



FAMILY LAWYER

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

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Quote of the Month

"Some of the world's greatest feats were accomplished by people not smart enough to know they were impossible."
- Doug Larson

USEFUL ESTATE PLANNING TECHNIQUES PRESENTATION AT FAMILY LAW BREAKFAST

By Jon W. Hedgepeth, Hedgepeth & Heredia, LLC

Melissa "Missy" McMorries, Esq., a attorney with McClure & McMorries, P.C., addressed the Family Law Section's monthly breakfast in October. Ms. McMorries has been a lawyer for over 20 years. She has served as the interim executive director of the Atlanta Contemporary Art Center, has been at attorney with Rogers & Hardin, and, most recently has practiced at Paul, Hastings, Janofsky & Walker, LLP. Ms. McMorries, whose practice is primarily estate planning,

discussed estate planning techniques, and, for a nominal charge, the speech also afforded CLE credit to those who desired it.

The first topic she addressed was Asset Protection Trusts. Ms. McMorries described various forms of trusts, which are essentially where a grantor transfers property to a trustee for the benefit of a third party beneficiary. One recent development in the trust arena are asset protection trusts,

which are Self-Settled Spendthrift Trusts, which are essentially a way of keeping creditors away from assets held in trust. These were disfavored for a long time prior to 1990, as it was easy to divest a spouse as a creditor in a divorce case. Recently, however, certain states (not Georgia) have permitted these entities. These are primarily international trusts which were used by people who have "run afoul of securities laws" and are trying to shelter

assets from those seeking to recover them. No domestic self settled trusts have been litigated in those jurisdictions that allow these trusts, so we do not know their enforceability; however, it is probably questionable.

She went on to lay a foundation for estate tax planning and explained how, as we know, estates are taxable. If the value of one's estate is over \$2 million, the amount over

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MESSAGE FROM THE CHAIR

By Lauren G. Alexander

Once again the deadline approached and I found myself wondering what to write about. Certain that everyone was tired of my constant urging for more involvement, more pro bono work, and more community service work, I was looking for ideas. I never would have imagined the fodder I found from attending the 2 hour supplemental training on the new child support guidelines.

Let me preface this article first by stating that I am not opposed to an income shares model for determination of child support. I am concerned about an income shares model that may be unworkable.

I have waited dutifully to learn how to use the worksheets required by the new child support guidelines, as an attorney. What was delivered to me in the training not only confirmed my skepticism, but raised my concerns to an alarming level.

In the short 2 hours I spent trying to learn how to use the worksheets, I had several unanswered questions.

How do we reconcile the new law's requirement to name a custodial and non-custodial parent based on income of the parties with the joint/shared parenting arrangements that are viable?

Why do we now allow obligors to reduce their child support obligations when they choose to have more children regardless of the financial impact on their first children?

How will mediators resolve child support issues without getting involved in completing the worksheets, thereby making decisions on what information to put in, the impact information has on the final child support number, and thereby potentially practicing law?

How are courts going to determine child support when they cannot complete the "required fields" on the worksheets that seek information on pre-existing child support obligations?

How can the pro se litigant provide required information on pre-existing child support orders when the case number, court order, date of the order, amount of the obligation and proof that it has consistently been paid is not necessarily contained in documentation from the state's child support enforcement office?

How are pro se litigants going to complete these worksheets? Are they going to be able to reach a

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that amount is taxed presently at 45%, and the goal of an estate planner is to minimize that tax. When dealing with couples, one goal is to equalize the parties' estate, and thus the tax credit. In the domestic realm with second marriages, when seeking to provide for children from prior relationships, a good prenuptial agreement certainly is key. Trusts are also useful in working out a party's intention after death. Some clients may want to continue and perpetuate a financial legacy and are adamant in retaining control over these assets. Some of the tactics are best done in a pre-divorce situation, again such as a prenuptial agreement, a postnuptial agreement. "With wealthier clients, and particularly in the collaborative setting, using some of the devices used in estate planning can help in the negotiations."

The first tool Ms. McMorries discussed is the Irrevocable Life Insurance Trust, or "ILIT." The testator can buy a life insurance policy sufficient to pay the estate taxes upon death. She said, "while insurance benefits are also taxable, an ILIT is set up where the policy is owned by the trust and, upon death of the grantor, the proceeds are paid into the trust and administered by the trustee. It is used to provide liquidity to the estate."

