Family Law Newsletter

January-February 2002

STOCK OPTIONS AS INCOME FOR PURPOSES OF CHILD SUPPORT

By Laura W. Morgan, *Executive Editor, Divorce Litigation*

Stock Options Generally

In recent years, stock options have become an increasingly popular employment benefit. An employee stock option "allows a corporate employee to buy shares of corporate stock at a fixed price or within a fixed period [and is usually] granted as a form of compensation." Black's Law Dictionary 1431 (7th ed. 1999). "It is a contract for a right to buy (call) or sell (put) and, like most contracts, the value of the option depends directly on the terms of the option." Michael J. Mard & Jorge M. Cestero, *Stock Options in Divorce: Assets or Income?*, 74 Fla. B.J. 62, 62 (May 2000).

A stock option may be vested and matured, vested and unmatured, or unvested. As commentators have explained:

Essentially, the employee stock option is vested and matured if the employee has an absolute right to exercise the option immediately; the option is vested and unmatured if the employee cannot exercise the option yet but has an absolute right to do so at some future date; the option is unvested if it cannot yet be exercised and if future vesting is based upon the occurrence of a certain contingency.

Kristy Watson, *Acting in the Best Interests of the Child: A Solution to the Problem of Characterizing Stock Options as Income*, 69 Fordham L. Rev. 1523, 1538 (2001) (quoting Note, *Stock Options—Classification and Valuation*, 15 Equitable Distribution J. 77, 77 (1998)). *See generally* Alexander S. de Witt, *Classification, Valuation, and Division of Stock Options*, 2002 Family Law Update § 6.06 (Aspen 2001).

Income from Exercised Stock Options

When a stock option is exercised, the employee has realized income. To the extent that the capital gain is recognized as "income" under the child support guidelines, then the profit realized on the exercise of the stock options will be considered income.

The most recent case to apply this principle is *State ex rel. Dep't of Health & Human Resources, Child Support Enforcement Div. v. Baker*, 2001 WL 1511537 (W. Va. Nov. 28, 2001). In that case, in calculating the income available for the determination of back-owed child support, the family law master included income that resulted through the father's exercise of certain stock options. In particular, for the years 1998 and 1999, the family law master included as "gross income" to the father earnings that he received from the exercise of stock options he owned in McDonald's corporate stock for those respective years. The father realized $86,778 in connection with the exercise of stock options for 1998 and $47,620.58 for 1999. The father was required to pay income tax on these funds, and, as evidenced by his tax returns for these respective years, he did pay taxes on the capital gains he realized through the exercise of the stock options.

The court held that the child support guidelines include within their definition of "income" both earned and unearned income, and there is no basis on which to exclude the recurring income the father received from the exercise of his stock options.

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NOTES FROM THE CHAIR

Elizabeth Green Lindsey, Chair, State Bar of Georgia Family Law Section

Congratulations to the incoming officers of the Family law Section for 2002-2003. The elections were held at the Annual Meeting of the Family Law Section in January. At San Destin, I will pass the gavel to **Sandy Bair** who will be the new Chair, **Tom Allgood** will be the Vice Chair and **Richard Nolen**, Secretary/Treasurer. And in light of Richard's new duties, **Kurt Kegel** will become the new Editor of the Newsletter. The traditions of this Section are in good hands.

Many thanks to those who have offered to help with the Newsletter. The Section needs your input, especially from outside Atlanta. Paul Johnson, Savannah and John Lyndon, Athens have been great contributors, among others. We are scheduling the deadlines for submissions so that the next newsletter will be March 15. Let us know if there is news in your area, such as a new judge, local rules, or the like. We also welcome articles as well as suggested topics for articles.

Coming up in March is the Convocation of Professionalism. **John Mayoue** will lead the Tenth Convocation of Professionalism and will present the **Joseph T. Tuggle Award**. The award is to honor a member of the bar or bench for exemplifying the professionalism in his or her practice of law. This award was re-named for the late Joseph T. Tuggle (Chair 96-96). Last year's recipient was **The Honorable Mary E. Staley**. Please look at the website for a full description of the award and the full list of past recipients.

In light of the upcoming convocation of professionalism, I am reminded of some of the great wisdom of past mentors. Practicing family law is a hard business. It is made harder when you deal with the angry, contentious, belligerent, stupid, lying, bullying, and annoying. We know the good people. They make practicing law a pleasure. So how do you maintain your commitment to the professionalism when dealing with the infidels?

The following list is not complete, but contains some of the truisms that I have picked up along the way. By aspiring to follow these axioms, the practice of law can be much more civilized and humane.

- *First*, if the person you cannot tolerate is your client, either do not take the case or, if you have accepted the engagement, withdraw.
- *Second*, never work for a client who says you are too ethical for him or her.
- *Third*, have a trusted friend, partner or assistant review anything you write in anger. Always sit on it for a day if your blood pressure is elevated. Also, remember that you may have to justify your words and you do not want to embarrass yourself later.
- *Fourth*, think before you speak—especially when you are angry.
- *Fifth*, do not ignore an annoying person (client or opposing counsel). If you cannot deal with the person, then call in reinforcements. Delay will only make matters worse.
- *Sixth*, always document by letters or email all deals and conversations. Do so quickly after you make the deal to avoid misunderstandings.
- *Seventh*, as lawyers, we are not responsible for the consequences that befall those who do not follow the rules. In fact we have little to no power over these people. Your job is to advocate so that a higher authority (hopefully the judge, and if not then God) can make the right ruling. Therefore, put on the prayer cloth and pray for a judge who will have the courage and wisdom to curb the terrorist's activities.
- *Eighth*, follow the rules, do not lie, and make your word your bond.
- *Ninth*, do not let your client's anger become your own. Separate yourself from the client's emotion. Maintain objectivity. Remember there are always two sides to the story and no one ever really knows what goes on behind closed doors.
- *Tenth*, you are not in charge of the facts. The "crime" occurred before you were involved and the facts are what they are. You are in charge of fact presentation.
- *Eleventh*, treat people with dignity. You can make the point without unnecessary sarcasm and humiliation. Hold people to the truth. The most effective cross-examinations occur when the examiner systematically demonstrates by facts the fallacy of the witness's testimony and therefore undermine the witness's credibility.
- *Finally*, pursue excellence in every area of your life. Demand it of yourself and others and excellence will follow.

Keep the faith and have a prosperous New Year.

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COME TO THE 2002 FAMILY LAW INSTITUTE!

The 20th Annual Family Law Institute presented by the Family Law Section of the State Bar of Georgia will be held at the Hilton San Destin Golf & Tennis Resort in Destin, Florida, from May 23 to May 25, 2002. The program chair is Sandy Bair, vice-chair of the Family Law Section. Sandy is a family law practitioner who practices at Emily S. Bair & Associates, P.C., in Atlanta, Georgia.

The program is focused upon substantive issues in family law. An advanced two-hour session on effective cross-examination will be presented by Roger Dodd, the well known trial lawyer, author and teacher from Valdosta, Georgia. Janet R. Johnston, Ph.D., a leading authority on child psychology and divorce, a full Professor in the Administration of Justice Department, San Jose State University, and Executive Director of the Judith Wallerstein Center for the Family in Transition, will provide keen insights into ways courts, lawyers and mental health experts may work together for the benefit of families struggling with break up. An experienced panel of mental health professionals will offer insight into custody evaluations. The program will emphasize child custody and support issues as well as practice strategies, negotiation techniques, tax planning pointers and other practical pointers and new developments.

The program will include a complete year's CLE requirements, including the necessary professionalism, ethics and trial practice credits. Each participant will receive written materials accompanying the presentations as well as several bonus articles, including a legislative update written by experienced practitioners addressing timely family law topics. The Family Law Section of the State Bar will invite several Superior Court judges as well as appellate judges to attend the Institute. The presence of members of the bench and bar from all over the State of Georgia, as well as experienced psychologists and other professionals will enrich the experience of every attendee. Our programs and entertainment will be enhanced by generous sponsors. As in prior years, attendance is expected to be high. Make your reservations early.

