



THE FAMILY LAWYER

Official publication of the
Atlanta Bar Association's
Family Law Section

April 2007
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Quote of the Month

"Read every day, something no else is reading. Think, every day, something no one else is thinking. Do, every day, something no one else would be silly enough to do. It is bad for the mind to be always part of unanimity."

Christopher Morley

TAXATION OF DIVORCE: JOSHUA BERMAN, ESQ. ADDRESSES FAMILY LAW SECTION

By Jon W. Hedgepeth, Hedgepeth & Heredia, LLC

Joshua Berman, Esq., a partner with Cohen, Pollock, Merlin and Small, P.C., spoke at the monthly Family Law Section Breakfast at the Buckhead Club on March 8th. Mr. Berman received his B.B.A. in accounting from the Goizueta Business School at Emory University, and he graduated from the University Of Miami School Of Law. Mr. Berman is a member of

the Beta Gamma Sigma, Business Honor Society, and a member and past president of Beta Alpha Psi, National Accounting Honor Society.

Joshua's practice concentrates in estate and gift tax planning, including probate and estate administration, charitable planning, tax and estate planning for family-owned businesses, and business succession planning. In

addition, he advises fiduciaries on legal and regulatory matters. Mr. Berman is a member of the Georgia Bar; the Florida Bar; the American Bar Association - Real Property, Probate and Trust Section; the Atlanta Bar Association; and the Atlanta Estate Planning Council.

Mr. Berman began his presentation discussing Alimony and the five re-

quirements: 1) that it be paid in cash or cash equivalent; 2) that it be received pursuant to the terms of a divorce or separation instrument; 3) that the divorce instrument not have language that has the payment not be deductible by the payor and includable in the payee's gross income; 4) that the payments not be between those who are members of

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RECENT DECISIONS

By Anita H. Lynn, Anita H. Lynn, PC

The Supreme Court denied a Petition for Certiorari in the case of *Wheeler v. Wheeler*, S07C0299 (02/26/07), which would have addressed the issue of adoption by a partner in a nonmarital relationship. Sara Wheeler gave birth to a child in 2000 while she was living in a same sex relationship with Melody Wheeler. Sara Wheeler consented to Melody Wheeler adopting the minor child, and the trial court granted the adoption petition. The parties separated in 2004, at which time Sara Wheeler filed a Motion to Set Aside the final decree of adoption on several grounds, including § 9-11-60(d)(3). The trial court denied the motion, and Sara Wheeler filed an application for discretionary appeal. Justice Carley dissented from the majority's denial of the Petition for Writ of Certiorari. He argued that the case is "... one of great concern, gravity, and public importance," and he also felt that the trial court misconstrued the state's adoption statutes and erroneously concluded that it did not have the right to set aside the adoption. Under Georgia's adoption statutes, the existence of an anonymous, biological father does not prevent a step-parent adoption; however, the Petitioner for adoption, Melody Wheeler, was not a step-parent under Georgia law. Additionally, even though Georgia law allows for a child who has only one liv-

ing parent to be adopted by the spouse of that parent, Melody Wheeler was not the spouse of Sara Wheeler since Georgia does not permit marriages between persons of the same sex. O.C.G.A. §§ 19-8-5(a) and 19-8-7(a) allow a third party who is not a step-parent to adopt a child but only if the parents' rights are surrendered or terminated pursuant to O.C.G.A. § 19-8-10. In this case, Sara Wheeler's parental rights were not surrendered nor were they terminated. She had consented to the adoption and the trial court had declared that the child would have "two legal parents" and awarded permanent custody to both Sara and Melody Wheeler. Justice Carley argued that the legislature never intended to sanction adoptions by non-marital partners, as further evidenced by the language of O.C.G.A. § 19-8-19(a)(1), which references "all legal relationships." Justice Carley concluded that Melody Wheeler did not have a valid claim for adoption under Georgia law and that this deficiency constituted a non-amendable defect that appeared upon the face of the record or pleadings as required by O.C.G.A. § 9-11-60(d)(3). Justice Carley felt that because the adoption was not legally authorized, the trial court abused its discretion in denying the Motion to Set Aside. Melody Wheeler had argued that the Motion to Set Aside was barred

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the same household; 5) and that payments terminate upon death of the payee spouse.