Ms. McMorries went on to say that "the device I think that might have the most relevance in [divorce] negotiations is the Inter Vivos QTIP." A QTIP is an abbreviation for a Qualified Terminable Inter-

est Property Trust." Ms. McMorries further gave the audience a primer on gifting; pointing out that one cannot make unlimited gifts except to a spouse, without incurring tax exposure. One is limited, in 2006, to \$12,000.00 per person, without implicating a tax with a \$2 million lifetime exemption. The QTIP allows a person to transfer the lifetime exemption and still control the ultimate outcome. There are certain tax requirements, including the fact that all of the income to the trust must be paid to the spouse annually. Regardless of divorce, the income still has to go to the spouse. From an estate planning perspective, if that beneficiary spouse dies before you, you can get the income from that trust as part of the spouse's estate. The major drawback is the fact that an Inter Vivos QTIP it is irrevocable. The benefit is that it pares down the grantor's estate and equalizes it with the grantee spouse.

Finally, Ms. McMorries discussed Family Limited Partnerships (FLPs). These have the effect of "freezing" an estate and allowing assets transferred to the FLP to be out of the donor's estate, except for the donor's retained ownership/partnership percentage. From a family law perspective, the most significant value is that the FLP can be amended, while most other trusts are irrevocable. Also, because of control and transferability restrictions, FLPs can provide significant asset insulation from creditor's claims.

RECENT DECISIONS

By Anita Lynn

In the case of *Moses v. King*, A06A1249 (9/27/06), the father filed a modification of custody action, and the trial court granted his Petition, awarding him custody of the parties' 12-year old daughter. The trial court stated that its decision to change custody from the mother to the father was not based on the mother residing with her same sex partner; it was based on the fact that this particular trial court Judge prohibits cohabitation and meretricious relationships outside of marriage, regardless of the parties' sexual preferences. The trial court initially awarded the father primary physical custody of the minor child. The mother filed a motion for new trial, and the trial court granted the motion, in part, modifying its previous Order by awarding joint legal and physical custody of the child to the parties. The mother appealed the trial court's decision on the basis that her living arrangements had no adverse affect on the child and there was no showing of new and material conditions. The appellate court reversed the trial court's decision, finding that the facts upon which the trial court relied were not new nor did they demonstrate a material change in circumstances. The living arrangements of each parent had previously existed at the time the original award of custody was entered in 2002. Further, a parent's cohabitation with someone, regardless of the person's gender, is not a basis for denying custody or visitation unless the evidence shows that the child is harmed or exposed to inappropriate conduct. Also, the trial court contradicted itself by granting the parties joint physical custody of the child when its previous Order prohibited sexual partners, other than a spouse, from spending the night in a parent's home when the child is present; there is no such restriction in the second Order granting the parties joint physical custody. The legal standard is the material change must adversely affect the welfare of the child, not that the welfare and happiness of the child would be substantially improved if custody were modified.

In the case of *Gelfand v. Gelfand*, S06A1426 (10/02/06), the Supreme Court found that the wife's request for the trial court to clarify the meaning of purportedly ambiguous provisions in a Settlement Agreement did not truly constitute an action for declaratory judgment. Wife was not invoking the court's power to assist her with any uncertainty or insecurity respecting her rights, status or legal

relations. Consequently, and because there were other unresolved issues remaining from the hearing before the trial court, wife was not appealing a final order. She was, therefore, subject to the interlocutory appellate procedures, a certificate of immediate review. Wife's appeal was dismissed.

The trial court ruled in *Chubbuck v. Lake*, S06F0676 (10/02/06), that the parties' premarital agreement was unenforceable, because it was not properly witnessed. Accordingly, it could not be introduced into evidence. Nonetheless, the trial court allowed testimony concerning the existence and the contents of the agreement without referring to it as a premarital agreement but as a document the parties had executed prior to their marriage. The Supreme Court found that the trial court was in error when it allowed testimony concerning the contents of this document; as soon as the agreement was considered void and unenforceable, its existence and its contents were not to be considered by the fact-finder. As such, the judgment was reversed. However, the Supreme Court upheld the trial court's decision to charge the jury on impeachment of witnesses rather than on the elements of the crime of perjury. The charge given by the trial court sufficiently and substantially covered the same principals of law.

