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THE FAMILY LAWYER

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

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Quote of the Month

"Always be nice to those younger than you, because they are the ones who will be writing about you."

Cyril Connolly

JUDGE TOM DAVIS ADDRESSES FAMILY LAW SECTION BREAKFAST

By Jon W. Hedgepeth, Hedgepeth & Heredia, LLC

Judge Tom Davis, one of Gwinnett County Superior Court's newest judges, addressed the Family Law Section monthly breakfast on July 13, 2006. By introduction, Judge Davis graduated from the University of Georgia, both undergraduate and law school, graduating in 1978. That November, Judge Davis was commissioned as a Lieutenant in the U.S. Navy Judge Advocate

General's Corps, graduating first in his class at both the Officer Indoc-trination School and the Naval Justice School Lawyer Course. From 1981 through 1984, Judge Davis served as Staff Judge Advocate for Navy Recruit Training Command in Orlando, where he was the sole JAG officer serving over seven thousand recruits and

staff members.

In December 1984, Judge Davis was transferred to the Naval Legal Service Office where he was assigned as Chief Defense Counsel, Chief Trial Counsel and Head of Military Justice. Retiring in 2001, Judge Davis was hired by then-D.A. Tom Lawler where he ultimately rose to the rank of Deputy Chief Assistant where he re-

mained until ascending to the Superior Court bench.

The Judge recounted that his singular greatest achievement was asking high school sweetheart, Melanie, to marry him, which she did.

The Judge said that, as an assistant District Attorney, he got to "do it all," trying murder cases and every other imaginable

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RECENT DECISIONS

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

In the case of *Cormier v. Cormier*, S06F0442 (06/26/06), the Supreme Court affirmed the trial court's decision to enter a Final Judgment and Decree of Divorce in Husband's absence, finding that the Husband had been properly notified of the scheduled trial date. Husband was represented by two successive attorneys, both of whom withdrew from representing him. Thereafter, the Husband proceeded *pro se*. During the pendency of these proceedings, the Husband was held in willful contempt of the Temporary Order, he failed to provide discovery responses, and he also chose not to appear at a pre-trial hearing, which he had been notified of by the Court. The actual trial calendar was served upon Husband by the court, plus he was served with a Request for Production of Documents, which also included the trial date. Furthermore, Husband filed documents indicating that he did not want to appear at trial, because he was trying to avoid the consequences of the trial court's Order which had previously held him in contempt. The Supreme Court held that Husband was informed of the trial date on multiple occasions and "that he willfully chose not to attend." He had been properly informed of the scheduled trial date. Husband also argued that the trial court erred in its alimony award by failing to consider a computer disk that contained information about alleged trust in-

come received by his Wife. The computer disk was not introduced into evidence at the trial; the Supreme Court held there was no error in the trial court's Order awarding Wife alimony. Wife had testified that she may or may not inherit trust property at some point in the future. The trial court did not abuse its discretion by not attributing any trust income to her when making its alimony award. Husband also argued that the trial court erred by ordering him to satisfy a \$5,000.00 debt, which he claimed was not a marital debt. However, the Note was signed by both Husband and Wife. Accordingly, the trial court's decision on this issue was not erroneous. Husband also argued that Wife was not entitled to alimony, because she had deserted the marriage. Wife had left Husband a note stating that she was leaving, because she "needed to get away for awhile." It was given to Husband two months before Wife filed her Complaint for Divorce. Consequently, the separation did not establish desertion.

In the case of *Frazier v. Frazier*, S06F0211 (06/26/06), the parties were awarded joint legal and physical custody of their three children; the trial court divided the income tax dependency exemptions for the children between Husband and Wife. Wife argued

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crime. He and his colleagues would sit in the DA's office and congratulate themselves for not practicing law for money. Now, after years of practice, he can still state that he has not come across a single domestic case that is merely about money. "It is all about human emotions and issues." As a member of the homicide task force, ADA Davis went to homicide scenes at all hours of the night and day and has seen too many crimes arising out of domestic violence. This gave rise to the Judge's pledge with respect to domestic violence: "I will take your cases seriously."

As a judicial philosophy, Judge Davis believes in starting court on time as "I have never met another attorney who *doesn't* have another place to go. Otherwise, it would be a crashing waste of your time." He also stated "I will read your file and know what your case is about." "I may not retain it all, but I will know what you are asking me to do." Judge Davis believes that people should stand when addressing the Court, which stems from his years of formal military justice where litigants ask permission to address the court. This is his part to correct a growing trend of people wandering away from this formality. As his father recounted to him years ago, "it's not the man they are standing for, it's the robe." Judge Davis also feels that it is important to see this respect, as the litigation process is a solemn process they have invested in and this emphasizes the importance of the matter, which is also good for client control.

