SECTION SPONSORS: American Wealth Management, Inc.; CBeyond Communication; FairShare Financial, Inc.; F&D Advisors; Habif, Arogeti & Wynne, LLP; Investigative Consultants, Inc.; LexisNexis; Mellon Private Wealth Management; Taylor Consulting Group; Wealth Horizon, Inc.

FAMILY LAWYER

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

February 2007
Editor: Eileen Thomas
eileen@ethomaslaw.com

Family Law Section Board of Directors 2006-2007

Chair
Lauren G. Alexander
lauren@collaborativelawoffice.com

Vice Chair/Chair-Elect
John L. Collar, Jr.
jcollar@lawbck.com

Secretary
Melody Z. Richardson
melody@prfamilylaw.com

Treasurer
Marvin Solomiany
msolomiany@kssfamilylaw.com

Immediate Past Chair
Kurt A. Kegel
kkegel@dmqlaw.com

Members-at-Large
Daniel A. Bloom
dan@prfamilylaw.com

Jon W. Hedgepeth
jhedgepeth@hhfamilylaw.com

David N. Marple
dmarple@dmqlaw.com

Eileen Thomas
eileen@ethomaslaw.com

Atlanta Bar Association President
Richard B. Herzog, Jr.

Quote of the Month

"Education is what survives when what has been learned has been forgotten."

B. F. Skinner

PAULA FREDERICK SPEAKS ON ETHICS FOR THE FAMILY LAWYER

By Jon W. Hedgepeth, Hedgepeth & Heredia, LLC

Paula J. Frederick with the Office of the General Counsel for the State Bar of Georgia conducted an interactive discussion on ethics issues as they pertain to family law practice at the January monthly Family Law Breakfast at the Buckhead Club.

After discussing current events and various rule changes, including the new $200.00 fee requirement to be admitted to practice pro hac vice in Georgia, the adoption of the ABA Model Rules and their differences with what was previously in place, Ms. Frederick went on to discuss the issue of ethics and bar complaints. She stated that there are numerous grievances filed against attorneys in family law cases, and her discussion addressed these as a way to enlighten attorneys of potential problems and attempt to prevent future grievances.

"I'm sad to say that business is up," Ms. Frederick stated. Usually the numbers of grievances have been fairly level, taking in to consideration the number of new lawyers entering the Bar each year; however, during the 2005-2006 Bar year, there was much higher than normal level of complaints. 4392 people asked for complaints to file grievances against Georgia lawyers. "There are about 34,000 members of the State Bar of Georgia. Many of them maintain a law license but do other things. So the estimate is really about 28,000 engaged in the practice of law." "We dismiss about 85% of what we get, so we dismissed 2,351 grievances over the past year."

She discussed the changes the Bar has implemented in screening grievances which may attribute to the large number of dismissals. "We are trying now to really find out what hap-

FREDERICK, page 2

MESSAGE FROM THE CHAIR

By Lauren G. Alexander

Let me begin by congratulating Judge Melvin K. Westmoreland. He was elected Secretary-Treasurer of the Council of Superior Court Judges. In 2 years, he will head the Council. The honor and respect he clearly has from the other members of the bench is made more apparent by the fact that 16 years have passed since a member of the Fulton County bench served in this capacity. Thank you for your dedication and hard work Judge Westmoreland.

Since October 1, 2005, the state of New Hampshire, a state with a population of slightly more than half of the Atlanta metropolitan area, has operated under the auspices of The Parental Rights and Responsibilities Act.

After years of research and significant involvement by the State Bar of New Hampshire, their legislative body had the foresight to discard value-laden terms, such as "sole physical custodian", in favor of more neutral terms, such as residential responsibility.

Instead of "custody", the law and hence the parents and courts focus on parental rights and responsibilities. Instead of "legal custody", the focus is on decision-making responsibility, instead of "physical custody", the focus is on residential responsibility and instead of "visitation", the focus is on parenting schedules.

The law is written in plain English. The best interests standard remains at the core and as the foundation of the act. There is a presumption that, except in cases of family violence or other forms of maltreatment, parents can and will adopt joint decision-making responsibilities for their children. Responsibility for developing a parenting plan is placed on the shoulders of the parents first, without ignoring the fact that there are cases in which that will not be possible. In those cases, the court has the necessary power and discretion to develop the parenting plan, based on best interests.

The New Hampshire law encourages, rather than mandates, that a parenting plan be developed that outlines how parents will co-parent together and who will be responsible for what. Such plans are much more specific than those mandated by the courts. In addition to decision-making and residential responsibility for each parent, they include a plan for communication, the times each parent will see the children, relocation procedures, details of how plans may be modified in the future, and guidelines for how disputes will be handled and resolved.

In a nutshell, parenting plans are intended to ward off future problems.

I doubt that anyone in the legislature reads our newsletter, but wouldn't it be nice if our laws did not serve to promote acrimony and positional bargaining with children as the pawns? I wonder if our lawmakers could take a lesson from the tiny state of New Hampshire, where parents are both permitted and expected to remain parents and children are allowed to remain children?

