

**RESTAURANT NOUS NON PLUS:
A TASTING MENU OF THE LATEST GEORGIA FAMILY LAW CASES**

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CHEF SPECIAL # 1

A Platter of Prenuptials, Witnesses on the Side:

Dove v. Dove, 285 Ga. 647 (2009)

Key ingredients:

- Prenuptial agreements addressing alimony are in contemplation of divorce and therefore not “marriage contracts” requiring two witnesses.
 - Prenuptial agreements that settle property rights at death are “marriage contracts” and do require two witnesses.
-

Sullivan v. Sullivan, 286 Ga. 53 (2009)

Key ingredients:

- Prenuptial agreement did not mention “divorce” or alimony, but contract seemingly encompassed equitable division rights in event of divorce / property rights upon death.

“This waiver and release applies to claims that may have otherwise been made during the lifetime of [Wife] or after her death, should she die intestate.”
 - This type of agreement is a “marriage contract” and therefore requires two witnesses.
-

Lawrence v. Lawrence, 286 Ga. 309 (2009)

Key Ingredients:

- Two witnesses not needed for a prenuptial agreement that addresses alimony and “refers explicitly to the possibility of divorce” because it is not a contract “made in contemplation of marriage.”

CHEF SPECIAL # 2

Titillating Titles:

Coe v. Coe, 285 Ga. 863 (2009)

Key ingredients:

- Appeal based on trial court's instructions to jury
- Parties bought house and titled it jointly shortly after the marriage; H claimed that house was bought in part with funds from his personal injury settlement
- Appellate court seems to create a presumption of marital property whenever gifts exchanged between spouses, regardless of original marital / separate property nature of gift
 - Marital property gifted from one spouse to another → marital property status of that gift does not change
 - Separate property gifted from one spouse to another → rebuttable presumption that the separate property has transformed into marital property
- Remember a few of our Lerch lessons:
 - If third party gives gift to the marital unit during the marriage → presumption that the gift is marital property
 - If third party gives gift to one spouse alone → retains separate property status, but only if that spouse doesn't then turn around and make an interspousal gift of it
- These presumptions are all seemingly rebuttable, but probably only under a clear and convincing evidence standard
- Clear and convincing evidence standard would at least likely be required here, in this scenario (where SP put into asset that is then jointly titled) because of what the appellate court said was a permissible analogy to purchase money resulting trusts
 - purchase money resulting trust concept is evoked where a party is claiming that, despite whatever legal title may exist, he or she retains an equitable interest in the property

- if legal title is held by spouse / parent / sibling, person claiming equitable interest must prove by clear and convincing evidence that no gift – O.C.G.A. § 53-12-92(c)

CHEF SPECIAL # 3

Free Range Stock Options

Newman v. Patton, 286 Ga. 805 (2010)

Key ingredients:

- Facts
 - W employed at company for just under 7 years (5/99 – 4/06)
 - Marriage overlapped a little under 4 of those years of employment
 - All of W’s stock options associated with the company were granted to her prior to marriage
 - Some of those stock options vested before the marriage, and some of them vested during the marriage
- On appeal, the Supreme Court held that, “the trial court was required to look at the evidence and determine whether the vesting of the previously awarded stock options was the direct result of the parties’ labors and investments during the marriage.”
- If vesting of stock options was the result of marital efforts, then will be subject to equitable division.
- To determine whether they are subject to equitable division, and, if so, how to equitably divide, court permitted to consider a “multitude of factors, including, but not limited to:”
 - Whether marital / pre-marital funds used to exercise options;
 - The employer’s purpose for granting the option (past / present / future service) – presumably in relation to marriage;
 - The best formula to determine marital share of options, given timing and purpose of options vis-à-vis marriage;
 - Method of distribution to receiving party; and
 - Parties’ respective tax obligations resulting from the distribution.
- Mere timing of when an option vests does not determine whether it is marital or not

- Analysis focused on why option awarded / vested and whether these events tied to efforts or money made during marriage (the latter if marital funds used to exercise).
- In footnote, court notes with approval judge's determination that stock options which were awarded and vested prior to the marriage were separate property NOT subject to equitable division.
- SO:
 - Granted and vested prior to marriage → almost certainly SP (BUT: what if exercised with marital funds?)
 - Granted before marriage and vested during marriage → open question; look at factors (Tied to efforts made during marriage? If so, how much should be deemed MP?)
 - Granted during marriage and vested during marriage → probably MP, but look at whether reasons behind grant / vest related to efforts made during marriage
 - Granted during marriage but not yet vested → open question re: whether actually an asset, or just speculative

AMUSE-BOUCHES

Virtual Adoption

Morgan v. Howard, 285 Ga. 512 (2009)

Key ingredients:

- appeal from a trial court's declaration that a virtual adoption took place is an appeal from a decision in equity and so appellate jurisdiction lies with the Georgia Supreme Court
- trial court properly admitted statements made by decedent to alleged adoptee's biological parents (tendered to show that decedent implicitly contracted to adopt child)

Common Law Marriage

In re Estate of Smith, 298 Ga.App. 201 (2009)

Key ingredients:

- Existence of common law marriage decided under preponderance of evidence standard.
- Where any evidence to support trial court's determination that common law marriage does not exist, that determination will be upheld upon appeal, even if some conflicts in overall evidence presented.

Norman v. Ault, 2010 WL 2243287 (Ga.)

