Recent Developments in Family Law: 2008-2009 Case Update

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ROADMAP: 71 slides in 60 minutes

- Adoption
- Alimony
- Attorney's Fees
- Child Support
- Contempt
- Custody
- Declaratory Judgment
- Equitable Division
- Evidence
- Family Violence
- Garnishment
- Insurance Benefits
- Jurisdiction
- Legitimation
- Modification
- Money Had and Received
- Notice
- Partition
- Settlement
- Prenuptial Agreements
- UCCJEA
- UIFSA

Adoption: Owen v. Watts

- Issue: Evidence for Best Interest of the Child in an adoption action.
- Facts: The child, M.F.L., lived with her mother and grandmother, Watts. In 2005, the child was removed from her mother's custody by the Department of Family and Children Services ("DFCS"), and the mother was later incarcerated on drug charges.
- The child was placed in foster care with the Owens. On October 2, 2006, the Owens filed a petition to adopt M.F.L.
- The next day, as a result of "issues" between the Owens and DFCS, the child was removed from the Owens' custody and returned to her grandmother, Watts.
- In November 2006, the trial court entered a temporary custody order in favor of the Owens, finding that DFCS acted improperly by removing M.F.L. from the Owens' custody and did not follow proper procedures.
- However, in December 2006, the court ordered upon emergency motion for an ex parte restraining order that the Owens were to be restrained from retrieving M.F.L. from Watts
- The trial court ruled that granting Watts' adoption petition was in the best interest of the child, based upon "consideration of the physical, mental, emotional, and moral condition and needs of the minor child, especially considering the need for a secure and stable home with a biological relative."

Adoption: Owen v. Watts

- Watts filed a petition to adopt M.F.L. along with valid surrenders of parental rights from both M.F.L.'s legal mother and father in favor of Watts. The Owens intervened.
- **Held:** In an adoption proceeding, the court considers whether:
- (1) each living parent of the child has surrendered or had terminated all his rights to the child in the manner provided by law;
- (2) the adopting parent is capable of assuming responsibility for the care, supervision, training and education of the child;
- (3) the child is suitable for adoption in a private family home; and
- (4) the adoption requested is for the child's best interest.
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The Court found that there was no evidence in the record that supported a finding that the adoption was in the child's best interest.

The only evidence submitted by Watts was her testimony that she loved the child, took her to doctor visits, and that DFCS had indicated that her home was sufficient to pass a home evaluation.

The Court stated that the best interest standard requires more, including the physical, mental, emotional and moral condition and needs of the child.

In absence of such evidence, the trial court erred in granting Watt's adoption petition.

Adoption: In the Interest of K.W.

- Issue: Newly Discovered Evidence
- Facts: Mother executed a surrender of parental rights for children who are then placed with foster parents for adoption. The trial court thereafter granted the Father's request to legitimate and placed the children with the Father.
- Mother filed a motion to set aside the order and an extraordinary motion for new trial alleging newly discovered evidence. Specifically, she stated that her surrenders were based upon the fraudulent misrepresentation of a DFCS case worker.
- Following a hearing, the trial court granted the Mother's motion and restored the Mother's parental rights to the children.
- Father appealed, alleging that the trial court erred because the mother presented insufficient evidence and the trial court lacked personal and subject matter jurisdiction over the matter.
- Father further alleged that the mother lacked standing to challenge the trial court's original order and that the surrender of her parental rights was res judicata. Finally, Father alleged that the Mother's appeal of the order granting the Father custody was untimely filed.
- Held: Noting the procedural posture of this case, the Court asserted that there was sufficient evidence in the record to show that the mother had been unduly influenced and that the DFCS case worker had an ongoing personal relationship with the foster parents and the family of the foster parents.
- Finally, after finding the trial court had jurisdiction and the mother had standing, the Court found that "res judicata and estoppel by judgment will not bar …a motion to set aside such [a] judgment based upon newly discovered evidence…"

Adoption: Sastre v. McDaniel

- Issue: Residency Requirements
- Sastres were godparents of a child who was placed in DFCS custody and they sought to adopt him
- The Sastres lived in GA since 2002, but had recently moved to TN for seminary school
- Their complaint was dismissed as the Court found that Sastres were not "bona fide residents" of GA
- Sastre argues that residency requirement is the same as used in O.C.G.A. 19-5-2 for divorce

- "Bona fide residency" requires domicile in GA for 6 mos. prior to filing a petition.
- Court of Appeals Agreed
- Domicile means "a single fixed place of abode with the intention of remaining there indefinitely **or** a single fixed place of abode where a person intends to return, **even though that person may in fact, be residing elsewhere**.

Alimony Modification:
Patel v. Patel

(not on materials; published 5/4/2009)

- Issue: Automatic reductions in alimony
- Trial court awarded W alimony which decreased automatically after the 1st and 2nd years
- W appealed claiming it constituted improper future modifications not based on a change of circumstances
- Supreme Court disagreed with Wife

- Because the Order specifically stated the exact amount of each payment and the exact number of payments without any limitations (I.e., termination language), it is lump sum alimony rather than periodic alimony

- Lump sum alimony (which can be paid in installments) is not subject to modification

Alimony: Rivera v. Rivera

- Issue: Periodic v. Lump Sum Alimony
- Facts: The parties were divorced in 2006 and the final divorce decree required Husband to pay Wife the sum of $500.00 per month as alimony for 60 months for a total payment of $30,000.00.
- This amount was based upon the jury's verdict, which left blank the portion of the verdict dealing with lump-sum and in-kind alimony.
- It awarded Wife periodic alimony payments by circling the word "month" and indicating an amount of $500.00 for a payment period 60 months.
- Husband filed a Motion for Modification of Alimony. The trial court dismissed the Motion stating that the alimony sought to be modified was lump sum, and lump sum alimony is not modifiable.
- Husband appeals and the Supreme Court affirms.
- Held: Husband relies on the jury's identification of the award as periodic alimony. However, it is clear that in judicial review of alimony awards, the Court will ascertain the nature of the award as a matter of law and on the basis of substance rather than on labels.
- To determine if an award of alimony is periodic or lump sum, if the obligation states the exact number and the amount of payments without other limitations, conditions or statements of intent, then it is considered lump sum alimony and non- modifiable.
- Here, the jury's award has no limitation or contingency such as remarriage, death, or upon the provisions for Husband to pay Wife. Therefore, the Court was correct in dismissing the Motion for Modification.

