



FAMILY LAWYER

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

June 2008
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Quote of the Month

"A compromise is the art of dividing a cake in such a way that everyone believes he has the biggest piece."

Ludwig Erhard

THE HONORABLE GAIL TUSAN ADDRESSES FAMILY LAW SECTION

By Jon W. Hedgepeth, Hedgepeth & Heredia, LLC.



Pictured are Family Law Section Secretary Jonathan W. Hedgepeth, *Hedgepeth & Heredia, LLC*, Section Chair Melody Z. Richardson, *Pachman Richardson, LLC*, Hon. Gail S. Tusan, *Superior Court of Fulton County*, and Section Immediate Past Chair John L. Collar, Jr., *Boyd Collar Knight, LLC*.

Judge Gail Tusan addressed the Atlanta Bar Association Family Law Section at the March monthly breakfast at the Buckhead Club. Judge Tusan has almost twenty-five years of judicial service, including serving as a guest justice on the Georgia Supreme Court. Prior to serving in the Fulton County Superior Court and Family Court, she was a Fulton County State Court judge. Prior to that, she was a judge in the City Court of Atlanta. She has lectured nationally and taught foreign judges in Russia and the Philippines.

Judge Tusan started her presentation by alerting us to staff changes in her office. Her staff attorney, Kelly Kenner, who has been with Fulton County for fifteen years, is moving to Augusta. She will be replaced by Cassandra Gillette, who interned for Judge Tusan

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WHAT DO YOU KNOW ABOUT SUPERVISED VISITATION?

By Mark Watkins, Kids First

Supervised Visitation refers to contact between a non-custodial parent and one or more children in the presence of a third person responsible for observing and seeking to ensure the safety of those involved. Supervised Visits are designed to assure that a child can have safe contact with an absent parent without having to be put in the middle of the parents' conflicts or other problems. It is the child's need that is paramount in making any decisions regarding the need for such supervision. However, there are also some significant benefits to parents. It is a tool that can help families as they go through difficult and/or transitional times. Some of the benefits for the various family members are as follows:

FOR THE CHILDREN:

* It allows the children to maintain a relationship with both of their parents, something that is generally found to be an important factor in the positive adjustment to family dissolution.

* It allows them to anticipate the visits without the stress of worrying about what is going to happen and to enjoy them in a safe, comfortable environment without having to be put in the middle of their parents' conflict and/or other problems.

FOR THE CUSTODIAL PARENTS:

* You do not have to communicate or have contact with a person with whom you are in conflict or by whom you might be frightened or intimidated. The arrangements can be made by a neutral party (the visit supervisor) and there does not have to be contact before, during, or after the visits.

* You can relax and feel comfortable allowing your child to have contact with the other parent and can get some valuable time to yourself.

FOR THE NON-CUSTODIAL PARENTS:

* You can be sure that your contact with your children does not have to be interrupted regardless of any personal or interpersonal problems you may be having.

* If allegations have been made against you, which is often the case when supervision is ordered, you can visit without fear of any new accusations because there is someone present who can verify what happened during your time together. When using a professional service, you can also be assured that the supervisors are neutral and objective.

Why not use a friend or relative rather than a professional service, particularly when there is a fee

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years ago and, until recently, worked for Monroe Ferguson, Esq., in Clayton County. Also, at the end of June, we will be losing Tyra Johnson, who is moving to Kentucky and who has been commuting to and from Kentucky, where her husband works. Her replacement has yet to be announced.

Judge Tusan then stated the reason for her speech, which was to unveil the idea of the summary trial order, a flexible tool which the judge has begun to use as a way to condense the time of a trial, narrow the issues of a case, save clients money and attorneys time, and give all concerned a window into what the judge is thinking.

This process starts with an order, which alerts counsel to anticipate a phone conference with the judge or her staff attorney. "The point of the conference is to address the uniqueness of any unresolved issues." The judge asked us to consider the biggest unknown in a trial: what is on the judge's mind. "I can be hard to read sometimes, so a summary trial allows you to tap into what is on the judge's mind. With proper planning, the Summary Trial leads to significant cost savings to parties and the court and provides a forum sooner than later."