Judge Davis recalled that he was unprepared for the amount of human misery at his first calendar. He had divorce cases with high financial stakes, but, according to the Judge, it is the human aspect of the case that makes it worthwhile, taking the parties from "rock bottom to the other side" in one piece.

Judge Davis added "the day I was sworn in at the Capitol, I made two promises: I will give people a chance to say what they want to say, even if it means I don't get out of court until 7:00 p.m; and if I can be the kind of judge my wife wants me to be, we don't have to worry."

On practical matters, the Judge encourages Motions for Judgment on the Pleadings. He will do his best to get you on a calendar when requested, and if you have a case with Judge Davis, it will never be transferred.

WHAT'S COMING UP...

August 10 - Family Law Section Breakfast - Justice Carol W. Hunstein, Supreme Court of Georgia

August 18 - "Cutting Edge Issues in Family Law"

September 14 - Family Law Section Breakfast - Vivian Hoard on Tax Issues
1 CLE Hour will be available

October 12 - Family Law Section Breakfast - Melissa McMorries on Life Insurance
1 CLE Hour will be available

November 9 - Luncheon honoring Fulton County Superior Court Judges

December 2 - Planting Trees with Trees Atlanta - 9:00am to noon

Family lawyer, Howard Gold, is seeking an associate with 2-4 years of experience in family law. Please send resumes to 31 Lenox Pointe NE, Atlanta, GA 30324, fax 404-237-3827, or email goldlaw@mindspring.com.

Cutting Edge Issues in Family Law - Not Your Usual CLE Topics

Join your fellow practitioners on Friday, August 18 and learn more about the issues that affect you.

What you need to know:

Date: Friday, August 18, 2006

Time: 8:30 a.m. – 1:00 p.m. Registration available at 8:00 a.m.

Location: State Bar of Georgia Conference Center--Auditorium, 6th Floor, 104 Marietta Street (at Spring Street)

CLE credit: 4 CLE hours

Cost: Atlanta Bar Family Law Section members: \$119; Atlanta Bar members: \$129; non-members: \$159; law students: \$25

Topics:

- Digging Deep into the Child Support Guidelines - The Bottom Line for You and Your Clients
- The Do's and Don'ts of Private Investigations, including Computer Forensics: "Delete" Really Means "See Ya Later"
- Custodial Issues Unique to Same-Sex Couples
- Hot Tips You Need to Know: Where Family Law Intersects with Other Areas of Practice
 - Criminal Aspects of TPO
 - Immigration
 - Business Law
 - Real Estate
 - Bankruptcy

To register, please complete the form below and return it to the Atlanta Bar Association, or register by phone or email (404-832-6203; mljohn@atlantabar.org).

REGISTRATION: Cutting Edge Issues in Family Law, 8-18-06

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Fax to 404-522-0269. **Register online** at www.atlantabar.org. **Questions?**
 Call 404-832-6203 or e-mail mljohn@atlantabar.org.

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that she is the “custodial parent” for the purpose of the dependency exemptions and that it was erroneous for the trial court to award these exemptions to a non-custodial parent, relying on the case of Blanchard v. Blanchard, 261 Ga. 11 (401 S.E.2d 714) (1991). The Supreme Court held that in accordance with the Internal Revenue Code, a “custodial parent” is the parent having custody for the greater portion of the calendar year; however, their calculations, based upon the trial court’s Order, revealed that the children would be spending “so far as is practicable, equal” time with each parent. Therefore, the lower court’s decision was not erroneous, since it complied with the Internal Revenue Code by splitting the exemption between the two parents who were both “custodial parents” and neither of whom had custody of the children for a greater portion of the calendar year. The Supreme Court also held that allowing the Husband to claim the dependency exemption would not cause his child support award to fall below the child support guidelines. The Wife also appealed the award of joint physical custody, in which the trial court adopted the recommendation of the Guardian *ad Litem* with the agreement of both parties. The trial court’s decision was affirmed, because the evidence did not reflect a clear abuse of discretion. The Supreme Court also upheld the trial court’s decision to allocate between the parties final decision making authority in the event of a disagreement. Again, this is a discretionary decision regarding custody which will not be overturned by an appellate court unless the evidence shows a clear abuse of discretion. The Supreme Court found no such abuse. Wife also appealed a division of the marital property, claiming that the trial court made certain valuations without an evidentiary basis. However, the record revealed that the Wife’s testimony was inconsistent and that she had presented conflicting evidence. A trial court’s factual findings will not be set aside unless they are “clearly erroneous;” the appellate court made no such finding in this case. The fifth and final issue on appeal was whether or not the trial court has the authority to exclude from a *supersedeas* bond a particular portion of the Judgment; the trial court had the right to exclude the custody provisions of the Final Decree from the *supersedeas* arising from Wife’s filing of a Motion for New Trial, for which there is no authority to hold that the trial court must use an “all or nothing” application. The dissent disagreed with the majority’s holding that the trial court had the authority to allocate the dependency exemptions between the parties; previous cases held that it was improper for courts of the state to allocate the dependency exemption. Also, the dissent disagreed with the majority’s conclusion that since the parents had “so far as is practicable, equal” time with the children, that finding conforms to the IRC requirements.