Past Chairs of the Family Law Section

Robert D. Boyd, Atlanta	2000-2001
H. William Sams, Augusta	1998-1999
Carl S. Pedigo, Jr., Savannah	1997-1998
Joseph T. Tuggle, Dalton	1996-1997
Nancy F. Lawler, Atlanta	1995-1996
Richard W. Schiffman, Jr., Atlanta	1994-1995
Hon. Martha C. Christian, Macon	1993-1994
John C. Mayoue, Atlanta	1992-1993
H. Martin Huddleston, Decatur	1991-1992
Christopher D. Olmstead, Atlanta	1990-1991
Hon. Elizabeth Glazebrook, Jasper	1989-1990
Barry B. McGough, Atlanta	1988-1989
Edward E. Bates, Jr., Atlanta	1987-1988
Carl Westmoreland, Macon	1986-1987
Lawrence B. Custer, Marietta	1985-1986
Hon. John E. Girardeau, Gainesville	1984-1985
C. Wilbur Warner, Jr., Atlanta	1983-1984
M.T. Simmons, Jr., Decatur	1982-1983
Kice H. Stone, Macon	1981-1982
Paul V. Kilpatrick, Jr., Columbus	1980-1981
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AGENDA

THURSDAY, MAY 23,2002

8:15 **REGISTRATION** (All attendees must check in upon arrival – A removable jacket or sweater is recommended)

8:25 **OPENING REMARKS AND OVERVIEW**
Emily S. Bair

8:30 **"RUSH HOUR," A CHILD 'S POEM**
Lauren G. Alexander ,The Collaborative Law Office of Lauren G. Alexander, Atlanta

8:35 **BUILDING MULTIDISCIPLINARY PROFESSIONAL PARTNERSHIPS WITH THE COURT ON BEHALF OF HIGH CONFLICT DIVORCING FAMILIES:WHO NEEDS WHAT KIND OF HELP?**
Janet R. Johnston, Ph D ,Menlo Park, CA

9:25 **BREAK**

9:40 **THE GOOD CUSTODY EVALUATION**
Moderator:*Elizabeth Green Lindsey* ,Davis, Matthews &Quigley, P.C., Atlanta
Panelists: *Nancy McGarrah, PhD* ,Cliff Valley Psychologists,P.A., Atlanta
Carol Webb, PhD, Peachtree Psychological Associates, Atlanta
Elizabeth King, PhD ,Peachtree Psychological Associates, Atlanta
Robert J.Alpern, MD ,Atlanta
David Alexander, MS,LPC ,Atlanta
Janet R. Johnston, PhD, Atlanta

10:40 **BAD FACT CUSTODY DISPUTES:**
- **Domestic Violence**
- **Substance Abuse**
- **Drugs/Alcohol**
- **Parental Alienation**
- **Sexual Abuse**
- **Mental Disorders: Depression, Bipolar, Borderline Personality**

Moderator:*The Honorable Cynthia D. Wright* , Judge, Superior Court, Atlanta Judicial Circuit, Atlanta
Panelists: *E. Marcus Davis* , Davis, Zipperman, Kirschenbaum & Lotito, Atlanta
Richard W. Schiffman, Jr., Davis, Matthews & Quigley, P.C., Atlanta
Lauren G. Alexander
Jacqueline L. Payne ,Atlanta Legal Aid Society, Inc.,A tlanta
Richard David Tunkle, English, Tunkle & Smith, Clayton
Janet R. Johnston, PhD

11:50 **BREAK**

12:05 **IRRESOLVABLE CONFLICT? RELOCATION AND LONG –DISTANCE PARENTING SOLUTIONS**
Moderator:*The Honorable Louisa Abbot* , Judge, Superior Court, Eastern Judicial Circuit, Savannah
Panelists: *Michael E Manely*, Manely & Silvo, Marietta
Gwenn D. Holland , Kidd &Vaughan, Atlanta

1:00 **RECESS**

1:30 **GOLF TOURNAMENT** (Any hole-in-one on the designated par 3 will entitle that lucky golfer(s)to 3 years ' use of a **BMW Z-3 Roadster,** provided by **Athens BMW, Athens, Georgia** .)

6:30 **INSTITUTE WELCOME RECEPTION**

FRIDAY, MAY 24, 2002

8:30 **"ONLY THREE RULES," ADVANCED CROSS EXAMINATION TECHNIQUES**
Roger J. Dodd , Attorney at Law, Valdosta

9:45 **BREAK**

10:00 **FURTHER ADVANCED CROSS EXAMINATION TECHNIQUES**
Roger J.Dodd

11:00 **BREAK**
11:15 **CUSTODY JURISDICTION ISSUES:THE FIRST YEAR OF THE UCCJEA**
Carl J. Pedigo, Jr , McCorkle, Pedigo &J ohnson, LLP, Savannah
11:45 **ADVOCACY AND CUSTODY CONFLICTS: WHAT ARE THE ETHICAL BOUNDARIES?**
Moderator:*Robert D. Boyd*, Davis, Matthews &Quigley, P.C., Atlanta
Panelists: *Honorable Steve C. Jones* ,Judge, Superior Court, Western Judicial Circuit, Athens
Honorable Mary E. Staley , Judge, Superior Court, Cobb Judicial Circuit, Marietta
H. William Sams, Jr., Attorney at Law, Augusta
12:40 **"WHO 'S YOUR DADDY?" DNA AND RELITIGATING PATERNITY**
*Randall M.Kessler,*Kessler Schwarz,P.C.,Atlanta
1:00 **RECESS**
6:30 **FAMILY LAW SECTION RECEPTION**

SATURDAY, MAY 25, 2002

8:30 **ALIMONY: DEAD OR ALIVE?**
Moderator:*Margaret G.Washburn* ,Attorney at Law, Lawrenceville
Panelists: *The Honorable R.Rucker Smith* ,Judge, Superior Court, Southwestern Judicial Circuit, Americus
The Honorable Debra Kaplan Turner ,Judge, Superior Court, Gwinnett Judicial Circuit, Lawrenceville
9:25 **MANAGING DIVORCE AFTER 50**
Nancy F. Lawler, Lawler, Tanner & Zitron, Atlanta
M.T.Simmons, Simmons, Warren, Szczecko & McFee, Decatur
M.Lynn Reagan ,CPA, Bennett Thrasher &Co., P.C., Atlanta
10:20 **BREAK**
10:30 **CHILD SUPPORT GUIDELINES:THE 18th FACTOR**
The Honorable Ellen McElyea , Judge, Juvenile and Family Court, Blue Ridge Judicial Circuit, Canton
11:00 **MILITARY SERVICE MEMBERS AND DIVORCE**
Joseph D. McGovern , Dubberly & McGovern, Glennville
Jeffrey L.Arnold ,Jones, Osteen, Jones &Arnold, Hinesville
11:30 **BREAK**
11:40 **RECENT DEVELOPMENTS IN GEORGIA FAMILY LAW**
Kurt A. Kegel , Davis, Matthews &Quigley, P.C., Atlanta
K. Paul Johnson , McCorkle, Pedigo & Johnson, Savannah
1:00 **ADJOURN**

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The UCCJEA and the UCCJA: what *is* the difference?

By Leslee Mitchell, *Attorney at Law, Marietta, Georgia*

February 1, 2002 marked the seventh month since the date the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) became effective in Georgia. The repeal of the Uniform Child Custody Jurisdiction Act (UCCJA) brought several changes to the longtime procedures utilized in determining what other states have jurisdiction to make child custody determinations. The purpose of this article is to highlight the significant changes, both substantive and procedural, resulting from the enactment of the UCCJEA. Hopefully this article will provide an answer to the question on several minds since last July: what *is* the difference?

PURPOSE OF THE ACT

The purpose behind the UCCJEA and the UCCJA appear to be very similar. However, in spite of the likenesses they share there is a definite difference between them. Both statutes read somewhat the same, including detailed jurisdictional requirements aimed at avoiding competing jurisdictions and promoting comity in disputes with courts of other states, and promoting uniformity of the substantive law among the states, and facilitating interstate enforcement of custody orders. While the purposes are virtually identical, when implemented each produces a different result. In many ways, as is laid out in this article, the UCCJA was found to have defeated the purposes for which it was written. Along with the substantive changes, the UCCJEA also provides the procedural means for satisfying its purposes.

JURISDICTIONAL CHANGES

"Primary Jurisdiction Test: The Child's Homestate"

The UCCJEA brought substantial change to the requirements that must exist before a Georgia court obtains jurisdiction for making an initial child custody determination between two states. Under the UCCJEA, the test for determining jurisdiction for a child custody case is the "home state" test. Under O.C.G.A. § 19-9-61 (a) (1),

A court of this state has jurisdiction to make an initial child custody determination only if a child's home state is the home state of the child on the date of the commencement of the proceeding, 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.