Judge Tusan discussed the flexibility of the Summary Trial process and its ability to address individual needs. "One was focused on a separate property issue, but this can be used for all sorts of issues." The Summary Trial Conference allows the attorneys or parties to discuss how much time is reasonable to present the case, and Judge Tusan noted that she recently was able to resolve a three-day trial in one day through this process.

The proposed order suggests one and a half hours per side, which will include opening statements, witness testimony and closing statements. The clock will tick and there will be a time keeper. The judge requests that she and opposing counsel be provided with a 'wish list' that hits on the highlights as to how equitable division should go. This list is to be shared with the other side so they can see what the other side is asking for. Each side can go through its "wish list" or summarize it as the opening statement, and then the parties will present evidence. Plaintiff will go first and can reserve time to go last as well, time permitting.

During the evidentiary presentation, the attorneys are free to refer to the evidence, and the judge will urge the parties to stipulate to exhibits in advance. If there are disputes, they should be handled at a pretrial conference or prior to trial. The judge will question witnesses if necessary, which she said we should welcome, as this will show us what is important to the court. "If you go on a tangent at my insistence, you may ask the court for more time," she said.

"The Summary Order anticipates one live witness," the Judge said, "and if there are two witnesses, we can discuss that in advance via a phone call." "The wife can explain why she ignited husband's dry cleaning." The judge understands a party's need to vent, and the rules anticipate fifteen minutes of venting. Further, Judge Tusan affirmed that demonstrative evidence is acceptable, but blow-ups need to be big enough for all to see. "The evidentiary rules are relaxed, not the issues," she said.

The advantage of a Summary Trial is the reduction of cost. Clients will be well served, and the judge indicated that this gives a rare opportunity to get unprecedented access to what is on a judge's mind. The challenges are the imposed time limits.

Judge Tusan was introduced to this concept at the National Judicial College, and she has used this effectively in State Court cases to settle million-dollar trials. It is currently in use in certain State Court cases.

The judge tweaked this format for the Family Division.

Alimony and testimony credibility issues may not be appropriate for a Summary Trial, as the major criticism and key disadvantages of the process are the elimination of demeanor of an examined witness and lack of a credibility assessment. Also, there were a number of questions regarding the rights of appeal. The judge said that "the parties need to understand what they're signing up for when agreeing to participate in the procedure. The parties can stipulate how the record would go up on appeal." While there remain a few issues to be resolved in the area of appeals, John Collar and Melody Richardson agreed to assist the court in formulating a plan that will pass constitutional muster to allow this apparently highly effective form of dispute resolution to gain widespread acceptance.

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involved? Often there is nothing to prohibit you from using a "non-professional" relative, friend, or acquaintance. Many court orders will allow that as an option providing both parents can agree on whom to use. That often does not work out for the following reasons:

First and foremost is the difficulty in finding someone on whom you both agree. If you are having sufficient conflict that supervision was deemed necessary, then chances are very slim you will be able to find an individual that both of you will trust and feel comfortable with. Secondly, it puts a real strain on friendships. Many well-meaning friends and relatives will agree to provide the service but will quickly tire of the regular commitment and/or being in the middle of your conflicts. It is difficult for friends and relatives to restrain from taking sides. Once neutrality is lost, then the credibility of the "supervisor" will come into question and much of the feeling of security and safety will be gone. And, finally, it may actually detract from the quality of the parent/child time together. It is often tempting to spend time interacting with the acquaintance rather than focusing on the child. Children may then come to resent the visits, because they feel that they are secondary and not primary in the interaction.

At Kids First, our goal is to provide children the opportunity to visit with their non-custodial parent or significant family members in a safe, neutral, and stable environment. Our trained monitors observe the interactions between the child and the parent in an objective and neutral manner. This enables the child and the parent to have an enjoyable and safe visit in a stress free and relaxing environment.

For more information, contact Mark Watkins at Kids First.

What's Coming Up

**Family Law Section Breakfast
Thursday, July 10, 2008**

**Buckhead Club at 7:30 am
Speaker & Topic: TBD**

**Cost:
\$15 in Advance
\$18 at the Door**

A REVIEW OF MISJUDGED A NOVEL BY GAIL TUSAN WASHINGTON

By Jeanney Kutner, Fulton County Superior Court

I could not put this book down until I had finished it.