Attorney's Fees: Fort v. Rucker-Fort

- Issue: Court's Authority to Award Fees
- H and W were divorced and H was ordered to pay mortgage on marital home for W plus $1k in attorney's fees
- H later filed for bankruptcy; and the bankruptcy court issued an injunction prohibiting creditors from filing contempt actions against him
- W filed a contempt action
- H was found in contempt for failing to pay mortgage
- H filed motion for contempt against W for ignoring the bankruptcy court's injunction
- Prior to adjudication (of the contempt actions), parties entered an accord and satisfaction whereby W would assume mortgage and H would pay W $60,000

Attorney's Fees: Fort v. Rucker-Fort

- 7 months after their Agreement, W discovered that the IRS filed a lien on the marital home to collect on H's tax debt ($120,000.00)
- W filed motion to set aside the parties' agreement based on H not disclosing the lien
- Prior to the Court ruling on the Motion to Set Aside, Wife's attorneys negotiated with the IRS to resolve the tax issue.
- W amended her Motion to only request that ex H pay the $10k she incurred in fees
- **The trial court, using its equitable powers, awarded W attorneys fees under the fees provision in the decree of divorce, even though it found the accord and satisfaction superseded the divorce decree**
- Held: A court cannot use equitable powers to award fees absent a statutory or contractual basis;
- Here, the divorce decree had been superseded and the court had no basis upon which to award fees and cited no basis for its award.

Attorneys' Fees: Ruth vs. Herrmann

- Issue: Res Judicata and Attorneys Fees
- Facts: Wife filed a divorce action in Clayton County against her Husband, who was represented by Scott Herrmann.
- In March of 2006, Mr. Herrmann served a Notice of Withdrawal from Representation during the divorce action
- Herrmann then filed an attorney's lien against the marital property owned by both parties and served notice of the filing of this lien on Wife in March of 2006.
- In April, 2006, the Court signed the Order granting Herrmann's request to withdraw as counsel for Husband in the divorce.
- In June of 2006, Ruth filed an emergency Motion to remove the lien, noting therein that the marital residence had been awarded to her in the final divorce decree.
- In August, 2006, the trial court issued an Order finding the lien was properly filed and that Wife had received notice of the lien, thus denying Wife's Motion. Wife did not appeal the ruling.
- In September, 2006, Wife filed the underlying action in Dekalb County Superior Court seeking removal of the attorneys fees lien as well as punitive damages and attorney's fees.
- The case was transferred to Clayton County. Herrmann moved for Summary Judgment arguing that this claim to remove attorney's lien was precluded by the doctrine of res judicata and/or collateral estoppel. Wife also responded and filed a cross Motion for Summary Judgment arguing that his claim was for money he had received
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Attorneys Fees: Ruth vs. Herrmann

- The trial court denied Wife's Motion and granted Herrmann's Motion finding that the August, 2006 Order was a final judgment of this Court and could not be re-litigated by Wife under the legal principles of res judicata and/or collateral estoppel. Wife appealed and Court of Appeals affirms.
- Held: Pursuant to O.C.G.A. §9-12-40, a judgment of the court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put at issue or which under rules of law might have been put at issue.
- Collateral estoppel, or issue preclusion, precludes re-litigation of an issue that was previously litigated and was decided on the merits in another action between the same parties or their privies.
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- The propriety of Herrmann's attorney's lien was litigated and decided in the divorce action when Wife filed an Emergency Motion to Remove the Lien and a Brief in Support of her Motion, and a hearing was held and Wife's Motion to Remove the Lien was denied.
- Wife did not appeal that Order or move the Court to reconsider its decision.
- In making its decision, the Court held that an attorney has the same right over an action, judgment or decree as his client has or might have had for the amount due the attorney. Therefore, Herrmann had the same rights as Husband.
- Pursuant to O.C.G.A. §15-19-14(b), the attorney's lien was valid. Under the statute "upon any action, judgment, or decree for money, attorneys at law shall have a lien superior to all liens except tax liens; and no person shall be at liberty to satisfy such action, judgment or decree until the lien or claim of the attorney for fees is fully satisfied."

Child Support: Whitehead vs. Peavy

- Issue: Child Support and Social Security
- Facts: Father appeals trial court's decision denying his request to be reimbursed for overpayments in child support made to the Mother by the Social Security Administration.
- In the action, Husband's original amount of child support was modified upward. Until the Social Security system caught up, Father was to pay the increase directly to the Mother, however, when Social Security started, Father was entitled to any reimbursements for any overpayment made directly to Mother.
- The order required that the reimbursement to be made by either the Wife or by the Social Security Administration
- Held: The Court held that the order requiring repayment was consented to by all parties and had not be modified, vacated, or found unenforceable. Therefore the Husband was entitled to reimbursement.

Child Support: Hamlin v. Ramey

Issue: Deviations and Child Support

Facts: Father and mother were unmarried. Father filed a petition to legitimate the minor child. A consent order was entered legitimating the minor child. It also contained provisions addressing custody and other visitation related matters.

- Subsequent to this order, the trial court entered an order determining the amount of support for the minor child, including findings as required pursuant to O.C.G.A § 19-6-15.
- Father appealed alleging that the trial court failed to grant him a deviation from the presumptive amount based on his parenting time and failed to explain why he was not entitled to such deviation
- Held: The Court held that the Father had failed to prove that his proportional amount of parenting time constituted a special circumstance making the presumptive amount of child support excessive, and or failed to prove that the child's best interest would be served by deviation from the presumptive amount.
- The Court further noted that on appeal that it would review any findings based on disputed facts or witness credibility under the clearly erroneous standard and review the decision to deviate or not to deviate from the presumptive amount of child support under the abuse of discretion standard.
- Finally, the Court found that if no deviation applies " and the court or jury decides not to deviate from the presumptive amount of child support, then the order need not explain how the court or jury reached that decision", and "OCGA §19-6-15 does not require the court to issue findings to explain its reasoning in reaching that decision."

