2005-2006 FAMILY LAW

CASE UPDATE

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2005-2006 GEORGIA FAMILY LAW CASE UPDATE

I. CHILD CUSTODY

Bull v. Bull, 280 Ga. 49, 622 S.E.2d 326 (2005)

Cook v. Cook, 2006 WL 1921165

Curtis v. Klimowicz, 279 Ga. App. 425, 631 S.E.2d 464 (2006)

DeVito v. DeVito, 280 Ga. 367, 628 S.E.2d 108 (2006)

Taylor v. Taylor, 280 Ga. 88, 623 S.E.2d 477 (2005)

II. VISITATION

Luke v. Luke, 2006 WL 1827807 (grandparent visitation)

Ormond v. Ormond, 274 Ga. App. 869, 619 S.E.2d 370 (2005)

III. CHILD SUPPORT

Bullard v. Swafford, 279 Ga. 577, 619 S.E.2d 665 (2005)

Department of Human Resources v. Prater, 278 Ga. App. 900, 630 S.E.2d 145 (2006)

Dial v. Dial, 279 Ga. 767, 621 S.E.2d 461 (2005)

Drake v. Drake, 632 S.E.2d 165 (2006)

Falkenberry v. Taylor, 278 Ga. 842, 607 S.E.2d 567 (2005)

Farrish v. Farrish, 279 Ga. 551, 615 S.E.2d 510 (2005)

Frazier v. Frazier, 631 S.E.2d. 666 (2006)

Hayes v. Hayes, 279 Ga. 741, 620 S.E. 2d 806 (2005)

Jones v. Jones, 632 S.E.2d 121 (2006)

Pate v. Pate, 631 S.E. 2d 103 (2006)

IV. LEGITIMATION AND PATERNITY

Branyon v. Hilbert, 275 Ga.App. 511, 621 S.E.2d 529 (2005)

V. ENFORCEMENT AND INTERPRETATION OF SETTLEMENT AGREEMENTS

Findley v. Findley, 280 Ga. 454, 629 S.E.2d 222 (2006)

Gravley v. Gravley, 278 Ga. 897, 608 S.E.2d 225 (2005)

Porter-Martin v. Martin, 280 Ga..150, 625 S.E.2d 743 (2006)

Smith v. Smith, 280 Ga. 620, 632 S.E.2d 83 (2006)

Torgensen v. Torgensen, 274 Ga. App. 298, 617 S.E.2d 223 (2005)

Waters v. Waters, 280 Ga. 477, 629 S.E.2d 233 (2006)

VI. ATTORNEY'S FEES

Nguyen v. Dinh, 278 Ga. 887, 608 S.E.2d 211 (2005)

Thornton v. Intveldt, 272 Ga. App. 906, 614 S.E.2d 175 (2005)

Waits v. Waits, 2006 WL 1827824

Williams v. Cooper, 280 Ga. 145, 625 S.E. 2d 754 (2006)

VII. PROCEDURAL MATTERS

Anderson v. Deas, 2006 WL 1493627

Bayless v. Bayless, 280 Ga. 153, 625 S.E.2d 741 (2006)

Ciraldo v. Ciraldo, 280 Ga. 602, 631 S.E. 2d 640 (2006)

Francis v. Francis, 279 Ga. 248, 611 S.E.2d 45 (2005)

Fuller v. Fuller, 279 Ga. 805, 621 S.E.2d 419 (2005)

Groover v. Groover, 279 Ga. 507, 614 S.E.2d 50 (2005)

Searcy v. Searcy, 280 Ga. 311, 627 S.E.2d 572 (2006)

Walker v. Walker, 631 S.E.2d 697 (2006)

Wilson v. Wilson, 279 Ga. 302, 612 S.E.2d 797 (2005)

VIII. DEBTS AND BANKRUPTCY

Benton v. Benton, 280 Ga. 468, 629 S.E.2d 204 (2006)

McGahee v. Rogers, 2006 WL 1919895

IX. DIVISION OF PROPERTY

Baker v. Baker, 280 Ga. 299, 627 S.E.2d 26 (2006)

Brock v. Brock, 279 Ga. 119, 610 S.E.2d 29 (2005)

Harmon v. Harmon, 280 Ga. 118, 622 S.E 2d 336 (2005)

Lerch v. Lerch, 278 Ga. 885, 608 S.E.2d 223 (2005)

Pollard v. Pollard, 279 Ga. 57, 609 S.E.2d 354 (2005)

Rabek v. Kellum, 279 Ga. 709, 620 S.E.2d 387 (2005)

X. ALIMONY

Lanier v. Lanier, 278 Ga. 881, 608 S.E.2d 213 (2005)

Smelser v. Smelser, 280 Ga. 92, 623 S.E.2d 480 (2005)

XI. LEGISLATIVE UPDATE/OTHER

Perdue v. O'Kelley, 632 S.E.2d 110 (2006)

Legitimation & Custody

New Guardian Ad Litem Rules

CHILD CUSTODY

Bull v. Bull, 280 Ga. 49, 622 S.E.2d 326 (2005)
Facts: Father petitioned for divorce from mother. A judge resolved all of the issues in a non-jury trial, in which evidence was introduced regarding the parties' fitness to have custody of the two minor children of the marriage. Finding neither party to be an unfit parent, the trial court entered a final judgment and decree awarding primary physical custody of the minor children to wife and unsupervised visitation to husband, with both parties sharing joint legal custody. Husband filed an application for discretionary appeal.

Issue: Despite her personal difficulties, was wife entitled to primary physical custody of the children?

Holding: Yes, wife was entitled to primary physical custody as the evidence showed she had made great strides with her personal issues and the trial court properly exercised its discretion to determine if she was a fit parent.

Analysis: Where the trial court exercises its discretion and awards custody to one fit parent over the other fit parent, appellate court will not interfere unless the evidence shows the trial court clearly abused its discretion.

Cook v. Cook, 2006 WL 1921165
Facts: Husband and Wife were marred in 2003 and separated four months later. Husband filed for divorce and the case was tried by the court sitting without a jury. Wife was awarded custody of the parties' minor son. Husband filed for a new trial and his motion was denied.

Issue: Whether the trial court erred by awarding Wife legal and physical custody when the evidence demonstrates that Husband was a good parent.

Holding: The trial court did not err in awarding custody of the minor child to Wife.

Analysis: A trial court does not abuse its discretion in awarding custody of a minor child to a parent when evidence supports the judge's decision. In this case there was evidence that both parents were good parents. While a court is required to consider joint custody between fit and equally capable parents, the court is not required to award joint custody. Joint custody was not awarded in the instant case due to lack of communication between the parents.

Curtis v. Klimowicz, 279 Ga. App. 425, 631 S.E.2d 464 (2006)
Facts: Mother filed an emergency motion for ex parte modification of custody seeking temporary sole and physical custody of the minor child. The Father answered and counterclaimed for modification, seeking primary physical custody. Following an emergency hearing, the trial court did not find sufficient evidence to justify an emergency modification, instead appointing a guardian ad litem. At a second hearing, there was evidence of Mother's drug use and poor care of the minor child. The court granted Father's counterclaim and awarded him primary physical custody, but with

respect to his military service, the court order stated as follows: "The father is presently serving in the military service of the United States and is subject to be assigned for extended overseas duty. In the event that the father is assigned to duty overseas, in other words, outside the United States of America, then the minor child shall at all times remain in the United [S]tates and shall not be removed from the jurisdiction of the United States of America." In this discretionary appeal from a trial court's order modifying his divorce decree, Father appealed that provision of the order, contending that the trial court erred in prohibiting his minor child from leaving the jurisdiction of the United States. Specifically, he argued (1) that the court improperly attempted to retain jurisdiction over the action, (2) that the court failed to find that removal from the country would harm the child, and (3) that if he were assigned to duty outside the United States, he would be deprived of custody of his child.

Issue: Does the court improperly attempt to retain jurisdiction of a case when it issues an order preventing the minor child from being out of the United States?

Holding: The Court of Appeals affirmed that: (1) a provision of custody order requiring child to remain in United States in event of Father's overseas deployment was not improper attempt by trial court to retain exclusive jurisdiction; (2) trial court did not abuse its discretion in finding that it was in child's best interests to remain in the United States if Father was assigned military duty overseas; and (3) the provision at issue did not prevent Father from exercising primary physical custody should he be assigned overseas.

Analysis: The court's order did not prevent the child from being taken from the jurisdiction of the court to another state. Instead, the order merely prevents the child from being taken outside the United States, and does not purport to retain exclusive jurisdiction on the part of the trial court. There is a distinction between prohibiting removal of the child or children from the country, as opposed to prohibiting their removal from the state.

DeVito v. DeVito, 280 Ga. 367, 628 S.E.2d 108 (2006)

Facts: The parties divorced in Taylor County, Georgia in 1997 and Mother was awarded sole legal custody of the parties' Minor Child and Father received visitation rights. In 2002 Mother moved with the Minor Child to Louisiana and Father remained in Taylor County. Father filed a motion to modify custody and visitation, and a motion for contempt in 2004. Mother was served pursuant to O.C.G.A. § 9-10-91, Georgia's Long Arm Statute. She filed a motion to dismiss for lack of personal and subject matter jurisdiction challenging the constitutionality of O.C.G.A. § 19-9-62(a) of the Uniform Child custody Jurisdiction and Enforcement Act ("UCCJEA"), O.C.G.A. § (19-9-40) et seq.

Issues: (1) Whether O.C.G.A. § 19-9-62 (a) of the UCCJEA violated the Georgia Constitution of 1983 Art. VI, Sec. II, Par. VI, which provides that venue is the county where the defendant resides in "all other civil cases" not otherwise addressed by the Constitution. (2) Whether the trial court has jurisdiction to modify a 1997 child custody determination under the UCCJEA.

Holdings: (1) O.C.G.A. § 19-9-62 (a) of the UCCJEA does not violate the Georgia Constitution of

1983. (2) A trial court has jurisdiction under the UCCJEA to modify a child custody determination entered prior to the enactment of the UCCJEA.

Analysis: (1) The court noted that because the Georgia Constitution of 1983 Art. VI, Sec. II, Par. VI (requiring that venue is in the County where Defendant resides) has no application to out-of -state defendants for the obvious reason that they do not reside within the State of Georgia, it was not improper to choose venue for child custody modifications under the UCCJEA in the court that made the initial child custody determination. (2) The UCCJEA in Georgia only requires that the initial child custody determination be entered "consistent with" O.C.G.A. §§ 19-9-61 - 19-9-63. Therefore, the Court has jurisdiction to modify an award entered prior to the enactment of the UCCJEA in 2001 if no evidence is presented to support a finding that the initial custody determination was not consistent with the provisions of the UCCJEA.

Taylor v. Taylor, 280 Ga. 88, 623 S.E.2d 477 (2005)

Facts: During the divorce negotiations Husband agreed to voluntarily surrender his parental rights pursuant to O.C.G.A. §19-7-1 in exchange for Wife's agreement to release him from any child support obligations. After the agreement had been announced to the court, but before it had been finalized or incorporated into the final judgment, Husband attempted to back out of the agreement. Wife filed a motion to enforce. After a hearing on Wife's motion to enforce, the trial court expressed its reluctance to enforce the agreement, and stated that it was not in the best interest of the child. Nevertheless the trial court enforced the agreement and made it a final order.

Issue: Whether the trial court erred in enforcing an agreement that it had determined was not in the best interest of the minor child.

Holding: The trial court had the discretion to consider whether the parties' agreement, in which father agreed to voluntarily surrender his parental rights in exchange for release form any child support obligations, was in the best interests of the child, and after finding such agreement was not in the best interests of the child, the court erred in enforcing said agreement.