Mr. Berman then discussed the alimony recapture rules in an understandable and logical way using several examples. "Recapture rules are designed to prevent "front-loading" of alimony, i.e., the disguise of property settlement payments as alimony in an attempt to obtain income shifting from the payor to the payee, thus minimizing taxes," Mr. Berman explained. He stated the rule that, if the alimony payments in the first post-separation year exceed the average payments in the second and third year by more than \$15,000.00, the excess amounts are recaptured in the third post-separation year. A similar rule applies to the extent that payments in the second year exceed the payments in the third year by more than \$15,000.00. This rule does not apply to a court-ordered temporary support payment.

Mr. Berman also discussed in detail the exceptions to the application of the recapture rule: It is not required if the payments terminate because of death of either party or a payee spouse remarries before the end of the third post-separation year provided that payments cease by reason of that event; it's not required if payments under a judicial decree or order for temporary support that is not part of a Final Decree of Divorce or Separate Maintenance (however, payments made under a private separation agreement are subject to recapture); and it does not apply if payments fluctuate and are not within the control of the payor, such as payments based on

a portion or percentage of the payor's income.

The discussion then turned to IRC Section 1041(a) *st seq.*, which proscribes the tax treatment of property transfers between spouses and former spouses incident to divorce. "There is no gain or loss recognized as taxable income for transfers of property from an individual to a spouse or former spouse if the transfer is *incident to a divorce* (The transfer must occur within one year after the date of the final judgment and decree of divorce and the transfer must be related to the ending of the marriage, either through an Order or Settlement Agreement, and must occur within six years from the date of the Final Judgment and Decree). The transfer is treated as a gift for tax purposes." Property under this section includes real, tangible or intangible personal property but does not include transfer of services.

Mr. Berman further discussed dependency exemption issues, who can claim a child as a dependent under IRS rules, the special rules for non-custodial parents claiming the child(ren), the tax filing status of divorced and divorcing parties, and the joint and several liability of parties filing a joint return, which allows the IRS to collect any taxes and penalties due from either or both spouses regardless of the language in the Settlement Agreement. He further explained the Innocent Spouse Rule a possible relief from joint and several liability but emphasized that it is always a good idea to take any estate planning structures that may be in place at the time into account at the time of divorce to avoid having to deal with those issues in court at a later time.

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The Following Attorneys have taken on Pro Bono Cases in MarchGALs:

Shawna Woods
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Mary Semmelmeier
Ben Garren
Bobby Burnett
Allen Harris
Amy Waggoner
Jim Gorsline

Please contact Dawn R. Smith at AVL
if you can help next month.

WHAT'S COMING UP...

April 12, 2007...Family Law Breakfast
Richardson Lynn - Dean, John Marshall Law School

May 5, 2007 - Spring networking Social at Zoo Atlanta
11:30 am - 3:30 pm

May 10, 2007 - Family Law Breakfast - Legislative Update
Stephanie Stuckey Benfield and Mary Margaret Oliver

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by O.C.G.A. § 19-8-18(e), which prohibits the judicial challenge of an adoption decree filed more than six months after the date of the entry of such decree. Justice Carley argued that this code section did not apply, because it is only applicable when parents' rights have been terminated or surrendered. Since Sara Wheeler's rights were never terminated or surrendered, the six month limitation did not bar the Motion to Set Aside. Justice Carley argued that this case dealt with an important issue that should have been addressed by the majority since, "It has far reaching implications with respect to potential adoptions by either the same-sex or opposite-sex partner or friend of an unmarried living parent."

In the case of *Stanley v. Stanley*, S07F0155 (02/26/07), husband argued that the trial court erroneously failed to award him any marital property. The trial court has the right to award whole or part interest in marital property to one spouse" *Wright v. Wright*, 277 Ga. 133, 134 (2) (587 SE2d 600) (2003). The Supreme Court reviewed the evidence considered by the trial court and did not find an abuse of the trial court's discretion. The trial court's decision to allow each party to maintain their interest in any marital property as it stood before the decree was entered was not erroneous. In husband's second enumeration of error, he contended that the trial court erroneously considered his disability benefits as a marital asset. The case of *Lanier v. Lanier*, 278 Ga. 881, 882 (1) (608 SE2d 213) (2005) holds that such benefits can be treated as an income source for alimony purposes, but they cannot be classified as marital property subject to equitable division. In the case at bar, the trial court did not make an equitable division of property and, therefore, did not treat the husband's disability benefits as an equitably divisible marital asset. The trial court found that the amounts in the parties' individually titled bank accounts were essentially equivalent and constituted marital property. The trial judge did not make any disposition of these accounts and also did not address the husband's future entitlement to receive disability benefits; consequently, case law holds that when title to property, including jointly-owned property, is not addressed in the verdict, the property remains titled in the owner or owners before the decree was entered. In the husband's third enumeration of error, he argued that the trial court failed to consider the enumerated factors to determine the amount of alimony, if any, to be awarded him. However, since the trial court concluded that alimony would not be awarded, it was not necessary for the court to consider the factors set forth in O.C.G.A. § 19-6-5(a). In response to the husband's fourth enumerated error, the Supreme Court found that the trial court properly considered the parties' financial circumstances when it denied his request for attorneys' fees.