On one level this novel purports to be a most interesting story about a hotly contested, contentious judicial election. Suzanne Vincent, the main character, is a young, attractive female of color who has become the third woman judge in the state of Georgia. The governor appointed her to a judgeship, one that an Assistant District Attorney thought he was entitled to receive. We begin the story finding her fighting a nasty re-election campaign against the ADA, Chance Rotherman. ADA Rotherman is aided and abetted by the Chief Judge, who bemoans the “pantyhoose brigade,” his derogatory term for the women judges who are beginning to appear in his courthouse. Although Suzanne’s court is the fictionalized “Atlanta District Court,” we can recognize events and places from the Atlanta legal scene and the Fulton County Superior Court.

And although this is a work of fiction, recent history in Georgia and in Atlanta has given us a bitter taste of nasty, mean-spirited judicial elections. It always seems to be the women and minorities who are “targeted” with vicious and cruel campaign opponents in judicial races. Suzanne’s mentor, her campaign manager, gives her good advice: “You won’t win if you try to play nice.” And yet, and yet....

On another level, the novel permits the reader to enter the mind and world of a family court judge who must make painful, life-altering decisions for broken families: how to apportion parenting rights between and among acrimonious and adversarial parties. Those working in family courts often like to say about their cases: “We couldn’t make this stuff up.” Even though the author, Judge Gail Tusan Washington, is a dedicated judge currently assigned to the Family Division of Fulton County Superior Court, we know that the cases Suzanne Vincent hears in this novel are not real; they are just examples of the types of troubling cases that a family court judge would hear.

But the best most interesting level of all is the search for what it means to be a parent. The judge’s mentor tells her early on: “Life is a series of decisions and lessons.” We learn that “[p]rofessional acclaim and success came early for Suzanne and for that reason she made a point of playing the part of judges as others expected her to.” And yet, this successful attorney and judge finds herself at a crossroads in her life, one that has nothing, and yet everything, to do with her judicial campaign: although she has told no one, not even her campaign manager who begs for her honesty, Suzanne carries the burden of one personal decision she made eighteen years earlier.

As a single, 18 year old college student, she found herself pregnant and unable and unprepared to be a mother but unable to go through with an abortion. Hence, she permitted her parents and grandparents to convince her to give up her baby for adoption at birth to a loving couple. Suzanne’s most forceful story weaves around her inner struggle as a mother. Even as she judges others, she feels driven to assist those parents whose struggles to parent their children are thwarted. The reader actually feels the sacrifice she made with her own son on nearly every page.

Gail Tusan Washington provokes us in a myriad of ways not to misjudge the actions of others, even as Suzanne Vincent comes to understand how she has misjudged her own actions.

Gail Tusan Washington serves as Judge of the Family Division of

Fulton County Superior Court.

The reviewer, Jeanney Kutner, is a Judicial Officer in the Family Division of Fulton County Superior Court, has practiced family law in Georgia for 15 years, and has written numerous articles on the topics of family law, appeals, and professionalism, which have been published in ICLE seminar materials; in *The Family Law Newsletter and Review*, a publication of the Family Law Section of the State Bar of Georgia; and in *The Bench*, the magazine of the American Inns of Court.

CASE LAW UPDATES

By Tamar Oberman Faulhaber, Vernis & Bowling of Atlanta

Wood v. Wood S07F1474 (Jan. 8, 2008)

LUMP SUM ALIMONY OF \$50,000 UPHELD WHERE COURT IMPUTES INCOME TO HUSBAND.

In Wood v. Wood, the parties were married and divorced twice. The Supreme Court affirmed the alimony award where trial court considered extensive testimony regarding all of the relevant factors set forth in O.C.G.A. 19-6-5(a), including both parties’ employment, assets, debts, income streams and potential for future earnings. Supreme Court rejected Husband’s argument that trial court improperly granted lump sum alimony to prevent him from discharging the alimony debt in a future bankruptcy pleading. (He had filed several bankruptcies in the past). Supreme Court also upheld award granting Wife house as her separate property that was quitclaimed to her in between the two marriages and all proceeds of her retirement account as equitable division. Further, evidence of husband’s acts of adultery during the first marriage was admissible in the second divorce because the acts that may have been condoned in the past may be “revised by fresh acts of cruelty.” The further acts of adultery that occurred in the second marriage revived the prior acts making them relevant and admissible. The attorney’s fees award to wife to insure effective representation of both spouses so that all issues can be fully and fairly resolved was proper where the trial court considered the financial condition of the parties. Finally, husband had sufficient notice of the contempt proceeding which had been filed 27 days prior to the divorce trial.