Analysis: The Supreme Court in its decision stated that it is well settled under Georgia law that the trial court has the authority to "disregard any agreement between the parties in making the award [of custody], since the welfare of the child is the controlling factor." Where the court determines that terminating parental rights is not in the best interests of the child, it should reject the parties' agreement to do so. Therefore, because the trial court expressly stated in its decision that the agreement was not in the best interests of the child, the Supreme Court reversed and remanded the decision of the lower court.

VISITATION

Luke v. Luke, 2006 WL 1827807 (involving grandparents)
Facts: The parents were divorced in 2002 and Mother received sole legal custody of the three children while Father received visitation. In 2004 Father enlisted in the Army. He was relocated to Washington state and then was scheduled or a Summer 2005 deployment to Iraq. Paternal Grandfather petitioned for court-ordered visitation claiming the following: that the children's health or welfare would be harmed without visitation; that the visitation would serve the children's best interests; and that the children had developed a strong familial bond with him and his family and with Father serving in Iraq, the paternal family would be destroyed without visitation. After a hearing, the trial court granted Paternal Grandfather visitation until the children's father was discharged from the Army, lived within 100 miles of Mother or resumed his visitation.

Issue: Whether the trial court failed to exercise its discretion and arbitrarily substituted the visitation schedule of Father for that of Paternal Grandfather based on the fact that Father was in the military and unable to exercise his visitation.

Holding: The Court of Appeals affirmed the decision of the trial court finding that the record shows that visitation was granted on the grounds authorized by the grandparent visitation statute.

Analysis: The grandparent visitation statute, O.C.G.A.§ 19-7-3(c), allows the court to grant grandparents reasonable visitation rights if the court finds that the health or welfare of the child would be harmed unless visitation is granted, and if the best interest of the child would be served by such visitation. The court noted that while grandparent visitation would not be authorized solely on the ground that the children's father's military obligations interfered with Paternal Grandfather's visitation opportunities, the trial court's order contained several findings, supported by clear and convincing evidence, that the minor children would suffer actual emotional harm unless visitation was granted to Paternal Grandfather and that the visitation was in the children's best interests.

Ormond v. Ormond, 274 Ga. App. 869, 619 S.E.2d 370 (2005) (involving grandparents)
Facts: Husband filed for divorce seeking custody of the two minor children. Maternal Grandfather and Stepmother filed a petition to intervene seeking child custody or visitation. The court entered a final divorce decree incorporating Husband and Wife's settlement agreement, which gave Husband primary physical custody of the children and granted Mother visitation every other weekend. The court then awarded Grandparents visitation with the children one weekend per month during and in lieu of one of the Mother's visitation weekends. Husband filed an application for discretionary appeal with respect to Grandparents' visitation award.

Issue: Whether the trial court erred in awarding Grandparents visitation rights.

Holding/Analysis: The Grandparent Visitation Statute provides that the court may grant any grandparent reasonable visitation rights if the court finds that the health or welfare of the child would be harmed unless visitation is granted, and if the best interests of the child would be served by such

visitation. Evidence supporting mandated visitation must be supported by clear and convincing evidence. The Supreme Court determined that although the lower court found by clear and convincing evidence that the best interests of the children would be served by granting visitation, it did not find by clear and convincing evidence that the children would be harmed unless visitation was granted. The lower court concluded that the latter finding was not necessary because both parties consented to the visitation. However, after a review of the record the Supreme Court determined that neither party consented to the mandated visitation. Accordingly, the Supreme Court found that the lower court erred in granting visitation rights and reversed the lower court's decision.

CHILD SUPPORT

Bullard v. Swafford, 279 Ga. 577, 619 S.E.2d 665 (2005)
Facts: Husband and wife were divorced and on July 2, 2002, the Superior Court of Polk County entered a "final consent order" regarding, inter alia, child support, which memorialized an agreement reached by the parties following mediation. The agreement provided that the husband would pay child support of $160 a week for the couple's son, payable until such time as the child becomes eighteen (18) years of age, dies, marries, or otherwise becomes emancipated, except that if the child becomes 18 years of age while enrolled in and attending secondary school on a full time basis, then such support shall continue until the child completes secondary school, provided that such support shall not be required after the child attains twenty (20) years of age. The son turned 18 years old on February 25, 2004, close to three months before he was scheduled to graduate from high school. Due mainly to voluntary class absences and tardiness, the son did not have enough credits to graduate. Though he planned to attend summer school to make up some of his missing credits, he did not do so after the school district canceled the summer school program. He then enrolled in the 2004 fall semester at his high school for a full course load in order to obtain the required credits. Husband ceased child support payments on May 21, 2004, the day after the son was originally scheduled to graduate. He then filed a "Motion for Declaratory Judgment or for Modification of Child Support" seeking a declaration that the son was emancipated or that there was a material change in circumstances since the agreement because of his son's alleged refusal to attend school and wife's alleged refusal to make him go; he asked that his child support obligation "be immediately halted." Wife filed a counterclaim asking that husband be held in contempt for his failure to pay child support since May 21, 2004. The superior court focused on the son's absences, tardiness, and failure to attend summer school and concluded that the son was not a "continuous full time student"; consequently, it ruled that husband's child support obligation terminated as of May 20, 2004, "when the 2003-04 school year ended and the [son] ceased attending school on a full time basis." Wife appealed, arguing that the superior court erred by expanding the scope of OCA § 19-6-15(e) to require that a child be a full-time student in order to receive support when the child's efforts to complete his secondary education extend beyond the child's eighteenth birthday because there is no such requirement in the statute. (But, a question of judicial "expansion" of the statute is not at issue in this case according to the Georgia Supreme Court).

Issues: May a domestic obligation which a trial court has not ordered pursuant to statutory authority become enforceable when the parties agree to it, and the Cout approves the agreement and incorporates it into an order of the Court?

Holding: Yes.
Analysis: Parties may enter into an agreement regarding a child support obligation as long as it is specific, does not contravene a statute, and does not violate public policy.

Department of Human Resources v. Prater, 278 Ga.App. 900, 630 S.E.2d 145 (2006)
Facts: The Georgia Department of Human Resources ("DHR") petitioned the trial court pursuant to O.C.G.A. § 19-11-12 to increase mother's child support obligations for her minor child. Following an evidentiary hearing, the trial court increased the monthly child support payment, but

not to the extent recommended by DHR. The trial court also forgave mother's arrearage of past-due support. DHR filed an application for discretionary appeal, which the Court of Appeals granted. Affirmed in part and reversed in part.

Issue: Did the trial court abuse its discretion in forgiving mother's child support arrearage?

Holding: Yes, the trial court erred in forgiving the mother's child support arrearage?

Analysis: The trial court did not simply "address the repayment" of the arrearage. Instead, it specifically forgave the debt, requiring no further payment. The court recognized that O.C.G.A. § 19-11-12(e) does not explicitly preclude such forgiveness. But the general statutory scheme governing child support provides that any payment or installment of support under any child support order is, on and after the date due, not subject to retroactive modification. Thus, an order modifying child support may operate only prospectively. And a reduction in child support arrearage constitutes an improper, retroactive modification of support obligations.

Dial v. Dial, 279 Ga. 767, 621 S.E.2d 461 (2005)

Facts: Husband and Wife were married in 1988 and no children were born of the marriage. However during the marriage, Wife obtained guardianship of a minor child through a private arrangement with the Mother of the minor child. The mother of the minor child signed a document stating that she was giving "full legal guardianship and or power of attorney of her son." Wife and Mother of the minor child signed the document. Husband was not named anywhere on the document and he did not sign it. In 2002 Husband and Wife separated. Wife sought custody and child support for the minor child, which the trial court granted. It is from this decision that Husband appealed.

Issue: Whether the trial court erred in ordering Husband pay child support for the minor child of whom wife had obtained guardianship through a private arrangement.

Holding: Husband was not legally obligated to pay child support for a minor child whom Wife obtained guardianship through a private arrangement with the biological mother.

Analysis: In this case Husband had no legal relationship with the minor child. He was not the biological father of the minor child, nor did he adopt him. Additionally, Husband did not hold himself out as the child's father and he made no assertion of paternity. The court noted that the situation was similar to one in which a couple takes a minor relative into their home for a period of time. Providing support in a voluntary manner does not create a legal obligation to continue to provide that support. Consequently the court determined that the trial court erred and reversed its decision.

Drake v. Drake, 632 S.E.2d 165 (2006)

Facts: The parties entered into a settlement agreement that was incorporated into a final judgment and decree of divorce. The divorce decree awarded the parties joint legal and physical custody of

their two minor children, and based on the shared custody arrangement, neither party was to pay child support to the other. The settlement agreement included language which stated that the "financial arrangement is subject to modification based upon the future circumstances of the parties' respective employment and financial status." Father later filed an action to establish child support. The trial court treated Father's complaint as a modification, rather than a complaint to establish child support, and denied his request.

Issue: Whether the trial court erred in treating his action to establish child support as a modification of child support.

Holding: The trial court did not err in treating Father's complaint to establish child support as a modification.

Analysis: The Court of appeals cited to O.C.G.A. § 19-7-2, which provides a party with the right to institute an original action for an award of child support when a divorce decree is silent with respect to support. However the Court noted that in this case, the settlement agreement was not silent as to support, and an action for modification was the exclusive remedy for obtaining a provision supplementing the child support award in the divorce judgment.

Falkenberry v. Taylor, 278 Ga. 842, 607 S.E.2d 567 (2005)

Facts: The parties divorced in 1994 and pursuant to the final decree, Father was awarded custody of the minor child and Mother was ordered to pay child support in the amount of $45.00 per week. Father requested the Department of Human Resources (DHR) to review the child support order despite the fact that the minor child was not receiving public assistance. DHR recommended an increase in the child support obligation to $605.00 per month. Mother objected and DHR filed a petition with the court requesting that the court adopt its recommendation. After a bench trial, the trial court denied the petition, finding that the evidence presented did not show any need for additional support. The trial court also denied Father's motion for a new trial based on the holding in Allen v. Ga. Dept. Of Human Resources, 262 Ga. 521 (1992) that DHR is not authorized to file a modification of child support on behalf of a child not receiving public assistance unless it can show the child's need for additional support.

Issue: Whether it is necessary to prove need, when seeking an increase in child support payments in light of the 2003 Amendments to the Child Support Recovery Act (Act) codified at O.C.G.A. §19-11-1.

Holding: Under the 2003 Amendments to the Child Support Recovery Act, evidence of "need for additional support" is no longer necessary when seeking a modification of child support.

Analysis: Prior to the 2003 Amendments, the Act contained language that distinguished between procedures available where the child was receiving public assistance compared to a child who was not receiving such assistance. The Court noted that the statute, after the 2003 Amendments, sets forth a unitary procedure for every administratively or judicially imposed child support order and it

no longer distinguishes between those children receiving assistance. In addition, the statute explicitly abrogates the prior requirement that a need for increased child support be shown. Rather, the sole basis for a recommendation for a change in support shall be a showing of a significant inconsistency between the existing child support order and the amount which would result from the application of O.C.G.A. §19-6-15. Consequently, the trial court erred and the Supreme Court reversed and remanded the case.

Farrish v. Farrish, 279 Ga. 551, 615 S.E.2d 510 (2005)

Facts: Husband and wife were divorced in 2004 after 26 years of marriage. They have five children, three of whom are minors living with appellee-wife. Following a non-jury trial, the trial court awarded appellee alimony in the amount of $2,000 per month and child support of $3,000 per month. Husband filed an application for discretionary review. Husband contends that the trial court erred in awarding child support and alimony in an amount substantially disproportionate to his ability to pay. The record demonstrated that husband had a gross monthly income of $10,374 and wife had no monthly income and would require job training to obtain any employment beyond minimum wage.

Issue: Did the trial court err in awarding child support and alimony in an amount that husband argued was substantially disproportionate to his ability to pay?

Holding: No, the trial court did not err or abuse its discretion when it awarded child support and alimony.