Key ingredient:

- Although Georgia does not recognize common law marriages, it will recognize (i.e., hold valid) a relationship deemed to have resulted in a common law marriage during the parties' residence in another state, at least to the extent that the relationship is so recognized by the other state.

Dormancy Statute Impact on Old CS Awards

Markowitz v. DHR, 300 Ga.App. 371 (2009)

Key ingredient:

- If CS order entered before 7/1/97, it will be subject to dormancy statutes and contempt action will not lie if ten years go by and no pursuit of CS arrearage

APPETIZERS

Prenuptial Agreements

Quarles v. Quarles, 285 Ga. 762 (2009)

Key ingredients:

- Much better to move to enforce prenuptial agreement (court sitting in equity and has discretion to approve agreement in whole or in part) versus move for partial summary judgment (which can only be granted if no disputed issues of material fact)
- Since, as here, disclosure of financials / knowledge of financials was in factual dispute, entry of partial summary judgment could not stand (although grant of motion to enforce would almost undoubtedly have been affirmed).

Lawrence v. Lawrence, 286 Ga. 309 (2009)

Key Ingredients:

- Although agreement did not attach financial disclosures of the parties, it was still enforceable in exercise of trial court's discretion.

Possible Distinguishing Flavors:

- Parties dated for a year and a half, and then lived together for over two years before marrying
- W worked in a building that H owned; W knew that H had a successful real estate practice (H told W about each real estate project in which he was involved during their courtship)
- W knew H was member at Milledgeville country club and that he had a 6000 sq ft house, as well as condo in Florida and a cabin in Wilkerson County
- W knew about various expensive trips taken by H, that he bought her a \$25K Mercedes, paid for her shopping expeditions, and gave her various items of jewelry

Contractual Ability to Marry

Beard v. Beard, 285 Ga. 675 (2009)

Key ingredients:

- Facts:
 - Parties married, then divorced.
 - Divorce judgment not filed until a little over seven years later, and therefore it was not effective until that time (see O.C.G.A. § 9-11-58).
 - A second marriage took place between the parties after their divorce but before the entry of the decree – that second marriage was held invalid (because they were still married at time of 2nd marriage).

Jurisdiction

Taylor v. Curl, 298 Ga.App. 45 (2009)

Key Ingredients:

- Facts:
 - Parties divorced in Jackson County, Georgia;
 - Mother and children had moved to State of Florida;
 - Father had moved to Walker County, Georgia
- Walker County court properly exercised emergency custody jurisdiction for purpose of temporary order because:
 - emergency order contained finite time period after which father had to seek similar order in court of proper jurisdiction (here, Jackson County, Georgia);
 - children in Walker County visiting their father at time emergency order entered; and
 - trial court found that children had been subjected to or threatened with mistreatment or abuse.

Jurisdiction – cont.

Croft v. Croft, 298 Ga.App. 303 (2009)

Key Ingredients:

- Facts:
 - Child and parents moved from SC to GA on October 1, 2007.
 - A little over five months later (i.e., on March 20, 2008), father moved out of marital residence to SC, and mother and child remained in GA.
 - More than a month after that (i.e., on May 1, 2008), parties entered into an agreement under which child stayed with father in SC four days a week, and with mother in GA three days a week.
 - More than four months after that (i.e., on September 9, 2008), father filed custody action in SC and “snatched and grabbed” the child during a time that mother agreed to let child be with father.
 - Georgia was the home state for the child, even if he had arguably “lived” in SC under the 4-days-with-dad arrangement for the four months prior to the SC case being filed.
 - Trial court properly found that GA was the home state of the child from October of 2007 (when the family moved to GA) through at least May of 2008 (when the shared SC / GA parenting time arrangement was put into place).
-

Murillo v. Murillo, 300 Ga.App. 61 (2009)

Key ingredient:

- Where court declines to exercise its jurisdiction under the UCCJEA on the basis that GA is an inconvenient forum and another state is a more appropriate forum, court MUST consider ALL factors set forth in O.C.G.A. § 19-6-67(b)(1) – (8) and make specific findings either in writing or orally on the record demonstrating its consideration of each one.

Jurisdiction – cont.

Long v. Long, 300 Ga.App. 215 (2010)

Key ingredients:

- Superior court erred when enjoined juvenile court and DHR from allowing children to live with party or visit with her without supervision.
- Superior court and juvenile court had concurrent jurisdiction, but whichever first takes jurisdiction shall retain it → juvenile court had jurisdiction first here.

Venue

Parris v. Douthit, 287 Ga. 119 (2010)

Key Ingredients:

- Former husband filed petition for modification of alimony in county in which former wife did not reside but had filed previous contempt. Former wife, who answered by special appearance, moved to dismiss based upon improper venue.
- Proper venue in alimony modification action was former wife's current county of residence, and her previously filed contempt motion did not constitute a waiver of the defense of improper venue. Further, the former wife's purported oral consent to venue at hearing on her motion for contempt involving unpaid alimony did not constitute a valid waiver of defense of improper venue, as it related to subsequent alimony modification action brought by former husband following former wife's move to another county because there was no voluntary, clear, and specific waiver either in writing or transcribed in a court of record.

Service

Dennis v. Dennis, 302 Ga.App. 791 (2010)

Key Ingredients:

- Father appealed trial court's grant of mother's motion to dismiss second or amended motion for contempt filed by father while cross-motions for contempt remained pending in post-divorce proceedings.

Service – cont.