Child Support: Appling v. Tatum

- Issue: Inclusion of K-1 income in gross income
- F filed Petition for Legitimation, M filed counterclaim for Child Support, Custody & Visitation
- Trial court awarded joint legal custody, visitation time to F, and $2,200 in monthly child support
- F appealed, claiming trial court improperly used K-1 income in calculating his gross income
- Father claimed that because K-1 income was not "available" to him, it should not have been used to calculate child Support
- Father relies on O.C.G.A. 19-6-5(f)(1)(b) which directs that income from self employment or operation of business should be carefully reviewed to determine the income that is "available" to satisfy a child support obligation.

Child Support: Appling v. Tatum

- Court of Appeals disagrees.
- OCGA 19-6-15 (f)(2) does not exclude K-1 income from gross income for purposes of child support
- As such, it can be included even if not “available” because the owner elects to leave that income in business to operate it

Child Support: Garcia v. Garcia

- Issue: Application of promissory estoppel in child support cases

- H and W were divorced, but H was not biological father of W's child
- Trial court applied promissory estoppel and ordered H to pay child support for his non-biological child
- Order based on W claiming that H had "promised to care for the child" and "wanted the three of them to be a family" as evidenced by the fact that he included his name in the child's birth certificate

- The Supreme Court reversed
- A biological or adoptive father has a statutory obligation to support his child
- Nonetheless, a father may agree to pay support for a non-biological or adoptive child
- Absent a duty or agreement, a **non biological** father may be obligated to pay support where he **promised** such support and the mother/child **relied** on that promise to their detriment.
- In this case, there was no evidence to establish that Mother had foregone the ability to recover child support from the biological father because of H's actions
- As such, promissory estoppel could not be applied

Child Support: Garcia v. Garcia

- Court distinguishes this case from prior cases
- In Wright v. Newman, a Georgia court applied the doctrine of promissory estoppel where M had relied on F's promise of support to her detriment by foregoing an opportunity to seek out the child's biological father for support
- In Mooney v. Mooney, W was awarded support of her grandchild because she took the child in based on H's promise to help her support the child
- Here, W did not rely on H's promise of support to her detriment and the court improperly applied promissory estoppel to establish a support obligation

Child Support: Hampton v. Nesmith

- Issue: "Phase In" of Increase in Child Support
- F sought downward modification of child support, and M counterclaimed for contempt and upward modification
- Trial court found F in contempt for his arrearage and awarded M an **upward** modification of support (greater than 50% of the original amount)
- **However, the increased amount would not take effect for 15 months to give F time to pay off arrearage**
- Court of Appeals vacated in part
- O.C.G.A. 19-6-15 does not authorize a complete delay in increased payments
- Instead, 19-6-15 (b)(3) provides for a phase in of increased support payments over a period of up to two years
- The phase should be evenly distributed over that period
- The initial adjustment must be not less than 25% of the difference of the old and new amounts

Child Support: Johnson v. Johnson

- **Issue:** Educational Expenses as Deviations from the child support Presumptive Amount
- **Facts:** The Final Judgment and Decree of Divorce was entered in November of 2007, which awarded Wife primary custody of the two minor children.
- Child support was set at $935.31 per month, with an extra $100 per month to be applied towards the arrearage pursuant to the Temporary Order.
- The child support calculation did not include the children's private school tuition or any findings of fact why such was not included. Wife appeals and the Supreme Court affirms.
- Held: Extraordinary educational expenses MAY be factored in as a deviation to the presumptive amount of child support but are NOT REQUIRED to be factored into the child support calculation.
- A trial court is only REQUIRED to make findings of fact if a deviation is applied that diverges from the presumptive amount of child support.
- The trial court DID NOT DEVIATE from the child support obligation table when setting child support.
- Therefore, the Court is not REQUIRED to make any findings or explanations in its decision to forego applying the children's private school tuition to the child support calculation.
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Child Support: Sebby v. C**osto**

- Issue: Child Support Deviations
- Facts: Father appealed a trial court order which ordered him to pay support and established visitation rights.
- Issues: Should the work schedule of the Father be considered when determining visitation rights? Did the trial court apply the correct child support guidelines
- Held: The Father failed to assert authority for the position that the trial court erred when it did not consider his work schedule when it determined his visitation rights, therefore the Court did not consider his enumeration of error.
- Additionally, Father failed to provide a transcript to the court. Again, authority and transcripts are required to obtain a decision from the court.

Child Support: Evans v. Evans

(not on materials: published 4/28/09)

- Issue: Effect of overtime income
- Trial court did not include the overtime income in its child support calculation because it was "not guaranteed"
- Supreme Court reversed
- Statute specifically requires that overtime income be considered
- Statute states that "*overtime pay . . . shall be **averaged** by the court . . . over a reasonable period of time **consistent** with the **circumstances** of the case and **added** to a parent's fixed salary or wages to determine gross income.*"

Contempt: Carlson v. Carlson

- Issue: Modification of Divorce Terms in Contempt Action
- H and W were divorced
- H was awarded full custody; W was awarded supervised visitation and ordered to undergo mental therapy
- Parties were to equally divide visitation costs
- W failed to go to therapy; the court found her in contempt and ordered her to pay 100% of supervised visitation costs
- W appealed arguing that the court improperly modified terms of the divorce decree in a contempt proceeding by modifying the costs of the supervised visitation

Contempt: Carlson v. Carlson

- As a general rule, a trial court **cannot modify** the terms of a divorce decree in a **contempt** proceeding
- There is an **exception** that allows courts to modify visitation rights in a contempt proceeding, even on its own motion (OCGA 19-9-3(b)
- Since the costs of supervised visitation were *associated with* her visitation privileges, the trial court had authority to increase the costs paid by W during the contempt proceeding

Contempt: Hall v. Doyle-Hall

- Issue: Affidavit of non-compliance by a party
- H and W were divorced
- H incurred an arrearage for child support and W filed contempt action
- Court found H in contempt and ordered that if H failed to pay the arrearage, H would be incarcerated ***upon affidavit of noncompliance signed by W's attorney***
- Trial Court is reversed
- The fact that the incarceration order is self-executing is not the problem
- The problem is that the order is self-executing upon affidavit of an interested party (W's attorney)
- To be a valid arrest order, the affidavit must come from a neutral, disinterested official based on objective information
- Cannot put the keys to the jail in the hands of a party . .