Lafont v. Rouviere S07F1422 (Jan. 28, 2008)

SUPREME COURT REJECTS ARGUMENT THAT COURT USED A SPECIAL BOND STANDARD RATHER THAN BEST INTEREST OF THE CHILD IN AWARDING CUSTODY TO MOTHER DESPITE “SUICIDE GESTURE”.

This is an appeal from a divorce where the trial court awarded custody of the parties’ three year old child to her mother and permitted her to move to France with the child. French Mother did not have a permit to work in the United States and took the child to France with her each summer. Testimony regarding the child’s relationship with her maternal grandparents in France supported the trial court’s statements about the bond and special relationship they hold. The evidence also showed that the father had an affair, as a result of which he left the family, and that father exercised poor judgment in taking the child to live with him and his mistress following an episode in which the Mother

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took an overdose of prescription medicine. The psychiatrist testified it was a “suicidal gesture, not an attempt to end her life.” The Supreme Court affirmed the trial court’s decision.

Blige v. Blige**S07F1817 (Jan. 28, 2008)****A PARTY SEEKING TO ENFORCE AN ANTE-NUPTIAL AGREEMENT MUST SHOW FULL AND FAIR DISCLOSURE FOR BRIDE-TO-BE HAS NO DUTY TO INQUIRE.**

Supreme Court upheld trial court’s decision to set aside an ante-nuptial agreement pursuant to the standard set forth in Scherer v. Scherer, 249 Ga. 635, 292 SE2d 662 (1982): “The party seeking enforcement bears the burden of proof to demonstrate that 1) the ante-nuptial agreement was not the result of fraud, duress, mistake, misrepresentation or non-disclosure of material facts; 2) the agreement is not unconscionable; and 3) taking into account all relevant facts and circumstances, including changes beyond the parties’ contemplation when the agreement was executed, enforcement of the ante-nuptial agreement would be neither unfair nor unreasonable.” Here, husband failed to make a “fair and clear disclosure of his income, assets and liabilities before the parties signed the ante-nuptial agreement” as required by the first prong of the Scherer test. The facts were as follows: the bride-to-be signed the ante-nuptial agreement the day before the wedding, after having been presented with it by an attorney hired by husband. Pursuant to the agreement, husband retained, as his sole and separate property, land that he had previously purchased “together with any house or structure which may be situated on said property.” Husband failed to disclose he had \$150,000 cash he planned to use to build a home on the land, the parties did not live together, and bride had no knowledge or any reason to know of the cash before they wed. Husband used the cash towards construction of an enormous home on the property, which appreciated during the marriage.

Husband argued that the wife had a duty to inquire about his assets, citing Mallen v. Mallen, 280 Ga. 43, 622 SE2d 812 (2005) in support of his argument. The Supreme Court held Mallen v. Mallen was distinguishable, because in Mallen, the parties attached a financial disclosure statement to the ante-nuptial agreement that accurately reflected their assets and liabilities and clearly revealed a tremendous disparity between the net worth of the prospective spouses; also, the Mallens had lived together for four years before the execution of the ante-nuptial agreement. The Supreme Court specifically rejected that Mallen created a “duty of inquiry as such a reading would turn the spousal’s affirmative duty to disclose on its head.”