- Trial court was required to consider allegations in father's second or amended motion for contempt, including his allegation that mother interfered with his visitation rights, and thus trial court's dismissal of second motion sua sponte and without a hearing deprived father of due process, even though second motion was filed after the close of evidence on father's original contempt motion; second motion gave mother adequate notice of the nature of father's claim.

Discovery Abuse / Other Misconduct

Harrell v. DHR, 300 Ga.App. 497 (2009)

Key Ingredients:

- In order to sanction someone for failure to comply with discovery under O.C.G.A. § 9-11-37, trial court must follow two part process:
 - Motion to compel must be filed and granted;
 - If party still fails to follow the order compelling his or her performance, then other party must notify court that he or she is seeking sanctions and a hearing must be held to determine if failure is willful
- In this case, that two-step procedure did not occur, and trial court precluded father from introducing evidence of his business expenses which would have reduced his overall income number for CS calc.
- Especially where court considering such a drastic sanction, hearing must be provided as to whether party willfully failing to follow motion to compel (and in this case, no motion to compel even filed).

Kautter v. Kautter, 286 Ga. 16 (2009)

Key Ingredient:

- Trial court properly struck H's jury demand as sanctions for willfully refusing to appear and participate on date that jury trial scheduled

MAIN COURSES

Paternity / Legitimation

In re Estate of Warren, 300 Ga.App. 408 (2009)

Key ingredient:

- DNA evidence from half siblings was sufficient to meet evidentiary requirement for establishment of paternity under O.C.G.A. § 53-2-3 (statute setting forth rights of inheritance of child born out of wedlock); not limited to test of putative father and child

Williamson v. Williamson, 302 Ga.App. 115 (2010)

Key ingredients:

- Child born during the marriage, which wife contended was not her husband's child.
- W failed to show that de-legitimizing the child served the child's best interest; she was not entitled to compel her husband to submit to paternity testing.
- Presumption of legitimacy is not easily rebutted.

Ernst v. Snow, 2010 WL 2737199 (Ga.App.)

Key ingredients:

- Court could not have properly granted legitimation petition where only presented with a verified petition and no sworn testimony or other proper evidence.
- In considering whether to grant a legitimation petition, court must 1) determine whether father has "abandoned his opportunity interest to develop a relationship with the child," and 2) decide that legitimation serves the child's best interests.

Paternity / Legitimation – cont.

- This two-pronged inquiry cannot be properly undertaken without presentation of appropriate evidence (conclusory language on preprinted but verified legitimation petition was inadequate for this purpose).

Adoption

Owen v. Watts, 2010 WL 1444551 (Ga.App.)

Key ingredients:

- Facts:
 - Child born in 2000, lived with her mother in maternal grandmother's home from 2000 – 2005, at which point DFACS removed her and placed her in foster care.
 - In October of 2006, the foster parents petitioned to adopt the child.
 - The day after the adoption petition was filed, DFACS removed the child from her foster home and placed her back with grandmother.
 - Mother executed voluntary surrender of her parental rights in favor of grandmother; grandmother's petition for adoption of child was granted.
 - Foster parents intervened and appealed grant of adoption to maternal grandmother; adoption reversed for lack of sufficient evidence to show it was in the best interest of the child.
 - THEN: maternal grandmother moved to intervene in foster parents' adoption petition proceeding, and trial court found that 1) foster parents lacked standing to pursue the adoption; and 2) that, even if they did, insufficient evidence that their adoption of the child would serve her best interests.
- Appellate court found that, although the Foster Parent's Bill of Rights provided that foster parents have a right to be considered, where appropriate, as the first choice as a permanent parent for a child who after 12 months of placement in the foster home, is released for adoption or permanent foster care, the statute is silent on the subject of the foster parents' legal rights regarding adoption.
- Moreover, appellate court held that, without the department's release of the child and consent to the adoption, Georgia law provides no right for foster parents to adopt.

Child Custody

Moore v. Moore-McKinney, 297 Ga.App. 703 (2009)

Key ingredients:

- In modification of visitation case, court did not abuse its discretion in excluding evidence re: mother seeking help from mental health professional twelve years before.
- Trial court properly exercised its discretion in changing pick-up location for exchange of children from mother's house to two more public locations (school and Barnes & Noble, respectively) where evidence showed conflict between parents when they came into contact with each other.
- Modification of pick-up time in order was not exercise of trial court discretion, but was result of trial court's mistaken belief that the parties had a certain agreement, and therefore modification order reversed on this point.
- Trial court not required to make particular findings of fact re: why it accepted or rejected a particular parenting plan submitted by a party.
- Trial court is required to include a parenting plan as part of any modification of visitation order, but that plan need not be identical to the parenting plan submitted by either party.
- Trial court properly prohibited parties from having weapons in their possession when exchanging the children (no unconstitutional infringement on right to bear arms where prohibition narrowly tailored and justified by evidence that father had loaded gun in car during at least one pick up of children).

Mitcham v. Spry, 300 Ga.App. 386 (2009)

Key ingredients:

- Material changes supporting custody modification:
 - Parents, both of whom were on active duty in the armed forces at time of SA, were no longer in military
 - Parents had both relocated (mom in different town in NC, dad in different state)

Child Custody – cont.