Custody: Galtieri v. O'Dell

- Issue: 3rd party Custody & Findings of Fact
- M and F had illegitimate child. F resided out of state and never legitimated, but occasionally provided support
- M went to drug rehab and her mother, O'Dell, took in the child
- F petitioned to legitimate the child and obtain custody; Grandmother intervened
- The trial court made no findings of O'Dell's fitness as a parent, but awarded custody to her because it would be "detrimental" to remove the child from GA

Custody: Galtieri v. O'Dell

- Custody disputes between biological parents and 3rd parties are governed by O.C.G.A. 19-7-1(b)(1)
- The statute **presumes** fitness and child's best interest in the biological parent's custody.
- To overcome the presumption, the statute provides a 2-step burden of proof for the 3rd party:
- 1. The 3rd party must show that custody with the bio parent would **harm** the child.
  - Harm" means "significant, long-term emotional harm, not merely social or economic disadvantages."
- 2. 3rd party must show that her award of custody would best serve the child's **welfare and happiness.**
- The trial court made no such findings; Judgment reversed and remanded.
- Court MUST make specific findings of fact

Custody: Rembert v. Rembert,

- **Issue: Final Decision Making Authority**
- Facts: Husband and Wife were divorced, and the trial court awarded the parties joint legal custody, with Husband having primary physical custody of the parties' two children.
- In the final judgment and decree, the trial court awarded Husband "final decision-making authority on all matters involving the children, including the school they attend, membership in organizations, and other extracurricular activities."
- Wife moved for new trial, and the trial court amended its order, specifying that the parties were to participate equally in making major decisions .pursuant to O.C.G.A. § 19-9-6(2).
- The court further stated that Husband was not allowed to exercise his authority to make final decisions on major issues without discussing them with Wife in good faith.
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- Wife also argues that the trial court did not act in the best interest of the children in making Husband the primary physical custodian because she was at least as equally fit to be the primary physical custodian.
- Held: The Court of Appeals corrected her, stating that Husband was awarded "final" decision-making authority, not "full."
- O.C.G.A. § 19-9-6(2) defines "joint legal custody" as "both parents hav[ing] equal rights and responsibilities for major decisions concerning the child, including the child's education, health care, extracurricular activities, and religious training."
- However, the same provision allows the judge to designate one parent to have sole power to make certain decisions while both parents retain equal rights for other decisions

Custody: Rembert v. Rembert

- Held:
- This language gives the trial court the discretion to decide which parent should have final decision-making authority if the parents are unable to agree.

- The trial court did not abuse its discretion in giving Husband the final say.

- The Court of Appeals found that the trial court has broad discretion in a contest between parents over custody, and may award custody to one parent despite the fitness of the other.

- The appellate court will not interfere unless the evidence shows a clear abuse of discretion.

- The record showed that Wife planned to attend law school full-time, borrowed money from Husband to buy a car, had an affair with a married man, and threatened the life of a neighbor. On these facts, the trial court did not abuse its discretion in analyzing the best interest of the children and awarding primary physical custody to Husband.

Custody: Rumley-Miawama v.Miawama

- Issue: Self-executing modification provisions
- H and W were awarded joint legal and physical custody in divorce proceedings
- The final judgment contained a self-executing provision which would **drastically reduce** W's visitation if she ever moved out of state
- W appeals and trial court reversed by Supreme Court.
- Such provisions should only be used where a party has ***committed*** to a course of action and the trial court has specifically evaluated how the child will be affected

Custody: Rumley-Miawama v.Miawama

- Evidence did not show that W definitely planned to move out of state
- The provision contained no limiting language as to its time of application; it never expired
- It materially altered visitation and failed to account for individualized circumstances that arise in every case, and how the child might be affected
- Thus, the provision improperly authorized an open-ended, automatic, material change in visitation without providing for a determination whether such a change is in the best interests of the child
- Court essentially quotes its previous ruling in Dellinger (2004)

Declaratory Judgment: Acevedo v. Kim

- Issue: Use of Declaratory Judgment Action
- Facts: The divorce decree set forth a formula where Father's child support obligation would increase at the same rate that Father's income had increased in the prior two years.
- Mother claimed that Father owed approximately $35,000 in past child support. Father claimed that he overpaid by $5,000., Father filed a Declaratory Judgment action for clarification of the child support formula.
- Mother counterclaimed for back child support in the amount of $56,153.66.
- The trial court granted declaratory judgment and ordered father to pay $54,464.48, without interest, at the rate of $1,000 per month until the debt was paid in full.
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- Held: Upholding the trial court The Court held that "A declaratory judgment is an appropriate means of ascertaining one's rights and duties under a contract and decree of divorce….notwithstanding the fact that the complaining party has any other adequate legal or equitable remedy or remedies."
- Justice Sears supports use of the declaratory judgment action as an alternative method of discerning the rights of parties to a, in order to secure an authoritative construction of a confusing child support provision in a divorce decree."
- Justice Hines wrote a dissenting opinion stating this opinion unnecessarily opens up the declaratory judgment statute to all debt actions.
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Equitable Division

Equitable Division: Smith v. Smith

- Issue: Separate Property
- H and W were married in 1979 and divorced in 1988; H was awarded his military retirement pay
- In 1999, they remarried and later divorced a second time in 2008
- In the 2nd divorce, W was awarded a share of H's military retirement pay
- H argues that the military retirement pay became his separate property after the 1st divorce and it was improperly divided as part of equitable distribution
- H retired in 1995 (**before** the parties remarried in 1999)
- Marital property awarded to a spouse on divorce becomes that spouse's separate property, even if the parties later remarry

Evidence : Leggette v. Leggett

- Issue: Award of Attorneys Fees
- Facts: Husband appealed from a final decree of divorce. Husband asserted that the trial court erred in awarding $28,423.25 in attorneys fees.
- Held: The Court held that the trial court failed to specify the statutory basis for the award of attorneys fees
- Additionally, the Court held that the trial court failed to make findings sufficient to support an award of attorneys fees under either statute mentioned in this case.
- Absent specification of the statutory basis and findings supporting the statutory basis, an award of attorney fees will fail.