In the case of *Page v. Page*, S06F1404 (10/02/06), the parties agreed to arbitrate the financial issues. Prior to arbitration, the parties reached an agreement and signed a memorandum. Thereafter, Wife hired a new attorney, who attempted to set aside the settlement agreement. The trial court held that it did not have jurisdiction to consider the agreement because the case had been referred to arbitration. Upon husband's request, the settlement agreement was then incorporated into the Final Decree of Divorce, without any indication that the trial court had conducted an independent review of the wife's motion to set aside or the settlement agreement itself. The trial court was reversed; the agreement was reached prior to arbitration, so the trial court could have conducted a review at the time wife filed her motion. The record also failed to establish that the trial court had conducted an independent review of the settlement agreement prior to incorporating it into the Decree of Divorce.

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It is the duty of the trial court to properly review an award made by an arbitrator, as well as the settlement agreement, before it is incorporated into the Final Decree.

In the case of *Upchurch v. Smith*, S06A1099 (10/02/06), father was granted custody of the parties' two minor children by a consent agreement incorporated into a Fulton County order in 2002. The father then filed a petition to change custody a few months later, by which time the mother and children had been residing in Cobb County for over 6 months; accordingly the father's petition was filed in Cobb County. The trial court in Cobb County denied the husband's petition, and a couple of years later, the mother and children moved to California. The father then filed the instant action in Fulton County to modify custody and child support. The mother raised the defenses of improper jurisdiction and venue and she moved to transfer the action to Cobb County since that was the county of her residence prior to her move to California. The motion to transfer was granted, and, subsequently, the husband's petition to modify custody was denied. Husband then appealed the transfer of the custody action to Cobb County under the UC-CJEA, since the initial determination was made in Fulton County. The Supreme Court found that the State of Georgia had continuing exclusive jurisdiction under the UCCJEA and that neither of the events occurred that would extinguish Cobb County's continuing jurisdiction. The proper venue for modification was Cobb County, in accordance with O.C.G.A. § 19-9-62(a).

In the case of *Moore v. Moore*, S06F0927; S06F0928; S06F0929; S06F0930 (9/18/06), Husband filed for a divorce; wife filed an Answer and Counterclaim and later moved to add Crisp Farms, Inc. and Amy Minshew as third party defendants. She also filed an amended answer and counterclaim, which included claims of fraudulent conveyance and conversion. The wife's motion was granted, and the trial court subsequently realigned the parties so that wife became plaintiff and the remaining three parties became the defendants. At trial, Crisp Farms moved for a directed verdict, which was granted. The jury then found that the husband had made a fraudulent conveyance to Ms. Minshew and awarded wife over \$28,000.00 against her. The appellate court found that the trial court has the discretion to realign a plaintiff as a defendant when an appropriate party with legitimate claims has a more extensive burden of proof. In the instant case, the wife had a heavier burden of proof than the husband; she had the burden of proof for alimony, adultery, attorney's fees, and the fraudulent transfers. The trial court's decision was, therefore, in line with Georgia statutory and case law, which holds that the party who has the burden of proof has the right to open and close before the jury. The husband also appealed the trial court's denial of Crisp Farms motion for summary judgment. However, a party does not have standing to complain of the ruling on another party's motion. Additionally, the directing of the verdict and granting of judgment in favor of Crisp Farms rendered the denial of their motion for summary judgment moot. Husband further claims that he was consequently denied the right to exercise all 6 jury strikes, to which each side would ordinarily be entitled. However, there was no place in the record that reflected husband ever objected specifically to the number of strikes. Husband had also moved to disqualify a prospective juror, who was a client of the wife's attorney; the trial court denied this motion. There are automatic disqualification rules which would prohibit a prospective juror from serving, based upon certain prohibited relationships. The relationship between the prospective juror and wife's attorney was not such a prohibitive relationship. Accordingly, husband had the burden of rebutting the presumption of impartiality. Ms. Minshew then claimed that the trial court erred in adding her as a party; however, the Supreme Court disagreed. She also claimed that the trial court erred in denying

her motion for summary judgment; however, she should have raised this issue prior to the entry of the verdict and judgment. Ms. Minshew also appealed the trial court's decision denying her motion for a separate trial; this is generally an issue within the discretion of the trial court and will not be overturned absent clear abuse of discretion. Ms. Minshew and the husband had an adulterous relationship during the time when the fraudulent transfers occurred. Evidence of that close relationship was relevant to the fraudulent conveyance claim, and this evidence would have been admissible at a separate trial as well as in the divorce case. Accordingly, there was no prejudice to Ms. Minshew when the trial court denied her motion. The Supreme Court also upheld the trial court's decision to direct a verdict in favor of Crisp Farms on the fraudulent conveyance claim, because there was no evidence that the conveyance was not a legitimate transfer; there was no evidence from which a jury could reasonably find that the conveyance was fraudulent.