In the case of *Padron v. Padron*, S06A1965 (02/26/07), the Supreme Court held that it was error for the trial court to find that a person is not a resident of Georgia for the purposes of filing a

Complaint for Divorce based solely upon the plaintiff's immigration status. The term "resident" as set forth in O.C.G.A. § 19-5-2 refers to domiciliary. The power to grant a divorce, jurisdiction, is founded on domicile; domicile is established by actual residence with the intent to remain there for an indefinite time. The Plaintiff had established six months residence as required by O.C.G.A. § 19-5-2, regardless of his immigration status.

In the case of *Crowder v. Crowder*, S06F1572 (02/26/07), wife appealed the trial court's equitable distribution of marital property following a bench trial. Evidence at the trial established that the husband brought into the marriage a 401(k) savings plan, a pension plan, and the marital residence (which he had purchased one year prior to the parties' marriage); the wife had brought into the marriage a car, a savings account, and a retirement plan. In the final judgment, the husband was ordered to pay \$5,000.00 to the wife as an equitable division of property; however, the husband was awarded title to the marital residence, his checking and savings accounts, his 401(k) account, and his pension. The wife received title to one vehicle, her checking and savings accounts, her retirement account, and her pension. On appeal, the wife argued that portions of the equity in the home, the husband's 401(k) plan, pension account, and her retirement plan constituted marital property subject to an equitable division. If the fact finder determines that appreciation in the value of separate property is due solely to market forces, then the appreciation remains the owner's separate property; however, if the fact finder determines that the appreciation is the result of the efforts of either or both spouses, that appreciation is a marital asset. *Bass v. Bass*, 264 Ga. 506, 507 (448 SE2d 366) (1994). When a spouse brings a home into the marriage, subject to an outstanding indebtedness, and it is undisputed that the parties reduced the outstanding balance of the loan during their marriage, a portion of the interest in the home is marital property subject to equitable division. *Snowden v. Alexander-Snowden*, 277 Ga. 153 (587 SE2d 54) (2003). In that situation, the trial court is to apply the "source of funds rule" which requires the trial court to determine the non-marital contribution of the spouse who brought the home into the marriage and weigh it against the total marital and non-marital investment in the property to determine the amount of marital property in the home subject to equitable division. *Horsley v. Horsley*, 268 Ga. 460 (490 SE2d 392) (1997). The equitable division of the portion of the home that is marital property is dependent upon, in part, the present fair market value of the house, and when there is a dispute as to its fair market value, the fact finder has a factual determination to make. The finder of fact determines whether and to what extent a particular item is a marital or non-marital asset and then exercises its discretion to divide the marital property equitably. In the case at bar, the trial court did not include any findings of fact to clarify the basis upon which it reached its result. However, the court is not required to make findings of fact in a nonjury trial unless one of the parties had requested it prior to the entry of the written judgment, pursuant to O.C.G.A. § 9-11-52(a). Since neither party asked the trial court to make findings of fact, the Supreme Court was unable to determine whether or not the court's equitable division of marital property was improper as a matter of law or as a matter of fact. The case of *Wright v. Wright*, 277 Ga. 133, 134 (587 SE2d 600) (2003) holds that an equitable division of property does not necessarily mean an equal division, and the actual division of the marital property is within the discretion of the fact finder. Nonetheless, since the trial court did not enter any findings of fact, the

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Supreme Court was unable to determine whether it had properly classified the property as marital or non-marital in its division of assets. Accordingly, the trial court's judgment was affirmed.