***FREDERICK*, continued from page 1**

pened." she stated with respect to reported complaints. "We have an investigator who is a former FBI agent who also is a law school graduate although not a member of the bar, and he is really good in money cases finding the trail of where the funds went." But most of the complaints involve a lack of communication between the lawyer and the client. In most cases, even after the grievance is filed, if the lawyer gives the client the needed attention, the complaint is often dismissed. Often, Ms. Frederick admitted, the case is that the client does not know what the Bar is for, so they file complaints when they are merely angry at the lawyer but there is no allegation of unethical conduct, thus the 85% dismissal rate of grievances.

The second tier of the grievance process works through the disciplinary board that does a more thorough investigation, makes a probable cause finding, and then sends the case back to the Bar to prosecute in the event there is really a problem. "Every year, the number of lawyers disbarred remains relatively the same." Last year, there were 182 cases where discipline was imposed; including interim suspensions which may or may not ultimately result in suspension (which some are ultimately lifted). The majority of the grievances are criminal related. "Sadly, since the state adopted the state-wide indigent defense system and didn't fund it, we are seeing a huge number of grievances against criminal defense numbers, including huge numbers against indigent defense lawyers." Ms. Frederick believes that the criminal defense complaints in this indigent defense arena account for at least half of the grievances, and they are constantly wrestling with how to treat them. While she admits that a large number of complaints are from defendants who are in jail and simply discontent for that fact, there are many instances where their cases are simply abandoned. So the Bar is trying to strike a balance and not overburden these overwhelmed public defenders with an ever increasing caseload.

Family law is probably the second highest practice area for grievances after criminal law, but I would say that less than a quarter of the grievances involve family law." She attributes this high number to the emotionally charged nature of the practice with stakes higher than in most other types of practice. "Most of the time, the nature of the complaint is just sour grapes over the outcome of the case." When dealing with custody of children and division of assets, people are more emotionally involved than in a mere business transaction. Also, Ms. Frederick said that they get a lot of grievances from the party representing their spouse's lawyer. "Our rules don't have any standing requirements. If a complaint alleges any ethical misconduct, we are supposed to look into it." The Bar may require the Bar member to respond to a complaint leveled by the party on the other side of a case, but in responding to such cases, it puts the attorney in the position of being forced to reveal confidential information about your client, so the Bar is conscious of the awkwardness of the situation for the lawyer.

The Bar is also getting more and more conflict situations, which can be remedied by an effective conflicts check system, including adding maiden/previous names of past clients in the conflict system. Other types of conflicts the Bar sees are personal conflicts in the form of some form of sexual relationship between the lawyer and the client which is addressed with some fairly on-point Georgia case law. And most of the time, those types of cases do result in confidential discipline. Finally, another conflict arises when attorneys attempt to represent both parties to a case, thinking that there are no issues and that the attorney is merely acting as a scrivener. Ms. Frederick adamantly stated; "it's against the rules. Don't do it."

WHAT'S COMING UP...

February 8, 2007 - 7:30 am
Family Law Breakfast
Marty Varon, Alternative Resolution Methods, "The Various Pitfalls and Concepts to Look out for in the Valuation of a Closely Held Business"

February 14, 2007 - 8:30 am - 4:00 pm
Family Law Seminar: Love Hurts …And What Family Lawyers Need to Know and Do to Make it Better

February 14, 2007 - 4:00 pm to 5:30 pm
Love Hurts Reception and Art Auction

March 8, 2007 - 7:30 am
Family Law Breakfast
Joshua Berman, Richard Litwin, tax issues-one hour CLE offered

April 12, 2007 - 7:30 am
Family Law Breakfast
Richardson Lynn, Dean, John Marshall Law School

DEAR VOLUNTEER LAWYERS:

The Atlanta Volunteer Lawyers Foundation is looking for experienced divorce attorneys to serve as mentors. As you know divorce can be a difficult and emotional time for our clients. And it is therefore one of the most difficult types of cases to take on as a volunteer attorney.

We often have new attorneys and attorneys who do not practice family law who are interested in taking on divorce cases. However with no experience in this area of law it is difficult for these attorneys to feel comfortable that they are adequately representing the clients.

With this in mind we ask you to consider becoming a mentor. Your role as a mentor will be two fold. You will be assisting a young or non-family law attorney gain the skills and confidence to successfully represent our clients. And you will be serving your community through pro-bono; though you will not be directly representing the client you will be directly influencing the outcome of the case.

Being a mentor is a great option for those of you who do not have the time or resources to take the full responsibility of a case yourself. Though you may be limited in the time you have to give; your skills and knowledge are the greatest resource we could hope to gain from you.

If you are interested in becoming a divorce mentor for AVLF we want to hear from you! Please call Christina Weeks, Paralegal (cweeks@avlf.org) or Tamara Caldas, Esq. (tcaldas@avlf.org) for further details and to get paired with an attorney who needs your guidance!

RECENT DECISIONS

By Anita H. Lynn, Esq.