The statutory language of the UCCJEA's "home state" test, found in O.C.G.A. § 19-9-61 (a) (1), is almost identical to the language found in the UCCJA's "home state" test. Ga. Code Ann. § 19-9-43 (a) (1) (repealed). The language similarities make it difficult to distinguish what differences, if any, were created by the UCCJEA.

The UCCJEA changed the significance of the "home state" test. This test is now the primary test in determining the jurisdiction of a child custody case as between two states. The language found in paragraphs (2), (3), and (4) of the Code Section are exceptions to the "home state" test and are invoked only after a determination that the court of the home state does not have jurisdiction. Under O.C.G.A. § 19-9-61 (a) (2)-(4),

(2) A court of another state does not have jurisdiction under paragraph (1) of this subsection, 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 Code Section 19-9-67 or 19-9-68 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;

(3) All courts having jurisdiction under paragraph (1) or (2) of this subsection have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Code Section 19-9-67 or 19-9-68; or

(4) No court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2), or (3) of this subsection

While the UCCJA jurisdictional test entertains the same question of what is the "home state" of the child, the variation lies in the fact that the UCCJA does not prioritize between home state and significant connections jurisdiction. Ga. Code Ann. § 19-9-43 (a) (repealed). All prerequisites for jurisdiction were equally signifcant. Consequently, the circumstances of custody and enforcement cases oftentimes resulted in competing claims of jurisdiction in multiple states, precisely the opposite of the proposed purpose of the UCCJA.

Exclusive, Continuing Jurisdiction

Prior to the enactment of the UCCJEA, Georgia courts recognized the exclusive continuing jurisdiction of child custody determinations from courts of other states. Georgia relied on the Parental Kidnapping Prevention Act (PKPA) 28 U.S.C.A. § 1738A and the UCCJA as its authority in recognizing custody decrees of other states. Henderson v. Justice, 237 Ga. App. 284, 289 (1999);); Wilson v. Gouse, 263 Ga. 887, 889, 441 S.E.2d 57 (1994). Unlike most other states that had enacted the UCCJA, Georgia had not codified the law pertaining to the exclusive continuing jurisdiction, relying on the applicability of the PKPA. Upon the adoption of the UCCJEA, Georgia codified the laws of exclusive continuing jurisdiction. The prerequisites for termination of exclusive, continuing jurisdiction are found in O.C.G.A. § 19-9-62 and are as follows:

(a) Except as otherwise provided in Code Section 19-9-64, a court of this state which has made a child custody determination consistent with Code

Section 19-9-61 or 19-9-63 has exclusive, continuing jurisdiction over the determination until:

(1) A court of this state determines that neither the child nor the child's parents or any person acting as a parent has a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(2) A court of this state or a court of another state determines that neither the child nor the child's parents or any person acting as a parent presently resides in this state.

(b) A court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this Code section may modify that determination only if it has jurisdiction to make an initial determination under Code Section 19-9-61.

***Temporary* Emergency Jurisdiction**

Under the UCCJA, child custody decrees handed down by courts having emergency jurisdiction were final determinations. Emergency jurisdiction under the UCCJA was found in Ga. Code Ann.§ 19-9-43 (a) (3) (repealed), among other jurisdictional prerequisites for making child custody determinations by initial decree. The finality of a custody decree determined by a court having emergency jurisdiction under the UCCJA oftentimes resulted in competing claims of jurisdiction from multiple states, thereby defeating the purpose of the Act.

Under the UCCJEA, emergency jurisdiction is *temporary*. A Georgia court has temporary emergency jurisdiction to make a child custody determination if a child is present in Georgia and has either been abandoned *or* an emergency situation makes protection of the child necessary due to actual or threatened mistreatment or abuse of the child, a sibling or the child's parent. O.C.G.A.§ 19-9-64 (a).

In a recent appellate decision, Georgia has ruled that the emergency and the necessity for protection must arise while the child is in Georgia. In the interest of J.S.J., 2002 Ga. App. LEXIS 9 (Jan.9, 2002). In that case, custody of the child was awarded to her father by a court in her home state of Mississippi. During a visit with her mother in Georgia, the child was placed in the temporary custody of the Department of Children and Family Services by the Georgia juvenile court based on the mother's allegations of molestations against the father. The Court of Appeals found that since the alleged abuse arose before child was brought to Georgia, the Georgia juvenile court should have declined jurisdiction in favor of the home state, absent compelling reasons to do otherwise.

The duration of a child custody decree established under temporary emergency jurisdiction is found in O.C.G.A. § 19-9-64 (b) and (c), which provides that:

(b) If there is no previous child custody determination that is entitled to be enforced under this article and a child custody proceeding has not been commenced in a court of a state having jurisdiction under Code Sections 19-9-61 through 19-9-63, a child custody determination made under this Code section remains in effect until an order is obtained from a court of a state having jurisdiction under Code Sections 19-9-61 through 19-9-63. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under Code Sections 19-9-61 through 19-9-63, a child custody determination made under this Code section becomes a final determination, if it so provides and this state becomes the home state of the child.

(c) If there is a previous child custody determination that is entitled to be enforced under this article, or a child custody proceeding has been commenced in a court of a state having jurisdiction under Code Sections 19-9-61 and 19-9-63, any order issued by a court of this state under this Code section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under Code Sections 19-9-61 through 19-9-63. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.

Additionally, O.C.G.A. § 19-9-64 (d) requires a Georgia court to immediately communicate with the appropriate foreign court when it is informed that a child custody proceeding in the foreign state has commenced, or a custody determination has been made.

Enforcement of Another State's Order

In enforcing a custody or visitation order of another state, the UCCJEA provides that a court may use any remedy that is available to enforce one of its own orders. O.C.G.A. § 19-9-83 In addition, the UCCJEA provides the following four remedies:

1.) Registration of Order

While the UCCJA permitted the registration of foreign custody decrees, the statutory language previously used to describe registration proceedings was rather vague. Ga. Code Ann. § 19-9-55 et seq.(repealed). The UCCJEA now provides more detailed registration requirements. Under O.C.G.A. §19-9-85 (a), the following documents must be sent to the Superior Court in the appropriate venue in order to register a foreign custody decree:

(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

(3) 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.

For additional requirements regarding duties of the registering court, notice of registration, and contesting the validity of registration, see O.C.G.A. §19-9-85 (b),(c),(d),(e), and (f). For requirements concerning verification and petition for enforcement; sealing; appearance; and expenses regarding registration of a child custody determination, see O.C.G.A. §19-9-88 *et. seq* and §19-9-89.

2.) Expedited Enforcement in Habeas-Type Proceeding

Although not defined as a habeas corpus proceeding, the UCCJEA establishes a procedure for enforcement similar to a habeas corpus proceeding.

O.C.G.A. §19-9-88 (d). When a petition for the enforcement of a child custody determination is filed, the court must issue an order directing the respondent to appear in person at a hearing that is to be held the next judicial day after service of the order or the first possible judicial day. Unless the court issues a temporary emergency order pursuant to O.C.G.A. §19-9-64), O.C.G.A. §19-9-90 requires the court to issue an allowing the petitioner to take immediate physical possession of the child unless the respondent establishes that:

(1) The child custody determination has not been registered and confirmed under O.C.G.A. §19-9-85 in that:

(A) the issuing court did not have jurisdiction under Part 2 of this article;

(B) the child custody determination for which enforcement is sought has been vacated, stayed, or modified by a court of a state having proper jurisdiction to do so under Part 2 of this article;

(C) The respondent was entitled to notice, but notice was not given (in accordance with standards of Code Section 19-9-47, in the proceedings before the court that issued the order for which enforcement is sought; or

(2) The order was registered and confirmed Code Section 19-9-85 but has been vacated, stayed, or modified by a court of a state having proper jurisdiction to do so under Part 2 of this article.

Other issues related to this UCCJEA remedy for the enforcement of an order can be found under O.C.G.A. §19-9-90 and O.C.G.A. §19-9-92. Those provisions define the adverse inferences the court is permitted to draw if a party is called to testify and then refuses to answer, allow the court to award fees, costs, and expenses to the prevailing party (which may include a state), and the irrelevance of spousal relationship in enforcing such an order.