Expert Testimony: Hamilton-King v. v. HNTB Georgia, Inc.

- Issue: Application of Daubert and Kumho to Expert Testimony
- Facts:. Plaintiff was traveling over a bridge at night with her two brothers, which was part of the construction project, when another car moved into her lane and she ran into the median. There was no shoulder on the bridge due to the construction project. When the Plaintiff and her brothers got out of the car, a van struck their car and killed her two brothers. Plaintiff sued the contractors for negligence in failing to maintain proper precautions on the roadway for emergency situations.

- An expert was excluded by the trial court for failure to meet all of the" Daubert" factors and the Plaintiff's appealed

- Held: O.C.G.A 24-9-67.1(f) provides that in interpreting O.C.G.A 24-9-67.1 the courts may draw from Daubert and Kumho . The Court found that the language from the statute is a permissive suggestion that courts consider federal interpretations of cases on which the federal rules and O.C.G.A 24-9-67.1 are based

Family Violence: Williams v. Jones

- Issue: Mutal Order Provisions
- Facts:Williams and Jones lived together and were the unmarried parents of a child.
- Williams petitioned the court under the Family Violence Act, alleging that Jones had physically and verbally abuse her by holding her down, beating her and pouring a bottle of bleach into her nose, mouth and eyes. She also alleged that she broke the windows in his car.
- As a result of her actions, Jones complained to the police and Williams was arrested. Williams thereafter filed her Family Violence Petition.
- The Superior Court entered a mutual protective order restraining and enjoining Williams as well as Jones from harassing or interfering with each other,
- The order further ordered **both parties** to undergo a batterer's intervention program and procure a alcohol/drug abuse evaluation.
- Held: The Court held that because the record showed that Jones did not file a verified counter petition to Williams's petition for family violence, the Superior Court was without legal authority to include the mutual protective provisions in the order.
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FAMILY VIOLENCE: WILLIAMS V. JONES

- The Court noted that such provisions have been criticized as they appear to blame the victim rather than the accused.
- The Court held that the due process rights of Williams were violated “because Jones filed nothing to put her on notice that she would have to defend against a claim that a protective order would be issued against her”, and she is entitled “to notice and an opportunity to prepare a defense before appearing at the hearing.”
- The Court further noted that such provisions violate the due process rights of the victim when the victim is not served with such allegations prior to a hearing on the matter

Garnishment: Stoker v. Severin

- Issue: Garnishment and Medical and Extracurricular Expenses.
- Facts: Mother filed a garnishment action in the state court that Father was indebted to her in the principal amount of $8,886.21 which represented Husband's arrearage pursuant to the 1999 Divorce Decree as modified in 2002 Consent Order.
- Of the alleged indebtedness, one month or $2,350.00 was attributed to one month's past due period child support, and the $6,536.21 was attributed to Husband's share of health care expenses and extracurricular activity costs.
- At the time of the hearing, Father had paid the child support arrearage amount and as a result, there was no remaining unpaid periodic child support. The trial court granted Husbands traverse and dismissed the garnishment action. Wife appealed and the Court of Appeals affirmed.
- Held: Under Georgia law, a judgment for periodic child support that fixes the amount of the installments and when they are due is a money judgment subject to collection by post-judgment garnishment.
- This is because the court can determine the amount due from the terms of the decree and with no more than a mathematical computation.
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Garnishment: Stoker v. Severin

- The Georgia debtor and creditor code expansively provides for the collection of debts through the process of garnishment and all cases where the money judgment has been obtained in a court of this state.
- The remaining $6,536.21, which Wife identified as representing Husband's share of the health care expenses and extra curricular activities, have not been reduced to a money judgment against Husband, and therefore Mother's attempt to garnish Husband's property for this amount is governed by the prejudgment garnishment procedure at O.C.G.A. §18-4-40 et. seq..
- The law regarding prejudgment garnishment proceedings must be strictly construed to permit garnishment for the collection of a debt which has not been reduced to a money judgment only where the action is pending against the Defendant,
- and the court finds one of the other conditions specified in O.C.G.A. §18-4-40:
- 1) when the Defendant resides outside the limits of the state;
- 2) when the Defendant is actually removing, or about to remove, outside the limits of the county;
- 3) when the Defendant is causing his property to be removed beyond the limits of the state;
- 4) when the Defendant has transferred, has threatened to transfer, or is about to transfer property to defraud or delay his creditor; or
- 5) when the Defendant is insolvent.

Garnishment: Stoker v. Severin

- Here, Mother failed to show that any of the conditions precedent to a prejudgment garnishment exist or a pending against the Defendant.
- Wife's claim against Husband for healthcare and extracurricular activities expenses had not been reduced to a money judgment and Wife failed to show that she was entitled to the process of prejudgment garnishment under O.C.G.A. §18-4-40 et seq.,
- The trial court was required to grant Husband's traverse to the extent of the amount claimed for those expenses

Insurance Benefits: Sparks v. Jackson

- Issue: Impact of not changing beneficiary pursuant to Settlement Agreement
- H and W, Jackson, were divorced and the settlement agreement named Jackson as an irrevocable beneficiary of H's life insurance policy of $220,000 for the benefit of the parties' children
- H later married Sparks and named her as his **new** beneficiary (he never included the children or ex wife as the beneficiaries)
- When H died, both Sparks and Jackson claimed the proceeds, totaling $238,000
- The trial court awarded the entire amount of the policy to Jackson
- Affirmed
- If the insured names a beneficiary by **revocable** designation, he can later **change** the beneficiary
- But, the insured **forfeits** his right to change the beneficiary if he receives **valuable consideration** in exchange for the designation

Insurance Benefits: Sparks v. Jackson

- In the divorce context, a settlement agreement may **preclude** the insured from changing the beneficiary

- Where a settlement agreement requires H to name his children or ex-wife as beneficiary to keep the policy in effect, the children and ex-wife obtain a **vested** right in the proceeds

- Sparks argues that the policy is not the same policy that was named in the settlement agreement
- Where one policy replaces a policy named in a settlement agreement, the minors' interest carries over to the replacement policy
- Held: Jackson is entitled to $220,000 (amount in settlement agreement); Sparks gets remainder.