In *Facey v. Facey*, S06A0693; S06X0694 (11/27/06), the parties were granted joint legal custody of their three children in the divorce, and Wife was awarded primary physical custody. Husband was initially to pay a fixed monthly amount of child support, to be modified annually based upon 25% of his gross annual income. Subsequent to the entry of the divorce Decree, Wife filed a contempt action alleging that Husband failed to provide the required income documentation and, also, that he unilaterally reduced his child support without seeking a modification of the divorce Decree. Husband filed a separate action seeking a change of primary physical custody from his ex-Wife to himself, also requesting an award of child support. The trial court consolidated both actions and entered one order, which modified custody by granting Husband additional time with the children, set a fixed monthly child support payment, and deleted the annual adjustment provided for in the parties' divorce Decree. Both parties appealed the trial court's decision; some of their appellate issues were similar. First, both parties asserted that the trial court abused its discretion by entering a written order limiting the amount of time that each party could testify; however, neither party objected to the written order nor did either party object at the hearing. Accordingly, they waived their right to a review of any such error. Husband also appealed the trial court's modification of the child support award. He contended that the trial court did not have the authority to modify child support in the Wife's contempt action; Wife also contended that the trial court did not have the right to modify child support without a separate petition being brought under O.C.G.A. § 19-6-19. The Supreme Court held that both parties were incorrect, since the Husband's petition for a change of physical custody also contained a corresponding request for a change in child support. The trial court had modified Husband's visitation by expanding his rights, and visitation is a part of custody. In the next enumerated error, Husband contended that the trial court should have entered a year-round schedule of alternating weeks with each parent instead of alternating weeks only during the summer months; he argued that this new arrangement was not in the best interest of the children. The Supreme Court found no abuse of discretion. Next, Husband contended that the trial court did not did not enter the required findings to modify his child support under O.C.G.A. § 19-6-19; however, the Supreme Court held that the trial court properly found that the Husband's income had decreased significantly since the divorce Decree, thereby supporting a downward modification. In the next enumerated error, Husband alleged that the trial court improperly determined his future child support obligation and the arrearage by failing to use the income figures set forth on his personal income tax returns. However, an accountant had reviewed the Husband's business returns and personal financial documents and testified that Husband's decisions about certain tax deductions and discretionary business expenses affected his calculations. The Supreme Court held that the trial court, sitting as the finder of fact, has the right to resolve any conflicts in the evidence. The divorce Decree also included a provision requiring Husband and Wife to each pay the children's clothing, school allowances, Cub Scout dues, and uniform expenses, with payment of these expenses alternated between the parties on an annual basis; the Husband claimed that this requirement was vague and in an indefinite amount. However, the Supreme Court held that at the time of the award, the uncertainty of future expenses did not reflect that the award departed from the statutory guidelines. In the Wife's appeal, she contended that the language regarding an automatic annual recalculation of Husband's child support obligation was invalid and should not have been used to compute the arrearage; she claimed that the trial court should have utilized the initial fixed monthly amount set forth in the Decree. The Supreme Court held that this portion of the Decree was not void since it was entered by a court of competent jurisdiction; the proper method of attack would have been by direct appeal of the Decree or a motion to set aside. In Wife's next enumerated error, she alleged that the court improperly attempted to retain jurisdiction by requiring the parties to alternate annual expenses and by entering a mechanism by which the parties could resolve disputes in the future. The Supreme Court held that the trial court had established a permanent award and did not attempt to retain jurisdiction. Additionally, requiring the parties to give the court a status report when the eldest child reached 18 years of age was not found to be an improper attempt for the trial court to retain jurisdiction, since nothing in the order provided that the court could issue a modification of custody, visitation, or child support without a petition being properly filed by one of the parties.

In *Moxley v. Moxley*, S06F1183 (11/28/06), in Husband's first enumerated error, he contended that Wife's counsel improperly cross-examined him on what would be fair regarding alimony and property division, claiming that it invaded the province of the jury. Previous case law did not support Husband's position, plus the Supreme Court pointed out that his own counsel had essentially asked him the same question on direct examination. Husband next claimed that the trial court improperly admitted into evidence the financial affidavit that he had prepared several months prior to trial, contending that it was not relevant and was unfairly prejudicial. The Supreme Court found that the admission of evidence objected to on the ground of relevancy is within the sound discretion of the court and will not be overturned absent a clear abuse of discretion. In this case, Wife had argued at trial that Husband had hidden or dissipated assets during the divorce proceeding; therefore, the trial court's decision did not reflect a clear abuse of discretion. The Husband's third enumerated error was that the trial court allowed the testimony of a witness, who had not been identified as a person with information about the case in the Wife's answers to Husband's interrogatories. The trial court refused to exclude this witness and allowed Husband's attorney an opportunity to interview the witness before she was called to testify. In this type of situation, the proper procedure is for the trial court to allow the objecting party a sufficient

DECISIONS, page 4

THE FOLLOWING ATTORNEYS HAVE TAKEN PRO BONO CASES IN OCTOBER AND NOVEMBER:

GAL:
Jon Rotenberg
Amber Patterson
Laura Mendleson
Megan Miller
Stacy Sax
Adria Perez
Michael Sheridan
Joanna Deering
Patrick Deering
Michael Johnson
Dan Bloom

Divorces:
Alvah Smith
Ernest Napier

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

DECISIONS, continued from page 3

amount of time to interview the witness, check the facts, and arrange for rebuttal witnesses if necessary, with the appropriate length of time being a matter within the trial court's discretion. Husband did not contend that the trial court had failed to allow him a sufficient amount of time; furthermore, the record reflected that Husband and his counsel had been aware of this witness for 2 months prior to trial. Accordingly, the trial court did not abuse its discretion in this matter. Next, Husband enumerated as error the admission of testimony on the ground that it was prejudicial hearsay; this witness had testified to statements allegedly made by Husband's lover, prior to the lover having testified. The witness attempted to impeach the testimony of the Husband's lover "in anticipation of this testimony." A party is allowed to use a prior inconsistent statement to impeach a witness, but it is improper for the impeaching testimony to be made prior to the testimony sought to be impeached. However, even though the statement was improperly admitted, no harm was demonstrated, so the enumeration of error was without merit. In Husband's fifth enumeration of error, he contended that the trial court improperly admitted a document that was not authenticated or identified. Husband had initially denied any knowledge of the document, yet when asked about specific transactions reflected in the document, he testified that he did recognize some of this information. The Supreme Court found that even if the document's admission was erroneous, it was merely cumulative of the Husband's testimony and the error was harmless. Husband's sixth enumeration of error - after the closing arguments were concluded and the jury had been charged and had begun its deliberation, Husband moved for a mistrial alleging that Wife's counsel had made an improper argument. The record revealed that no objection to this argument was made during the trial; therefore, the motion was not timely. Under these circumstances, the test for reversible error is whether or not there is a reasonable probability that the improper argument changed the result of the trial; there was no such reasonable probability reflected in the record. The Husband's final enumeration of error concerned the jury's verdict; he claimed that the verdict was contrary to the weight of the evidence. This is a question for the trial court, and when the trial court has accepted the verdict, the only issue for the appellate court is whether or not there exists any evidence sufficient to authorize the verdict. Since the jury heard evidence of the parties' assets, liabilities and earning power, the Supreme Court held that the evidence was sufficient to authorize the jury's verdict.

In *Seeley v. Seeley*, A06A0843 (11/15/06), the parties were granted joint legal and physical custody of their daughter in the divorce Decree, which was entered in the Superior Court of DeKalb County. After the divorce, mother moved to Gwinnett County; however, the father remained a resident of DeKalb County. Father filed a petition requesting temporary and permanent physical custody of the child; his action was filed in the Superior Court of Gwinnett County. The mother filed a counterclaim seeking primary physical custody of the child and child support. On the morning of the trial, the father made an oral motion to dismiss the mother's counterclaim pursuant to O.C.G.A. § 19-9-23. The trial court reserved its decision on this motion and began the trial. After hearing testimony from six witnesses, the court revisited the father's motion and denied it, finding that the mother's counterclaim was permissible since both parties were essentially seeking the same relief. Husband appealed the trial court's decision. The mother argued that O.C.G.A. § 19-9-23 should not apply, because she was only seeking a change in physical custody, not legal custody. The Court of Appeals found no merit to Wife's argument, holding that this code section precluded her counterclaim. The trial court erred when it denied the father's motion to dismiss the mother's counterclaim, since the statute precludes a counterclaim seeking a change of custody. The mother's claim should have been brought as a separate action in the father's county of residence. For the first time on appeal, the mother also raised the issue that the father waived his right to move to dismiss her counterclaim, since his motion was made orally instead of in writing. The mother's failure to raise this waiver issue at the trial court level barred the issue from being reviewed by the appellate court.