3.) Warrant to Take Physical Custody of Child

This UCCJEA remedy allows a petitioner the right to apply for physical possession of the child in certain circumstances. According to O.C.G.A. §19-9-91, upon a filing of a custody or visitation order, a petitioner may file a verified application asking for a warrant to take physical possession of the child. The court will issue a warrant if it finds that the child is imminently likely to suffer serious physical harm or be removed from this state. In order to issue the warrant, however, the Court must specifically recite the facts upon which it relied to determine that the child at issue was imminently likely to suffer serious physical harm or that the child was in danger of being removed from the jurisdiction. Additionally, O.C.G.A. §19-9-91, directs law enforcement officers to take physical custody of the child immediately upon the issuance of a warrant and provides for placement of the child pending final relief. The respondent must be served with the petition, warrant, and order immediately after the child is taken into physical custody. These warrants to take physical custody of a child are enforceable throughout the state and permit courts to impose conditions upon the placement of the child.

4.) Role of Law Enforcement Officials

The UCCJEA empowers a prosecutor, law enforcement officer, or other public official to make any lawful act to locate a child, obtain the return of a child, or enforce a custody or visitation order. As provided under O.C.G.A. §19-9-95, in any case arising under the UCCJEA or involving the Hague Convention on the Civil Aspects of International Child Abduction, the district attorney may take any lawful action, including resort to a proceeding under the UCCJEA or any other available civil proceeding to locate a child, obtain the return of a child, or enforce a child custody determination if there is:

(1) An existing child custody determination;

(2) A request to do so from a court in a pending child custody proceeding;

(3) A reasonable belief that a criminal statute has been violated; or

(4) A reasonable belief that the child has been wrongfully removed or retained in violation of the Hague Convention on the Civil Aspects of International Child Abduction.

A district attorney acting under this section acts on behalf of the court and may not represent any party.

Further, under O.C.G.A. §19-9-96, at the request of a district attorney acting under O.C.G.A. §19-9-95, a law enforcement officer may take any lawful action reasonably necessary to locate a child or a party and assist a district attorney with responsibilities under O.C.G.A. §19-9-95. In order to encourage respondents to adhere to Court order, the UCCJEA allows the Court to cast all direct expenses and costs incurred by the district attorney or law enforcement officers against any respondent who does not prevail. O.C.G.A. §19-9-97.

MISCELLANEOUS PROVISIONS

Enactment of the UCCJEA also resulted in other additional changes of which attorneys should be aware. The UCCJEA provides new standards for Georgia courts interaction with Indian tribes and foreign countries in child custody proceedings and enforcement of child custody determinations and provides for direct communication between Georgia courts and those of another state in regard to custody and enforcement. The UCCJEA provides for enforcement of an order for the return of a child under the ***Hague Convention on the Civil Aspects of International Child Abduction*** and for enforcement of child custody determinations of other states.

The UCCJEA provides for joinder and intervention in on-going custody determinations and enforcement proceedings and defines the factors and procedures that a trial court should consider when determining when it is optional and when it is mandatory that a Georgia court decline to exercise jurisdiction. The Act further provides factors for determining whether to decline based on issues of inconvenient forum or unjustifiable conduct by a person seeking to invoke jurisdiction and provides procedures to ensure the safety of a child subject to such conduct and to prevent further misconduct. The Act prohibits litigants from invoking certain privileges and immunities in enforcement proceedings and provides expedited appellate procedures for appeals from final orders. Finally, the Act repeals any and all conflicting laws and controls in the event of conflicts with Article 2 of the chapter, the "Georgia Child Custody Intrastate Jurisdiction Act of 1978". The UCCJEA does not govern adoption proceedings or a proceeding pertaining to the authorization of emergency medical care for a child.

Stock Options - *continued from Page 1*

Just one week before, the New Hampshire Supreme Court reached the same result in *In re Dolan*, 2001 WL 1472651 (N.H. Nov. 21, 2001). There, discussing the public policy reasons for including the exercised stock options as income, the court stated:

> Categorizing the exercised stock options as income serves the policy goal of minimizing the economic consequences of divorce to children. If the exercised stock options are not deemed income for child support purposes, a person could avoid child support obligations merely by choosing to be compensated in stock options instead of by a salary. Moreover, children would be deprived of the standard of living equal to that of the subsequent family of the parent paying child support.

These cases are following well-established precedent that the income realized from the exercise of stock options constitutes income for purposes of child support. *Accord In re Marriage of Kerr*, 77 Cal. App. 4th 87, 91 Cal. Rptr. 2d 374 (1999) (where a parent enjoys substantial income in addition to his salary and bonuses in the form of stock options, this additional income is part of his overall employment compensation and must be used to calculate child support); *In re Marriage of Campbell*, 905 P.2d 783 (Colo. Ct. App.1995) (exercise of stock options was income); *Goold v. Goold*, 11 Conn. App. 268, 527 A.2d 696 (1987) (exercise of stock options was income); *Kenton v. Kenton*, 571 A.2d 778 (Del. 1990) (postdivorce profits realized from the exercise of stock options are income for child support); *Stacey v. Stacey*, 1999 WL 1097975 (Tenn. Ct. App. Oct. 6, 1999); *Smith v. Smith*, 1997 WL 672646 (Tenn. Ct. App. Oct. 29, 1997); *In re Interest of C.J.*, 2001 WL 493701 (Tex. App. May 10, 2001) (unpublished) (income from father's stock options should have been considered in computing net monthly income); *Forsythe v. Forsythe*, 1996 WL 1065613 (Va. Cir. Ct. 1996); *cf. Yost v. Unanue*, 109 Ohio App. 3d 294, 671 N.E.2d 1372 (1996) (exercise of stock options would not be considered income because it was a one-time event); *Frazier v. Frazier*, 2001 WL 1222248 (Tenn. Ct. App. Oct. 15, 2001) (parties, by valid separation agreement, excluded from income calculation income from stock options).

Possible Income from Unexercised Stock Options

In a case of first impression, the Ohio Court of Appeals in *Murray v. Murray*, 128 Ohio App. 3d 662, 716 N.E.2d 288 (1999), addressed whether unexercised stock options should be included in "gross income" for purposes of determining child support, and, if so, how to value the stock options.

Relying on the general principle that the definition of income is intended to be both broad and flexible, the court held that unexercised stock options are to be considered part of gross income. The court specifically analogized the unexercised stock options to retained earnings of a corporation where the parent is the majority shareholder. *Williams v. Williams*, 74 Ohio App. 3d 838 600 N.E.2d 739 (1991). In both these instances, the parent should not be allowed to sit upon assets and hide behind the shield of a corporate business decision, depriving the children of an income stream they would otherwise enjoy. As to the value of the unexercised stock options, the court held that the best way to value stock options is to account for the options' appreciation in value as determined on the grant and exercise dates of the options which fall into the income year at issue. By this method, the options are valued according to the underlying stock price on the date most important to the options' holder, the date the options may be exercised and the income realized.