The trial court determined in the case of *Johnston v. Johnston*, S07A0134 (02/26/07) that the term "marital home" as used in the final decree referred to the mobile home, only, and not to the real property on which it was situated. A mobile home is personal property and not real property, unless it is permanently attached to realty. Subsequent to the parties' divorce action, the wife filed a motion for contempt, alleging that husband willfully failed and refused to pay her one-half of the equity in the "marital home." In accordance with the formula set forth in the divorce decree, the husband argued that he did not owe wife any money, because there was negative equity in the mobile home; the husband did not include the value of the real property, which he owned prior to the marriage. The trial court entered an order entitled, "Declaratory Judgment;" however, the law states that an order is judged by function rather than by its name. The trial court's order was entered in a contempt proceeding and functioned as a determination of how the disputed term "marital home" was used in the divorce decree, so it was classified as an order of clarification. The trial court, therefore, had the authority to interpret the divorce decree to decide the contempt issue placed before it by the wife. Whether or not a dwelling is a mobile home is a mixed question of fact and law; the trial court's determination will only be overturned in the event of manifest abuse of discretion. The record on appeal in the case at bar did not include a transcript. Consequently, the Supreme Court must presume that the evidence supported the trial court's finding that the "marital home" was a mobile home. Additionally, because there was no evidence that the mobile home was permanently attached to the real property, the case of *Griswell v. Columbus Finance Co.*, 220 Ga. App. 803-804 (470 SE2d 256) (1996) supported the trial court's finding that the marital home consisted entirely of personal property. In regard to the real property, in the absence of a transcript, the appellate court must presume that the evidence supported the trial court's finding that it was the husband's separate property and not a marital asset. Accordingly, the Supreme Court upheld the trial court's finding that the real property was the husband's separate non-marital property and that the marital home referred to in the decree referenced only the mobile home, for which there was no equity to be divided between the parties based upon the formula set forth in the parties' final divorce decree.

The parties' divorce decree in the case of *Eubanks v. Rabon*, S06A1955 (03/19/2007), required the husband to pay child support to the wife for nine months while the children were in her physical custody; in turn, the wife paid child support to the husband during the summer months when the children were in his custody. Wife filed a modification petition for an increase in child support based upon an increase in husband's income; husband filed a counterclaim also seeking an increase in wife's child support obligation based upon an increase in her income. Husband's child support was modified post divorce to 28.5% of his gross income for 3 children; this amount was to be paid until the youngest child reached majority (or until age 20 if in secondary school), married, died, or became self-supporting. Husband appealed this decision, arguing that the modification order provided for child support above the level mandated by the guidelines once the oldest child reached majority. The Supreme Court agreed, holding that there was no

finding of special circumstances made by the trial court to warrant such a deviation. There is no reason why the guidelines should not apply to the youngest children as it does to the oldest child. As such, the trial court's award was improper. Husband also argued that the trial court erred by changing the terms of the divorce decree relating to child support other than the amount, that is, by changing the time frames in the original decree, which had provided for a reduction in support relating to the oldest child; as such, the trial court in the modification action had no authority to extend the period of time for which husband was obligated to pay support. The Supreme Court held that the trial court's modification award was erroneous for both of these reasons. In husband's second enumeration of error, he argued that the trial court erred by failing to consider his counterclaim for an increase in child support even though it found that wife had a 112% increase in her income since the date of the divorce. The trial court was in error for failing to apply the guidelines to the counterclaim. In husband's third enumeration of error, he claims that the trial court erred by taking judicial notice of an increase in the children's needs. Had wife asserted this factor as a basis for an increase in support, she would have had the burden of proving that the needs of the children had increased – it would not be a proper matter for judicial notice. Wife's complaint for modification did not include this assertion, and it was not used as a basis by the trial court for increasing husband's support obligation. Therefore, it was harmless error.