The Supreme Court vacated its previous decision in the case of Walker v. Walker, S06F0577 (05/17/06) and held that Husband did not impliedly waive his jury trial demand by appearing 45 minutes late to the call of the trial calendar. To waive his timely filed demand, Husband would need to file a written stipulation or orally stipulate in open court that he consented to a bench trial; to “impliedly” waive a demand for a jury trial, the conduct must indicate that the right is not being asserted. This one isolated incident, given the other facts of this case, did not amount to an implied waiver, in contrast to a previous case where the court found an implied waiver based upon “repetitive conduct.”

The Supreme Court held in Jones v. Jones, S06A0388 (07/06/06) that the trial court erred by disregarding the waiver of Husband’s

right to seek a decrease in his child support obligation below a minimum amount. The waiver language in the parties’ Settlement Agreement was in compliance with previous case law, Varn v. Varn, 242 Ga. 309 (248 SE2d 667) (1978). It was, therefore, enforceable, since there was no evidence of fraud, mutual mistake or other legal defense to the contract. Husband also argued that his Agreement and the case of Varn referenced only “alimony” and does not apply to child support; however, the Supreme Court held that the term “alimony” has long been established by statutes and case law to include support for a spouse or support for a child or children. The dissent takes issue with the confusion between these two terms and disagrees with the majority’s conclusion that the term “alimony” also includes child support.

In Waits v. Waits, A06A0445 (07/05/06), Wife filed a contempt action against Husband for his failure to pay the property taxes on the marital residence; Husband defended by claiming that Wife was cohabitating with a male unrelated by blood or marriage and that under these circumstances, he was relieved of his obligations to pay the mortgage and property taxes pursuant to the terms of their Decree. Husband also filed a motion for declaratory relief. The jury found for Wife, and the trial court awarded her attorney’s fees to cover both the contempt action and defending the declaratory judgment action. The trial court’s award was affirmed even though attorney’s fees are not authorized in a declaratory judgment action; the trial court could base its award on OCGA § 19-6-2(a), which authorizes an award as part of the expenses of litigation *at any time during the pendency of the litigation*, after considering the financial circumstances of both parties, in contempt actions arising out of a divorce and alimony case. Also, because the declaratory judgment action was “inextricably linked” to the contempt action, it was appropriate for the trial court to consider Wife’s expenses in defending the declaratory judgment action as part and parcel of the contempt.

The Court of Appeals affirmed the trial court’s decision to award the paternal grandfather visitations rights with his grandchildren in the case of Luke v. Luke, A06A0216 (07/05/06). After the divorce, the children’s father enlisted in the U.S. Army and served in Washington state and then in Iraq. The grandfather petitioned for court ordered visitation rights on the grounds that the children’s health or welfare would be harmed without visitation and that such visitation would be in the children’s best interest; the children had formed a strong familial bond with him and his family even before their father enlisted in the Army, which would be destroyed without such visitation since Dad was serving in the Army. With Mom’s approval, the grandfather, and other members of his family, had been visiting with the children the first, third and fifth weekends of each month. Despite Mom’s claims of concern over several incidents, the Court of Appeals found that a rational trier of fact could have found that there was clear and convincing evidence that the mandated visitation was authorized; the trial court had specifically made the correct findings under the Grandparent Visitation Statute and had not inappropriately substituted the father’s visitation for that of the grandfather. Even though the grandfather’s parents were spending “significant” amounts of time with the children during granddad’s visits, it was not error for the trial court to grant the grandfather visitation. Also, when Dad resumed his visitation, it was not error for the grandfather to continue one weekend per month of visitation, even though that would take the children away from their mother’s home for three weekends per month.

Atlanta Bar Association
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Family Law Section Breakfast
Speaker: Presiding Justice, Carol W. Hunstein
Supreme Court of Georgia

Thursday, August 10, 2006 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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