Insurance Benefits: Stanton v. Fisher

Issue: Insurance Beneficiaries

- Facts: The parties were divorced in 1998 and there were three children born as issue of the marriage.
- In 2003, Father remarried and obtained an accidental death and dismemberment insurance policy where Father designated his new wife (SW) as beneficiary.
- Father divorced his SW in 2004. In 2006, Father died as a result of multiple traumatic injuries sustained in a motorcycle accident
- The first wife (FW) and Father's children made a claim to the insurance proceeds.
- FW claimed that after his divorce from SW the Father filled out and mailed a change of beneficiary form to the insured naming the FW and children as beneficiaries.
- FW did not produce a copy of the that Father allegedly sent. SW claimed an interest as the designated beneficiary of the insurance proceeds.
- The insurance company showed the SW as the designated beneficiary. Insurance company claimed that it had not received any notice from the Father to change the beneficiary.

Insurance Benefits: Stanton v. Fisher

- Both parties filed motions for summary judgment and the trial court granted the second wife's motion. The Court of Appeals affirmed
- Held: Georgia law is that when an insured is authorized by the insurance policy to change the beneficiary during his life and the insured dies without having exercised the authority, the named beneficiary has a vested interest in the proceeds of the policy
- If, however, the insured has done substantially all that he is able to do to affect a change of beneficiary and all that remains to be done is ministerial action of the insurer, the change will take effect though the details are not complete before the death of the insured.
- Some affirmative act on the part of the insured to change the beneficiary is required and his mere intention will not suffice to work the change of beneficiary

Insurance Benefits: Stanton v. Fisher

- Even though the FW filed an affidavit stating that the deceased Father showed her a letter that he allegedly sent stating he was changing the beneficiary, said statement is hearsay without an exception and cannot be considered in support of a motion for summary judgment.
- Therefore, there was no genuine issue of material fact of whether Father did substantially all that he could do to affect the change of beneficiary

Jurisdiction: Amerson v. Vandiver

- Issue: Termination of Parental Rights in Divorce/Estoppel

- During H and W's divorce, H voluntarily surrendered his parental rights to avoid support obligation
- The superior court accepted the surrender
- 4 years later, H filed a motion in Superior Court to set aside the surrender for lack of subject matter jurisdiction

- Georgia allows judicial approval of voluntary surrenders of parental rights when it is in the best interest of the child
- However, O.C.G.A. 15-11-28 designates **juvenile court** as the sole forum for initiating termination of parental rights (except in adoption proceedings, which haven't occurred here)

Jurisdiction: Amerson v. Vandiver

- A superior court, during divorce proceedings, does not have jurisdiction to terminate parental rights
- Parties cannot confer subject matter jurisdiction on the court by agreement
- However, equitable defenses, e.g. laches, apply in a Motion to Set Aside that termination
- Here, the Supreme Court found that H failed to exercise “utmost promptness” in attacking the judgment, and that combined with his acts and omissions, he was estopped from attacking the termination 4 years later

Legitimation: Binnis v. Fairnot

- Issue: Abandonment of Opportunity Interest (First Impression Case) when full payment of child support and some contact.
- Facts: Parents of the minor child were unmarried. Father filed a petition to legitimate the minor child and for visitation rights. The trial court denied Father's petition, determining that the Father had abandoned his opportunity interest in the minor child
- Held: The Court held that while the father had not contacted the child since 2004.
- The Mother had moved to another state and did not provide information regarding herwhereabouts, nor did she contact the Father to make him aware of her return to Georgia.
- The Court found the Father's continued and consistent payment of child support mitigated against a finding of abandonment.
- The Court further found that the lower court had failed to determine whether the legitimation would be in the child best interest and remanded the matter for a determination of this issue.

Modification: Pineres v. George

- Issue: Modification and Attorneys Fees
- Facts: Wife filed a petition for modification of the psychological expenses, among other things. However, Wife had filed a previous contempt and child support modification action less than two years earlier. It is undisputed that medical expenses constitute a form of child support.
- Held: Wife's complaint constituted a petition for modification of child support and was barred pursuant to O.C.G.A. §19-6-19 (a).
- Based upon Wife's improper filing of the petition to modify, the trial court awarded attorney's fees pursuant to O.C.G.A. §19-15-14.
- Here, the record establishes that Husband introduced evidence regarding attorney's fees incurred in response to the improper modification petition.
- This evidence was admitted without objection, and was neither challenged nor rebutted by Wife. Therefore, the award of attorney's fees under either section (a) or (b) of O.C.G.A. §19-15-14 was warranted

Modification: Pineres v. George

- Here, the record establishes that Husband introduced evidence regarding attorney's fees incurred in response to the improper modification petition was admitted without objection, which was neither challenged nor rebutted by Wife. Therefore, the award of attorney's fees under either section (a) or (b) of O.C.G.A. §19-15-14 was warranted
- With regards to the contempt action, the trial court changed the final decision-making authority regarding their minor son's health care to their co-parenting counselor. Therefore, the trial court's contempt judgment to the extent that grants final decision making authority to the parenting counselor is reversed. The trial court improperly modified the parties' divorce decree by shifting the decision-making authority