The *Murray* case draws upon the long line of authority holding that retained earnings will be considered "income" to the owner/parent if the parent has the ability or discretion to draw on the funds. *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998) (allowing deduction from income for retained earnings of sub-chapter S corporation would encourage shareholders to favor their own long-term financial interests in their corporations over their children's need for support by keeping most of shareholder income as retained earnings); *Merrill v. Merrill*, 587 N.E.2d 188 (Ind. Ct. App. 1992) (retained earnings of wholly owned close corporation are income to father); *In re Crosser*, 24 Fam. L. Rep. (BNA) 1343 (Iowa Ct. App. Mar. 27, 1998) (undistributed profits from sub-chapter S corporation are income); *Campbell v. Campbell*, 682 So. 2d 312 (La. Ct. App. 1996) (retained earnings of closely held corporation were income to father, despite bonding company's restrictions on how much father could take as salary); *Roth v. Roth*, 406 N.W.2d 77 (Minn. Ct. App. 1987) (profits of sub-chapter S corporation must be attributed to chiropractor, as well as his salary); *Morgan v. Ackerman*, 964 S.W.2d 865 (Mo. Ct. App. 1998) (funds held by closely held corporation owned 100% by husband had to be considered since he disregarded corporate structure throughout marriage); *Boudreau v. Benitz*, 827 S.W.2d 732 (Mo. Ct. App. 1992) (funds labeled as retained earnings were income to father where he had control over funds); *Smith v. Smith*, 197 A.D.2d 830, 602 N.Y.S.2d 963 (1993) (income for owner of sub-chapter S corporation must be all of corporation's gross receipts, including retained earnings); *Barham v. Barham*, 127 N.C. App. 20, 487 S.E.2d 774 (1997) (obligor's gross income includes sizable cash reserve held by corporation that is required to be deposited, and is held by, creditor bank); *Quamme v. Bellino*, 540 N.W.2d 142 (N.D. 1995) (in computing income for self-employed parent, court must take into consideration retained earnings of business); *Williams v. Williams*, 74 Ohio App. 3d 838, 600 N.E.2d 739 (1991) (income for purposes of support includes retained earnings of corporation); *In re Perlenfein*, 216 Or. 16, 848 P.2d 604 (1993) (undistributed income of closely held corporation that is attributable to minority stockholder is income for child support); *Ochs v. Nelson*, 538 N.W.2d 527 (S.D. 1995) (retained earnings of corporation are income to father where he owned 80% of stock); *Weis v. Weis*, 215 Wis. 2d 135, 572 N.W.2d 123 (Ct. App. 1997) (applying same principles to retained earnings of a partnership); *Bailey v. Bailey*, 954 P.2d 962 (Wyo. 1998) (father had discretion to, and should have, set salary at $72,000 rather than $42,000 to take advantage of retained earnings); *see also In re Marriage of Glueck*, 913 S.W.2d 951 (Mo. Ct. App. 1996) (retained earnings should be included in income where there was no evidence that earnings were not distributed); *Rohrer v. Rohrer*, 24 Fam. L. Rep. (BNA) 1520 (Pa. Super. Ct. July 24, 1998) (retained earnings of corporation, if not considered income, must be considered as assets subject to equitable distribution and assets

available for support); *cf. Huger v. Huger*, No. 0303-96-3 (Va. Ct. App. Feb. 18, 1997) (unpublished) (court would not consider retained earnings of sub-chapter S corporation where court had already considered those same earnings as income to the obligor in the appropriate tax year).

On the other hand, if the parent is a minority owner or if the retained earnings are essential for the continued existence of the business (as opposed to growth), then the retained earnings need not be considered. *McTurner v. McTurner*, 649 La. Ct. App. 1994) (trial court not completely erroneous to disregard retained earnings); *In re Marriage of Wait (Greenlee)*, 21 Fam. L. Rep. (BNA) 1529 (Mont. Sept. 8, 1995) (profits from partnership that were retained by partnership to pay off mortgage debt would not be included in father's income where there was no evidence father had choice over use of funds); *Roberts v. Wright*, 117 N.M. 294, 871 P.2d 390 (Ct. App. 1994) (mother's corporate earnings would not be considered income where mother reinvested earnings in business); *Taylor v. Taylor*, 118 N.C. App. 356, 455 S.E.2d 442 (1995) (sub-chapter S income not actually received and used by corporation for reinvestment should not be considered income); *Riepenhoff v. Reipenhoff*, 64 Ohio App. 3d 135, 580 N.E.2d 846 (1990) (retained earnings held by close corporation should not be considered part of income where obligor owned only 47% of stock and earnings were not available upon his request); *Muir v. Muir*, 841 P.2d 736 (Utah Ct. App. 1992) (reinvestment to maintain business in present condition would not be considered income; reinvestment to expand business would be considered income); *cf. King v. King*, 390 Pa. Super. 568 A.2d 627 (1989) (retained earnings of husband's partnership would be attributed to husband where evidence was insufficient to establish legitimate need of business to retain and use funds).

Since the *Murray* decision, other courts have followed and held that vested, but unexercised, stock options are income for purposes of child support. *See* Jack E. Karns & Jerry G. Hunt, *Should Unexercised Stock Options Be Considered "Gross Income" Under State Law for Purposes of Calculating Monthly Child Support Payments?*, 33 Creighton L. Rev. 235, 256 (2000).

In *In re Marriage of Robinson & Thiel*, 2001 WL 146455607 (Ariz. Ct. App. Nov. 20, 2001), the court held that vested but unexercised employee stock options constituted income for purposes of calculating child support under the 1996 Arizona Child Support Guidelines because the options were an integral part of the father's compensation package. "Although his base salary was $42,600, David's total income from AOL, including income from exercised options, was $159,721 in 1995, $88,297 in 1996, $267,438 in 1997, and $1,817,059 in 1998. That the options comprise a significant part of David's compensation and represent value to him is irrefutable." The court declined, however, to adopt a universal method of valuing such options and left that to the trial court's discretion, based on the facts and circumstances of each case. *See also In re Marriage of Cheriton*, 92 Cal. App. 4th 2690, 111 Cal. Rptr. 2d 755 (2001) (court would consider unexercised stock options not as "income" but as part of parent's overall wealth and assets in setting support); *Seither v. Seither*, 779 So. 2d 331 (Fla. 2d Dist. Ct. App. 1999); *In re Marriage of Moore*, 2000 WL 564165 (Iowa Ct. App. 2000).

Conclusion

Both exercised or unexercised stock options are now "income" for purposes of child support. *Clark v. Clark*, Vt. 779 A.2d 42 (2001) (citing Laura W. Morgan, *Child Support Guidelines: Interpretation and Application* (2001) (stating emerging trend is to treat vested stock options as income)). Counsel should not overlook this source of income that will not show up on a 1040.

This article was reprinted from the December 2001 issue of Divorce Litigation with permission of the editor. For subscription or reprint information, please contact Divorce Litigation at 1-800-727-6574 or by email at divlit@nlrg.com. *Website: www.nlrg.com.*

Tips on The Importance of Basis

By Scott Thurman

Internal Revenue Code Section 1041 provides that no gain or loss is recognized on property transfers between spouses as long as the recipient spouse is not a non-resident alien. The transfers that qualify include,

1.) Transfers between spouses during marriage,
2.) Transfers between former spouses within one year after a divorce becomes final, and
3.) Transfers between former spouses that are made pursuant to a divorce or separation agreement and the transfer is made between two and six years after the cessation of the marriage.

Since there is no gain or loss from these property transfers, the tax basis of the property does not change. Thus the spouse who receives the property has the same basis as the spouse who transferred his or her interest in the property. The holding period of the transferor is included in the transferee's holding period. The transferor of the property is required to provide the transferee, at the time of transfer, with records sufficient to determine the adjusted basis and holding period of the property as of the transfer date.

When dividing assets between the spouses, it is critically important to consider the basis of the assets. The following examples illustrate the importance of basis.

Example 1: Husband and Wife own a home as joint tenants with a basis of $150,000 and a Fair Market Value of $400,000. The couple resided in the home two out of five previous years and the home is free of debt. The spouses also jointly own marketable securities with a Fair Market Value of $400,000 and a basis of $200,000. Pursuant to a divorce decree, the wife transfers her half interest in the home to the husband and the husband transfers his half interest in the securities to the wife. On the surface it appears that each party receives property with the same value. Based on the income tax rules regarding the sale of a residence, the husband can sell the house and exclude all of the gain (up to $250,000 maximum). He will net $400,000 after tax from the sale of the residence. The wife, however, will be responsible for capital gain taxes when she sells the securities. If the securities have been held for more than one year at the date of sale she will pay federal tax at 20% and Georgia tax at 6% on the gain. After paying capital gains taxes, she will net $348,000. After the income taxes are taken into account, the husband nets $52,000 more than the wife.

Example 2: The husband pays the wife $300,000 cash for her interest in a lake property worth $600,000 with a basis of $100,000. Because the transaction is subject to Section 1041, the wife will recognize no gain even though she sold her interest for cash. The husband's basis in the property will remain at $100,000 even though he paid the wife $300,000 in cash. As this example illustrates, the payment of cash for property will not impact the basis of the property.

Example 3: The husband owns stock with a basis of $100,000 and a value of $90,000. He sells the stock to his wife for $90,000 in cash. The husband cannot deduct the loss and the wife's basis is $100,000. If she subsequently sells the stock for $80,000, she will have a $20,000 loss to deduct subject to any capital loss restrictions.

It is important to consider the basis, holding period and tax implications of transfers of property between spouses. When negotiating property settlements for couples who own homes, securities, businesses, real estate, and similar assets, the basis of the assets can have a significant effect on the economic value of the settlement.

(This article was especially written for the Newsletter by Mr. Thurman. Mr. Thurman, CPA/ABV, CVA, is president of Thurman Financial Consulting, Inc. Mr. Thurman graduated Magna Cum Laude from the University of Georgia where he was a member of Phi Beta Kappa Honorary Society.)