In the case of *Weil v. Paseka*, A06A1273 (11/15/06), the trial court entered a post-divorce modification order transferring custody of the parties' 13 year old son from the mother to the father. The order also provided that the mother would have only supervised visitation with her son and that at least one visitation per week should be supervised by a child psychologist. The mother was ordered to pay the psychologist's fees as well as 20% of her gross income in monthly child support, plus all expenses associated with supervised visitation, health insurance, and one-half of the child's uncovered medical expenses. Additionally, the trial court also ordered the mother to get psychological treatment as a condition to her exercise of visitation rights. The trial court did not make any specific findings regarding special circumstances. In her appeal, the mother contended that the trial court failed to consider and make specific findings on the record regarding the special circumstances present under the child support guidelines, and it failed to reduce her child support obligations to accommodate for these extra expenses. The Court of Appeals held that the trial court was not required to identify in its written order every fact that could possible qualify as a "special circumstance" as long as that special circumstance did not make the presumptive amount of child support unfair. The question in this case is whether the facts render the presumptive amount excessive. The trial court's failure to identify these facts as "special circumstances" was not error per se. However, nothing in the record indicated that the trial court actually considered whether ordering the mother to pay 20% of her gross income was excessive or unjust in view of her other financial obligations under the order. The trial court failed to consider whether there were any "special circumstances." There was no evidence in the record indicating the actual cost to the mother of these additional financial obligations nor were there any written findings as to whether she had the financial resources to pay these court ordered obligations in addition to her monthly child support. In a footnote, the Court of Appeals noted that although the Appellee asserts that the child's medical and psychological expenses are mere possibilities (which would prevent the mother from showing that the court's order departed from the guidelines), the trial court had made such treatment mandatory; these costs plus the cost of supervised visitation were a certainty – they were not merely "potential expenses" that might never materialize. In summary, there was no indication that the trial court actually considered all relevant evidence and made the required determinations under the guidelines before issuing its child support order. Accordingly, the appellate court was unable to review whether or not the trial court properly applied the statute when calculating the final child support award. Consequently, the trial court's order was vacated and remanded with direction to consider on the record the issues outlined in the Court's opinion. The mother also enumerated as error the trial court's finding that she was an "unfit parent," contending that it was not supported by the evidence and should be reversed. Nonetheless, the mother correctly argued that a finding of unfitness was not required to transfer custody to the father pursuant to O.C.G.A. § 19-9-1(a)(1). The mother did not contend that custody was improperly transferred to father nor did she challenge the restrictions on her visitation. She failed to demonstrate that the court's unnecessary findings constituted reversible error.

In the case of *Jones v. Van Horn*, A06A2467; A07A0057 (12/29/06), the parties were divorced in Texas in 2001. The mother was awarded physical custody of the parties' son and the father

DECISIONS, page 6

A VIEW FROM THE BENCH

The Honorable Mark A. Scott

Judge Mark Anthony Scott graciously agreed to speak to our section in December after having visited us approximately two years ago when he had just started his first term as a Superior Court Judge in Dekalb County.

Judge Scott presides over civil, domestic relations, and criminal felony matters as a Superior Court Judge in the Stone Mountain Judicial Circuit. Prior to being elected as a Superior Court Judge in August 2004, Judge Scott's primary legal concentration focused on criminal defense work throughout the United States for over 20 years.

Judge Scott earned his J.D. degree from Howard University School of Law in Washington, D.C. in 1984. Prior to law school, Judge Scott served in the United States Air Force.

It was important for Judge Scott to make sure that we were aware that he wanted "to take the time and listen to lawyers and litigants, to these divorcing parents, to these children,[for] whom if you care anything about conditions of people in this community, would feel the hurt and pain that walks into the courtroom on the day … [he] will be granting the temporary or final order." One of Judge Scott's pet peeves is that he "can't go up to the litigants and give them a big hug and tell them it will be alright,…and that the lawyers have not given them that big hug." He is concerned that the litigants have seemed to lose sight of the children in their fight. Judge Scott would like to remind the parents that they must have liked each other at some time, but he cannot.

Judge Scott went on to compliment our own Shiel Edlin for his article for the State Bar of Georgia, Family Law Review, wherein Shiel spoke about his passion for family law. Judge Scott brought up that Shiel said that in order for him to render effective advice he "must be known about taxation and …psychology and … the divorce law." Before reading this article, Judge Scott believed that "only criminal defense lawyers had this kind of passion."

Judge Scott voiced another of his pet peeves, namely when lawyers come into his courtroom who do not have strong cases, they pick on the Judge. More specifically, he said, "they try to engage the Judge into making some mistake or error to take him or her up on appeal. [He] thought just criminal defense lawyers did that." This was said as a compliment to the vast majority of metro Atlanta attorneys (at least 95%) who he believes "come into his court well qualified and well prepared, able to articulate and advocate for their positions." They do not need to pick on him. He "celebrates lawyers, he is there to help you, to be the neutral."

For those of you, who practice in Dekalb County, please be aware that the Courthouse is now wireless. It is now possible to go into Court with a single document and put it on the ELMO (sp?). There is a touch screen at the witness station and with the lawyers, so copies are not absolutely necessary. It is important to learn the new technology that is available. Judge Scott noted that it is important for him to understand how the numbers were arrived at. We need to be able to show him how. This is especially true with the new Child Support Guidelines coming in January 2007. Judge Scott says, "Use the technology to educate your Judges, and to educate your juries, even if you forget the copies." In fact, if you go to Judge Scott's division and ask to use the ELMO before your Hearing or trial he will have his staff come out and help you. Judge Scott wants you to look good.

Two years ago, Judge Scott invited the Family Law Section to go to him and let him know if you thought he was doing something wrong with procedure, or how he conducts the courtroom. We did not do it. We had the opportunity to make his division into a more user-friendly division, we still do, and Judge Scott is willing to listen. Judge Scott considers Fulton County Family Court to be a great model. He has implemented a plan whereby in his division, you will go thru a 45-60 day review before a court date is assigned. Judge Scott believes that the public will be less critical of the system if they understand the process, and how the Judge gets from point A to point B.