Modification: Shepherd v. Collins

- Issue: Periodic v. Lump-Sum Alimony
- The divorce decree ordered H to pay W $2000/mo in child support and alimony for a period of 180 months, payable as follows:
  - $1500 for the first 60 mos.
  - $1000 for the 2nd 60 mos.
  - $500 for the 3rd 60 mos.
- The payments were to continue even if W remarried and **only ceased** upon her death or when 180 payments had been made, whichever first occurred
- H later filed a modification based on decrease in income

Modification: Shepherd v. Collins

- The trial court decreased his child support obligations
- Trial court **refused to decrease alimony** because it was lump-sum, not periodic, and was thus non-modifiable

- Supreme Court reversed

- Lump sum alimony is found where "words of the document establishing the obligation state the **exact amount of each payment and the exact number of payments without other conditions or limitations"**

- Here, the agreement made alimony payments "**contingent** upon W's survival," making the total amount of payments uncertain

- Therefore, the alimony is periodic and is modifiable

- The portion of the judgment classifying the alimony as "lump-sum" is reversed and remanded.

Money Had and Received: McGonigal v. McGonigal

Issue: Overpayments

- H and W were divorced and H later sued W for **money had and received**, alleging that he had overpaid amounts due to W in the settlement agreement
- The trial court dismissed H's complaint, holding that contempt was the appropriate action
- The trial court relied on Baghdady, which held that a party may not resort to an action for "money had and received" to modify terms of their contract
- H claim there was no other action to file b/c the Agreement did not contain a provision relating to overpayments
- Court of Appeals Agrees with Husband
- If the agreement contains a provision regarding money paid by mistake, then action for "money had and received" is **inappropriate**
- Here, the agreement made no such provision, so the court erred in dismissing H's action
- Such an action was the only action available to Husband as there were no grounds for filing a contempt

Notice: Arkwright v. Arkwright

- Issue: Notice and Effect on Final Orders
- Facts: Wife filed for divorce. Husband and his attorney failed to appear at the bench trial scheduled for the matter. The trial court entered an order and the Husband moved to set aside the order.
- The trial court denied the Husband's motion and Husband appealed on the ground that he did not have **actual** notice of the final trial date and that the final order was manifestly unfair.
- Held: The lower court record reflected that Husband's attorney had **actual** notice of the trial date but failed to notify the Husband
- The Court held that the "misunderstanding between [the Husband] and his counsel does not afford a meritorious reason for granting a motion to set aside a judgment. "
- As the trial court's findings were not clearly erroneous, the Court would not set aside the decision of the trial court.

Partition: Harvey v. Sessoms

- Issue: Partition of a Marital Residence
- Facts: The parties divorced in 1970. Wife was awarded permanent possession of the marital home and was required to pay the mortgage payments
- Title to the property remained in both Husband and Wife's names.
- Wife lived in the home until 2004 when she left to care for her elderly mother. She rented the home to a third party and retained the rental income.
- In October, 2006, Husband filed a Petition for Statutory Partition claiming Wife had given up the possession of the marital home and was seeking an accounting of the rental income and half of the profits earned from the lease of the property.

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- Wife moved for summary judgment arguing:
- that the Court placed the property of the parties as tenants in common in the exclusive possession of one tenant, burdening the interest of the non-possessing tenant to the point that the property is not subject to partition by the non-possessing tenant.
- Therefore, the property is not subject to partition.
- The trial court granted wife's Motion for Summary Judgment. The Supreme Court reversed.

Partition: Harvey v. Sessoms

- Held: Pursuant to the divorce decree, the parties are tenants in common giving Husband one-half undivided interest in the property.
- A tenant in common of land with no provision of how the land can be divided, Husband was authorized to seek statutory partitioning
- A non-possessing tenant in common can surrender his or her statutory right to partition
- If they have has expressed or impliedly agreed to surrender or relinquish that right, then they have no right to partition
- If a non-possessing tenant in common has not agreed to give up his right to partition, then that right is not extinguished by a judgment imposed upon him.
- Therefore, since Husband did not contractually relinquish his right to partition, the trial court erred in the granting summary judgment.

Prenuptial Agreements

Prenuptial Agreements: Blige v. Blige

- Issue: Disclosure and Due Diligence
- The day before the wedding, H took W to his attorney to review a prenuptial agreement he prepared
- H made $10/hr, but had just purchased 19 acres of land on which he planned to build a house
- H had over $150,000 in savings not disclosed
- **No disclosures were attached to Prenup**
- H did not inform W of his savings, which he later used to build the house after the parties were married
- W later filed for divorce and H tried to enforce the prenuptial agreement
- The trial court found that H had not disclosed his income, assets and liabilities, and awarded W a share of the home's value
- Supreme Court affirms

Prenuptial Agreements: Blige v. Blige

- Under Scherer, there are 3 prongs to determine whether a prenup is valid:
  - No fraud, duress, mistake, or non-disclosure
  - Not unconscionable
  - Facts and Circs have not changed so as to render the Agreement unfair and unreasonable
- H claims on appeal that the trial court misapplied the first prong, i.e. that he did not fail to properly disclose his assets
- Evidence shows that H actively hid his $150,000 in savings from W

Prenuptial Agreements: Blige v. Blige

- H further argues that Mallen creates a **duty of inquiry** and that W failed to inquire as to the extent of H's assets, and this failure to inquire bars any subsequent challenge to enforceability
- Supreme Court disagrees
- H's proposed interpretation of Mallen "turns Scherer on its head"

- **Affirmative duty of disclosure is superior to duty to inquire**
- Mallen did not create a duty of inquiry
- This case is distinguished from Mallen b/c: Wife had no reason to know about assets not disclosed (parties did not live together prior to marriage and no exhibits were attached)
- Impact: Blige limits interpretation of Mallen