Analysis: In determining that husband had the ability to pay the combined alimony and child support awards, the court properly considered husband's income, property in his possession, the fact that he appropriated for his own use $55,000 of joint or marital assets after the parties' separation for which he had not accounted at the time of trial, and the fact that husband accumulated substantial debt after the separation by providing monetary support for his paramour and her family to the detriment of his own children and wife. In the absence of any mathematical formula, fact-finders are given a wide latitude in fixing the amount of alimony and child support, and to this end they are to use their experience as enlightened persons in judging the amount necessary for support under the evidence as disclosed by the record and all the facts and circumstances of the case.

Frazier v. Frazier, 631 S.E.2d 666 (2006)

Facts: The parties were divorced by a final decree of divorce issued after a three-day bench trial. The trial court awarded the parties joint legal and physical custody of the children, and awarded Wife child support. Husband was awarded the income tax dependency exemption for one child, Wife was awarded the exemption for another child and the parties alternated each year the dependency exemption for the third minor child. Wife filed a motion for a new trial and a motion to set aside the decree. Husband filed a motion for supersedeas bond, which the trial court granted. The trial court denied Wife's motion for a new trial, and the Supreme Court granted her discretionary appeal application pursuant to the Family Law Pilot Project.

Issues: Wife asserted several assignments of error in her discretionary appeal. (1) Whether the trial court erred in giving any portion of the federal income tax dependency exemption to Husband. (2) Whether granting a tax dependency exemption would cause the child support order to fall below the guideline amount. (3) Whether the trial court erred in granting the parties equal physical custody of the children. (4) Whether the trial court erred in awarding Husband with final decision making authority with respect to education and extra-curricular activities. (5)Whether the trial court was authorized to except the custody provisions of the decree from the automatic supersedeas bond provided by O.C.G.A.§ 9-11-62(b).

Holdings: (1)(2) The trial court did not err in granting Husband a portion of the federal income tax dependency exemption, and the allocation of tax dependency exemptions did not cause the child support order to fall below guidelines. (3) Awarding joint physical custody was in the best interests of the children. (4) Evidence supported the trial court's decision in awarding Husband final decision making authority with respect to education and extra-curricular activities. (5)The trial court has the statutory authority to except child custody provisions of a divorce decree from supersedeas bond imposed on a party's motion for a new trial.

Anaylsis: (1)(2) In this case the amount of time that each parent was to spend with the children was almost equal. I.R.C. § 152(4)(A) provides that "the term custodial parent means the parent having custody for the greater portion of the calendar year." Accordingly, the Supreme Court found that the trial court came as close to the requirement under I.R.C. § 152(4)(A) as possible by splitting the exemption between two parents who are both custodial parents by virtue of the divorce decree and neither of whom has custody for a greater portion of the calendar year. The Court further held that permitting Husband to claim an exemption would not affect his gross income, which is the basis for child support calculations under the statutory guidelines. Therefore the trial court did not cause a reduction in the amount of child support by awarding Husband the dependency exemption.

(3)(4) Trial courts have broad discretion when determining a custody of the minor children. The court is to consider the best interests of the minor children when making such a determination. A reviewing court will not interfere with that decision unless the evidence shows a clear abuse of discretion. In this case the evidence showed that despite the parents communication problems they were improving in their ability to communicate regarding the children's needs, thus the evidence does not support an abuse of discretion and the Supreme Court would not reverse the lower court's decision.

(5) The Supreme Court determined that the statutory language of O.C.G.A.§ 9-11-62(b) provides the court authority to deny supersedeas entirely, as well as providing the court the power to condition supersedeas upon the giving of bond. Nothing in the statute appears to limit a court's authority to an "all or nothing" application. Accordingly, the Court did not err in including in its grant of Husband's motion for supersedeas bond a provision excepting the custody provision of the final decree from the supersedeas arising from Wife's filing of a motion for new trial.

Hayes v. Hayes, 279 Ga. 741, 620 S.E.2d 806 (2005)
Facts: Husband and Wife purchased their first home when married, and Husband's parents provided the parties with a down payment of $3,500.00. Husband's parents later provided the parties with an additional $40,000.00 for improvements to their home. The $40,000.00 was paid in four separate checks of $10,000.00 each. Each party had two separate checks written to them. Thus each received $20,000.00. Husband and his Father both testified at trial that the entire $40,000.00 was intended as a gift to Husband only, and that half was given to Wife in order to avoid gift tax repercussions. The trial court found that the gifts were Husband's separate property. The Wife appealed from the trial court's final judgment of divorce.

Issues: (1) Whether the trial court erred in characterizing certain property as Husband's non-marital property. (2) Whether the trial court erred in failing to include in-kind benefits when calculating Husband's gross income for child support purposes (3) Whether the trial court erred in failing to include book royalties as part of Husband's income for child support purposes.

Holdings: (1) The trial court erred in finding that the entire gift of $40,000.00 was Husband's separate property. (2)(3) The trial court properly declined to include in-kind fringe benefits, but should have included book royalties received when calculating Husband's income for child support.

Analysis: (1) The Court based its holding on the rationale that it was impermissible for Husband and his parents to engage in a sham transaction in order to camouflage the actual tax situation. (Because there was conflicting evidence as to whether the $3500.00 down payment was a gift to Husband, the Supreme Court affirmed the trial court's ruling that this amount was Husband's separate property.)

(2) When determining whether the trial court erred by not including the in-kind fringe benefits as income for child support purposes, the Supreme Court looked at O.C.G.A. § 19-6-15(b)(4), which provides that such benefits "may" be included in calculating an obligor's gross monthly income. In this case the benefits were not considered part of Husband's gross income for income tax purposes, and the benefits were not for daily personal living expenses such as automobile or housing expenses. The Court further noted, that O.C.G.A. § 19-6-15, (with an effective date of July 1, 2006) provides that fringe benefits "shall be counted as income if they significantly reduce personal living expenses." In this case the in-kind benefits were for life insurance, medical insurance and a retirement plan. Thus the trial court did not err by not including them in Husband's gross income for child support purposes.

(3) The book royalties should have been included in Husband's gross income for child support purposes pursuant to O.C.G.A. § 19-5-16(b)(4), which provides that gross income includes compensation for personal services . . and all other income.

Jones v. Jones, 632 S.E.2d 121 (2006).
Facts: The parties entered into a settlement agreement, which was incorporated into a final decree of divorce in 2000. The agreement provided in pertinent part that Wife would have primary physical custody of the parties' two children, and that Husband would pay to her $1,657.86 a month as "permanent child support." The agreement further recognized that the amount represented 28 % of

Husband's gross monthly wages at the time, and in the event that he earned more in wages, then his child support obligation would increase to 28% of his increased gross wages earned. The agreement also provided for a waiver of Husband's right to seek a downward modification of his support obligation, and it included the waiver language as follows: the partes agree to "hereby waive their statutory right to future modifications, up or down, of the alimony payments provided for herein. . ." In October of 2002, Husband petitioned for a modification of his child support obligation. A hearing was held in October of 2004, wherein the Court denied his request and he was ordered to pay 28% of his then-salary of $93,500.00. However, Husband then lost his job and moved for a reconsideration of the October 2004 ruling. A hearing was held on his motion to reconsider in April 2005. Husband testified at that hearing that he had obtained a new job, which paid him $60,000.00. The trial court ordered Husband to pay $1,562.50 a month as child support based on 25% of an imputed income of $75,000.00. The court imputed income to Husband based on the fluctuation of his yearly income. The court held that "special circumstances of the requirements of justice and fairness necessitate a modification" of its prior order and declared "void" the floor amount provision of 28% of his income in the original settlement agreement. Wife filed an application for discretionary appeal.

Issues: (1) Whether the trial court erred in relieving Husband's support obligations imposed by the settlement agreement. (2) Whether the wavier language that the parties, "hereby waive their statutory right to future modifications, up or down, of the alimony payments provided for herein"applies to child support.

Holdings: (1) The trial court erred by relieving Husband of his support obligations imposed by the settlement agreement. (2) The waiver language is verbatim to the clear waiver language that was set forth in *Varn v. Varn*, 242 Ga. 309 (1978) and it applies to child support modifications.

Analysis: (1) The Court based its holding on the rationale that the trial court has the ultimate discretion of whether to approve a settlement agreement, whether in whole or in part, or refuse to approve the agreement altogether, citing to *Guthrie v. Guthrie*, 277 Ga. 700, 701(1) (2004). Because the trial court initially approved the settlement agreement with the waiver of the right for downward modification in 2000, and then in October of 2004 the trial court again found the settlement agreement to be enforceable, and the transcript from the April 2004 hearing did not reveal any evidence of "special circumstance of requirements of justice and fairness" to support voiding the waiver of the downward modification, the Court found that the trial court erred. (2) Husband argued that the settlement agreement did not apply to child support because it specifically stated "alimony." The Court rationaled that in Georgia, both case law and statutory language have recognized for over half a century that alimony includes support for a child or children.

Pate v. Pate, 631 S.E.2d 103 (2006)

Facts: Husband and Wife were divorced in 1988. The settlement agreement, which was incorporated into the final decree of divorce provided that "upon the completion of medical school, Husband would pay Wife child support fo the couple's two children equal to "twenty-five (25) percent of Husband's gross income each month until the youngest child reaches age 21." Husband was also

required to provide Wife with a copy of his W-2 each year. Once Husband completed medical school and his residency, he remarried and established a surgical practice in Tennessee. He formed a Tennessee professional corporation and later assigned to the corporation all sums received by him for rendering medical services. The corporation paid salaries to Husband and his new wife, and annually reported the salary payments on a Form W-2, Wage and Tax Statement. Husband then calculated his child support obligation pursuant to the wages reflected on his W-2, rather than the gross income assigned to the corporation. Wife filed a contempt action alleging Husband willfully violated the divorce decree. The trial court found him in contempt and awarded Wife child support arrearages of $314,944.21. Husband filed an application for discretionary appeal.

Issue: Whether's Husband's gross income for child support purposes should be limited to his Form W-2 wages when the parties' settlement agreement is ambiguous with respect to the definition of "gross income."

Holding: Husband's gross income includes all income received from his professional corporation less reasonable expenses, rather than only the wages paid out by the corporation as noted on his Form W-2.

Analysis: In upholding the trial court's decision of finding Husband in contempt for unpaid child support, the Court determined that the parties had intended for Husband's child support obligation to be based upon Georgia's Child Support Guidelines. The guidelines provide in relevant part that gross income shall include "100 percent of wage and salary income and other compensation for personal services" and shall be reduced by "[allowable expenses..." O.C.G.A. § 19-5-16(b)(2)-(4). When applying this standard, Husband's gross income was much greater than his form W-2 wages. The Court further noted that Wife, at the time the parties entered into the settlement agreement, most likely did not comprehend that Husband would use a subsequently created professional corporation as a conduit to reduce his gross income subject to child support. Any other finding would allow for individuals, who are sole directors and managers of a corporation, to be able to arbitrarily set their child support obligations, irrespective of their gross income received for personal services.

LEGITIMATION AND PATERNITY

Brannon v. Hilbert, 275 Ga. App. 511, 621 S.E.2d 529 (2005)

Facts: Father filed a petition to legitimate the minor child, and after mediation, he entered into a consent agreement with the child's mother in which she consented to the legitimation. The consent agreement also provided visitation rights for the father and obligated him to continue to provide child support. The trial court approved the consent agreement and the issue of custody was not addressed in the agreement. After obtaining the order legitimating his son, father filed a separate action seeking custody. Although titled a "petition for change of custody," father's counsel clarified in the hearing on the petition that he sought to obtain a judicial decree establishing custody rights of the parents for the first time. The trial court denied his petition based on its conclusion that father was required to establish a change of circumstances affecting the welfare of the child in order to obtain custody. The trial court also denied his motion for new trial, and rejected his argument that it should have applied a best interest of the child analysis when establishing the custody rights of the parents for the first time, as opposed to a change of circumstances standard.