In the case of *Fine v. Fine*, S06F2037 (03/19/2007), husband filed for divorce, and wife counterclaimed for alimony. Wife timely filed a jury trial demand. Both parties were represented by counsel. The case was heard without a jury; the parties' property was divided, but no alimony was awarded. Acting *pro se*, wife filed a Motion for New Trial challenging the trial court's disallowance of her jury trial. She then filed a Motion for Continuance, stating that the transcript "had not yet been produced;" she also requested a copy of the transcript at no charge. The trial court granted a continuance, but when she filed the same Motion for Continuance a second time, the continuance was denied. The trial court subsequently denied wife's Motion for New Trial, also noting that wife had never contacted the court reporter in regard to the preparation of the transcript. Wife appealed but failed to include a transcript of the proceedings on appeal - there is no right to a free transcript for an indigent in an appellate, civil proceeding. Generally speaking, a jury trial demand must be withdrawn in writing or there must be a written stipulation to a bench trial, neither of which was in the court's record. Additionally, a party may waive a jury trial by his or her actions, which may include appearing at the hearing and allowing the bench trial to proceed without objection. Since no transcript was prepared, it could not be determined whether or not wife had made an oral stipulation in open court withdrawing her request for a jury trial or, absent this stipulation, whether she timely objected to the trial court hearing her case without a jury. The Supreme Court has the right to presume that the trial court faithfully and lawfully performed its duties and, therefore, in the absence of the transcript, concluded that the trial court correctly heard the case without a jury. Additionally, it was not error for the trial court to rule on wife's motion for new trial prior to the completion of the transcript, since she failed to request the transcript. Also, in response to wife's fourth enumeration of error, the Supreme Court held that in the absence of a transcript, it must be assumed that the evidence adduced at trial supported the trial court's evidentiary rulings.

MESSAGE FROM THE CHAIR

Dear All,

Seems like only yesterday that I was struggling to come up with an idea worthy of commenting on in print.

Apparently though, it was not yesterday. It was February. I do struggle to think of a topic other than the usual child support guidelines banter, the upcoming Family Law Institute, Law Day, what the legislature may do to us, and my constant pressure on you all to volunteer more, give more, be more as family lawyers so that we leave a good impression on our communities.

I decided to offer statistics on our own community. Then we can figure out how to not only leave a good impression on our community but to have a lasting effect on it as well.

The United States has the highest divorce rate in the world. In addition, the numbers of children born to unwed mothers is astounding. One study has it at 39%. There is more father absence today than in 1943 when most fathers were at war.

In Georgia alone, 35% of our children are in a single parent home.

Since 1990, the marriage rate in Georgia has declined 35%.

Married couples in the city of Atlanta constitute only 33% of the population with more than 54% single parent families. 39.3% of children under 18 live in poverty, many of them in those single parent families.

Georgia is the 9th most populous state. Of the 9.2 million people in the state, 50,000 of them are in prison with 2-3 children each. Georgia is a leader in the incarceration rate.

In the inner city the drop out rate is about 25%.

The Juvenile Court of Fulton County sees approximately 13,000 children a year. 78% of them do not know who or where their fathers are.

Fulton County services 1700 children who are out of their homes.

11% of Georgia families are in poverty.

These are sobering statistics. The divorce rate and unwed pregnancy rate in this country have had an astounding effect on our society as a whole. The absence of fathers in the home has been listed by one think tank as the single most important predictor of whether someone ends up in jail.

The statistics speak for themselves. Business is good. There are lots of divorce cases to go around. There are plenty of legitimations and custody agreements to be drafted and filed. But if we as family practitioners take a look at the statistics, recognize that the very core of our society has a rift in it, maybe we can convey some of this information to our clients, and begin to help families transition in a way that will keep them out of the statistical jungle, that will point them in a better direction.

Lots of questions were raised in my mind when I first heard many of the above statistics. The various issues seem overwhelming and the odds seem stacked against us in many ways. At this point, there are many more questions than answers. The one I leave you with is: "What can we as family practitioners do to positively impact our community, either through the courts, the legislature or individually to stem the tide?"

Lauren G. Alexander

SAVE THE DATE

Please join the Atlanta Bar Association Family Law Section,
Georgia Hispanic Bar Association and the Family Law Committee, Young Lawyers Division of the State Bar of Georgia at
ZOO ATLANTA
on May 5, 2007 from 11:30 am until 3:00 pm
for their joint Spring Networking Social.

FREE - One member and a guest; \$10 - Each additional guest; \$25 - pay at the door with no reservation
cost includes lunch and admission to the zoo.

There will be something for everyone - networking, good food and plenty of time
to tour the zoo. We look forward to seeing you there!

Atlanta Bar Association
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229 Peachtree Street NE
Atlanta, GA 30303-1601

Family Law Section Breakfast
Speaker: Richardson Lynn
Dean, John Marshall Law School

Thursday, April 12, 2007 at 7:30am
The Buckhead Club, 3343 Peachtree Road
\$15 pre-registered; \$18 at door

Name _____

Yes, I would like _____ reservation(s)
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