In the case of *Veal v. Veal*, S06F1460 (10/16/06), the trial court erred in awarding custody of the minor child to the husband, who was not the biological or legal father of this child. At the time he married the child's mother, husband and wife had acknowledged that the husband was not the child's biological father; the legitimation process cannot be used to establish legal ties between the child and the husband, who qualified as the child's step-parent. Additionally, he was not the child's legal father; at the time he married the child's mother, they had acknowledged that he was not the child's biological father, plus he was not married to the mother at the time the child was conceived or born. As such, the husband was not the child's legal father nor did he have the right to bring a legitimation action. Consequently, only the mother was entitled to custody of the child, who was born out of wedlock.

In the case of *Smith v. Smith*, S06A0897 (10/16/06), the wife was awarded a division of assets, alimony, and "supplemental alimony" to assist in support of the parties' disabled daughter. The husband appealed. However, the Superior Court dismissed the husband's appeal for his failure to pay costs. The husband's application for discretionary appeal from this dismissal was denied. The wife then filed an application for contempt alleging the husband's failure to make certain payments and transfers of property required by the decree. The trial court excused the husband's noncompliance by reason of "impossibility or illegality;" it also nullified part of the awards and reduced the previous award of attorney's fees. The trial court found that some of the assets to be transferred to wife no longer existed and the supplemental alimony was void and unenforceable. The Supreme Court reversed the trial court's decisions on all of these issues and held that the trial court had "substantially modified the decree." It was error for the trial court to nullify certain provisions of the decree, such as the supplemental alimony, on the basis that they are void as against Georgia law. A judgment is not void if it is entered by a court of competent jurisdiction. A judgment which is erroneous but not void may only be attacked by a direct appeal or by a motion to set aside. In the instant case, the husband's appeal was dismissed and he failed to move to set aside the decree. The contempt proceeding was not an alternate means by which the husband could alter the terms of the divorce decree.

In the case of *Coleman v. Coleman*, S06A0954 (10/16/06), the husband appealed the trial court's order requiring the parties to be present at the final hearing if they sought any redress from the court. In its order, the trial court did not set forth a basis for its decision. Therefore, the Supreme Court cannot determine whether or not the trial court had properly exercised its discretion, so the case was remanded with direction that the trial court reconsider this matter, exercise its discretion, and enter a new order setting forth the basis for its decision, to permit appellate review.



Holiday Wish List

The holidays are particularly stressful times for the battered women and their children residing in our emergency shelters. Your donation can help make things brighter. Shelter residents would be grateful for any of the following items. In particular, **we never have enough items for teenagers or boys**. All donations should be unwrapped.

Children Ages 0 – 12 – New, unwrapped toys

Gifts for Teenage Girls:

- Gift certificates from mall stores
- Youth oriented accessories (such as jewelry and hair clips)
- Purses (small and backpack type)
- Journals
- Movie passes
- Bath and body gift sets - lotions, soaps, etc...
- Portable CD players
- Robes and slippers



Gifts for Teenage Boys:

- Gift certificates from mall stores
- Movie passes
- Portable CD players
- Watches
- Wallets
- Books
- Sports equipment
- Pajamas, robes and slippers

Gifts for Women

- Journals
- Women's Inspirational books and Bibles
- Accessories (belts, purses, watches, etc.)
- Bath and body gift sets - lotions, soaps, etc...
- Purses

Gifts for the Whole Family (infants, children, teens and women)

- Hat, glove/mitten and scarf sets
- Winter boots, tennis shoes and slippers (all sizes)
- Photo albums and disposable cameras

Arrangements for deliveries of donations can be made by calling the shelters directly:

Fulton – 404-870-9627 or Gwinnett – 770-339-9160.

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public library, access the computers and figure out the program?

Are the underemployed, who now have a "self-support" reserve available according to the new guidelines, going to understand why their child support obligation is increasing, when they can barely pay what they have been ordered?