Issue: When there is no prior custody determination having been made, which standard should be used in the parent's custody petition?

Holding: The trial court applied the wrong analysis to father's petition for custody. On father's petition for custody of the child following legitimation, with no prior custody determination having been made, the "best interest of the child" standard should have been used, rather than denying petition on basis of "change in circumstances" analysis.

Analysis: Once a child is legitimated, the father stands in the same position as any other parent and has a claim to parental and custodial rights with respect to his child. In a case where the father seeks custody after legitimation, the trial court should apply the best interest of the child standard set forth in O.C.G.A. § 19-9-3(a). As there had been no previous adjudication of the custody issue in this case, the change in conditions analysis should not have been used.

ENFORCEMENT OF SETTLEMENT AGREEMENT

Findley v. Findley, 280 Ga. 454, 629 S.E.2d 222 (2006)

Facts: The Court granted the application for discretionary review filed by wife after the trial court denied wife's petition for contempt, ruling that the estate of her late ex-husband was not obligated to make monthly alimony payments to wife because the obligation to pay alimony did not survive the May 2004 death of the obligor husband. The trial court also directed wife to pay $500 attorney fees to the estate. Husband and wife were divorced in 1975. In her effort to establish a clear expression of intent to have the alimony obligation survive the obligor's death, Wife relies on the portion of the incorporated settlement agreement which states the payment of alimony "shall continue until she dies or remarries." In *Dolvin v. Dolvin*, 248 Ga. 439 (1981), the court held that such language in an agreement which is silent as to the effect of the obligor's death on the alimony obligation does not evidence the necessary "manifest intention of the parties to reverse the normal rule that the death of the [obligor] terminates [the] obligation to pay alimony." In so doing, the Dolvin court expressly overruled the plurality decision in *Ramsay v. Sims*, 209 Ga. 228 (1952), which held that the alimony obligation in an incorporated settlement agreement survived the death of the obligor if the incorporated settlement agreement stated a definite time for performance, i.e., the majority of the minor child or the death or remarriage of the supported spouse. Wife acknowledged that Ramsay has been overruled, but argued it is applicable to the case at bar because it was in effect at the time the judgment of divorce incorporating the settlement agreement was entered.

Issues: Does an obligor's alimony obligation terminate upon his or her death absent a clear expression of intent to extend payments beyond the obligor's death? Does the Dolvin court's ruling apply retroactively?

Holdings: The former husband's alimony obligation terminated upon his death and the Georgia Supreme Court case of *Dolvin v. Dolvin* applies retroactively.

Analysis: Where the parties to a divorce enter into a separation agreement that provides for the payment of alimony and the agreement is incorporated into the judgment and decree of divorce, the obligation to pay alimony terminates upon the death of the obligor spouse unless the incorporated settlement agreement contains a clear expression of intent to extend payments beyond the obligor's death. Furthermore, a judicial decision announcing a new rule is retroactive unless the decision itself expressly makes it a matter of pure or selective prospectivity or, after examining whether retroactive application would adversely affect operation of the new rule and weighing the inequity imposed by retroactive application, the courts subsequently conclude application of the new rule would cause unjust results to those who relied on the prior state of the law.

Gravley v. Gravley, 278 Ga. 897, 608 S.E.2d (2005)

Facts: The parties were divorced in July 2004 by a final judgment and decree of divorce that incorporated a settlement agreement.

Issues: (1) and (2) Whether the trial court erred when it found that the parties had reached an enforceable settlement agreement and incorporated said agreement into the final judgment and decree of divorce without considering whether the terms of the purported agreement were unconscionable.

Holdings: (1) The trial court acted within its discretion when determining that a settlement agreement existed and in incorporating it into the divorce judgment. (2) A trial court is not required to consider whether an agreement reached between the parties of a divorce litigation is unconscionable.

Analysis: Under Stookey v. Stookey, 274 Ga. 472, (2001) a court is obligated to acknowledge a settlement agreement upon a showing that (1) the attorney representing the party contesting the existence of a settlement agreement had plenary authority to bind the party to the agreement; (2) the court was informed that a settlement agreement had been reached; and (3) a settlement agreement incorporating the essential terms of the agreement had been prepared. In this case, the evidence at the hearing satisfied all three elements required under *Stookey* and thus the court did not err in finding that a settlement agreement existed. The Supreme Court further held that it was within the trial court's discretion to approve or reject the settlement agreement in whole or in part and a trial court is not required to examine whether an agreement reached during a divorce proceeding is unconscionable.

Porter-Martin v. Martin, 280 Ga. 150, 625 S.E.2d 743 (2006)

Facts On January 30, 2003, the parties were divorced pursuant to a final decree which incorporated a separation agreement entered into the prior day. In the final divorce decree, husband's gross income was purposefully listed as $160,000 annually and he was required to pay child support in the negotiated amount of $3,250 per month. It is undisputed that Husband received a copy of the divorce decree after it was filed, and he raised no objection at that time to the amount of his gross income stated therein. Over two years later, however, Husband filed a motion to set aside and correct the final divorce decree pursuant O.C.G.A.§ 9-11-60(d) arguing that the amount of his income had been stated as $160,000 due to a mistake or accident. The trial court granted husband's request to correct the divorce decree, but it did not set aside the judgment. Wife appealed trial court's ruling.

Issue: Did the trial court lacked authority to grant husband's motion to correct divorce decree by revising conclusive finding of fact in divorce decree as to amount of husband's income, while leaving rest of decree untouched when purposeful statement of husband's income in divorce decree was not clerical error that could be corrected without setting aside decree?

Holding: O.C.G.A. § 9-11-60(d) does not authorize the trial court's action here. It provides that, in certain enumerated instances, an entire judgment may be set aside. It does not authorize a trial court to revise a single finding of fact while leaving the judgment untouched, as the trial court did in this case. Husband had to file complaint in equity to set judgment aside. Therefore, the trial court erred.

Analysis: Contrary to husband's arguments, O.C.G.A. § 9-11-60(g) does not alter the outcome in

this case. It provides: "Clerical mistakes in judgments . . . and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." Here, the error complained of is neither a clerical mistake nor an error arising from oversight or omission. To the contrary, the record indicates that the income listed for the Husband on the final divorce decree was purposefully stated as $160,000, and, unless the divorce decree is actually set aside, the stated amount of Husband's income is conclusive.

Smith v. Smith, 280 Ga. 620, 632 S.E.2d 83

Facts: The parties were divorced in 2000 and Wife was awarded primary physical custody and Husband was ordered to pay $900.00 a month in child support. Wife filed for contempt on February 15, 2001, after Husband failed to pay his child support. Husband was in found in contempt and incarcerated until May 1, 2001 when the parties reached an agreement. Pursuant to their agreement, which the court entered as an order, Husband owed back child support in the amount of $13,500.00, and he was to extinguish the debt by paying $1,000.00 a month, with $900.00 as his monthly support obligation and $100.00 applied to his arrears. The order further provided that if husband failed to make a monthly payment then the Court would execute an order directing the Sheriff to arrest and incarcerate him until the remainder of the $13,500.00 arrearage was paid. On January 15, 2005 the clerk of court averred that Husband had not made any payments under his release order. Therefore, on January 26, 2006, the trial court entered an order for Husband to be incarcerated until his child support arrearage was paid in full. Husband moved to set aside the order under O.C.G.A. §9-11-60(d). The trial court denied his motion and Husband filed an application for interlocutory appeal from said order.

Issue: Whether entering a self-effectuating order and incarcerating Husband without serving notice or holding another hearing was a violation of due process.

Holding: A trial court cannot order incarceration pursuant to a self-effectuating order, regarding future acts, without first providing the individual with the benefit of a hearing.

Analysis: Wife argued that incarceration was proper based on a court officers' affidavit, because they previously had a contempt hearing wherein Husband had been found in contempt, and the future payments were the mechanism in which Husband was purging his contempt. The court however, determined that the May 1, 2001 order was self-effectuating as to future acts because Husband was ordered to be incarcerated for his failure to pay the entire $1,000.00 a month. The language of the order was pertinent, as it provided that $900.00 of the monthly payment was for Husband's ongoing child support obligation, and only $100.00 was to purge for his previous finding of contempt. Accordingly it was unlawful for Husband to be incarcerated without a hearing, and the trial court should have granted his motion to set aside the incarceration order.

Torgesen v. Torgesen, 274 Ga. App. 298, 617 S.E.2d 223 (2005)
Facts: Husband and wife entered into a settlement agreement as part of their divorce. It provided in part that husband would receive the marital residence free and clear from any claim from wife, that husband had to refinance within 12 months of the date of agreement to remove wife's name from the mortgage, and then once she was removed as a party to a debt, then she would execute a quitclaim deed relinquishing her interest. Six months after execution of the agreement, husband died. After his death, the estate's administrator contacted the wife to sign an assumption and release of liability document. Wife refused and sued estate claiming that since husband did not refinance within 12 months, she was not required to sign the quitclaim, and therefore retained an undivided half interest in the property. Trial court agreed with wife. Administrators of estate appealed.

Issue: Did wife maintain an undivided half interest in the property since late husband's estate had not refinanced and therefore taken her off the debt?

Holding: No, the Court of Appeals reversed finding that time was not of the essence of the contract and so the estate had a reasonable time to perform.

Analysis: Pursuant to O.C.G.A. § 13-2-2(9), unless a contract expressly states otherwise, time is not generally of the essence of a contract. The court held that the question of whether the estate performed within a reasonable time was to be determined by the trier of fact. Moreover, the estate's act of paying the mortgage in full substantially complied with the agreement because the wife was no longer responsible for the debt. As a result, failure to refinance the loan was not a material breach of the agreement.

Waters v. Waters, 280 Ga. 477, 629 S.E.2d 233 (2006)
Facts: Husband and wife were native New Zealanders who lived in Georgia. They were married in 1984. Together, husband and wife owned and operated a home improvement business through which they purchased, renovated and sold (or rented) real estate. Wife returned to New Zealand in 2001 and, shortly thereafter, informed husband that she met someone else and no longer wished to be married. Husband filed for divorce, and upon conclusion of the trial, the court entered a decree of divorce and equitably divided the parties' marital assets and liabilities, including a 75% of aggregate cash surrender value award of husband's whole life insurance policies to wife. Husband filed a motion for new trial. The motion was denied and he appealed.

Issue: Did the trial court err and fail to make specific findings as to whether a particular category of property was a marital or non-marital asset?

Holding: No, the trial court did classify the parties' assets as either marital or non-marital before dividing the marital property on an equitable basis. Additionally, the court found that: the fact that trial court awarded real property and personalty located in New Zealand to wife, and real property, personalty, and business located in Georgia to husband, did not establish that trial court failed to divide marital assets equitably; the fact that wife was awarded 75 percent of aggregate cash surrender value of husband's whole life insurance policies did not render division of marital assets inequitable;

the loan to husband's mother at stated rate of interest, with sum to be repaid from mother's estate on her death, was husband's personal property; and trial court did consider evidence of wife's adulterous conduct in making equitable distribution of marital property.

Analysis: An equitable division of marital property does not necessarily mean an equal division. The purpose behind the doctrine of equitable division of marital property is to assure that property accumulated during the marriage be fairly distributed between the parties. Each spouse is entitled to an allocation of the marital property based upon his or her respective equitable interest therein. Thus, an award is not erroneous simply because one party receives a seemingly greater share of the marital property.

ATTORNEY'S FEES

Nguyen v. Dinh, 278 Ga. 887, 608 S.E.2d 211 (2005)
Facts: The trial court, after a bench trial, entered a final decree which awarded Wife custody of the minor chid and permanently restrained Husband from any contact with Wife that was unconnected with the child. Husband applied for a discretionary appeal and the Court granted it in accordance with the pilot project.