FAMILY LAW SECTION AT LARGE

ABOUT THE COURTS:

In Memoriam:

Judge William W. Daniel, 79, passed away January 8, 2002 of cancer. Judge Daniel served on the Fulton County Superior Court from 1979 until 1996. He served as a senior judge from 1996 until his death. Before serving on the Bench, Judge Daniel was in private practice from 1955 to 1979. In addition to his judgeship, Judge Daniel was known for his strong advocacy for ethics in the legal profession, his authorship of several books on Georgia Criminal Trial Practice and Evidence as well as being a master cattleman. Judge Daniel will be missed. Please look for a tribute to Judge Daniel by Baxter Davis in the next issue of the newsletter.

News:

On January 30th, Judge Joseph Gaines, a Superior Court Judge in Athens for over twenty-five years, announced his retirement. An election for one of the three Superior Court Judgeships in Athens will be held later this year. Look for an article about the nominees in the next issue of the newsletter.

New Judges:

Judge Juanita Stedman was appointed as a Juvenile court judge in Cobb County. She conducts final trials by designation on the Superior Court Bench

Judge Cindy Morris has been appointed as a Superior Court judge in Dalton.

Please look for an article about these new judges in the next issue of the newsletter.

Know about any other new judges or local rule changes? Please contact the newsletter so we can include information in the next issue.

ABOUT MEMBERS:

Office Moves:

Frank E. Martinez, Attorney at Law, is pleased to announce the relocation of our office effective January 2, 2002 to:

Power's Ridge, Building 7, Suite 150
1827 Powers Ferry Road
Atlanta, GA 30339

The phone number will remain 770-541-1050.

Jonathan R. Levine and Alvah O. Smith of Levine and Smith, LLC announce the relocation of their offices to:

One Securities Centre
3490 Piedmont Road, N.E. Suite 1150
Atlanta, GA 30305

The phone number will remain 404-237-5700

Emily S. Bair and Associates and the Collaborative Law Office of Lauren Alexander announce the opening of their new offices to:

6100 Lake Forrest Drive Suite 370
Atlanta, GA 30328

The phone number is 404-806-7330

Partnerships and Associates

The firm of McCorkle, Pedigo & Johnson, LLP, Savannah, Georgia is pleased to announce that K. Paul Johnson has become a Partner in the firm as of January 1, 2002.

Jennifer L. Vardeman and Patricia M. Murphy are also now associated with McCorkle, Pedigo & Johnson, LLP , Savannah, Georgia.

Warner, Mayoue and Bates, P.C., Atlanta, Georgia, announces that Susan D. Hargus has become associated with the firm.

The partners announce that Rebecca S. Olson has become associated with the Levine and Smith, L.L.C., Atlanta, Georgia.

Davis, Mathews, and Quigley, Atlanta, Georgia, announces that David Marple has become associated with the firm.

Have any news from your firm? Please contact the newsletter.

Legislative Update – Paternity Testing Bill

Randall M. Kessler, *Kessler & Schwartz, P.C. Atlanta, Georgia*

The so-called "Paternity Fraud" Bill looks like it is headed for success. As of press time, similar versions of the bill (HB 369) had passed both the Georgia House and Senate. In essence, the bill allows a purported father to request cessation of future child support, past due support and termination of parental rights, custody and visitation, if certain required factors are present. Those factors include the existence of newly discovered evidence, that the there must be credible genetic testing showing a zero (0) percent possibility that the purported father is not the biological father, that the purported father has not adopted the child, married the child's mother, prevented the real father from asserting his rights, or, while knowing he is not the father, married the child's mother, agreed to pay support, acknowledged paternity or consented his name being placed on the birth certificate. If all of the requirements are not met, the court has full discretion in granting the motion or other action as described in the bill.

Additionally, if the test results are provided solely by the male, further testing may be ordered, with the costs paid by the requesting party. Also, if the requested relief is not granted, the court will assess fees and costs against the movant.

GEORGIA CASE LAW UPDATE

Sylvia A. Martin, *Davis, Matthews and Quigley, Atlanta, Georgia*

CHILD CUSTODY - MODIFICATION OF CUSTODY AND RELOCATION
Lewis v. Lewis, 252 Ga. App. 539 (2001)

In this case, the Court of Appeals paves new paths in finding that, under certain circumstances, relocation of one parent can constitute a change in circumstances sufficient to justify modification of custody. While Georgia courts have heretofore found that a move is not necessarily a sufficient change in condition to authorize a change of custody, the Court of Appeals in the Lewis case notes that the previous cases decided by the Court of Appeals only concerned cases in which a non-custodial parent was attempting to change custody from the custodial parent. The Court of Appeals stated that it had not found any cases addressing the issue of a proposed move in the context of joint physical custody, which was the situation in Lewis v. Lewis.

The facts showed that the parties entered into an agreement in their divorce in December 1999. Under the terms of the agreement, they had joint legal custody and shared physical custody of the children. During the school year, the children resided with the mother, and the father had them every other weekend from Thursday after school until Sunday evening; and in the off weeks, he had them from Thursday after school until the next day. In the summer months, the children resided with the father, and the mother had them every other weekend from Wednesday at 3:00 p.m. until Sunday evening. The holidays and other vacation periods were divided evenly between the parties. The mother also agreed that she would not change her residence from Carroll County until July 1, 2001.

The father learned that the mother planned to remarry in June 2001 and move to Cobb County, which was approximately 72 miles away. He filed a petition to change custody, asking that the children reside with him during the school year and with the mother on alternate weekends. The mother filed a counterclaim seeking to modify the custody such that the children would be with her during the week and with the father every other weekend from Friday at 6:00 p.m. until Sunday at 6:00 p.m. The trial court awarded primary physical custody to the father.

On appeal the mother claimed that the trial court erred in finding that she was not actually the primary physical custodian as the children were with her slightly more than the father. The trial court had found that neither parent had been awarded primary physical custody of the children, which was affirmed by the Court of Appeals. The Court of Appeals noted that the mother had custody of the children approximately 60% of the time, and the father had them approximately 40% of the time. The Court of Appeals held that the mother's percent of custody was not so substantial to entitle her to special deference, nor was the father's obligation to pay child support a factor that would indicate that it was intended that the mother be the primary custodian.

The mother also claimed that her relocation to Cobb County was an improper basis upon which the trial court made its decision to modify custody. The trial court considered the impact of the proposed move on the existing custody arrangement. The trial court found that if custody were unaltered, the children's school and activities schedules would become impractical and onerous as they were shuttled between the parents' homes. The trial court found that the continuation of the original custody arrangement would adversely impact the children's welfare and that the changed circumstances were sufficient to justify a modification of custody.

The Court of Appeals upheld the trial court's findings and found that the trial court properly considered the impact of the proposed move on the children's welfare. The Court of Appeals stated it has previously ruled that difficulty in maintaining a shared custody arrangement can amount to an adverse change in condition affecting the welfare of the child. The Court of Appeals noted that the trial court heard testimony from friends, a family counselor and the parents themselves. The evidence showed that the children had strong ties to the school, church and friends in Carroll County, and that the father maintained almost daily contact with the children before and after school, in addition to his scheduled times with them. The mother did not dispute the testimony, although she testified that she felt they would adjust to their new surroundings and that they had extended family nearby in Cobb County. The older two children expressed some concern for moving to Cobb County, and the Judge met with the youngest in chambers, who was an eleven year old child.

In summary, the Court of Appeals found that because the mother's proposed move would impact the parties' shared custody arrangement, and that such difficulty in maintaining the joint physical custody arrangement amounted to an adverse change in condition, then the mother's relocation to Cobb County could be the basis for the court to modify physical custody of the children and to award physical custody to the father.

CHILD CUSTODY — MODIFICATION OF JOINT LEGAL CUSTODY
Daniel v. Daniel, 250 GA. App. 482 (2001)

The parties were divorced in March, 1999, by agreement, rather than trial. The final decree and agreement of the parties gave them joint legal custody of their daughter. However, the agreement was silent as to final decision-making authority in the event the parents did not agree on decisions for the child. The mother was awarded physical custody of the daughter.