WHO'S WHO IN THE FAMILY COURT:

JUDGE CYNTHIA D. WRIGHT

Judicial Assistant:	Ann Collins	404-730-4185
Staff Attorney:	Kyla Lines	404-730-4187
Case Manager:	Katherine Weitzel	404-730-4188
Court Reporter:	Lisa Lewis	404-730-0349

JUDGE MELVIN K. WESTMORELAND

Judicial Assistant:	Rebecca Conrad	404-335-2572
Staff Attorney:	Jill Zierer	404-730-4288
Case Manager:	Cynthia Miller Person	404-730-4290
Court Reporter:	Susan Cooper	404-730-4292

JUDGE GAIL S. TUSAN

Judicial Assistant:	Annette Anderson	404-302-8520
Staff Attorney:	Kellie Kenner	404-302-8522
Case Manager:	Tyra Johnson	404-302-8523
Court Reporter:	Wynette Blathers	404-302-8526

LOVE HURTS... AND WHAT FAMILY LAWYERS NEED TO KNOW AND DO TO MAKE IT BETTER

Wednesday, February 14, 2007 from 9:00 a.m. - 4:00 p.m.

- Superior Court Judges from Fulton, DeKalb, Cobb & Gwinnett
- Case law update
- 2007 Legislature - Family Law Matters

Happy Hour Reception and Art Auction from 4:00 p.m. - 5:30 p.m.

6 CLE hours, including 1 Professionalism and 2 Trial Practice

Visit www.atlantabar.org and click on Calendar/Register for Events or call (404) 521-0781 to register

2007 FAMILY LAW INSTITUTE SPONSORS (as of 1/31/07)

Diamond:
Davis, Matthews & Quigley, P.C.
Kidd & Vaughan, LLP
Stern & Edlin, P.C.
Aussenberg Waggoner LLP
Cohen Pollock Merlin & Small, P.C.

Double Platinum:
Thurman Financial Consulting, Inc.

Gold:
Lynch & Shuman, LLC

Silver:
Robert G. Wellon

Bronze:
Eileen Thomas, LLC
The Collaborative Law Office of Lauren G. Alexander
Janis Dickman, LLC
Evin L. Somerstein, P.C.

***DECISIONS*, continued from page 4**

was awarded physical custody of their daughter. Approximately 4 years after the parties were divorced, the mother filed a petition in Georgia seeking an order changing physical custody of the daughter; jurisdiction was proper in Georgia pursuant to the UCCJEA and was, in part, based upon the fact that the child had resided with her father within the State of Georgia for at least 6 months prior to the commencement of the proceedings. The trial court entered a final order changing custody of the daughter to the mother, since the divorce Decree provided for a temporary change of custody to the mother, for so long as the father, who was in the military, was deployed overseas. The trial court found that because the divorce decree provided for the daughter to reside with her mother during the father's deployment to Korea, this provision was a basis for the court to award permanent legal custody to the mother. However, a change of custody is based upon a finding by the trial court that there has been a material change in condition affecting the welfare of the child and the new custody arrangement would be in the best interest of the child; the only "change of condition" upon which the trial court based its decision to change custody was the court's finding that the divorce decree provided that the child would temporarily reside with her mother if she did not accompany her father during his deployment. The Court of Appeals reversed the trial court's decision, holding that no change of condition had yet occurred and, also, there was no finding by the trial court that any such change substantially affected the welfare and best interest of the child. The father also contended that the trial court lacked personal jurisdiction, because he was not personally served with the petition. However, copies of the petition were left at his dwelling home or usual place of abode with a person of suitable age and discretion, pursuant to O.C.G.A. § 9-11-4 (e) (7). Additionally, he showed up at the temporary hearing with his attorney and, therefore, submitted himself to the jurisdiction of the court; there was nothing in the record to reflect that this issue was raised at the hearing and preserved for appeal. The father also claimed that the court failed to grant him a stay of the final hearing pursuant to the Servicemembers Civil Relief Act. The trial court had denied the father's motion for a new trial, finding that the father had not moved for a continuance pursuant to this Act. Since there was no transcript of the final hearing in the record, the Court of Appeals would not consider affidavits in support of the father's claim, which were filed after the final hearing and after the trial court's custody order. Additionally, there was nothing in the record to indicate that any such application that may have been filed by the father contained all of the necessary information under the Act. The father enumerated as an additional error that the trial court should have stayed the proceedings, because the mother's change of custody petition did not contain all of the required information in accordance with O.C.G.A. § 19-9-69. Subsection (b) of O.C.G.A. § 19-9-69 authorizes the court to stay the proceedings upon motion of a party or upon the court's own motion, until the information is furnished. However, nothing in the record reflected that the mother withheld this information or that the father moved for a continuance. Without a transcript of the final hearing, the Court of Appeals could not determine whether or not the mother had produced the required information at the hearing; there was no evidence to indicate that the trial court had abused its discretion by not staying the proceedings until more information was furnished. In the father's final enumeration of error, he contended that his due process rights were violated under the U.S. Constitution, because the judges and clerk of the Superior Court refused to comply with the Uniform Superior Court Rules pertaining to the assignment of cases to judges. However, the father failed to support his claim by citing any specific rules or laws that may have been violated and he also failed to provide any arguments in support of his claim. Additionally, there was no evidence in the record supporting the substance of the father's claim or reflecting that any such claim had been raised at the trial court level and preserved for appellate review. Consequently, the Court of Appeals considered this claim to be abandoned.