Issues: (1) Whether the trial court abused its discretion in awarding custody to Wife. (2) Whether the trial court erred in ordering Husband to pay fees of the Guardian ad Litem and psychologist. (3) Whether the trial court erred in granting Wife a permanent restraining order in the final decree when the temporary family violence protective order had expired.

Holdings: (1) The trial court did not err in awarding custody to Wife. (2) Husband's status as the losing party on a contested custody issue was sufficient to authorize discretionary assessment of costs associated with the custody issue. (3) The trial court did not err in entering a permanent restraining order in the final decree.

Analysis: (1) Trial courts are vested with the broad discretion in determining which parent can best serve the interest of the child. The evidence in this case included a Guardian ad Litem report and the testimony of a psychologist who both recommended Wife to have custody.

(2) Under O.C.G.A.§9-11-54(d) if no statutory provision exists to address costs, then the court may award costs to the prevailing party. The court reasoned that such provision applies to divorce cases, and thus Husband's losing status on the custody matter authorized the trial court to order him to pay costs associated with the issue.

(3) O.C.G.A. § 19-13-4 (c) provides that "a protective order may remain in effect for as long as a year, but such temporary order can be converted into a permanent one upon the motion of a petitioner and notice to the respondent after a hearing." In the instant case Wife filed her request for a permanent order during the period when the temporary order was still in effect. Husband received notice of her request and relevant evidence was submitted at trial without objection. Therefore, under those circumstances the trial court did not err.

Thornton v. Intveldt, 272 Ga. App. 906, 614 S.E.2d 175 (2005)
Facts: Mother filed action for modification of custody and modification of child support against father. After parties settled majority of issues through mediation, the Superior Court, Cobb County, resolved issue of location of pick-up and return of children in favor of mother, found that neither party would be responsible for payment of child support to the other, and ordered father to pay mother attorney fees in the amount of $3,000.00. Father appealed.

Issue: Are attorney fees authorized in an action seeking change of custody by non-custodial parent, even where child support was also sought?

Holding: No, attorney fees aren't authorized in an action seeking change of custody by non-custodial parent, even where child support was also sought. Trial court was reversed.

Analysis: It is well settled that even where child support is sought, attorney fees are not authorized in an action seeking change of custody by the non-custodial parent.

Waits v. Waits, 2006 WL 1827824

Facts: The parties were divorced in 1999. Wife filed a contempt action against Husband for his failure to pay property taxes for the marital residence. Husband then filed an action seeking a declaratory judgment to determine whether Wife had cohabitated with her fiancé, which would have terminated Husband's obligation to pay the mortgage and taxes on the residence. The actions were consolidated and a trial was held. The jury determined that Wife did not cohabitate with her fiancé and Wife requested attorneys's frees. After a hearing on Wife's request, the trial court awarded attorney's fees to Wife in the amount of $25,271.53. The trial court did not cite to a statute, but stated that Wife was the prevailing party in both actions and was entitled to attorney's fees.

Issue: Whether the trial court erred in awarding Wife attorney's fees in the contempt and declaratory judgment actions.

Holding: The trial court was authorized to award Wife attorney's fees in defending the declaratory judgment action because it was "part and parcel" to the contempt action.

Analysis: Husband argued that Wife was not entitled to attorney's fees because the lawsuit was strictly a declaratory judgment action in which attorney fees were not authorized. The Court of Appeals agreed that attorney fees would not have been authorized if premised solely upon the declaratory judgment action. However the Court determined that attorney fees was appropriate under O.C.G.A.§ 9-6-2(a)(1), which authorizes the award of attorney fees as a part of the expenses of litigation at any time during the pendency of the litigation, in actions for contempt arising out of a divorce and alimony case, including, but not limited to contempt of court orders involving property division. The Court reasoned that it was appropriate to consider Wife's expenses in defending the declaratory judgment action as "part and parcel" of the contempt action because the two actions were linked by the same issue of cohabitation, which was essential to both actions.

Williams v. Cooper, 280 Ga. 145, 625 S.E. 2d 754 (2006)

Facts: Wife filed a motion for contempt against Husband for his failure to pay support. She sought attorney's fees incurred "as a result of [Husband's] willful failure and refusal to comply with a support order" and she further asked to "be awarded costs and expenses of litigation including reasonable attorneys' fees that she incurred as a result of bringing" her contempt motion. After a hearing the trial court found Husband in contempt and reserved the question of attorney fees. After a hearing on the attorney's fees, wherein Husband's attorney contested Wife's argument pertaining to attorney's fees, Husband was ordered to pay Wife $500.00 in attorney's fees under O.C.G.A. §

19-6-2, and Husband's attorney was ordered to pay wife $5,278.53 in attorney fees under O.C.G.A.§ 9-15-14(b) due to Husband's attorney's conduct of expanding the scope of the litigation, pursuing defenses lacking substantial justification, and delaying the contempt hearing.

Issues: (1)Whether attorney fees can be awarded pursuant to O.C.G.A. §9-15-14(b) without any motion for fees under said statute. (2) Whether notice of a hearing on attorney fees pursuant to O.C.G.A. § 19-6-2 is sufficient notice for an award of attorney fees under O.C.G.A.§ 9-15-14(b).

Holdings: (1) and (2) Attorney fees cannot be awarded pursuant to O.C.G.A. §9-15-14(b) without proper notice that an award of attorney fees under said statute is under consideration.

Analysis: (1) O.C.G.A. §9-15-14(b) provides that an award of attorney fees may be based "upon the motion of any party or the court itself. . ." However, in this case, no motion was filed for fees under this statute, and the court did not mention that it was considering an award of fees under this statute. The notice of hearing contained no reference to §9-15-14(b) or to the possibility that Husband's attorney could be subjected to attorney fees for her conduct. Because the trial court acted *sua sponte* in making the award, and gave no notice that such an award was under consideration, it was the equivalent of the court failing to make its own motion with respect to fees. Therefore, the attorney did not receive adequate notice and could not be ordered to pay attorney's fees.

(2) Additionally, notice for a hearing for attorney fees under O.C.G.A. § 19-6-2 does not provide notice for an award of attorney fees under O.C.G.A. §9-15-14(b) because the basis for the award of attorney fees is different under both statutes. O.C.G.A. § 19-6-2 depends on the financial circumstances of the parties, while O.C.G.A. §9-15-14(b) considers the conduct of the party against whom an award is sought, as well as the conduct of that party's attorney and the impact of that conduct on the attorney fees incurred by the opposing party.

PROCEDURAL MATTERS

Anderson v. Deas, 2006 WL 1493627

Facts: Plaintiff charged Defendant with committing acts of family violence by placing harassing and intimidating telephone calls to her in Georgia from another state. The Court of Appeals held that because the acts would not have occurred in the state of Georgia, Plaintiff's charges did not give the Superior Court personal jurisdiction over Defendant under the Family Violence Act. The Supreme Court granted certiorari and remanded the case to the Court of Appeals for reconsideration in light of its holding in *Innovative Clinical & Consulting Svcs., LLC v. First Nat. Bank*, 229 Ga. 672, 2005.

Issue: Whether daily telephone calls made by a non-resident and placed to an individual in Georgia to allegedly terrorize and stalk her were sufficient to show that the caller was engaging in a "persistent course of conduct" in this state under paragraph (3) of the Georgia Long Arm Statute codified at O.C.G.A. § 9-10-91.

Holding: Daily telephone calls placed to a Georgia resident made by a nonresident did not constitute engaging in any conduct within the state of Georgia under paragraph (3) of the Georgia Long Arm Statute.

Analysis: The family violence act provides superior courts of Georgia jurisdiction over a nonresident charged with the commission of an act of family violence where the act meets the elements of personal jurisdiction under paragraphs (2) or (3) of Georgia's Long Arm Statute. Paragraph (2) authorizes a court to exercise jurisdiction if the nonresident commits a tortious act or omission within this state. Paragraph (3) allows a court to exercise jurisdiction if the nonresident "commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or services rendered in this state." The Supreme Court's decision in Innovative Clinical followed the approach that when a person commits a tortious act outside of the state causing injury inside the state, then paragraph (3) of the long arm statute applies. The Court of Appeals rationaled that the conduct giving rise to the offense occurs at the place where the maker of the call speaks into the telephone, rather then where the listener receives the call. Thus, the conduct did not take place within the state of Georgia and the Superior Court did not have jurisdiction over the non-resident under Georgia's Long Arm Statute.

Bayless v. Bayless, 280 Ga. 153, 625 S.E.2d 741 (2006)

Facts: Parties were married for more than 20 years. They have two children, one of whom is still a minor. Wife sued for divorce on November 13, 2003. During the course of the divorce proceedings, husband did not personally appear for a rule nisi hearing on August 19, 2004, although the hearing was, inter alia, on his "Motion to Withdraw Funds for Business Development and Expenses." Husband also completely failed to comply with an August 26, 2004 order compelling discovery, necessitating the entry of a second order on September 24, 2004, directing that he comply with wife's discovery requests. The record discloses that husband never fully complied with the discovery requests in a timely manner. On November 22, 2004, the trial court entered a "Third Supplemental

Order," which provided in part that the parties were to attend mediation on December 1, 2004, and that the trial was specially set for December 9, 2004 at 9:00 a.m. Even though the order stated unequivocally that "[t]he parties are ordered to attend mediation," husband did not personally appear for the scheduled mediation; instead, an unsuccessful attempt was made to conduct the mediation via long distance telephone conference. Husband did not personally appear at the specially set final hearing on December 9, 2004, although his attorney was present. The attorney asked for a continuance, which was denied. The trial court rejected husband's claim that a Colorado snow storm prevented his timely arrival in Georgia. The trial court found that husband's attorney was without sufficient information to determine the reason for his client's failure or inability to appear and proceeded with a final, non-jury trial without his presence. Because of husband's pattern of ignoring the trial court's directives and failed personal attendance at court proceedings, the trial court struck his answer and counterclaim, and prevented his attorney from tendering evidence at the final hearing. However, his attorney was permitted to cross-examine the wife and challenge her evidence, and to present argument on husband's behalf. The trial court entered its final judgment and decree of divorce on February 4, 2005, awarding, inter alia, child support, lump sum alimony and attorney fees to wife, and making an equitable division of the marital property. Husband moved for a new trial, arguing that the striking of his pleadings and consequent prevention of the presentation of evidence on his behalf was error and that he should have been allowed to offer expert evidence.

Issue: Is a court properly acting within its authority when it decides to strike a spouse's answer and counterclaim, and bar presentation of that spouse's evidence at final hearing, as a sanction in divorce proceeding?

Holding: Yes. The Georgia Supreme Court held that trial court was acting within its authority when it decided to strike husband's answer and counterclaim, and bar presentation of husband's evidence at final hearing, as a sanction in divorce proceeding.

Analysis: It is certainly true, as husband notes, that Uniform Superior Court Rule 10.4 does not require that a party appear in court or authorize the trial court to impose sanctions for a party's failure to do so. However, the trial court may impose a harsh sanction, including the striking of defensive pleadings and the barring of the introduction of supporting evidence, because of the inherent power of the trial court who is charged with the efficient clearing of cases upon the court's docket. Further, O.C.G.A. § 15-1-3 provides that every court has the power to compel obedience to its orders and to control the conduct of everyone connected with a judicial proceeding before that court. Moreover, the trial court did not grant default judgment in favor of wife, even though trial court struck husband's answer and counterclaim and prevented husband's attorney from tendering evidence at final hearing, since the trial court tried the case and allowed husband's counsel to challenge evidence presented by the wife.

Ciraldo v. Ciraldo, 280 Ga. 602, 631 S.E.2d 640 (2006)

Facts: Husband filed for divorce on November 17, 2003. The parties submitted certain issues to arbitration, wherein an arbitration hearing was held on September 27, 2004. The trial court issued its final judgment and decree of divorce on January 13, 2005, which approved and incorporated the

Arbitration Award into the Final Judgment and Decree. However, at the time the trial court issued its order, the Arbitration Award had not been issued to the parties or filed with the court. Husband filed an application to vacate the arbitration award under O.C.G.A. § 9-9-13. The trial court denied the application.