After the divorce, the parties disagreed over the minor child's education. The mother wanted to home school the child, and the father wanted her to attend public school. The mother filed a petition for change of custody, asking that she be granted final decision-making authority with regard to all major issues concerning the child. At the trial itself, the father made an oral counterclaim, requesting that the court give him primary decision-making authority regarding the child's education.

The trial court found that there was no change in condition materially affecting the child's welfare to justify a change of custody. However, the trial court proceeded to modify the parties' joint legal custody over the minor child and granted primary decision-making authority on educational matters to the father. The trial court found that the best interest of the child would be served by modifying joint legal custody, and the trial court relied upon O.C.G.A. § 19-9-6(2), which is the statutory definition of joint legal custody. The mother appealed said ruling, claiming that an improper standard was employed, and that the court was required to find first a material change in circumstances affecting the minor child's welfare in order to justify a change of custody.

The Court of Appeals held that the mother had waived her right to take issue with the standard of review applied by the trial court because she explicitly agreed with the trial court that the best interest standard should be applied to the determination regarding the minor child's education. Therefore, the Court of Appeals found that the mother could not challenge that issue on appeal. However, the Court of Appeals went further and set forth an interesting discussion of both the standard of review to be employed in change of custody cases and the necessity for parents agreeing to some division of responsibility in making decisions in the event they cannot agree. First of all, the Court of Appeals noted that the modification of custody as requested by the parents in the Daniel case requires a finding of a material change of condition. The Court made it clear that the trial court is allowed to use the best interest test upon an initial determination of custody. However, for any change in custody, including a change of legal custody, the trial court is required to determine first whether there has been a change of condition which materially affects the welfare of the minor child before the court may then employ the best interest standard. The Court of Appeals pointed out that O.C.G.A. § 19-9-6(2) is a definition of joint legal custody, and it does not allow a trial court to avoid the requirement that a change in condition be proven to support a custody modification under the facts of a case.

The Court of Appeals stated that an agreement or custody award which fails to provide a method for resolving disputes when the parents are awarded joint legal custody ignores the realities of life and guarantees future litigation. The Court of Appeals noted that it places the trial court in the position of making decisions that should be made by the parents, either jointly or singly if they cannot agree. Furthermore, the Court of Appeals advised couples entering into a divorce that they do so knowingly, advisedly and fully aware of their inability to agree on fundamental matters of importance. The Court held that such parties should adopt a procedure for resolving such disagreements and to include it as part of the order. Finally, the Court of Appeals advised trial courts that they should not approve agreements which do not provide a reasonable procedure for resolving disputes in joint custody cases.

CHILD CUSTODY – VISITATION / CHILD SUPPORT
Brandenburg v. Brandenburg, 274 Ga. 183 (2001)

The parties were married in 1976 and had six children. In 1995, husband became intimately involved with another woman, Dana Pike, who lived out of state. Husband moved Ms. Pike to Atlanta where he leased and furnished an apartment for her. After the parties' sixth child was born, husband told wife about his relationship with Ms. Pike and moved out of the home, and he filed for divorce.

The parties had a jury trial, and they were awarded joint custody of the children, with the wife being awarded primary physical custody and the husband awarded visitation with them. However, the final decree provided that the husband was precluded from exercising any visitation in the presence of Ms. Pike, even if he married her. Husband was also ordered to pay child support and an additional $200.00 per month into an individual custodial account previously established for the children under the Georgia Transfers to Minors Act. Husband appealed the visitation prohibition provision and the requirement to pay an additional $200.00 per month. The Supreme Court reversed the trial court's order on visitation and affirmed the order on additional child support. Specifically, the Supreme Court stated that it is the policy of this State to encourage parents to share in the rights and responsibilities of raising their children after they have dissolved their marriage, and that a trial court abuses its discretion in this regard when it places unnecessarily burdensome limitations on the exercise of visitation. The Supreme Court noted that, although some conduct can justify certain limitations upon visitation rights if it is shown that such conduct adversely affects the children, the case before the Court was devoid of such evidence. Although the father had been continuously involved with Ms. Pike for a period of two years, the children had never met her nor seen her. Furthermore, the wife's own expert testified that in the event the husband and Ms. Pike married, it would be in the children's best interest for the Court to provide for their gradual introduction to Ms. Pike so that they may adjust to their father's relationship with her. Thus, the Supreme Court found that the trial court abused its discretion in prohibiting the father from exercising his visitation rights in Ms. Pike's presence and reversed the case on those grounds.

As for the additional $200.00 per month into an individual custodial account, the father argued that such account was established to fund the children's college education, and, thus, such provision would be void and unenforceable. The Supreme Court held that because the custodial account was previously established prior to the divorce being filed, and that it was established pursuant to the Georgia Transfers to Minors Act, O.C.G.A. § 44-5-110, then pursuant to Georgia law, there could be no limitation on the use of such funds, and the funds may be used for any reason deemed necessary by the custodian for the support, education and maintenance of the children. Thus, the Court held that the $200.00 monthly contributions into the custodial account did not constitute post-minority child support, and thus, inclusion of that provision in the final decree was not error.

CHILD SUPPORT GUIDELINES
Betty v. Betty, 274 Ga. 194 (2001)

Pursuant to O.C.G.A. § 19-6-15(c)(6), the trial court may deviate from the child support guidelines if there is evidence that the payor has other support obligations to another household. This case examines circumstances under which the court is and is not authorized to employ this standard in deviating from the guidelines.

Specifically, the two questions before the Supreme Court were: (1) whether a father's status as legal custodian of a child by another marriage, constitutes a special circumstance under O.C.G.A. § 19-6-15(c)(6), although the father does not pay child support and does not have physical custody of the child; and (2) whether a father's past due child support obligation for an adult child from a previous marriage is a special circumstance under the same code section.

The Supreme Court held that the status of legal custodian alone, when the father does not have physical custody nor does he pay child support for the child, is not enough to determine whether a support obligation to that child would render the presumptive amount under the statute excessive. Thus, the Supreme Court remanded the case to the trial court for determination of the circumstances relevant to the child in question which would have necessitated deviation from the child support guidelines.

As for the second question, the Supreme Court held that a past due child support obligation for an adult child could be considered a special circumstance, and could be considered a party's other support obligations to another household. The fact that the obligation is past due does not mean that it is no longer a support obligation, nor does the fact that the child is an adult child mean that it is no longer an obligation of the payor.

LEGITIMATION
Jones vs. Smith, 250 Ga. App. 486 (2001)

This case provides some practical guidance if you find yourself involved in a legitimation case. In this case, the biological father, Smith, filed a petition to legitimate a child born to his girlfriend, Jones. The trial court, at the end of the hearing on legitimation, announced in open court that it was granting the petition for legitimation. Nine days later, the mother, relying on O.C.G.A. § 9-11-52(c), specifically requested factual findings by the trial court in its order as to how the minor child in the case would benefit from being legitimated by the father, and why such legitimation was in the child's best interest. The court issued its findings, which the Court of Appeals found to be insufficient in that the court's findings did not state which test would be used for assessing legitimation nor provided the factual support for that decision. Furthermore, the Court of Appeals stated that the trial court's findings did not contain findings of fact or conclusions of law to support a decision under either the best interest or parental fitness standard.

The Court of Appeals pointed out that the law relevant to a legitimation petition filed by the biological father has been explained by the Supreme Court in the case of In Re: Baby Girl Eason, 257 Ga. 292 (1987). In a legitimation proceeding, the trial court must first determine whether the father has abandoned his opportunity interest to develop a relationship with the child. The next step, depending on the nature of the father's relationship with the child and other circumstances, is either a test of the father's fitness as a parent or the best interest of the child. There are many factors which are spelled out in the Eason case and also in Lebrecht v. Davis, 243 Ga. App. 307 (2000). The primary issue at trial in this case was whether the father had abandoned his opportunity interest in being the legal father of the child and whether legitimation was proper given his background as a convicted criminal and violent person. The Court of Appeals remanded the case with direction that the trial court vacate the judgment and prepare appropriate findings of fact and conclusions of law, and to enter a new judgment thereon.

Thus, the lesson here is twofold: If you are representing the putative father, make sure you establish the evidence set forth in the Eason and Lebrecht cases. Secondly, it is a good idea to ask the trial court to make findings of fact and conclusions of law in its order for appeal purposes. See O.C.G.A. § 9-11-52 for specifics on how and when to do so.