Retirement Benefits: Shell v. Teachers Retirement System

- Issue: Retirement Beneficiaries
- Facts: Husband, Mr. Shell, was a former teacher employed by the Atlanta Board of Education. He had a retirement account with the Teachers Retirement System (TRS) and died in August of 2000.
- His current wife, Mrs. Shell, (CW)requested that TRS pay her the funds remaining in her late husband's retirement account.
- TRS refused on the basis that her husband's former wife (FW) was listed as his beneficiary.
- CW filed a Declaratory Action against TRS and FW alleging that CW should be the beneficiary of her late husband's retirement account.
- CW argued that the FW ceased being the beneficiary pursuant to the divorce decree which provided that Mr. Shell would retain all funds in his TRS retirement account.
- TRS responded with a Motion to Dismiss arguing that TRS was legally required to pay Mr. Shell's retirement benefits to the **last filed beneficiary designation.** The trial court granted the motion dismissing Shell's complaint. The Court of Appeals affirmed.
- Held: Georgia law requires that upon the death of a TRS member, TRS is required to pay the applicable retirement benefits to the beneficiary **nominated by the member by means of a written designation duly executed and filed with the Board of Trustees.**
- Generally, they are exempt from attachment and are not assignable
- Dismissal was correct;

SETTLEMENT: Ford v. Hanna

- Issue: Entry of Appearance, Settlement Authority, Attorney's Fees

- Facts: Former Husband and Wife entered into a settlement agreement on custody of their 14 year old child, support and other issues.
- Wife refused to allow her attorney to execute the agreement and Husband moved to enforce agreement.
- Prior to the Husband's motion to enforce the agreement, the Wife's attorney moved to withdraw from the matter.
- At the Motion to Enforce hearing, the Wife's now former attorney testified:
- that he, opposing counsel and the parties reached an agreement, and announced the agreement to the court with his client's express permission.
- Wife's attorney prepared an order consistent with the agreement.
- However, the Wife would not allow him to release the prepared agreement to the trial court.

SETTLEMENT: Ford v. Hanna

- Held: The Wife asserted that her attorney did not have the authority to bind her to the agreement because he had not filed a written Entry of Appearance pursuant to USCR 4.2.
- The Court found that the attorney in this matter had agreed to represent the Wife the day prior to the hearing, had contacted opposing counsel the same day and made an oral statement of appearance the next day.
- The Court noted that though the rule requires counsel to mail to the court or opposing counsel or file with the court an entry within forty-eight hours of being retained, the rule does provide that "[f]ailure to timely file shall not prohibit the appearance and representation by counsel."
- The court also noted that when the Wife refused to allow the attorney to forward the settlement agreement counsel withdrew at the **client's direction**.
- Based upon the actions of the attorney in this case, the Court found that counsel had become Ford's attorney of record and had the authority to enter into the settlement agreement

SETTLEMENT: Ford v. Hanna

- Mother also contends that trial court erred by awarding attorney's fees pursuant to O.C.G.A. §9-15-14.
- However in the trial court's order, it awarded attorney's fees to Father because it found that Mother had:
- unnecessarily expanded the litigation without justification by denying she was represented by an attorney who accompanied her to the initial hearing and announced the matter settled; and
- by refusing on this basis to recognize the agreement.
- Because the trial court set forth findings clearly sufficient to support the award, attorney's fees awarded pursuant to O.C.G.A. §9-15-14 are affirmed.

UCCJEA: Daniel v. Barnes

- Issue: Personal Jurisdiction in Contempt over non-resident
- In 2001, a Georgia court awarded M sole custody of the children
- M moved to Rhode Island
- The grandparents, who remained in Georgia, filed a petition for **modification** of visitation and **contempt**
- M was personally served in Rhode Island and refused to appear at the hearing, but filed an Answer claiming lack of personal jurisdiction in the **CONTEMPT**
- When M failed to send the children to Georgia, the grandparents filed a motion for contempt
- M gets served in Rhode Island and objects to GA having personal jurisdiction in **Contempt action**
- Mother held in contempt (ordered 200 days in jail . ..)
- Court of Appeals overturns
- UCCJEA does not grant personal jurisdiction for **contempt** (only for custody actions, including modifications)
- Long Arm provides personal jurisdiction **only** for alimony, child support and division of property
- Mother must be served personally to be held in contempt of visitation

UCCJEA: Hall v. Wellborn

- Issue: Determination of whether Exclusive Continuing Jurisdiction Exists

- Hall and her husband were divorced in GA in 2002, with custody of the child to Hall, and the court ordered paternity testing
- Hall's ex-husband was determined not to be the father of her child
- The child's father, Wellborn, lived in FL; when Hall moved to FL, Wellborn filed a legitimation action seeking sole custody

- FL granted custody to Wellborn, and Hall moved to set aside the judgment based on the fact that her ex-husband remained in GA

- Court of Appeals disagrees

- Since FL determined that both of the child's parents lived in FL, GA had lost continuing, exclusive jurisdiction

- Fact that her ex-husband, who was not the biological father, continued to live in Georgia was irrelevant as he was not the biological father of the child

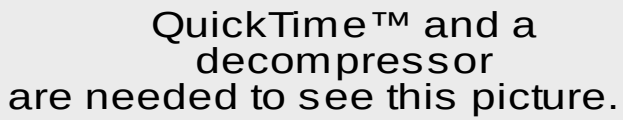
UIFSA: Kean v. Marshall

- Issue: Interpretation of "resides" for purposes of UIFSA
- An Alabama court entered an order of child support
- M filed an action in GA to register and modify the amount of support under UIFSA
- F challenged GA's basis for personal jurisdiction, claiming that he still resided in AL, but was temporarily stationed in the military in GA as his father was ill
- Trial Court found that he resided in GA
- UIFSA does not define "resides"
- Trial court found that F resided in GA even though he paid AL taxes, registered his car,commuted to AL on the weekends, and stated that he never intended to remain in GA
- The Court of Appeals reversed, finding that "**resides**" requires establishing a **domicile** with intent to remain.
- You can have numerous residences, but only 1 domicile

UIFSA: Kean v. Marshall

- Georgia Courts have previously held that "a person's domicile is not changed merely by his enlistment in the army, and his transfer or assignment by military order to another jurisdiction."

Empirical Measurement?!



Recent Developments in Family Law: 2008-2009 Case Update

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