Taylor v. Taylor**S07F1634 (Jan. 28, 2008)****TRIER OF FACT NEED NOT CONSIDER EMPLOYER’S CONTRIBUTIONS TO PENSION PLAN IN EQUITABLE DIVISION.**

Supreme Court upheld division evening out pension plans based only upon parties’ contributions rather than including employer’s contributions. Wife appealed a judgment of divorce where trial court divided the parties’ pensions and denied her request for attorney’s fees. Each party owned vested pension benefits they acquired during

the marriage. Husband presented evidence of the contributions he made to the retirement, the contributions his employer made, and the amounts his benefits would be if he ceased employment immediately and either began drawing benefits at that time or waited until age 65. Wife only presented evidence of her own contributions to her retirement account and the amount of benefits she would receive if she ceased her employment immediately or began drawing benefits at age 60.

The trial court awarded wife one half of the difference between her own pension contribution and the greater amount of husband’s pension contribution. Supreme Court affirmed, but there were no findings of facts or conclusions of law recited in the judgment or requested by the parties.

Shepherd v. Collins**S07A1658 (Feb. 11, 2008)****ALIMONY PAYMENTS THAT TERMINATE UPON THE WIFE’S DEATH ARE CONSIDERED TO BE PERIODIC AND MODIFIABLE.**

The Supreme Court reversed trial court’s refusal to modify alimony where trial court incorrectly characterized alimony award as “lump sum” rather than “periodic.” “If the words of the document creating the obligation state the exact amount of each payment and the exact number of payments to be made without other limitations, conditions or statements of intent, the obligation is one for lump sum alimony payable in installments.” Winokur v. Winokur, 258 Ga. 88, 365 SE2d 94 (1988).

In Shepherd, the Settlement Agreement provided for alimony to be paid in specific amounts over a set period of 180 months. The Agreement further stated “Even though said payments are alimony, they shall continue even if the wife should remarry and they shall cease only upon the death of the wife or until 180 payments have been made, whichever first occurs.” Because alimony terminates upon wife’s death, the total amount of alimony is uncertain, making it periodic alimony rather than lump sum. It should also be noted that the trial court lowered alimony on a temporary basis and made husband repay the difference in the final order.

Sparks v. Jackson**A07A1963 (Feb. 29, 2008)****FORMER WIFE ACQUIRES A VESTED INTEREST IN LIFE INSURANCE WHERE THE SETTLEMENT AGREEMENT NAMES HER AS IRREVOCABLE BENEFICIARY.**

Court of Appeals held that former spouse (Jackson) could collect insurance proceeds pursuant to her Settlement Agreement incorporated into the divorce decree, even though the insurance policy designated deceased husband’s then current wife as beneficiary, because the Settlement Agreement required husband to designate former wife as “irrevocable beneficiary.” In Sparks, the Agreement stated husband “agreed to maintain his current level of life insurance on his wife through his employment at which the present time is \$220,000, with wife being named as the irrevocable beneficiary for the benefit of the children until such time as the children attain the age of 18 years, at

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which time she will be deleted as the beneficiary for their behalf and the children will be named as equal beneficiaries.” Parties were divorced in 1998. In June of 2005, the husband designated his new wife (Sparks) as a beneficiary under his life insurance provided by his employer. After husband’s death, Sparks filed interpleader action against life insurance company, the employer, and Jackson, and the insurance proceeds were deposited in the Court’s registry.

Trial court granted Jackson’s motion for summary judgment, and the Court of Appeals affirmed in part and reversed in part. It held, “as a general rule, if an insured names a beneficiary by revocable designation, the beneficiary does not acquire vested right or interest in the policy and the insured may change the beneficiary at will. However the insured may forfeit this right if he agrees for valuable consideration not to change the beneficiary.” In the context of a divorce settlement, “the terms of a property settlement agreement may preclude the insured from making a change of beneficiary even though he is given this right by terms of the insurance policy. Thus, where a divorce decree requires the husband to name his children or his former wife as beneficiaries of his life insurance policy and to keep the policy in force, the children or former wife obtain a vested interest in the policy proceeds.” It did not matter that there was no evidence that the husband ever named Jackson or the children as beneficiaries.

It also did not matter that the insurance policy did not come into effect until several years after the divorce decree, because it was the only insurance policy shown to be carried by the husband through his employer. Where a policy of life insurance replaces a policy or an amount specified in a separation agreement, the minor’s interest in the prior policy applies to the replacement policy. The Court of Appeals concluded that the former wife had a vested interest in the policy by virtue of the settlement agreement regardless of whether she was specifically designated as a policy beneficiary or whether the policy was the exact instrument in effect at the time of the divorce.