In *Garnett v. Murray*, S06A2101 (01/08/07), Ruby Garnett filed a mandamus petition against Brian Murray to compel him to issue an income deduction order to garnish the wages of her ex-husband, who was in arrears on his child support. Murray previously was employed by Maximus, which had contracted with the State of Georgia to provide child support enforcement services. Murray moved to dismiss the petition on the ground that he no longer worked for Maximus and was not in a position to perform the service that Garnett wanted him to perform. Approximately seven months after Murray filed his motion to dismiss, and approximately three weeks prior to the hearing, Murray filed a supplement brief in support of his motion. Murray's motion to dismiss was granted by the trial court. Ruby appealed on the ground that she was not granted sufficient time to respond to the supplement brief pursuant to Uniform Superior Court Rule 6.2; however, the Supreme Court stated that a brief is not a motion, and, therefore, this Uniform Superior Court Rule was not applicable. Additionally, the trial court has the discretion to shorten the amount of time to respond to a motion to dismiss in a civil case. Also, Garnett failed to show how she was harmed by the alleged error. Accordingly, the trial court's decision was affirmed.

In the case of *Corvin v. Debter*, S06A2039 (01/08/07), the wife failed to pay husband his share of the equity in the marital home in accordance with the terms of the final decree. Eight years after the money came due to the husband, and ten years after the decree was entered, husband filed a motion for contempt against wife. She filed a response in which she pled estoppel, illegality, and waiver as affirmative defenses. The trial court held wife in contempt. She subsequently filed a motion for new trial and a motion to set aside, in which she asserted that the judgment had become dormant pursuant to O.C.G.A. § 9-12-60. The Supreme Court found that because the dormancy statute is a statue of limitations, wife had the burden of timely raising it as an affirmative defense. Since she failed to invoke the dormancy statute except in her post judgment motions for new trial and to set aside, the defense was not timely made and was, therefore, waived.

A question of first impression was addressed in the case of *Barton v. Barton*, S06F2159, S06X2160 (01/08/07). Is the court required to value the stock of a closely-held corporation for purposes of dividing marital property based upon the value set forth in a buy-sell provision of the stockholder agreement? The Supreme Court's answer is, "No." Husband appealed the arbitrator placing a fair market value on the stock, which was in excess of the value derived from a formula set forth in the buy-sell provision of the stockholder agreement. The Supreme Court adopted the opinion from the majority of jurisdictions, which holds that "… the value established in the buy-sell agreement of a closely-held corporation, not signed by the non-shareholder spouse, is not binding on the non-shareholder spouse but is considered, along with other factors, in valuing the interest of the shareholder spouse." Since the buy-sell price in a closely-held corporation can be manipulated, it does not necessarily reflect the true market value.

In the case of *D'Errico v. D'Errico*, S06F1588 (01/08/07), the parties entered into a separation agreement drafted by wife's attorney in June of 1996. The agreement contained a provision stating that the parties intended the agreement to settle all questions regarding alimony, property, and all other issues of the marriage. In the agreement, wife was awarded $1,100.00 per month in alimony, and husband was awarded "exclusive use of" the marital home titled in his name. The agreement further provided that, in the event of divorce, it would be incorporated into the final decree. Seven years

DECISIONS, page 7

***DECISIONS*, continued from page 6**

later, husband filed a complaint for divorce. Wife filed an answer and counterclaim, requesting an interest in the marital home as well as a share of husband's retirement pay as alimony. Husband subsequently filed a motion for summary judgment and asked the trial court to enter a final decree incorporating the separation agreement. In her response to the summary judgment motion, wife's only argument was that the separation agreement failed to resolve ownership of the marital home. She did not make any argument regarding the husband's retirement benefits. The husband's motion for summary judgment was granted; the trial court found that all issues arising from the marriage of the parties had been resolved in the separation agreement. In her first enumeration of error, wife contended that the trial court erred by finding that all issues of the divorce were settled in the separation agreement. However, the Supreme Court found that the trial court did not abuse its discretion in approving the agreement; the agreement explicitly stated that it was intended to "settle all questions pertaining to alimony, property, and all other issues of the marriage." The agreement further provided that, in the event of a divorce or separate maintenance, the agreement would be presented to the court and incorporated into any temporary order, judgment or decree. Also, the agreement had been drafted by wife's own counsel. In wife's second enumeration of error, she contended that the trial court erred by finding that she had no ownership rights in the marital home. Nothing in the separation agreement diminished the husband's ownership rights or granted any such rights to the wife. Also, husband was granted "exclusive use of the home" and was to be solely responsible for all indebtedness thereon. Consequently, this language supported the trial court's determination that the husband retained ownership of the home. In wife's third enumeration of error, she claimed that the trial court erred by failing to consider her claim for alimony as it related to the husband's military and civil service retirement pay. The Supreme Court rejected wife's claim, finding that she was bound by the separation agreement, because as drafted by her attorney, it stated that the parties had settled "all issues of property and alimony."