ALIMONY AND EQUITABLE DIVISION OF PROPERTY
Anderson v. Anderson, 274 Ga. 224 (2001)

In this case, the wife appealed the trial court's interpretation of a paragraph of the parties' prenuptial agreement. Specifically, paragraph 6 of their prenuptial agreement, which pertained to property division, stated that "all assets and income derived from the date of the parties' marriage forward shall be the assets of both parties and shall be subject to equal division (50%/50%) between the parties." The agreement also stated that the wife agreed that husband had executed a trust agreement with his first wife pertaining to marital assets of his first marriage, and that said assets were not subject to equitable division between the parties to the prenuptial agreement.

The wife, at trial, sought to have equitably divided as part of the marital estate, interest derived from certain certificates of deposit which were held in husband's name but owned by the trust created prior to his divorce from his first wife. The trial court found that, although the certificates were titled in husband's name, the parties' did not benefit from the income derived therefrom, which was, instead, reinvested in the trust. Such interest was not reported as income on the tax returns filed by the parties, nor did they keep said interest income for themselves. The Supreme Court held that the trial court correctly ruled that the wife was not entitled to one-half of the interest from the certificates of deposit due to the provision in the prenuptial agreement.

The wife also contended that, pursuant to the same paragraph, the phrase "all assets and income derived from the date of their marriage forward" included the gross income of the husband, without taking out taxes or living expenses, and that she sought one-half of his income from all sources as temporary alimony. Again, the Supreme Court affirmed the trial court's ruling that she was not entitled to receive one-half of husband's income, and that she was stretching the meaning of said term in the prenuptial agreement. The Supreme Court noted that the prenuptial agreement must be looked at in its entirety, and elsewhere in the prenuptial agreement the wife had waived any right to receive alimony in the event of a divorce. Thus, the Supreme Court held that there was no intent for her to receive

alimony, in effect, by obtaining one-half of husband's gross income from employment. The Court concluded that said paragraph from the prenuptial agreement meant that the wife was entitled to receive one-half of all marital assets and the income derived from those assets, but that she did not have any claim to husband's gross income.

EQUITABLE DIVISION OF PROPERTY
Payson v. Payson, 274 GA. 231 (2001)

The parties were married in 1991 and divorced in 2000. At the final trial, which was a bench trial, the trial court awarded the wife her Home Depot stock which she had owned prior to the marriage, Home Depot stock she had received after exercising stock options which had vested prior to the marriage, Home Depot stock which the trial court classified as marital property, and appreciation on the entire account, which the trial court also classified as marital property. On appeal, the question was whether the trial court erred in classifying the wife's appreciated shares of Home Depot stock as a marital asset for purposes of equitable division of property.

The Supreme Court held, after examining the marital and separate nature of the Home Depot stock, that the trial court incorrectly concluded that all the appreciation on the premarital Home Depot stock was marital, subject to equitable division. The Supreme Court stated that if the appreciation of a non-marital asset during the marriage is the result only of market forces, then the increased value is a non-marital asset. On the other hand, if the appreciation in value of a non-marital asset during the marriage is due to the result of efforts of either party or both parties, then such appreciation would be a marital asset and subject to equitable division. The trial court concluded that all of the appreciation of the wife's Home Depot stock was a marital asset; however, the Supreme Court found that the evidence showed that some of the appreciation in value of her stock was due solely to market forces, which made it error for the trial court to classify all the appreciation in value of the stock as marital property. Thus, the Supreme Court reversed the trial court's finding of equitable division of property and remanded the case back to the trial court so that it could reconsider the allocation of marital property, including a determination of the amount of appreciation in value that was due to market forces and the amount that was due to the efforts of one or both parties.

The husband claimed that the trial court's error was harmless since the wife received all of the stock. However, the Supreme Court disagreed and stated that if there is an error in the classification of property as marital or non-marital, even if the error is limited to one item, then the fact finder's allocation of economic resources must be determined de novo.

Another issue which the Supreme Court addressed in this case which is helpful to know from a practical standpoint, is when does O.C.G.A. § 9-11-52(a), require a court to make findings of fact and conclusions of law upon the request of any party: is it when the judge orally pronounces its judgment from the bench, or when the court reduces its order to a written order? The Supreme Court, after much discussion in the opinion, stated that the word "ruling" in the Code Section must be synonymous with "judgment," meaning that a party must make such a request before the court reduces its order to writing and it becomes a judgment. Thus, in this particular case, the court rendered an oral ruling from the bench; subsequently, the wife made a request for findings of fact and conclusions of law. The husband tried to argue that her request was too late, and that the court had the discretion as to whether it would issue findings of fact or conclusions of law. However, the Supreme Court disagreed with the husband's line of reasoning and found that the trial court must make findings of fact and conclusions of law as requested by the wife because she followed the provisions properly of O.C.G.A. § 9-11-52(a).

ENFORCEMENT OF SETTLEMENT AGREEMENTS
Stookey v. Stookey, 274 Ga. 472 (2001)

In this matter, the trial court denied the husband's motion to enforce the settlement agreement. The Supreme Court found that the trial court erred in determining that a settlement agreement did not exist, and reversed the judgment and remanded the case to court to give the parties the full opportunity to present evidence on whether or not the court should enforce the agreement.

The facts showed that the parties, who had been married for thirty-eight years, were in the process of divorcing in the year 2000. A few days before trial, the wife was at the office of her first attorney to prepare for her deposition and to participate in settlement discussions over the phone with the attorney for the husband. The parties reached an agreement that afternoon; and the deposition was cancelled. The wife's attorney reported to the court that the case had been resolved and requested that it remove the matter from the upcoming trial calendar. The husband's attorney drafted the settlement agreement, which the wife refused to sign and subsequently obtained new counsel. The husband filed a motion to enforce the settlement agreement.

In support of his motion to enforce the agreement, the husband's attorney filed an affidavit stating that the parties had reached an agreement over the telephone. The wife's former attorney also provided an affidavit claiming that there was a settlement agreement, that she had the authority from the wife to enter into and be bound by the agreement, and that the written settlement agreement prepared by the husband's attorney accurately reflected the terms of the agreement worked out by telephone. The wife never contended that she placed any limitations on her prior attorney's authority or that any restrictions on her attorney's authority to negotiate for her were communicated to the opposing party. The wife claimed that she did not understand what the discussions were about, and that she thought they were just negotiating "like they had done before." The trial court found that there was no meeting of the minds between the parties and refused to enforce the agreement.

The Supreme Court disagreed with the trial court, finding that the trial court was obligated to acknowledge the existence of the agreement once it was determined that the previous attorney for the wife had the authority to bind the wife to the agreement, and that it was announced to the court that a settlement had been reached. The Supreme Court remanded the case to give each party full opportunity to present evidence on whether or not the trial court should enforce the agreement.

Editor's Column
"Raising The Family Law Bar"

Richard M. Nolen, Warner, Mayoue & Bates

A CALL TO VOLUNTEER

"My call tonight is for every American to commit at least two years…to the service of your neighbors and your nation."

President George W. Bush
State of the Union Speech,
January 30, 2002

We have had extremely positive feedback from many Section members about our new format and new look, as reflected in our most recent issue. We know that several printing glitches occurred in the last newsletter; we have been assured by the printer that these mistakes will not occur again. We apologize for these errors.

I would like to thank Susan Hargus, an associate with our firm, for all of her diligent efforts in crafting and developing the newsletter, and for her creativity in designing the new Family Law Section Logo. She has volunteered a tremendous amount of time and worked very hard for our Section to design what we hope is a reader-friendly, informative, and useful publication. Susan is the embodiment of volunteerism, and her efforts should be recognized. Without her, this newsletter would not have been possible.

In last month's Editor's column, I discussed the importance of words, and I referenced President Bush's inspiring address to Congress and the nation, following the September 11 terrorist attacks. In his first State of the Union address, President Bush called on all Americans to re-dedicate their lives to the spirit of volunteerism, as shown by the quotation above.

Our Section and our profession, through pro bono service and the sharing of knowledge through seminars, are fortunate to experience this spirit of volunteerism on a daily basis.

On behalf of the Section, I thank all the seminar contributors and the leaders in our Section who consistently volunteer their time and efforts to benefit the practice of family law.

Come to the Family Law Institute 2002 in Destin, and watch volunteerism in action.

Sincerely,

Richard M. Nolen

Don't forget . . .

The 2002 Family Law Institute Will be held at SanDestin, FL May 23-25.

SEE YOU AT THE BEACH!

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