Issues: (1) Whether the trial court erred by incorporating a then non-existent arbitration award into the final judgment. (2) Whether the trial court erred by denying Husband's application to vacate the arbitration award. (3) Whether an arbitration award delivered to the parties after entry of the final judgment and decree had any effect.

Holdings: (1) A non-existent arbitration award could not be incorporated into a final judgment and decree. (2) The time for seeking a discretionary appeal from the arbitration award began to run upon the issuance of the trial court's order prematurely confirming such arbitration award. (3) An arbitration award delivered to the parties after the entry of the Final Judgment and Decree of Divorce was of no effect.

Analysis: (1) The Court determined that an arbitration award that has not been filed with the court does not exist. The Court based its rationale on the concept that an incomplete and unenforceable settlement agreement cannot be accepted and incorporated into a decree of divorce because said agreement does not exist. The Court cited to *Moss v. Moss* 265 Ga. 802, 463 S.E. 2d (1995); and *DeGarmo v. DeGarmo*, 269 Ga. 480(1), 499 S.E. 2d 317 (1998). Similarly, a court cannot accept and incorporate an arbitration award that does not exist.

(2)(3) The Court based its holding on O.C.G.A. §9-9-15, which provides that an arbitration award becomes a judgment of the court when a trial court issues an order confirming such award. The Court further noted that after the trial court entered its judgment, an arbitrator cannot alter that judgment regardless of how erroneous that judgment may have been.

Francis v. Francis, 279 Ga. 248, 611 S.E.2d 45 (2005)

Facts: At trial, husband raised an objection for the first time to psychological evaluations which had already occurred and had been ordered one and half years prior. Husband based his objection on the fact the psychologist had previously consulted with the wife. The trial court overruled his objection, and husband appealed.

Issue: Did husband waive his right to object to the appointment of the psychologist by waiting to raise the issue until final trial?

Holding: Yes, the trial court correctly held that husband waived that ground of objection to the psychologist's appointment by failing to raise it until trial.

Analysis: The failure to make an objection which is both timely and specific is treated as a waiver for purposes of appeal.

Fuller v. Fuller, 279 Ga. 805, 621 S.E.2d 419 (2005)
Facts: In the parties divorce proceeding, temporary orders were issued. Wife moved for contempt against Husband for his failure to abide by the temporary order. After a final hearing, the trial court entered a final judgment decree of divorce and also entered an order denying Wife's contempt motion. At trial each party submitted proposed orders. After reviewing the submitted proposed orders, the trial court trial court had instructed Husband's counsel to revise the order and include certain provisions from Wife's proposed order. The trial court then adopted Husband's revised proposed order. Wife's contempt action was for Husband's failure to pay her $10,000.00 under the temporary order. The trial court found in its order denying Wife's contempt motion that Wife had converted for her own use two checks sent to Husband in the total amount of $7,636.50 and that she increased the parties' equity line to $5,000.00 without Husband's consent.

Issues: (1) Whether the trial court erred in engaging in an ex-parte conversation with Husband's attorney and then entering orders pursuant to that communication. (2) Whether the trial court erred in denying Wife's Motion for Contempt based on a setoff of funds.

Holdings: (1) The trial court did not err in adopting Husband's orders after engaging in ex- parte communication because the communication did not harm Wife. (2) The trial court did not err in denying Wife's Motion for Contempt based on a setoff of funds that Wife converted for her own use against the funds that Husband was required to pay under the temporary order.

Analysis: (1) Although the ex- parte communications between the trial court and Husband's attorney may have violated Georgia Rules of Professional Conduct and Canon 3 B (7) of the Code of Judicial Conduct, the court had already made its decision with respect to the divorce case and had simply directed Husband's attorney to revise the order to include certain provisions that were beneficial to Wife. Therefore, the ex-parte communications did not harm Wife. Also the Supreme Court noted that the trial court did not abdicate its adjudicative function and rather played an active and independent role when considering both proposed orders.

(2) Under Georgia Law a spouse obligated to pay support is not entitled to a set off. However the widely accepted exception to the general rule is that the obligor "may be given credit if equity would so dictate under the particular circumstances involved, provided that such an allowance would not do an injustice to the obligee." The Supreme Court noted that the trial court's finding that Wife's action of appropriating funds for her own use constituted a setoff against Husband's obligation to pay her $10,000.00, fell well within the equitable exception to the prohibition against set-offs of support obligation.

Groover v. Groover, 279 Ga. 507, 614 S.E.2d 50 (2005)
Facts: Husband filed for divorce. After a jury trial, the Superior Court entered judgment on jury verdict that awarded wife alimony and the marital residence, awarded husband land, trucks, and farm equipment, and divided the marital debt and held husband responsible for $91,000 in marital debt and wife responsible for $6,500 in marital debt. The trial court awarded Wife $50,000 in attorney's fees. Husband appealed for a new trial, contending (in relevant part) that it was error to allow Wife to testify regarding her attorney's fees in front of the jury.

Issue: Is it erroneous for a trial court to permit a party to testify about attorney's fees in front of the jury in a divorce trial?

Holding: The trial court erred in allowing wife to testify regarding her attorney's fees in front of the jury but the error did not warrant a new divorce trial.

Analysis: Because the award of attorney's fees is a matter for the trial court and not the jury, the Georgia Supreme Court agreed that it is error to permit a party to testify about attorney's fees in front of the jury. However, they were unable to conclude from a review of the lengthy record that the limited testimony about fees warranted the grant of a new trial.

Searcy v. Searcy, 280 Ga. 311, 627 S.E.2d 572 (2006)

Facts: Wife filed divorce action and sought to join as defendants estates of husband's parents. The trial court added the co-executors of the estates, who were the husband's brothers, as defendants and ruled that portion of husband's undivided interest in estates could be awarded to wife as alimony. Husband and co-executors filed petitions for interlocutory review, which were granted. Affirmed in part, reversed in part.

Issues: (1) Can a portion of a spouse's undivided interest in estates of his or her late parents be awarded as alimony? (2) Could the co-executors of husband's parents estates be joined as co-defendants?

Holdings: (1) Yes, a portion of a spouse's undivided interest in estates of his or her late parents be awarded as alimony when the parent's wills awarded the inheriting spouse an interest in the estate, and the inheriting spouse's right to the interest in estates was a chose in action and assignable. (2) No, wife could not join as defendants in the divorce action the co-executors of estates of husband's parents, although wife sought spousal support, and husband had one-third undivided interest in estates since there was no evidence that any marital property was in either estate or that husband had co-mingled marital assets with property of estates, and an absence of the co-executors would not render relief afforded wife partial or hollow since wife would obtain interest as full and complete as that held by husband.

Analysis: If there had instead been evidence or issues of fraud, the result would likely have been different, and the court probably would have been correct to allow the joinder of the co-executors as co-defendants.

Walker v. Walker, 631 S.E.2d 697 (2006)

Facts: Wife filed a complaint for divorce to terminate the parties' five year marriage. Husband, acting pro-se, timely filed his answer and counterclaim. He also filed a written request for a jury

trial. On the day prior to trial Husband and Wife's attorney had entered into settlement negotiations and had reached a verbal agreement to engage in mediation. They had agreed to meet at 8:30 a.m. on the day of trial to review a proposed consent order. The case was scheduled for trial at 9:00 a.m. on April 18, 2005. Wife and her attorney appeared, but Husband failed to appear. The trial court held a bench trial at 9:30 a.m. even though Husband still had not appeared. The trial court heard evidence from Wife and made a final ruling. Husband appeared in court at 9:45 a.m. and was told that his case had already been called and heard. Husband at no time contacted the court or Wife's attorney indicating that he would be late or requesting a continuance. Husband requested a new trial, or moved to set aside the judgment. The trial court denied his requests and Husband filed an application for a discretionary appeal.

Upon first review the Supreme Court determined that the trial court did not err in conducting a bench trial after a demand for a jury trial had been timely filed. The Court cited to *Matthews v. Matthews*, 268 Ga. 863 (1998) for the proposition that a party in a divorce action can by his or her voluntary actions, impliedly waive a demand for a jury trial. Furthermore in citing to *Bonner v. Smith,* 226 Ga. App.3 (1997), the Court noted that the right to a jury trial can be waived "by conduct indicative of the fact that the right is not asserted." The Court found that Husband's right to a jury trial had been implicitly waived due to his conduct of failing to appear, coupled with the fact that he received notice of the final hearing and had engaged in discussions with Wife's attorney on the eve of trial knowing that the case was scheduled for trial the following morning. Upon reconsideration, the Supreme Court modified its holding.

Issue: Whether the trial court erred in refusing to vacate a decree of divorce after conducting a bench trial despite the fact that a demand for jury trial had been timely filed.

Holding: Yes. The trial court erred in refusing to vacate the decree and conducting a bench trial, after a demand for jury trial had been timely filed.

Analysis: Upon reconsideration, the Supreme Court of Georgia reasoned that the Constitution of Georgia 1983, Art. I § I, Para. XI provides civil litigants the right to a trial by jury. Such right shall be preserved and the waiver of that right is carefully controlled by statute, O.C.G.A. § 9-11-39(a). The Court acknowledged that a litigants actions can impliedly waive a jury demand, however, Husband's actions in the instant case did no rise to the level of a waiver. The Court distinguished the instant case from *Matthews v. Matthews* 268 Ga. 863 (1998) and found that Husband arriving 45 minutes late in answering a calendar call did not warrant a waiver of a jury trial. Accordingly, the Court found that the trial court erred in refusing to set aside the judgment decree of divorce.

Wilson v. Wilson, 279 Ga. 302, 612 S.E.2d 797 (2005)

Facts: This was the second appearance of this case in the Supreme Court. While an appeal from a Spalding County order was pending, appellant wife filed an action to modify custody in Fulton County, which was appellee husband's new county of residence, and he counterclaimed. Both parties

discussed the effect of the pending appeal during their first appearance in Fulton Superior Court. The Fulton County trial court determined that the custody modification hearing could continue because appellant wife sought to reverse only financial elements of the initial judgment. Prior to any decision by the Fulton Superior Court on the motion to modify custody, however, the Supreme reversed the Spalding County judgment on the ground that the trial court committed reversible error in refusing to allow appellant's counsel to make a closing argument. After the filing of the remittitur, Spalding County reinstated the divorce case. Post reversal, appellant filed a motion to dismiss the Fulton County action claiming that total reversal in the first appeal returned jurisdiction to the Spalding Superior Court and left no final judgment for modification by the Fulton Superior Court. The Fulton Superior Court ruled that it retained jurisdiction to modify matters not specifically enumerated in the original appeal. Wife thereafter filed an application for interlocutory appeal which was granted to determine whether the Fulton Superior Court erred in refusing to dismiss the modification petition after reversal of the final judgment of the Spalding Superior Court.

Issue: Did the trial court err in refusing to dismiss the child custody modification proceeding?

Holding: Yes, the trial court erred in refusing to dismiss the child custody modification proceeding.

Analysis: The trial court erred in refusing to dismiss wife's child custody modification proceeding because a divorce judgment rendered by another county is vacated on appeal and the case is remanded to that county for trial de novo, even when a trial court claims it retains jurisdiction over issues not specifically enumerated in the appeal. Wife was entitled to new trial on all issues on remand as the divorce court's refusal to allow her to make closing argument denied her rights as to all issues being tried.