- Child had reached school age, so could no longer rotate between households every 6 months (as he had under original SA)
 - Change of custody upheld
-

Mongerson v. Mongerson, 285 Ga. 554 (2009)

Key ingredients:

- Trial court can prohibit parent from exercising visitation in the presence of certain people if evidence demonstrates:
 - That a child has been exposed to inappropriate conduct involving a particular person or persons; or
 - That exposure to the prohibited person would adversely affect the child
 - Trial court cannot include blanket prohibition on visitation being exercised in presence of broad category of people (for example, as here, gay and lesbian community) b/c no required evidentiary support.
-

Cates v. Jamison, 301 Ga.App. 441 (2009)

Key ingredient:

- Trial court committed reversible error in order granting maternal grandmother's petition for visitation by neglecting to include specific written findings that 1) the health or welfare of the child would be harmed unless such visitation is granted and 2) the best interest of the child would be served by such visitation.

Child Custody – cont.

Hardin v. Hardin, 303 Ga.App. 416 (2010)

Key ingredients:

- Facts:
 - At hearing on Mother’s petition to modify visitation, Father was questioned about his recent marriage to an 18-year old, who had an 18-month old daughter and was 20 years younger than the Father. He testified that new wife was “somewhere in Tennessee” and that he had no contact information for her.
 - After the hearing, but before the ruling, the Mother’s attorney located Father’s new wife and interviewed her. Counsel wrote a letter to the trial court stating that the new wife had information “imperative to the safety of the children” and was willing to testify.
 - The court denied the request for additional evidence, noting that “the evidence is closed.”
 - Trial court committed reversible error in refusing to consider all facts and conditions which present themselves up to the time of rendering the judgment where the issue is a material change in conditions affecting the welfare of a child.
-

In re J.S., 302 Ga.App. 342 (2010)

Key ingredients:

- Facts:
 - Child’s maternal grandparents brought action to terminate putative biological father’s parental rights to child born in 2004 where father
 - Had not lived with child since his first year due to his incarceration; and
 - Had sent no cards, notes or other communications to child.

Child custody – cont.

- Father appealed denial of his petition for legitimation and termination of his parental rights
 - Appellate court held that father had abandoned his opportunity interest to develop a relationship with his child.
 - As a result, proper to deny his petition for legitimation, and he lacked standing to appeal termination of his parental rights
-

Lynch v. Horton, 302 Ga.App. 597 (2010)

Key ingredients:

- Doctrine of “unclean hands” does not apply to child custody cases
 - Material change supporting custody modification can be a change that has a positive effect on child (not just negative effect)
 - Custody change upheld where, among other facts, mother left child with maternal grandmother and step-grandfather for three month period and did not tell child’s father where child was during this time.
-

Mitchum v. Manning, 2010 WL 2674560 (Ga.App.)

Key ingredients:

- Even in a case involving a mentally and physically handicapped adult child, a non-custodial parent will not be denied “all visitation rights absent exceptional circumstances in which there is ‘reasonable probative evidence’ that the parent is morally unfit.”
- Demonstrates what a high standard must be met to preclude visitation by the non-custodial parent altogether.

Child custody – cont.

In re J.N., 302 Ga.App. 631 (2010)

Key ingredient:

- Facts:
 - Children deemed deprived; after parents failed to follow reunification plan, children were placed in custody of third party relatives until their 18th birthdays.
 - Father, who was in drug abuse recovery and who had taken parenting classes, petitioned for custody or visitation rights with the end goal of reunifying him with children.
 - Trial court denied Father’s modification petition
- Appeal from an order in child deprivation proceeding was not directly appealable under O.C.G.A. § 5-6-34(a)(11) because a deprivation proceeding is not a “child custody case” within the meaning of that statute.
- Direct appeal did lie, however, from juvenile court’s final order under O.C.G.A. § 5-6-34(a)(1).
- Father had the burden of showing via a preponderance of the evidence (not via a clear and convincing evidentiary standard) that changed circumstances required a modification of the juvenile court’s original order in the best interests of the children.
- After custody of children placed in third parties through juvenile court’s final order, Father did not enjoy a “rebuttable presumption that parental custody is always in the child’s best interests” under O.C.G.A. § 19-7-1.

Harris v. Williams, 2010 WL 2331450 (Ga.App.)

Key ingredient:

- To support a change of custody action, a party must initially demonstrate that a change in the opposing party’s circumstances is having an adverse effect on the child, or that changes in his or her circumstances would have a beneficial effect on the child.

Child custody – cont.

Saravia v. Mendoza, 303 Ga.App. 758 (2010)

Key ingredient:

- Nothing precludes a trial court from consolidating a contempt action with a modification of child custody action (so long as the custody action was filed separately as statutorily required).
-

Srader v. Midkiff, 303 Ga.App. 514 (2010)

Key Ingredients:

- The trial court's failure to hear testimony from child or appoint a guardian ad litem for child prior to rendering a judgment in grandparent visitation case was not an abuse of discretion; statute granted the trial court the discretion to appoint a guardian ad litem in a grandparent visitation case, and the court heard testimony regarding the best interests of child from father and grandparents.
 - Trial court not required to order the case to mediation prior to the trial.
-

Salmon-Davis v. Davis, 286 Ga. 456 (2010)

Key Ingredients:

- When exercising its discretion in relocation cases, as in all child custody cases, the trial court must consider the best interests of the child and cannot apply a bright-line test. Thus, any determination of the best interests of the child must be made on a case-by-case basis, and there is no presumption that a relocating custodial parent will always lose custody.
- Trial court did not err in adopting the recommendations of the guardian ad litem, notwithstanding the relocation entailed therein.