In *Rawcliffe v. Rawcliffe*, A06A1674 (01/12/07), the trial court entered a 12-month protective order pursuant to O.C.G.A. § 16-5-94. Following an evidentiary hearing, the court granted the protective order and enjoined the Defendant from contacting, following, or approaching within 500 yards of the Plaintiff. The Defendant was also prohibited from owning or possessing fire arms for the duration of the protective order. The Defendant appealed, contending that the evidence was insufficient, the court exceeding its authority, and the protective order violates public policy. The Court of Appeals found that the evidence supported the trial court's finding under the preponderance of evidence standard. An appellate court will not reverse a protective order absent an abuse of discretion. Based upon the Defendant's conduct toward the Plaintiff, the Court of Appeals found that the trial court did not err in entering the 12-month protective order. The Court of Appeals did reverse that portion of the order which prohibited the Defendant from owning or possessing a firearm for the duration of the protective order. Only certain types of relief may be granted pursuant to O.C.G.A. § 16-5-94(d). The trial court was not specifically authorized to prohibit the Defendant from owning or possessing a firearm, so that portion of the protective order was vacated. The Court of Appeals also found that the portion of the protective order which prohibited the Defendant from having contact with the Plaintiff and/or her immediate family was, in fact, against public policy, since the Defendant was the Plaintiff's sister-in-law. In essence, the protective order prohibited the Defendant from having contact with her brother, who is the Plaintiff's husband. The trial court could have entered a protective order without limiting the Defendant's contact with her own family; accordingly, the order was vacated to the extent it prohibited the Defendant from contacting her brother and her parents or from being with her brother and her parents when the Plaintiff was not present. The relief the trial court was authorized to grant is listed in O.C.G.A. § 16-5-94(d).

In *Sweat v. Sweat*, S06F2079 (01/22/07), the jury awarded the wife 43% of the husband's retirement plan; however, the jury did not detail how the division was to be accomplished for the purpose of tax treatment. The parties discussed the use of a QDRO, but the trial court did not provide for a QDRO in the final decree. The husband contended that the trial court erred by failing to do so, arguing that he had agreed in open court to have a QDRO included in the decree. A review of the record does not reflect that the parties reached such a stipulation, and the final word of wife's attorney was to leave the jury verdict as is; there was no stipulation as to the payment. Husband then argued that his attorney's comments did not reflect his wishes; however, in a civil proceeding, a client is bound by the statements of his or her attorney made in open court when the statements are made in the client's presence and are not denied by the client. In the husband's second enumeration of error, he addressed the lump sum alimony award payable to wife by August 1, 2005, since the decree was not entered by the trial court until December 23, 2005. Husband argued that the decree resulted in an "impossible alimony payment date." Nonetheless, even though the husband argued that the delay rendered the stipulated payment date impossible, he had already paid the alimony and did not claim any harm. To have reversible error, there must be harm as well as error, and the lack of harm renders the enumeration of error without merit. In the third enumeration of error, both parties agreed that the final decree contained an incorrect valuation date for the division of husband's retirement account. Since the decree contained a clerical error, the case was remanded to the trial court solely for the correction of this error.

In the case of *Echols v. Echols*, S06F2153 (01/22/07), the wife appealed the trial court's denial of her recusal motion. The wife contended that the trial judge was biased against her in favor of her husband and that the judge had a long-time business and personal relationship with the husband's family. She first learned of this relationship when her husband told her that his family had known the judge "forever" and that he would rule in his favor on the custody issue. The wife should have filed her recusal motion within five (5) days of this conversation in accordance with Uniform Superior Court Rule 25.1. The basis of a recusal motion is bias, and this conversation between the parties alerted the wife to the judge's alleged bias. She should not have waited over one year to file her motion. The wife argued that the entry of a certain order confirmed the judge's bias and prompted her filing of the recusal motion; however, the Supreme Court held that the order was not the basis for her motion but the alleged close ties to the husband's family. Since the bias was known long before the order was entered, the motion was not timely. Also, an order is an insufficient basis for a recusal motion; it is not "an extra-judicial act that evidences bias." Consequently, the trial court correctly ruled that the recusal motion was not timely filed. Also, based upon several other discoveries made by the wife during the course of these proceedings and because other specific allegations of bias occurred over a six month period, the Supreme Court could not find that the wife acted in good faith by waiting to file her motion beyond the five (5) day period set forth in the Uniform Superior Court Rules. Wife also contended that the trial court erred in awarding joint physical custody to the husband. After a two day hearing, the trial court found that both parties were fit and capable of exercising custody and that it was in the child's best interest to award the parties joint legal and physical custody. Even though there was conflicting evidence at the hearing, there was some evidence that it was in the child's best interest to award joint physical custody. Accordingly, the Supreme Court could not conclude that the trial court had abused its discretion.