DEBTS AND BANKRUPTCY

Benton v. Benton, 280 Ga. 468, 629 S.E.2d 204 (2006)

Facts: Husband filed for divorce on May 13, 2003. Thirteen days later, wife filed an answer and counterclaim, in which she alleged that she was totally dependent upon Husband for support. In February 2005, while the divorce action was pending, wife filed a voluntary Chapter 7 bankruptcy petition. In connection with her bankruptcy action, she filed a "Statement of Financial Affairs," which listed the pending divorce case as one of three suits to which she was or had been a party in the preceding year. However, in "Schedule B-Personal Property," which asked her to list alimony, maintenance, support, and property settlements to which she is or may be entitled, she checked "None." Wife was granted a discharge by the bankruptcy court on May 19, 2005. On July 11, 2005, husband moved for partial summary judgment in the divorce action on wife's claims for property division and alimony, including attorney fees. His motion was based on the doctrine of federal judicial estoppel; he asserted that wife's failure to disclose to the bankruptcy court that she might be entitled to support and property in her pending divorce case precluded her from pursuing such claims in the divorce action. Wife responded that her claims for relief in the divorce were inchoate, choses in action, and therefore, she had not made an omission in her bankruptcy petition, but had made an honest and complete disclosure of her financial condition. Following a hearing in the matter, the trial court denied husband partial summary judgment on October 3, 2005, after expressly finding a genuine issue as to one or more material facts. On October 28, 2005, wife moved the bankruptcy court to reopen her case in order to allow her to amend her bankruptcy Schedule B. On December 6, 2005, after notice to all parties in interest and no objections having been filed, the bankruptcy court entered an order granting wife's motion to reopen her case and allow her to amend Schedule B. On or about December 16, 2005, she filed an "Amended Schedule B-Personal Property," listing the pending divorce action and the possibility that she might receive alimony and other support.

Issue: Did trial court err by not applying doctrine of federal judicial estoppel to bar wife from making claims for support and marital property in a divorce proceeding when wife did not disclose the divorce proceeding in her bankruptcy petition?

Holding: No, the trial court did not abuse its discretion when it refused to apply doctrine of federal judicial estoppel to bar wife from making claims for support and marital property in a divorce proceeding. The court also held that genuine issue of fact as to whether wife failed to disclose, in her federal bankruptcy proceeding, divorce proceedings and possibility that she might receive alimony and other support, precluded entry of partial summary judgment.

Analysis: A debtor filing for bankruptcy under Chapter 7 is not under any statutory duty to amend his or her schedule of assets, but, as in this case, may voluntarily amend the schedule to avoid consequences such as judicial estoppel. This equitable doctrine is invoked by a court at its discretion, and intended to prevent abuse of the judicial process. The circumstances under which it is appropriate are not reduced to any general formula or rule.

McGahee v. Rogers, 2006 WL 1919895

Facts: The parties were divorced in 2001 pursuant to a settlement agreement, which was incorporated into a final decree of divorce. Pursuant to the decree, neither party received alimony, however each party was designated to pay certain joint marital debts. The decree specified that each party would assume the specific obligation and would indemnify and hold the other harmless for the debts that he or she assumed. Two debts Husband assumed included one owed to the IRS, and another for a loan secured by a car to which he took title and possession. After the divorce was final, Husband filed for Chapter 7 Bankruptcy and the two debts were discharged as to him. Thereafter, the IRS and the holder of the note for the debt secured by the vehicle sought payment from Wife. Wife thereafter filed a criminal contempt action against Husband for his failure to pay the two joint marital debts. The trial court found that Husband was in violation of the decree, but that it did not have the authority to hold him in criminal contempt because the debts were discharged in bankruptcy. Wife filed an application for discretionary appeal. The Supreme Court of Georgia reversed the trial court's judgment and remanded the case. Upon remand, Wife amended her motion to have Husband held in civil contempt, and she also sought an award of attorney's fees including all previous hearings, the appeal to the Supreme Court and all hearings subsequent to the remand. The trial court determined that the debts and the 'hold harmless" language in the agreement were in the nature of support and were not dischargeable in bankruptcy. Husband was found in contempt and ordered to pay attorney's fees. Husband filed an application for discretionary appeal.

Issues: Whether the trial court erred (1) in finding the two joint marital debts were not dischargeable in bankruptcy, and (2) in ordering Husband to pay attorney's fees.

Holdings: (1) The trial court erred in finding that the debts were in the nature of alimony, maintenance or support and thus were not dischargeable in bankruptcy. (2) The trial court erred in ordering Husband to pay attorney's fees pursuant to O.C.G.A. §9-15-14(b) and O.C.G.A. § 9-6-2.

Analysis: (1) The Court determined that the parties' original intent, not the subsequent results of a default, is the controlling factor in determining whether debts are considered as support or alimony. The Court reasoned that the non-debtor spouse will most likely always suffer financially when the debtor spouse defaults on his or her obligation under the divorce decree. When the intent of the parties is unclear in the agreement, the court should consider certain facts, such as need, the absence of support payments in the decree, the presence of minor children in the marriage, and a disparity of income between the parties. In this case, the decree did not provide for the payment or receipt of alimony, and Wife testified that at the time the settlement was reached she was not in need of support. Furthermore, the Court noted that the underlying nature of the debts themselves does not have any legal consequence, and rather the controlling issue is whether the parties intended the assumption of the debt obligation to be an element of support. Accordingly, the Court determined that the allocation of the marital debts was in the nature of a property settlement, rather than alimony and such debts were dischargeable in bankruptcy.

(2) The Court did not find any evidence of improper conduct on the part of Husband to warrant a finding of attorney's fees under O.C.G.A. § 9-15-14(b). Furthermore, O.C.G.A. § 19-6-2 provides for an award of attorney's fees where a finding of contempt is authorized. In this case because the Supreme Court determined that Husband was not in violation of the decree, he was not in contempt. Therefore an award of attorney's fees based upon a finding of contempt was not authorized.

DIVISION OF PROPERTY

Baker v. Baker, 280 Ga. 299, 627 S.E.2d 26(2006)

Facts: Wife brought a divorce action against husband. One of the issues at trial was whether the proceeds from a $170,000 check, which wife received from Wilks Investments, LLP, a partnership formed by her parents, constituted a gift or a loan. Wife endorsed the check and gave it to Husband, who placed it into a stock trading account which thereafter lost most of its value. After a jury trial, the trial court entered a final divorce decree which provided, in relevant part, the following: "The jury having announced its determination that the $170,000 alleged marital debt to Wilks Investments was not a loan, but a gift, neither party is ordered to pay said [alleged] debt." Wife applied for a discretionary appeal, which was granted.

Issue: Does a check for $170,000 that former wife had received from account of partnership of her parents constitute a gift, rather than a loan, for purposes of division of marital debts?

Holding: Yes, it constitutes a gift where evidence supports a jury's finding that a wife had received a gift from the account of a partnership of her parents, as opposed to a loan, for purposes of division of marital debts upon divorce. A valid gift must meet the requirements of § O.C.G.A 44-5-80. Pursuant to that statute, "the donor must intend to give the gift, the donee must accept the gift, and the gift must be delivered."

Analysis: Here, the circumstances of the transaction gave rise to a rebuttable presumption of a gift, and such presumption was itself sufficient to support jury's finding with respect to the $170,000, and the presumption was corroborated by complete absence of promissory note or a deed to secure debt, and by evidence that parties did not, and were never required to, make repayments on any of the alleged principal.

Brock v. Brock, 279 Ga. 119, 610 S.E.2d 29 (2005)

Facts: After a bench trial the court entered a final judgment and decree of divorce awarding joint legal custody of the three children with Husband being the primary physical custodian. Wife filed an application for discretionary appeal challenging custody and the court's division of property.

Issues: Wife asserted three assignments of error: (1) that the trial court erred in finding that the conveyance of the marital residence from Husband to Wife resulted in an implied resulting trust; (2) that the trial court erred in classifying a $400,000.00 payment from Husband's employer to Husband as a gift; and (3) that the trial court erred in awarding custody to Husband.

Holdings: (1) The trial court erred in finding that Wife held the marital residence in trust for Husband. (2) Husband failed to satisfy his burden of proving that the $400,000.00 payment was a gift. (3) The aware of primary physical custody of the minor children to Husband was not an abuse of discretion.

Analysis: (1) O.C.G.A. § 53-12-93 (3) provides that an implied resulting trust may arise under three different circumstances, a)when an express trust is created but fails for any reason; b) when a trust is fully performed without exhausting all of the trust property; or c) a purchase money resulting trust is established. In this case no evidence was presented to show that an express trust had been created or that a trust had been fully performed without exhausting all of the trust property. The Supreme Court determined that in order for Husband to prove that his conveyance of the marital home to Wife was a resulting trust, he would have had to overcome the presumption under Georgia Law that the conveyance was a gift, as Georgia Law under O.C.G.A. § 53-12-92(c) provides that a gift is presumed if payor and transferee are husband and wife. To prove otherwise, Husband needed to show by clear and convincing evidence that a resulting trust was contemplated by both parties by way of an understanding or agreement. The record did not contain any such evidence, and accordingly, the Court found that the trial court erred in finding that Wife held the property in trust for Husband.

(2) Under Georgia law, the burden of proving a gift is on the person claiming it to be a gift. The Court rationaled that Husband did not meet this burden, as the overwhelming evidence supported that the money was not intended as a gift. The facts were undisputed that the $400,000.00 to Husband was for compensation from the corporation; the corporation prepared a Form 1099 identifying said amount as compensation; and the corporation did not pay a gift tax on said amount.

(3) The Court stated that it would not interfere with a custody determination unless the evidence shows that the trial court abused its discretion. In this case the record revealed that both parents were fit and proper parents and each had a loving relationship with the children. Therefore the trial court did not abuse its discretion in awarding custody to Husband.

Harmon v. Harmon, 280 Ga. 118, 622 S.E.2d 336 (2005)

Facts: Husband filed an appeal challenging the trial court's division of property in their divorce action.

Issue/Holding/Analysis**:** The Supreme Court determined that the trial court did not err in its property division award. The court rationaled that while each spouse is entitled to an allocation of the marital property based upon his or her respective equitable interests, an award is not erroneous because one party receives a greater share than the other. An equitable division of marital property does not necessarily mean an equal division.

Lerch v. Lerch, 278 Ga. 885, 608 S.E.2d 223 (2005)

Facts: The parties were married in 1994 and divorced in 2004. During the marriage the couple lived in a home that Husband had purchased prior to the marriage and according to the parties' prenuptial agreement constituted his separate property. In 1999 Husband executed and recorded a gift deed transferring ownership in the home to himself and Wife as tenants in common with the right of

survivorship. The trial court determined that as a result of the gift, half of the house was marital property and the other half remained Husband's separate property.

Issue: Whether the trial court erred in treating only half of the marital residence as marital property.

Holding: The trial court was required to find the entire marital residence as marital property.

Analysis: When a gift is given to the marital couple the property becomes marital property absent evidence to the contrary from the donor. In this case by executing the deed, Husband manifested his intent to transform his own property into marital property, and thus each party owned an undivided one-half interest in the property. Accordingly the Court reversed the trial court's decision.

Rabek v. Kellum, 279 Ga. 709, 620 S.E.2d 387 (2005)

Facts: After 25 years of a common law marriage, Wife brought a divorce action, and the parties had a bench trial on the sole issue of the division of the their retirement assets. Husband as an employee of the Federal Aviation Commission participates in the Federal Civil Service Retirement System pension plan, and by virtue of his participation in the plan, he does not participate in social security. Wife, is employed by a private employer and participates in a pension plan and in the social security system. The trial court entered a Final Judgment and Decree of Divorce providing for an equal division of the retirement assets, exclusive of Wife's social security retirement benefits. Husband filed an application to appeal from the final divorce decree. The Supreme Court of Georgia granted the appeal pursuant to the Court's pilot project.

Issue: Husband asserted that the trial court erred when it failed to deduct an amount in lieu of social security benefits from the value of his civil service pension when determining the equitable division of the marital retirement accounts.

Holding: The trial court did not err in its division of the marital retirement accounts.