Child Support

Grenevitch v. Grenevitch, 285 Ga. 509 (2009)

Key ingredients:

- Motion to dismiss petition to modify child support was improperly granted where husband's obligation to support one of his children could arguably have ceased if 1) that child was 18; and 2) that child was no longer in high school
 - Dissent pointed out that settlement agreement language indicated that the child support was a "group" award (i.e., was the same so long as a duty of support was owed to any of the minor children) and therefore that husband did not have an actionable modification claim under any rationale.
-

Henry v. Beacham, 301 Ga.App. 160 (2009)

Key Ingredients:

- Trial court properly required \$250K trust to be established to fund future child support payments in event of arrearage.
- In creating trust, trial court
 - noted that, although professional athlete father had made substantial amounts of money over the years, he had been behind on temporary child support payments at least three times
 - noted that father had had other financial problems during his career
 - made funding of trust coincide with three large bonus payments that father was to receive
 - ordered that trust funds would revert back to father once his CS obligations ended
- Requiring establishment of trust was permissible deviation from CS guidelines under O.C.G.A. § 19-6-15 since those guidelines simply create a rebuttable presumption which may be overcome where child's best interests are served by a different arrangement

Child support – cont.

- Prior case law under old guidelines permitted lump sum CS payments and the creation of trust funds for future payments where trust corpus reverted back to payor at end of CS obligation.
 - Trust still permissible even though it benefited only one of the father's nine children – was funded with bonus money, so did not take away future income that would be available as support for those other children, and trial court did not have authority to deal with the interests of these other children, most of whom did not reside in Georgia.
-

Harrell v. DHR, 300 Ga.App. 497 (2009)

Key Ingredient:

- Under CS guidelines, which are mandatory, trial court must consider business expenses.
-

Turner v. Turner, 285 Ga. 866 (2009)

Key Ingredients:

- Where trial court deviates from presumptive CS amount, it must include required findings of fact supporting that deviation under O.C.G.A. § 19-6-15.
- Presumptive amount of CS covers some of the cost of extracurricular activities, so court cannot have separate provision in order dealing with how to share these total costs.
- If costs of extracurriculars exceed 7% of basic child support obligation, and court wants parties to participate above and beyond this 7% threshold, then should deviate from CS amount to cover total cost and explain deviation with required findings – see O.C.G.A. § 19-6-15(i)(2)(J)(ii)

Child support – cont.

James-Dickens v. Petit-Compere, 299 Ga.App. 519 (2009)

Key ingredient:

- Child support order entered as part of a TPO was still enforceable via contempt after TPO expired.
-

Bankston v. Lachman, 286 Ga. 459 (2010)

Key ingredient:

- Where trial court imputes income for child support purposes, it must assess the reasonableness of a party's occupational choices in light of his
 - The trial court not required, however, to make specific findings of fact supporting the imputed income number that it uses in child support calculation.
-

Mongerson v. Mongerson, 285 Ga. 554 (2009)

Key ingredient:

- Trial court could not order party to maintain life insurance benefits for child who had already reached age of majority, absent party voluntarily assuming that kind of obligation.
 - Trial court can require party to participate in psychological counseling costs incurred by child as part of uncovered health care expenses where such an expense is specifically listed as coming within that category (cf. Wimpey v. Pope case – only stands for proposition that such costs are not included in phrase “medical care”)
-

Roberts v. Tharp, 286 Ga. 579 (2010)

Key ingredient:

- Final order in contested child support case entered after January 1, 2007, must include findings required under O.C.G.A. § 19-6-15.

Child support – cont.

Spurlock v. DHR, 286 Ga. 512 (2010)

Key ingredient:

- Supreme Court had jurisdiction to review child support modification undertaken by DHR under O.C.G.A. § 19-11-12 because properly evoked “divorce and alimony jurisdiction”
 - Where appeal improperly filed with COA and transferred to Supreme Court (which court did not have authority to grant discretionary appeal), Supreme Court declined to dismiss appeal and make it pursue the proper discretionary appeal process; instead, heard case on its merits
 - Trial court deviating child support based upon high income had to include specific findings of fact required under O.C.G.A. § 19-6-15 (why served best interests of child, why presumptive amount would be unjust or inappropriate, considering parents’ relative ability to pay, etc., etc.)
-

Herrin v. Herrin, 2010 WL 2553469 (Ga.)

Key ingredient:

- Although it is sometimes appropriate for a court to look at earning capacity versus actual income in calculating a child support award amount, there must be actual evidence that a parent is suppressing his or her income and has the ability to earn more (otherwise, the award is unsupported).
- No such evidence present where mother testified
 - that she searched for jobs every night on her computer / had attended various interviews, and that no job had resulted
 - that she didn’t have the money to pursue the father of her other child for child support at the same time that she was defending against the child support modification action, and that her father was fronting her the money for the one case
- Court also presented evidence that mother had obtained her real estate license, but no proof that, since the downturn of the economy, she could actually pursue a real estate career

Alimony

Sprouse v. Sprouse, 285 Ga. 468 (2009)

Key Ingredients:

- Trial court not required to include findings of fact supporting its alimony award
- Trial court not prohibited from considering the length of parties' premarital cohabitation in exercise of its discretion re: alimony award under "catch-all" portion of alimony statute

Possible Distinguishing Flavors:

Between common law marriage, cohabitation, and ceremonial marriage, parties together for a total of thirteen years by time of divorce trial (court awarded thirteen years of alimony).