However, the Court of Appeals reversed any amount of money that was over and above the \$220,000 as set forth in the agreement, plus the interest, and remanded the case to the trial court to enter a judgment that gave the new wife the remainder.

Two other arguments were rejected by the Court of Appeals: 1) Sparks contended that the trial court failed to equitably divide the policy proceeds between her and the former wife to get the policy premium payments back, and 2) she claimed that the settlement agreement failed to meet ERISA requirements for beneficiary designation. The Court of Appeals held that it didn’t have equity jurisdiction and that the ERISA argument was raised for the first time on appeal.

Dasher v. Dasher**S08F0386 (Mar. 10, 2008)****HUSBAND HAS BURDEN OF PROVING THAT PROPERTY ACQUIRED DURING THE MARRIAGE IS MARITAL.**

Husband appealed a divorce judgment claiming that the trial court abused its discretion by failing to award any marital property to him. The final decree identified eight parcels as being owned and exclusively titled in wife’s name and provided that she “shall retain possession and ownership of those tracks.” It also ordered each party to pay their own attorney’s fees. Supreme Court affirmed. “Property does not become a marital asset simply because one of the spouses obtains it during the course of the marriage. Only property acquired as a result of the labor and investment of the parties during the marriage is subject to equitable division. Whether a particular item of property actually constitutes a

marital or non-marital asset may be a question of fact for the trier of fact to determine from the evidence.” Thus, it held that husband had the burden of proving that the four tracts were marital assets. As in most of these cases, there was no request for findings of fact nor was there any explanation as to the trial court’s rationale in the decree. There was no transcript for the court to review. Judgment was affirmed.

Gary v. Gowins**S07G1104 (Mar. 10, 2008)****FATHER COULD NOT BE HELD IN CONTEMPT OF AN ORDER THAT INCORPORATED A SETTLEMENT AGREEMENT FOR CHILD SUPPORT WHICH ACCRUED PRIOR TO THE DATE THE AGREEMENT WAS INCORPORATED INTO THE COURT ORDER.**

In Gary v. Gowins, the Supreme Court held that a father could not be held in contempt for failure to pay child support that accrued pursuant to an agreement during the time period before the agreement was incorporated into an order. In Gary, the parties signed an agreement for child support in July 2002. In April 2005, the trial court incorporated the agreement into an order. The order did not specify a commencement date for child support, but rather ordered the parties to comply with the terms of the agreement, which made child support payments begin August 15, 2002. The father filed a motion for new trial and for clarification regarding whether the judgment required him to pay back child support from July 2002 through April 2005. (Father contended there was a mistake in the amount of child support and had been paying the actual agreed upon amount during that time.) In a subsequent order, the trial court stated no award of back child support had been granted.

Nevertheless, mother filed a contempt action charging the father with willful failure to pay child support as required under the April 2005 judgment. The trial court held that the father could not be held in contempt for failure to pay support under the parties’ agreement prior to its incorporation. The Court of Appeals reversed, holding that when the agreement was incorporated into the April 2005 judgment, the child support obligation imposed by the agreement from the date executed in July 2002 became an order subject to contempt.

The Supreme Court reversed, stating the Court of Appeals ignored the trial court’s subsequent order clarifying its April 2005 judgment. “Before a person may be held in contempt for violating a court order, the order should inform them in definite terms as to the duty thereby imposed upon him.” Here, there was no clear directive that child support was ordered from July 2002 to April 2005.

Justice Hunstein concurred, limiting the holding to the facts presented in this case. The concurrence states, “in the absence of the court’s subsequent clarification Order, compliance with the settlement agreement would have been enforceable by contempt retroactive July 2002. To hold otherwise would stymie efforts to enforce pre-judgment obligations under such agreements and invite non-compliance of terms intended to facilitate the provision of maintenance, protection, and education to minor children whom both parties are statutorily obligated to support. Thus, nothing in the majority’s opinion should be read as requiring a party to bring a separate contract action to enforce pre-judgment obligations that the trial court, having specifically approved as just and consistent with applicable law, has incorporated into its decree.”