Analysis: Unlike a pension, social security retirement benefits are precluded by federal statute from consideration by state courts as marital property and are not subject to equitable division. Husband relied on a Pennsylvania case, which deducted "hypothetical" social security benefits from an employee's civil service pension that was equivalent to the amount that would have accrued under social security during the marriage. The court would not apply the Pennsylvania case to the case at hand. Whether a portion of a civil service pension benefit plan should be exempted from marital property as imputed social security benefits for purposes of an equitable distribution of marital retirement accounts is a question of first impression that the Court declined to address because Husband failed to present sufficient evidence to calculate a portion of his pension as "hypothetical"

social security benefits. However, because the trial court is authorized with the broad discretion to divide marital property on an equitable basis, after considering the evidence presented, the Supreme Court found that the trial court did not err in its division of the retirement benefits.

ALIMONY

Lanier v. Lanier, 278 Ga. 881, 608 S.E.2d 213 (2005)

Facts: After 31 years of marriage, the trial court awarded Wife a lump sum alimony payment of $25,000.00 plus $400.00 per month as permanent alimony until she either dies remarries or cohabits with another person or until [Husband} begins to receive retirement benefits under International Longshoremen's Pension and Welfare Plan or the Railroad Retirement Act, whichever occurs first.

Issue: Whether certain retirement benefits Husband expects to receive under the Railroad Retirement Act of 1974 may be considered as income to the recipient, and thus a source of alimony payments.

Holding: Retirement benefits may be considered as income and a source of alimony payments.

Analysis: In a case of first impression the Supreme Court determined that although the benefits could not be classified as marital property subject to equitable distribution, they could be considered as income for alimony purposes. The court followed the line of authority of other states who had addressed the issue and had found a distinction between using the benefits as marital property compared to income for payment of support or alimony.

Smelser v. Smelser, 280 Ga. 92, 623 S.E.2d 480 (2005)

Facts: After eight years of marriage the parties had a bench trial wherein the trial court entered a final judgment and decree of divorce. The court awarded Husband title to his un-vested retirement account and found the marital residence to be the non-marital property of husband. The court then awarded Wife a one-half undivided interest in the residence as alimony for her support. Wife was also authorized to sell the property at any time with net proceeds to be equally divided between the parties.

Issue: Whether the trial court was authorized to award alimony to wife derived from husband's non-marital asset.

Holding: The trial court did not err in awarding Wife an interest in the non-marital residence as alimony.

Analysis: The award in this case was characterized as "alimony" and it was clearly made for wife's maintenance and support, as the lower court determined that Wife's earning capacity was diminished due to an unspecified disability. Further, it appeared that the marital residence was the only non-liquid asset from which an award of alimony could be made. The Supreme Court of

Georgia looked to Daniel v. Daniel, 277 Ga. 871-872 (2004) which clarified the distinction between various financial obligations owed to and by divorcing parties. In that case the Court made the distinction that alimony, whether in gross, or in a lump, sum, is in the nature of a final property settlement, which differs from an equitable property division.

LEGISLATIVE UPDATE

Perdue v. O'Kelley, 632 S.E.2d 110 (2006)

Background: Challengers sought declaration that state constitutional amendment adopted by voters, barring state's recognition of same-sex marriages, violated state constitutional requirements for submission of proposed constitutional amendments to voters. The Superior Court, Fulton County, found the amendment was unconstitutional. Appeal was taken, and the Georgia Supreme Court reversed.

Holding: The Georgia Supreme Court held that the constitutional amendment did not violate constitutional prohibition of multiple subjects in proposed constitutional amendments submitted to voters. They held: (a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state. (b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship.

Legitimation & Custody:

OCGA Section 19-7-22:	Petition for Legitimation can now include a request for custody and/or visitation

Guardian Ad Litem Rules:

24.9 Appointment, Qualification and Role of a *Guardian ad Litem*

1. Appointment

The Guardian ad Litem ("GAL") is appointed to assist in a domestic relations case by the superior court judge assigned to hear that particular case, or otherwise having the responsibility to hear such case. The appointing judge has the discretion to appoint any person as a GAL so long as the person so selected has been trained as a GAL or is otherwise familiar with the role, duties, and responsibilities as determined by the judge. The GAL may be selected through an intermediary.

2. Qualifications

A GAL shall receive such training as provided by or approved by the Circuit in which the GAL serves. This training should include, but not be limited to, instruction in the following subjects: domestic relations law and procedure, including the appropriate standard to be applied in the case; domestic relations courtroom procedure; role, duties, and responsibilities of a GAL; recognition and assessment of a child's best interests; methods of performing a child custody/visitation investigation; methods of obtaining relevant information concerning a child's best interest; the ethical obligations of a GAL, including the relationship between the GAL and counsel, the GAL and the child, and the GAL and the court; recognition of cultural and economic diversity in families and communities; base child development, needs, and abilities at different ages; interviewing techniques; communicating with children; family dynamics and dysfunction, domestic violence and substance abuse; recognition of issues of child abuse; and available services for child welfare, family preservation, medical, mental health, educational, and special needs, including placement/evaluation/diagnostic treatment services.

3. Role and Responsibilities

The GAL shall represent the best interests of the child. The GAL is an officer of the court and shall assist the court and the parties in reaching a decision regarding child custody, visitation and child-related issues. Should the issue of child custody and/or visitation be tried, the GAL shall be available to offer testimony in accordance with provision 6 and 7 herein.

The GAL holds a position of trust with respect to the minor child at issue, and must exercise due diligence in the performance of his/her duties. A GAL should be respectful of, and should become educated concerning, cultural and economic diversity as may be relevant to assessing a child's best interests.

A GAL's appointment, unless ordered otherwise by the Court for a specific designated period, terminates upon final disposition of all matters pertaining to child custody, visitation and child-related issues. The GAL shall have the authority to bring a contempt action, or other appropriate remedy, to recover court-ordered fees for the GAL's services.

4. Duties

By virtue of the order appointing a GAL, a GAL shall have the right to inspect all records relating to the minor child maintained by the Clerk of the Court in this and any other jurisdiction, other social and human service agencies, the Department of Family and Children Services, and the Juvenile Court. Upon written release and/or waiver by a party or appropriate court order, the GAL shall have

the right to examine all records maintained by any school, financial institution, hospital, doctor or other mental health provider, any other social or human services agency or financial institution pertaining to the child which are deemed confidential by the service provider. The GAL shall have the right to examine any residence wherein any person seeking custody or visitation rights proposes to house the minor child. The GAL may request the court to order examination of the child, parents or anyone seeking custody of the child, by a medical or mental health professional, if appropriate. The GAL shall be entitled to notice of, and shall be entitled to participate in all hearings, trials, investigations, depositions, settlement negotiations, or other proceedings concerning the child.

5. Release to GAL of a Party's Confidential Information from Non-Parties

A GAL's right to request and receive documents and information from mental health professionals, counselors, and others with knowledge of a confidential nature concerning a party is conditional upon the party agreeing to sign a release allowing the GAL access to such records and information.

Upon receipt of a party's signed waiver/release form, the GAL shall have the right to inspect all records, documents and information relating to the minor child(ren) and/or the parties maintained by any mental health professionals, counselors and others with knowledge of a confidential nature concerning a party or minor child.

6. Written Report

Unless otherwise directed by the appointing judge, the GAL shall submit to the parties or counsel and to the Court a written report detailing the GAL's findings and recommendations at such time as may be directed by the assigned judge. At trial, the report shall be admitted into evidence for direct evidence and impeachment purposes, or for any other purposes allowed by the laws of this state. The court will consider the report, including the recommendations, in making its decision. However, the recommendations of the GAL are not a substitute for the court's independent discretion and judgment, nor is the report a substitute for the GAL's attendance and testimony at the final hearing, unless all parties otherwise agree.

a. *Contents of Report*

The report shall summarize the GAL's investigation, including identifying all sources the GAL contacted or relied upon in preparing the report. The GAL shall offer recommendations concerning child custody, visitation, and child-related issues and the reasons supporting those recommendations.

b. *Release of Report to Counsel and Parties*

The Report shall be released to counsel (including counsel's staff and experts) and parties only, and shall not be further disseminated unless otherwise ordered by the Court.

c. *Release of GAL's File to Counsel*

If ordered by the Court, the parties and their counsel shall be allowed to review and/or copy (and shall pay the cost of same) the contents of the GAL's file.

d. *Unauthorized Dissemination of GAL's Report and Contents of File*

Any unauthorized dissemination of the GAL's Report, its contents or the contents of the GAL's file by a party or counsel to any person, shall be subject to sanctions, including a finding of contempt by the Court.

e. *Sealing of Written Report*

If filed, the Report shall be filed under seal by the Clerk of Superior Court in order to preserve the security, privacy, and best interests of the children at issue.

7. Role at Hearing and Trial

It is expected that the GAL shall be called as the Court's witness at trial unless otherwise directed by the Court. The GAL shall be subject to examination by the parties and the court. The GAL is qualified as an expert witness on the best interest of the child(ren) in question. The GAL may testify as to the foundation provided by witnesses and sources, and the results of the GAL's investigation, including a recommendation as to what is in a child's best interest. The GAL shall not be allowed to question witnesses or present argument, absent exceptional circumstances and upon express approval of the Court.

8. General and Miscellaneous Provisions

a. *Requesting Mental Fitness and Custody Evaluations*

Based upon the facts and circumstances of the case, a GAL may request the Court to order the parties to undergo mental fitness and/or custody evaluations to be performed by a mental health expert approved by the Court. The Court shall provide for the parties' responsibility for payment of fees to the appointed experts.

b. *Filing Motions and Pleadings*

If appropriate, the GAL may file motions and pleadings if the GAL determines that the filing of such motion or pleading is necessary to preserve, promote, or protect the best interest of a child. This would include the GAL's right to file appropriate discovery requests and request the issuance of subpoenas. Upon the filing of any such motions or pleadings, the GAL shall promptly serve all parties with copies of such filings.

c. *Right to Receive Notice of Mediations, Hearings and Trials*

Counsel shall notify the GAL of the date and time of all mediations, depositions, hearings and trials or other proceedings concerning the children(ren). Counsel shall serve the GAL with proper notice of all legal proceedings, court proceedings wherein the child(ren)'s interests are involved and shall provide the GAL with proper and timely written notice of all non-court proceedings involving the child(ren)'s interests.

d. *Approval of Settlement Agreements*

If the parties reach an Agreement concerning issues affecting the best interest of a child, the GAL shall be so informed and shall have the right and opportunity to make objections to the Court to any proposed settlement of issues relating to the children prior to the Court approving the Agreement.

e. *Communications Between GAL and Counsel*

A GAL may communicate with a party's counsel without including the other counsel in the same conversation, meeting or, if by writing, notice of the communication. When communicating with the GAL, counsel is not required to notify opposing counsel of the communication or, if in writing, provide opposing counsel with a copy of the communication to the GAL.

f. *Ex Parte Communication Between GAL and the Court*

The GAL shall not have *ex parte* communications with the Court except in matters of emergency concerning the child's welfare or upon the consent of the parties or counsel. Upon making emergency concerns known to the Court, the GAL may request an immediate hearing to address the emergency. Notification shall be provided immediately to the parties and counsel of the nature of the emergency and time of hearing.

g. *Payment of GAL Fees and Expenses*

It shall be within the Court's discretion to determine the amount of fees awarded to the GAL, and how payment of the fees shall be apportioned between the parties. The GAL's requests for fees shall be considered, upon application properly served upon the parties and after an opportunity to be heard, unless waived. In the event the GAL determines that extensive travel outside of the circuit in which the GAL is appointed or other extraordinary expenditures are necessary, the GAL may petition the Court in advance for payment of such expenses by the parties.

h. *Removal of GAL from the Case*

Upon motion of either party or upon the court's own motion, the court may consider removing the GAL from the case for good cause shown.

Adopted effective May 19, 2005.