Coker v. Coker, 286 Ga. 20 (2009)

Key Ingredients:

- Facts:
 - Trial court ordered H to pay W \$36.5K in lump sum alimony a little over three months after divorce decree entered
 - H was earning only \$500 at time of divorce and had non-transferrable interest LLC (worth about \$100K) and no other assets
- Because alimony based upon ability to pay, H earning \$500 / week and had no assets that could be convertible to cash – alimony award here, together with its limited time frame, reversed.

Mongerson v. Mongerson, 285 Ga. 554 (2009)

Key ingredient:

- Not improper for trial court to require "monthly alimony for as long as [Wife] was enrolled at an educational facility and earning passing grades in a program to obtain a college degree."
 - Factors here: W had 1/10th the income of H; W spent the majority of

Alimony – cont.

21 year marriage as full-time homemaker and caretaker of kids

- Even if seemed to allow possibility of W as lifetime student, that problem could be addressed in modification action – alimony award therefore still okay.

Moore v. Moore, 286 Ga. 505 (2010)

Key ingredients:

- Facts:
 - Wife sought division of \$40,000.00 marital debt incurred in her name
 - Trial court ordered Wife responsible to pay debt, but because of an “obvious disparity in incomes and earning capacity,” it required the Husband to pay to the Wife “\$400.00 per month for 100 months for a total alimony of \$40,000.00.”
 - Alimony award not terminable upon death or remarriage of either Spouse
- Award was not alimony, but property division
- Trial court’s characterization of award as “alimony” was not controlling
- Why property division:
 - Periodic payments made until given sum has been paid;
 - Does not terminate upon the death of either spouse.

Wier v. Wier, 2010 WL 2553577 (Ga.)

Key ingredients:

- “The jury may consider assets and earning capacity, in addition to income, in fixing the amount of alimony.”

Alimony – cont.

- Georgia law contemplates that a party may be “required to sell or encumber property in order to pay equitable division and alimony awards.”
-

Norman v. Ault, 2010 WL 2243287 (Ga.)

Key ingredient:

- A final verdict on alimony does not preclude a party from collecting amounts due prior to that final judgment under a temporary order.
- Similarly, a party cannot claim a credit against the final alimony amount based upon amounts paid on a temporary basis.

Marital Property Subject to Equitable Division

Michel v. Michel, 286 Ga. 892 (2010)

Key ingredients:

- Trial court can divide military retirement benefits even if parties have not been married for 10 years
 - 10 year rule under U.S.C.A. Sec. 1408(d)(2) means that a spouse who has been married to the retiree for less than 10 years cannot receive direct pay; does not mean that this property is not subject to equitable division under state laws
-

Windham v. Araya, 286 Ga. 501 (2010)

Key ingredients:

- Facts:
 - Wife purchased the house before the marriage with SP
 - Husband was unemployed during the marriage and failed to present any proof of his alleged mortgage payments or handyman work on home

Marital Property Subject to Equitable Division – cont.

- The trial court correctly applied the legal principle that only property acquired as a direct result of the labor and investments of the parties during the marriage is subject to equitable division.
- Because the Wife brought the house to the marriage, only the subsequent increase in the net equity attributable to marital contributions was a marital asset.

Frier v. Frier, 303 Ga.App. 20 (2010)

Key ingredients:

- Settlement agreement contained the following language about each party’s personal property accounts:

“[H] and [W] shall have and receive any sums of money [in] their respective checking accounts, savings accounts, IRAs, retirement funds or accounts or other properties in their own individual names.”
- After the divorce, H died and did not change W’s status as payable-upon-death beneficiary of a certain account
- Language quoted above worked to divest ex-W of her interest in account during ex-H’s life (during which he could change beneficiary, etc.), but did not work to divest ex-W of her interest in account upon death, given ex-H’s failure to change her beneficiary status
- Court noted that it reached a different result in a case where the language was as follows:

“any IRA [] wherever located presently are the sole and exclusive property of the designated depositor or named owner or recipient, and the other party shall have no interest therein”
- According to the appellate court, this language referring to “depositor” and explicitly waiving “interest” was sufficient to waive any interest of the ex-spouse that may spring up upon death

Marital Property Subject to Equitable Division – cont.

- SO: most client-protective drafting would be to waive “interest” and to state that the contents of the account would remain the “sole and exclusive property of the depositor”
-

Klardin v. Klardin, 2010 WL 2680597 (Ga.)

Key ingredients:

- Judicial estoppel did not act to bar wife from claiming interest in certain retirement accounts where husband failed to show that wife had wrongfully excluded such accounts from her bankruptcy estate.
-

Gonzalez v. Crockett, 2010 WL 2553473 (Ga.)

Key ingredient:

- If divorce decree does not specifically describe and dispose of a particular item of property, title to that property will remain unaffected (and, where applicable, titled in the names of both parties).

DESSERT

Contempt

Killingsworth v. Killingsworth, 286 Ga. 234 (2009)

Key Ingredients:

- In contempt action, trial court impermissibly modified the divorce decree by requiring H to pay W cash in lieu of transferring half of his 401-k funds to her (as was required under original decree).
- “The test for distinguishing permissible interpretations and clarifications from impermissible modifications is ‘whether the clarification [or interpretation] is reasonable or whether it is so contrary to the apparent intention of the original order as to amount to a modification.’”
- Agreement stated how 401-k account transfer would be calculated, manner in which transfer should be accomplished, and contemplated drafting of a QDRO.
- Intent for 401-k transfer was clear, therefore cash transfer instead was impermissible modification.