How much more in fees is it going to cost for lawyers to determine what constitutes the correct "adjusted income", especially for the self-employed?

Why do litigants have to justify an upward deviation from the guidelines before the Court can grant them the right to do better by their children than this law provides?

If lawyers and judges need training to learn how to use this new law and mediators are mandated to obtain training in order to maintain their state certification, how are our pro se litigants ever going to obtain a child support order?

Get involved in what the legislature is planning this session. Get involved before we find ourselves here again.

WHAT'S COMING UP...**November 9, 2006**

Family Law Luncheon honoring the Fulton County Superior Court Judges with Justice Robert Benham as our speaker

December 2, 2006

Planting Trees with Tree Atlanta

December 14, 2006

Family Law Breakfast, Judge Mark Anthony Scott, Superior Court of Dekalb County

December 14, 2006

Annual Holiday Party

January 11, 2007

Family Law Breakfast with Paula Frederick, General Counsel of the State Bar of Georgia, 1 Professionalism hour available

PRO BONO OPPORTUNITIES

Volunteers are needed for 30 minute consults with a pro se client, should Atlanta Legal Aid conflict out. With the upcoming child support changes, there may be many more conflicts.

When: Anytime you have 30 minutes to give for a consult

Time: 30 minutes

Where: At your office or the Family Law Information Center

Who to contact: Please email Michelle Jordan at MHJordan@AtlantaLegalAid.org to volunteer.

COLLABORATIVE PRACTICE TRAINING**Advanced Interdisciplinary Collaborative Practice Training**

December 1, 2006

Cost: \$175.00

Basic Interdisciplinary Collaborative Practice Training

February 2-3, 2007 or September 28-29, 2007

Cost \$650.00

Location: Atlanta, GA

Contact: Betsy Geisler @ 770-441-2323 orbng@bngiesler.com

Rainmaking Essentials

Presented by Andrew Dietz, Creative Growth Group

What you need to know:

Date: Wednesday, December 13, 2006

Time: 9:00 a.m. – 12:15 p.m.

Location: State Bar of Georgia Conference Center

CLE credit: 3 CLE hours • Including 1 Professionalism

Cost Atlanta Bar members: \$129; Non-members: \$159; Law students: \$25; Add \$20 for on-site registration

Topics include:

- How to develop a client development strategy that fits your unique marketing capabilities
- How to expand and mine your existing relationships to grow your client base
- How to use Thought Leadership to build your practice
- How to sustain your client development efforts in the midst of an already heavy workload.

Partners' Panel of Rainmakers:

- Brett Lockwood, Partner with Smith, Gambrell & Russell, LLP
- Liz Price, Partner with Alston & Bird, LLP
- Andrew Schutt, Partner with Arnall Golden & Gregory, LLP
- Jessica Harper, Partner with Bodker Ramsey Andrews Winograd & Wildstein PC

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: Rainmaking Essentials, 12-13-06

Full name _____

First name for name tag _____ GA Bar # _____

Phone _____ Fax _____

Firm _____

Address _____

City, State, ZIP+4 _____

E-mail _____

Payment options

Check enclosed (payable to the Atlanta Bar Association)

Charge my: Visa MasterCard American Express

Account # _____ Exp. ____/____

Signature _____

Check one:

Atlanta Bar member: \$129

Non-member: \$159

Law student: \$25

Mail to: Atlanta Bar Association, 229 Peachtree St. NE #400, Atlanta GA 30303.

Fax to 404-522-0269. **Register online** at www.atlantabar.org. **Questions?**

Call 404-832-6203 or e-mail mljohn@atlantabar.org.

Atlanta Bar Association
The Family Lawyer 752-06-005
400 International Tower
229 Peachtree Street NE
Atlanta, GA 30303-1601

Family Law Section Breakfast

**Speaker: Judge Mark Anthony Scott,
Superior Court of DeKalb County
1 Hour of CLE Available
Thursday, December 14, 2006 at 7:30am
The Buckhead Club, 3343 Peachtree Road
\$15 pre-registered; \$18 at door**

Name _____

Yes, I would like _____ reservation(s)
at \$15 each (\$18 at door).

Add \$5 for 1 CLE Hour

Check Enclosed

Please charge AMEX/VISA/MC

Exp. _____

Return this form to Atlanta Bar Association:
400 International Tower; 229 Peachtree Street NE; Atlanta, GA 30303-1601; FAX: 404-522-0269