce must address this adversarial **"v",** and one of the four (4) very deliberate determinations MUST be made in every case according to the specific facts.

CONCLUSION

Mr. Wilson's article was titled with the word "Requiem". A Requiem is sometimes referred to as a "Mass for the Dead"; even if not a part of a religious ceremony, the "Requiem" is most associated with death (or musical compositions associated with death). A possible reading of Mr. Wilson's article is that alimony of any significant amount and term and that any "Equitable Division" other than 50-50 is "dead".

While I completely agree with Mr. Wilson's analysis, I would submit that the writing of the actual Requiem of these concepts has not yet been completed; however, the concern is that the "composition" is much further along in practice than in the Law. And, the resolution of cases based on "rule of thumb" and/or void of factual application of statutory and case law furthers the completion of this Requiem.

A person cannot point straight with the thumb; the "turn in the thumb is better for hitch-hiking. Similarly, "Rules of Thumb" do not point straight. If you as a practitioner choose to use them, then accept and use the "Rules of Thumb" consistently and always tempered and modified by the Law and the facts.