Bauman v. Humphries, 300 Ga.App. 263 (2009)

Key ingredients:

- Improper for trial court to order party incarcerated for failure to follow a prior contempt order without, at a bare minimum, an affidavit from a neutral party such as a court official
- Letter from attorney to court re: other side’s non-compliance was not sufficient, and best for trial court to have actual hearing

Darroch v. Willis, 286 Ga. 566 (2010)

Key ingredients:

- Where former H in contempt for failure to remove former W’s name from mortgage on marital residence, was impermissible modification for court

Contempt – cont.

to order sale (if not refinanced within particular time frame) where nothing in the settlement agreement referenced / contemplated sale

- Former H could sell at his election, and appellate court noted that the trial court was not without effective means for enforcing the decree and suggested that the former husband could be required to pay a substantial sum every day until he purges his contempt (i.e., purge conditions imposed by the trial court on remand could be far more draconian than those imposed by the order he successfully appealed).

Attorney's Fees

Moore v. Moore-McKinney, 297 Ga.App. 703 (2009)

Key ingredient:

- Attorney's fees award to mother had insufficient basis where no specific findings to support award under O.C.G.A. Sec. 9-15-14 or O.C.G.A. Sec. 19-9-3(g), and where trial court simply stated that father's pro se representation made proceedings take "four times as long as it should take."

Kautter v. Kautter, 286 Ga. 16 (2009)

Key Ingredients:

- H appealed case at two different stages; trial court permissibly included appellate work by W's attorney with respect to earlier appeal under O.C.G.A. § 19-6-2.
- Including appellate work by attorney under O.C.G.A. § 9-15-14 fees award would be improper because that statute specifically encompasses proceedings before lower court (versus appellate court).

Brown v. Gadson, 298 Ga.App. 660 (2009)

Key ingredients:

- Woman sought to have sperm donor father pay child support to their child, despite their Florida artificial insemination contract to the contrary.

Attorney's Fees – cont.

- Attorney's fees award not proper under O.C.G.A. § 9-15-14 where no controlling Georgia authority re: whether this type of contract would be upheld, given relevant public policy considerations, etc.
-

Mongerson v. Mongerson, 285 Ga. 554 (2009)

Key ingredient:

- Prime rate that applied for purpose of calculating interest on judgment on attorney's fees was date that judgment was entered, not date on which oral ruling given.

(H given option of paying attorney's fees all at once, or at certain amount per month with interest accruing thereon)

Lurry v. McCants, 302 Ga.App. 184 (2010)

Key ingredient:

- Trial court could not properly assess reasonableness of attorney's fees to support award under O.C.G.A. § 19-9-3(g) where party only "made a generalized proffer of evidence concerning the amount of attorney fees that she had incurred prior to the date of hearing, but the proffer lacked billing records or other evidence showing precisely how her attorney's time had been spent."
-

Roberts v. Tharp, 286 Ga. 579 (2010)

Key ingredient:

- Court could not enter attorney's fees award that was inconsistent with parties' agreement (entered into consent order) re: who would pay fees if particular party held in contempt.

Attorney's Fees – cont.

Klardie v. Klardie, 2010 WL 2680597 (Ga.)

Key ingredients:

- In certain cases, trial court can properly consider earning capacity in making an award of attorneys' fees under O.C.G.A. § 19-6-2.
 - Factors considered by court in this case in making this type of award of fees from husband to wife:
 - Husband was underemployed / unemployed by virtue of his own actions and contrary to his wife's wishes
 - Husband clearly capable of earning more, given his age, education level, and lack of health problems
-

Harris v. Williams, 2010 WL 2331450 (Ga.App.)

Key ingredient:

- O.C.G.A. § 19-9-3(g) fees only available in the same cases in which O.C.G.A. § 19-6-2 are available (i.e., divorce case / alimony case / contempt of court arising out of divorce case or alimony case)

Judgment on the Pleadings

Ellis v. Ellis, 286 Ga. 625 (2010)

Key ingredients:

- Facts:
 - H filed complaint for divorce; W, who was initially unrepresented, acknowledged service but filed no responsive pleading
 - W later retained attorney, who filed no responsive pleading, either, but secured agreement from H's attorney that H's attorney would inform W's attorney of the date for any scheduled final hearing.
 - H retains new attorney, W's attorney is not informed of final hearing date (per agreement with H's former attorney) and H gets divorce judgment based upon his verified complaint, domestic relations financial affidavit, and answers to interrogatories

Judgment on the Pleadings – cont.

- Wife waived her right to receive notice of final hearing due to her failure to file responsive pleadings.
- Supreme Court distinguished this case from case where pro se party failed to file responsive pleadings but was assured by trial court judge that he / she would receive notice of final hearing (in that case, motion for new trial on divorce was granted); here, W was represented.
- Supreme Court also distinguished case from situation where plaintiff did not have notice of hearing because only defendant waives right to notice of hearing when he or she fails to file responsive pleadings.
- Under O.C.G.A. § 19-5-8, trial court, in absence of evidentiary hearing, could determine divorce-related matters based “upon verified pleadings of either party, one or more affidavits, or such other basis or procedures as the court may deem proper in its discretion.”
- Under this statute, trial court properly entered judgment based upon verified complaint, financial affidavit, and answers to interrogatories provided by husband.
- Dissent strenuously objected to waiver of notice of hearing, given assurances made by H’s former counsel (how is this different from trial court judge assurances since an attorney is an officer of the court?).
- Dissent also objected to sufficiency of evidence presented to support divorce judgment since no evidence of marital estate (H’s affidavit just showed what he contended to be his separate assets) – result was that virtually entire estate out of 14 year marriage was given to H.

Post-Judgment Relief

Kuriatnyk v. Kuriatnyk, 286 Ga. 589 (2010)

Key ingredients:

- Although burden was on W in divorce to show that she met six month residency requirement to file for divorce, the burden shifted to H in context of motion to set aside divorce to show that the judgment was void for lack of subject matter jurisdiction (i.e., because this domiciliary requirement not met)

Post-Judgment Relief – cont.

- Motion for new trial is proper means to contest failure of court to comply with child support guidelines in O.C.G.A. § 19-6-15 – NOT motion to set aside.
 - Unless ordered otherwise by the court, motion for new trial “shall be decided” after an oral hearing on the motion.
-

Yurevich v. Williams, 302 Ga.App. 162 (2010)

Key ingredients:

- Facts:
 - H and W borrowed money from H’s mother to put down payment on their marital residence.
 - Promissory note stated that, “[n]o payments of principal are required to be paid until any of the parties of this agreement sell or transfer title in any manner their ownership interests in” the marital home.
 - W signed quitclaim deed in favor of H and his mother in July of 2006; parties divorced in September of 2007.
 - In amended final judgment and decree of divorce that occurred after the sale of the home, trial court divided the net equity that resulted between the parties AFTER paying off the mortgage and paying back the down payment to H’s mother.
 - Former mother-in-law filed suit against ex-W, claiming that she owed her the money under the promissory note and to reimburse her for attorney’s lien place on marital residence by ex-W’s attorney
- Ex-W owed no money to mother-in-law because 1) quitclaim deed probably not the transfer of ownership contemplated under the note that would trigger repayment; and 2) even if it were, trial court left equity in the marital residence representing mother-in-law’s interest
- Leaving aside whether attorney’s fees lien were even proper (i.e., whether W “recovered” anything in the divorce related to the marital residence to which the lien could properly attach), mother-in-law’s relief sought re: attorney’s lien did not properly lie against ex-W

Post-Judgment Relief – cont.

- Moral of the story: going after your ex-daughter-in-law when your own son fails to pay you back does not reap rewards
-

Jacob-Hopkins v. Jacob, 2010 WL 2541976 (Ga.App.)

Key ingredient:

- A ruling on a motion for contempt does not preclude a party from bringing an action for damages arising out of the contemptuous behavior (especially since contempt action typically only restores the parties to their status quo positions without necessarily making them monetarily ‘whole”).

Appellate Procedure

Moore v. Moore-McKinney, 297 Ga.App. 703 (2009)

Key ingredients:

- Direct appeal of final order in modification of visitation case is available under O.C.G.A. Sec. 5-6-34(a)(11) (statute permitting direct appeal of “child custody” order).
-

Martinez v. Martinez, 301 Ga.App. 330 (2009)

Key Ingredients:

- Amendment to O.C.G.A. § 5-6-34 permitting direct appeal of child custody order applies “to all child custody proceedings and modifications of child custody filed on or after January 1, 2008”
- Facts:
 - Divorce complaint filed in 2007 in which H sought primary custody of children
 - Motion to enforce SA as to child custody and visitation filed by H in October of 2008
 - Court granted motion to enforce and entered a “Final Order on Custody and Visitation.”

Appellate Procedure – cont.

- W appealed this final custody order via direct appeal.
 - “The salient date for triggering the change in appellate procedure . . . is the time the legal action is filed, not the date that an order sought to be appealed in such action is issued.”
 - Ga. Sup. Ct. held that, since the final order being appealed derived from the SA and the motion to enforce it filed in 2008 (versus being derived from a final trial on the divorce initiated in 2007), a direct appeal was available.
 - The motion to enforce was the triggering “legal action,” not the filing of the divorce itself.
-

Cohen v. Cohen, 300 Ga.App. 7 (2009)

Key ingredient:

- W entitled to direct appeal from denial of motion to dismiss H’s complaint for divorce / child custody where motion to dismiss based upon lack of jurisdiction under UCCJEA.
 - W did not have to follow interlocutory appeal procedure, nor did she have to follow discretionary appeal procedure.
-

Todd v. Todd, 2010 WL 1169931 (Ga.)

Key Ingredients:

- Despite statutory language permitting direct appeal from child custody orders, a direct appeal will not lie from a judgment granting a divorce, even if only relief sought on appeal pertained to relief from custody decision, where there is no separate child custody order being appealed.
- Appeal had to be brought by application for discretionary appeal instead.

A la Carte

Georgia General Assembly: SB 491

June 3, 2010, Signed by Governor

- Provides jurisdiction over non-residents:
 - Upon divorce, if parties resided in state during marriage, so long as other spouse still resides in state;
 - Upon modification of alimony, child custody, child support, equitable apportionment of debt, or equitable division of property, so long as the petitioner resides in state and the respondent was subject to the jurisdiction of a court within the State in the order being modified.
- Provides for creation of certified process server
 - licensed anywhere within the state, provided sheriff of county where process to be served allows such servers to service.

Georgia General Assembly: HB 1055

May 12, 2010, Signed by Governor

- Across the board increases in Court fees for most civil filings.
- Check your local jurisdiction for exact amounts.